

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

Injury No.: 01-116248

Employee: Ray D. Reed  
Employer: Associated Electric Cooperative, Inc.  
Insurer: Self-Insured T/P/A CCMSI  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: September 26, 2001  
Place and County of Accident: New Madrid County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 24, 2008. The award and decision of Administrative Law Judge Lawrence C. Kasten, issued January 24, 2008, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 31st day of July 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-157598

Employee: Ray D. Reed  
Employer: Associated Electric Cooperative, Inc.  
Insurer: Self-Insured T/P/A CCMSI  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: Alleged June 9, 2002  
Place and County of Accident: New Madrid County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 24, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Lawrence C. Kasten, issued January 24, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 31st day of July 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## **AWARD**

Employee: Ray D. Reed

Injury No. 01-116248 & 02-157598

Employer: Associated Electric Cooperative, Inc.

Additional Party: Second Injury Fund

Insurer: Self-insured T/P/A CCMSI

Hearing Date: October 22, 2007

Checked by: LK/kh

### **SUMMARY OF FINDINGS**

- Are any benefits awarded herein? Yes in 01-116248  
No in 02-157598
- Was the injury or occupational disease compensable under Chapter 287? Yes in 01-116248  
No in 02-157598
- Was there an accident or incident of occupational disease under the Law? Yes in 01-116248  
No in 02-157598
- Date of accident or onset of occupational disease? On or about September 26, 2001.
- State location where accident occurred or occupational disease contracted: New Madrid County, Missouri.
- Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes in 01-116248 and 02-157598
- Did employer receive proper notice? Yes in 01-116248  
Moot in 02-157598

- Did accident or occupational disease arise out of and in the course of the employment?

Yes in 01-116248

No in 02-157598

- Was claim for compensation filed within time required by Law?

Yes in 01-116248 for employer-insurer; Moot in 01-116248 for Second Injury Fund

Yes in 02-157598

- Was employer insured by above insurer? Yes in 01-116248 and 02-157598
- Describe work employee was doing and how accident happened or occupational disease contracted:  
The employee slipped and twisted his back on September 26, 2001.

- Did accident or occupational disease cause death? No in 01-116248 and 02-157598

- Parts of body injured by accident or occupational disease: Low back and body as a whole in 01-116248. N/A in 02-157598

- Nature and extent of any permanent disability:

Permanent Total Disability against Employer in 01-116248

N/A in 02-157598

- Compensation paid to date for temporary total disability: \$11,978.37 in 01-116248

None in 02-157598

- Value necessary medical aid paid to date by employer-insurer? \$22,253.47 in 01-116248

None in 02-157598

- Value necessary medical aid not furnished by employer-insurer?

\$148,461.55 in 01-116248

N/A in 02-157598

- Employee's average weekly wage: Undetermined in 01-116248 & 02-157598

- Weekly compensation rate: \$628.90 PTD/TTD and \$329.40 PPD in 01-116248 & 02-157598

- Method wages computation: By Agreement in 01-116248 & 02-157598
- Amount of compensation payable: \$148,461.55 in previously incurred medical

\$72,323.50 in additional temporary total disability  
\$150.43 for underpayment of temporary total disability.

TOTAL: \$220,935.48 in 01-116248.  
N/A in 02-157598

- Second Injury Fund liability: None in 01-116248     N/A in 02-157598
- Future requirements awarded: See Rulings of Law for future medical and permanent total disability in 01-116248

Said payments to begin (see rulings of law) and 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 attorney Ron Little for necessary legal services rendered.

### **FINDINGS OF FACT AND RULINGS OF LAW**

On October 22, 2007, the employee, Ray Reed, appeared in person and by his attorney, Ron Little for a hearing for a final award. Also present was Ruth Reed, the employee's wife. The employer was represented at the hearing by its attorney, Joe Page. The Second Injury Fund was represented by Assistant Attorney General Frank Rodman. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

#### **UNDISPUTED FACTS:**

- In Injury Number 01-116248 and 02-157598, Associated Electric Cooperative, Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was qualified as a self-insured employer through their TPA, CCMSI.
- On or about September 26, 2001 and on or about June 9, 2002, Ray Reed was an employee of Associated Electric Cooperative, Inc. and was working under the Workers' Compensation Act of Missouri.
- The employer had notice of the employee's alleged September 26, 2001 accident in Injury Number 01-116248.
- The employee's claims in Injury Number 01-116248 and Injury Number 02-157598 were filed against the employer within the time allowed by law. The claim against the Second Injury Fund in injury number 02-157598 was filed within the time allowed by law.
- The rate of compensation Injury Number 01-116248 and 02-157598 is \$628.90 for temporary total disability and permanent total disability. The rate of compensation is \$329.40 for permanent partial disability.
- The employer paid a total of \$22,253.47 in medical aid in Injury Number 01-116248.

- The employer has not paid any medical aid in Injury Number 02-157598.
- The employer paid temporary total disability in the 01-116248 case in the amount of \$11,978.37 representing 19 2/7 weeks compensation from September 26, 2001 through March 19, 2002. The employer paid temporary disability at the rate of \$621.10. Based upon the agreed upon rate of compensation of \$628.90, there was an underpayment of temporary total disability of \$7.80 per week. The employee is entitled to and the employer shall pay to the employee an additional \$150.43 (19 2/7 weeks x \$7.80 per week) in temporary total disability.
- The employer has not paid any temporary disability in Injury Number 02-157598.

## ISSUES:

- Accident in injury number 01-116248.
- Accident or occupational disease in injury number 02-157598.
- Notice of the alleged accident of occupational disease in injury number 02-157598.
- Medical causation in injury number 01-116248.
- Medical causation in injury number 02-157598.
- Claim for previously incurred medical benefits in injury number 01-116248.
- Claim for previously incurred medical benefits in injury number 02-157598.
- Direct medical fee dispute filed by Dr. Gornet in injury number 01-116248 in the amount of \$53,562.50.
- Claim for additional or future medical aid in injury number 01-116248.
- Claim for additional or future medical aid in injury number 02-157598.
- Additional temporary total disability in injury number 01-116248.
- Additional temporary total disability in injury number 02-157598.
- Nature and extent of permanent disability in injury number 01-116248.
- Nature and extent of permanent disability in injury number 02-157598.
- Liability of the Second Injury Fund for permanent partial disability or permanent total disability in injury number 01-116248.
- Liability of the Second Injury Fund for permanent partial disability or permanent total disability in injury number 02-157598.
- Statute of limitations for the claim filed against the Second Injury Fund in injury number 01-116248 case.
- Dependency status of the employee's wife under Schoemehl v Treasurer of the State of Missouri, 217 S.W.3rd 900 (Mo.2007) in injury number 01-116248.
- Dependency status of the employee's wife under Schoemehl v Treasurer of the State of Missouri, 217 S.W.3rd , 900 (Mo.2007) in injury number 02-157598.

**EXHIBITS:** The following exhibits were offered and admitted into evidence:

### Employee's Exhibits

- Southeast Missouri Hospital records
- Saint Francis Medical Center Records
- Medical records of Dr. Scott Gibbs
- Medical records of Dr. Hatfield
- Medical records of Dr. Schisler
- Medical records of Ozark Physical Therapy
- Medical records of Mid-America Rehab
- Medical records of Dr. Chen

- Medical records of Barnes Jewish West County Hospital
- Medical records of Dr. Gornet
- Medical records of Missouri Southern Healthcare
- Medical bills of Overturf Drugs
- Medical bills of Southeast Missouri Hospital
- Medical bills of Dr. Gibbs
- Medical bills of Saint Francis Medical Center
- Medical bills of Dexter Medical Center
- Withdrawn prior to being offered
- Medical bills of Ozark Physical Therapy
- Medical bills of Dr. Chen
- Medical bills of Dr. Gornet
- Medical bills of Washington University
- Medical bills of Barnes Jewish West County
- Medical bills of Southern Missouri Healthcare
- Medical bills of Mid-America Rehab
- Medical bills of Dr. Schisler
- Deposition of Dr. Cohen with exhibits.
- Deposition of Mr. England with exhibits
- Deposition of Dr. Stillings with exhibits.
- Deposition of Dr. Gornet with exhibits
- Deposition of Vincent Stock with exhibits
- Medical bills spreadsheet
- Attorney contracts
- TTD calculations
- Correspondence documenting pursuant of treatment
- Marriage license

#### Employer's Exhibits

- CV of Dr. Gibbs
- Medical records of Dr. Gibbs
- Medical records of Ozark Physical Therapy
- Medical records of Mid-America Rehab
- Deposition of Donna Abram
- Deposition of James England
- Withdrawn prior to being admitted
- Deposition of Dr. Gibbs
- Deposition of Chad Casey, PT, ATC
- Deposition of Craig Brown, PT, CEAS
- TTD paid
- Medical paid

The following exhibits were not admitted into evidence:

Employee A: Medical records of Dr. Jung  
 Employee JJ: Treatment History  
 Employee KK: Work history.

**Witnesses:** Ray Reed, the employee; Ruth Reed, wife of the employee; Shawn Reed, son of the employee

Judicial notice of the contents of the Division's file in injury number 01-116248 and injury number 02-157598 were taken. On the day of the hearing, the employer filed an amended answer in injury number 02-157598 and injury number 01-116248.

**Briefs:** All of the parties filed their respective briefs on behalf of their client on October 22, 2007, the day of the hearing. The Second Injury Fund filed a supplemental trial brief that was filed on November 9, 2007.

**FINDINGS OF FACT:** The employee is 63-years-old and graduated from high school. The employee grew up on a farm and worked from the time he was seven or eight until he was nineteen. He worked for Brown Shoe Company from 1962 until 1963 or 1964 as a service operator. He then worked at Endicott Johnson Shoe Company in Mississippi for about two years as an assistant foreman. In 1966, he returned to work for Brown Shoe and worked there until 1989. He was an assistant foreman, a foreman, and an assistant supervisor. He went to work for Associated Electric around 1989 and did various jobs including utility worker, deck hand, utility operator, and auxiliary operator. From 1994 until June 9, 2002, he was a yard equipment operator and operated scrapers, dozers, trailer trucks, loaders, and backhoes.

He joined the Army Reserve in 1965 and later transferred to the Missouri National Guard. He attained the rank of Staff Sergeant. He was in the infantry, the ambulance, and then an equipment company. He was honorably discharged in 1975. The employee and Ruth Hurley Reed were married on April 4, 1963, and have married for forty-four years. They have never been divorced. They have one child, Shawn Reed, who is 31-years-old. At the time of the employee's accident he was over the age of 21 and was not dependent upon the employee.

Prior Medical: The employee was diagnosed with sleep apnea in 1999 and had surgery. After the surgery he did well and that condition did not interfere with his job or ability to work. The employee cannot remember being treated for depression. One time while working at Brown Shoe, he received a little medication for his nerves but he never went back to the doctor. After being let go from Brown Shoe, he was let down and low but did not get any treatment and fully recovered. Prior to September 26, 2001, the employee had no prior back pain or problems and had never been to a doctor or chiropractor for his back. He was able to do everything he was asked to do as a heavy equipment operator.

September 26, 2001: On Wednesday, September 26, 2001, the employee was driving a scraper and loading coal. He saw smoke coming out of the rear engine. He climbed on the back of the scraper and saw that a fuel line had broken. When he reached in to stop the engine, his foot slipped and he twisted his back. After he finished his shift, he went home and started getting a lot of pain in his lower back, right leg and the top of his foot. He was not scheduled to work on Thursday or Friday. He was scheduled to work on Saturday but was unable to. He called work, told them what happened, and requested medical treatment. Garland Hughes, the safety coordinator told him to go to whoever he wanted and went to the emergency room.

At the emergency room on September 29 it was noted that three days ago the employee was at work when a machine caught on fire. As he was rushing to get the machine turned off, his foot slipped and he caught himself which he believed caused the injury to his right hip and back area. The employee denied prior back pain. He had pain in the right lower back, right buttocks, and right lower extremity as well as numbness anteriorly across the right thigh and lower leg. The doctor diagnosed an acute lumbar strain, muscle spasms and right leg radiculopathy.

An October 4, 2001 MRI showed at L2-3 there was a mild diffuse bulging annulus and early facet hypertrophy without stenosis. At L3-4 there was a mild diffuse bulging annulus with minimal ventral sac flattening. At L4-5, there was a small right foraminal disc extrusion involving the exiting right L4 nerve root. There was a diffuse bulging annulus. At L5-S1 there was no abnormality. The conclusion of the radiologist was mild multilevel changes with a small right foraminal disc extrusion at L4-5 involving the right L4 nerve root.

On October 11, the employee saw Dr. Gibbs a neurosurgeon. He reported no prior back pain or injury. On September 26, the employee was hauling coal in a scraper. The engine began to smoke from a burst fuel line. The employee reached with his left hand to shut off the scraper and his right leg slipped and he twisted. That evening he

began developing right hip and lateral thigh pain that persisted and became worse. On September 29, the aching pain became much more severe and radiated to the right thigh and to the lateral aspect of the calf as well as to the dorsum of his foot with numbness and tingling.

Dr. Gibbs stated that the October 4 MRI showed that the disc height was diminished throughout the lumbar spine except at L5-S1. At L4-5 there was a broad based disc bulge and the lateral recesses and the neural foramina were narrowed. At L5-S1 there was very slight broad based disc bulge with no deformity of the exiting nerve roots. There were no apparent focal disc herniation but in the right lateral recess and foramina zone, there was a very tiny focal disc protrusion that narrowed the right lateral recess. Dr. Gibbs' impression was right hip and lower extremity pain and paresthesia that seemed to follow an L5 dermatomal pattern with a slightly diminished right Achilles tendon reflex. The employee had findings of a right L4-5 foraminal herniated nucleus pulposus which was superimposed on lateral recessed stenosis. It was Dr. Gibbs' opinion that since the employee had no prior back pain, it appeared that there was a temporal relationship with the alleged incident and his current complaints.

On November 14, Dr. Gibbs' impression was evidence of S1 radiculopathy on the right with attenuation of the Achilles reflex consistent with a foraminal zone disc herniation on the right L4-5 superimposed on lumbar spinal stenosis. On December 13, 2001, Dr. Gibbs performed a bilateral inferior L4 and superior L5 laminectomy and medial facetectomy with foraminotomy for a diagnosis of right L4-5 foraminal herniated nucleus pulposus. On December 21, the employee's right leg pain was gone but still had numbness in the right leg.

The employee testified that prior to the surgery, he pain in his lower back, hip and down his right leg into the top of his foot. Immediately after the surgery, the pain in the top of foot had changed to numbness. The surgery helped a bit with his pain. He improved to the point he thought he could go back to work. He wanted to go back to work. He loved his job, company and the people he worked with.

On January 29, 2002, Dr. Gibbs noted that the employee had no back or leg pain but had slight numbness at the dorsum of the right foot and the right lateral calf. The employee wanted to go back to work. He operated heavy equipment with air cushions. Dr. Gibbs released the employee to go back to work on February 11 with a twenty-five pound lifting restriction and no repetitive bending, twisting or stooping. He may need to take frequent breaks or at least get out of the truck and walk around to prevent stiffness or soreness in his back.

On March 5, 2002, the employee reported he has been back to work and was doing well. He was performing all the requirements of his job except heavy lifting and avoiding undue strain on his back. The employee thought he was ready to go back to work unrestricted. He had no back or leg pain and was very pleased with the surgery. He had some numbness in the right lateral calf and dorsum of the foot. Nurse Practitioner Christine Byrd, in conjunction with Dr. Gibbs, discharged the employee and released the employee to work without any restrictions.

Mrs. Reed testified that when the employee went back to work on light duty on February 11, 2002, he still had problems with his back and his right leg. After work, he would go home to rest. He was sore and his back pain got worse and worse. The employee testified that he started developing pain in his lower back and the numbness on the top of his foot started coming up into his right leg when he was running the equipment, especially the dozers and scrapers. He used his right foot to operate the dozer. There was vibration from operating the dozers and scrapers. His lower back pain and the numbness in his right leg increased. He felt worse at the end of the day while operating the dozer. He got progressively worse symptoms in his right leg and started limping. He took a lot of over the counter medicine for pain relief. The employee testified that prior to June 9, he contacted Dr. Gibbs' office and asked one of his nurses about taking Neurontin. She told him that he needed to take Advil or Tylenol, and that Dr. Gibbs would not see him again until he filed a second claim.

June 9, 2002: Due to the back pain and numbness up his leg, the employee was unable to do his job and stopped working on June 9, 2002. The employee testified that on June 9, 2002, the employee talked to his immediate supervisor, Phil Morrison about the pain in his lower back and numbness coming up his foot and leg from running the equipment. The employee told Phil that he was going to talk to Larry Swilley, the yard superintendent. Phil told him not to do that but to go to a doctor. The employee went to Dr. Schisler.

The employee saw Dr. Schisler on June 10, 2002, for low back pain and right leg numbness. After Dr. Gibbs' surgery, the employee felt better but still had numbness in his foot. He went back to work in February of 2002 on restricted work and gradually progressed back to his normal level of work. He did fine for a while but he began having progressively increasing right lower extremity numbness that went from his foot to his knee and his thigh. His back pain had gotten progressively worse. The employee had contacted Dr. Gibbs' office and was told to take Aleve or Ibuprofen. Dr. Schisler noted that the employee was in a lot of pain, had numbness in the right lower extremity, and muscle spasms in the lower lumbar area. Dr. Schisler diagnosed low back pain with right lower extremity radiculopathy. She prescribed Naprosyn, a Medrol dose pack, Skelaxin, and physical therapy at Ozark PT. Dr. Schisler took the employee off work.

The employee testified that on June 11, 2002, he filed a second injury with Larry Swilley who stated that the claim was denied. Mrs. Reed testified that there was not an incident in June of 2002 but the symptoms happened over a period of time.

On June 17, the employee continued to have significant pain in his back and numbness in his right lower extremity. Dr. Schisler kept the employee off work; continued anti-inflammatory pain medication and muscle relaxers; and ordered an MRI. The June 27, 2002 MRI showed degenerative disc changes at L2-3, L3-4 and L4-5 with disc dehydration and loss of signal intensity. The ligamentum flavum was moderately thickened at the L5-S1 level. There was no recurrent disc herniation noted at L5-S1. There was an annular disc bulge at L3-4 and L4-5 without evidence of disc herniation or spinal canal stenosis.

The employee testified that he thought that his problems with his shoulder and neck during physical therapy with Chad Casey was from pain in his lower back that was drawing up and causing the rest of his back to hurt.

The employee was treated at Ozark Physical Therapy from June 10 to June 28, 2002. The employee had numbness down the right leg and tightness in the lower back. He ached across the shoulders and down the arms and had pain in his joints. Physical findings show decreased sensation on the right lateral leg and weakness on the right quads. The employee had tight hamstrings, tight piriforms, right posterior innominate, weak abdominals, neural tension, poor posture and low back paraspinal tightness. Mr. Casey stated that the employee needed physical therapy to restore imbalances and decreased pain. The employee had eight therapy sessions. On June 28, Chad Casey the physical therapist noted that the employee had made progress on the range of motion and strength, his movement pattern has improved and his pain behavior lessened. The employee continued to have multiple complaints of right leg numbness along with pain across the shoulder and numbness down the arms. The patient's SLR was unremarkable. The employee reported there was no way he can return to his construction job on July 2. The employee appeared to be most upset about running out of his pain medication. Mr. Casey stated that the employee's pain complaints and movement patterns did not add up.

In his deposition (March 7, 2005), Chad Casey testified that with regard to his notations that the employee's pain complaints and movement patterns did not add up. Mr. Casey testified that generally as people come into the clinic, they watch how they are moving. If they have high pain rating, they are taught to recognize what is organic versus non-organic. So at the time he was observing the employee going through his exercises, stretching, and walking, he must have made the observation that his pain complaints and movement patterns did not correlate. Mr. Casey testified from the records and has a very vague memory of the employee. He would not have been able to answer the questions without referencing what was in his records. He does not have any independent recollection of how he was moving apart from his June 28 note. The note does not indicate where the pain complaints were or what motion he was referring to. The fact that the employee improved with therapy would be an indication that he had a real problem.

On July 1, 2002, Dr. Schisler stated that the employee was having significantly more problems with the lumbar back pain and right lower extremity radiculopathy. Dr. Schisler's intent was to refer the employee to a neurosurgeon and possibly a pain clinic evaluation. Given his level of discomfort and numbness, Dr. Schisler kept the employee off work until August 1, unless he improved or the neurosurgeon released him to work.

The employee testified that both Dr. Schisler and Chad Casey told him that his low back and leg pain was associated with and connected to the first injury. The employee told Larry Swilley about the low back pain and the numbness running up the leg from running the dozer and what Dr. Schisler and Chad Casey told him. The employee

asked the company to provide treatment. The next day, Larry Swilley told him that his claim was denied, and that he should seek treatment on his own and use his medical insurance. The employee then went to Dr. Chen.

The employee saw Dr. Chen on July 18, 2002 for hip and back pain with numbness in the right foot, ankle, and leg. On July 29, Dr. Chen noted the employee was having numbness in his left leg. In August, Dr. Chen referred the employee to Dr. Gornet, orthopedic surgeon.

The employee saw Dr. Gornet on September 9, with low back pain to his buttocks and hips as well as right leg numbness. The symptoms began on September 26, 2001 when his foot slipped coming out of a scraper. He twisted and has had significant back pain and leg symptoms since. Dr. Gibbs thought the employee had radiculopathy from foraminal stenosis and performed a bilateral L4-5 decompression on December 13, 2001. The employee returned to work on limited duty on February 11, 2002 with improvement in his right leg pain. He had numbness that gradually increased in severity. He returned to work full duty on March 5 but his pain became so severe that on June 9, he stopped working. The employee had a constant low back pain with right leg numbness, tingling and pain; and numbness and tingling in his left leg. The symptoms were worse with walking, prolonged sitting, and standing; and were better with changing positions. During examination, the employee's back pain was diffuse and into both buttocks with right leg numbness down into the top of his foot, more consistent with the L5-S1 dermatomes. The sensation was decreased in the right L5-S1 dermatomes. Dr. Gornet reviewed the June 27, 2002 MRI scan which showed continued foraminal stenosis at L4-5 and changes in disc hydration in what appeared to be L3-4 and L4-5. Dr. Gornet discussed post-laminectomy syndrome and continued foraminal stenosis. Dr. Gornet's working diagnosis was a disc injury. Dr. Gornet believed the employee's current symptoms were attributable to his initial work related injury and a continuation of this problem. In the medical information form filled out by the employee, he stated that the date of the injury was September 26, 2001. Dr. Gornet stated that the employee remained temporarily totally disabled and ordered a CT myelogram

The CT myelogram was done on October 1, 2002. The employee stated in the patient questionnaire "I believe my condition relates back to a injury that happened on September 26, 2001". The radiologist opinion was status post laminectomy at L4-5 without evidence of spinal stenosis. There were disc bulges throughout the lumbar spine with very mild canal narrowing at L2-3 and L3-4 best seen on the CT scan but no lateralizing nerve root compressions.

On October 24, 2002, Dr. Gornet stated that the October 4, 2001 MRI revealed no significant disc herniation but what appeared to be disc protrusions and foraminal stenosis at L3-4, L4-5 and L5-S1. The employee's October 1, 2002, CT-myelogram revealed no evidence of facet arthropathy and no significant disc herniation. It was Dr. Gornet's belief that the employee suffered from post discectomy back pain. The symptoms began within three months after returning to work and continued to be similar in nature and character to his original problem. It was Dr. Gornet's opinion that the employee's current symptoms were related to his original work related injury, and the only option was a lumbar fusion tentatively from L2-L5. Dr. Gornet stated that he would attempt to contact the employer to determine whether it would be paid for. It was Dr. Gornet's opinion that the employee remained temporarily totally disabled.

The employee testified that after Dr. Gornet recommended surgery, he was sent back to Dr. Gibbs by the employer. On December 10, 2002, the employee was seen by Dr. Gibbs. The employee noted that when he was discharged on March 5, 2002 he was not one hundred percent. After the surgery, he had a residual of numbness located in the dorsum of the right foot. He had back pain that was aggravated with certain activities especially with lifting at work. In the later part of May of 2002, he continued to have back pain and developed numbness in the right leg from the knee to the lateral calf, and started to limp. The employee last day worked on June 9, 2002 due to increasing back pain and pain and numbness in the right leg. Currently he had back and right leg pain. When lying down and sitting for any length of time, he developed numbness in both legs. Sitting and standing increased his back pain. He has paresthesia from the right leg from the knee to the lateral thigh to the calf and globally into the right foot. Dr. Gibbs noted that the employee appeared uncomfortable at rest and was very guarded with position changes. He was somewhat vague and verbose when answering questions. He had to be redirected several times during the history. The employee demonstrated some guarding of the right lower extremity and some decreased range of motion and guarding in the right ankle area. There was slight diminution to light touch in the right lateral calf and the dorsum of the right foot. During the back examination, he was guarded with position change. He had diffuse tenderness over the entire lumbosacral area. He had negative straight leg raising. The diagnostic impression was status post surgery

with good resolution of lower extremity pain. The employee reported an ongoing and gradual increase in his back and right leg pain and an increase in paresthesia in the right lower extremity. Dr. Gibbs ordered physical therapy three times a week for four weeks.

On December 30, 2002, it was Dr. Gornet's opinion that the employee suffered from post discectomy low back pain. He has numbness in his leg and the pain in his back, buttocks and legs are getting worse. He was now developing left leg symptoms. Dr. Gornet recommended a planned staged anterior/posterior spinal fuse tentatively from L2-L5, but which may require stabilization at L5-S1. He scheduled it on February 25, 2003. Dr. Gornet stated that the employee remained temporarily disabled.

The employee testified that Dr. Gornet's surgery was cancelled. He did physical therapy for about a month which did not help.

The employee received twelve sessions of physical therapy at Missouri Southern Healthcare from January 27 to February 20, 2003. The employee stated that the initial injury occurred on September 26, 2001 and he had surgery on December 13, 2001. When awoke from his surgery, the top of the right foot was numb. The employee was able to return to work in approximately two months and was initially aware of a slight limp after performing a vigorous day of work. As time went on the numbness gradually moved up the right leg and he had so much numbness and back pain that his last day he was able to work was on June 9, 2002. The employee had constant and variable numbness from the top of the right foot to the right lower leg and right thigh. He also has pain in the bilateral lumbar area more on the right side. The employee was beginning to have numbness in the top of the left foot and the left lower leg. On February 20, the employee stated he felt he had no decrease in pain since the therapy and had an increase in the numbness in the right foot. The employee continued to walk with a limp. The employee's movements seemed to be slow and labored with the employee indicating pain or increased numbness with any movement. Julie Minton, the therapist, noted the employee indicated a strong desire to improve his mobility to be able to return to the workforce.

On February 25, 2003, Dr. Gibbs noted that the employee had back pain that radiated into his bilateral buttocks and a sense of weakness in the right leg. He has numbness in both legs with the right in a global sense and below the left knee to the foot on the lateral side of the calf and foot area. The employee made several remarks regarding his doctors not being able to understand how bad his pain was, his level of disability, and his inability to work. He wanted surgical intervention for the pain. Dr. Gibbs noted the employee appeared to be uncomfortable at rest and with position changes. He demonstrated facial grimacing, moaning and guarding with position changes. To specific interview questions as a response were at times vague and he required redirection to obtain a clear picture of the pain pattern. The employee demonstrated guarding and cog wheeling especially in the muscle testing of the lower extremities. There was decreased range of motion and guarding in the right ankle area. Axial loading was positive with low back pain reported. His movements were very slow and deliberate. Sensory exam in the lower extremities demonstrate a slight diminution in a global sense in the right lower extremity, left lateral calf and foot area. On back examination, he had diffuse tenderness and was tender to superficial touch. Dr. Gibbs diagnostic impression was back and bilateral leg pain and paresthesia that had gradually increased in intensity and distribution. The employee had inconsistent responses to his neurological exam; for example a discrepancy between sitting and supine findings, facial grimacing, voluntary muscle tension, diminished response to light touch in a non-anatomical dermatomal pattern, partial cog wheel give away of muscle testing, low back pain experienced with axial loading and diffuse tenderness felt over most of the thoracolumbosacral area. Dr. Gibbs ordered a functional capacity evaluation.

The employee's functional capacity evaluation was done on March 11, 2003 by physical therapist, Craig Brown. The history stated that the employee had an injury on September 26, 2001, when his foot slipped. He had onset of right sided low back pain, lower extremity numbness later that evening which increased in severity. The employee had surgery on December 13, 2001. The employee had good resolution of low back pain and lower extremity numbness post surgery but had continued right lateral calf and superior right foot numbness. The employee returned to work and reported duration of work of about four months and then he experienced increased low back pain and increasing right and left lower extremity numbness. Mr. Brown stated that the employee displayed limited functional capacity primarily secondary to subjective complaints of pain and inadequate functional range of motion/weakness. He exhibited severe over guarding behavior that did not allow the performance of repetitive positional tolerance tasks. The maximum lifting tolerance demonstrated was nine pounds. The employee did not demonstrate the ability to lift

from the floor or twelve inches from the floor. The employee did not tolerate extended period of sitting, standing or ambulation. The maximum sitting time was thirty-two minutes, the maximum standing time without a request to sit down was eight minutes and thirty seconds, and the maximum ambulation without request to sit down was one minute and forty-five seconds.

In the deposition of Craig Brown (March 8, 2005), he testified that there were certain portions of the test process that was unable to be completed and was shortened due to the employee being unable to perform some of the activities. The employee was given three subjective pain questionnaires. The employee's score on the modified somatic questionnaire was 13 with a score of 6 or greater considered high for increased somatic awareness which has been associated with psychological distress and chronic low back pain. In the Oswestry low back pain and disability questionnaire the employee scored 68% which is considered crippled. In the five item Waddell's inappropriate symptoms questionnaire, the employee had 5 positive findings. Mr. Brown stated that two or more positive findings is considered significant or inappropriate illness behavior or non-organic basis for pain. When asked if five out of five indicated that the employee was magnifying his symptoms, Mr. Brown stated that he did not think one could draw a direct conclusion from the testing. Symptom magnification is a way of describing someone whose display of symptoms may not be consistent with the diagnosis or the pathology. He did not think it was appropriate to take one isolated test and correlate that into a positive symptom magnification. Mr. Brown stated that the employee did not meet the lifting and climbing requirements provided in his job description.

In a work status report dated March 25, 2003 signed by Victoria Holman, the nurse practitioner of Dr. Gibbs, the employee was returned to work with lifting of twenty pounds maximum. The employee was at maximum medical improvement. In a April 16, 2003 report, Dr. Gibbs stated that based upon the Guides to the Evaluation of Permanent Impairment 5th Edition, he assigned a 13% whole person impairment rating. Dr. Gibbs stated that the employee did not appear to have any pre-existing conditions. He noted that during the employee's initial evaluation on October 11, 2001 the employee reported no prior back injury or back pain before the alleged event on September 26, 2001. Dr. Gibbs thought the employee had a permanent lifting restriction of twenty pounds and felt his subjective complaints of pain may limit his ability to function. The lifting restrictions were based up on the functional capacity evaluation completed on March 11, 2003.

The employee testified that after the functional capacity examination he never heard back from Dr. Gibbs about the results. He called Dr. Gibbs' office and asked about treatment. He was told that Dr. Gibbs had released him. He then talked to Garland Hughes, the Safety Coordinator but he never got back with him. He then asked Theresa Crossfield for more treatment and she told him that the company would not provide any more treatment.

In May of 2003, the employee went back to Dr. Chen who noted that the employee had low back pain, numbness in his legs, and a limping gait and prescribed Hydroco/APAP for lower back pain and numbness in legs.

The employee went back to Dr. Gornet on May 22, 2003. Dr. Gornet stated that earlier he had planned to do an anterior/posterior spinal fusion at L2-L5 with sextant and decompression but the surgery was cancelled. He tentatively planned the same operation with a question of whether he would fuse L5-S1. Dr. Gornet stated that the employee remained temporarily totally disabled and ordered an MRI. In July, the employee continued to have disabling back pain and leg symptoms. The MRI showed disc protrusions and changes in disc hydration at L2-3, L3-4 and L4-5. Dr. Gornet's planned to do an anterior/posterior spinal fusion at L2-3, L3-4 and L4-5, and noted that he had received denial of further treatment from the employee's insurance carrier.

On August 1, 2003, the attorney for the employee sent the attorney for the employer a letter confirming that she had informed him that the employer was not willing to authorize any further treatment for the employee's work related injuries. On the same day, the attorney for the employee sent a letter and advised Dr. Gornet that he had talked to the attorney for the employer and they had refused to provide any further treatment.

Dr. Gornet performed surgery at Barnes Jewish West County Hospital on August 13, 2003 with a diagnosis of discogenic post disectomy low back pain. The procedure performed was an anterior decompression of L2-3, L3-4 and L4-5. There was an anterior lumbar fusion at L2-3, L3-4, and L4-5 with danek dowels, and crushed cancellous allograft. At L4-5 there was a central annular tear noted as well as a small central disc herniation which was removed.

At L2-3 there was no disc herniation but a small central annular tear. At L3-4 there was a central disc bulge and a small central disc herniation.

Dr. Gornet on August 15, 2003 performed the second stage of the surgery for a diagnosis of discogenic post discectomy low back pain. The procedure performed was a posterior fusion facet L2-L5, and posterior instrumentation L2-L5 with sextant rods. Pedicle screws were placed at L2, L4 and L5 on the right and pedicle screws were placed at L2, L3 and L5 on the left.

On September 4, the employee's back and leg symptoms were improved. He was very pleased with his progress and was walking better. Dr. Gornet stated that the employee remained temporarily totally disabled. A CT scan was done to evaluate the fusion. On November 24, it was noted that the employee continued to do well and was grateful for the surgery that he significantly improved his pre-operative state. He still had burning in both legs with any prolonged ambulation or prolonged sitting which Dr. Gornet believed represented some nerve dysfunction. The CT scan looked excellent and Dr. Gornet thought there would be a solid fusion. The employee remained temporarily totally disabled.

A CT scan was done on February 23, 2004. In the patient questionnaire the employee stated that his numbness, burning and soreness in his low back was better after Dr. Gornet's surgery. Walking and getting around has increased since the injury. He has had symptoms since the September 26, 2001 injury which improved since Dr. Gornet's surgery. The impression was status post anterior interbody fusion at L2-3, L3-4 and L4-5 with posterior instrumentation.

On February 23, 2004, Dr. Gornet noted that the employee's low back continued to improve and the employee was grateful for his progress. He is walking better than he has in many months. He still has burning in his legs which has been consistent, predated his surgery and was probably related to some mild nerve damage from his disease process. Dr. Gornet he did not believe the employee would ever return to his previous job. It is quite possible that he will be able to perform some type of sedentary work although from his educational level that was doubtful. Dr. Gornet stated that the employee would have fairly significant restrictions placed on him to prophylax against the injury in one of the adjacent segments.

On March 11, 2004, Dr. Gornet released the employee for sedentary work as of the February 23, 2004 visit. He put restrictions of no lifting greater than ten pounds and no repetitive bending. The employee should be able to alternate between sitting and standing at his leisure. He will see the employee back in six months and if the fusion appears to be consolidating well on a CT scan, he will place him at maximum medical improvement. On August 23, 2004, the employee continued to improve with back and leg pain but he still has some burning in his legs with extreme activity. The employee was relatively pleased with his progress. His CT scan shows for the most part that the fusion was solid. Dr. Gornet stated that the employee was at maximum medical improvement, the restrictions were permanent, and he wanted to see the employee back in a year.

On April 20, 2004, Dr. Chen noted that the employee had a 2001 work injury. Since the August 2003 back surgery he is much better, his back pain is reduced and he can walk.

The employee's Claim for Compensation for the alleged June 9, 2002 accident or occupational disease was dated on May 20, 2004 and filed on May 21, 2004. It alleged that the claimant was driving a bulldozer and operating the bulldozer caused his injury to his back.

In June of 2004, Dr. Chen noted that the employee was having problems sleeping. He is getting depressed that he is not back to normal. He had numbness and burning in his hips and thighs. His walking was improved. Dr. Chen prescribed Elavil. In July, the employee was not as depressed and Dr. Chen refilled the Elavil.

On April 21, 2005, the employee saw Dr. Gibbs. Dr. Gibbs stated the employee was initially injured at work on September 26, 2001. The employee had surgery in December of 2001 and in the three post-operative visits reported doing very well and had a significant improvement in the pre-operative back and right lower extremity pain. The employee had residual numbness along his right dorsal foot. He was discharged and returned to work without any

restrictions on March 5, 2002. The employee returned to see Dr. Gibbs in December of 2002 with reports of ongoing and gradual increase in his back and right lower extremity pain. He reported his back pain was aggravated with activities that were consisting of heaving lifting and the jarring he experienced while driving heavy equipment. Dr. Gibbs referred the employee for physical therapy. At the next clinic visit on February 25, 2003, the employee did not notice any significant improvements and continued to report back and bilateral leg pain with paresthesia gradually increased in both intensity and distribution. During that exam, he had inconsistent responses to the neurological exam and that there was a discrepancy between the sitting and supine positions when evaluating the straight leg test. He had positive Waddell's sign with lower back pain on axial load, as well as diminished response to light touch in a non-anatomical dermatomal pattern. He was sent for an FCE and discharged from the clinic. In August of 2003, Dr. Gornet performed a two stage surgery. After the surgery, the employee reported improvement in his back and leg symptoms. He noticed improvement in his lower back pain and somewhat in his lower extremity, being able to walk further than he had previously. He continued to have burning in both legs with any prolonged ambulation or prolonged sitting.

On April 21, the employee reported to Dr. Gibbs global numbness and burning in his lower extremities and extending down to the dorsal aspect of his feet. His leg pain is more bothersome than his back pain. His pain is exacerbated with prolonged sitting and walking and gets relief while lying flat. He has been cautious with strenuous activity and not lifting anything over five pounds. He was currently taking Aleve, Elavil, Neurontin, and Hydrocodone for pain.

Dr. Gibbs noted the employee was sitting, standing and walking in a camptocormic (bent spine, severe forward flexion) posture. On motor testing, the employee demonstrated flacid cog wheeling and give away weakness. He was quite dramatic in muscle group movements and testing. He was slow and deliberate in his motion but would not demonstrate full dorsoflexion or extensor function. With testing of the psoas groups bilaterally, he demonstrated slightly greater than anti-gravity strength but with frank cog wheeling give away weakness. Dr. Gibbs' diagnostic impression was back and bilateral leg pain and paresthesia that had not improved despite a variety of conservative measures and despite his initial improvement following the December 13, 2001 surgery. The employee acknowledged he had improvement for several months after the operation. He believed when he went back to work he realized a second injury that occurred on June 9, 2002. The employee described it as an intense low back pain while operating a bull dozer with excessive jarring that aggravated his back. Dr. Gornet performed an anterior and posterior fusion with posterior instrumentation from L2-L5. The employee did not realize any significant improvement in his symptoms. He continued to complain of back pain and bilateral leg pain and paresthesia that seem to predominately follow a right S1 dermatomal pattern. Based upon the AMA Guidelines to the Evaluation of Permanent Impairment 5th Edition, he assigned the employee a 37% whole person impairment rating which is a combined rating based on both the surgery performed by him and the Dr. Gornet's lumbar fusion.

On August 11, 2005, the employee saw Dr. Gornet with continued moderate back pain but felt grateful for the help and had definitely improved due to the surgery. He has always had some burning in his legs which began at the time of the accident and has never completely resolved. Dr. Gornet did not think that it would ever completely resolve. Based on the employee's symptoms and his understanding of the employee's educational level, it was Dr. Gornet's opinion that he did not believe that the employee would return to gainful employment. The possibility exists that he could perform a sedentary job with no lifting greater than ten pounds with no repetitive bending. He should be able to alternate between standing and sitting positions but even with those severe restrictions, he may not be able to work a complete eight hour day. The employee was at maximum medical improvement.

The employee continued to see Dr. Chen in 2005 for pain medication refills. The employee still had complaints with regard to burning in his legs and back problems and depression. On October 13, 2005, the employee had refills on Neurontin/Gabapentin, Elavil and Norvasc. The employee testified that with medication he is able to function better including sleeping better but is unable to sit long.

On December 6, 2005, Dr. Chen noted he had continued back pain and prescribed Hydroco/APAP. He was diagnosed with back pain and depression. The employee had a limping gait. The employee continued to see Dr. Chen in 2006 and received refills on different medications for low back pain, leg pain, burning in his leg upon exertion and stress.

On August 7, 2006, Dr. Gornet stated that the employee has undergone a very complex spinal surgery which has significantly benefited his symptoms. The employee still has a chronic level of pain which intermittently can become severe. He will probably require a low level of intermittent narcotics over time to manage his symptoms. Dr. Gornet recommended prescribing sixty Vicodin, 500 milligram tablets every three months to help manage his symptoms. Dr. Gornet believed that would allow the employee to improve his quality of life over the long term. He would not escalate this dosage even if requested by the employee as they may lead to more problems. Dr. Gornet stated that they are currently following the employee on an as needed basis and could not prescribe the medication. Dr. Gornet noted that the employee continued to be grateful for their help but with any significant activities, he develops increasing pain. Dr. Gornet believed that this would be a standard for him for the remainder of his life and he should be guarded as far as his overall activities.

In April of 2007, Dr. Chen noted continued burning in the leg and back pain. In July of 2007, the employee continued to be prescribed Neurontin, Hydroco/APAP, and Amitriptyline.

In his May 13, 2005, deposition, Dr. Gibbs stated that the diagnostic testing prior to his initial examination showed that the employee had some degenerative conditions in his back including stenosis. Although the employee had degenerative disease, Dr. Gibbs was not indicating that the September 26, 2001 injury was not a substantial factor in causing his symptoms. He saw what appeared to a suspicious area at his right L4-5 disc suggestive of a disc herniation. During the December 13, 2001 surgery it was determined not to be a disc herniation. Dr. Gibbs thought that the employee had lumbar spinal stenosis at L4-5 and performed an operation to restore the patency of the spinal canal in his neural foramina by performing bilateral inferior L4 and superior L5 laminectomy and medial facetectomy and foraminotomy.

Dr. Gibbs did not see any indication that the employee had any problems with back pain before the injury of September 26, 2001. If the employee had no problems with his back before September 26, 2001, and immediately after the injury started having pain, it was Dr. Gibbs' opinion that he probably believed that the injury was a substantial factor in causing the pain due to the strong temporal relationship. Dr. Gibbs stated that his treatment was necessary and appropriate and was result of the injury that he suffered at work.

Dr. Gibbs stated that it was not unusual but not extremely common for someone to make an initial recovery following surgery and after resuming activities to have a reoccurrence of pain and symptoms. When he saw the employee on December 10, 2002, there was no reference to any particular work injury on June 9, 2002. The first time that he became aware of an alleged June 9, 2002 injury was on April 21, 2005 when the employee told him.

Dr. Gibbs stated that when he examined the employee in February of 2003, his complaints and symptoms were not consistent with the imaging, and his behavior seemed inconsistent from time to time. In his April 21, 2005 report Dr. Gibbs mentioned that the employee was having bilateral leg pain and paresthesia that seemed to predominantly follow a right S1 dermatomal pattern but he had many other pain behaviors that do not follow dermatomal patterns. It was possible, but not probable, that the S1 nerve root was impinged at the L2-L5 level but that was not consistent with the imaging findings. There can be some overlap in the L5 nerve root and the S1 nerve dermatome pattern. It is possible that the same injury and incident can cause an injury to both the L5 and the S1 nerve root.

Dr. Gibbs stated that his surgery did not address the L5-S1 segment. The S1 nerve transverses the whole spinal canal and comes down past the L4-5 level on its way to the L5-S1 level. He addressed the S1 level as it related to the S1 nerve root passing through the L4-5 level because it compressed that nerve root. He did not operate at the L5-S1 level to specifically address each S1 nerve exiting at that level. Dr. Gibbs stated that Dr. Gornet apparently did not address the L5-S1 motion segment of the spine and the fusion ended at the L4-5 level. The fusion included the L5 vertebrae but not the L5-S1 motion segment which is still mobile. Dr. Gibbs stated that having a long segment fusion puts a lot of biomechanical stress on the motion segment at L5-S1. Over a long period of time, the L5-S1 level may degenerate and require a fusion.

It was Dr. Gibbs' opinion that Dr. Gornet's surgery did not help the employee. When asked if Dr. Gornet's surgery was necessary and the result of an injury sustained at Associated Electric, Dr. Gibbs answered that it was

difficult to speak about another surgeon's decision making, but it was not an operation that he would have offered the employee. During his treatment, Dr. Gibbs did not believe that fusion surgery was indicated.

It was Dr. Gibbs' opinion that the employee was at maximum medical improvement. It was Dr. Gibbs' opinion that the employee could perform sedentary work with ability to rise from the sedentary position and change positions frequently. Dr. Gibbs stated that he could not say that Dr. Gornet's restrictions were appropriate because he preferred to use a functional capacity evaluation to determine whether a person is giving a valid effort and to have some objectivity in assessing their functions. Dr. Gornet's restrictions of sedentary work with no lifting more than ten pounds, no repetitive bending, and alternate between sitting and standing certainly seemed reasonable given the history and the presentation of the employee.

In his June 13, 2005 deposition, Dr. Gornet stated that when he first saw the employee on September 9, 2002, the employee's right leg problems were consistent with L5-S1 dermatomal pattern. It was Dr. Gornet's opinion that the October 4, 2001 MRI showed no significant disc herniation but there appeared to be a disc protrusion and foraminal stenosis at L4-5, L3-4 and L5-S1. Dr. Gornet considered post-laminectomy syndrome or continued back pain after surgery and felt the employee had continued foraminal stenosis.

As to why the employee had continued pain after the first surgery and why the surgery failed, Dr. Gornet stated that he thought Dr. Gibbs' surgery helped him initially but the problem was that the surgery only addressed nerve compression and did not address any kind of structural aspect of his spine. In addition the removing of the bone to help free up the nerves made the structure and stability of the spine weaker. The combination of not addressing the structural problem and making the spine structurally weaker or less stable it was predictable that even as the spine had more demand mechanically first with light duty work and then full duty work, the employee's symptoms increased in severity which ultimately translated into his disability. It was Dr. Gornet's opinion that it was the same problem he initially had from his September 26, 2001 injury by the fact that it was not treated to begin with and the spine was structurally less stable after the surgery. It was Dr. Gornet's opinion that the employee's current symptoms were directly causally connected to his initial work related injury on September 26, 2001.

Dr. Gornet was asked about Dr. Gibbs noting inconsistent responses to his neurological exam including a discrepancy in findings between sitting and supine. Dr. Gornet stated that Dr. Gibbs' examination was remarkably consistent with his September 9, 2002 examination except that Dr. Gibbs interpreted a straight leg raise difference. However, Dr. Gornet stated that his straight leg raise was not remarkably productive for right leg pain either. Dr. Gornet reviewed the functional capacity evaluation which showed a report of over guarding behaviors and Waddell signs. The FCE was inconsistent with Dr. Gornet's experience with the employee. Dr. Gornet stated the he treated the employee over quite sometime, and in his opinion the employee had no evidence of functional overlay. The employee's pain and symptoms were consistent with his problems and both the surgery of Dr. Gibbs and Dr. Gornet helped the employee.

Dr. Gornet stated that his pre-surgery testing showed no significant disc herniation but what appeared to be a disc protrusion, which is a first grade in a disc herniation. There was a disruption in the annulus but not enough to have a frank disc herniation. During surgery he found at the L4-5 level a central disc herniation that he graded as small. At L2-3 there was no disc herniation but a small annular tear. At L3-4 there was a central disc bulge and a small disc herniation at that level. Dr. Gornet performed a two stage anterior/posterior spinal fusion from L2-L5. From the front, he removed the disc material which was mechanically injured at the time of his accident. He was able to identify a torn disc at several of the levels as well as a protrusion in the annulus at one of the other levels. On the back side surgery, there was additional stability provided from L2-L5 with instrumentation as well as a back sided fusion. Dr. Gornet stated that the fusion did not extend to the L5-S1 level because he felt that that level was structurally sound to the point that he felt it was stable to anchor the fusion to. Dr. Gornet testified that the treatment that he performed on the employee was not authorized by the employer.

With regard to the employee's foraminal stenosis, it was present over a long period of time and probably pre-existed the September 26, 2001 injury. It was Dr. Gornet's opinion that the stenosis was made symptomatic from the injury. Dr. Gibbs stated that his diagnosis is essentially attributed the pain to his initial work injury and the continuation of the same problems. The employee continued to have numbness after the first surgery which gradually

worsened and he quit working on June 9, 2002. The employee did not tell Dr. Gornet of an accident or injury on June 9, 2002, and did not tell him anything about a bulldozer incident.

It was Dr. Gornet's opinion that the employee's symptoms and problems were attributable and related to the September 26, 2001 back injury. It was Dr. Gornet's opinion that the injury of September 26, 2001 was a substantial factor if not the dominant factor in the need for the surgery he performed on the employee. It was his opinion that all of the treatment that he provided was reasonable and necessary and was related to the September 26, 2001 injury.

The employee saw Dr. Raymond Cohen on June 14, 2004. His report and April 13, 2005 deposition were part of the evidence. In the history, the employee described the September of 2001 accident and injury. After the surgery by Dr. Gibbs the employee continued to have back pain. He was released to return to work. He had been back to work approximately two weeks when the back pain increased from driving the bulldozer. He had to nearly constantly use his right leg to drive the bulldozer and the machine had a significant amount of vibration. While at work on or about June 9, 2002, he was driving bulldozer and the pain and numbness in the right leg increased. The employee ultimately had fusion surgery by Dr. Gornet.

Dr. Cohen diagnosed the employee with 1) Status post three lumbar surgeries (the second and third surgeries were stage surgeries) for a lumbar radiculopathy with the last surgeries being an extensive fusion and instrumentation from L2-L5. 2) Failed lumbar laminectomy syndrome 3) Depression. It was Dr. Cohen's opinion that the above diagnoses were a direct result of injuries that the employee sustained to his lumbar spine at work on or about September 26, 2001 and on or about June 9, 2002. It was his opinion that work was the substantial factor in his disability and the treatment that he has received was medically necessary and reasonable.

It was Dr. Cohen's opinion that the employee has a sixty-five percent whole person disability at the level of the lumbar spine, of which fifty percent is due to the injury on or about September 26, 2001. The remaining fifteen percent is due to the injury on or about June 9, 2002. Dr. Cohen stated there was an additional approximate three percent from the age related degenerative changes (for a total of sixty-eight percent at the level of the lumbar spine). The employee has a fifteen percent whole person disability due to the depression.

Dr. Cohen stated that the approximate three percent from age related degenerative changes is for persons in the 59 age group who normally have some degenerative changes simply because of their age. The degenerative changes including stenosis were a pre-existing condition. Dr. Cohen stated that there was no evidence either by the medical records or by the employee that prior to September 26, 2001 the employee had any kind of pre-existing disability.

Dr. Cohen stated that it was his opinion that the work related injury of September 26, 2001 was a substantial factor in causing his disability and the development of the depression. It was Dr. Cohen's opinion that as a result of his September 26, 2001 injury, the employee needed to be followed by a physician skilled in pain management and need to be followed by a physician for his depression. It was his opinion that the injury of September 26, 2001 was a substantial contributing factor in the need for the future medical treatment.

It was Dr. Cohen's opinion that the June 9, 2002 work injury was a substantial factor in causing the injury and disability including the development of the depression. It was Dr. Cohen's opinion that the employee needed to be followed by a physician skilled in pain management. He needed to be on medications for depression as well as medications for his pain and to help him sleep. It was Dr. Cohen's opinion that the employee would need the pain management as well as the treatment for the depression as a result of the June 9, 2002 injury, and that said injury was a substantial contributing factor in the need for the future medical treatment.

It was Dr. Cohen's opinion that the injury to his back from September 26, 2001 and any other pre-existing disabilities prior to June 9, 2002 were a hindrance or obstacle to his employment or re-employment. It was Dr. Cohen's opinion that his pre-existing condition or disability (September 26, 2001 injury and the surgery by Dr. Gibbs) combined with the primary work related injury (June 9, 2002 and the two stage surgery by Dr. Gornet) to create a greater overall disability than their simple sum. It was his opinion that due to this combination of these disabilities the employee is permanently and totally disabled and not capable of gainful employment. It was Dr. Cohen's medical

opinion that the employee's permanent and total disability was due to the combination of both the last injury (June 9, 2002) and the first injury (September 26, 2001) combined with the resulting depression. It was Dr. Cohen's medical opinion that the employee was unemployable based upon the June 9, 2002 injury and all the pre-existing conditions that he described which would include the September 26, 2001 injury and any depression that resulted. Dr. Cohen stated that assuming that there was no June 9, 2002 work injury he would attribute all of the employee's back problems, pain, numbness, the surgeries and the care that has taken place, all back to the September 26, 2001 work injury.

The employee needed to be permanently restricted from any work in which he does any prolonged sitting, standing, walking or climbing. He should not repetitively bend, lift, stoop or twist at the waist. He should not lift more than five pounds. He should not do any ladder work or walk on uneven surfaces.

Dr. Cohen reviewed Dr. Gibbs February 25, 2003 report and stated that it was odd that out of all the times that Dr. Gibbs had seen the employee, he suddenly on the date came up with the so called Waddell's finding. It seemed pretty unusual for a doctor to have seen a patient, operated on the patient and never to find the so called symptom magnification and then suddenly find them. When the FCE was performed, the employee had not had the additional surgery by Dr. Gornet. Dr. Cohen stated in his examination of the employee, he did not see any indication of symptom magnification. The employee was cooperative in his examination and did not give any responses that were not appropriate.

The employee was seen by Vincent Stock, a licensed psychologist and vocational expert, on August 10, 2005. His report and his October 28, 2005 deposition were part of the evidence. The employee was cooperative and friendly. He was agitated in his motor activity, he continually shifted in his chair, and stood up at times. The employee stated that he felt depressed, has anxiety every day, and is sad especially when he thinks about his injury. He cries whenever he thinks about his circumstances and cried at least twice during the interview. The employee's mental status examination revealed that the employee was agitated; his affect was labile (very expansive at one moment and crying and being constricted at another moment); his mood was depressed and anxious; and his speech was slurred and pressured. He appeared to be disoriented at times.

It was Mr. Stock's psychological opinion that the employee was depressed and experiencing a mood disorder as a result of his injury and surgery. Mr. Stock made a diagnosis on Axis I as a mood disorder due to fusion L2-L5 with major depressive like episodes. It is a recurrent episode and has reached the moderate level. Axis II has no diagnosis. Axis III refers to his physical which is a history of fusion L2-L5. Axis IV refers to occupational problems as being any other factors that have a bearing on his diagnosis. Axis V is a current Global Assessment Functioning score of 45. The score ranges from 0 to 100 and a 45 means that the employee has significant difficulties. Below 50 is the criterion for whether or not a person can handle the physical and emotional demands of a full time job. He is below that criterion which means that he has significant issues in his life.

It was Mr. Stock's opinion that prior to September 26, 2001, the employee had no psychological impairment or disability. The employee was a fairly stable and high functioning person with a high level of ethics. It was Mr. Stock's opinion that the employee's psychological trauma began on September 26, 2001 and his depression resulted from all of the implications of that incident. There was no additional permanent psychological disability as a result of the June 9, 2002 injury. Mr. Stock believed that 100% of the employee's depression was attributable to the injury of September 26, 2001. The depression has gradually had a greater impact on the employee and his limitations have become significant and permanent.

Although the employee worked after the first injury up until June 9, 2002, Mr. Stock believed that the employee was experiencing a significant level of impairment even in February of 2002. Mr. Stock stated that the employee was a very contentious man who really wanted and still wants to work. He pushed himself to the extent that no matter what his emotional state was, he was going to try to work even with the pain and it eventually got to him and that is why he stopped working on June 9, 2002. It was Mr. Stock's opinion that the psychological difficulty the employee has arose solely from the September 26, 2001 injury.

Mr. Stock stated that the employee's functional and mental limitations are significant, and it was his

vocational opinion that the employee was permanently and totally disabled. He did not believe that the employee was permanently and totally disabled just as a result of his psychological condition. It was Mr. Stock's opinion that the employee's psychological state/deficit and the employee's physical limitations contributed to and caused him to be permanently and totally disabled. Mr. Stock did not determine which work injury caused the physical limitations or whether it was a combination of those injuries that caused the physical limitations. Mr. Stock stated that it was a combination of the physical limitations and the depression as a result of the physical limitations that caused him to be permanently and totally disabled. Mr. Stock stated that the employee's depressed response adds to his functional limitations. If the employee did not have the physical limitation, Mr. Stock did not think the employee would have depression and would be working. Mr. Stock believed that the employee is not capable of handling any type of full time employment and is not capable of returning to work in any capacity including a sedentary setting. Mr. Stock did not see how the employee would be able to successfully compete for or sustain employment. It was his opinion that the employee would not be able to compete in an open and fair labor market due to both the psychological and physical components of his injury.

The employee has taken his medication prescribed by Dr. Chen, his primary care physician but has not sought treatment from a psychiatrist or a psychologist. Mr. Stock stated that the employee could probably benefit from weekly to every other week psychotherapy. The employee is a fairly self sufficient person and feels like he can get through his condition by himself. It was Mr. Stock's opinion that employee would probably not seek psychological treatment unless his condition deteriorates and/or his depression scares him.

When the employee saw Dr. Stillings it was the first time he had seen a psychiatrist. Prior to September 26, 2001, the employee was not aware of any diagnosis for depression or anxiety by a psychologist or a psychiatrist; and he had no restrictions or physical problems.

The employee saw Dr. Stillings on January 11, 2007 for a psychiatric medical examination. His report and April 3, 2007 deposition were in evidence. Dr. Stillings noted that the employee was alert, cooperative, candid and forthright. The employee walked very slowly with short steps and limped on the right side. He manifested psychomotor retardation related to his depressive disorder. His speech was slow and somewhat circumstantial. He exhibited poor concentration and had to be redirected to questions frequently. He was in obvious discomfort while sitting, often leaning to his left. He displayed significant psychological distress regarding injury, disability, and suicidal ideation. His mood was significantly clinically depressed. He cried several times during the interview which caused him significant embarrassment. The employee's cognitive functions were impaired by his depressive disorder. He manifested a reduced mental process speed.

Dr. Stillings psychiatric diagnosis under Axis I was: 1. Mood disorder with a major depressive like episode, due to a general medical condition (injury to low back, right lower extremity, status post two lumbar surgeries); 2. Pain disorder associated with both psychological factors and a general medical condition (same as 1.). Axis II is dependent and compulsive personality traits. Axis III is prior record review. Axis IV is disabled from employment, loss of self esteem due to occupational disability, chronic pain, chronic depression, and interaction with the legal system. Axis V is Global Assessment Functioning score of 48 (serious symptoms/impairment).

Dr. Stillings testified how the pain disorder and mood disorder impacts the ability of the employee to work. Dr. Stillings stated that essential feature of a mood disorder is a depressed mood with other symptoms. People with depressed moods do not function well in the work place, socially, family and marriages because they are disconnected somewhat from reality. Their people skills including their ability to relate to others and situations outside themselves are diminished which segues into impaired concentration, psychomotor speed and functional capacity. The mood disorder erodes their motivation and they have a loss of interest. They have a variety of cognitive problems that can include dysfunction; forgetfulness; and difficulty with audio, verbal, and visual learning. It is very difficult for a person with a significant mood disorder to function in a sustained basis in an employment setting and in seeking reemployment. The employee's mood disorder is very severe. Testing revealed that there is a serious possibility he has considered suicide. He reported historically he has suicide ideation. People who are preoccupied by this level of dysfunction generally are not able to function in the workplace or to seek reemployment. The pain disorder can also be significantly disabling. It almost becomes an obsession or obsessive disorder where people are preoccupied with chronic pain. It is very distracting and interferes with the ability to function on a daily basis occupationally or otherwise.

The global assessment functioning score is on a 0 to 100 point scale. The employee's score of 48 translates into serious psychiatric symptoms and impairment. Most people with that level of impairment are disabled from gainful employment. It is a very significant level of impairment and the vast majority of people are dysfunctional from an occupational standpoint. Dr. Stillings noted that Mr. Stock diagnosed the employee with a mood disorder and listed his GAF as 45 which is relatively concordant with his assessment.

It was Dr. Stillings' opinion that the employee had no permanent partial psychiatric disability pre-existing the work injuries of September 26, 2001 and June 9, 2002 on Axis I. He has pre-existing dependent and compulsive personality traits, with an associated permanent partial psychiatric disability of ten percent. Dr. Stillings stated that there was no evidence of any diagnosis of any personality trait issues and no indication of any kind of condition or disability that created an impact on work or created work restrictions prior to September 26, 2001.

It is Dr. Stillings' opinion that the September 26, 2001 and June 9, 2002 work injuries are substantial factors in causing the employee to suffer from a mood and a pain disorder. As a result of the September 26, 2001, work injury, it was Dr. Stillings' opinion that the employee has a fifteen percent permanent partial psychiatric disability as a result of the mood disorder and a ten percent permanent partial psychiatric disability as a result of the pain disorder. It was Dr. Stillings' opinion that as result of the June 9, 2002 work injury, the employee has a thirty percent permanent partial psychiatric disability due to the mood disorder, and a twenty percent permanent partial psychiatric disability due to the pain disorder.

Dr. Stillings' conclusions regarding any type of disability related to the alleged June 9, 2002 work injury are based upon an assumption that there was a June 9, 2002 injury. It was Dr. Stillings opinion that the psychiatric disability described under Axis I was attributable to his back injury, back condition and the surgeries regardless of which work injury it was attributed to. If there was just one injury, it wouldn't affect the level of his depression. If you take out the June 9, 2002 injury, he would have exactly the same diagnosis and his overall rating would become attributable to the September 26, 2001.

It was Dr. Stillings' opinion that it was reasonable and probable that the employee will require future psychiatric treatment as a result of the two work injuries. Such treatment would consist primarily of psychotropic medication and monthly visits to a psychiatrist for medication management. He will require anti-depressants and a sleep aid, in conjunction with monthly visits to a psychiatrist for a minimum of two years. The treatment is necessary to prevent a clinical deterioration of the psychiatric condition and to help provide a more enjoyable life for the employee. It is possible that he may need open ended psychotropic medication for the rest of his life. Dr. Stillings stated that the employee is currently on psychotropic medication (Amitriptyline) which should be managed by a psychiatrist.

Donna Abram a vocational counselor and consultant evaluated the employee. She stated that employability determines whether the employee has the skills and abilities to do the job. Placeability determines whether there are employers who would hire him. It was Ms. Abram's opinion that the employee could not return to his past employment with Associated Electric. It was Ms. Abram's opinion that the employee was employable in the open labor market.

With regard to employability, Ms. Abram noted that the employee has a varied background with some supervisory and skilled labor experience. The employee has transferable skills based on his past training, education and experience which would apply to the current labor market. It was her opinion that the employee has the skills, abilities, and knowledge that equates to jobs in the open labor market that he could find with a diligent job search.

With regard to placeability, there are a number of concerns that would need to be addressed and overcome before there would be a successful placement for the employee. Ms. Abram took into account the limitations that were placed on the employee by his doctors. She did not take his subjective complaints in terms of what he is able to do because she cannot assign limitations based on that. She did take into account how he copes with his pain and what his statements were in terms of what his pain level has done at that point. If the employee cannot sit or stand very long

and needs to change back and forth, it becomes a placement issue in terms of finding a job where the employer will let someone sit, stand and move around such as in an office where the person dictates their postural as opposed to the job duties dictating what the person is doing. Ms. Abrams stated that Dr. Gibbs indicated that the employee needed to be able to change his position frequently, and a great deal of sedentary jobs would not allow that.

Ms. Abrams stated if the restrictions that the doctors gave him were applicable to 80% of his days, and with 20% of his days were worse than it could change her opinion on employability. Ms. Abrams stated that if due to a level of pain that the employee needed to lay down several times a day, the employee would not be employable. If his pain level is that high and the doctors' limitations are not correct, the employee would not be employable. Ms. Abram stated that the employee needing to lay down several times a day would make it very difficult to find a job and to keep a job. It is negative factor in employability that the employee is 62-years-old and looks his age. Being uncomfortable is also a limiting factor as to employability. There is a connection between long term back pain and depression, and depression can be a limiting factor as far as employability. She did not take into consideration any limitations from depression or any other mental aspect of the employee.

The employee saw James England for a vocational rehabilitation evaluation on October 11, 2004. His report and February 15, 2005 deposition were part of the evidence. Mr. England stated that the employee was obviously depressed and became tearful on several occasions during the evaluation process. He was in a great deal of discomfort and had to move about periodically. He shifted often while seated and actually got up to walk around on several occasions. Mr. England testified that the employee was cooperative during the time that he saw him and thought he was applying himself when he did the testing. .

The employee reported that after the surgery by Dr. Gibbs, his right foot was numb from that point on. The employee was released to light duty for a month and then he went back to regular duty without restrictions. Over the next several months, his pain became progressively worse. By June of 2002, he could no longer tolerate the pain, stopped working, and asked for further treatment. Mr. England testified that the employee did not mention or indicate a specific injury that occurred on June 9, 2002. In reviewing the medical records, Mr. England did not see any mention of an injury occurring on June 9, 2002.

Mr. England stated that it appeared that the employee would not have transferable skills from his last job that would be usable at below a medium level of exertion. His other work in production supervision would offer transferability of skill to a light level exertion normally, although the person would need to be able to be up on his feet walking on concrete for most of the day in order to use such skills. Those skills would appear to be negated by his medical problems and his psychological frame of mind. Mr. England administered a wide range achievement test and the employee scored at the eight grade level both on reading and math, which would be adequate for a variety of entry level positions.

Mr. England stated that the employee is a 60-year-old gentleman who has worked in production supervision and more recently as a heavy equipment operator. It did not appear that the employee has a physical ability to return to either of his past career positions. Taking into consideration only the results of the FCE or Dr. Gibbs' recommendation, there still will be some types of sedentary to light service employment which such an individual could perform. Taking into consideration, however, the opinions of Dr. Gornet and Dr. Cohen along with the restrictions and the employee's description of his day to day functioning, Mr. England did not see how the employee would be able to successfully compete for employment or to sustain it in the long run. His physical and emotional problems are readily observable to a perspective employer in an interview setting. He thought that these would certainly make them less than likely to hire the employee for any type of work. In addition, Mr. England did not see how the employee would be able to sustain work as he is now finding the need to recline at least two times a day for anywhere from 40-45 minutes on up to 2 hours at a time due to his pain level. Considering his physical and psychological functioning at this time, the employee did not appear to Mr. England to be capable of lasting in a job setting on a full time regular basis. It would appear that he is more likely to remain totally disabled from a vocational standpoint.

Mr. England stated that if a person is having significant problems with a psychological component that was important in the evaluation of impairment or vocational ability. Mr. England stated that the employee seemed very

emotionally distraught when he met with him. He cried on several occasions which is pretty unusual for the people that he sees.

Shawn Reed, the employee's son, is 31 years old. He testified that prior to September of 2001, his father was very outgoing. They went fishing and hunting, attended ballgames, and took vacations together. The employee was a very outgoing and social person. He loved to collect political memorabilia. Since September 2001, they have not done any hunting, fishing, or taken any vacation together. The only reason for this change was the employee's back injury.

Mrs. Reed testified that she observed her husband every day with regard to his emotional and physical state. Prior to September of 2001, the employee was very outgoing and social and he liked to get together with people. Now he is isolated, very depressed and very emotional. He does not want to be around people and does not get around in public. Physically before September 26, 2001, he kept busy doing wood work, hunting, fishing, going places with his son and with her. That has all now stopped. Ms. Reed stays home with her husband due to his isolation, but he does not want her to be with him. The employee cries a lot. Prior to September 26, 2001, the employee had no physical problems. The employee has not been the same since then. He used to walk straight and proud, now he walks like he is beat and walks with a shuffling gait. The employee was a proud man and this had brought him completely down and has taken its toll. Mrs. Reed testified that the employee's depression has gotten worse in the last year.

The employee testified that prior to the accident in 2001, he went to St. Louis Cardinals and Memphis Redbird games with his family. He hunted with his son and fished with his son and wife. He went to a lot of Bernie basketball high school games with his family. They went to Branson two to three times a year and took vacations. He went to flea markets for collecting records, fishing reels, lanterns, cotton scales and political memorabilia. Since 2001, he has been unable to continue 90-95% of his activities. He has collected some records and political memorabilia. He has not done any hunting or fishing. He no longer goes to baseball games in St. Louis or Memphis. Prior to his injury, he went to seven or eight St. Louis games a year and a couple of Memphis games each year. He has stopped doing activities due to his depression and his physical problems. He does not like to be around people now.

The employee testified that from September 26, 2001 through the date of the hearing, he has had continuous problems with his low back and right leg and later problems with his left leg. Before Dr. Gornet's surgery, the pain had gotten bad and he had numbness and burning in his legs. He was in a deep, deep depression and almost came to suicide. Dr. Gornet's two step procedure caused his back pain level to decrease and he is not as depressed as he was before. He continued to have numbness in his leg and burning in his leg. The employee stated that if it was not for Dr. Gornet he would not be here and he "saved his life". Dr. Gornet gave him hope and helped with his pain and his life. Mrs. Reed testified that prior to Dr. Gornet's surgery the employee was in very bad shape. Her husband improved after Dr. Gornet's surgery and that is what has saved him.

The employee testified that he is still treating with Dr. Chen for depression and pain. He is prescribing Neurontin for pain, Elavil for depression, and Vicodin/Hydrocopp for pain. He takes one to two of the Vicodin/Hydrocopp each day for break through pain. He is also taking three to six Naprosyn and Aleve a day. The medications help.

The employee testified that presently his symptoms are low back pain with numbness and burning in his legs. He has problems with prolonged standing, sitting or walking. He has to lie down to help relieve the symptoms. Sometimes he has to lay down thirty to sixty minutes and sometimes it is all afternoon. He cannot sit all the time and cannot stand all day, due to the pain. To help with his pain, he uses ice packs, lays down and reclines. On the day of the hearing, the employee laid down in the courtroom several times. The employee has not worked since June 9, 2002 except he has done a few odds and end jobs around his house. He has not tried to get a job because he is not physically or mentally able. He would love to work but does not know a job he can function with because he has to be able to lay down, and does not like to be around people.

## **RULINGS OF LAW:**

***Issue 1. September 26, 2001 Accident. Issue 2. June 9, 2002 Alleged Accident or Occupational Disease. Issue 4. Medical Causation for September 26, 2001 Accident. Issue 5. Medical Causation for alleged June 9, 2002***

## *Accident or Occupational Disease.*

The employer is disputing that on September 26, 2001 the employee sustained an accident that arose out of and in the course of his employment, and that the employee's injuries, condition and treatment was medically causally related to the accident. The employer also is disputing that on or about June 9, 2002, the employee sustained an accident or occupational disease that arose out of and in the course of his employment, and that the employee's injuries, condition and treatment was medically causally related to the alleged accident or occupational disease.

A pre-existing but non-disabling condition does not bar recovery under the Workers' Compensation Act if a work related accident causes a pre-existing condition to escalate to the level of disability. See Weinbauer v. Gray Eagle Distributions, 661 S.W.2d 652, 654 (Mo. App. 1983) and Miller v. Wefemeyer, 890 S.W.2d 372 (Mo. App. 1994). The aggravation of a pre-existing symptomatic condition is also compensable. See Rector v. City of Springfield, 820 S.W.2d 639 (Mo. App. 1991) and Parker v. Mueller Pipeline, 807 S.W. 2d 518 (Mo. App. 1991). In Kelly v. Banta and Stude Construction Company, Inc., 1 S.W.3d 43 (Mo. App. 1999), the Court of Appeals held that the employer-insurer was liable for hip replacements based on a finding that the employee's work activity aggravated the employee's pre-existing osteoarthritis.

It is sufficient that causation be supported only by reasonable probability. See Davis v. Brezner, 380 S.W.2d 523 (Mo. App. 1964) and Downing v. Willamette Industries, Inc., 895 S.W.2d 658 (Mo. App. 1995).

**Lumbar Spine Condition:** There is no dispute by the physicians including Dr. Gibbs, Dr. Gornet and Dr. Cohen that the employee had degenerative conditions in his low back that included stenosis and that those conditions pre-existed the alleged September 26, 2001 accident. The credible and uncontradicted evidence was that prior to September 26, 2001, the employee had no low back pain or problems, he had never been to a doctor or chiropractor for his back, and that any pre-existing conditions in his lumbar spine were not symptomatic or disabling.

September 26, 2001 alleged accident: The employee's testimony concerning an accident on September 26, 2001 is credible and has been consistent with the medical records beginning with the emergency room records on September 29, 2001, continuing with Dr. Gibbs treatment and throughout the employee's treatment with the various health care providers. I find that on September 26, 2001, the employee was driving a scraper, noticed smoke, climbed on the back of the scraper, reached in to stop the engine, his foot slipped and he twisted his back. I find that on September 26, 2001, the employee sustained an accident that arose out of and in the course of his employment.

Medical Causation on Surgery and Treatment by Dr. Gibbs through March 5, 2002: It was Dr. Gibb's opinion that the September 26, 2001 injury was a substantial factor in causing the employee's symptoms including his pain. Dr. Gibbs stated that due to the stenosis at L4-5, he performed an operation to restore the patency of the spinal canal by performing bilateral inferior L4 and superior L5 laminectomy and medial facetectomy and foraminotomy. Dr. Gibbs stated that the treatment he provided was the result of the injury that he suffered at work.

It was Dr. Gornet's opinion that the employee's symptoms and problems were attributable, related and directly causally connected to the work related low back injury on September 26, 2001. It was his opinion that the stenosis was made symptomatic from the injury. The surgery of Dr. Gibbs which decompressed the nerve helped the employee initially improve.

It was Dr. Cohen's opinion that the lumbar radiculopathy and lumbar surgery by Dr. Gibbs was a direct result of September 26, 2001 work injury, and was the substantial factor in his disability and the treatment that he has received.

Based on a review of all the evidence including the testimony of Dr. Gibbs, Dr. Gornet and Dr. Cohen, I find that the employee's September 26, 2001 work accident either caused a new injury and/or aggravated the employee's pre-existing condition in his lumbar spine which caused his low back to become symptomatic and disabling. I find that the employee's September 26, 2001 accident was a substantial factor in causing the employee's low back injury, resulting medical condition, disability and the need for treatment that the employee has received under the direction of Dr. Gibbs from the date of the accident through March 5, 2002 when Dr. Gibbs released the employee. I further find

that the employee's injuries, conditions and treatment that the employee has received under the direction of Dr. Gibbs from the date of the accident through March 5, 2002 was medically causally related to the September 26, 2001 accident.

June 9, 2002 alleged Accident or Occupational Disease and Medical Causation for Treatment and Surgery after June 9, 2002: The evidence is overwhelming that there was not a second accident or an occupational disease on or about June 9, 2002 and that the employee's problems, symptoms, and treatment after being released by Dr. Gibbs on March 5, 2002, were related to and caused by the September 26, 2001 accident and injury.

The evidence was that the employee had numbness on the top of right foot and right lateral calf when he was released to full duty on March 5, 2002. The employee testified that after March 5, 2002, the numbness went up his leg and his back pain got worse. Mrs. Reed's credible testimony was that when the employee went back to work on light duty in February of 2002, the employee still had problems with his low back and right leg which got worse over time. She testified that there was not an incident in June of 2002 but the symptoms increased over time.

The medical records after March 5, 2002 show that the employee had a gradual progressive worsening of his on going symptoms and did not sustain a new injury. Those records including Dr. Schisler in June of 2002, Dr. Gornet in September of 2002, Dr. Gibbs in December of 2002 and the physical therapist in January of 2003 did not mention or indicate an injury that occurred on June 9, 2002. In the medical information form filled out by the employee for Dr. Gornet on September 9, 2002, the employee stated that the date of the injury was September 26, 2001. In addition on October 1, 2002, the employee reported in a patient questionnaire during a CT-myelogram that he believed his condition was related to the September 26, 2001 injury.

The first written mention in the evidence of a separate injury on June 9, 2002 was when the employee filed a Claim for Compensation on May 21, 2004. There was nothing contained in the medical records concerning a June 9, 2002, injury until April 21, 2005 when the employee described to Dr. Gibbs a second injury at work occurring on June 9, 2002 of having intense low back pain while operating a bull dozer with excessive jarring that aggravated his back. That was the first time that Dr. Gibbs became aware of an alleged June 9, 2002 injury. The employee did not tell Dr. Gornet of a June 9, 2002 injury and did not tell him about a bulldozer incident.

It was Dr. Gornet's opinion that the employee's October 4, 2001 MRI showed disc protrusions and foraminal stenosis at L3-4, L4-5, and L5-S1. It was Dr. Gornet's opinion that the stenosis was made symptomatic due to the September 26, 2001 injury. It was Dr. Gornet's opinion that the employee's symptoms and problems were attributable and related to the September 26, 2001 back injury. Dr. Gornet stated that Dr. Gibbs' surgery at L4-5 initially helped him. The employee continued to have numbness after Dr. Gibbs surgery which gradually worsened. When Dr. Gornet saw the employee on September 9, 2002, it was opinion that the employee suffered from post discectomy back pain and continued foraminal stenosis. The symptoms continued to be similar in nature and character to his original problem. Dr. Gornet stated that his diagnosis attributed the pain to his initial work injury and the continuation of the same problems. Dr. Gibbs stated that it was not unusual but not extremely common for someone to make an initial recovery following surgery and then after resuming activities to have a reoccurrence of pain and symptoms.

Dr. Gornet testified that Dr. Gibbs' surgery only addressed the nerve compression but did not address the structural aspect of his spine. By removing the bone to help free up his nerves, it made the structure and the stability of the spine weaker. By not addressing the structural problem and making the spine structurally weaker or less stable, the employee's symptoms increased in severity. It was Dr. Gornet's opinion that it was the same problem the employee initially had from his September 26, 2001 injury, and his current symptoms were directly causally connected to that work related injury.

Dr. Gornet stated that his pre-surgery testing showed disc protrusions which are first grade disc herniations. It was his opinion that the only option for the employee was a fusion from L2-L5. During surgery for discogenic post discectomy low back pain, Dr. Gornet found a small central annular tear at L2-3; a central disc bulge and a small central disc herniation at L3-4; and a central annular tear and small central disc herniation at L4-5. The disc material that was mechanically injured at the time of his accident was removed. Dr. Gornet stated that the fusion did not extend to the L5-S1 level. It was Dr. Gornet's opinion that the injury of September 26, 2001 was a substantial factor if not the

dominant factor in the need for the surgery he performed on the employee. It was his opinion that all of the treatment that he provided was reasonable and necessary and related to the September 26, 2001 injury. It was Dr. Gornet's opinion that the employee's current symptoms were directly causally connected to his initial work related injury on September 26, 2001.

When asked if the fusion surgery by Dr. Gornet was the result of the an injury sustained at Associated Electric, Dr. Gibbs answered that it was not an operation that he would have offered the employee, and it was his opinion that the fusion surgery was not indicated. Dr. Gibbs stated that the employee did not realize any significant improvement in his symptoms as a result of the fusion and it was his opinion that the surgery did not help the employee.

The evidence that Dr. Gornet's fusion surgery helped the employee's symptoms and condition is overwhelming. Dr. Gornet's medical records up to a year after the surgery show that the employee's back and leg symptoms were improved, he was walking better, was significantly improved from his pre-operative state, and was grateful for the surgery and was pleased with his progress. Dr. Gornet's records at two and three years after the surgery noted that employee was grateful for the help and he had definitely improved from the surgery. Medical records from a CT scan 6 months after surgery and from Dr. Chen's 8 months after the surgery, showed that his symptoms had improved, he was better, was able to walk and his back pain was reduced. The employee testified that prior to Dr. Gornet's surgery, he had extremely bad back pain with numbness and burning in his legs. He was in a deep, deep depression about his situation. The surgery by Dr. Gornet reduced his back pain and helped with his depression. The employee stated Dr. Gornet "saved his life", helped with his pain and his life, and gave him hope. Mrs. Reed testified that the surgery improved the condition of the employee and saved him.

I find that the opinion of Dr. Gornet is more credible than the opinion of Dr. Gibbs on medical causation for the treatment and surgery after June 9, 2002.

It was Dr. Cohen's opinion that as a direct result of the September 26, 2001 injury and the June 9, 2002 injury to his lumbar, the employee was status post three lumbar surgeries for a lumbar radiculopathy including an extensive fusion and instrumentation from L2-L5, and failed lumbar laminectomy syndrome. It was his opinion that work was the substantial factor in his disability and the treatment that he has received was medically necessary and reasonable.

I find that the opinion of Dr. Gornet is more credible than the opinion of Dr. Cohen on the issue of accident and medical causation for the alleged accident or occupational disease of June 9, 2002.

Based on a review of all the evidence, I find that the employee did not sustain an accident or occupational disease on or about June 9, 2002. I further find that the treatment and surgery after June 9, 2002, was not medically causally related to the alleged accident or occupational disease on or about June 9, 2002. Issue 2 Accident or Occupational Disease in Injury Number 02-157598 and Issue 5 Medical Causation in Injury Number 02-157598 are therefore denied, and the employee's claim in Injury Number 02-157598 is denied.

It was Dr. Cohen's opinion that if there was not a June 9, 2002 work injury, he attributed all of the employee's back problems, pain, numbness, the surgeries and the care to the September 26, 2001 work injury. Based on my ruling on Issue 2 and Issue 5, and the opinion of Dr. Cohen, I find that Dr. Cohen's combined ratings for the employee's lumbar back are attributable to the September 26, 2001 alone.

Based on the evidence including the credible testimony of Dr. Gornet, I find that that the employee's September 26, 2001 work accident either caused a new injury and/or aggravated the employee's pre-existing condition in his lumbar spine which caused his low back to become symptomatic and disabling. I find that the employee's September 26, 2001 accident was a substantial factor in causing the employee's low back injury, resulting medical condition, disability and the need for treatment that the employee has received since June 9, 2002 including the fusion surgery performed by Dr. Gornet. I find that the employee's injuries, conditions and treatment to his low back since June 9, 2002 including the fusion surgery performed by Dr. Gornet was medically causally related to the September 26, 2001 work accident.

## Depression

Prior to September 26, 2001: Prior to September 26, 2001, the employee had not seen a psychiatrist, cannot remember being treated for depression and was not aware of being diagnosed for depression or anxiety by a psychologist or a psychiatrist. One time while working at Brown Shoe (prior to 1989), he received a little bit of medication for his nerves but he never went back to the doctor. After being let go from Brown Shoe in 1989, he felt low but did not receive any treatment and fully recovered. Mrs. Reed testified that prior to September 26, 2001, the employee was very outgoing and social and liked to get together with people.

Dr. Stillings diagnosed the employee with pre-existing dependent and compulsive personality traits but stated that prior to September 26, 2001, there was no evidence of any diagnosis of any personality trait issues and no indication of any kind of condition or disability that created an impact on work or created work restrictions. It was Dr. Stillings' opinion that the employee had no permanent partial psychiatric disability pre-existing the September 26, 2001 work injury. It was Mr. Stock's opinion that prior to September 26, 2001, the employee had no psychological impairment or disability. I find that any pre-existing psychological or psychiatric condition that the employee may have had prior to September 26, 2001 was not symptomatic or disabling.

After September 26, 2001: Dr. Cohen diagnosed the employee with depression. It was Dr. Cohen's opinion that the depression was a direct result of injuries that the employee sustained at work to his lumbar spine on or about September 26, 2001 and on or about June 9, 2002. It was his opinion that work was the substantial factor in the employee's disability and the treatment that the employee has received was medically necessary and reasonable. However, it was Dr. Cohen's opinion that if there was not a June 9, 2002 work injury, he attributed all of the employee's back problems, the surgeries and the medical care that has taken place back to the September 26, 2001 work injury.

Dr. Stillings diagnosed the employee with a mood disorder with a major depressive like episode due to the injury to the low back and right lower extremity and lumbar surgeries. Dr. Stillings also diagnosed a pain disorder associated with both psychological factors and the injury to the low back and right lower extremity which resulted in two surgeries. It was Dr. Stillings' opinion that the September 26, 2001 and June 9, 2002 work injuries are substantial factors in causing the employee to suffer from a mood and a pain disorder.

Dr. Stillings' conclusions regarding any type of disability related to the alleged June 9, 2002 work injury are based upon an assumption that there was a June 9, 2002 injury. It was Dr. Stillings opinion that the psychiatric disability of mood disorder and pain disorder are attributable to his back injury, back condition and the surgeries regardless of which work injury it was or if it there was just one injury. The level of depression is the same. If the alleged June 9, 2002 injury did not occur, he would have exactly the same diagnosis and level of depression and his overall rating would become attributable to the September 26, 2001 accident and injury.

It was Mr. Stock's psychological opinion that the employee was depressed and experienced a mood disorder as a result of his injury and L2-5 fusion with major depressive like episodes which are moderate and recurrent. It was Mr. Stock's opinion that the employee's psychological trauma began on September 26, 2001 and his depression resulted from all of the implications of that incident. There was no additional permanent psychological disability as a result of the alleged June 9, 2002 injury. Mr. Stock believed that 100% of the employee's psychological difficulty and depression was solely attributable to the September 26, 2001 injury.

Based on the evidence, I find that the employee has depression, a mood disorder and a pain disorder. Based on a review of all the evidence and including my rulings on Issue 2 and Issue 5, that the employee did not sustain an accident or occupational disease on or about June 9, 2002, and that his injuries were not medically causally related to the alleged accident or occupational disease on or about June 9, 2002, I find that opinion of Mr. Stock is more credible than the opinions of Dr. Stillings and Dr. Cohen on the issue of accident and medical causation for the alleged accident or occupational disease of June 9, 2002.

Based on my ruling on Issue 2 and Issue 5, and the opinions of Dr. Cohen and Dr. Stillings, I find that overall ratings on psychiatric disability for Dr. Cohen and Dr. Stillings are attributable to the September 26, 2001 accident

alone.

I find that that the employee's September 26, 2001 work accident to his lumbar spine and resulting conditions either caused the employee to develop depression, a mood disorder and a pain disorder, or aggravated a pre-existing condition which resulted in the depression, a mood disorder and a pain disorder to become symptomatic and disabling. I find that the employee's September 26, 2001 accident was a substantial factor in causing the employee's depression, mood disorder and pain disorder, resulting medical conditions, disability and the need for treatment of those conditions. I further find that the employee's depression, mood disorder, and pain disorder; resulting medical condition; disability; and the need for treatment for those conditions are medically causally related to the September 26, 2001 work accident.

***Issue 6. Claim for previously incurred medical in 01-116248***

The employee is claiming medical bills in the amount of \$148,461.55 for treatment provided by Dr. Gornet, Washington University Physicians, and Barnes Jewish West County Hospital. The employer-insurer is disputing the authorization, necessity and causal relationship of those medical bills. The employer is not disputing those bills with regard to reasonableness.

Employee Exhibit U is the medical bills from Dr. Gornet which total \$53,869.50. Employee Exhibit V is the medical bills from Washington University Physicians which total \$6,042.00. The amount being claimed is \$4,103.15 due to adjustments by the health care provider in the amount of \$1,888.85 and a \$50.00 Medicaid payment. Employee Exhibit W is the medical bills from Barnes Jewish West County Hospital which total \$105,796.35. The amount being claimed is \$90,488.90 due to adjustments by the health care provider in the amount of \$15,307.45.

With regard to authorization, Section 287.140 RSMo gives the employer the right to select the treating physician. The employer waives that right by failing or neglecting to provide necessary medical aid. See Banks v. Springfield Park Care Center, 981 S.W.2d 161 (Mo. App. 1998). In Wiedower v. ACF Industries, 657 S.W.2d 71 (Mo. App. 1983), medical bills were awarded to the employee when the employer had notice of the injury but chose to treat the injury as non-compensable and did not offer medical services.

The employer will be liable for medical expenses incurred by the employee when the employer has unsuccessfully denied compensability of the claim. Denial of compensability is tantamount to a denial of liability for medical treatment. An Award can be entered for medical expenses of a employee through the selection of his own medical treatment. Beatty v. Chandeysson Elec. Co., 190 S.W.2d 648 (Mo. App. 1945). Mo. Workers' Compensation Law Section 7.2 (Mo. Bar 3rd ed. 2004)

The employee filed his Claim in Injury Number 01-116248 alleging a date of injury of September 26, 2001. In its Answer dated August 9, 2002 and filed with the Division on August 12, the employer denied the accident, injury and disability. The employer continued to deny the accident at the hearing.

There are several instances where the employee asked for medical treatment but the employer failed or neglected to provide the treatment. On June 11, 2002, Larry Swilley, the employee's yard supervisor, told the employee that his claim for a second injury was denied. Later the employee told Larry Swilley that Dr. Schisler and Chad Casey the therapist stated that his low back and leg problems were connected to the September 26, 2001 accident and injury, and asked the company to provide treatment. Mr. Swilley told the employee that he should seek treatment on his own. The employee then started treating with Dr. Chen on July 18, 2002 and was referred to Dr. Gornet. After the functional capacity examination in March of 2003, he requested more treatment from Teresa Crossfield. She told him that the company would not provide any more treatment. On or prior to August 1, 2003, the attorney for the employer told the employee's attorney that the employer would not authorize any further treatment.

Based upon the case law and a review of the evidence, I find that the employer waived its right to select the treating physician by denying the compensability of the case and by failing or neglecting to provide necessary medical aid. The alleged defense of authorization is not valid.

With regard to the issue of necessity, it was Dr. Gibbs opinion that the employee was not helped and did not

realize any significant improvement in his symptoms as a result of Dr. Gornet's fusion surgery. Dr. Gibbs stated that he did not believe the fusion surgery was indicated and that was not an operation that he would have offered the employee. The evidence that Dr. Gornet's fusion surgery helped the employee's symptoms and condition is overwhelming and is set forth in Issue 1 and Issue 4 of this Award. It was Dr. Gornet's opinion that all of the treatment that he provided was reasonable and necessary. Based upon a review of all the evidence, I find that the opinion of Dr. Gornet is more credible than the opinion of Dr. Gibbs on the issue of necessity of the medical treatment and medical bills. I find that all of Dr. Gornet's treatment including the fusion surgery was necessary. Based on my ruling in Issue 4, I further find that these requested medical bills were medically causally related to the September 26, 2001 work accident and injury.

Based upon a review of the bills, I find the employer is responsible for and is directed to pay the employee the sum of \$148,461.55 for the following previously incurred medical bills:

U	Dr. Gornet/The Orthopedic Center	\$53,869.50
V	Washington University Physicians	\$4,103.15
W	Barnes Jewish West County Hospital	\$90,488.90

There were additional medical bills from other health care providers that were contained in Exhibits M, N, O, P, Q, S, T, X, Y, and Z. Those medical bills were not being claimed and were not considered in this award.

***Issue 8. Notice of services provided and request for direct payment medical fee dispute in the amount of \$ 53,562.50 filed by the Dr. Gornet-The Orthopedic Center in 01-116248***

The Orthopedic Center-Dr. Gornet filed a Notice of Services Provided and Request for Direct Payment with the Division on December 3, 2004. The amount being requested was \$53,562.50 for services from September 9, 2002 through August 23, 2004.

Under Section 287.140.13(6) RSMo, a health care provider whose services have been authorized in advance by the employer or insurer may give notice to the division of any claim for fees . . . for services provided for a work related injury that is covered by this chapter . . . the administrative law judge may order direct payment from the proceeds of any . . . award.

The Notice filed by The Orthopedic Center-Dr. Gornet left the section for the Name and Title of Person Giving Authorization blank. Dr. Gornet testified that the treatment that he performed on the employee was not authorized by the employer. I find that the services of The Orthopedic Center-Dr. Gornet were not authorized in advance by the employer. The Notice of Services Provided and Request for Direct Payment Medical Fee dispute is denied.

***Issue 9. Claim for additional or future medical aid in 01-116248***

Under Section 287.140 RSMo the employee is entitled to receive all medical treatment that is reasonably required to cure and relieve him from the effects of the injury. In Landers v. Chrysler Corporation, 963 S.W.2d 275 (Mo. App. 1997), the Court held that it is sufficient to award medical benefits if the employee shows by "reasonable probability" that he is in need of additional medical treatment by reason of his work related accident.

It was Dr. Gibbs opinion that the employee was at maximum medical improvement. It was Dr. Cohen's opinion that the employee needed to be on medications for his depression, pain and to help him sleep, and needed to be followed by a physician skilled in pain management and by a physician for his depression. Dr. Gornet stated that the employee would require a low level of intermittent narcotics over time to manage his symptoms and believed that would allow the employee to improve his quality of life over the long term.

Mr. Stock stated that the employee could probably benefit from weekly to every other week psychotherapy. It was Dr. Stillings' opinion that it was reasonable and probable that the employee will require future psychiatric

treatment consisting primarily of psychotropic medication and monthly visits to a psychiatrist for medication management. He will require anti-depressants and a sleep aid in conjunction with monthly visits to a psychiatrist for a minimum of two years. The treatment is necessary to prevent a clinical deterioration of the psychiatric condition and to help provide a more enjoyable life for the employee. It is possible that he may need psychotropic medication for the rest of his life.

Dr. Stillings stated that the employee is currently on psychotropic medication (Amitriptyline) which should be managed by a psychiatrist. In late July of 2007, Dr. Chen was prescribing generic Neurontin, Hydroco/APAP, and Amitriptyline. The employee's credible testimony is that the medication helps relieve his symptoms and he is better able to function and sleep with the medicine.

Based upon a review of all the evidence, I find that opinions of Dr. Cohen, Dr. Gornet, Mr. Stock and Dr. Stillings are more credible than the opinion of Dr. Gibbs with regard to the issue of additional medical treatment.

I find that the employee is in need of additional medical treatment to cure and relieve him from the effects of his September 26, 2001 work related injury to his lumbar spine and resulting depression. The employer is therefore directed to provide the employee with all of the medical care that is reasonable and necessary to cure and relieve him from the effects of his work related injury pursuant to Section 287.140 RSMo. This includes but is not limited to the treatment recommendations made by Dr. Gornet, Dr. Stillings, Mr. Stock, and Dr. Cohen.

#### ***Issue 11. Additional period of temporary total disability in 01-11624***

The employer paid temporary total disability from September 26, 2001 through March 19, 2002. The employee is claiming additional temporary disability benefits from June 9, 2002 through August 28, 2004.

Temporary total disability benefits are intended to cover healing periods and are payable until the employee is able to return to work or until the employee has reached the point where further progress is not expected. The pivotal question is determining whether an employee is totally disabled is whether any employer in the usual course of business would reasonably be expected to employ the claimant in his present physical condition. Brookman v Henry Transportation, 924 S.W.2d 286 (Mo.App.1996).

On March 5, 2002, Dr. Gibbs discharged the employee from treatment and released him to work without any restrictions. On March 25, 2003, Dr. Gibbs office stated that the employee was able to work with restrictions of 20 pounds maximum lifting and that the employee was at maximum medical improvement.

The employee's credible testimony was that due to his back pain and numbness in his right leg, he was unable to do his job and stopped working on June 9, 2002. The employee treated with Dr. Schisler from June 10 through July 1, 2002, and kept the employee off work until August 1. In August, the employee treated with Dr. Chen until being referred to Dr. Gornet. Dr. Gornet started treating the employee on September 9, 2002, and from date until February 23, 2004, Dr. Gornet stated that the employee remained temporarily totally disabled. Dr. Gornet released the employee for sedentary work as of February 23, 2004 but put restrictions of no lifting greater than ten pounds, no repetitive bending, and to alternate between sitting and standing at his leisure. On August 23, 2004, Dr. Gornet stated that the employee was at maximum medical improvement and made the restrictions permanent.

Based on the review of the evidence and the employee's credible testimony, I find that from June 10, 2002 through August 23, 2004, the employee was not able to return to work, had not reached the point where further progress was not expected, and no employer in the usual course of business would reasonably be expected to employ the claimant in his physical condition. I find that the employee is entitled to temporary total disability from June 10, 2002 through August 23, 2004. The employer-insurer is therefore ordered to pay the employee 115 weeks of

compensation at the rate of \$628.90 per week for a total of \$72,323.50.

***Issue 13. Nature and extent of permanent disability in Injury Number 01-116248 and Issue 15. Liability of the Second Injury Fund for permanent total disability or permanent partial disability in Injury Number 01-116248.***

The employee is claiming that he is permanently totally disabled. The term “total disability” is defined under Section 287.020.7 as follows:

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

The phrase “inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. See Kowalski v/ M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1992). The test for permanent total disability is whether; given the employee’s situation and condition, he or she is competent to compete in the open labor market. See Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo. App. 1992). Total disability means the “inability to return to any reasonable or normal employment.” An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. See Brown v. Treasurer of State of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990). The key question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person’s present physical condition, reasonably expecting the employee to perform to work for which he or she entered. See Reiner at 367, Thornton v. Haas Bakery, 858 S.W.2d 831, 834 (Mo. App. 1993), and Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995).

The first question that must be addressed is whether the employee is permanently and totally disabled. There is both credible medical and vocational evidence to support his claim of permanent and total disability.

Dr. Gibbs gave the employee permanent lifting restriction of twenty pounds and felt his subjective complaints of pain may limit his ability to function. His restrictions were prior to the fusion surgery by Dr. Gornet. It was Dr. Gibbs’ opinion based upon the AMA Guidelines to the Evaluation of Permanent Impairment 5th Edition that the employee had a 37% whole person impairment rating which is a combined rating based on both the surgery performed by him and fusion performed by Dr. Gornet. It was Dr. Gibbs’ opinion that the employee could perform sedentary work with the ability to rise from the sedentary position and change positions frequently. Dr. Gibbs stated that Dr. Gornet’s restrictions of no lifting more than ten pounds, no repetitive bending, and to alternate between sitting and standing seemed reasonable given the history and the presentation of the employee.

Based on the employee’s symptoms and educational level, it was Dr. Gornet’s opinion that the employee was unable to return to gainful employment. The possibility existed that he could perform a sedentary job with no lifting greater than ten pounds, no repetitive bending, and the ability to alternate between standing and sitting. Dr. Gornet stated that even with those severe restrictions, he may not be able to work a complete eight hour day. Dr. Gornet noted that with any significant activities, he develops increasing pain which will be a standard for him for the remainder of his life and the employee should be guarded with his activities.

Dr. Cohen stated that the employee needed to be permanently restricted from any work in which he does any prolonged sitting, standing, walking or climbing. He should not repetitively bend, lift, stoop or twist at the waist. He should not lift more than five pounds and should not do any ladder work or walk on uneven surfaces. It was Dr. Cohen’s opinion that the employee has a sixty-five percent whole person disability at the level of the lumbar spine and fifteen percent whole person disability due to the depression. It was his opinion that due to this combination of these disabilities the employee is permanently and totally disabled and not capable of gainful employment and therefore was unemployable.

It was Mr. Stock’s vocational opinion that based on the employee’s significant functional and mental

limitations that the employee was permanently and totally disabled. Mr. Stock stated that it was a combination of the physical limitations and the depression as a result of the physical limitations that caused him to be permanently and totally disabled. Mr. Stock did not believe that the employee is capable of handling any type of full time employment including a sedentary setting. Mr. Stock did not see how the employee would be able to successfully compete for or sustain employment in the open labor market.

It was Dr. Stillings' opinion that the employee has a 45% percent permanent partial psychiatric disability as a result of the mood disorder and a 30% permanent partial psychiatric disability as a result of the pain disorder. Dr. Stillings testified the essential feature of a mood disorder is a depressed mood and people with depressed moods do not function well in the work place. The employee's mood disorder is very severe and Dr. Stillings stated that it is very difficult for a person with a significant mood disorder to function in a sustained basis in an employment setting and in seeking reemployment. The pain disorder can also be significantly disabling because it becomes an obsession or obsessive disorder where people are preoccupied with chronic pain. It is very distracting and interferes with the ability to function on a daily basis occupationally or otherwise. Dr. Stilling stated that the employee's global assessment functioning score of 48 translates into serious psychiatric symptoms and impairment, and that the vast majority of people with that level of impairment are dysfunctional and would be disabled from gainful employment.

It was Ms. Abram's opinion that the employee was employable in the open labor market. Ms. Abram's opinion is substantially affected by the fact that she did not take into account the employee's subjective complaints in terms of what he is able to do or take into consideration any limitations from his psychological condition. Ms. Abram stated that depression and the employee's age of 62 can be negative factors in employability. Being uncomfortable is a limiting factor to employability. Ms. Abram stated that if due to a high level of pain, the employee needed to lay down several times a day, he would not be employable.

Mr. England stated that taking into consideration only the results of the FCE or Dr. Gibbs' recommendation, there still will be some types of sedentary to light service employment which such an individual could perform. Taking into consideration the opinions of Dr. Gornet and Dr. Cohen along with the restrictions and the employee's description of his day to day functioning, Mr. England did not see how the employee would be able to successfully compete for employment or to sustain it in the long run. His physical and emotional problems are readily observable to a perspective employer in an interview setting and would certainly make them less than likely to hire the employee for any type of work. Mr. England did not see how the employee would be able to sustain work as he is now finding the need to recline at least two times a day for anywhere from 40-45 minutes on up to 2 hours at a time due to his pain level. Mr. England stated that if a person is having significant problems with a psychological component that was important in the evaluation of impairment or vocational ability. Mr. England stated that the employee seemed very emotionally distraught when he met with him. Considering his physical and psychological functioning at this time, the employee did not appear to Mr. England to be capable of lasting in a job setting on a full time regular basis. It would appear that he is more likely to remain totally disabled from a vocational standpoint.

Based on a review of all the evidence, I find that the opinions of Dr. Gornet, Dr. Stillings, Dr. Cohen, Mr. Stock and Mr. England are more credible than the opinions of Dr. Gibbs and Ms. Abram regarding whether the employee is permanently and totally disabled.

In addition to both the medical and vocational evidence, I find that the employee, his wife and son were very credible witnesses on the issue of permanent total disability. Their testimony concerning the impact his injuries have had on the employee's daily ability to function either at home or in the work place. Their testimony in this regard is very credible and supports a conclusion that the employee will not be able to compete in the open labor market. With his physical and mental limitations, restrictions and pain it is extremely unlikely that any employer would reasonably be expected to hire the employee in his present physical and mental condition.

In addition to his testimony the employee was observed for an extended period of time prior to and during the course of the hearing. The employee exhibited numerous behavior and physical patterns that support a finding of permanent total disability including lying down in a bench in the courtroom several times; frequently moving around, standing up, and sitting down; becoming emotional; and walking extremely slow. Based on

these observations, it is clear that he is suffering from a constant and significant level of pain, discomfort, and mental anguish.

The observations and opinions of the following physicians and vocational experts confirm my observations during the hearing. Dr. Stillings noted that the employee was cooperative, walked very slowly with short steps, limped on the right side, was in obvious discomfort while sitting, and cried several times. Mr. England stated that the employee was obviously depressed, seemed emotionally distraught, became tearful on several occasions, was in a great deal of discomfort, and had to move about periodically, he shifted often while seated and got up to walk around on several occasions. Mr. England testified that the employee was cooperative and applied himself during testing. Mr. Stock stated that the employee was cooperative but was agitated in his motor activity, continually shifted in his chair, and stood up at times, and cried least twice. He was depressed and anxious. These observations and opinions were important evidence on the issue of permanent total disability.

I find that the employee is very credible and is not exaggerating his complaints. Based on the credible testimony of the employee, his wife, and son; the observed behavior of the employee; and the supporting medical and vocational rehabilitation evidence, I find that no employer in the usual course of business would reasonably be expected to employ the employee in his present physical and mental condition and reasonably expect the employee to perform the work for which he is hired. I find that the employee is unable to compete in the open labor market and therefore is permanently and totally disabled.

Given the finding that the employee is permanently and totally disabled, the last issue is to determine whether the employer or the Second Injury Fund is liable for the employee's permanent total disability. Under Section 287.220.1 RSMo, the Second Injury Fund has no liability and the employer is responsible for full permanent total disability benefits if the last injury "considered alone and of itself," results in permanent total disability. See Roller v. Treasurer of the State of Missouri, 935 S.W. 2d 739 (Mo.App.1996), and Landman v. ICS, 107 S.W.3d 240, 248 (Mo. banc 2003).

Although the employee in this case had several pre-existing conditions including stenosis and sleep apnea, those conditions were asymptomatic, not disabling, and were not a hindrance or obstacle to his employment or reemployment. The testimony of the employee, his wife, and his son; and the credible medical and vocational evidence overwhelmingly support a finding that the employee's permanent total disability was caused solely by his September 26, 2001 injury. It is clear that he is not working is due to the severe pain he is experiencing in his low back and legs along with the depression that resulted from this severe pain which is all related to the September 26, 2001 accident alone and of itself.

On August 23, 2004, Dr. Gornet stated that the employee was at maximum medical improvement and his restrictions were permanent. I find that the employee was in his healing period through August 23, 2004. I find that as of August 24, 2004, no employer in the usual course of business would reasonably be expected to employ the employee in his physical condition and reasonably expect the employee to perform the work for which he is hired, and therefore was no longer able to compete in the open labor market and was permanently and totally disabled. I find that the employer is liable to the employee for permanent total disability benefits and is directed to pay the employee the sum of \$628.90 per week commencing on August 24, 2004 and continuing thereafter for the remainder of the employee's life or until suspended in accordance with Section 287.200 RSMo. The Second Injury Fund has no liability in this case.

Since the employee has been awarded permanent total disability benefits against the employer, Section 287.200.2 RSMo mandates that the Division "shall keep the file open in the case during the lifetime of any injured employee who has received an award of permanent total disability". Based on this section and the provisions of 287.140 RSMo., the Division and Commission should maintain an open file in the employee's case for purposes of resolving medical treatment issues and reviewing the status of the employee's permanent disability pursuant to Sections 287.140 and 287.200 RSMo.

***Issue 18. Dependency status of the employee's wife under Schoemehl v. Treasure of the State of Missouri, 217 S.W.3d 900 (Mo. 2007) in Injury Number 01-116248***

In an amended claim, Ruth Reed was listed as a dependent. Mrs. Reed has requested that her status as a dependent be determined. Under Section 287.240 RSMo, a dependent is defined as a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. Under Section 287.240 RSMO, a wife upon a husband with whom she lives or who is legally liable for her support is conclusively presumed to be totally dependent for support. I find that Ruth Reed, the wife of the employee, was a conclusively presumed total dependent at the time of the employee's accident and injury.

Underpayment of Temporary Total Disability: The parties agreed that there was an underpayment of \$7.80 per week in temporary total disability based on an incorrect rate of compensation paid for 19 2/7 weeks from September 26, 2001 through March 19, 2002. The employee is entitled to and the employer is ordered to pay to the employee an additional \$150.43 (19 2/7th weeks x \$7.80 per week) in temporary total disability benefits.

Moot Issues: Based on my ruling in Issue 15 that the Second Injury Fund had no liability in Injury Number 01-116248, Issue 17 which is the Statute of Limitations for the Claim filed against the Second Injury Fund in Injury Number 01-116248 is moot and shall not be ruled upon.

Based on my rulings in Issue 2 and Issue 4 regarding the alleged June 9, 2002 accident or occupational disease, and the employee's claim in Injury Number 02-157598 being denied; Issues 3, 7, 10, 12, 14, 16, and 19 are moot and will not be ruled upon.

**ATTORNEY'S FEE:**

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

**INTEREST:**

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

Date: \_\_\_\_\_

Made by:

\_\_\_\_\_  
Lawrence C. Kasten  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Mr. Jeff Buker  
*Division Director*  
*Division of Workers' Compensation*

