

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

Injury No.: 05-040898

Employee: Melvin Stark  
Employer: Thomas Construction, Inc.  
Insurer: Westport Insurance Corporation  
c/o Gallagher Basset Services, Inc.

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 13, 2010, as supplemented herein.

In his award on pages 16 and 19, the administrative law judge refers to Dr. Koprivica's opinion and findings. Dr. Koprivica was not involved in this case. It's clear from the context of the administrative law judge's comments that he was, in fact, referring to Dr. Volarich's opinions and findings whenever he referred to Dr. Koprivica. We acknowledge this error and correct it with this supplemental opinion.

The award and decision of Administrative Law Judge L. Timothy Wilson, issued September 13, 2010, is affirmed, and is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees 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 17<sup>th</sup> day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Melvin Stark

Injury No. 05-040898

Dependents: N/A

Employer: Thomas Construction, Inc.

Insurer: Westport Insurance Corporation

Additional Party: N/A

Hearing Date: August 10, 2010

Checked by: LTW

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: May 10, 2005
5. State location where accident occurred or occupational disease was contracted: Pulaski County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While engaged in his employment with Employer, installing a galvanized steel laundry chute with a coworker, the steel laundry chute slipped out of the coworker's hands, resulting in Employee holding the weight of the entire piece of metal, as well as being jerked forward, downward and against a wall to the right. Employee attempted to keep the laundry chute from falling to the ground and hitting a worker below by holding on to it. As he held the chute, it pulled Employee to his knees, and eventually he had to let go. This incident caused Employee to sustain an injury to his low back.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low Back
14. Nature and extent of any permanent disability: Permanent Total Disability
15. Compensation paid to-date for temporary disability: \$2,487.10
16. Value necessary medical aid paid to date by employer/insurer? \$7,446.73

Employee: Melvin Stark

Injury No. 05-040898

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: See Award
- 19. Weekly compensation rate: \$355.30 for TTD & PTD / \$354.05 for PPD
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses: N/A

Weeks of temporary total disability (or temporary partial disability): N/A

Weeks of permanent partial disability from Employer: N/A

Weeks of disfigurement from Employer: N/A

Permanent total disability benefits from Employer & Insurer beginning March 30, 2007, for Employee's lifetime

22. Second Injury Fund liability: N/A

TOTAL: \$355.30 per week beginning March 30, 2007, for Employee's lifetime

23. Future requirements awarded: Yes (See Award)

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorneys for necessary legal services rendered to the claimant: VAN CAMP LAW FIRM, L.L.C.

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Melvin Stark

Injury No. 05-040898

Dependents: N/A

Employer: Thomas Construction, Inc.

Insurer: Westport Insurance Corporation

Additional Party: N/A

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on August 10, 2010. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about August 24, 2010.

The employee, Melvin Stark, appeared personally and through his attorney Christine M. Kiefer, Esq. The employer, Thomas Construction, Inc., and its insurer, Westport Insurance Corporation, appeared through their attorney, Michael Mayes, Esq.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about May 10, 2005, Thomas Construction, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Westport Insurance Corporation.
- (2) On the alleged injury date of May 10, 2005, Melvin Stark was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about May 10, 2005, the employee sustained an accident, which arose out of and in the course and scope of his employment with the employer.
- (4) The above-referenced employment and accident occurred in Pulaski County, Missouri. The parties agree to venue lying in Laclede County, Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section, 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.

- (7) At the time of the claimed accident the employee's average weekly wage was sufficient to allow a compensation rate of \$355.30 for temporary total disability compensation and permanent total disability compensation, and a compensation rate of \$354.05 for permanent partial disability compensation.
- (8) Temporary disability benefits have been provided to the employee in the amount of \$2,487.10, payable for the period of May 11, 2005 to June 29, 2005.
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$7,446.73 in medical expenses.

The sole issues to be resolved by hearing include:

- (1) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee from the effects of the injuries?
- (2) Whether the employee sustained any permanent disability as a consequence of the alleged accident; and, if so, what is the nature and extent of the disability?

**EVIDENCE PRESENTED**

The employee testified at the hearing in support of his claim. Also, the employee offered for admission the following exhibits:

- Exhibit A..... Medical Records from Capital Region Corporate Health
- Exhibit B.....Educational Records from Miller County R-III School District
- Exhibit C..... .Medical Records from Lake Region Health System
- Exhibit D..... Medical Records from Springfield Neurological & Spine Institute
- Exhibit E ..... Medical Records from Lake Regional Medical Management
- Exhibit F .....Deposition of David Volarich, D.O.
- Exhibit G..... Deposition of James England, CRC

The exhibits were received and admitted into evidence.

The employer and insurer did not present any witnesses at the hearing of this case. However, the employer and insurer offered for admission the following exhibits:

- Exhibit 1..... Deposition of Ted Lennard, M.D.
- Exhibit 2.....Deposition of Mary Welch Titterington, M.S., C.D.M.S., L.P.C.
- Exhibit 3.....Payroll Records

The exhibits were received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

- Notice of Hearing
- Request for Hearing-Final Award
- Answer of Employer and Insurer to Amended Claim for Compensation
- Amended Claim for Compensation
- Answer of Employer and Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

## **DISCUSSION**

The employee, Melvin Stark, is 61 years of age, having been born on March 6, 1949. Mr. Stark is single, and resides alone in Tuscumbia, Missouri without any dependents. Mr. Stark described his home as a trailer, situated on a one acre lot. Also, Mr. Stark's brother is his immediate neighbor, who lives next door.

Mr. Stark enjoys limited education. He attended high school, reaching the 11<sup>th</sup> grade, but he did not graduate. Also, Mr. Stark has not obtained a GED. Nor has he received other formal education or training, and enjoys no certifications or degrees. In describing his education, Mr. Stark noted that he received poor grades in school, and he experienced problems with reading and math. And while in school, he was assigned to special education classes.

Mr. Stark is not presently employed. However, he is receiving social security disability compensation.

### Employment History

Mr. Stark's employment history relates primarily to work involving physical labor. Upon quitting high school, Mr. Stark obtained employment on a Turkey farm. He then obtained employment with Montgomery Ward in Jefferson City, Missouri, working in the automotive department. In this employment he changed tires, and performed other labor type work. He worked for Montgomery Ward for two to three years.

Subsequent to being employed by Montgomery Ward, Mr. Stark obtained employment with Tennyson's Furniture Store, delivering furniture to customers. He engaged in this employment for three to four years. He later obtained employment in construction.

Mr. Stark's employment in construction includes operating a tractor, as well as a Bobcat and a backhoe. He is familiar with a variety of hand tools and has driven trucks up through tandem axle flatbeds. However, he has not driven tractor trailer units. Additionally, he is familiar

with a wide variety of hand and power tools, as well as methods and materials used in the construction industry. And he is familiar with basic plumbing.

Mr. Stark does not have experience with office machines. Similarly, he does not have any experience in bookkeeping or performing inside office work. Nor does Mr. Stark have experience in inventory control, shipping and receiving, scheduling or supervising, or working with computers.

#### Employment with Employer

Eventually, in or around 1975, Mr. Stark obtained employment with the employer, Thomas Construction, Inc., working as a carpenter engaged in general construction involving residential and commercial construction projects. Mr. Stark continued in this employment for approximately 21 years, until on or about March 30, 2007. At the end of his employment, Mr. Stark was earning approximately \$17.50 an hour.

Mr. Stark's duties included all phases of construction, exterior and interior, from framing to finish work, roofing work, sheet rock work, concrete work, digging ditches, operating a Bobcat and backhoe, etc. In this employment, Mr. Stark engaged in standing and walking throughout the workday, and engaged in lifting items, weighing as much as 100 pounds, on occasion. Additionally, he was required to bend, kneel, squat, climb, reach, balance, carry, push, pull, stoop and handle tools.

As an employee of Thomas Construction, Inc., Mr. Stark worked occasional overtime hours. And at times he would travel to other states, including Oklahoma, Kansas and Illinois. During the last six to seven years of his employment with Thomas Construction, Mr. Stark worked on construction projects involving construction of motels, as the company became more involved with commercial jobs.

#### Accident

On May 10, 2005 Thomas Construction was engaged in a commercial construction project involving the construction of a motel. This job included installation of a galvanized steel laundry chute, which came in separate pieces (weighing approximately 45 to 60 pounds) and required workers to fit the pieces together similar to a stove pipe. This installation process required at least two workers to position the two pieces together, allowing the top piece to drop slowly into the bottom piece. The workers would situate themselves at different levels. One worker would be situated on the first floor, while a second worker would be situated on the floor above.

While engaged in this installation process, and working with a coworker, Mr. Stark was situated on the second floor; the coworker was situated on the first floor. As the two men were holding on to the laundry chute from different levels, the chute slipped out of the coworker's hands, resulting in Mr. Stark holding the weight of the entire piece of metal, as well as being jerked forward, downward and against a wall to the right. Mr. Stark attempted to keep the laundry chute from falling to the ground and hitting a worker below by holding on to it. As he held the chute, it pulled him to his knees, and eventually he had to let go.

This incident caused Mr. Stark to experience immediate burning pain in his lower back and down his right thigh and lower extremity. Mr. Stark told the coworker that he hurt his back, but continued to work and completed his work shift. That night, however, he informed his supervisor of the work injury, as he continued to be in pain, which got worse as he drove home. The next day, Mr. Stark attempted to get up and go to work, but was unable, resulting in him calling the office and informing the office of his situation. Thereafter, the employer scheduled a doctor's appointment for Mr. Stark.

### Medical Treatment

The employer accepted compensability of the claim and authorized treatment for Mr. Stark. Initially, Mr. Stark presented to Lake Regional Health System. At the time of this initial examination, Mr. Stark noted that the pain had become considerably worse. The attending physician determined that Mr. Stark demonstrated a positive right straight leg raise test, and diagnosed Mr. Stark with low back pain. The attending physician elected to treat Mr. Stark conservatively with Celebrex, and scheduled a follow-up examination.

In follow-up treatment, Mr. Stark underwent diagnostic studies involving x-rays of the lumbar spine and thoracic spine, which revealed only mild degenerative changes. The treating physician continued conservative treatment. On May 31, 2005, Mr. Stark initiated a course of physical therapy.

Mr. Stark, however, continued to have low back pain and eventually received a referral to William Harris, D.O., who is an orthopedic surgeon with Lake Regional Health System. And on July 18, 2005, Mr. Stark presented to Dr. Harris, who examined Mr. Stark and diagnosed an acute ligamentous strain and sprain of the lumbar spine. In light of his examination and diagnosis, Dr. Harris elected to continue with the conservative treatment, including physical therapy modalities, and light duty restrictions. Additionally, Dr. Harris ordered diagnostic studies in the nature of an MRI scan of the lumbar spine, which occurred on July 29, 2005. This study revealed moderate central canal stenosis of the lumbar spine at L4-L5 and mild central canal stenosis of the lumbar spine at L3-L4, with slight stenosis at L2-L3. Additionally, Mr. Stark was found to have moderate bilateral foraminal stenosis at L4-L5.

During the course of treatment with Dr. Harris, Mr. Stark was off work for approximately seven weeks, completing a trial of physical therapy. Eventually, in light of unresolved low back pain, including pain radiating into his left hip and right thigh, Dr. Harris prescribed epidural steroid injections of the lumbar spine, which occurred during the latter part of 2005 and early part of 2006. According to Mr. Stark, the epidural steroid injections provided little to no relief.

In or around September 2007, the employer and insurer referred Mr. Stark to Wade Ceola, M.D., who is a neurosurgeon with Springfield Neurological & Spine Institute. On September 20, 2007, Mr. Stark presented to Dr. Ceola with complaints of constant low back pain and intermittent lower extremity pain occurring daily with activity. Additionally, Mr. Stark noted that his pain was aggravated by reaching over head, bending, or working on his knees. In light of his examination and evaluation of Mr. Stark, Dr. Ceola offered an impression that Mr. Stark was suffering from congenital spinal stenosis and progressive stenosis, and recommended that Mr. Stark undergo a CT/Myelogram and then return for follow-up appointment. The employer and

insurer, however, did not authorize the CT/Myelogram and did not authorize any additional treatment for Mr. Stark.

### Post-Accident Employment

During the course of his treatment with Dr. Harris, Mr. Stark was given a release to light duty work, and returned to work with Thomas Construction. Fortunately, the employer allowed Mr. Stark to work with accommodations, by allowing him to perform interior finish work, such as caulking, trim painting and replacing trim work on doors. The light duty would require him to caulk at floor level around toilets and bathtubs, underneath individual room air conditioner units and around windows. He would occasionally have to get on ladders to caulk or paint overhead.

Also, he occasionally worked reduced hours due to pain, and refrained from all heavy lifting, climbing, and heavy demand work. He continued to work light duty and his employer accommodated him by allowing him to change positions, sit down, take time off, and work at his own pace. He continued to do this light duty work until March 30, 2007 when he said he quit because it was too painful. (Records from Thomas Construction indicate that after Mr. Stark returned to work in July 2005, he averaged 32.5 hours/week through the remainder of 2005, 36.4 hours/week in 2006 and 34.7 hours/week in 2007 through the end of March.)

In 2007, Mr. Stark applied for and obtained Social Security Disability compensation. He has not engaged in any employment since terminating his employment with Thomas Construction in March 2007.

### Independent Medical Examinations

David T. Volarich, M.D. testified by deposition on behalf of the employee. (Dr. Volarich has received board certifications, which include nuclear medicine, nuclear cardiology, occupational preventive medicine and independent medical examiner.) Dr. Volarich performed an independent medical examination of Mr. Stark on April 15, 2009. At the time of this examination, Dr. Volarich took a history from Mr. Stark, reviewed various medical records, and performed a physical examination of him.

In light of his examination and evaluation of Mr. Stark, Dr. Volarich opined that the work injury of May 10, 2005, is the "substantial contributing factor as well as the prevailing or primary factor causing" causing Mr. Stark to suffer an aggravation of a "previously asymptomatic central and foraminal stenosis from L2-3 through L4-5." Dr. Volarich further opined that this aggravation caused Mr. Stark to suffer a "lumbar radicular syndrome," which required Mr. Stark to undergo extensive conservative medical treatment.

Dr. Volarich is of the opinion that Mr. Stark is at maximum medical improvement. In considering the issue of disability, Dr. Volarich opined that, as a consequence of the work injury, Mr. Stark sustained a permanent partial disability of 40 percent to the body as a whole. He further opined that this work injury constitutes a hindrance to Mr. Stark's employment or re-employment, and causes Mr. Stark to be governed by work restrictions. In this context, Dr. Volarich states,

With regard to work and other activities referable to the spine,

1. He is advised to avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks to an as needed basis.
2. He should not handle any weight greater than 15-20 pounds, and limit this task to an occasional basis assuming proper lifting techniques.
3. He should not handle weight over his head or away from his body, nor should he carry weight over long distances or uneven terrain.
4. He is advised to avoid remaining in a fixed position for any more than about 20-30 minutes at a time including both sitting and standing.
5. He should change positions frequently to maximize comfort and rest when needed including resting in a recumbent fashion.
6. He is advised to pursue an appropriate stretching, strengthening, and range of motion exercise program in addition to non-impact aerobic conditioning such as walking, biking, or swimming to tolerance daily.

Finally, Dr. Volarich opined that as a consequence of the work injury, Mr. Stark will require additional medical care in order to cure and relieve him from the effects of the injury. In this regard, Dr. Volarich recommends prescription medications, physical therapy and pain management (inclusive of epidural steroid injections, foraminal nerve root blocks, triggers pint injections, radiofrequency ablations, TENS units, and other similar treatments). Additionally, Dr. Volarich recommends that Mr. Stark follow-up with a spine surgeon for consideration of surgical treatment, based on presenting symptomology.

In explaining his opinion and diagnosis, Dr. Volarich testified that while the stenosis was pre-existing, this condition is “very tolerable until there is an injury.” However, he opined that once there is an injury,

[T]he degenerative conditions are now inflamed, aggravated, and made worse because they are causing inflammation around the nerve roots, around the spinal cord, and there’s now swelling that’s putting pressure on those nerves. There’s some minor instability because of this jerking type of injury that he had. And all of these combined are what’s causing him to now have the symptoms that he has.

Dr. Volarich further testified that the heavy labor performed by Mr. Stark for over 20 years “increased the loading forces on the spine...the net result of that wear and tear, that repetitive lifting, is eventual breakdown of those structures.”

Ted Lennard, M.D., who is a physician practicing in the specialty of physical medicine, testified by deposition on behalf of the employer and insurer. Dr. Lennard performed an independent medical examination of Mr. Stark on August 6, 2009. At the time of this examination, Dr. Lennard took a history from Mr. Stark, reviewed various medical records, and performed a physical examination of him.

In light of his examination and evaluation of Mr. Stark, Dr. Lennard diagnosed Mr. Stark with low back pain, underlying L4-L5 stenosis and widespread degenerative changes. Further, Dr. Lennard diagnosed Mr. Stark with a lumbar strain, which he opined occurred as a consequence of the work injury of May 10, 2005.

In considering the issue of disability, Dr. Lennard is of the opinion that Mr. Stark presents with a permanent partial disability of 15 percent to the body as a whole, referable to the lumbar spine. In apportioning this disability, Dr. Lennard assigns 5 percent to the body as a whole, referable to the work-related lumbar strain; and he assigns 10 percent to the body as a whole, referable to the non-work related stenosis and degenerative changes.

Further, Dr. Lennard is of the opinion that Mr. Stark is governed by work restrictions, which include: "avoid prolonged bending and lifting > 20 lbs.", which he attributes to the lumbar degenerative changes and L4-L5 stenosis. He opines that Mr. Stark does not have any work restrictions from the lumbar strain.

In addition, while Dr. Lennard does not believe the lumbar strain will require any additional medical care, he is of the opinion that Mr. Stark will require additional medical care for treatment of his lumbar spine and lower extremity complaints, including a CT myelogram and surgical intervention. In this regard, Dr. Lennard states, "He [Mr. Stark] may ultimately require surgical treatment for his non work related lumbar stenosis."

In his deposition, Dr. Lennard was questioned about the relationship of the work injury to Mr. Stark's presenting symptoms. In this context, Dr. Lennard indicated that he did not have any reason to believe Mr. Stark was exaggerating his symptoms and found he was using maximal effort. Additionally, Dr. Lennard agreed that Mr. Stark's loss of range of motion, and a 20 percent reduction in flexion and extension were due not only to his age and degenerative changes, but also to the work injury. Similarly, he also found nerve damage in the lower extremities, which he believed was coming from the nerve root at L4-L5. He found this to be "primarily" but not exclusively due to the stenosis.

Further, Dr. Lennard agreed that the work strain, or the stretching of the ligaments, can lead to inflammation around the nerve root, and can "aggravate that structure beyond the nerve root." And Dr. Lennard agreed that Mr. Stark had no radicular symptoms until after the injury of May, 2005.

#### Vocational Opinion

James England, M.Ed., CRC, performed a vocational evaluation of Mr. Stark on May 13, 2009. At the time of this evaluation Mr. England took a vocational and educational history of Mr. Stark, reviewed various medical records and performed a vocational examination of him. In light of this vocational evaluation, and considering the restrictions imposed by Dr. Volarich, Mr. England is of the opinion that Mr. Stark is unemployable in the open and competitive labor market.

In performing this vocational evaluation Mr. England noted that during the last 20 years of Mr. Stark's employment he was required to kneel, squat, reach, climb, push, pull and lift up to 100 pounds. Mr. England further noted that Mr. Stark lacked any previous experience working

with office machines, bookkeeping, inventory, shipping, receiving, scheduling or supervising. Although Mr. Stark enjoys certain transferable knowledge, Mr. England indicates that this transferable knowledge does not provide employment opportunity for Mr. Stark, insofar as such employment would be dependent on Mr. Stark enjoying computer skills, which he does not presently possess.

In addition, the vocational testing performed by Mr. England indicates that Mr. Stark is reading at the eighth grade level and scores at the sixth grade level in math. According to Mr. England, these test scores indicate that Mr. Stark would require a "great deal of remedial classes in order to try to get a GED." Further, considering the restrictions imposed by Dr. Volarich, Mr. England is of the opinion that Mr. Stark is limited to less than sedentary activity. In opining that Mr. Stark is unemployable in the open and competitive labor market, Mr. England offers the following explanation:

At the time I saw him he would have been sixty years old; that places him in the nearing normal retirement age as for as Department of Labor guidelines. He has a limited education; he has only six and a half or six and a quarter credits of high school education. His whole life or the vast majority really from 1975 on had been that of a carpenter; it certainly does not appear that he could go back to doing that. He really doesn't have any computer skills and hasn't done any sedentary to light work before. I thought considering the restrictions that were indicated by Dr. Volarich as well as Mel's description of his typical daily functioning I didn't see how he would be able to sustain even sedentary to light work. He had limited amounts of sleep, he was taking breaks during the day when trying to accomplish household tasks. He said he was reclining at times because of back pain. I think somebody functioning that poorly would not be able to go out and sustain himself in any regular job setting.

Mr. England thus finds Mr. Stark to be permanently and totally disabled and unable to find employment in the open job market.

On cross-examination, Mr. England admitted that the only restriction given by Dr. Volarich that would preclude work was the statement about needing to lie down. In this regard, Mr. England acknowledges that if Mr. Stark could "get through the day consistently without needing to recline, then there probably would be some things that he could do." Notably, at the time of his vocational evaluation of Mr. Stark, Mr. England did not realize that Mr. Stark was still doing the light duty construction work through March 2007. Mr. England thus acknowledged that the closer Mr. Stark came to working consistently 40 hours a week, the more likely it would be that he could still work.

Further, on cross-examination Mr. England indicated that if he excluded from consideration Dr. Volarich's restriction of allowing Mr. Stark to lie down, the other restrictions imposed by Dr. Volarich, together with Mr. Stark's age and educational background would continue to limit him to some type of service employment. Yet, Mr. England concedes, the restrictions (excluding having to lie down) would not preclude employment in "some kind of security job or some kind of cashiering job, parking lot cashier, something like that."

Mary Titterington, M.S., L.P.C., performed a vocational evaluation of Mr. Stark on February 5, 2010. At the time of this evaluation Ms. Titterington took a vocational and educational history of Mr. Stark, reviewed various medical records and performed a vocational examination of him. The vocational examination included three tests:

- Wide Range Intelligence Test. This is a standardized full-scale intelligence test that was used to determine Mr. Stark's current level of intellectual functioning. The results of this test places Mr. Stark in the Borderline to Below Average range of intellectual functioning.
- Wide Range Achievement Test-Revision IV. This is a standardized achievement test that was used to determine Mr. Stark's basic academic skills, which revealed Mr. Stark reading at the 8.1 grade level, spelling at the 6.7 grade level, and performing math skills at the 4.5 grade level. The results of this test places Mr. Stark in the Below Average range.
- Adult Basic Examination, Level III. This is a standardized achievement test designed for adults who have not completed a formal high school education but have attended more than nine grades. This test revealed Mr. Stark having a vocabulary equivalent to an 8.6 grade level, demonstrating reading comprehension equivalent to a 5.5 grade level, performing language skills equivalent to a 5.0 grade level, and performing spelling skills equivalent to a 5.9 grade level.

In addition, Ms. Titterington reviewed Mr. Stark's school transcripts, which reflected three intelligence scores, which were administered when he was in the sixth grade, eighth grade and ninth grade. The test administered in the sixth grade provided an IQ score of 75 and placed Mr. Stark in the Mentally Deficient to Slow Learner category of learning. The test administered in the eighth provided an IQ score of 91 and 93, which placed Mr. Stark in the average range. The test administered in the ninth grade provided an IQ score of 85, which placed Mr. Stark in the Slow Learner or Below Average range.

In light of this vocational evaluation, and considering the restrictions imposed by the various physicians, Ms. Titterington opines that Mr. Stark "is not able to return to his former job as a carpenter/laborer" and Mr. Stark "does not possess any transferable work skills." Further, if she accepts the restrictions imposed by Dr. Volarich, including the need to recline, Ms. Titterington opines that Mr. Stark is unemployable in the open and competitive labor market. However, if she considers only the restrictions imposed by Dr. Lennard, Dr. Harris and Dr. Acosta-Rodriquez, Ms. Titterington is of the opinion that Mr. Stark is employable in the open and competitive labor market.

Notably, when considering Dr. Lennard's restrictions, Ms. Titterington indicates that Mr. Stark could do unskilled, entry level positions such as a security guard and lumber yard sales clerk, where "they actually like to hire older people." Additionally, Ms. Titterington notes that there are some machine tender jobs that would be available to Mr. Stark, which allow the employee to alternate between sitting and standing. In discussing this issue, Ms. Titterington propounded the following testimony.

Q. Those unskilled jobs that fit in with Dr. Lennard's restriction, are they jobs that Mr. Stark could perform with the need to alternate between sitting and standing every 45 minutes to an hour as he did in your office?

A. Security, some of the security jobs, yes, definitely the security jobs, the majority of them would be yes on that. The order clerk jobs and the sales clerk jobs, no. Most of those people have got to stand throughout a work shift. So he would not be able to rotate positions at a 45-minute level. He would get a break, say, at two hours, but no, not at 45 minutes.

There are some lower level unskilled machine tender jobs that rotate positions every hour. 45 minutes, no, but they are at an hour level.

In examining Dr. Volarich's restrictions, Ms. Titterington acknowledges that Dr. Volarich's restrictions would eliminate work because of the need to lie down. However, she notes that if the need to lie down were eliminated and Mr. Stark could sit for close to 30 minutes at a time, he would be employable. In this context she discussed the restriction of rotating positions every 20-30 minutes and testified as follows:

Q. --- if you take that [need to lie down] away, is Mr. Stark going to be able to openly compete with others in the labor market?

A. It's one of those right on the borderline. The restriction right above the recumbent, "He is advised to avoid remaining in a fixed position for any more than 20 to 30 minutes at a time including both sitting and standing."

What I have found is that most employers will allow someone to do the rotating of positions at the 30-minute level. But if you to, say, the 15-20 minute level, it becomes too much what they call jackrabbiting, up and down too much that the person doesn't maintain their consistency of work and they tend to lose their concentration.

So if he can sit for more towards the 30, I'd say yes he could work with those restrictions, the same as with the other doctors. If it's 20 or less, then no, we would have a problem.

### **FINDINGS AND CONCLUSIONS**

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying workers' compensation case involving an accident occurring on May 10, 2005, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on May 10, 2005, which is substantive in nature, and not procedural, governs the adjudication of this case. Accordingly, in this context, several familiar principles govern this case.

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of

and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo.App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo.Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo.App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo.App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Brufat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo.App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo.App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo.App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575,577 (Mo.App., W.D. 1994); and *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650 (Mo.App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo.App. W.D. 1993).

In addition, in the context of this case and premised on the understanding that the work-related accident must constitute a substantial factor in the cause of the resulting medical condition or disability, an accident is recognized as being compensable "if it is clearly work related". In examining whether an injury is clearly work related, Section 287.020.2, RSMo. 1993, in pertinent part states:

An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

The term "injury" is defined in Section 287.020.3 RSMo., 1993. The legislation reads as follows:

3.(1) In this Chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

In this context the employee must establish a causal connection between the accident and the claimed injuries. *Thorsen v. Sachs Electric Company*, 52 S.W.3d 611, 618 (Mo.App. 2001), overruled in part on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. 2003). An injury is clearly work related, "if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor." *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. 1999). A substantial factor does not have to be the primary or most significant causative factor. *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App 1998), overruled in part on other grounds by *Hampton*, 121 S.W.3d at 226.

Notably, an accident may be both a triggering event and a substantial factor in causing an injury. Further, there is no "bright-line test or minimum percentage set out in the Workers' Compensation Law defining 'substantial factor.'" *Cahall at 372*.

## I. Accident & Injury

The parties readily acknowledge that on May 10, 2005, Thomas Construction was engaged in a commercial construction project involving the construction of a motel. This job included installation of a galvanized steel laundry chute, which came in separate pieces (weighing approximately 45 to 60 pounds) and required workers to fit the pieces together similar to a stove pipe. This installation process required at least two workers to position the two pieces together, allowing the top piece to drop slowly into the bottom piece. The workers would situate themselves at different levels. One worker would be situated on the first floor, while a second worker would be situated on the floor above.

Further, the parties stipulate that on May 10, 2005, while engaged in the installation process of installing a galvanized steel laundry chute, the employee sustained an injury by accident, which arose out of and in the course of his employment with the employer. This accident occurred while Mr. Stark was working with a coworker. Mr. Stark was situated on the second floor; the coworker was situated on the first floor. As the two men were holding on to the laundry chute from different levels, the chute slipped out of the coworker's hands, resulting in Mr. Stark holding the weight of the entire piece of metal, as well as being jerked forward, downward and against a wall to the right. Mr. Stark attempted to keep the laundry chute from falling to the ground and hitting a worker below by holding on to it. As he held the chute, it pulled him to his knees, and eventually he had to let go.

This incident caused Mr. Stark to experience immediate burning pain in his lower back and down his right thigh and lower extremity. Although the parties stipulate to Mr. Stark sustaining a compensable work injury involving an injury to the low back, the parties differ as to the nature and extent of the injury.

## II. Nature & Extent of Permanent Disability

The employee, relying principally upon the medical opinion of Dr. Koprivica, argues that the work injury caused Mr. Stark to suffer an aggravation of a preexisting and asymptomatic condition (central and foraminal stenosis of the lumbar spine, from L2-L3 through L4-L5), resulting in Mr. Stark suffering an injury in the nature of lumbar radicular syndrome. The employer and insurer, relying principally upon the medical opinion of Dr. Lennard, argue that Mr. Stark presents with two medical conditions – (1) underlying L4-L5 stenosis and widespread degenerative changes; and (2) lumbar strain. The employer and insurer contend that only the lumbar strain is compensable and relates to the work injury.

Notably, in explaining his opinion and diagnosis, Dr. Volarich testified that while the stenosis was pre-existing, this condition is “very tolerable until there is an injury.” However, he opined that once there is an injury,

[T]he degenerative conditions are now inflamed, aggravated, and made worse because they are causing inflammation around the nerve roots, around the spinal cord, and there’s now swelling that’s putting pressure on those nerves. There’s some minor instability because of this jerking type of injury that he had. And all of these combined are what’s causing him to now have the symptoms that he has.

Although Dr. Lennard apportions and separates the preexisting condition from the work injury, he offers medical opinion strikingly similar to Dr. Koprivica. When questioned about the relationship of the work injury to Mr. Stark’s presenting symptoms, Dr. Lennard indicated that he did not have any reason to believe Mr. Stark was exaggerating his symptoms and found he was using maximal effort. Additionally, Dr. Lennard agreed that Mr. Stark’s loss of range of motion, and a 20 percent reduction in flexion and extension were due not only to his age and degenerative changes, but also to the work injury. Similarly, he found nerve damage in the lower extremities, which he believed was coming from the nerve root at L4-L5. He found this to be “primarily” but not exclusively due to the stenosis.

Further, Dr. Lennard agreed that the work strain, or the stretching of the ligaments, can lead to inflammation around the nerve root, and can “aggravate that structure beyond the nerve root.” And Dr. Lennard agreed that Mr. Stark had no radicular symptoms until after the injury of May, 2005.

The adjudication of the nature and extent of this low back work injury requires consideration of the governing law, as it existed under the statute in effect on May 10, 2005. In this context several principles bear reprise.

A pre-existing but non-disabling condition does not bar recovery of compensation if a job-related injury causes the condition to escalate to the level of disability. *Conrad v. Jack Cooper Transport Co.*, 273 S.W.3d 49, 54 (Mo.App. W.D. 2008); *Higgins v. Quaker Oats Co.*, 183 S.W.3d 264, 271 (Mo.App. 2005). *See, also, Atkinson v. Peterson*, 962 S.W.2d 912, 917 where the court noted:

If substantial evidence exists from which the Commission could determine that the claimant’s pre-existing condition did not constitute an impediment to performance of claimant’s duties, there is sufficient competent evidence to

warrant a finding that the claimant's condition was aggravated by a work-related injury.

The "disability sustained by the aggravation of a preexisting nondisabling condition or disease caused by a work-related accident is compensable even though the accident would not have produced the injury in a person not having the condition." *Kelley v. Banta & Stude Constr. Co.*, 1 S.W.3d 43, 38 (Mo.App E.D.1999). An employer is liable for any aggravation of a preexisting asymptomatic condition caused by the primary injury. *Weinbauer v. Grey Eagle Distributors*, 661 S.W.2d 652 (Mo.App. 1983).

Further, it is sufficient to show only that the performance of usual and customary duties led to a breakdown or change in pathology. *Winsor v. Lee Johnson Const. Co.*, 950 S.W.2d 504, 509 (Mo.App. 1997). The worsening of a preexisting condition, i.e., an increase in the severity of the condition, or an intensification or aggravation thereof, is a "change in pathology." *Id.* at 509. "If substantial evidence exists from which the Commission could determine that the Claimant's preexisting condition did not constitute an impediment to performance of Claimant's duties, there is sufficient competent evidence to warrant a finding that the Claimant's condition was aggravated by a work-related injury." *Id.*

In the present case, prior to May 10, 2005, Mr. Stark presented with a preexisting condition involving central and foraminal stenosis of the lumbar spine, from L2-L3 through L4-L5. Yet, prior to the work injury this condition was not symptomatic and was not an impediment to Mr. Stark's ability to perform his job and engage in heavy physical labor. Similarly, prior to May 10, 2005, this preexisting stenosis or degenerative disease did not cause Mr. Stark to present with a level of disability. The work injury of May 10, 2005, however, caused the asymptomatic condition to become symptomatic, and despite receipt of extensive conservative medical treatment, Mr. Stark continues to suffer residual and severe lumbar and lower extremity pain.

Accordingly, after consideration and review of the evidence, and in light of applicable law, I find and conclude that the accident of May 10, 2005, caused a physical breakdown and change in pathology to Mr. Stark's low back. I further find and conclude that the accident of May 10, 2005, exacerbated the preexisting condition stenosis or degenerative disease, causing an acceleration of the deterioration of the preexisting degenerative disc disease, and further causing an asymptomatic low back condition to become symptomatic and painful with radicular pain. The work injury of May 10, 2005, caused Mr. Stark to suffer an injury in the nature of lumbar radicular syndrome and further caused Mr. Stark to suffer permanent disability.

#### Permanent Partial Disability v. Permanent Total Disability

Yet, in determining that Mr. Stark sustained an injury in the nature of lumbar radicular syndrome, which resulted in him suffering permanent disability, a questions remains – did the work injury cause Mr. Stark to be permanently and totally disabled, or merely result in him suffering permanent partial disability? The adjudication of this issue requires consideration of Section 287.020.7, RSMo, which states,

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

The test for determining permanent and total disability is whether a claimant is able to compete competently in the open labor market given his or her condition and situation. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 210 (Mo.App. E.D. 1999). “An inability to return to any employment” further defines total disability. The issue in making this determination is whether an employer, in the normal course of business would be reasonably expected to employ the individual in the usual course of business, and if the employee, in his present physical condition could be reasonably expected to perform the work for which he is hired. *Thornton v. Haas Bakery*, 858 S.W.2d 831, 834 (Mo.App. 1993).

The adjudication of this issue is not without difficulty. Notably, subsequent to suffering the work injury and during the course of receiving medical treatment for his low back, Mr. Stark was given a release to light duty work, and returned to work with Thomas Construction. The employer allowed Mr. Stark to work with accommodations, by allowing him to perform interior finish work, such as caulking, trim painting and replacing trim work on doors. This light duty work required Mr. Stark to caulk at floor level around toilets and bathtubs, underneath individual room air conditioner units and around windows. He would occasionally have to get on ladders to caulk or paint overhead.

Also, upon returning to work Mr. Stark occasionally worked reduced hours due to pain, and refrained from all heavy lifting, climbing, and heavy demand work. He continued to work light duty and his employer accommodated him by allowing him to change positions, sit down, take time off, and work at his own pace. Records from Thomas Construction indicate that after he returned to work in July 2005, Mr. Stark averaged 32.5 hours/week through the remainder of 2005, 36.4 hours/week in 2006 and 34.7 hours/week in 2007 through the end of March.

Mr. Stark continued to do this light duty work until March 30, 2007 when he quit his employment with Thomas Construction. According to Mr. Stark, he quit his employment with Thomas Construction because it was too painful. Further, according to Mr. Stark, the pain continued to worsen, progressing from burning low back pain to radiating pain, which rendered him unable to keep working. Additionally, Mr. Stark notes that he is unable to sleep through the night because of the pain; and he sleeps in a recliner in an attempt to obtain relief from the pain. And during the day he must rest or lie down in order to obtain relief from the pain.

Mr. Stark is 61 years of age. Certainly, a person might view Mr. Stark’s decision to quit his employment and to seek permanent total disability as a desire to avoid the demands of heavy physical labor and to obtain early retirement. However, I find Mr. Stark to be credible and accept as true his complaints of pain and reasons for terminating his employment with Thomas Construction. Mr. Stark’s work history and post-accident employment is reflective of a person having a strong work ethic, who enjoyed a very stable work history. I find and conclude that Mr. Stark possesses a strong work ethic and was willing to work with pain. Unfortunately, the pain became too much for him, rendering him unable to continue in his employment.

Whether Mr. Stark is unemployable in any employment, and not merely his employment with Thomas Construction, is dependent on the work restrictions to be imposed on him. The parties offer differing medical opinion on work restrictions, which govern and apply to Mr. Stark. After consideration and review of the evidence, I resolve the difference in medical opinion in favor of Dr. Koprivica, who I find credible, reliable and worthy of belief. The restrictions prescribed by Dr. Volarich include:

1. He is advised to avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks to an as needed basis.
2. He should not handle any weight greater than 15-20 pounds, and limit this task to an occasional basis assuming proper lifting techniques.
3. He should not handle weight over his head or away from his body, nor should he carry weight over long distances or uneven terrain.
4. He is advised to avoid remaining in a fixed position for any more than about 20-30 minutes at a time including both sitting and standing.
5. He should change positions frequently to maximize comfort and rest when needed including resting in a recumbent fashion.
6. He is advised to pursue an appropriate stretching, strengthening, and range of motion exercise program in addition to non-impact aerobic conditioning such as walking, biking, or swimming to tolerance daily.

The vocational experts testifying in this case agree that Mr. Stark cannot return to his previous job duties and he has no transferable skills. They further agree that Mr. Stark reads at the 8<sup>th</sup> grade level and that he struggled in school; and Mr. Stark's academic abilities and the lack of a GED, make him a poor candidate for retraining. More importantly, both vocational experts agree that if the restrictions imposed by Dr. Volarich, which include Mr. Stark's need to switch positions every 20-30 minutes and his need to lie down during the day, govern, Mr. Stark is unemployable in the open and competitive labor market.

After consideration and review of the evidence, I find and conclude that Mr. Stark is governed by the work restrictions imposed by Dr. Volarich. I further find and conclude that during the day Mr. Stark is governed by the need to rest and lie down. Accordingly, in light of the foregoing, I find and conclude that as a consequence of the accident of May 10, 2005, and the resulting injury in the nature of lumbar radicular syndrome, Mr. Stark is unemployable in the open and competitive labor market, and is thus permanently and totally disabled.

Although Mr. Stark suffered from a preexisting condition, this preexisting condition did not rise to the level of disability prior to the work injury. The work injury of May 10, 2005, considered alone, renders Mr. Stark permanently and totally disabled.

Therefore, in light of the foregoing, the employer and insurer are ordered to pay to the employee, Melvin Stark, the sum of \$355.30 per week for the employee's lifetime. The payment

of permanent total disability compensation by the employer and insurer is effective as of March 30, 2007, when Mr. Stark ceased working and had effectively reached maximum medical improvement.

### III. Medical Care

The evidence is supportive of a finding that the employee is entitled to future medical care in order to cure and relieve him from the effects of the work injury of May 10, 2005. Section 287.140.1, RSMo states:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Treatment must be provided even if while comforting and relieving the employee's pain the underlying condition cannot be cured. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271 (Mo. App. 1996).

The threshold for determining if additional treatment is needed is reasonable probability. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986). Section 287.140.1, RSMo. does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992). Further, the employer and insurer may be ordered to provide medical treatment to cure and relieve an employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. *Hall v. Spot Martin*, 304 S.W.2d 844, 854-55 (Mo. 1957).

Three physicians (Dr. Ceola, Dr. Lennard and Dr. Volarich) opine that Mr. Stark is in need of additional medical treatment. Notably, on September 20, 2007, Dr. Ceola examined Mr. Stark and recommended that he undergo a CT/Myelogram and then return for follow-up appointment. The employer and insurer, however, did not authorize the CT/Myelogram and did not authorize any additional treatment for Mr. Stark. Subsequently, independent medical examinations were performed by Drs. Volarich and Lennard.

Dr. Volarich opines that as a consequence of the work injury, Mr. Stark will require additional medical care in order to cure and relieve him from the effects of the injury. Dr. Volarich recommends prescription medications, physical therapy and pain management (inclusive of epidural steroid injections, foraminal nerve root blocks, triggers pint injections, radiofrequency ablations, TENS units, and other similar treatments). Additionally, Dr. Volarich recommends that Mr. Stark follow-up with a spine surgeon for consideration of surgical treatment, based on presenting symptomology.

Dr. Lennard opines that Mr. Stark will require additional medical care for treatment of his lumbar spine and lower extremity complaints, including a CT myelogram and surgical intervention. Dr. Lennard recognizes that Mr. Stark may ultimately require surgical treatment for the lumbar stenosis.

I find that Mr. Stark's testimony of the work related injury, how it occurred, and the presence of ongoing symptoms are credible. I also find that the employee, Melvin Stark, has sustained his burden of establishing that the work injury is "a substantial factor" in causing the lumbar radicular syndrome, and the present disability. I find he has also met his burden in showing a need for ongoing treatment to cure and relieve him from the effects of the injury.

Although Drs. Ceola and Lennard relate the need for treatment to the underlying preexisting stenosis, I find and conclude that the condition for which they recommend treatment is causally related to the aggravation caused by the work injury. Accordingly, it is reasonably probable that as a consequence of the work injury of May 10, 2005, the employee will need additional medical treatment in order to cure and relieve him from the effects of the injury.

Therefore, after consideration and review of the evidence, and taking into consideration that this case is evaluated under the substantive law existing at the time of the May 10, 2005, accident, and finding that at the time of the May 10, 2005, accident, Mr. Stark was asymptomatic and not governed by any work restrictions relative to his lumbar spine, I find and conclude that Mr. Stark is entitled to future medical care. The employer and insurer are ordered to provide future medical care consistent with the medical opinions and recommendations of Drs. Ceola, Lennard and Volarich.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable. The award is subject to modifications as provided by law.

Made by: /s/ L. Timothy Wilson  
 L. Timothy Wilson  
*Administrative Law Judge*  
*Division of Workers' Compensation*  
 (Signed September 9, 2010)

This award is dated and attested to this 13<sup>th</sup> day of September, 2010.

/s/ Naomi Pearson  
 Naomi Pearson  
*Division of Workers' Compensation*