

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

Injury No.: 05-125665

Employee: Larry Underwood  
Employer: High Road Industries, LLC  
Insurer: Firstcomp Insurance

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 24, 2011. The award and decision of Administrative Law Judge Victorine Mahon, issued May 24, 2011, 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 10<sup>th</sup> day of November 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

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

\_\_\_\_\_  
CONCURRING OPINION FILED  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

Employee: Larry Underwood

**CONCURRING OPINION**

I write separately to disclose the fact that I did not participate in the October 26, 2011, oral argument in this matter. I have reviewed the evidence, read the briefs of the parties, and considered the whole record. I concur with the decision of the majority of the Commission.

---

Curtis E. Chick, Jr., Member

## **AWARD**

Employee: Larry Underwood

Injury No. 05-125665

Dependents: N/A

Employer: High Road Industries, LLC

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: N/A

Insurer: Firstcomp Insurance

Hearing Date: March 24, 2011

Checked by: VRM/dlb

### **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: November 28, 2005.
5. State location where accident occurred or occupational disease was contracted: Taney 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: Claimant was installing a radiator in a cement truck when he fell from a ladder.
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: \$32,337.50.

16. Value necessary medical aid paid to date by employer/insurer? \$118,158.92.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$832.22.
19. Weekly compensation rate: \$365.08 (PPD) / \$554.81 (PTD).
20. Method wages computation: By Agreement

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

For accrued Permanent Total Disability benefits  
The sum of \$554.81 per week for 141 3/7 weeks  
(7/8/2008 through 3/24/11, the date of hearing):

**TOTAL: \$78,465.99**

22. Second Injury Fund liability: None.
23. Future requirements awarded:

Employer shall pay Permanent Total Disability benefits in the amount of \$554.81, beginning March 25, 11, and continuing for the remainder of Claimant's life.

Employer also shall provide such medical treatment as is necessary to cure and relieve the effects of the work injury, as discussed in the Award. Employer shall have the right to select the physician.

This Award is subject to modification and review as provided by law.

The Award is subject to a lien in the amount of 25 percent of all amounts awarded herein as a reasonable fee for necessary legal services rendered to claimant in favor of attorney:  
John Wise.

**FINDINGS OF FACT AND RULINGS OF LAW:**

Employee: Larry Underwood

Injury No. 05-125665

Dependents: N/A

Employer: High Road Industries, LLC

Additional Party: N/A

Insurer: Firstcomp Insurance

Hearing Date: March 24, 2011

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: VRM/ps

**PRELIMINARIES**

The undersigned Administrative Law Judge conducted a hearing in this case on March 24, 2011. Larry Underwood (Claimant) appeared with his legal counsel, John Wise. High Road Industries, LLC, and its insurer, First Insurance (Employer/Insurer), appeared by Attorney Joseph Ebbert. The Second Injury Fund is not a party.

**STIPULATIONS**

1. On November 28, 2005, Claimant sustained an accident in Taney County, Missouri that arose out of and in the course of his employment with High Road Industries, LLC. On that date, Claimant was covered by, and High Road Industries, LLC, was subject to, the Missouri Workers' Compensation Law.
2. High Road Industries, LLC, was fully insured by First Insurance.
3. The claim was filed timely, jurisdiction is appropriate, Employer received notice, and the parties consent to venue in Springfield, Missouri.
4. Employer paid medical benefits in the amount of \$118,158.92 and temporary total disability in the amount of \$32,337.50.
5. Claimant's average weekly wage was \$832.22, yielding a PPD rate of \$365.08 and a PTD and TTD rate of \$554.81.
6. If there is any outstanding balance for mileage expenses and prescription drugs, as reflected in Exhibits K and L, Employer/Insurer will pay the balance.

### **ISSUES**

The parties stipulated that the following were the sole issues for this hearing:

1. Is Claimant's current condition medically and causally related to the work accident?
2. What is the nature and extent of any permanent disability?
3. Is Claimant entitled to future medical treatment?

### **EXHIBITS**

The following exhibits were offered by Claimant and admitted:

- A. Report of Injury
- B. Medical Records – Cox Medical Center
- C. Medical Records – Orthopaedic Specialists of Springfield, P.C.
- D. Medical Records – Work Evaluations and Ergonomic Assessments, Inc.
- E. Medical Records – Skaggs Clinics
- F. Medical Records – St. John's Clinic
- G. Medical Records – Tri Lakes Diagnostic Technologies
- H. Curriculum Vitae – Phillip Aaron Eldred
- I. Vocational Evaluation – Phillip Eldred
- J. Addendum Report – Phillip Eldred
- K. Mileage Expenses
- L. Prescription Drug Expenses

The following exhibits were offered by Employer and admitted:

1. Deposition – Dr. Paul Olive, with attachments
2. Deposition – Terry Cordray, with attachments
3. Deposition – Larry Underwood
4. Certified Records – Tri-Lakes Diagnostic Technologies

### **FINDINGS OF FACT<sup>1</sup>**

The only live witnesses at the hearing were Claimant and Phillip Eldred, a vocational consultant. All other testimony was offered through deposition.

Claimant was born on June 22, 1959. He is currently 51 years old. He has a limited educational background and work history. Claimant finished the 10<sup>th</sup> grade. He never obtained a

---

<sup>1</sup> All objections not previously ruled upon are now overruled. Any marks in the exhibits were made prior to their receipt into evidence and were not made by the Administrative Law Judge.

GED because prescreening tests determined that he would need significant remedial instruction in math, history and spelling. Claimant did not believe he could accomplish such remedial education. His only formal vocational training was as a diesel mechanic in the U.S. Army.

Both vocational experts in this case administered vocational testing (WRAT-3 test) to Claimant. His test scores generally were consistent with his educational background. Claimant has a below-average Intelligence Quotient of 81.

Following his military service, Claimant worked from 1983 through 1994 at Shadd Trucking, in Florida. He worked as a truck mechanic and as a local delivery driver. Eighty percent of his time was spent as a mechanic. The remainder of his time he worked as a delivery driver. His mechanic work was heavy, requiring him to lift tires weighing up to 120 pounds.

Claimant next worked at Pride Trucking, from 1994 to 1999, in Florida. Claimant again worked as a mechanic and local delivery driver, with similar heavy lifting duties.

Claimant then moved to Missouri. He began working for White River Ready Mix (High Road Industries) in 1999, located in Branson. This was work similar to that performed at Shadd Trucking and Pride Trucking. In 2001, he began working part-time for the Branson School District at the bus barn, while also continuing his full-time job at White River Ready Mix. He worked 10 to 12 hours per week as a mechanic and occasional bus driver for the bus barn. In March 2005, he left employment at Branson bus barn and worked exclusively at White River Ready Mix through December 2005.

### **The Accident**

On November 28, 2005, while standing on a ladder to install a radiator in a truck at White River Ready Mix, the step on which Claimant was standing broke. Claimant fell, landing on a concrete surface on his right side and right hip. He experienced immediate pain, burning and

throbbing in his low back and right hip. He had radicular complaints into his right foot. He subsequently received a substantial course of treatment through his employer and its insurer.

This was not the first time that Claimant had experienced low back complaints. In 2003, Claimant received treatment from Dr. Diane Cornelison, including an MRI of the lumbar spine and epidural steroid injections. Claimant maintained he had a complete recovery from those complaints. He described the period from March 2005 and leading up to November 28, 2005 as follows: he had no problems in his lower back, was taking no medications for lower back complaints, and had no problems performing his job at White River Ready Mix.

On cross-examination, Claimant was asked about a record entry of December 8, 2005 from St. John's Urgent Care. That entry contained the following history: "fell off a ladder in the shop twisted and caught himself before hitting the ground, fell off steps at work one month prior." Claimant explained that about one month prior to the December accident, Claimant was descending some steps at work when a step collapsed, causing his leg to go through the step. The incident resulted in no low back complaints at the time and no medical attention was needed.

### **Medical Treatment**

Dr. Olive first examined Claimant on March 7, 2006, recording this history:

[Claimant] "relates that on 11/28/05 he fell off of a ladder. He was standing on approximately the third step. This occurred while he was at work for Superior Ready Mix. Since that time, he has been having right leg pain, numbness and tingling into his foot. This continues to get worse for him . . . . He relates that his pain begins in his right hip and buttock area and extends down the posterior aspect of his right leg into his ankle. He has numbness and tingling on the lateral side of his foot . . . . It is bothering him to the point where this is causing him problems with his sleep. He is also having difficulty with walking and feels like his right leg "drags behind him."

Dr. Olive diagnosed "SI radiculopathy" and initiated a course of conservative therapy. He eventually determined that surgery was appropriate, and performed a right L4-5 laminotomy and L5 nerve root decompression, right L-5-S1 laminotomy, and right S1 nerve root

decompression and discectomy on April 24, 2006 at Cox Medical Center. The surgery provided only limited relief. Claimant continued to experience low back pain at the level of the belt line, and throbbing pain down his right leg and outside of his right calf extending into his right foot, with the outer three toes being numb.

Dr. Olive ultimately released Claimant from treatment, for the first time, on September 1, 2006. His note indicates:

I discussed releasing the patient with no restrictions and therefore allowing him to seek a job that he thinks he can do vs. assigning some estimate of restrictions and letting him try and find a job under those restrictions. He would rather be released with no restrictions, inherently knowing that he does have some restrictions and using his own common sense when he goes out to find another job in the job market. I think that this is probably the most reasonable route to take at this time. Hopefully with time, he will get stronger and be able to do more and more.

Claimant testified that at the time of his initial release from Dr. Olive's treatment, he continued to experience significant complaints involving his low back and right leg. He still experienced a constant pain in his low back and constant pain down his right hip, the outside of his right calf, and extending into his right foot, with the outer three toes being numb.

Claimant thereafter sought treatment on his own with Dr. Diane Cornelison. He also attempted to return to work at Big O Tires in the spring of 2007. He worked at that facility changing auto tires, but was unable to work longer than two weeks because of his ongoing low back and right lower extremity complaints. Claimant admitted that he had not attempted to find lighter-type work. He has not worked since his failed attempt at Big O Tires in the spring of 2007.

Claimant was able to return to Dr. Olive on August 23, 2007. At that time, Dr. Olive noted the following:

He states that his radicular pain is worse down his right lower extremity and into his ankle. His parathesias are worse. He is having more back pain. . . . He feels that his symptoms have progressed and are now much worse than when he was last seen by me. He would like to have something done in an attempt to lead a more normal life.

Dr. Olive diagnosed “radicular pain secondary to epidural fibrosis from his previous surgery.”

He found Claimant to be a candidate for a spinal cord stimulator. Dr. Olive performed surgery on February 25, 2008, at Cox Medical Center, to insert a permanent Medtronic spinal cord stimulator. Dr. Olive’s diagnosis at the time of that surgery was “failed back syndrome and chronic radicular pain in right lower extremity.”

Claimant has a 40 percent improvement in low back pain and right leg pain as a result of the spinal cord stimulator. Dr. Olive released Claimant from treatment, again, on July 8, 2008, at maximum medical improvement, and indicated that he did “not think that he can work.”

### **Current Complaints**

Claimant has ongoing complaints involving his low back and right leg. He experiences a constant pain across his lower back, slightly below the belt line, and throbbing pain in his right hip extending along the outside of his right hip and right calf and down into his foot. The outer three toes of his right foot are still numb. This pain is nagging and constant, ranging from a level of four to six on a typical day. He has difficulty sleeping at night due to the pain. He is able to sit or stand, but must alternate positions after approximately 30 minutes. He can walk moderate amounts, but must then sit down and stretch his leg to relieve his pain. He described difficulty in climbing stairs.

Because of his pain, Claimant no longer engages in hobbies that he enjoyed before November 28, 2005. He attempted but has been unable to fish because of back pain. He can no longer play softball or attend stock car races because it is too painful for him to sit on the bleachers. He is able to mow his yard a “little” while using a riding lawn mower.

Claimant takes hydrocodone and tramadol every four to six hours, which is prescribed by a physician at the Veterans Administration. At his deposition he said he had no complaints of fuzziness. At the hearing 18 months later, Claimant said the medications started to give him problems approximately six to eight months before the hearing.

Claimant testified that he drives short distances. But, Claimant understood the spinal stimulator could send false signals to his right lower extremity. To avoid this, Claimant turns off the stimulator to drive. He indicated that the pain is significant when he does this. There was evidence that when Claimant traveled for a medical examination, he drove about 30 miles within the city, but his wife drove otherwise. Claimant does not believe he can work.

### **Work Evaluations**

Claimant underwent two functional capacity evaluations at Work Evaluations and Ergonomic Assessments. The evaluations were administered by Nancy Dickey on August 29, 2006 and December 5, 2008. The results of both of these tests were discussed extensively by Drs. Olive and Parnet, and Mr. Cordray and Mr. Eldred. In her last report (Exhibit D), Ms. Dickey indicated that Claimant could perform light/medium work. She noted, however, that Claimant needed to change positions from sitting or standing after an hour, only "very occasionally" stair climb, and avoid frequent lifting.

### **Medical Opinions**

**Dr. Paul Olive** is a board certified orthopedic surgeon and the treating physician in this case. He opined that Claimant suffers a 13 percent permanent partial disability to the body as a whole for the injury of November 28, 2005. He also assessed the following final restrictions:

- A. Reaching was not restricted, squatting was occasional, bending was occasional, sitting-one hour that could be resumed following positional changes, standing-one hour, can be resumed following positional changes, walking-moderate to long distances, stair climbing-very occasional, balance-protective heights, crawling-very occasional, leg lift-30 pounds,

carrying-50 pounds, lifting his shoulder-30 pounds, overhead lifting-20 pounds, work level was light/medium.

Q. Based upon these restrictions were you of the belief based upon a reasonable degree of medical probability at this point in time, December 2008, as the ability of him to return to the labor market in some capacity?

A. Yes.

Q. And what was that, Doctor?

A. That he was able to return with the restrictions noted on the December 5<sup>th</sup>, 2008, functional capacity evaluation.

Q. Was he still unable to return to work as a diesel mechanic though?

A. That's correct.

(Deposition of Dr. Olive, Ex. 1, p. 18-19).

Dr. Olive clarified the statement found in his records that Claimant was unable to return to work. He intended that Claimant could not return to work as a diesel mechanic (Deposition of Dr. Olive, Ex. 1, p. 20). Dr. Olive agreed, however, that he would defer to a vocational expert to determine Claimant's employability in the open labor market factoring in his work history, transferable skills and educational background. Dr. Olive admitted that he authorized a handicapp sticker for Claimant. The reason for the authorized sticker was due to an inability to walk more than 50 feet. He said he also would not have completed this form or a disability form for Claimant, which he did, unless it appropriate to do so.

Dr. Olive said the accident of November 28, 2005, was the prevailing factor in the need for the initial surgery he performed. He said Claimant now suffers from epidural fibrosis, which he defined as "scar tissue that is a result of surgery." He opined that the epidural fibrosis was a direct result of the surgery he performed on April 24, 2006. When Dr. Olive examined Claimant on August 23, 2007, he concluded Claimant's radicular pain was secondary to epidural fibrosis

from the initial surgery he performed (Deposition of Dr. Olive, Ex. 1, p. 34-35). Dr. Olive thereafter performed a laminectomy at the T-10 level to install the stimulator.

Dr. Olive testified that any restrictions he assessed were attributed solely to the accident of November 28, 2005. He also explained that he found no evidence of symptom magnification during the two years he treated Claimant. He found Claimant's complaints to be consistent with the nature of the injury. When Dr. Olive discharged Claimant from his care in February 2008, Dr. Olive used the diagnosis of a "failed back syndrome." Dr. Olive explained that the diagnosis means the patient failed to improve with surgery, and there does not appear to be another solution from a surgical standpoint.

**Dr. Alan Parmet** examined Claimant on January 15, 2009. Dr. Parmet is not an orthopedic surgeon; rather, he is board certified in occupational and aerospace medicine. He said he testifies on behalf of both claimants and the defense. A significant portion of his practice is clinical, and includes teaching and research.

Dr. Parmet testified, with a reasonable degree of medical certainty, that Claimant had no lower back condition existing prior to November 28, 2005 which resulted in any permanent disability or which constituted a hindrance or obstacle to employment or reemployment. He opined that the accident of November 28, 2005, was the prevailing factor in causing a herniated nucleus pulposus at L5-S1 and L5-S1 radiculopathy on the right, resulting in an impairment of 40 percent to the body as a whole. He acknowledged the difference between impairment and disability, and testified that given Claimant's background, he was skeptical that the impact of Claimant's impairment was going to lead to anything other than total disability. Following his examination of Claimant, Dr. Parmet concluded that Claimant was limited to the sedentary exertional level. After reviewing Ms. Dickey's FCE report of December 2008, he opined that

Claimant was limited to the light exertional level, but Dr. Parmet did not feel that Claimant could sustain that on a continuing basis. Dr. Parmet explained:

A. Factoring in the functional capacity evaluation, I noted that he was able on a static basis to work at the light level of labor and he met that standard. He didn't meet the medium standard. I'm still concerned that he was taking narcotics and another analgesic, the Tramadol, for breakthrough pain, the incomplete relief from the spinal cord stimulator. So I had to question whether he could sustain the light level of labor even though he meets the physical standard for the short term.

Mr. Eldred's evaluation suggested that he was not going to be able to find any employment vocationally at the lighter sedentary level of labor and that leaves him permanently and totally disabled.

Q. So was that your conclusion as well?

A. Yes.

Q. And was it your opinion that the total disability results solely because of the injury of November 28, 2005?

A. That's correct.

(Deposition of Dr. Parmet, Ex. A, p. 32).

In discussing Claimant's current condition, Dr. Parmet indicated that persons with spinal cord stimulators rarely return to work. He said the stimulator improves a patient by providing relief, but does not correct the problem. He believed Claimant's chronic pain has the potential to disrupt concentration, and will interfere with anything academically.

Dr. Parmet also described a number of significant findings on his physical examination. He noted spasms in the lumbar spine, a significant loss of range of motion, decreased muscular strength in the right calf musculature, and a decreased sensation of the right L5-S1 dermatomes which he identified as an objective finding.

### **Future Medical**

Dr. Olive disagreed with the dosage of medication that Claimant currently was taking (hydrocodone and Tramadol), but as the following colloquy indicates, Dr. Olive would not rule out the use of some prescription medication.

Q. Okay. Now, also with respect to prescriptions for medicine, you indicated you gave him a six month refill of tramadol in May of '09, and you wouldn't have done so if you didn't feel it was appropriate?

A. That's correct.

Q. And the prescription for that medication was necessitated by the accident of November 28, 2005; correct?

A. Yes.

Q. And likewise the refills of hydrocodone, you wouldn't have issued those had you not felt it appropriate?

A. That's right.

Q. And that refill was necessitated by the accident of November 28, 2005; true?

A. True.

Q. And I think you earlier indicated to determine whether or not he continues to need medication and the amount he needs, you need to see him again currently; correct?

A. Yes.

Q. So you wouldn't necessarily say it was inappropriate for him to take medication, but to determine that definitively you need to see him again?

A. Correct.

(Deposition of Dr. Olive, Ex. 1, pp. 26-27).

As to the spinal stimulator, Dr. Olive noted in his preoperative report of February 21, 1008, that the "battery may need to be changed periodically." He also acknowledged that Claimant experienced a post surgical infection following the insertion of the spinal stimulator and that there is the potential for recurring infection.

Dr. Parmet opined that the accident of November 28, 2005, and resultant injury, was the prevailing factor in the need for future medical treatment. While Dr. Parmet did not like to prescribe on a long-term basis the types of medication that Claimant is taking, he recommended

that Claimant needed some form of pain medication indefinitely. Dr. Parmet also discussed the need for a physician to monitor the spinal cord stimulator.

- A. The stimulator has to have the battery changed and depending on the model, it's usually about every two years . . . the stimulator doesn't have to be replaced itself, but the battery does have to be changed out and that's a surgical procedure done as an outpatient.

(Deposition of Dr. Parmet, Ex. A, pp. 16-17).

### **Vocational Opinions**

Terry Cordray conducted a vocational evaluation of Claimant on June 29, 2009. Mr. Cordray concluded that Claimant was capable of performing light jobs within the functional capacity evaluation, or even sedentary jobs within the restrictions of Dr. Parmet.

On cross-examination, Mr. Cordray noted that Claimant was cooperative and forthright throughout his interview, and made good effort on all tests administered to him, including vocational testing. Mr. Cordray observed that Claimant was required to alternate between sitting and standing after about 30 minutes throughout the testing and interview. Mr. Cordray's evaluation and interview took approximately four hours. He agreed that if Claimant needed to alternate sitting and standing at 30-minute intervals, he would be limited to jobs that allowed him the opportunity to sit and stand. He agreed that such a requirement has a negative impact on employability. He also agreed that a 10<sup>th</sup> grade education negatively impacts employability. He agreed that Claimant's I.Q. of 81 indicates that Claimant is unlikely to benefit from any formalized training setting.

Mr. Cordray was also questioned about the impact of a restriction of walking no more than 50 feet. He agreed that such limitation would restrict the jobs Claimant could perform. These would be limited to more sit-down types of jobs, such as a cashier, a ticket taker, or ticket seller. Mr. Cordray specifically noted that there were ticket taker positions available at multiple shows in Branson.

Mr. Cordray admitted that he had not reviewed the deposition of Dr. Olive, nor was he aware of the foregoing restrictions imposed by Dr. Olive. Mr. Cordray's vocational assessment was based on the physician's characterization of Claimant's restrictions at the sedentary or light exertional level. He did not examine the restrictions in isolation to assess the impact on the appropriate exertional level or employability.

**Phillip Eldred** also performed a vocational evaluation of Claimant. Mr. Eldred believed it was important to review deposition testimonies from treating and examining physicians because they often elaborated on restrictions they had assessed at the time of their deposition. In this case, he considered the restrictions discussed by Dr. Parmet and Dr. Olive in their deposition testimony to be their final restrictions. Mr. Eldred explained that when reviewing the restrictions assessed by treating and examining physicians, it was essential to look at individual restrictions assessed by those doctors rather than their characterizations of those restrictions as, for example, light or sedentary exertional levels. Mr. Eldred appears to be the only vocational expert to have performed that form of analysis of the restrictions.

Mr. Eldred considered the results of the two FCEs performed by Nancy Dickey in August 2006 and December 2008, and considered the results of the 2008 FCE to be the final set of restrictions discussed by Ms. Dickey given that it occurred after all of Claimant's treatment regarding the occupational injury had been concluded. Mr. Eldred thought that Dr. Olive had essentially adopted the restrictions found by Nancy Dickey following the FCE she performed in December 2008. He believed it was significant that Ms. Dickey and Dr. Olive had concluded that Claimant was required to alternate sitting and standing. Mr. Eldred opined that such restrictions alone placed Claimant in the less than sedentary exertional level, which would make him unemployable on the open labor market.

Mr. Eldred also examined Ms. Dickey's opinion regarding Claimant's lifting ability. Mr. Eldred said the lifting restrictions identified by Ms. Dickey alone placed Claimant in the sedentary exertional level. At the sedentary level, however, Claimant still could not perform any of his prior work jobs, and he has no transferable skills. Mr. Eldred concluded that Claimant was permanently and totally disabled from the work accident.

On cross-examination, Mr. Eldred admitted that Claimant's knowledge of automotive parts could transfer to another job, but he also noted that most of the jobs identified by Mr. Cordray fit in the light to medium category rather than sedentary. Mr. Eldred emphasized that Claimant's need to alternate sitting and standing is a major problem in working.

### **Credibility Assessment**

Despite Employer/Insurer's effort to paint Claimant as not credible, I find Claimant to be particularly credible. I agree with Dr. Olive that this individual is not a malingerer. I generally find both examining physicians to be credible, but I find Dr. Parmet more persuasive as to the extent of Claimant's disability. Dr. Olive is a respected board certified orthopedic surgeon and treating physician. But, he appears to have simply adopted the report of Nancy Dickey as to physical restrictions and limitations. Based on the whole record, I believe Claimant's physical limitations are more severe than those reported in the FCE. As to the vocational opinions, I find Mr. Eldred credible and more persuasive in this case.

## **CONCLUSIONS OF LAW**

### **Medication Causation**

The record clearly demonstrates that the accident on November 28, 2005, was the prevailing factor in causing Claimant's injury, need for treatment, and resulting disability. Both Dr. Olive and Dr. Parmet opined that the accident of November 28, 2005, was the prevailing factor in causing injury to Claimant's lower back and necessitating the medical treatment he

underwent for that injury. They both opined that all restrictions they assessed were attributed solely to the injury of November 28, 2005. Dr. Parmet also testified, with a reasonable degree of medical certainty, that Claimant had no lower back condition existing prior to November 28, 2005 which resulted in any permanent disability or which constituted a hindrance or obstacle to employment or reemployment.

While Claimant had fallen through a step at work a short time prior to the work accident of November 28, 2005, there is simply no evidence to attribute any significance to that incident. Claimant credibly testified that he was taking no medication, and was having no difficulty performing his duties at White River Ready Mix at the time of his November 28, 2005 injury.

### **Future Medical Treatment**

Section 287.140.1 RSMo 2000, entitles a worker to medical treatment as may be reasonably required to cure and relieve the effects of the injury, including future medical treatment. While Claimant has the burden of proof, he need not prove the need with absolute certainty. It is sufficient if the evidence shows by “reasonable probability” that he is in need of additional medical treatment by reason of the work-related accident. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo. App. E.D. 1997). Treatment to relieve the effects of the injury is appropriate even if the condition is not expected to improve. *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 270 (Mo. App. S.D. 2004).

Dr. Olive did not rule out the need for medical treatment by way of medication, although he questioned the amount of medication being provided to Claimant through the Veterans Administration. Dr. Olive simply would not provide a definitive opinion without having had the opportunity to see Claimant again. Dr. Parmet thought medication was appropriate, although he might prescribe something other than what Claimant was taking. Further, Dr. Parmet believed Claimant needed to be monitored by a physician with respect to the spinal stimulator, noting that

batteries may need to be replaced at some point. Dr. Olive's medical records concur that battery replacement is needed.

I conclude that based on the evidence presented, Claimant has demonstrated the need for future medical treatment. Employer/Insurer shall provide future medical treatment to cure or relieve the effects of the work-related injury including but not limited to, regular monitoring of the spinal stimulator and other such pain management as is deemed appropriate by a physician chosen by Employer/Insurer.

### **Permanent Total Disability**

Mr. Eldred explained that the restrictions assessed by Ms. Dickey and Dr. Olive that Claimant must alternate sitting and standing, in isolation, placed Claimant in the less than sedentary exertional level. Mr. Eldred explained that such restriction, in isolation, renders Claimant unemployable and permanently and totally disabled. That restriction relates solely to the injury of November 28, 2005. While Mr. Eldred analyzed individual restrictions assessed by physicians or Ms. Dickey's FCE, Mr. Cordray simply used the doctors' characterization of restrictions as light or sedentary in arriving at his conclusions. He did not address the restriction that Claimant alternate sitting and standing imposed by Dr. Olive and Nancy Dickey.

But even setting aside the need to alternate positions, Mr. Eldred credibly explained that if Claimant could walk no more than 50 feet without resting, and Ms. Dickey's restriction related to frequent lifting, were sufficient to place Claimant in the sedentary exertional level. Mr. Eldred said even at that level, Claimant still is unemployable on the open labor market given all of the factors in this case. I agree.

"Total disability means the inability to return to any reasonable employment....It does not require that the claimant be completely inactive or inert [citations omitted]." *Smith v. Richardson Bros. Roofing*, 32 S.W.3d 568, 573 (Mo. App. S.D. 2000). Here, Claimant is a man

in his 50s who is unable to return to his past occupations. He has few, if any, transferable job skills. He has no GED, below average intelligence, and would have difficulty retraining due to concentration problems. These concentration problems arise because of documented permanent low back pain and right radiculopathy from epidural fibrosis. Claimant testified that the narcotic medication he was taking also caused him cognitive problems. Moreover, Claimant is unable to drive long distances, he needs to vary his positions, and limit his walking and lifting. Moreover, there is absolutely no doubt in this Administrative Law Judge's mind that Claimant is a credible individual and is not malingering. He tried, but made a failed attempt, to return to the only type of work he knows. He is permanently and totally disabled.

Dr. Olive found Claimant to be at maximum medical improvement as of July 8, 2008. Beginning that date, through the date of hearing, Claimant is entitled to past 141 3/7 weeks of Permanent Total Disability at the weekly benefit rate of \$554.81, for a total of \$78,465.99. He thereafter is entitled to weekly benefits at the rate of \$554.81 for the remainder of his life, subject to modification and review as provided by law.

Claimant's attorney, John Wise, is awarded 25 percent of all past and future weekly benefits as a reasonable fee for necessary legal services provided to Claimant. This fee shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Date: May 24, 2011

Made by:

/s/ Victorine Mahon  
Victorine Mahon  
Administrative Law Judge  
Division of Workers' Compensation

A true cop: Attest:

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