

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

Injury No. 12-096454

Employee: Eugene W. Price
Employer: BMS Transportation Company, Inc.
Insurer: Praetorian Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Credibility of live witnesses

Employer argues very effectively, in its brief, that the record before us would support a different result than that reached by the administrative law judge, including a denial of benefits. Because, however, the resolution of each of the disputed issues in this case turns so heavily upon the evaluation of the credibility of the witnesses who appeared live before the administrative law judge, we are particularly reluctant to substitute our own judgment for his in this regard. This is especially true where the administrative law judge specifically identified his own careful observation of the witnesses as the basis for his credibility determinations.

After careful consideration, we ultimately decline to disturb the administrative law judge's credibility determinations. Specifically, deferring to the administrative law judge's determination that employee is credible, we find that the administrative law judge's other findings (including the weight he gave to the expert testimony) is fully supported. For this reason, we affirm the award and adopt it as our own.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Robert B. Miner, issued July 31, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Employee: Eugene W. Price

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

Given at Jefferson City, State of Missouri, this 17TH day of February 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Eugene W. Price

Injury No.: 12-096454

Employer: BMS Transportation Company, Inc.

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

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

Insurer: Praetorian Insurance Company, c/o Midwestern
Insurance Alliance

Hearing Date: April 16, 2015

Date Record Closed: May 4, 2015

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: August 7, 2012.
5. State location where accident occurred or occupational disease was contracted: St. Joseph, Buchanan 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 fell out of the cab of his truck while he was fueling the truck.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Right shoulder, right hip, and low back.
14. Nature and extent of any permanent disability: Permanent total disability as a result of Employee's August 7, 2012 injury considered alone.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? \$2,887.00.
18. Employee's average weekly wages: \$1,016.68.
19. Weekly compensation rate: \$677.79 for temporary total disability and permanent total disability, and \$433.58 for permanent partial disability.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$2,887.00

27 weeks of temporary total disability for the period August 7, 2012 through February 11, 2013 at the rate of \$677.79 per week = \$18,300.33.

Employer is directed to authorize and furnish additional medical treatment to cure and relieve Employee from the effects of his August 7, 2012 work injury, in accordance with section 287.140, RSMo.

Permanent total disability benefits from Employer beginning February 12, 2013, and thereafter, at the weekly rate of \$677.79 for claimant's lifetime.

22. Second Injury Fund liability: None. Employee's claim against the Second Injury Fund is denied.

23. Future requirements awarded: As awarded.

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: John R. Campbell, Jr.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Eugene W. Price

Injury No.: 12-096454

Employer: BMS Transportation Company, Inc.

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

Before the
**Division of Workers'
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PRELIMINARIES

A final hearing was held in this case on Employee's claims against Employer and the Treasurer of the State of Missouri as Custodian of the Second Injury Fund on April 16, 2015 in St. Joseph, Missouri. Employee, Eugene W. Price, appeared in person and by his attorney, John R. Campbell, Jr. Employer, BMS Transportation Company, Inc., and Insurer, Praetorian Insurance Company, c/o Midwestern Insurance Alliance, appeared by their attorney, Amy L. Young. The Second Injury Fund appeared by Candace R. Cole.

STIPULATIONS

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

1. On or about August 7, 2012, Eugene W. Price ("Claimant") was an employee of Employer, BMS Transportation Company, Inc. ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about August 7, 2012, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by Praetorian Insurance Company, c/o Midwestern Insurance Alliance ("Insurer").
3. Claimant's Claim for Compensation was filed within the time allowed by law.
4. The average weekly wage was \$1,016.68, the rate of compensation for temporary total disability and permanent total disability is \$677.79 per week, and the rate of compensation for permanent partial disability is \$433.58 per week.

5. No compensation has been paid by Employer or Insurer for temporary disability.
6. No medical aid has been paid or furnished by Employer or Insurer.
7. Claimant and the Second Injury Fund stipulated that on or about August 7, 2012, Claimant sustained an injury by accident in St. Joseph, Buchanan County, Missouri arising out of and in the course of his employment. Employer did not stipulate that on or about August 7, 2012, Claimant sustained an injury by accident in St. Joseph, Buchanan County, Missouri arising out of and in the course of his employment.
8. Claimant and the Second Injury Fund stipulated that Employer had notice of Claimant's alleged injury. Employer did not stipulate that Employer had notice of Claimant's alleged injury.

ISSUES

Claimant and Employer agreed that there are disputes on the following issues:

1. Did Claimant provide notice of his alleged injury as required by law?
2. Did Claimant sustain an injury by accident arising out of and in the course of his employment for Employer on or about August 7, 2012?
3. Is Claimant's injury medically causally related to the alleged work injury of August 7, 2012?
4. What is Employer's liability, if any, for permanent partial disability benefits, or in the alternative, for permanent total disability benefits?
5. What is Employer's liability, if any, for past temporary total disability benefits?
6. What is Employer's liability, if any, for past medical expenses?
7. What is Employer's liability, if any, for future medical aid?

Claimant and the Second Injury Fund agreed there is a dispute on the following issue:

8. What is the liability, if any, of the Second Injury Fund for permanent partial disability benefits, or in the alternative, permanent total disability benefits?

Claimant testified in person. Helen Crawford testified on behalf of Claimant. Claimant offered the following exhibits at the hearing which were admitted in evidence without objection, except the depositions were admitted subject to any objections contained in the depositions:

- A—Medical Records of Atchison Memorial Hospital
- B—Medical Records of Everett Wilkinson
- C—Medical Records of VA Hospital
- D—Deposition of Dr. P. Brent Koprivica with deposition exhibits
- E—Deposition of Michael Dreiling, with deposition exhibits
- J—Hospital Bill of Atchison Hospital for \$2,667.00
- K—Hospital Bill of Wilkinson Orthopaedic for \$200.00
- L—Fuel Ticket of Wiedmaier's Truck Stop dated 8/7/12
- M—Ambuck's Fuel Printout
- N—Photograph of truck
- O—Time Line
- Q—Commercial Driver Fitness Determination
- R—Return to Work Form of Dr. Wilkinson
- S—Updated Medical Records of VA Hospital
- T—Medical records emailed by Helen Crawford to BMS

Exhibit P was not offered in evidence. Exhibits F, G, H and I were offered in evidence. Employer's Objections to those Exhibits were sustained. Claimant's attorney withdrew Exhibits F, G, H and I.

Dave Webster, John Thornton, and Jimmy Henningsen testified on behalf of Employer. Employer offered the following exhibits at the hearing which were admitted in evidence without objection, except the depositions were admitted subject to any objections contained in the depositions:

- 1—Deposition of Brandi Webster
- 2—Police Report
- 3—Injured Employee Information Form
- 4—Notebook entries of Dave Webster
- 5—BMS Fuel Records
- 6—Deposition of Dr. Stephen Reintjes with deposition exhibits
- 7—Deposition of Stella Doering with deposition exhibits

The Second Injury Fund did not offer any exhibits.

The attorneys agreed at the hearing to leave the record open to permit Employer's attorney to offer VA records as Exhibit 8. Exhibit 8 was received by the Court on April 24, 2015 and was admitted in evidence on April 24, 2015.

John R. Campbell requested an attorney's fee of 25% from all amounts awarded to Claimant pursuant to Request for Attorneys Fees received by the Court on April 27, 2015. The Request for Attorneys Fees has been marked Exhibit U. Exhibit U was admitted in evidence without objection on April 27, 2015.

Exhibits O1, O2, O3, & O4 (individual pages of Time Line, Exhibit O) were received by the Court on May 4, 2015 and were admitted in evidence on May 4, 2015.

The record was closed on May 4, 2015.

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

The Post-Hearing Briefs have been considered.

Findings of Fact

Claimant started driving a truck in about 1972. He was out of a job in early 2012. He took time off and moved to Atchison, Kansas from Bolivar, Missouri. He wanted to look for a job when he moved. He applied for jobs in Atchison, including with Employer.

Claimant filled out an application with Employer in March 2012 and was hired the same day by Jimmy Henningsen subject to Claimant passing the physical. Claimant had a complete physical examination required by the DOT.

Exhibit Q is Claimant's Commercial Driver's Fitness Determination dated March 26, 2012. Claimant signed Exhibit Q. Exhibit Q is in a doctor's handwriting. Exhibit Q has no notations of any health issues. The words "chronic low back pain" are checked "no" on page 1. The doctor asked about other health issues and they were all checked "no". Claimant received the original Exhibit Q and took it to Employer. Employer gave him a copy of Exhibit Q. All of the information in Exhibit Q was accurate when it was completed.

Claimant passed the physical and began working for Employer on April 2, 2012. He was assigned to deliver and pick up loads.

Claimant worked continuously for Employer until he was injured on August 7, 2012. He missed no work and had no physical problems when he worked for Employer prior to August 7, 2012.

Claimant worked for Employer on August 3 and August 4, 2012. During those days, he drove from St. Joseph, Missouri to Nebraska, from Nebraska to Gary, Indiana, from Gary to Nebraska, from Nebraska to Kansas City, and from Kansas City to St. Joseph. He arrived in St. Joseph on August 5, 2012.

Claimant took the truck he was operating to Employer's shop on August 5, 2012 for an oil change and other work.

Claimant was off work for two or three days while the truck was serviced. He needed to be off work for thirty-eight hours to be able to work seventy-two hours the next week.

Employer contacted Claimant on Monday, August 6, 2012, and instructed him to go to Lee's Summit the next day and then to go to Minneapolis. Claimant was to pick up a load after 6:00 p.m. Trailers are loaded during the day. Claimant would take his truck and then hook up the trailer.

Claimant went to the shop to check on the truck on August 7, 2012. His girlfriend, Helen Crawford, took him to the shop on August 7, 2012 and dropped him off around 7:30 p.m. He performed the DOT check of the truck when he got to the shop and let the truck warm up about 30 minutes. He checked the oil, and lights. He then took the truck to the Fuel Stop at Wiedmaier's at 169 and I-29 in St. Joseph, Missouri.

Claimant arrived at Wiedmaier's at 8:45 p.m. on August 7, 2012. He was at Wiedmaier's for ten to fifteen minutes. He went straight to Wiedmaier's from the shop. The truck had less than one-quarter tank of fuel when he picked it up. He had last driven the truck on August 5 before he picked it up at the shop on August 7. He could not recall when the truck was last filled up.

When Claimant arrived at Wiedmaier's, he pulled up to the fuel island. Wiedmaier's knew him and had turned on the pump. After he pulled up to the pump, he got out of the truck, took the hose out, and put it in one of the two fuel tanks on the truck. One tank is on one side of the truck and the second tank is on the other side. Each tank holds 160 gallons of fuel.

Exhibit N is a picture of the truck Claimant was driving.

Claimant had left his wallet in the truck when he got out of the truck to fuel it. He climbed back into the truck to get his wallet. While he was climbing down out of the truck after he got his wallet, he stepped on the fuel hose and fell to the ground. He injured his back, right shoulder, and right hip when he fell.

When he came out of the truck and fell to the ground, the hose shut off. Another driver came to where Claimant had fallen and asked Claimant if he was okay, and helped him up. The hose was lying on the ground at that time.

Claimant did not finish fueling his truck after he fell. The truck was not full when he fell. He did not top off the fuel because he was in terrible pain and could hardly walk. He was irritated and dirty. He wanted to at least get the trailer. He hung up both hoses and walked to the office and signed the fuel ticket. He had to take a fuel card inside.

Exhibit L is Claimant's fuel ticket for August 7, 2012 at Wiedmaier's. He put 168.149 gallons of fuel into the truck at Wiedmaier's that day. That did not fill the truck. The truck holds a total of around 300 gallons. There was not much fuel in the truck when he picked it up before he took it to Wiedmaier's. He did not turn the fuel ticket in to Employer.

Exhibit M is a record of Claimant's Ambuck's card that he uses to get points. The August 7, 2012 entry in Exhibit M shows the time was 9:00 p.m. Claimant was injured on August 7, 2012 at about 9:00 p.m.

After Claimant was injured, he got back into the truck after he signed the fuel ticket. He was planning to drive to Lee's Summit to get his load. He drove to the stop light and pushed in the clutch. He turned left to go onto to I-29, but felt he could not drive to Lee's Summit because he was in too much pain. He continued to drive under I-29 and pulled into Love's Truck Stop.

Claimant tried to get his phone to work when he got to Love's. His phone did not work and he used another driver's phone to call for Jimmy Henningsen at the Employer. He tried to call but Jimmy did not answer. He called Employer's phone number when he called Jimmy, but in the evening that number rolls to Jimmy's cell phone.

Claimant called for Jimmy Herrington on August 7, 2012 about 9:30 p.m. or 9:45 p.m. and got voice mail. He left a message that he had been fueling up and fell out of the truck and injured himself. He said he could not make the trip, the truck was parked at Love's, and he was going to bed. His truck had a sleeper.

Claimant called Helen right after he called Jimmy and told her he had been hurt. He told Helen he would stay where he was and she should come for him the next morning after she took her son, who was disabled, to the Atchison Achievement Center.

Claimant also testified he called Ken Pratt Trucking the evening of August 7, 2012. Ken Pratt owns Employer as well as Ken Pratt Trucking. He called Ken Pratt Trucking because he wanted somebody to know what had happened. He talked to a person named Dave. He does not know Dave and does not know Dave's last name. He told Dave he had fallen out of the truck, had hurt himself, and could not drive. Dave told him to do the best that he could. He did not tell Dave where the truck was or send him emails

Claimant went to bed in the sleeper cab after he made these calls.

Claimant called John Thornton of Employer, a dispatcher, in the morning on August 8, 2012 and told him he hurt his back. He thinks he told John where the truck was. John put him over to Jimmy Henningsen.

Claimant talked to Jimmy Henningsen about 7:30 a.m. or 8:00 a.m. on August 8, 2012 while he was still in his truck. He used another driver's phone to make the call. He told Jimmy on August 8, 2012 that he fell out of the truck and hurt his back. He told Jimmy on August 8, 2012 that the truck was at Love's. Claimant testified that Jimmy started cussing. Claimant asked to see a doctor and Jimmy said they do not have any "fxxxing" doctor. Claimant then hung up.

Claimant later testified at the hearing that while he was being questioned in his August 24, 2014 deposition, he may have testified he used his own phone to make the calls. He then testified at the hearing that he could have used his own phone for some calls and the other driver's phone a couple of other times.

Claimant testified on cross examination at the hearing that he may have told Jimmy where the truck was on Wednesday morning, August 8, 2012. He also may not have told Jimmy where the truck was. He is not sure.

Claimant is not sure if he talked to Jimmy twice on August 8, 2012. He did not talk to anyone else at Employer on August 8, 2012. He might also have talked to Jimmy the next Sunday.

Claimant testified that he did not move the truck. Both he and Employer had a set of keys for the truck. Helen turned in his truck keys and fuel card maybe a couple of weeks after the accident. Claimant did not return the truck to Employer. Employer ultimately found the truck.

Helen picked Claimant up about 8:30 a.m. or 9:00 a.m. on August 8, 2012. Claimant was in terrible pain then and felt worse. Helen helped him get out of the truck and get into her van. They then went to Helen's in Atchison. She helped Claimant take a shower and put him to bed.

Helen wanted Claimant to go to a doctor then, but he had no insurance and he did not go at that time. Claimant knew the doctor would give him a narcotic pain killer but he could not drive if he took that medication. Claimant thought he would get better and he hoped he could resume his work duties.

Claimant took Ibuprofen for pain. He also drank four to five vodkas per day to help with the pain and help him sleep.

Claimant testified that before August 7, 2012, he only drank beer and a little wine. He stated he did not drink hard liquor before then.

After about a week, Helen convinced Claimant to go to a doctor. Helen took Claimant to the hospital in Atchison on August 15, 2012. He gave a history of his accident and told them he had one fall from the truck. The hospital prescribed Vicodin. He had a prescription filled and about two days later he took one-half of a pill. He felt terrible after taking the Vicodin and did not take any more of that medication. He continued to take Ibuprofen. The doctor at the hospital sent Claimant to a specialist, Dr. Wilkinson.

After the August 7, 2012 fall, Claimant's left leg gave out and he fell against a table in the kitchen at Helen's. He caught himself with his hand. He testified that was not really a fall. He did not fall to the ground—he fell against a table. He was not injured from the fall against the table. He leaned against the table because his left leg gave out on him. He attributes his leg giving out to the August 7, 2012 injury.

Claimant saw Dr. Wilkinson on August 20, 2012 for the August 7, 2012 fall from the truck. He told Dr. Wilkinson he had fallen from the truck. There is a note in Dr. Wilkinson's record that he fell. He did not tell Dr. Wilkinson about a chair.

Claimant saw Dr. Wilkinson on only one occasion and that was on August 20. Dr. Wilkinson did not prescribe medication. Dr. Wilkinson told Claimant that he could not go back to work. He told Claimant he was disabled and should have an MRI. Claimant felt about the same between the time he went to the Atchison Hospital and the time that he saw Dr. Wilkinson. He did not feel he could work when he saw Dr. Wilkinson.

Claimant went to the VA by ambulance toward the end of August 2012. He reported low back complaints when he arrived at the emergency room at the VA. He complained that his low back was from the fall from the truck.

Claimant was admitted at the VA and was there for six to seven days. He had pain in his back, stomach, right thigh, and right shoulder. Claimant got IV's, a CAT scan, and Ultrasound.

Claimant tried physical therapy after his discharge from the VA, but he could not do the therapy. He took medication for pain.

Claimant later had an MRI on his low back that showed two disks were injured.

Claimant saw a neurosurgeon, Dr. Meredith, at the VA in Kansas City in February 2013 for his back. Dr. Meredith reviewed the MRI results. Dr. Meredith told Claimant that he was not a good candidate for surgery. Dr. Meredith recommended Claimant apply for Social Security disability.

Claimant applied for and received Social Security disability. He is now getting Social Security disability. He put on the form that his disability was due to his lower back.

Claimant worked for forty years before he was injured on August 7, 2012. All of his jobs were physical in nature.

Claimant has a high-school diploma but no education after high school.

Claimant met with Dr. Koprivica in February 2014. Claimant provided a thorough health history and work history to Dr. Koprivica. He reviewed Dr. Koprivica's report and heard his testimony. Dr. Koprivica's health history and work history is accurate and Claimant adopts that information contained in Dr. Koprivica's report.

Claimant has used a walker at times since approximately March or April 2013. The walker was prescribed by a physical therapist at the VA in Leavenworth. He uses the walker if he walks about ten minutes. He uses no other assistance devices. Helen sometimes helps him when he walks. He cannot go very far. He goes around a lake in Atchison. There are picnic tables there and he can walk and sit.

Claimant has no hobbies currently other than occasionally doing metal detecting. The last time he did that was about three weeks before the hearing. The metal detector he uses weighs three pounds. He sometimes goes antiquing with Helen.

Claimant wears a TENS unit that helps relieve pain. He wears the TENS unit if he sits for a long time or drives. He wears the TENS unit every day. He also takes a pain pill, Hydrocodone, if the pain gets bad. He takes Hydrocodone for pain about three days a week.

Claimant can take out light trash. He cannot stand for a long period. He cannot work in the yard. He testified he cannot do much of anything, except a little walking.

On an average day, Claimant's pain level is a six to seven on a zero to ten scale, with zero being pain free and ten being excruciating.

During the day, Claimant takes two to three hot showers to relieve pain. He lies in bed with pillows under his knees three times a day.

Claimant bends his knees and raises his knees at home. He has problems sleeping at night. He wakes at night because of pain. He does not sleep if he is out of pain pills.

Claimant has difficulty driving or riding in a car. He only drives in town. Helen drives when they go out-of-town. He has driven to Leavenworth, but he stopped three times. He did drive by himself on a 450 to 500 mile trip in 2013.

Claimant still lives with Helen Crawford. He has lived with her for most of the past three years. He has lived in Atchison, Kansas the last three years. He had his own apartment from March 2013 until March 2015, but he was rarely at his own apartment. Ms. Crawford's address was his primary address during that time. Helen does not work. She is on disability. Her disabled son died in October 2014.

Claimant is a member of the American Legion and V.F.W. He was in the Honor Guard until six months prior to the hearing. He did a total of four funerals. He held the flag once and held the gun three times. He carried a rifle to a grave on three occasions. The rifle weighs six to seven pounds. The flag weighs two pounds. He does not do the Honor Guard anymore because the American Legion office was closed.

Claimant has applied for no other jobs since August 7, 2012. He goes to the Public Library in Atchison a few times each week. He spends thirty to sixty minutes at a time at the library. He can use a computer. He uses Facebook and checks email.

Claimant's prior health history includes a broken right ankle. He had no problem with the ankle six months after he broke it. He was able to do sports and recreational activities after he recovered from the injury.

Claimant also had carpal tunnel surgery on the left side when he worked at Lipton in 2000. He had no impairment from that injury within a few months after the surgery.

Claimant was not having problems four months before August 7, 2012. He told Dr. Koprivica that he had had no prior back problems before August 7, 2012.

Claimant recovered after his prior ankle surgery and returned to work after that surgery. His ankle did not affect any job and did not limit any activities. He worked without ankle problems before August 7, 2012.

Claimant did not have any problems or limitations with carpal tunnel after his carpal tunnel surgery. He could perform work duties and duties around the home the same as before the surgery. Claimant testified that his ankle and carpal tunnel surgeries were not obstacles for him to perform work duties.

Claimant had received recognitions from other Employers. He worked at Lipton Food from 1994 through 2000 and was recognized for not having accidents, for safety, and for attendance. Claimant worked for Links Trucking. That company went out of business and wrote a document that helped Claimant get a job.

Claimant used to do a lot of walking prior to August 7, 2012. He played golf, bowled, and danced. Since August 7, 2012, he has not been able to do those activities.

Claimant has never been a gate guard or toll booth operator. He does not think he is capable of doing those jobs. He does not think he is physically capable of doing any prior jobs. He does not believe he could drive a truck or sit at a desk.

Claimant is not now employed. He last worked on August 7, 2012. He said he could not work anymore because physically he could not lift or walk. He knows of no jobs that he could do with his physical limitations.

Claimant identified Exhibit O, a four-page timeline from the date of accident to February 11, 2013. The information in Exhibit O is accurate.

Claimant identified Exhibit J, an Atchison Hospital bill in the amount of \$2,667.00. He testified that Employer's paid none of that bill. Claimant is making payments on the bill.

Claimant identified Exhibit K, a bill from Dr. Wilkinson for \$200.00. He testified that he had paid that bill. Employer did not pay that bill.

Claimant identified Exhibit R, Dr. Wilkinson's Release from Work form dated August 20, 2012. That form states in part: "Disabled", and notes Claimant should follow with an MRI.

Claimant does not get charged by the VA.

Claimant sees Dr. Meredith about every seven to eight months. He has also seen other neurosurgeons at the VA. He is not getting physical therapy. Claimant gets four epidural injections per year from Dr. Wray at the Leavenworth VA. Dr. Wray is in pain management. The VA has said he is to get those injections forever.

Claimant was shown Exhibit 3, an Injury Information form dated October 11, 2013. The form is not in his handwriting, it is in Helen's handwriting. He did sign the form. Claimant gave the form to his attorney to give to Employer. The form states he notified Employer of the injury on "August 8 7:30 a.m." Claimant left a voice mail message with Jimmy the night before.

Claimant was asked about an entry in a VA record dated August 30, 2012 that states he sat on a bag chair that broke. Claimant testified he did not remember talking to the VA about that. He testified that the references to the bag chair in the VA records are not accurate.

Claimant testified when he was at the VA, a foreign doctor and students came to visit him. A doctor came in the room and nearly fell in a chair. Claimant testified he told the doctor that he had fallen through a chair thirty-eight years before when his son was four-years-old. He did not have any falls before August 7, 2012 other than the fall thirty-eight years before.

On re-direct, Claimant was asked about VA entries regarding falling from a bag chair and a lawn chair. Claimant testified that thirty-eight years before, he had been fishing with his son. Claimant sat in a lawn chair and the bottom came out. Claimant was not injured at that time. Claimant's son was born in 1977.

Claimant testified that he had consumed maybe a fifth of vodka the day before he was admitted to the VA. He stated he was not intoxicated on the day of his admission to the VA.

Claimant denied that he drank a gallon of vodka the day prior to his admission in August 2012. He stated he consumed maybe one-fifth of vodka the day before his admission. He said he was not intoxicated the day of admission.

Claimant testified that he did not consume alcohol on August 7, 2012 or within 24-hours before the August 7, 2012 accident. He stated in an average week prior to August 7, 2012, he drank eight or ten beers per week.

Claimant testified he did not get treatment for alcohol abuse before August 7, 2012. He has had treatment since then on two or three occasions at the VA.

Claimant testified that he was sober on the day of the April 16, 2015 hearing and had been sober the eight or nine months prior to the hearing. He has a few beers every week, two to four per week, but not every day. He does not drink hard liquor. Claimant denied he had not fallen several times due to intoxication. He fractured a rib in May 2013 when he fell against a table. He said he was not intoxicated at that time.

Claimant met with Dr. Koprivica for three and one-half hours. Dr. Koprivica performed numerous measurements and tests. Dr. Koprivica has also said that Claimant is not a candidate for surgery.

Claimant saw Dr. Reintjes at Employer's request on August 14, 2014. Dr. Reintjes came in about two to three minutes after Claimant arrived. Claimant gave Dr. Reintjes an MRI disc. They visited a little. He told Dr. Reintjes he had no pain before August 7, 2012. Claimant had pain in his back and left leg after August 7, 2012. His leg would occasionally go out. Claimant stood up, stood on his tiptoes, and held onto a table. He walked three steps. Dr. Reintjes asked Claimant to sit down. A leg strength test was not done. Claimant testified Dr. Reintjes never touched him. Dr. Reintjes was with Claimant for fifteen to twenty minutes.

Claimant has read the reports of Dr. Reintjes. Those reports do not contain a rating. Claimant was present at the deposition of Dr. Reintjes. Dr. Reintjes was asked about a rating. He did not respond for a few minutes. Dr. Reintjes did not give restrictions other than telling Claimant to be careful lifting.

Claimant has had no conversations with Employer other than what he stated earlier, except at the end of August before he went to the VA, he went to Mr. Pratt in St. Joseph and explained what had happened. He asked why they held out \$500.00 from his paycheck. Jimmy was next door and came in cussing and hollering and said it was for fuel because the tank was not full when the truck was taken back. Claimant never got the \$500.00 back.

Claimant has never received temporary total disability benefits from Employer. He has received no additional compensation from Employer since August 7, 2012 except for his last paycheck.

Claimant believes he is permanently totally disabled. He is asking for past temporary total disability and permanent total disability benefits.

Throughout the trial, Claimant moved in his chair at times. He stood on one occasion for a few minutes during the hearing. He stood and stretched two or three times during the hearing, and two other times during short recesses. He leaned on his right arm rest on occasion during the hearing. He genuinely appeared to be in pain at times during the hearing.

I find Claimant's testimony to be credible unless discussed otherwise later in this award.

Testimony of Helen Crawford

Helen Crawford testified that she is Claimant's girlfriend. She lives with Claimant. They have dated since December 2011. She lived with Claimant for nine months prior to August 7, 2012 when he was not on the road. She met Claimant in the fourth grade.

Prior to August 7, 2012, Claimant helped lift her handicapped son. Claimant helped a lot around the house. He raked leaves. They bowled a couple of times. They danced and shot pool. They took her son to festivals. Claimant did not have any physical limitations before August 7, 2012. He did not complain of any back problems before August 7, 2012.

Ms. Crawford picked up Claimant from the shop on 22nd Street on either August 3 or August 4, 2012. She had her son with her then. Her son was not verbal and could not walk. Claimant had finished his run and she picked him up.

Claimant was with her the next few days. He had no physical problems those days. He sustained no injury and did not fall from a chair during that time.

Claimant told her that he had a call and had to take the truck to Toys 'R Us. On August 7, 2012, she and her son took Claimant back to the shop to get his truck. She dropped Claimant off around 8:00 p.m. He was to go to Toys 'R Us after he got his truck.

Claimant called Ms. Crawford around 9:30 p.m. or 9:45 p.m. on August 7, 2012 and told her that he had fallen from the truck. He said he had tripped on a gas hose. She asked him if he was alright and he told her that he thought so. There was no discussion then about him not making the run. He said he would try and make it.

Later that night, he called her and said he could not make the run and would need a ride the next morning. They arranged for her to pick him up the next morning. She believes she talked to Claimant twice the evening of August 7, 2012. He told her about his fall. He told her to come the next morning.

Ms. Crawford arrived at Love's the next morning. Claimant was in his truck. He was in bad shape. His back was really hurting. Claimant told her that he had reached to get his billfold and tripped on the hose and came down out of the truck. She helped get Claimant into her van. He was not able to stand on his own. She grabbed Claimant's laundry bag and briefcase. They locked the truck. She did not see Claimant call anyone when she picked him up on August 8. His phone was dead that morning.

Ms. Crawford and Claimant went directly to her home after she picked him up at Love's. She got Claimant cleaned up and helped him into bed. She saw that the side of Claimant's body looked scraped. He had abrasions on his chest, shoulder, and the back of his hip. He took Ibuprofen.

Ms. Crawford asked Claimant if he had contacted BMS and he said, "Yes." Claimant told her that Jimmy told him that they did not have a doctor.

Ms. Crawford let Claimant rest. He took Ibuprofen. She told him every day he should see a doctor. He thought he could work it out.

On August 15, she told Claimant he had to go to the doctor. She took Claimant to the Atchison Emergency Room that was one-half mile away. She got Claimant into a wheelchair. He was at the ER for three hours.

Ms. Crawford drove Claimant to Dr. Wilkinson on August 20, 2012.

Ms. Crawford contacted Beth at BMS to send the doctor's notes to her. She emailed Beth the Atchison doctor's notes and other doctor's notes, including ER notes, Exhibit T. She talked to Beth and Beth told her she had received the emails.

Jimmy Henningsen also told Ms. Crawford they were getting the emails that she had sent to Beth. Jimmy told her it did not matter because Claimant did not work there anymore. Ms. Crawford stopped sending doctor's notes to Employer after that.

Ms. Crawford took Claimant to the VA on August 30, 2012. He was a little intoxicated then. Claimant drank beer on the weekends and wine occasionally before August 7, 2012.

Ms. Crawford took Claimant to the VA for an MRI on September 25, 2012.

Ms. Crawford returned the key to the truck and the fuel card to Employer, but she is not sure when she did that. She asked about Claimant's last paycheck. She was told Claimant needed to talk to Mr. Pratt.

Ms. Crawford saw Mr. Pratt in Platte City about the paycheck. Claimant was not with her then because he could not go. She received Claimant's paycheck from Mr. Pratt. She told Mr. Pratt that Claimant was hurt and was in a lot of pain. She has had no further discussions with Mr. Pratt since then.

Ms. Crawford takes care of Claimant. She takes Claimant to the doctors' appointments. He has to stop and stretch on the way. He does not do household chores. He does not bowl or dance. He does not go on long walks. He was not able to help with her son after August 7, 2012. Claimant does cook and grill.

Bad weather bothers Claimant more. He uses heat. He uses a walker quite a bit.

Ms. Crawford is with Claimant on a daily basis, day and night. He has difficulty sleeping. He lies down periodically during the day. He uses a TENS unit during the day but not when he sleeps.

Ms. Crawford does not know of a job Claimant could do. She wishes there were one. It has been hard on him not to work. Claimant could not return to Employer because they could not accommodate his restrictions.

Ms. Crawford injured her back at work in 2007. She did not have surgery. She received a \$34,000.00 settlement. She is on Social Security disability due to her back and mental condition because of the loss of her son.

Ms. Crawford was paid to care for her son by Medicaid. She has not worked since she lost her son. She had worked previously at H & R Block for two years.

I find Helen Crawford's testimony to be credible.

Testimony of Dave Webster

Dave Webster testified that he is employed by Ken Pratt Trucking as a dispatcher. He talks to drivers daily. He gives directions on pickups. He is Ken Pratt's son-in-law. Mr. Webster does not work for Employer. Ken Pratt owns both K P Trucking and Employer.

Mr. Webster testified he does not know Claimant. Mr. Webster reviewed his notes, and he only talked to Claimant one time. His August 16, 2012 notes (Exhibit 4) have names and notes regarding calls. The notes are in his handwriting. He wrote Claimant's name and a number to call Claimant back. Claimant called him and asked if Ken Pratt was available. He told Claimant that Mr. Pratt was not. Claimant asked if he would call Jimmy and ask him why he was not getting dispatched. There was no discussion regarding Claimant getting hurt.

Mr. Webster has a dispatch sheet for August 7, 2012. The sheet indicates that he did not get a call from Claimant then.

Mr. Webster testified that Claimant never reported to him that he hurt his back falling from a truck. If he had ever received a report of an injury, he would have asked the employee to get medical attention because they would want the drug and alcohol checked. He would also see if they needed to recover the load, and if so, they would get the truck later.

Mr. Webster testified he had no discussions with his father-in-law regarding Claimant. He did not know Mr. Pratt's position regarding whether Claimant quit on August 4th.

Mr. Webster called Jimmy Henningsen on August 16, 2012. Jimmy reported that the truck had been missing for a period of time and that Claimant no longer worked for Employer. Mr. Webster was not aware of a police report.

I find Dave Webster's testimony to be credible except as discussed otherwise later in this Award.

Testimony of John Thornton

John Thornton testified that he worked for Employer and had worked for Employer for five years. He is a dispatcher. He makes calls regarding loads and getting trucks back. He worked from 3:30 a.m. until 4:00 p.m.

Jim Henningsen is also a dispatcher for Employer. Mr. Henningsen has the night shift. Phone calls made to Employer are rolled to Mr. Henningsen's cell phone if a call comes to the office after 4:00 p.m. If a driver has a problem after 5:00 o'clock p.m., the driver calls the office to reach Jim. If an Employee called regarding an injury, the dispatcher would need to find another driver if the injured Employee could not drive.

Mr. Thornton knows Claimant. He usually had daily contact with Claimant when Claimant worked for Employer.

Mr. Henningsen took calls on August 7, 2012. Mr. Thornton testified he received no calls from Claimant on August 8, 2012 or August 9, 2012 to report a work injury. He had no contact from Claimant after August 7, 2012 regarding a work injury.

Mr. Thornton received a call on August 8, 2012 from Toys 'R Us advising that their load had not been picked up. Claimant had been dispatched to pick up a load on Monday and was to get the load on Tuesday. Mr. Henningsen and Mr. Thornton tried to call Claimant on his cell but they could not reach him. Both called for Claimant that week, but Claimant did not answer. The calls went to voice mail or the phone was not picked up.

Claimant was allowed to take the truck home since he lived in Atchison.

Mr. Henningsen went to Claimant's home the weekend after August 7 to look for the truck. Mr. Henningsen went to the door, but no one answered the door. Mr. Henningsen knew Claimant's address. Mr. Thornton did not know Claimant's address.

Mr. Thornton works strictly for BMS. He had not been involved with Claimant filing a claim. He did not recall writing anything down in a notebook regarding this incident. He had only seen Claimant one time since August 7, 2012, and that was at a deposition.

Claimant was still employed by Employer on August 7, 2012.

I find John Thornton's testimony to be credible except as discussed otherwise later in this Award.

Testimony of James Henningsen

James Henningsen has worked for Employer for seven to eight years. He is Employer's Operations Manager. He dispatches trucks, works on trucks, and talks to customers and drivers. He works with Mr. Thornton.

There is always a dispatcher on duty at Employer. Mr. Henningsen usually takes calls that come in after 5:00 p.m. Calls made to the office roll to his cell. There is voice mail on both phones.

Mr. Henningsen knows Claimant. Claimant worked for Employer. They had daily contact when Claimant worked there.

Either Mr. Henningsen or John Thornton dispatched Claimant on August 7, 2012 to pick up a load. He was not sure whether he or John had dispatched Claimant to Toys 'R Us. There was no record of who made that dispatch.

Mr. Henningsen had no other calls with Claimant on August 7, 2012. Mr. Henningsen was a dispatcher that evening. He testified he received no call and had no voice mail from Claimant on August 7, 2012. He testified he received no calls from Claimant on August 8, 2012. He testified he had no contact with Claimant between August 7, 2012 and August 12, 2012.

Mr. Henningsen learned of Claimant's missing truck from a customer. He tried to call Claimant three to five times on his cell and left messages. Claimant did not return his calls. He got in his car and went to Wiedmaier's to look for the truck since Claimant had fueled there. He could not locate the truck that day.

Mr. Henningsen called the police about the truck on August 9, 2012. He made the report to the police, Exhibit 2, because he could not find Claimant or the truck.

Mr. Henningsen testified he tried to reach Claimant every day. He went to Claimant's house on August 12, 2012 and beat on the door. No one answered the door. He went to an elevator where Claimant used to park the truck, but he did not find the truck there.

Claimant called Mr. Henningsen later in the day on August 12. Mr. Henningsen asked Claimant where he had been. He told Claimant he tried to call him on the August 12. He asked where the truck was. Claimant said that the truck was in Atchison. Claimant said he would bring it to Employer the next day. The truck did not arrive on August 13. Mr. Henningsen called Claimant on August 13. Claimant said that he would bring it up, but he did not.

On August 14, 2012, a Tuesday, at 10:00 a.m., the truck showed up at Love's Truck. The key was in the truck then. The fuel tank showed one-quarter to one-half fuel. There were four bottles of urine in the truck. The sleeper mattress had been defecated upon. The truck stunk.

Mr. Henningsen testified that every morning he goes to nine truck stops, including Love's and two lots, to check on trucks. He looked at the back of Love's lot every night at 4:30 a.m. except on Saturday or Sunday. He testified he went to Love's and Wiedmaier's every day between August 8 and August 14, and he never saw the truck until August 14.

Mr. Henningsen knew Claimant had fueled the truck at Wiedmaier's. The truck had 161 gallons added to it at Wiedmaier's when Claimant fueled the truck on August 7. When Mr. Henningsen found the truck on August 14, it only had one-quarter to one-half in the tank.

Mr. Henningsen had checked records and found that on August 2 or 3, 2012, Claimant filled the truck in Illinois. Claimant drove 922 miles and averaged about 5.3 miles per gallon. The truck holds a total of 240 gallons, 120 gallons on each side. Mr. Henningsen believed between 70 to 100 gallons of fuel were missing from the truck on August 14, 2012.

Claimant was employed by Employer on August 6 and August 7, 2012. Between two and four weeks after August 7, Claimant said he would come back to work, but he never showed up. Claimant's girlfriend called or saw Mr. Henningsen, but does not recall any conversation with her.

Mr. Henningsen testified that until August 7, 2012, Claimant was an excellent employee of Employer.

Mr. Henningsen testified if something happened to Claimant on August 7, they would have taken care of him immediately.

The credibility of Jimmy Henningsen's testimony is discussed later in this award.

Medical Evidence

Exhibit A contains records of Atchison Hospital Emergency Department dated August 15, 2012. These records record under History of Present Illness: "Fell off truck and sustained injuries 7 days ago. Pain in right shoulder, right hip, right thigh, low back. Abrasions to right thigh. X-rays were taken of Claimant's pelvis, right hip, lumbar spine, and right shoulder. The Departure Diagnosis was: "Primary Impression: Contusions Right Shoulder, Right Hip, Right Pelvis. Additional Impressions: Lumbar Strain, Right Thigh Abrasions." Claimant was given scripts for Mupirocin, Tramadol, and Hydrocodone.

Exhibit T includes a Patient Visit Information record of Atchison Hospital dated August 15, 2012 that notes Claimant was seen that day for contusions of the right shoulder, right hip, right pelvis, lumbar strain, and right thigh abrasion. The record states in part: "Follow up in office with Dr. Wilkinson in 1-3 days. No work until recheck." Exhibit T includes a Return to Work form dated August 15, 2012 that states in part: "Comments: No work through 8/20/12."

Exhibit R is a Return to Work or School form of Wilkinson Orthopedics dated August 20, 2012 that states in part: "He will be disabled until approximately follow up care following MRI."

A record of Dr. Everett Wilkinson dated August 20, 2012 (Exhibit B) states in part:

Chief Complaint

Chief Complaint: R Shoulder/hip pain

Additional complaints

R shoulder and hip were injured two weeks ago as a result as [*sic*] a fall, then refell days later. Xrays complete.

.....

History of Present Illness

Details

DOS: 08/20/2012

S: Eugene is here today for evaluation of low back pain. He had a significant fall and had some right knee pain and right shoulder pain, but the main pain today that he is complaining of is severe low back pain with radiation of pain from the back into the lower extremity along the back and lateral aspect of the leg. He has only taken Ultram for pain since he does not wish to take anything stronger because he is an over-the-road driver and does not want to risk any type of problems with taking any other medications. He has limited that use to only when he is not driving. Other than that, he is taking anti-inflammatory, which do not seem to be helping a whole lot. He does not have a history of prior injury to his low back and no other problems. No bowel or bladder changes.

His past medical history, surgical history, medications, allergies and review of systems are reviewed.

.....

Assessment/Plan

Assessment

A:

1. Low back pain with radiculopathy right lower extremity.

2. Contusion right shoulder, contusion right hip by history.

Additional Plan

P: I would like to obtain an MRI examination of his lumbar spine as soon as possible to rule out any complex disc along the area of the L4-5 or L5-S1 region. We have given him a Medro Dosepak today, which he can take as directed. He will continue taking Ultram only when he is off the road. When he is over the road he only wants to take over-the-counter Tylenol. I certainly agree with this and will see him back after the MRI is completed.

Exhibit T includes an August 24, 2012 letter to Claimant stating an appointment had been set for an MRI at the VA Medical Center in Leavenworth on September 25, 2012.

Veterans Administration (VA) Records

Exhibit C contains medical records of VA Hospital through April 8, 2014.

A VA Attending Emergency Department Note dated August 30, 2012 states in part:

Chief Complaint: Lower back pain. History of Present Illness: Pt states he fell threw [*sic*] a canvas lawn chair on 8/7/12 and injured his lower back. Pt states he is a truck driver and was driving a truck as well. Pt states he fell out of the truck on 8/8/12 further injuring his back. Pt states he went to the ER in Atchison where he had plain x-rays.

The VA Attending Emergency Department record dated August 30, 2012 notes Claimant stated he had lower back pain radiating right lower extremity.

An August 30, 2012 VA History and Physical Note in Exhibit C states in part:

Chief Complaint: Low back pain, bladder incontinence. History of Present Illness: Mr. Price reports to the ED and states he fell threw [*sic*] a canvas lawn chair on 8/7/12 and injured his lower back. On 8/8/12 he fell from the cab of his truck to the ground and further injured his back. Pt states he went to the ER at Atchison at that time where he had plain x-rays. Pt states he was told he might need an MRI. Pt states he has had surgery on his right ankle with multiple mental [*sic*] screws and plates. Pt states that the lower back pain is sharp and radiates to the right lower extremity and he has weakness in

the right leg and trouble walking, requiring assistance to the bathroom at home by his girlfriend.

The August 30, 2012 VA in Exhibit C record notes that Claimant had no difficulties with ambulation prior to his fall. Pain was noted to be 9/10 on arrival to ED, and was now 8/10.

An August 30, 2012 VA Discharge Summary in Exhibit C notes Claimant was admitted from the ER on August 30, 2012 and discharged on September 5, 2012. The discharge diagnoses were: "primarily low back pain, kidney cyst/mass." The Discharge Summary states in part:

Hospital course, (including some specialty consultations): Mr. Price reported to the Leavenworth VA ED with sharp low back pain radiating to right leg, RLE weakness and new urinary incontinence. He had injured his back on 8/7/12 and again on 8/8/12 when he fell from the cab of his truck to the ground. PT seen at Atchison ER given Lortab, but had not been taking it. PT presented with new onset nocturnal urinary incontinence X3 over the last week with dysuria, frequent [sic] and urgency X 1 week.

A VA Consultation Note—Anesthesia Pain Clinic dated August 30, 2012 in Exhibit 8 states in part:

Mr. Price is a pleasant 59 year old man visiting the pain clinic to day [sic] for evaluation of his acute low back pain. He fell out of his 18 wheeler truck in August and was admitted for severe acute low back pain. He previously had no history of back pain or prior injury.

A VA record of Dr. Galante dated August 30, 2012 in Exhibit 8 states in part: **HISTORY OF PRESENT ILLNESS:** Pt states he fell threw a canvas lawn chair on 8/7/12 and injured his low back. Pt states he is a truck driver and was driving a truck as well. Pt states he fell out of the truck on 8/8/12 further injuring his back."

An August 31, 2012 VA note in Exhibit 8 states in part: **"SYMPTOMS: C/O SEVERE BACK PAIN ALONG WITH L.E. PAIN WHICH CAME ON ~3 WEEKS AGO AFTER SITTING ON A BAG CHAIR THAT BROKE, AND HE LANDED ON THE GROUND. THE NEXT DAY HE REPORTS HIS L.E.'S GAVE OUT AND HE FELL OFF HIS TRUCK. THE PAIN IN HIS BACK HAS BEEN SEVERE SINCE."**

A VA MRI Lumbar Spine Report dated September 25, 2012 in Exhibit C notes an indication of low back pain. The Impression states:

1. Multi-level disc degenerative disease of the lumbar spine as detailed above most pronounced at the L4/L5 level. 2. There is a broad bulging annulus with superimposed central disc extrusion at the L4/L5 level. Additionally there is facet hypertrophy and ligamentum flavum hypertrophy all of which contribute to severe canal stenosis with compression of the cauda equina nerve roots by the disc extrusion. Mild to moderate bilateral frontal narrowing is also noted at this level. 3. Additional multi-level disc protrusions as detailed above.

A VA K.C. Neurosurgery Consult record dated November 7, 2012 in Exhibit C states in part:

CHIEF COMPLAINT: Patient with acute low back pain.

HISTORY OF PRESENT ILLNESS: Patient is a 59-year-old gentleman with past medical history of hypertension, hyperlipidemia, elevated liver function tests. Patient comes in today for evaluation of low back pain. The patient says in August of this year he was working as an over-the-road trucker and was in his cab bending over to get something when he fell out his cab and fell on his right side. He had no loss of consciousness. Patient says that since that time he has had quite a bit of low back pain. It very rarely goes down his left leg. He denies any numbness or tingling or other leg pain. He says his primary concern is his low back pain that is primarily low back and on the right. He has been taking tramadol and it has helped a little bit. The patient denies any loss of control of urine or bowel movements. Patient says that at times his pain is a 7 on a scale of 1 to 10. He did have an EMG in October that showed no radiculopathy. He has no other complaints today and denies any other trauma, injuries, or falls.

PAST MEDICAL HISTORY: As above.

.....

ASSESSMENT AND PLAN: Patient with low back pain. He does have a large L4-L5 herniated disc. However, in speaking with the patient, the patient only has low back pain. It rarely goes down his legs. He has no numbness or tingling. After review with Dr. Wolter, with the patient not having any pain in hips, buttocks, or down his legs, we will continue to monitor him bringing him back in about 3

months. I did stop his tramadol and ordered some Hydrocodone for him. He has our number to call with any questions or concerns or progression of his symptoms. Patient stated understanding and he and his girlfriend agreed with plan.

The V.A. records in Exhibit C include a January 23, 2013 Anesthesiology Physician Note documenting Claimant had joint injections bilateral L4-5 and L5-S1. Plaintiff presented with continued low back pain and intermittent left lower extremity radiation of pain.

A VA Neurosurgery Note of Dr. Christopher Meredith dated February 11, 2013 in Exhibit C states in part:

The patient is a very pleasant 59-year-old gentleman who is well known to the Neurosurgery Service and returns today for progressive and worsening low back pain predominantly.

I reviewed his images with him again today, but he continues to have fairly significant severe low back pain. He does have occasional pain in the left leg, especially in the anterior thigh and down the anterior medial aspect of his left calf them [*sic*] that might correspond with a saphenous nerve pain corresponding to L4 distribution. He does have a large disk herniation L4-L5, but he says the pain in his leg is not really the issue, it is the pain in his low back that bothers him the most.

He used to be an over the road truck driver, but he now says that the pain is just so debilitating he is just unable to function anymore.

He has been taking hydrocodone 5 but he says that they are not providing him with that much relief.

I had a lengthy discussion with him today and I have cautioned him about low back surgery for low back pain that is generally not extremely effective.

Spinal fusion is generally the mainstay for this, but at best for 1 level pain is a 50-50 chance of improvement, which I really do not think is a great overall chance for him.

He is in agreement and he is not interested in surgical intervention. I think at this point, the patient has had such as strenuously life

physically that he is really [*sic*] a point where he is just not able to work anymore.

I told him that I would certainly support his application for federal disability as I just do not see how he could hold any kind of significant employment given the way his back looks and his symptomatology.

I changed his prescription to Lortab 10/500, 1 to 2 tablets p.o. every 6 hours p.r.n. pain, number 60 with several refills. I told him he will have to wait until his current prescription expires before he gets this mailed out to him. He should continue to see Pain Management, although he said his last epidural steroid injections did not provide him with much in the way of relief. I will make him a followup in 3 months to return to see us and I have given him my card, but I told him he may always call or return sooner if he has questions or concerns.

A February 25, 2013 VA Anesthesiology Physician Note in Exhibit C states in part:

REASON FOR TODAY'S VISIT:

Follow-up consult for LBP s/p bilateral L4-5 and L5-S1 HPI (as recounted by patient or per data form chart):

Pt is a 59 yo, right-handed male, who comes into clinic today for chronic low back pain, s/p bilateral L4-5, L5-S1 facet injections on January 23, 2013. However the injections did not achieve any relief of the pain. Neurosurgery last saw patient and did not think a back surgery is guaranteed at this time. The pain still located in the midline of lumbosacral junction, it is aching in character, 8/10 in severity, aggravated with extension, alleviated with flexion. He denied any weakness, numbness/tingling, and bowel/bladder accidents.

A February 25, 2013 VA Addendum Note in Exhibit C states in part:

Pt is being followed by neurosurgery at KC V.A. Pt and surgeon occurred [*sic*] that the only surgery indicated is lumbar fusion with a 50/50 chance of long-term improvement. Pt wants to continue with pain injections. Pt will be scheduled for lumbar medial branch injection for his axial LVP.

A VA Neurosurgery Note dated May 13, 2013 in Exhibit C states in part:

HISTORY OF PRESENT ILLNESS: The patient is a 60-year-old male, who is known to the Neurosurgery Clinic. The patient was consulted for low back pain that was progressively getting worse. The patient is here today for routine follow-up. The patient had been seen and evaluated by Dr. Christopher Meredith before. The patient's pain was predominantly back pain with occasional pain down his left leg, which correlated to an L4-L5 disk herniations that the patient has. The patient is here today after Dr. Meredith recommended the patient get some epidural steroid injections. The patient stated the epidural steroid injections did not give him any relief. He does not work anymore, and so the pain medication, he takes them occasionally because he does not want to get addicted if he has something done that seems to control his pain. The patient states his symptoms are still predominantly in the back with occasional pain down his left leg. The patient states he thinks he can live with the pain. He is really not interested in any surgical intervention at this time and would like to take the wait-and-see attitude.

PLAN: At this point, we are going to bring the patient back in the Neurosurgery Clinic in about 4 months. If he has any complaints or any concerns before that time, he will give us a call. The patient still has a prescription for his Lortab. I explained this to the patient, who acknowledged understanding and agreed to the plan. I reviewed with Dr. Meredith, who agreed with the plan.

A May 19, 2013 CT X-ray Report in Exhibit C notes a non-displaced fracture involving the anterior left seventh rib and small area linear scarring/atelectasis left base. A May 19, 2013 CT head notes a history of fall, alcoholic.

A June 19, 2013 VA Anesthesiology Physician Note in Exhibit C states in part that Claimant was in the clinic for bilateral throat thoracolumbar fascia injection and had a history of multiple procedures involving injections at L4-L5 in January 2013 with minimal to no relief. Claimant continued to report severe lower back pain which radiated anteriorly to the left lower extremity mostly at the upper thigh.

A November 8, 2013 VA Progress Note in Exhibit C states in part:

Veteran's occupation was over-the-road trucker for 40 years. Admits to having a clean record for 40 years. Was involved in an incident falling out of a truck last year. Has low back pain (L4-L5 herniated disc) ended his driving career. States that after the incident has been having regular drinking binges.

A November 13, 2013 note in Exhibit C states in part that Claimant: “reports bingeing on 3 gallons of vodka in 3 days. Claims that he tends to binge and does not drink every day. Been on binge per girlfriend since 10/23 – wants to quit for good.”

A December 16, 2013 VA record in Exhibit C notes that Claimant had been hospitalized in early November 2013 for alcohol detox and was re-admitted on December 14, 2013 after falling and fracturing his ribs and also for alcohol detox.

A December 17, 2013 VA record in Exhibit C states in part:

Chief Complaint: Patient is here for alcohol detox. S: ‘I fell and hurt my ribs.’ Patient had fallen and hurt his ribs. Interestingly, he denied that he had been drinking, yet his alcohol level was over 350 on admission. He stated that he had not been drinking alcohol when he fell but did delude to having hard liquor recently. He did minimize his drinking stating that this episode was an ‘unusual’ moment since he does not drink regularly.

A December 19, 2013 VA Discharge Summary in Exhibit C notes Claimant presented with ETOH intoxication on December 14, 2013 and was discharged in December 2013. Final Diagnosis is noted to be: “ETOH/withdrawal.”

Exhibit S contains updated records from the VA Hospital. These include an April 28, 2014 Progress Note states in part that Claimant is being seen routinely for a herniated disk at L4-5 in his lumbar spine. The record states in part:

The patient stated hot showers helped him a lot, and lying on his back helped him a lot. He uses his walker to walk if he does not have anyone around to help to avoid falling or when his legs give out. The patient states his legs gave out on him once in the kitchen and he fell on the table and had a few rib fractures. The patient has some weakness down his legs, which is occasional, but the pain in this low back and butt cheek is pretty constant.

An August 19, 2014 VA note states in part:

The patient gets epidural steroids injections every 3 to 4 months. The patient states that helps him for a very brief time, not too long. The patient states he still thinks he can manage his pain right now and is really not interested in any surgical intervention. He takes his pain

medicine only when he needs it. He has no bowel or urinary incontinence or saddle anesthesia. Does walk daily.

Exhibit S includes a VA Progress Note dated February 18, 2015 that states in part:

Has chronic LBP due to DDD L/spine and has had LESI's and seen Neurosurgery also with last visit on 04/2014. Conservative approach was suggested again. The patient's pain was predominantly back pain with occasional pain down his left leg, which correlated to an L4-L5 disk herniation that the patient has.

The February 18, 2015 record also notes that the Claimant had had bilateral thoraco-lumbar fascia injections on February 11, 2015, August 19, 2014, January 6, 2014, June 19, 2013, and January 23, 2013.

Dr. P. Brent Koprivica Evaluation

The deposition of Dr. P. Brent Koprivica dated July 25, 2014 was admitted as Exhibit D with Deposition Exhibit 1, his Curriculum Vitae, Exhibit 2, his February 14, 2014 report and Deposition Exhibit 3, AMA Guide pages. Dr. Koprivica is a licensed medical doctor in Missouri and Kansas. He has board certification by the American Board of Emergency Medicine and the American Board of Preventative Occupational Medicine. He is a Diplomate of the American Board of Forensic Examiners and is a Fellow of the American Academy of Disability Evaluating Physicians at American College of Emergency Physicians.

Dr. Koprivica evaluated Claimant and personally reviewed the actual films set forth in a CD that contains some diagnostic studies. (Koprivica deposition, page 7).

Dr. Koprivica knew that Claimant had a left carpal tunnel release in around 2001. Claimant told him that his recovery from that injury was to a level that there was really no impact on his activities of daily living and it did not impact him vocationally and that physically Claimant could do anything he wanted to do with that hand despite having had that surgery. (Koprivica deposition, page 27).

Dr. Koprivica was aware that Claimant had a fracture and dislocation of Claimant's right ankle in 1997. (Koprivica deposition, page 29). Claimant told Dr. Koprivica that the ankle injury was not industrially and disabling. After healing in 1997, Claimant got better and was able to stand, walk, climb on the truck, do all of the things that he had done work wise, and walk on an uneven surface around his truck. Claimant told him that it did not limit him. Dr. Koprivica stated that it would not be an obstacle to Claimant getting a job, nothing of significance. (Koprivica deposition, page 31).

Claimant told him that it did not adversely impact his ability to perform his regular job functions. (Koprivica deposition, pages 31-32). Claimant worked pretty consistently up until August 2012. (Koprivica deposition, page 32).

Claimant also had left elbow tendonitis. Dr. Koprivica concluded that the epicondylitis was not industrially disabling for Claimant. (Koprivica deposition, page 34).

Dr. Koprivica did not have any information to suggest a prior industrial disability of alcoholism. (Koprivica deposition, page 39). He did not see references to prior issues regarding the back, and Claimant denied having ongoing problems with his back before August 7, 2012. (Koprivica deposition, page 40).

Dr. Koprivica was asked the following questions and gave the following answers at Koprivica deposition, pages 40-41:

Q. Now, did Mr. Price describe to you in any detail exactly how he injured himself?

A. He did.

Q. And what did he tell you?

A. He told me that he suffered a fall at work. That he was going to climb back into his tractor to get his wallet because he had left it in the cab when he started fueling his tractor, and he said that because of where the fuel tank was and the fuel hose, he basically slipped over the fuel hose, fell, hit the front part of his body against the side of the tractor and landed on – more or less on his buttocks onto his right hip and onto his right shoulder. Now, he told me that even though he directly landed on the hip and also hurt his shoulder, those problems went away.

Dr. Koprivica was asked the following questions and gave the following answers at Koprivica deposition, pages 41-42:

Q. Okay. Doctor, just generally given your description by Mr. Price of the mechanism of injury, given the medical records and your review of the - - your examination of Mr. Price, have you formulated any opinion as to whether or not the injury as he described it to you on August 7th, 2012, is what is causing his present problems at this time?

A. I have an opinion in that regard.

Q. And what is that opinion, Doctor?

A. My opinion is that that fall was the direct proximate and prevailing factor in the ongoing disabling symptoms he has from his low back. Now, I'm not saying it's the only factor when I say it's the prevailing factor. There are changes on his spine, some underlying degeneration that would have been present when he fell. But I believe that he had acute structural change associated with this injury that has led to him having disabling symptoms, and he was not having them before, even though there were [*sic*] some degeneration at the time. You have new structural change that now has led him to have this disabling back pain, that's my opinion.

Q. Thank you, Doctor. Now, I'll ask this one time and then kind of a catchall, but the opinion you just expressed, is that an opinion within a reasonable degree of medical certainty?

A. Yes.

Dr. Koprivica was asked the following questions and gave the following answers at Koprivica deposition, pages 48-57:

Q. (By Mr. Campbell) Well, I think we've already pretty well covered it, Doctor. I think you kind of talked about a clarification that Mr. Price tried to provide you or at least his explanation as to why he believed those entries were made in the record?

A. Yeah. And just so that the record is accurate, earlier when you were asking the question, this is information that I did not specifically get from him on February 14th, 2014. Now, I did -- today I did have a discussion with Mr. Price and in that discussion Mr. Price's belief was that it was an error in getting that into the record because of an event that occurred when the attending physician had an incident in his room. And what he told me was that the attending physician went to sit in the chair and almost fell out of the chair. And when that happened, he said he described having a similar type of event, I think, his son was four years old at the time, where he almost fell from an aluminum folding chair because the straps that support your body weight gave way. And he said it was a similar type of event where he almost fell out of a chair just like that.

And his -- what he told me was that the individuals, the students when you do rounds, and I taught in this type of situation, you have med students and you have residents and you stand in a group around a patient's bed and you have discussion with the patient and show them physical exams, that they were recording that information when that discussion occurred, and that he believes that there was a misunderstanding on one of them writing that note down, that it got into the record that he had fallen since August 7th, 2012, which he said it did not happen. That was the discussion we had today.

Q. Okay. But either way, none of that really affects your opinions because when you interviewed Mr. Price and when you examined Mr. Price, he had told you there was only one fall?

A. Right. I asked him because I saw this reference in the VA records, and he said there was only one fall. And we -- I didn't go into further discussion like I did today where this explanation was given. So I just want to be clear on the record, I didn't know the story about 30 years before almost falling from a folding chair, whatever year it was, I think he said it was '81 that it happened, but that incident, we didn't have that discussion on February 14th, 2014. We had it today.

Q. And the information that you were provided, that just did nothing more than kind of explained why he believe [*sic*] it got in the records, none of that's really going to change your opinions that you've expressed, correct?

A. No, it doesn't change my opinion.

Q. And all the opinions that you've expressed in your report and that you will express during the course of this examination are based upon your belief and understanding that there was one fall and that that fall took place on August 7th, 2012?

A. Yes, as he described when he was fueling his truck.

Q. All right. Thank you. We'll keep going, Doctor. I'm sorry I'm taking so long. But you continued to, on Page 10, talk about the history of the present injury and illness, and you talk about your review of the different x-rays and MRI, correct?

A. Yes, I had the MRI available to me on the disk. There's some CAT scans and other things that are reports in the record from the radiologist.

Q. And did you see things in the various films that you saw or in the radiology reports you had an opportunity to review that you felt would explain to you what is causing Mr. Price's present symptomatology?

A. Yes. And I said this earlier. I felt that there was degenerative change in his spine that existed at the time of this fall. When he fell, he was in his late fifties and to see degeneration in the spine is expected. That's what the population studies tell you, everybody has degeneration of their spine over the years, and it actually starts in your teens and twenties, you start getting some degeneration in your spine, and as it goes on, the rate will differ among people, the extent will differ among people, but everybody has it, so I know that he has degeneration in his spine when he fell.

The thing that I thought was of significance was the fact that he had a left foraminal far lateral disk protrusion at L3-L4. That he had a bulge at L4-L5 that was causing central protrusion and stenosis or narrowing, and that was at L4-5, and that he had a central left disk herniations at L4-S1 that was putting some mass effect on the left S1 nerve root.

Now, with an acute fall to cause an injury to the annulus, which is the containing structure of the disk that would allow -- that would produce bulging, new bulging, and/or disk protrusion is something that would occur on an acute basis, and those findings structurally would explain why he's having this disabling back pain that started with that fall. All the findings aren't explained. But the findings that with the degeneration that you do have present, if it's not symptomatic and you're working as a truck driver and doing climbing and twisting and bending and lifting and things that you do and you're not symptomatic, that's certainly plausible.

Q. And was that the case with Mr. Price?

A. Well, that's my understanding of review of the records and the fact base about what he's told me subjectively is that's what we're operating under. And what I'm trying to do is establish is there -- are

there findings that something new happened and that's why he's got the ongoing disability. And this annular injury that we're seeing particularly at L4-5, those changes would be something that are to a degree that it would explain why now he's got symptoms and why he's disabled, why he had to go to the doctor, why he had to get treatment from the VA. That's what's explained by those annular changes. That's my opinion.

Q. Okay. And you talk about all that in that section, and I won't go into any further detail.

A. Can I say one other thing here?

Q. Sure.

A. Because I was thinking about this answer to be complete. It is true that you can see these changes on a degenerative basis. I'm not saying that that's not possible. What doesn't make sense with the facts that I have is that he's asymptomatic, he has the fall, he now has the documentation of these disabling symptoms that start with that fall going forward from which he doesn't recover. And for these changes just to be on a degenerative basis, that doesn't make any sense. Okay? The fact is is [*sic*] that those changes can occur with a structural change with annular bulging because of annular injury with the fall. That does make sense, and because that is what can occur plausibly when I try to weigh out, well, do I think it's just all degenerative and that's all we're seeing because that can explain it, that doesn't really fit the clinical story that I've been told, and I have to make those judgments to try to come to my conclusion.

Q. Okay. So, Doctor, based on what you just said, did you conclude whether or not the pathology that you reference in terms of his spine, other than the degeneration, is related to the fall of August 7th, 2012?

A. I did form a conclusion regarding that.

Q. And what was your conclusion in that regard?

A. My conclusion was that the annular injury was bulging to the extent that it's causing stenosis occurred as a direct result of that

fall. That that fall was the prevailing factor in that new structural change and why he had disability and why he had to have treatment.

Q. Okay. Thank you, Doctor. We won't go into any further details in regard to that section. On Page 15 you make reference to current complaints, and we haven't discussed, at least in regard to that section, so can you just talk about the findings that you made as far as his current complaints?

A. Yes. He told me that he was never pain free regarding his low back. That in terms of his quantification of it on an analog scale, zero being no pain and 10 being the worst pain you can experience, that his pain levels varied from 4 up to 9. Most of the time he said it was severe and he graded it at 6 to 7. He was not incontinent. One of the reasons why I was asking that, if you look at those structural changes on the MRI, there is evidence that the disk bulge was pushing up against the cauda equina. If you have enough compression of the cauda equina, you become incontinent, but he wasn't having that as a complaint. If that was true, then those structural changes are something that require surgery, okay, so that's helping me to find my recommendations for treatment in trying to assess the situation. So he was not having any urinary or fecal incontinence. He was having some problems sexually for which he was taking Viagra. Having sexual dysfunction associated with back disability is something that we see, and he told me that it had not started until he had injured his back August 7th, 2012.

Q. You saw some records that suggested it might have started before that?

A. No, I don't think they -- I had that it was diagnosed in February of 2012.

Q. Okay. Which actually was a little bit before the accident?

A. Yes, it was six months before.

Q. Okay.

A. He had intermittent left leg and thigh numbness down to the knee level. It was rare. When I saw him, he told me that he was using a walker at times in February of 2014. His girlfriend was doing most of his activities for him during the day because of his back.

He described a reduced sitting tolerance where he could sit less than 30 minutes at any one interval. He told me that on the trip to the appointment to see me, which he said was a 45-mile trip, he had stopped three times. He told me he did drive, but he tried to limit how much driving he did because of the pain he experienced in his back with sitting and trying to drive.

His standing tolerance he said was reduced to less than 15 minutes. That he could walk a couple of blocks but he had to stop and rest. He could walk without a walker. He was self limiting his lifting and carrying to less than 10 pounds. And he volunteered to me that because his back hurt so bad, he was laying down during the day multiple times. He said he couldn't tell-- predict when that was going to be necessary, he just did it based on his pain level and that was one way he was trying to get relief from the pain.

He had sleep interruption. The longest time that he was sleeping when I saw him in February of 2014 was about two-hour intervals. He would wake up, he would be up for awhile, try to get up, move around, then lay back down. That overall he was getting between four and five hours if he added the time he slept overnight altogether cumulatively.

He was using Tramadol an average of four days a week. Tramadol is a non-narcotic pain medication. He had Hydrocodone with Tylenol available as well, that's Vicodin, which is a narcotic pain medication he was using.

Q. All medications you just described, Doctor, are those strictly for the pain he's experiencing in his back?

A. That's what I recorded, that he was taking those for his back pain.

Q. Okay.

Dr. Koprivica performed a physical examination of Claimant that was consistent with all of the information he had. (Koprivica deposition, page 58). He did not find evidence that Claimant was exaggerating his physical impairment on his exam. (Koprivica deposition, page 59).

Dr. Koprivica testified regarding his observations and opinions beginning on page 20 of his February 14, 2014 report. (Koprivica deposition, pages 61-66). His testimony is consistent with his report. He testified in part that in his opinion the work-related fall was the direct, proximate, and prevailing factor in the development of any injury, particularly to L4-5 and L5-S1, but there was no evidence of cauda equina syndrome clinically. (Koprivica deposition, page 61).

Dr. Koprivica felt that Claimant had disability based on actual back pain attributable to the August 7, 2012 injury which was producing severe limitations for Claimant. He felt that the recommendation for non-operative treatment was appropriate with what he saw with the information he had available. (Koprivica deposition, page 62). He stated Claimant was at maximum medical improvement and that for non-operative treatment, and Claimant was as good as he was going to get. (Koprivica deposition, page 62).

Dr. Koprivica testified that the medical care and treatment Claimant had received since August 7, 2012 was medically reasonable and a direct necessity in an attempt to cure Claimant of the effects of the permanent injury sustained in the fall at work on August 7, 2012. (Koprivica deposition, page 62-63).

Dr. Koprivica further testified that Claimant was temporarily totally disabled beginning August 7, 2012 and that he reached maximum medical improvement once the decision was made that Claimant was not a surgical candidate on February 11, 2013 which is the date from Dr. Meredith's notes. (Koprivica deposition, page 63).

Dr. Koprivica further testified at Koprivica deposition, pages 63-66:

. . . . I felt the August 7th, 2012, injury was the prevailing factor in terms of that period of temporary total disability, and that it was medically reasonable and a direct necessity of the injury that he had sustained on August 7th, 2012.

Even though he was at maximum improvement, I felt it was reasonability probable that he was going to have ongoing life long treatment needs based on his injury to his low back on August 7th, 2012. I felt he needed to be monitored, provided chronic pain management. What I couldn't predict is whether or not the disk was going to progress in terms of the annular injury and having a disk herniation. They can get bigger and if it gets bigger and is causing cauda equine syndrome, he's going to have to have [*sic*] surgery. So what the specifics of treatment are going to be, I couldn't predict. I can tell you he's going to need treatment. At a minimum he's going to

need to see a doctor, be monitored and have appropriate medications, but surgery was something that may be necessary, I'm not telling you it's probable. I can just tell you that's part of what might be necessary in the future. And so I recommend leaving the medical care and treatment open to try and address those issues as they actually develop.

In terms of the disability issue, as I've said earlier, impairment is a standardized percentage that depends upon what methods you're using as to what percentage you assign. It's a consensus number. It's not individualized. Disability is an individualized concept, it's how that impairment is limiting that particular individual in terms of their ability to do activities they need or want to do, recreationally, socially, vocationally, it's how it impacts that individual. It's an individualized concept.

In this case, what he was describing to me in terms of limitations from his lumbar condition, his injury that he had sustained, were so overwhelming that I thought realistically he could not work. And when I looked at that issue of being permanently totally disabled, I felt the primary injury of August 7th, 2012, when I looked at it, the disability from that injury alone, I felt it in and of itself was totally disabling.

I did not identify any prior disability that would arise to resulting in Second Injury Fund liability on my assessment. And then I said that if the trier of fact found that, based on additional information, that he had a vocational profile that it would allow him to be placed in the open labor market, I would assign a 50 percent permanent partial disability to the body as a whole. But that was not factually the information that I had been given.

Q. And so your opinion is that, you know, even without the assistance of a vocational expert, you're not aware of any employment, given his physical limitations, that he could engage in at this point in time?

A. That's correct. As an occupational physician doing these types of evaluations, I get the opportunity to review vocational work-ups on individuals many, many times. Whenever you have postural restrictions that he describes to me, including the need to lie down unpredictably because of the severity of the pain, which is certainly

consistent with his pathology, that results in you not being employable. It's not reasonable for an ordinary employer to be able to accommodate where you can't tell me how long you can sit, how long you can stand or walk as limited as he is or that you need to lay down unpredictably. That's not something that I've read reports where that no matter how advanced the education level is, that a person can be placed in the open labor market. That's been my experience, and that's the reason I said it.

Dr. Koprivica testified that he has scheduled about twenty depositions a week and that 98 to 99 percent are for the Employee. He is not a vocational expert. Claimant told him that he did not drink alcohol to any significant extent prior to August 7, 2012, but reports of February 16, 2012 showed elevated liver function that is consistent with alcohol abuse. (Koprivica deposition, pages 73-74). Claimant told him that he developed impotence after the fall of August 7, 2012, but the records show Claimant's impotence was initially diagnosed in February 2012. (Koprivica deposition, page 75).

Dr. Koprivica had evaluated patients who have fallen to a seated position impacting their buttocks, and he stated that would be a mechanism of injury which could cause some form of low back injury. (Koprivica deposition, page 78). He agreed that falling through a seat from a seated position striking the ground with your buttocks is similar to the mechanism of injury as falling from a truck and striking the ground in the same fashion in terms of axial loading of the spine. (Koprivica deposition, page 78-79).

Dr. Koprivica agreed that other than Dr. Meredith's report, no other physician who treated Claimant whose records he reviewed said that Claimant could not work at all, and that he saw no reference of that. (Koprivica deposition, page 84).

Dr. Koprivica testified that Claimant told him he fully recovered from hurting his hip and right shoulder from the fall, and he did not believe there was any disability relating to the hip or shoulder. (Koprivica deposition, page 85).

Dr. Koprivica's February 14, 2014 report states in part at pages 21-25:

1. Predating the work injury of August 7, 2012, with the data that is available to me, it is my opinion that Mr. Price did, in fact, have pre-existent degenerative disease in the lumbar spine.

Historically, this was an asymptomatic and non-disabling condition.

I would note that I do not have prior Veterans Administration records to confirm that history and I am relying on Mr. Price's subjective history.

I would consider the August 7, 2012, work-related fall to be the direct, proximate and prevailing factor in the development of the annular injury at the L4-L5 and L5-S1 levels, in particular. Despite the significance of the disk herniation noted in terms of its size on the MRI scan from September 25, 2012, that I have reviewed, there is no evidence of cauda equina syndrome clinically on examination.

Mr. Price's disability arises from axial back pain based on this injury, which is resulting in severe limitations.

I am in agreement with the recommendation for non-operative treatment of his disabling back pain at this point.

2. I would consider Mr. Price to be at maximum medical improvement in reference to the work injury of August 7, 2012.

3. The medical care and treatment, which Mr. Price has received to date since the August 7, 2012, injury as described, was medically reasonable and a direct necessity in an attempt to cure and relieve Mr. Price of the effects of the permanent injury sustained on August 7, 2012.

4. I would consider Mr. Price to have been temporarily totally disabled beginning on August 7, 2012. I would consider his point of maximum medical improvement to be the date which Dr. Meredith indicated that he was not a surgical candidate on February 11, 2013.

This period of temporary total disability is felt to be medically reasonable and a direct necessity of the August 7, 2012, injury and the subsequent care and treatment necessity by that work injury.

The August 7, 2012, work injury is the prevailing factor resulting in this period of temporary total disability.

5. Even though Mr. Price is at maximum medical improvement, it is reasonably probable that Mr. Price is going to have ongoing life-long indefinite treatment needs based on his lumbar

impairment and resultant disability attributable to the August 7, 2012, injury.

At this point, Mr. Price is receiving ongoing chronic pain management.

Ongoing chronic pain management needs will be an indefinite need that will need to be provided.

At this point, I would advise against surgical intervention. If he should develop progression of the disk herniation to a point that there is a significant cauda equina syndrome, emergent surgery would be warranted.

I would recommend leaving the medical care and treatment indefinitely to address any treatment need as it actual [*sic*] develops.

In this particular case, Mr. Price is having to lie down multiple times unpredictably throughout the day.

Mr. Price has profound postural limitations.

Mr. Price is self-limiting lifting and carrying to less than 10 pounds based on his back pain.

I would note that these presentations of limitations are felt to be consistent with the actual pathology as suggested by Dr. Meredith.

In looking at this presentation, it is my opinion that it is unrealistic to believe that Mr. Price can access the open labor market in any capacity. An ordinary employer cannot realistically accommodate the restrictions and limitations with which Mr. Price presents.

It is my opinion, even without vocational input at this point, that Mr. Price is permanently totally disabled. Further, it is my opinion that permanent total disability arises based on the residual impairment and resultant disability attributable to the August 7, 2012, work injury when considered in isolation, in and of itself.

.....

7. If it were determined by the trier of fact that Mr. Price can, in fact, return back to work based on vocational input, which is clearly in conflict with my evaluation at this point, I would consider a fifty (50) percent permanent partial disability to the body as a whole to be appropriate for the primary injury of August 7, 2012. However, I would emphasize that this hypothetical is in conflict with my opinions based on the date that I have outlined.

8. I have not identified any Second Injury Fund liability.

I would note that I have spent four and a half hours in authoring this report. This includes the three and a half hours that I have spent with Mr. Price directly. The remainder of time was spent in reviewing records and authoring the report.

I would note the above opinions have all been given within a reasonable degree of medical certainty, unless otherwise expressed.

Dr. Stephen Reintjes Evaluation

The deposition of Dr. Stephen Reintjes taken April 8, 2015 was admitted as Employer's Exhibit 6, with Dr. Reintjes's Curriculum Vitae, Deposition Exhibit 1, Dr. Reintjes's August 8, 2014 report, Deposition Exhibit 2, and Dr. Reintjes's December 8, 2014 report, Deposition Exhibit 3. Dr. Reintjes is a member of the American Board of Neurological Surgeons. He has staff appointments at several hospitals. He is a Clinical Assistant Professor at the University of Missouri, Kansas City.

Dr. Reintjes testified that he is a neurological surgeon. (Reintjes deposition, page 4). He is licensed to practice medicine in the State of Missouri and is board certified as a neurosurgeon. (Reintjes deposition, page 5). He has had experience in Missouri Workers' Compensation Law in evaluating patients. He allows one IME per week. He evaluated Claimant. (Reintjes deposition, page 6).

Dr. Reintjes saw Claimant on August 8, 2014. He identified his reports, Reintjes deposition, Exhibits 2 and 3. He could not recall what medical records he reviewed. He took a history from Claimant. He testified regarding Claimant reporting his injury to his back on August 7, 2012 when he was climbing out of a Kenworth diesel truck and accidentally slipped and fell five feet. Since the fall, Claimant complained of low back pain that radiated to his left leg or the anterior thigh down to the knee. Claimant reported his low back pain was markedly more severe than his left leg pain. He reported that his left leg would give out on occasion and had given out about twelve times in the past two years. He had no right leg symptoms. (Reintjes deposition, page 9).

Dr. Reintjes performed a physical examination and found Claimant's sensory exam revealed decreased pin prick sensation in the left L4 and L5 distribution. Claimant had absent reflexes at the ankle jerk. Claimant's straight leg raising was positive at 60 degrees on the left. The rest of Claimant's exam appeared normal. (Reintjes deposition, pages 9-10).

Dr. Reintjes reviewed an MRI scan of the lumbar spine dated February 6, 2014 that showed a left sided L4-5 disk herniation with degenerative disk changes at that level.

Dr. Reintjes was asked if he reached an opinion regarding causation. He testified by reading from his August 8, 2014 report that is set forth later in this award. (Reintjes deposition, pages 10-12).

Dr. Reintjes testified further that as noted in his report of December 8, 2014, he had an opportunity to review the CT scan of lumbar spine dated August 30, 2012 and an MRI scan of the lumbar spine dated September 25, 2012 from the Veterans Administration's Hospital. They both suggested left sided L4-5 disk herniation. (Reintjes deposition, page 12).

Dr. Reintjes was asked the following questions and gave the following answers at Reintjes deposition, pages 12-17:

Q. And subsequent to that report did you have an opportunity to review the additional film?

A. My report of December 8, 2014, said I did have an opportunity to review the CT scan of the lumbar spine dated August 30, 2012, and an MRI scan of the lumbar spine dated September 25th, 2012. Both of these were from the Veterans Administration Hospital. The MRI scan is more clear than the CT scan. They both suggest a left-sided L4-5 disc herniation.

Q. Doctor, I'll represent to you that the first mention of any left-sided leg symptoms that I saw in the medical records was October 23, 2012, a little over two months after the accident. Would that be consistent with the disc herniations that you found on the disc being related to an accident that occurred sometime in August of 2012?

A. I've seen people have traumatic events, falls or accidents where they have low back pain and then at some point later develop leg symptoms or radicular symptoms, and I think that the two-month

window is certainly within the possibility that the accident of August 7th could have resulted in the manifestation of radicular symptoms two months later.

Q. Now, Doctor, there is also a different history in the VA records as to how the accident occurred and it's recorded that Mr. Price reported that he fell through a canvas lawn chair the day before this alleged accident where he fell off a truck. Would that mechanism of accident, falling through a lawn chair, would that also be consistent with the type of accident that could cause the disc herniations you saw on the films?

MR. CAMPBELL: I'll object to the extent it calls for speculation on the part of this witness with that limited information.

A. I will testify that I do not have that independent knowledge of reading those records, but based on the hypothetical that he had had a fall through a lawn chair before the fall off the truck, I would say either mechanism could result in a low back injury and a subsequent lumbar disc herniation.

Q. (By Ms. Young) Can you explain as far as the mechanism of injury is concerned how that would happen?

MR. CAMPBELL: Again, object to the basis of speculation, inadequate foundation.

A. Both are falls. Since I wasn't there, I can't identify the force that was involved in the fall, but both can be traumatic to the low back and I would say both could result in a low back injury and a lumbar disc herniation.

Q. (By Ms. Young) And if one has a disc herniations, specifically at L4-5, would your leg giving out, would that be a potential symptom of a disc herniations, either one of your legs giving out?

A. If you have a left-sided disc herniation at L4-5, it is a common complaint of patients that their legs want to give out. If you have disc herniations on the right side, it's a common complaint that the right leg would give out. So the side where the disc herniation is is usually that leg that wants to give out, not both legs.

Q. And as we sit here today you don't know which history of accident, the one that was reported to you by Mr. Price, the one documented in the VA records, you don't know which one is true; correct?

A. Again, the only one that I stand by is the one that was provided by the history and provided in my report.

Q. Because that's the one that the patient told you about?

A. That is correct. And I'm going to quote from my report. He said, quote, never had a pain of any kind before the fall, meaning the fall off the truck.

Q. If Mr. Price elects not to have surgery, would you agree that he's at maximum medical improvement?

A. Yes.

Q. And assuming Mr. Price has not had surgery and doesn't plan on having surgery, do you still recommend the physical restrictions that you outlined in your report of August 8 of 2014?

A. Yes.

Q. Would those be permanent physical restrictions?

A. Yes.

Q. Do you believe he requires any greater physical restrictions apart from what you've outlined in your report of August 8 of 2014?

A. No.

Q. Does it remain your opinion that he can perform work within those restrictions?

A. Yes.

Q. Assuming that Mr. Price is now at maximum medical improvement, do you have an opinion regarding the extent of any disability he sustained as a result of that L4-5 disc herniation?

MR. CAMPBELL: I'll object to the extent that he's written two reports previously and he has not in either one of those reports expressed any opinion in regard to the nature and extent of the disability on the part of Mr. Price and it would be my opinion in violation of section 287.210 for him to now attempt to render this opinion at this late date.¹

Q. (By Ms. Young) Subject to that, Doctor.

A. It's a hard question just because of the time that's passed. Are you asking me to answer the question?

Q. Yes.

MR. CAMPBELL: Subject to my objection.

MS. YOUNG: Of course.

¹ Claimant's attorney's objection is overruled. Claimant's attorney cross-examined Dr. Reintjes and did not postpone cross examination until there was an opportunity to review his testimony. *See Orr v. City of Springfield*, 118 S.W.3d 215 (Mo.App. 2003) where the court states at 222:

In *Goodwin*, [*Goodwin v. Farmers Elevator & Exchange*, 933 S.W.2d 926 (Mo.App.1996)] which considered the statute prior to the changes that made § 287.210.3 and its seven-day rule applicable to depositions, the Court noted that a party that does not receive a medical report in compliance with § 287.210.3 has at least two options. 933 S.W.2d at 929. The party may cross-examine the physician immediately after direct and reserve time for additional later cross-examination if necessary, or the party may postpone all cross-examination until there is an opportunity to review the testimony. *Id.* The Court in *Goodwin* determined that although there was a violation of the seven-day rule, admitting the testimony of the physician was not in error because the party who was adversely affected by the violation failed to object or assert any request for relief and thus, was not prejudiced. *Id.*

A. Referring to my report and his examination in that report, I would give him a permanent partial disability rating of 10 percent to the body as a whole based on the fourth Edition of the American Medical Association guidelines.

Q. (By Ms. Young) And have all your opinions today been given within a reasonable degree of medical certainty?

A. Yes, given the hypotheticals that I've been presented.

Dr. Reintjes testified from reading his report of December 8, 2014 that: "I would relate the L4-5 disk herniation to his work injury as well as whatever the necessary treatment." (Reintjes deposition, page 22).

Dr. Reintjes' August 8, 2014 report states in part:

Impression: It is my impression that the patient has a left L4-L5 disc herniation. However, the study that I reviewed was from February 6, 2014. The patient reported to me that he had had a prior MRI scan of the lumbar spine done in Topeka in closer temporal proximity to his injury.

Unfortunately, I do not have the MRI scan of the lumbar spine from that the patient reports was done in Topeka.

It would be very helpful for me to be able to review the films from the MRI scan of the lumbar spine done in Topeka, Kansas and compare them to the current studies of MRI scan.

I did have an opportunity to review a note from Everett Wilkinson, D.O. dated August 20, 2012. At that evaluation by Dr. Wilkinson, who is an orthopedic surgeon, the patient was complaining of low back and right leg pain with positive straight leg raising test on the right. That is an interesting finding because in 2014 he is complaining of low back and left leg pain.

At this point, I am reserving any judgment on whether this low back and left leg pain is in anyway related to his work injury.

I will try to answer the questions raised in your July 21st letter. My working diagnosis is low back and left leg pain due to a left L4-L5 disc herniation. I am reserving an opinion on whether the alleged

accident of August 7, 2012 was the prevailing factor in causing his low back and left leg pain until I can see the MRI scan, however, the office note of Dr. Everett Wilkinson would suggest that the patient had low back and right leg pain, which is contradictory to his current complaints. I cannot comment on whether his condition pre-existed the accident, although he said that he had no pain whatsoever prior to the accident. I am not going to make any further treatment recommendations until I can see the MRI scan that the patient reports occurred in Topeka, Kansas. If the MRI scan of the lumbar spine done in Topeka, Kansas in close temporal proximity to his work injury of August 2012 showed no evidence of disc herniation at L4-L5 then I think the patient is at maximum medical improvement from his work injury. I at this point would recommend the patient avoid repeated bending, twisting and lifting more than 35 pounds, not so much because of his work injury, but because of his current MRI scan finding of the left L4-L5 disc herniation. I do not believe that the patient is primarily and totally disabled at this time and I do not believe that I would attribute his current L4-L5 disc herniation to his work injury.

Dr. Reintjes' December 8, 2014 report states:

I appreciate your letter of September 15 regarding Eugene Price. I did have an opportunity to review the CT scan of the lumbar spine dated August 30, 2012 and an MRI scan of the lumbar spine dated September 25, 2012. These were both from the Veterans Administration Hospital. The MRI scan is more clear than the CT scan of the lumbar spine, but they both suggest a left-sided L4-L5 disc herniation.

If the patient complained of low back and left leg pain in the medical record in 2012, after his alleged work injury, then I would relate the L4-L5 disc herniation to his work injury. However, if the patient did not complain of low back and left leg pain in some close temporal relation to his work injury then I do not relate the L4-L5 disc herniation to his work injury.

Because he has evidence of a compressive lesion, I do not think that he is at maximum medical improvement and if the medical records report that his low back and left leg pain were present since the time or around the time of his accident, then I would relate the L4-L5 disc

herniation to his work injury as well as whatever the necessary treatment.

Again, I believe the patient has a left L4-L5 disc herniation. If he had left leg radicular complaints around the time of his work injury then I would relate this L4-L5 disc herniation to that work injury. I think the patient would benefit from the possibility of a left L4-L5 hemilaminectomy and discectomy and for that reason I do not believe that he is at maximum medical improvement.

Vocational Evidence

Michael Dreiling Vocational Evaluation

The deposition of Michael Dreiling, Exhibit E, taken March 18, 2015. Deposition exhibits include Michael Dreiling’s Curriculum Vitae and his July 30, 2014 report. Mr. Dreiling has a Master’s of Science Degree in Guidance and Counseling. He is a Diplomat of the American Board of Vocational Experts and is a vocational expert for the Office of Hearings and Appeals and has been a vocational expert for the Social Security Administration.

Mr. Dreiling testified to portions of his report and his testimony is consistent with his report. Mr. Dreiling noted that his report indicates Claimant says he still continues to lie down daily for thirty to sixty minutes at a time. (Dreiling deposition, page 21). Mr. Dreiling noted that can occur up to four times per day. He noted that it was a little over two years that Claimant had been approved for Social Security Disability. (Dreiling deposition, page 22).

Mr. Dreiling testified that based upon Claimant’s profile, he “felt that he [Claimant] could not return to any of his past relevant work which he had done in the labor market throughout his career.” (Dreiling deposition, page 24). Mr. Dreiling further testified at pages 24-26:

.....

Furthermore, I felt he was essentially and realistically unemployable in the open labor market. I didn’t feel he would be capable of performing any substantial gainful employment which would be consistent with the findings of the Social Security Administration.

And I felt that no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ this individual in his condition.

Q. Now does that pretty well sum up your opinions in this, Mr. Dreiling?

A. It does.

Q. There's been a suggestion that there might be some jobs that he might be able to do that are maybe not too physically demanding that he might have the aptitude for and be able to engage in certain types of jobs, and I wanted to just ask you specifically about those.

One might be working like at a tollboot [*sic*], or something like that, a booth cashier. Do you think that that is a type of job he might be able to do, given his limitations?

A. No.

Q. Some of the other jobs that have been suggested that he might be able to handle would be gate guard, front desk information clerk, motor vehicle dispatcher. Just in general terms given all the information you have about Mr. Price, do you think that he would be physically capable of performing any of those jobs?

A. No.

Mr. Dreiling believed the functional limitations identified on pages 1 through 2 of his report were not restrictions that were recommended by Dr. Koprivica but were actually the limitations that Claimant had reported to Dr. Koprivica and Dr. Meredith. (Dreiling deposition, page 29). He believed the functional limitations listed throughout his report had all been based on Claimant's subjective complaints or self reports about what he was capable of doing. (Dreiling deposition, page 32-33).

Mr. Dreiling was asked the following question and gave the following answer at Dreiling deposition, page 33:

Q. Your opinion regarding his physical ability to compete in the open labor market, it's not based on any physician-imposed restrictions but based on his self-reported limitations. Correct?

A. That and the comments contained with Dr. Koprivica's report.

Mr. Dreiling was not aware of any kinds of problems Claimant was having with his Employer before 2012 that would have resulted in poor work evaluations. (Dreiling deposition, page 37). He noted Claimant was able to perform his work activities without hindrance or obstacle prior to 2012. It was his understanding Claimant had not worked since the injury of August 2012. (Dreiling deposition, page 37).

Mr. Dreiling was asked the following questions and gave the following answers at Dreiling deposition, pages 39-42:

Q. Now one of the things that's been discussed here by counsel on Cross-Examination is that you didn't see any restrictions per se from Dr. Koprivica in his report. Is that correct?

A. That he specifically recommended, that's correct.

Q. And I'm going to have you look to Page 24 of Dr. Koprivica's report which you were provided before authoring your report, and it says about halfway down the page, "I would note that these presentations of limitations are felt to be consistent with the actual pathology as suggested by Dr. Meredith," and these limitations that he's discussing include having to lie down and having profound postural limitations.

As a vocational rehabilitation expert when he says that, even though he hasn't specifically said, "I find these as restrictions", what do you take that to mean?

A. That he would agree with those --

MS. YOUNG: I'm going to object that it calls for speculation. Subject to that, sorry.

A. He would basically medically agree with those needs for the patient.

Q. (By Ms. Fournier) And then a second question that kind of sprouts off of that, as a vocational expert if a person tells you they have a self-imposed limitation versus whether or not they have the restriction, does it really matter if they want to work?

A. No.

Q. So if Mr. Price tells you and you believe him that he has to lie down unpredictably throughout the day three to four times, how is that specifically, that in and of itself, going to impact his ability to work?

A. That would preclude the gentleman from being able to access the open labor market at any type of job.

Q. And I think what's important to point out in that regard is this unpredictable aspect of the lying down. If he were able to lie down on a scheduled routine, he might still be able to work. Fair statement?

A. It would be difficult, but it would make it a little bit more optimistic.

Q. But when somebody tells you they have to lie down unpredictably, that completely precludes employment on the open labor market. Is that a fair statement?

A. Yes.

Q. Is it your understanding that his need to lie down and to have these profound postural limitations that he has described come from the back injury that he sustained in August 2012?

A. That was my impression.

Q. And you've noted in your report in your ultimate conclusion that you believe Mr. Price is unemployable in the open labor market based on the residuals of that August, 2012, accident. Is that correct?

A. Yes.

Q. You were asked about some specific jobs that you felt Mr. Price could not do and Mr. Campbell listed those out for you during Direct Examination. Let me turn to those. They included being a booth cashier, being a front desk clerk, being a gate guard or being a dispatcher. You've indicated you don't believe he could do any of those jobs. Is that correct?

A. Correct.

Q. Would that be because he's having to lie down unpredictably throughout the day?

A. That's certainly part of it, yes.

Mr. Dreiling's July 30, 2014 report states in part:

VOCATIONAL TESTING:

Given this individual's age of 61 and the significant medical problems that he has been dealing with since the injury of August 2012, he is not a realistic candidate for formal academic or vocational training.

Based upon these factors, there is no need to perform vocational testing, in order to address his capacity to participate in any further formal academic or vocational-training program.

CONCLUSIONS:

This individual's vocational profile is represented by an individual who is 61-years-old; graduated from high school 42 years ago; has not participated in any further formal academic or vocational-training program in the past 42 years; has no typing skills; has a basic understanding of personal computers for emailing; is not a candidate for any further formal academic or vocational re-training program; has a work history primarily of truck driving and warehouse work; has significant medical restrictions and limitations to less-than sedentary physical activity; has ongoing, significant pain issues; utilizes various pain-prescription medications, including hydrocodone, tramadol and gabapentin; lies down periodically throughout the day for back pain; has limited ability to sit, stand and walk for any length of time; has not worked in the labor market since the day of the injury; and has applied for and is receiving Social Security disability benefits.

Based upon this vocational profile, this individual cannot return to any of his past relevant work, which he has performed in the labor market throughout his work career.

Based upon this vocational profile, he is essentially and realistically unemployable in the open labor market.

Based upon this vocational profile, he is not capable of performing any level of substantial, gainful employment, which would be consistent with the findings of the Social Security Administration.

Finally, based upon this vocational profile, no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ this individual in his condition.

From a vocational perspective, it would appear that this individual was able to continue to work as a truck driver without any limitations, prior to the August 2012 work injury.

It does appear that his vocational difficulties and inability to return to work have come about since the August 2012 work injury.

Stella Doering Vocational Evaluation

The deposition of Stella Doering taken March 10, 2015 with deposition exhibits was admitted as Exhibit 7.

Ms. Doering is a vocational rehabilitation disability consultant. She has been employed in that field for 25 years. (Doering deposition, pages 5-6). She is a Certified Rehabilitation Counselor, a Certified Disability Management Specialist and a Certified Case Manager. (Doering deposition, page 6).

Ms. Doering met with Claimant on January 22, 2015 at the request of Employer's law firm. It was her understanding that she was to evaluate Claimant's potential based on his past work experience, education, and any physical restrictions he might have to engage in competitive work in the open labor market. (Doering deposition, page 9). She reviewed records of Atchison Hospital, Veterans Administration, Dr. P. Brent Koprivica and Dr. Stephen Reintjes. (Doering deposition, page 11).

Ms. Doering's interview with Claimant lasted approximately three hours. (Doering deposition, page 12).

Ms. Doering did not observe Claimant to appear to be uncomfortable at all during the evaluation. Claimant did not verbalize any complaints of pain during the evaluation. He sat throughout the interview with the exception of a couple of breaks. (Doering deposition, page 14). He did not request any breaks. (Doering deposition, page 15). Claimant told her he could be up for two or three hours and then would lie down with a pillow under his knees. (Doering deposition, page 15). He said he was able to sit for 30 minutes and stand for about 20 minutes. (Doering deposition, page 15).

Ms. Doering observed Claimant for roughly fifty minutes. (Doering deposition, pages 15-16). Claimant told her the reference to him falling through a lawn chair in the VA records was due to what appeared to be foreign born students taking notes. He told the doctor he had a similar experience in the years before when he had fallen through a lawn chair and thought the foreign born students taking notes had misinterpreted that as an incident that had happened much more recently. (Doering deposition, page 17).

Ms. Doering administered a Wide Range Achievement Test. (Doering deposition, page 19). His scores were in the average range. (Doering deposition, page 20). She did not identify any pre-existing physical limitations or restrictions that would be a hindrance or obstacle to Claimant's employment prior to his back injury. (Doering deposition, page 21).

Ms. Doering noted the restrictions of Dr. Koprivica at Doering deposition, page 22:

Q. Assuming that he has no further surgical treatment, that he's elected not to do that, did you identify any restrictions in the medical records that you considered as part of your evaluation?

A. In treating records or including IME's?

Q. All inclusive of all of the records you received.

A. There were some restrictions that Dr. Koprivica had recommended in his independent medical evaluation.

Q. What were those restrictions?

A. Sitting tolerance of less than 30 minutes as a maximum, standing tolerance of less than 15 minutes, walk less than two blocks, and must stop and rest during that time, lifting and carrying to less

than ten pounds, uses a walker at times, but can also walk without a walker, drives, but limits amount of driving.

Ms. Doering was asked the following questions and gave the following answers at Doering deposition, pages 23-24:

Q. In looking at the restrictions that were recommended by Dr. Koprivica, where would his restrictions fall in terms of categories of employment?

A. It could be a reduced range of light work since sitting and standing would appear to need to be alternating for those jobs rather than sitting all the time, which would be consistent with sedentary work if you're sitting for awhile and then standing. That would be more consistent with light jobs that do not require lifting up to 20 pounds.

Q. Now have you also had an opportunity to review Dr. Reintjes' August 8, 2013 [*sic*] report?

A. Yes, I have.

Q. Just for the record, we discovered that report was missing from the records that you were initially provided, but you did have an opportunity to review it before today, correct?

A. Yes.

Q. Were there any restrictions that Dr. Reintjes recommended?

A. There were. He had suggested avoidance of repeated bending, twisting and lifting more than 35 pounds and that really was the only restriction that he listed in that report.

Q. Where would those restrictions fall in terms of category of employment?

A. That would certainly be within the limits of light work and definitely a reduced range of medium work, but it's much more consistent with light work.

Ms. Doering was asked the following questions and gave the following answers at Doering deposition, pages 26-28:

Q. Considering your interview of Mr. Price, your review of the records, the testing that you performed, your understanding of his daily activities, in your opinion, in your vocational opinion, would an employer be reasonably expected to hire Mr. Price in the open labor market?

A. I believe they would, yes.

Q. Why do you say that?

A. He was engaging and friendly, he demonstrated interest and enthusiasm in learning, in reading, he talked about liking to read biographies, liked history and his interest in participating in a variety of activities is indicative of somebody who employers would consider having a personality type that is beneficial in a work environment, particularly in environments where they might have to greet and have brief interactions with customers or other employees and things like that.

Q. In your vocational opinion, is there work in the open labor market that he will be capable of performing?

A. Yes, I believe there are. There are some jobs that would -- that he would be capable of performing.

Q. At what level of employment do you think he is capable of working?

A. There are some jobs that are classified at the light level that I believe and they're semi-skilled, so they -- they don't require, you know, vast attainment of education or other skills, but need just slightly more than extremely basis skills and work to perform.

Q. Can you give some examples of work he might be able to do?

A. Yes. Things like a gate guard, guards that control entrance to and from, could be -- could be a residential facility, it could be some type of industrial complex, places like that, and they-- gate

guards typically can sit or stand as they need to, they can walk around a little bit and they rarely are lifting very much at all, but it's still classified as light. Someone who would be an information clerk, either in a commercial building, a hospital setting, some type of public environment where they are answering basic questions, directing people. Again they typically are able to sit or stand as they need to, have brief interactions with individuals and there's very little lifting required in those jobs, although they are classified at the light level of exertion.

Q. In your review of Dr. Reintjes' report, did that change any of the opinions you expressed in your report here today?

A. No

Q. Have all of your opinions today been given within a reasonable degree of vocational certainty?

A. Yes.

Ms. Doering agreed that the records of Atchison Hospital and Dr. Wilkinson did not appear to mention anything about a fall from a chair. (Doering deposition, page 41). Claimant related that all of his back problems, neck problems he was complaining of in his consultation with a neurosurgery on November 7 were related to the fall from the cab of the truck. (Doering deposition, page 42). She agreed the doctor's assessment said that Claimant had a large L4-5 herniated disk. (Doering deposition, page 43). She inferred from Dr. Meredith's February 11, 2013 note that he was not recommending to Claimant that he have surgery. (Doering deposition, page 44). She understood that Dr. Koprivica agreed with Dr. Meredith that Claimant is not a surgical candidate. (Doering deposition, page 44).

Ms. Doering believed that work was still a possibility for Claimant even if he did not have back surgery. (Doering deposition, page 45).

Ms. Doering did not believe that Claimant could be a truck driver now. (Doering deposition, page 47).

Ms. Doering was asked the following questions and gave the following answers at Doering deposition, pages 52-53:

Q. Let me just ask you hypothetically if in fact Mr. Price did have to lie down multiple times unpredictably throughout the day as

described by Dr. Koprivica, would that inhibit his ability to find employment?

A. It would. It would depend on an average frequency and length of time that that would be required.

Q. If he went in for a job interview and they were asking him about any physical limitations, if he were to tell them, you know, whether it be at a guard job or you choose your own job, hey, I'd like to work for you, but by the way, you know, periodically I'm just going to have to lie down somewhere, you know, and I don't know when that's going to occur, but during the course of the day, I'm going to have to lie down because my back is going to be hurting so much, if the person doing the interview gets that information, are they going to be inclined to not hire Mr. Price based on that factor?

A. Probably.

Ms. Doering testified that someone working as a booth cashier would only typically be in a position to lie down during the day during breaks. (Doering deposition, pages 60-61).

The January 25, 2014 report of Stella Doering states in part:

Discussion and Conclusions

Mr. Price reports that his back pain and pain going into his left leg are what limit his physical activities the most. He described periodic pain in his right leg but said it does not occur as often as pain in the left leg. He uses the TENS unit, pain pills, hot showers and lying down with pillows under his legs to help reduce the pain. He reported that he receives epidural steroid injections (ESIs) approximately every four months. He was asked if he also has received facet joint injections but was unsure. He said he believes his next ESI is scheduled for February 2015. Mr. Price did not report pain, discomfort or limitations stemming from any other physical conditions.

There are a number of inconsistencies between what Mr. Price reports and what is found in some of the records.

First, two different physicians in the VA records noted that Mr. Price reported having two different episodes in early August 2012 when he

hurt his back. The first episode is described as Mr. Price having fallen through a lawn chair (a specific date is not described) and the second as when he fell from the cab of his truck on 8/8/2012. Although Mr. Price provided an explanation for this during the vocational interview, his explanation does not account for two different physicians noting the same thing.

There are numerous discrepancies, both in the medical records and as reported during the vocational interview, between Mr. Price's description of his drinking behavior prior to 8/8/2012 and after that date. Although he stated during the interview that he had not abused alcohol prior to having hurt his back in August 2012 and that he only turned to alcohol after that time to relieve his back pain, the VA records suggest otherwise. It was noted on a CT of the abdomen on 8/31/12 that he had fatty infiltration of the liver, and that he'd had elevated liver function test on 2/6/2012. The VA record also quotes him during the 8/30/2012 in-patient stay as saying, "I'm not an alcoholic or anything like that, but I drink 2-3 screwdrivers with vodka every night." The fact that he was able to continue to work as a truck driver for many years helps support the idea that he did not mix drinking and driving, but it does not eliminate the possibility that he drank regularly when he was not driving.

During the vocational interview Mr. Price reported using a walker on occasion. A Physical Therapy note in the VA records from his in-patient stay beginning 8/30/12 noted "Rolling walker was left in patient's room to be used with nursing staff over the weekend". Although there were three different assistive devices noted to be sent home with Mr. Price following that hospital stay, there is no indication from any of the remaining medical records that a walker was prescribed for him to use at home. There is no mention in subsequent medical records of him using a walker or other assistive device for ambulation.

The VA medical records of his in-patient stay that began on 8/30/2012 consistently reported that he had complaints of right leg pain. This continued through the time of a neurology consultation on 11/7/2012 in which it was noted that the pain rarely went down his left leg and that "his primary concern is his low back pain that is primarily low back and on the right". It was not until neurosurgeon Christopher Meredith's report of 2/11/2013 that he noted to have occasional pain in his left leg. Dr. Stephen Reintjes's report of 12/08/2014 states "If

the patient did not complain of low back and left leg pain in some close temporal relation to his work injury then I do not relate the L4-L5 disc herniation to his work injury.” During the vocational interview Mr. Price consistently mentioned his left leg as the one that sometimes “gives out”.

There is only one place in the medical record that notes a positive straight leg raise test and that was on admission to the VA hospital on 8/30/2012. An anesthesiology consult on 10/15/2012 noted negative straight leg raising. In addition, EMG testing of the left lower extremity was within normal limits, and radicular pain was not noted in the medical records.

Of particular note is an absence of specific objective physical restrictions by any treating providers. The only physical restrictions noted are from an Independent Medical Evaluation by P. Brent Koprivica on 2/14/2014, and that report describes the limitations provided as “subjective” and based on Mr. Price’s “self-limiting” of activity. They include:

- Sitting tolerance of less than 30 minutes as a maximum
- Standing tolerance of less than 15 minutes
- Walk less than 2 blocks and must stop and rest during that time
- Lifting and carrying to less than 10 pounds
- Uses a walker at times but can also walk without a walker
- Drives but limits amount of driving he performs

Mr. Price’s worker profile demonstrates a number of factors favorable for employment purposes. Results of testing show that he has average skill in Reading, Spelling and Math Computation. His longstanding work history, including at least one job (Unilever/Lipton Tea) which he held for nine years, demonstrates commitment to employment. That he was able to make a career change in the early 1990s to a position as a production supervisor with Hi-Line Plastics suggests adaptability and ability to learn new jobs, even at a higher skill level than jobs he’d previously held. He indicated that he could have continued to work for that employer in a similar position but chose not to of his own accord. He demonstrates curiosity and interest in various subjects as evidenced by his regular trips to the library to read and by his diverse leisure time activities. Based on his daily use of a computer for email, having a Face book page, and his ability to look

up information on the Internet suggest that he has at least basic skill and ability needed to use computers.

Mr. Price was cooperative throughout the interview, and he appeared to give full effort. He demonstrated a slightly antalgic gait when he was observed walking, but he did not use a cane and did not have a cane or walker with him for the interview. He had taken no pain medication prior to the interview yet exhibited no overt pain behaviors during the nearly three-hour interview. Although he described his limitations as being able to sit for about 30 minutes and stand for about 20 minutes, his sitting tolerance during the interview was greater than that and closer to 50 minutes or more. He also described being able to lift only five pounds but readily stated that the rifle used for Honor Guard weighs six pounds. He appears to have a more active lifestyle than would be expected for someone with his reported physical restrictions. The frequency and extent of his leisure time activities are discordant with those of someone with frequent debilitating back pain.

The combination of Mr. Price's worker profile and his usual level of activity are consistent with the ability to perform work in the open competitive labor market. Mr. Price's most recent past work as a truck driver is classified as being at a Medium level of exertion because of the force required to operate the foot or other controls of a truck. Medium work is that which typically requires exerting 20 to 50 pounds of force occasionally, and /or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. While it is unlikely at the present time that he could return to work as a truck driver, according to the report of Dr. Stephen Reintjes, surgical intervention may improve his symptoms. If that were to occur, then return to work as a truck driver may be feasible.

Even without further surgery, Mr. Price appears to be capable of performing some jobs that fall into either Sedentary or Light levels of exertion. Sedentary work generally requires exerting up to 10 pounds of force occasionally (1/3 of the time) and/or a negligible amount of force frequently. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Light work may involve exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently (2/3 of the time) and/or a negligible amount of force constantly or require standing more than

sitting. There are jobs classified as being at Sedentary or Light levels of exertion that allow for a change of position from standing to sitting or vice versa, and jobs that allow for such changes would appear to be within Mr. Price's present level of functioning. Jobs that fall into this category include Gate Guard, Front Desk Information Clerk, Booth Cashier and Motor Vehicle Dispatcher. All of these jobs are found in plentiful numbers and are expected to continue to be in demand. Except for Motor Vehicle Dispatchers, these jobs typically require no more than a high school diploma and basic skills commensurate with those of Mr. Price. His past experience as a truck driver coupled with his basic computer skills are likely to be sufficient for him to work as a Motor Vehicle Dispatcher.

Potential barriers to employment at the present time may include: 1) consideration of surgical intervention to decrease Mr. Price's back symptoms. If he were to undergo back surgery, he would need time to recuperate from surgery before exploring a return to the open competitive labor market; and 2) concern that a return to the open competitive labor market could jeopardize his Social Security Disability benefits. However, a Trial Work Period would be allowed during which he could receive his full wage as well as full Social Security Disability benefits.

The opinions contained herein are based on a reasonable degree of vocational certainty in combination with more than 25 years of professional experience in disability case management and rehabilitation counseling. Resources utilized include the Dictionary of Occupational Titles, Occupational Outlook Handbook, and the Department of Labor, Bureau of Labor Statistics.

Other Exhibits

Deposition Testimony of Brandi Webster

The deposition of Brandi Webster, Employer Exhibit 1, taken on April 15, 2014. Ms. Webster works for Ken Pratt Trucking. She had never met Claimant. (Webster deposition, page 6).

Ken Pratt called Ms. Webster on August 12, 2012 and told her they had a truck missing with BMS and could she see if she could see it when she was in Atchison. (Webster deposition, page 7). He gave her Claimant's address. She drove by Claimant's

house and circled around and looked for the truck for under an hour. (Webster deposition, page 13). She never saw the truck. (Webster deposition, page 14).

Employer Exhibit 2 is a St. Joseph Police Department Incident Report relating to an Incident Date of August 10, 2012. The Complainant was BMS Logistics and the Caller was Jimmy Henningsen. The report states in part that they believe ex-employee Gene Price who lives in Atchison, Kansas stole a red 2007 Kenworth truck vehicle.

Rulings of Law

Based on the substantial and competent evidence, the stipulations of the parties, and the application of the Workers' Compensation Law, I make the following Rulings of Law:

1. Did Claimant provide notice of his alleged injury as required by law?

Section 287.800, RSMo² provides in part that administrative law judges shall construe the provisions of this chapter strictly and shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Section 287.808, RSMo provides:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Section 287.020.2, RSMo provides:

The word 'accident' as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury

² All statutory references are to RSMo 2006 unless otherwise indicated. 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). See also *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

Section 287.420, RSMo provides:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice. No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.

The Court in *Aramark Educational Services, Inc. v. Faulkner*, 408 S.W.3d 271 (Mo.App. 2013) states at 275-76:

Generally, pursuant to Section 287.808, the employer has the burden of establishing any affirmative defense, which includes statutory notice of injury under Section 288.420. Section 287.808; see also *Snow v. Hicks Bros. Chevrolet Inc.*, 480 S.W.2d 97, 100 (Mo.App.1972). However, once the employer establishes lack of written notice or lack of timely written notice as required by Section 287.420, the burden shifts back to the claimant. See *Allcorn v. Tap Enter., Inc.*, 277 S.W.3d 823, 831 (Mo.App.S.D.2009) (“The final sentence of Section 287.420 saves a failed attempt at notice”). At that point, the claimant must establish that his or her failure to give notice or timely written notice did not prejudice the employer. *Soos v. Mallinckrodt Chem. Co.*, 19 S.W.3d 683, 686 (Mo.App.E.D.2000).^{FN3} A claimant can prove lack of prejudice in one of two ways.

FN3. The “good cause” excuse for failure to provide timely notice was eliminated by the legislature in 2005 by S.B. 130 (2005). See S.B. 130 (2005); Compare Section 287.420 (2013) with Section 287.420 (2004).

[7] First, if the claimant proffers substantial evidence that the employer had “actual knowledge” of the injury, there is no need for written notice. *Hall v. G.W. Fiberglass, Inc.*, 873 S.W.2d 297, 298

(Mo.App.E.D.1994). This option has been coined as the “prima facie” showing of no prejudice. *Willis v. Jewish Hosp.*, 854 S.W.2d 82, 85 (Mo.App.E.D.1993). Accordingly, if the employer admits or the claimant proffers substantial evidence demonstrating that the employer had “actual knowledge of the accident *at the time* *276 *it occurred* it has been held that employer could not have been prejudiced by a failure to receive the statutory written notice, and compensation has been allowed.” *Klopstein v. Schroll House Moving Co.*, 425 S.W.2d 498, 503 (Mo.App.1968) (emphasis added). Consequently, “if a claimant makes a prima facie showing of no prejudice, the burden [again] shifts to the employer to show prejudice.” *Hannick v. Kelly Temp. Serv.*, 855 S.W.2d 497, 499 (Mo.App.E.D.1993).

The Court in *Aramark* continues at 408 S.W.3d 277-78:

. . . before determining whether an injury is compensable under worker's compensation, the employer must receive timely notification of the injury or a claimant must prove an employer was not prejudiced by an untimely notification of the injury. *See* Section 287.420 (“No proceedings for compensation for any accident under this chapter shall be maintained unless ...”); *see also Fowler v. Monarch Plastics*, 684 S.W.2d 429, 431 (Mo.App. E.D.1984) (“Without timely notice to the employer of injury to an employee, the wheels of the process involving workmen's compensation do not grind.”). Resultantly, notification of the accident is a condition precedent to an award under worker's compensation. *See Orth v. Stoebner & Permann Const., Inc.*, 724 N.W.2d 586, 597 (S.D.2006) (“Notification of an injury, either written or by way of actual knowledge, is ‘a condition precedent*278 to compensation.’ ”); *Burke v. Indus. Comm'n*, 368 Ill. 554, 15 N.E.2d 305, 307 (1938) (notice of the injury within thirty days is a condition precedent to the right to maintain a proceeding under the statute).

I believe Claimant’s testimony and find that he called for Jimmy Henningsen on August 7, 2012 about 9:30 p.m. or 9:45 p.m. and got voice mail. He left a message that he had been fueling up and fell out of the truck and injured himself. He said he could not make the trip, the truck was parked at Love’s, and he was going to bed.

I believe Claimant’s testimony that he talked to Jimmy Henningsen about 7:30 a.m. or 8:00 a.m. on August 8, 2012 while he was still in his truck and told Jimmy on August 8, 2012 that he fell out of the truck and hurt his back. I find Claimant talked to

Jimmy Henningsen about 7:30 a.m. or 8:00 a.m. on August 8, 2012 while he was still in his truck and told Jimmy on August 8, 2012 that he fell out of the truck and hurt his back.

I also believe Claimant's testimony and find that during this conversation, Jimmy started cussing, Claimant asked to see a doctor, and Jimmy said they do not have any "fxxxing" doctor. I also find Claimant may or may not have told Jimmy on August 8, 2012 that the truck was at Love's.

I believe Claimant's testimony and find that Claimant called John Thornton of Employer, a dispatcher, in the morning on August 8, 2012 and told him he hurt his back.

I believe Claimant's testimony and find that he called Dave at Ken Pratt Trucking on August 7, 2012 and told Dave he had fallen out of the truck, had hurt himself, and could not drive.

I carefully observed the demeanor of all witnesses during the hearing. I believe Claimant's testimony that he was injured when he fell from his truck and that he reported the injury to John Thornton and Jimmy Henningsen on August 8, 2012 despite there being inconsistencies in Claimant's testimony discussed in Employer's post-hearing brief.

I believe Helen Crawford's testimony and find that she contacted Beth at BMS to send the doctor's notes to her. She emailed Beth the Atchison doctor's notes and other doctor's notes, including ER notes. She talked to Beth and Beth told her she had received the emails.

I believe Helen Crawford's testimony and find that Jimmy Henningsen told her they were getting the emails that she had sent to Beth. Mr. Henningsen told her it did not matter because Claimant did not work there anymore. Ms. Crawford stopped sending doctor's notes to Employer after that.

I do not believe Dave Webster's testimony that Claimant never reported to him that he hurt his back falling from a truck.

I do not believe John Thornton's testimony that he received no calls from Claimant on August 8, 2012 or August 9, 2012 to report a work injury and that he had no contact from Claimant after August 7, 2012 regarding a work injury.

I do not believe Jimmy Henningsen's testimony that he had no voice mail from Claimant on August 7, 2012, that he received no calls from Claimant on August 8, 2012, and that he had no contact with Claimant between August 7, 2012 and August 12, 2012.

I find and conclude Claimant provided notice of his August 7, 2012 injury sustained when he fell from Employer's truck by telling John Thornton and Jimmy Henningsen about the injury on August 8, 2012. If Employer has actual knowledge, there is no need for written notice. *Aramark*, 408 S.W.3d at 275.

I find and conclude Claimant gave notice of his August 7, 2012 injury to Employer as required by law.

2. Did Claimant sustain an injury by accident arising out of and in the course of his employment for Employer on or about August 7, 2012, and 3. Is Claimant's current condition medically causally related to the alleged work accident of August 7, 2012?

Section 287.020.3, RSMo provides in part:

3. (1) In this chapter the term 'injury' is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. 'The prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

(5) The terms 'injury' and 'personal injuries' shall mean violence to the physical structure of the body. . . .

Section 287.020.10, RSMo provides:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of 'accident', 'occupational disease', 'arising out of', and 'in the course of the employment' to include, but not be

limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

The workers' compensation claimant bears the burden of proof to show that her injury was compensable in workers' compensation. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 2012 WL 1931223 (Mo. banc 2012) (citing *Sanderson v. Producers Comm'n Ass'n*, 360 Mo. 571, 229 S.W.2d 563, 566 (Mo. 1950).

“In a workers' compensation case, the claimant carries the burden of proving all essential elements of the claim.” *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo.App. 1990).

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). The 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), 29; *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).

The Commission may not arbitrarily disregard and ignore competent, substantial, and undisputed evidence of witnesses who are not shown by the record to have been impeached and the Commission may not base its findings upon conjecture or its own mere personal opinion unsupported by sufficient and competent evidence. *Cardwell v.*

Treasurer of State of Missouri, 249 S.W.3d 902, 907 (Mo.App. 2008), citing *Copeland v. Thurman Stout, Inc.*, 204 S.W.3d 737, 743 (Mo.App. 2006).

8 CSR 50–2.010(14) states in part, “Prior to hearing, the parties shall stipulate uncontested facts and present evidence only on contested issues.” Such stipulations “are controlling and conclusive, and the courts are bound to enforce them.” *Hutson v. Treasurer of Missouri as Custodian of Second Injury Fund*, 2012 WL 1319428 (Mo.App. 2012) (citing *Boyer v. Nat'l Express Co.*, 29 S.W.3d 700, 705 (Mo.App. 2001)).

I find Claimant credibly testified that on August 7, 2012, he had left his wallet in Employer’s truck when he got out of the truck to fuel it, he climbed back into the truck to get his wallet, and while he was climbing down out of the truck after he got his wallet, he stepped on the fuel hose and fell to the ground, injuring his back, right hip, and right shoulder.

Claimant was working in the course of employment for Employer when he fell. He was fueling Employer’s truck in preparation to drive to pick up a load.

I believe Claimant’s testimony that he was injured when he fell from his truck and that he reported the injury to John Thornton and Jimmie Henningsen on August 8, 2012 despite there being inconsistencies in Claimant’s testimony discussed in Employer’s post-hearing brief, and despite entries in the VA records of a fall from a chair and a second fall from a truck.

One August 30, 2012 VA record notes Claimant reported to the ED and “stated he fell threw [sic] a canvas lawn chair on 8/7/12 and injured his lower back. On 8/8/12 he fell from the cab of his truck to the ground and further injured his back.” Another August 30, 2012 VA record refers to Claimant having back pain after sitting on a bag chair that broke and the next day falling off his truck. An August 31, 2012 VA record makes reference Claimant falling through a lawn chair and falling out of a truck on 8/8/12 further injuring his back.

I believe and find the entries in the VA records relating to a fall from a chair are incorrect. I believe Claimant’s explanation for those incorrect entries. I believe and find Claimant had a fall through a chair many years before August 7, 2012 when his son was young, but that he did not have a fall from or through a chair after that time many years before.

Helen Crawford credibly testified that on August 8, 2012, she saw that the side of Claimant’s body looked scraped. He had abrasions on his chest, shoulder, and the back of his hip. I find Claimant had abrasions on his chest, shoulder, and the back of his hip when Helen Crawford picked up Claimant on August 8, 2012.

I also believe Helen Crawford's testimony that Claimant did not complain of any back problems before August 7, 2012. I believe her testimony that Claimant was with her from August 3 or 4, 2012 before she took him to get the truck on August 7, 2012, and that he did not fall from a chair during that time.

The medical treatment records discussed previously in this award describe Claimant's history of his fall from the truck and the injury to his back, right hip, and right shoulder from the fall from the truck. The August 15, 2015 Atchison Hospital records describe a fall from a truck and note: "Primary Impression: Contusions Right Shoulder, Right Hip, Right Pelvis. Additional Impressions: Lumbar Strain, Right Thigh Abrasions." This record does not mention any fall on August 7, 2012. It does not mention a fall from a chair.

Dr. Wilkinson's August 20, 2012 record notes: "R shoulder and hip were injured two weeks ago as a result as a fall, then refell days later." I believe Claimant's testimony that he refell onto a table at Helen's after August 7, 2012, but did not fall to the ground at that time. Dr. Wilkinson noted on August 20, 2012 that Claimant's "R shoulder and hip were injured two weeks ago as a result as [sic] a fall, then refell days later." His record also states Claimant does not have a history of prior injury to his low back. This record does not mention any fall on August 7, 2012. It does not mention a fall from a chair.

Dr. Koprivica testified it is his opinion that Claimant's August 7, 2012 fall from the truck was the direct proximate and prevailing factor in the ongoing disabling symptoms Claimant has from his low back. Dr. Koprivica noted that although Claimant told him he landed on his buttocks onto his right hip and onto his right shoulder, the problems with his right hip and right shoulder went away. Dr. Koprivica concluded Claimant's annular injury was bulging to the extent that it is causing stenosis occurred as a direct result of that fall and that that fall was the prevailing factor in that new structural change and why he had disability and why he had to have treatment. I find these opinions are credible and persuasive. I find Dr. Koprivica's explanations of his opinions regarding causation are credible and persuasive.

Dr. Reintjes notes in his December 8, 2014 report that the September 25, 2012 MRI scan suggested a left-sided L4-L5 disc herniation. His report states:

If the patient complained of low back and left leg pain in the medical record in 2012, after his alleged work injury, then I would relate the L4-L5 disc herniation to his work injury. However, if the patient did not complain of low back and left leg pain in some close temporal relation to his work injury then I do not relate the L4-L5 disc herniation to his work injury.

The November 7, 2012 Neurosurgery Consultation note in the VA records describes the history of Claimant's fall from the cab of his truck with quite a bit of low back pain that very rarely goes down his left leg since then. The record assesses a large L4-L5 herniated disc.

The January 23, 2013 VA record notes Claimant presented with continued low back pain and intermittent left lower extremity radiation of pain.

Dr. Meredith's February 11, 2013 record notes Claimant continues to have fairly significant severe low back pain and occasional pain in the left leg.

The treatment records confirm that Claimant has had ongoing low back and left leg complaints after he fell from the truck on August 7, 2012.

I believe Claimant's testimony that he fell against a table after August 7, 2012 when his leg gave out at home and that he did not fall down at that time, and I so find. I believe Claimant's testimony that he did not fall through a chair prior to August 7, 2012, other than many years before when his child was young, and I so find. I find Claimant did not injure his back as a result of falling from or through a chair.

I find and conclude that on August 7, 2012, while working for Employer, Claimant fell from Employer's truck, and injured his low back, right hip, and right shoulder. I find and conclude that this was an unexpected traumatic event identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.

I also find and conclude that Claimant's current low back condition is medically causally related to the work accident of August 7, 2012. I find Claimant's right shoulder and right hip injuries have resolved.

I find and conclude that on August 7, 2012, Claimant sustained a compensable injury to his low back, right hip, and right shoulder by accident arising out of and in the course of his employment for Employer and that the accident was the prevailing factor in causing both the resulting medical condition and disability.

4. What is the nature and extent of permanent disability, and what is Employer's liability for permanent partial disability benefits, or in the alternative, permanent total disability?

Claimant requests a finding that he is entitled to permanent total disability benefits from Employer from his August 7, 2012 injury.

a. *What is the degree of Claimant's disability from his injury on August 7, 2012 alone?*

Section 287.190.2, RSMo provides:

(2) Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

An employee has the burden to establish permanent total disability by introducing evidence to prove her claim. *Carkeek v. Treasurer of State-Custodian of Second Injury Fund*, 352 S.W.3d 604, 608 (Mo.App. 2011), citing *Clark v. Harts Auto Repair*, 274 S.W.3d 612, 616 (Mo.App.2009).

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 v. Treasurer of State of Missouri*, 249 S.W.3d 902, 908 (Mo.App. 2008); *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. 1985); *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 evaluation of medical testimony concerning a claimant's disability is within the peculiar expertise of the Commission, and, as such, the Commission is free to disbelieve the testimony of the claimant's medical expert.” *Tombaugh v. Treasurer of State*, 347 S.W.3d 670, 675 (Mo.App. 2011).

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.

The court in *Carkeek v. Treasurer of State-Custodian of Second Injury Fund*, 352 S.W.3d 604 (Mo.App. 2011) states at 610:

The question whether a claimant is totally and permanently disabled is not exclusively a medical question. *Crum v. Sachs Elec.*, 769 S.W.2d 131, 136 (Mo.App.1989), *overruled in part by Hampton*, 121 S.W.3d at 220. The Commission, in arriving at its ultimate conclusion as to the degree of a claimant's disability, need not rely exclusively on the testimony of medical experts; rather, it may consider all the evidence and the reasonable inferences drawn from that evidence. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 239 (Mo.App.2003).

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 *Lewis v. Treasurer of State*, 2014 WL 2928017 (Mo.App. E.D. 2014) states:

Fund liability for PTD under Section 287.220.1 occurs when the claimant establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. *Highley*, 247 S.W.3d at 55; Section 287.220.1. For a claimant to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo.App. E.D.2007); Section 287.220.1.

In deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone. *Michael*, 334 S.W.3d at 663; *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.

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.

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. *Lewis v. Kansas University Medical Center*, 356 S.W.3d 796, 800 (Mo.App. 2011); *Molder v. Missouri State Treasurer*, 342 S.W.3d 406, 411, (Mo.App. 2011); *Carkeek*, 352 S.W.3d at 608; *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).

The court in *Vaught*, 938 S.W.2d 931, states at 939:

As explained in *Stewart, id.* at 854, § 287.220.1 contemplates that where a partially disabled employee is injured anew and sustains additional disability, the liability of the employer for the new injury “may be at least equal to that provided for permanent total disability.” Consequently, teaches *Stewart*, where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Id.* The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total).

Id. If the compensation to which the employee is entitled for the new injury is *less* than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability.
§ 287.220.1

Based on the substantial and competent evidence and the application of the Workers' Compensation Law, I find and conclude that Claimant's injury on August 7, 2012 considered alone, in isolation, and in and of itself, rendered Claimant permanently and totally disabled. I find and conclude that no employer in the usual course of business would be reasonably expected to hire him in his condition, reasonably expecting him to perform the work for which he is hired.

Factors which support my finding and conclusion that Claimant's injury on August 7, 2012, considered alone, in isolation, and in and of itself, rendered Claimant permanently and totally disabled include the following.

Claimant credibly testified he has had significant ongoing debilitating low back pain since the August 7, 2012 fall from the truck. He uses a walker at times to help him walk. He uses a TENS unit on a daily basis. He regularly takes prescription pain medication for back pain. He has significantly limited his activities due to his pain. He has significant difficulty walking, standing, lifting, carrying, and driving. He has difficulty sleeping.

Claimant lies down periodically during the day because of back pain. I find and conclude Claimant needs to lie down unpredictably during the day due to back pain caused by his August 7, 2012 compensable work accident.

Claimant is not now employed. He has not worked since August 7, 2012. He has been under medical treatment for his work injury since August 7, 2012 as discussed previously in this award.

Claimant does not believe he can work. He knows of no jobs that he could do with his physical limitations. He is 62 years old. He has limited education and limited job skills.

Claimant has a large herniated disc at L4-L5. He has elected not to have back surgery, a choice that is consistent with the opinions of Dr. Meredith and Dr. Koprivica. I find Claimant's decision not to have back surgery is reasonable.

I find Claimant's description of his injury, condition, complaints, and limitations to be credible. I believe his testimony that he has not been able to work since August 7, 2012.

Claimant's girlfriend, Helen Crawford, is with Claimant on a daily basis, day and night. Ms. Crawford credibly testified that she takes care of Claimant. She takes him to his doctors' appointments. He has to stop and stretch on the way. He does not do household chores. He does not bowl or dance. He does not go on long walks. He uses a walker quite a bit. He uses a TENS unit during the day. He was not able to help with her disabled son after August 7, 2012. Bad weather bothers Claimant. He uses heat. He has difficulty sleeping. Ms. Crawford confirmed Claimant lies down periodically during the day.

The medical records in evidence describe Claimant's ongoing treatment for chronic severe pain.

Dr. Meredith, a treating doctor from the VA, stated on February 11, 2013:

He [Claimant] used to be an over the road truck driver, but he now says that the pain is just so debilitating he is just unable to function anymore.

He has been taking hydrocodone 5 but he says that they are not providing him with that much relief.

I had a lengthy discussion with him today and I have cautioned him about low back surgery for low back pain that is generally not extremely effective.

Spinal fusion is generally the mainstay for this, but at best for 1 level pain is a 50-50 chance of improvement, which I really do not think is a great overall chance for him.

He is in agreement and he is not interested in surgical intervention. I think at this point, the patient has had such as strenuously [*sic*] life physically that he is really [*sic*] a point where he is just not able to work anymore.

I told him that I would certainly support his application for federal disability as I just do not see how he could hold any kind of significant employment given the way his back looks and his symptomatology.

I find these opinions of Dr. Meredith are credible and persuasive.

Dr. Koprivica described Claimant's current complaints. He noted Claimant was never pain free and his pain ranged from 4 up to 9 on a scale of 0 to 10. He had sleep interruption. He had reduced sitting and standing tolerance. He self-limited lifting and carrying to less than 10 pounds. He was lying down unpredictably multiple times during the day because his back hurt so bad. Dr. Koprivica noted these presentations of limitations were felt to be consistent with the actual pathology as suggested by Dr. Meredith.

Dr. Koprivica also noted Claimant took Tramadol, a non-narcotic pain medication, and Vicodin, a narcotic pain medication containing Hydrocodone for pain in his back. Dr. Koprivica did not believe Claimant is a candidate for back surgery.

Dr. Koprivica testified in terms of limitations from Claimant's lumbar condition, his injury that he had sustained, were so overwhelming that he thought realistically he could not work. He stated looking at the issue of being permanently totally disabled, he felt the disability from the August 7th, 2012 primary injury alone, in and of itself was totally disabling.

Dr. Koprivica testified in response to the following question:

Q. And so your opinion is that, you know, even without the assistance of a vocational expert, you're not aware of any employment, given his physical limitations, that he could engage in at this point in time?

A. That's correct. As an occupational physician doing these types of evaluations, I get the opportunity to review vocational work-ups on individuals many, many times. Whenever you have postural restrictions that he describes to me, including the need to lie down unpredictably because of the severity of the pain, which is certainly consistent with his pathology, that results in you not being employable. It's not reasonable for an ordinary employer to be able to accommodate where you can't tell me how long you can sit, how long you can stand or walk as limited as he is or that you need to lay down unpredictably. That's not something that I've read reports where that no matter how advanced the education level is, that a person can be placed in the open labor market. That's been my experience, and that's the reason I said it.

I find these opinions of Dr. Koprivica are credible and persuasive.

Dr. Koprivica noted in his report:

In looking at this presentation, it is my opinion that it is unrealistic to believe that Mr. Price can access the open labor market in any capacity. An ordinary employer cannot realistically accommodate the restrictions and limitations with which Mr. Price presents.

It is my opinion, even without vocational input at this point, that Mr. Price is permanently totally disabled. Further, it is my opinion that permanent total disability arises based on the residual impairment and resultant disability attributable to the August 7, 2012, work injury when considered in isolation, in and of itself.

I find these opinions of Dr. Koprivica are credible and persuasive.

Dr. Reintjes recommended Claimant avoid repeated bending, twisting and lifting more than 35 pounds. He did not believe that Claimant is primarily and totally disabled. He gave Claimant a permanent partial disability rating of 10 percent to the body as a whole based on the fourth Edition of the American Medical Association guidelines. I find these opinions of Dr. Reintjes are not credible or persuasive.

Michael Dreiling testified he felt Claimant was essentially and realistically unemployable in the open labor market. He testified he did not feel Claimant would be capable of performing any substantial gainful employment which would be consistent with the findings of the Social Security Administration. He felt that no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ Claimant in his condition. I find these opinions of Mr. Dreiling are credible and persuasive.

Mr. Dreiling testified if Claimant told him he believed Claimant that he has to lie down unpredictably throughout the day three to four times, that would preclude Claimant from being able to access the open labor market at any type of job. Mr. Dreiling also noted it appeared that Claimant's vocational difficulties and inability to return to work have come about since the August 2012 work injury. He believed Claimant is unemployable in the open labor market based on the residuals of that August, 2012 accident. I find these opinions of Mr. Dreiling are credible and persuasive.

Stella Doering stated an employer would be reasonably expected to hire Claimant in the open labor market. She believed there are jobs Claimant is capable of performing in the open labor market. I find these opinions of Ms. Doering are not credible or

persuasive. I have found that Claimant needs to lie down unpredictably during the day due to back pain caused by his August 7, 2012 work injury. Ms. Doering acknowledged that an employer would probably not be inclined to hire Claimant based on that factor.

I find the opinions of Dr. Meredith and Dr. Koprivica are more persuasive than the opinions of Dr. Reintjes regarding whether Claimant is able to work.

I find the opinions of Michael Dreiling are more persuasive than the opinions of Stella Doering regarding whether Claimant is able to compete in the open labor market.

Claimant testified he had no problem with the right ankle six months after he broke it. He was able to do sports and recreational activities after he recovered from the injury. He also testified he had no impairment from his 2000 carpal tunnel injury within a few months after the surgery.

Claimant testified he recovered after his prior ankle surgery and returned to work after that surgery. His ankle did not affect any job and did not limit any activities. He worked without ankle problems before August 7, 2012.

Claimant testified he did not have any problems or limitations with carpal tunnel after his carpal tunnel surgery. He could perform work duties and duties around the home the same as before the surgery. Claimant testified that his ankle and carpal tunnel surgeries were not obstacles for him to perform work duties.

I find this testimony of Claimant to be credible.

I find Claimant's prior right ankle and carpal tunnel injuries had resolved before he sustained his August 7, 2012 injury. I believe his testimony that he was not having right ankle or wrist problems before that injury. There are no medical records in evidence documenting he was treating for an ankle or wrist condition at the time of his August 7, 2012 injury. Claimant worked full duty for many years prior to August 7, 2012 without right ankle or wrist treatment or complaints.

Dr. Koprivica did not identify any prior disability that would arise to resulting in Second Injury Fund liability on his assessment. I find this opinion is credible and persuasive.

Michael Dreiling noted it appeared that Claimant was able to continue to work as a truck driver without any limitations prior to the August 2012 work injury.

Ms. Doering did not identify any pre-existing physical limitations or restrictions that would be a hindrance or obstacle to Claimant's employment prior to his back injury.

I find and conclude that Claimant did not have preexisting permanent partial disabilities at the time of his August 7, 2012 injury that were a hindrance or obstacle to him obtaining employment or reemployment in the event he becomes unemployed.

I find and conclude that the competent and substantial evidence does not establish that Claimant was permanently and totally disabled solely because of preexisting disabilities.

I find and conclude that the competent and substantial evidence does not establish that Claimant was permanently and totally disabled due to the combination of his present compensable injury and preexisting partial disability.

I find and conclude that Claimant's injury on August 7, 2012, considered alone, in isolation, and in and of itself, rendered Claimant permanently and totally disabled. I find and conclude that no employer in the usual course of business would be reasonably expected to hire him in his condition, reasonably expecting him to perform the work for which he is hired.

The court in *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902 (Mo.App. 2008), stated at 910:

After reaching the point where no further progress is expected, it can be determined whether there is either permanent partial or permanent total disability and benefits may be awarded based on that determination. One cannot determine the level of permanent disability associated with an injury until it reaches a point where it will no longer improve with medical treatment. Furthermore, an employers' liability for permanent partial or permanent total disability does not run concurrently with their liability for temporary total disability.

Although the term maximum medical improvement is not included in the statute, the issue of whether any further medical progress can be reached is essential in determining when a disability becomes permanent and thus, when payments for permanent partial or permanent total disability should be calculated.

Claimant has not worked for Employer or anywhere else since August 7, 2012. I find and conclude that Claimant has been unable to work continuously since August 7, 2012 as a result of his August 7, 2012 work injury.

Dr. Meredith saw Claimant on February 11, 2013 and cautioned Claimant about low back surgery for low back pain that is generally not extremely effective. Dr. Meredith did not think spinal fusion was a great overall chance for Claimant. Claimant agreed and was not interested in surgical intervention. Dr. Meredith stated at that point Claimant was at a point where he was just not able to work anymore.

Dr. Reintjes testified if Claimant elects not to have surgery, Claimant is at maximum medical improvement.

Dr. Koprivica saw Claimant on February 14, 2014. He agreed with Dr. Meredith that Claimant was not a surgical candidate. Dr. Koprivica concluded Claimant was at maximum medical improvement as of February 11, 2013. I find this opinion is credible and true.

I find and conclude that Claimant's low back condition caused by his August 7, 2012 work injury reached the point where no further progress was expected and would no longer improve with medical treatment, on February 11, 2013. I find and conclude Claimant reached maximum medical improvement on February 11, 2013 in connection with his August 7, 2012 work injury.

I find Claimant's permanent total disability began on February 12, 2013. I find that since February 12, 2013, Claimant has not been able to compete in the open labor market, and since that time, no employer in the usual course of business would be reasonably expected to hire him in his condition, reasonably expecting him to perform the work for which he is hired.

The parties stipulated that the rate of compensation is \$677.79 per week for permanent total disability. I find the rate of compensation is \$677.79 per week for permanent total disability.

I award Claimant permanent total disability benefits against Employer in the amount of \$677.79 per week beginning on February 12, 2013.

I therefore order and direct Employer to pay to Claimant permanent total disability benefits beginning February 12, 2013, and thereafter, at the rate of \$677.79 per week for Claimant's lifetime.

5. What is Employer's liability, if any, for past temporary total disability benefits?

Claimant requests an award 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. The ability to perform some work is not the test for temporary total disability, but rather, 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). "This standard is applied to temporary total disability, as well as permanent total disability. Contrary to the findings of the Commission, this does not mean that an employer is forced to either make light duty available to a claimant or pay temporary total disability benefits simply because the claimant remains under active medical care and there is a reasonable expectation that the employee's functional level might improve. An employer is only obligated for said benefits if the employee could not compete on the open market for employment." *Cooper*, 955 S.W.2d at 575.

The fact that a claimant was capable of, but did not seek, sporadic or light duty work, would not in itself disqualify the claimant from receiving temporary total disability benefits. 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 575-76. 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.

A “‘claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of temporary total disability.’ ” *Stevens v. Citizens Mem. Healthcare Found.*, 244 S.W.3d 234, 238 (Mo.App.2008) (quoting *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. banc 2003)); *Pruett v. Federal Mogul Corp.*, 365 S.W.3d 296, 309 (Mo.App. 2012).

Dr. Koprivica considered Claimant to have been temporarily totally disabled beginning on August 7, 2012. He considered Claimant’s point of maximum medical improvement to be the date which Dr. Meredith indicated that he was not a surgical candidate on February 11, 2013. He felt the temporary total disability to be medically reasonable and a direct necessity of the August 7, 2012 injury. He concluded the August 7, 2012 work injury is the prevailing factor resulting in this period of temporary total disability. I find these opinions of Dr. Koprivica are credible and persuasive.

Claimant testified Employer paid him no temporary total disability benefits. The attorneys stipulated at the hearing that no temporary total disability benefits have been paid in this case. I find Employer has paid no temporary total disability benefits to Claimant in this case.

I find that Claimant was unable to work and was temporarily and totally disabled, from August 7, 2012 through February 11, 2013, and that he is entitled to temporary total disability benefits from August 7, 2012 through February 11, 2013. I find that the total weeks that Claimant was temporarily and totally disabled as a result of this August 7, 2012 accident are 27 weeks.

The parties stipulated that the temporary total disability rate in this case is \$677.79 per week. I find the temporary total disability rate in this case is \$677.79 per week.

I award Claimant the sum of \$18,300.33 from Employer for past temporary total disability benefits for the period August 7, 2012 through February 11, 2013 at the rate of \$677.79 per week.

6. *What is Employer’s liability, if any, for additional medical aid?*

Claimant is requesting an award of additional 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 v. Hiland Dairy Co.*, 132 S.W.3d 260, 266 (Mo.App. 2004). 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. *Farmer v. Advanced Circuitry Division of Litton*, 257 S.W.3d 192, 197 (Mo. App. 2008); *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. *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 524 (Mo.App. 2011); *Farmer*, 257 S.W.3d at 197; *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 53 (Mo. App. 2007); *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. *Tillotson*, 347 S.W.3d 525; *Forshee v. Landmark Excavating & Equipment*, 165 S.W.3d 533, 538 (Mo. App. 2005); *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. *Farmer*, 257 S.W.3d at 197; *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 v. Hiland Dairy Co.*, 188 S.W.3d 79, 83 (Mo.App. 2006). Once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. *Id*; *Tillotson*, 47 S.W.3d 519.

The court in *Tillotson* states at 347 S.W.3d 519:

The existing case law at the time of the 2005 amendments to The Workers' Compensation Law instructs that in determining whether medical treatment is “reasonably required” to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 83

(Mo.App. S.D.2006). Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. *Id.* The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. *Id.*

The court in *Tillotson* states at 347 S.W.3d 524:

To receive an award of future medical benefits, a claimant need not show 'conclusive evidence' of a need for future medical treatment." *Stevens*, 244 S.W.3d at 237 (quoting *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo.App.W.D.2007)). "Instead, a claimant need only show a 'reasonable probability' that, because of her work-related injury, future medical treatment will be necessary. A claimant need not show evidence of the specific nature of the treatment required. *Id.*

The court in *Tillotson* also states at 525:

In summary, we conclude that once the Commission found that Tillotson suffered a compensable injury, the Commission was required to award her compensation for medical care and treatment reasonably required to cure and relieve her compensable injury, and for the disabilities and future medical care naturally flowing from the reasonably required medical treatment.

Claimant has continuing complaints relating to his low back. He continues to receive treatment for his low back. He takes prescription medication and uses a TENS unit. He has periodic doctor's visits that will continue in the future. He sees Dr. Meredith about every seven to eight months. He gets four epidural injections per year at the Leavenworth VA. The VA told him that he is to get those injections forever.

Dr. Koprivica stated even though Claimant was at maximum improvement, he felt it was reasonably probable that he was going to have ongoing lifelong treatment needs based on his injury to his low back on August 7, 2012. He felt Claimant needed to be monitored and provided chronic pain management. Dr. Koprivica testified:

I can tell you he's going to need treatment. At a minimum he's going to need to see a doctor, be monitored and have appropriate medications, but surgery was something that may be necessary, I'm not telling you it's probable. I can just tell you that's part of what might be necessary in the future. And so I recommend leaving the

medical care and treatment open to try and address those issues as they actually develop.

I find these opinions of Dr. Koprivica are credible and persuasive.

Based on competent and substantial evidence and the application of the Missouri Workers' Compensation Law, I find Claimant will need additional medical aid to cure and relieve him from the effects of his August 7, 2012 compensable injury.

Employer is directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of his August 7, 2012 injury, in accordance with section 287.140, RSMo.

7. *What is Employer's liability for past medical expenses?*

"Employee had the burden of proving his entitlement to benefits for care and treatment authorized by § 287.140.1, i.e., that which is reasonably required to cure and relieve from the effects of the work injury." *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 266 (Mo.App. 2004); *Rana v. Landstar TLC*, 46 S.W.3d 614, 622 (Mo.App. 2001). Meeting that burden requires that the past bills be causally related to the work injury. *Bowers*, 132 S.W.3d at 266; *Pemberton v. 3M Co.*, 992 S.W.2d 365, 368-69 (Mo.App. 1999).

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 *Martin* court states at 769 S.W. 2d 111-12:

In this case, Martin testified that her visits to the hospital and various doctors were the product of her fall. She further stated that the bills she received were the result of those visits. We believe that when such testimony accompanies the bills, which the employee identifies as being related to and the product of her injury, and when the bills relate

to the professional services rendered as shown by the medical records in evidence, a sufficient factual basis exists for the commission to award compensation. The employer, of course, may challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. In this age of soaring medical costs it no longer serves the purposes of the Act to assume that medical bills paid by an injured worker are presumed reasonable (because they were paid), while those which remain unpaid, very probably because of lack of means, must be proved reasonable and fair.

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.

The law in Missouri provides that while the employer has the right to name the treating physician, it waives that right by failing or neglecting to provide necessary medical aid to the injured worker. *Emert v. Ford Motor Co.*, 863 S.W.2d 629, 631 (Mo.App.1993); *Shores v. General Motors Corp.*, 842 S.W.2d 929, 931 (Mo.App.1992); *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816, 822 (Mo.App. 1995); *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 879 (Mo.App. 1984). The Court in *Shores* stated at 931-932:

The case law under §287.140(1) establishes the employer's right to provide medical treatment of its choice, however, this right is waived when the employer fails to provide necessary medical treatment after receiving notice of an injury. *Wiedower v. ACF Indus., Inc.*, 657 S.W.2d 71, 74 (Mo.App.1983). 'Where the employer with notice of an injury refuses or neglects to provide necessary medical care, the [claimant] may make his own selection and have the cost assessed against the employer.' *Id.*

In the present case, there is substantial evidence which supports a finding that employer had notice of claimant's injuries and refused to provide medical treatment. On the day she was injured, and thereafter whenever the pain made it difficult to work, claimant reported to the plant dispensary to receive medical aid. At some point, a nurse at the dispensary informed claimant that she was no longer welcome and should consult her own doctor for further treatment.

The court in *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818 (Mo.banc 2003) states at 822:

As previously noted, the aim of Missouri's workers' compensation law is to remedy the losses incurred by an employee as a result of a compensable injury. *Bethel*, 551 S.W.2d at 618. To award Ms. Farmer-Cummings compensation for medical expenses for which she has no liability would result in a windfall rather than compensation. On the other hand, to reduce Ms. Farmer-Cummings' award when she may still be held liable for those reduced amounts vitiates the policy behind workers' compensation-to place upon the shoulders of industry the burden of workplace injury. *See id.* Personnel Pool must reimburse Ms. Farmer-Cummings for all medical expenses incurred as a result of her workplace injury. Moreover, Personnel Pool should not receive an advantage for failing to timely pay medical bills incurred in such treatment at Ms. Farmer-Cummings' expense.

Ms. Farmer-Cummings had the burden and has produced documentation detailing her past medical expenses and has testified to the relationship of such expenses to her compensable workplace injury. *See Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989); *Esquivel v. Day's Inn*, 959 S.W.2d 486, 489 (Mo.App.1998). It is a defense of Personnel Pool, as employer, to establish that Ms. Farmer-Cummings was not required to pay the billed amounts, that her liability for the disputed amounts was extinguished, and that the reason that her liability was extinguished does not otherwise fall within the provisions of section 287.270. *See Martin*, 769 S.W.2d at 112; *Esquivel*, 959 S.W.2d at 489.

The medical records in evidence contain a history of Claimant's care and treatment relating to his August 7, 2012 injury.

Claimant incurred bills at Atchison Hospital and Wilkinson Orthopaedics for treatment of his back injury sustained on August 7, 2012. Dr. Koprivica stated the fall was the prevailing factor in why Claimant had to have treatment. Dr. Koprivica testified that the medical care and treatment Claimant had received since August 7, 2012 was medically reasonable and direct necessity in an attempt to cure Claimant of the effects of the permanent injury sustained in the fall at work on August 7, 2012. I find these opinions are credible and persuasive.

Exhibits J and K are billing records of Atchison Hospital and Wilkinson Orthopaedics relating to the care provided to Claimant for the injury he sustained in this case. These bills, Claimant's testimony, and the treatment records of Atchison Hospital and Dr. Wilkinson (Exhibits A and B) establish that Claimant incurred these bills for treatment of his August 7, 2012 injury. These bills were a product of the injury he sustained from a compensable accident while working for Employer. The total medical bills Claimant requests be paid by Employer are in the amount of \$2,887.00 (\$2,687.00 owed to Atchison Hospital and \$200.00 owed to Wilkinson Orthopaedic).

I have found Employer had notice of Claimant's August 7, 2012 injury when Claimant reported the injury on August 8, 2012.

Employer refused to provide medical aid to Claimant under workers' compensation after his August 7, 2012 injury, and after being notified of the injury. As in *Shores*, there is substantial evidence which supports a finding that Employer had notice of Claimant's injuries and refused to provide medical treatment. Where the employer with notice of an injury refuses or neglects to provide necessary medical care, the claimant may make his own selection and have the cost assessed against the employer.

I find and conclude the medical bills in evidence were shown by the medical records in evidence to relate to the professional services rendered for treatment of the product of Claimant's injury. I find and conclude that the medical care Claimant received on and after August 7, 2012 that is represented by the medical bills and treatment records in evidence was reasonably necessary to cure and relieve him of the effects of his August 7, 2012 injury that arose out of and in the course of his employment for Employer.

I have previously found that Claimant's August 7, 2012 compensable accident while working for Employer was the prevailing factor in causing his low back injury and resulting disability.

Employer did not pay Claimant's medical expenses for which he seeks payment. The evidence documents that Claimant received the treatment for the injury that is represented by the expenses for which he seeks payment. Employer offered no evidence that the charges were not fair and reasonable and usual and customary and offered no evidence that showed that the medical expenses incurred were not related to the injury in question.

Employer offered no evidence that Claimant was not required to pay the billed amounts, that his liability for the disputed amounts was extinguished, and that Claimant has ceased to be liable to healthcare providers for write-offs and fee adjustments. I find

Employer failed to prove that Claimant was not required to pay the billed amounts, failed to prove that his liability for the disputed amounts was extinguished, and failed to prove that Claimant has ceased to be liable to healthcare providers for write-offs and fee adjustments.

I find and conclude that Claimant met his burden of proof regarding Employer's liability for past medical expenses of \$2,887.00. I find that the medical expenses incurred in this case in the amount of \$2,887.00 were fair, reasonable, and necessary expenses to cure and relieve the effects of the injury that Claimant sustained in the course of his employment on August 7, 2012 while he was working for Employer. I find that the medical bills of \$2,687.00 owed to Atchison Hospital and \$200.00 owed to Wilkinson Orthopaedic are unpaid and remain outstanding and due.

I find and conclude that the medical bills incurred to treat Claimant's August 7, 2012 injury in the amount of \$2,887.00 should be paid by Employer. I award the sum of \$2,887.00 in favor of Claimant against Employer for these past medical expenses.

8. What is the Second Injury Fund's liability for permanent partial disability benefits, or in the alternative, permanent total disability benefits?

I have previously found and concluded that Claimant's injury on August 7, 2012, considered alone, in isolation, and in and of itself, rendered Claimant permanently and totally disabled. I have found and concluded Employer is responsible for the entire amount of compensation in this case. The Second Injury Fund therefore has no liability in this case. Claimant's claim against the Second Injury Fund is denied.

Attorney's 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 has requested a fee of 25% of all benefits to be awarded as shown by Exhibit U. Claimant has consented to this 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: John R. Campbell, Jr.

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