

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

Injury No.: 01-013252

Employee: Phillip Wheelington
Employer: McBaine Contracting Co.
Insurer: Missouri Employer's Mutual Insurance
Date of Accident: January 24, 2001
Place and County of Accident: St. Charles County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 6, 2007. The award and decision of Administrative Law Judge Grant C. Gorman, issued February 6, 2007, 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.

This award also is subject to a lien in favor of the Division of Child Support Enforcement.

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

Given at Jefferson City, State of Missouri, this 27th day of June 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Phillip Wheelington

Injury No.: 01-013252

Dependents: None

Employer: McBaine Contracting Co.

Additional Party: None

Insurer: Missouri Employer's Mutual Insurance

Hearing Date: August 23, 2006

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

Checked by: GCG/lm

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: January 24, 2001
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was moving a refrigerator up some stairs.
12. Did accident or occupational disease cause death? No Date of death? Not Applicable
13. Part(s) of body injured by accident or occupational disease: Low back, depression.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to-date for temporary disability: \$15,052.80
16. Value necessary medical aid paid to date by employer/insurer? \$43,917.18

Employee: Phillip Wheelington

Injury No.: 01-013252

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$537.60
19. Weekly compensation rate: \$358.40 TTD/\$314.26PPD
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Permanent total disability benefits in the amount of \$358.40 per week from
Employer beginning January 21, 2002 for Claimant's lifetime Indefinite

TOTAL:

23. Future requirements awarded: None

Said payments to begin as of the date of this Award, and to be payable and be subject to modification and review as provided by law.

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

Burton A. Librach, Ron Caimi to have a lien for \$2,752.04 of the awarded attorneys' fees.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Phillip Wheelington	Injury No.: 01-013252
Dependents:	None	Before the Division of Workers' Compensation
Employer:	McBaine Contracting Co.	Department of Labor and Industrial Relations of Missouri
Additional Party:	None	Jefferson City, Missouri
Insurer:	Missouri Employer's Mutual Insurance	Checked by: GCG/ln

INTRODUCTION

Hearing on the above styled Claim was held on August 23, 2006 at the Division of Workers' Compensation in St. Charles County. Claimant was present and was represented by Burton A. Librach. Patrick N. McHugh represented McBaine Contracting Co. (Employer) and Missouri Employers Mutual Insurance Co. (Insurer).

The parties entered into the following stipulations:

1. That Claimant was employed by McBaine Contracting Company at the time of the alleged date of accident.
2. That on January 24, 2001, claimant sustained an accident arising out of and in the course of his

employment with McBaine Contracting Company.

3. That venue is proper in St. Charles County, Missouri.
4. That timely notice of the injury was provided to Employer and a claim for compensation was filed within the time prescribed by statute.
5. That Claimant's average weekly wage was \$537.60, resulting in applicable compensation rates of \$358.40 for temporary total and permanent total disability benefits and \$314.26 for permanent partial disability benefits.
6. That Employer has provided temporary total disability benefits in the amount of \$15,052.80 for two periods of time from February 20, 2001 through September 28, 2001 and November 10, 2001 through January 21, 2002. Employer has also provided temporary partial disability benefits in the amount of \$10,038.40 for the period of time of September 29, 2001 through November 9, 2001.
7. That Employer has provided medical treatment in the amount of \$43,917.18.

The issues to be determined at hearing are:

1. Medical causation of Claimant's Depression.
2. The nature and extent of Claimant's permanent disability, whether the disability is permanent partial or permanent total.

Due to the complexity of the issues presented, the amount of expert testimony presented through deposition transcripts, and the nature of the case, this award was issued by the undersigned Administrative Law Judge in a time period that exceeded ninety days pursuant to §287.460.1 RSMo.

SUMMARY OF THE EVIDENCE

The following exhibits were offered into evidence:

- A. Employee's Exhibits
 - A. Deposition of David T. Volarich, D.O.
 - B. Deposition of Wayne A. Stillings, M.D.
 - B1. Supplemental report of Wayne A. Stillings, M.D.
 - C. Deposition of James England
 - D. Dr. Suren Chaganti-medical records
 - E. St. Louis Connect Care-medical records (30 pages)
 - F. St. Louis Connect Care-medical records (79 pages)
 - G. St. Louis University Hospital-medical records
 - H. James E. Walentynowicz, M.D.-medical report of 10/19/01
- B. Employer/Insurer's Exhibits
 1. Deposition of Frank Petkovich, M.D.

2. Deposition of Stacey Smith, M.D.
3. Deposition of Donna Abram
4. Russell C. Cantrell, M.D.-medical report of 2/26/02
5. James J. Coyle, M.D.-medical report of 12/5/01
6. John D. Graham, M.D.-medical reports of 9/14/01 and 11/19/01
7. PRORehab-functional capacity evaluations of 10/13/01 and 1/14/02-1/17/02; work hardening reports of 9/24/01, 10/18/01, 10/25/01-10/26/01
8. Missouri Baptist Medical Center-radiology reports of 4/16/01; 9/17/01
9. Claim for Compensation
10. Amended Claim for Compensation-filed 9/12/05
11. Claims Payments-medical and TTD benefits.

Certain Exhibits offered into evidence contained additional handwritten markings, underlining and/or highlighting on portions of the documents. Any extraneous markings on the exhibits were present when they were offered by the parties. Further, any such notes, markings and/or highlights were ignored by the undersigned ALJ in reaching any decisions made in this case.

Each exhibit was received into evidence without objection, with the exception of Exhibit B1. Employer objected to Exhibit B1 at hearing, and at the deposition of Dr. Wayne Stillings taken on November 23, 2005. The undersigned ALJ took the objection made at hearing under advisement, and the deposition transcript (Exhibit B) was offered into evidence subject to objections made at the time of the deposition.

At hearing, Employer made the following objection at the time Exhibit B1 was offered:

I have an objection to Exhibit B-1 which is the supplemental report of Dr. Stillings on the basis that its hearsay and Dr. Stillings was not a treating physician in this case. He was hired as an independent examiner on behalf of the claimant and as such, the report is not admissible under – as a treatment record. Also I believe it was raised at his deposition. It was produced at that time and the Seven-Day Rule objection was made then and that's contained in his deposition and I don't believe it was admitted at that time. Other than that I have no objections.

The deposition transcript (Exhibit B) on page 15 records the following objection to Dr. Stillings' testimony about the supplemental report, which was made after Dr. Stillings' testimony about the first conclusion in the report. "I just want to object at this point to the next conclusion that is in the report as it invades the province of the trier of fact. It calls for a legal conclusion and improper foundation for such an opinion." This same objection was again made on page 27 of Exhibit B.

At the deposition, the "seven day rule" from §287.210.3 was not given as a basis for the objection made to the testimony (p. 15) or the admission of the report (p.27). In fact, no objection was made to the entire supplemental report, but only to the second conclusion contained in the report, regarding Dr. Stillings' opinion of Claimant's permanent disability. Therefore, the record indicates that the first time the "seven day rule" was raised was at hearing on August 23, 2006.

Dr. Stillings is a licensed medical doctor and is board certified in Psychiatry and Neurology, and competent to form an opinion regarding the alleged permanent disability of Claimant based on physical and psychiatric conditions. Further, it is necessary for Claimant to provide such evidence in order to prove his case to the trier of fact. In cases involving medical causation, which is not within the common knowledge or experience, he must present medical or scientific evidence showing the cause and effect relationship between the complained-of condition and the asserted cause. **McGrath v. Satellite Sprinkler Systems, Inc.** 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). Employer's objection to the opinion evidence presented in Dr. Stillings' testimony at deposition on the basis that it calls for a legal conclusion, invades the province of the

trier of fact, and that an improper foundation has been laid, is overruled.

Regarding Exhibit B1, and the "seven day rule" objection made at hearing, the testimony from the deposition has been admitted, which would effectively render the objection to Exhibit B1 itself moot. Further, the deposition was held in November 2005, since Employer did not make the "seven day rule" objection until the hearing, Employer had possession of the exhibit for more than seven days prior to its introduction. The objection is overruled, and Exhibit B1 is received into evidence.

I. LIVE TESTIMONY

Claimant testified at trial. He is married and has two children, ages 21 and 5. His children do not live with him. He completed tenth grade and has not obtained his GED. He briefly described his employment background as involving positions in house keeping and bussing at hotels and hospitals. He said he has no special training in a skilled trade.

Claimant testified he worked as a laborer and painter for McBaine Contracting Company. This job involved demolition and remodeling of damaged homes. On January 24, 2001 he was working on a house that had sustained fire damage. He and a co-worker had placed a refrigerator on a dolly and were moving it up stairs, with claimant at the bottom portion of the refrigerator. His co-worker lost control of the refrigerator and he stopped the refrigerator from falling and rolling down the stairs. He testified that after this occurred his back was hurting, but did not think anything of it and thought his pain would go away. He continued working the rest of the day, which was a half day of work as it was a Saturday.

Claimant testified that after this incident, he experienced pain in his back and down into his legs. He first went to his private physician, Dr. O'Haver, approximately one to two weeks after this occurred. He recalls Dr. O'Haver gave him an injection in his arm, prescribed Tylenol with Codeine and took him off work.

Claimant said he was next treated by Dr. Petkovich. He recalls being given pain medication and, when his symptoms did not resolve, Dr. Petkovich recommended an MRI. Claimant stated that after this test, Dr. Petkovich performed a back surgery at Missouri Baptist Medical Center. He remained under Dr. Petkovich's care following the surgery and underwent a course of physical therapy and work hardening.

Claimant testified that he had no improvement in his condition after the surgery. He explained that he continued to have pain in his low back, down his legs and into both feet. He saw two pain management specialists, but that he did not get any results from this treatment. He said Dr. Petkovich released him from his care in January of 2002.

Claimant stated that after his release from Dr. Petkovich's medical care, he sought medical treatment on his own. This included several emergency room visits to St. Louis University Hospital for complaints of muscle spasms and chest pain. He said he has seen his private physician, Dr. Ahmed, who has been prescribing pain medications. He recently changed primary physicians and now sees a Dr. Lamb. He stated he had the MRI the day before the hearing and plans on seeing additional pain specialists. He has also seen a psychiatrist, Dr. Chaganti. He said he has continued to receive medications for pain and depression.

Claimant testified that his low back condition is worse today than it was before his surgery. He said he walks with a limp and uses a cane. He said he also feels "down" all of the time. He spends most of his time at home. He no longer engages in activities that he did prior to this accident, including playing basketball, going to movies with his wife and kids and going skating and dancing with his wife. He said he does not drive. Finally, he testified that he cannot go back to work because he is in pain all day long.

On cross-examination, claimant testified that he has been honest with all the doctors and health care providers he has seen since this injury occurred. He stated he has not exaggerated the pain that he is in or his physical limitations. He stated that he gave full effort when attending the work hardening and functional capacity evaluations at PRORehab. He further recognized that the testing he underwent at PRORehab was to help determine his ability to return to work.

Claimant was questioned about the results of the work fitness evaluations performed at PRORehab. Claimant agreed that on September 24, 2001, an evaluation was conducted of his grip strength and his average

grip strength on the right side was 130 pounds and 111 pounds on the left side. Claimant testified he was right handed. He admitted his back injury did not affect his arms or grip strength. Claimant agreed that it was noted on January 14, 2002 that his average grip strength was only 28 pounds in the right hand and 27 pounds in the left hand. Claimant was asked if he had an explanation for the difference in the grip strength, to which he replied "I don't have an answer for that." He testified that he gave his full effort, but that he wouldn't say that all the results they put down were true.

Claimant was presented with the observation made by Joe Hostler on the January 2002 FCE report that he was observed leaving the clinic on both testing days (1/14/02 and 1/17/02), entering his truck cab by stepping up with his left leg and hoisting his body into the cab while bearing weight solely upon the left lower extremity. When asked to explain why he was able to bear full weight on his left leg in the parking lot and not during testing, he said he had to step on to the running board with his right leg and grab the steering wheel to enter the truck.

Claimant testified that he started using a cane in approximately November of 2001. He admitted to seeing numerous physicians for his back condition and that none of the physicians recommended the use of this cane. He decided to use the cane on his own. He also testified that he sometimes uses crutches.

Claimant acknowledged that in September of 2001, he returned to work at light duty working one-half days. He said this light duty work involved activities such as wiping down silverware and appliances. After leaving work, he would then spend the rest of his day at work hardening. Claimant was presented with the work hardening records, which indicate at times he was reporting pain on a level 10 on a 0-10 pain scale. However, he admitted that despite reporting this level of pain, he was able to maintain a schedule of going to work in the morning and work hardening in the afternoon. He admitted Dr. Petkovich returned him to full time work in November of 2001 and he was directed to clean and organize the utility closet. He said this caused him pain and he left work. He has not worked at McBaine Contracting, or for any other employer, since that date. He stated that he has made no attempt to look for work since that day.

Claimant was presented with statements contained in the ConnectCare medical record of May 17, 2004 wherein he was offered physical therapy and occupational therapy but declined this treatment. Claimant initially stated he did not remember being offered such treatment. Claimant testified that he went into a pain management program but did not engage in physical therapy. He was questioned regarding a ConnectCare note of September 4, 2004 wherein it was noted that he was exhibiting narcotic drug seeking behavior, it appears from the record that the entry was actually September 9, 2004. Claimant testified he did not recall discussing drug seeking behavior with the attending health care providers. Counsel questioned Claimant about notations in medical records where Claimant had been quoted as describing his surgery as a back "fusion." Claimant said he did not know what a fusion was, and that he was not sure he had told anyone that he had a fusion.

Claimant was questioned regarding his prior work history. He stated his longest period of employment with any employer was four years working in housekeeping at St. Luke's Hospital. He admitted he was fired for attendance problems. He testified that he initially was hired by McBaine Contracting, through a temporary employment agency and that he quit McBaine Contracting in 2000 because he did not like his manager. He further testified that he was rehired one year later.

Claimant was presented with his prior deposition testimony with regard to his ability to read and do basic math. He testified he did not have any difficulty reading and could read some materials such as newspapers, magazines, and the Bible. He also testified that he had no difficulty with basic math.

Ms. Mary Jean Wheelington is claimant's wife and testified on his behalf. They were married approximately three months before this accident. They have no children. She was employed by the City of St. Louis at the time they were married. She is presently unemployed.

Ms. Wheelington testified her husband was a happy go lucky individual before this accident and they would go dancing, to the movies and amusement parks. She testified he now mainly lies around the house and very seldom visits friends. She testified he cannot sit or stand for long periods of time. He used to do most of the cleaning around the house. She said he is always down and depressed and "Feeling like he's less than a man because he can't do things with his son or me." She testified his condition has not improved in the last five years.

II. DEPOSITION TESTIMONY

Medical Testimony

The deposition of Dr. David Volarich was taken on behalf of Claimant on July 7, 2003. On direct examination, Dr. Volarich restated the contents of his written report dated May 20, 2002. He diagnosed Claimant's conditions as follows: First, herniated nucleus pulposus L5-S1 centrally and to the left. Status post laminotomy and bilateral nerve root decompression and excision of the herniated disc L5-S1. Second, failed back syndrome. Third, right shoulder impingement syndrome. (Exhibit A, p.6). Dr. Volarich testified that the work injury of January 24, 2001 was the substantial contributing factor for causing those conditions. (Exhibit A pp 6-7). He rated the permanent partial disability (PPD) of the back at 60% of the body as a whole referable to the lumbosacral spine. The rating accounted for his lost motion, ongoing back pain and bilateral lower extremity radicular pain consistent with failed back syndrome. Additionally he rated the shoulder at 25% PPD of the right upper extremity. Dr. Volarich, in his report, had the following work restrictions: avoid repetitive bending, twisting, lifting, pushing, pulling or carrying; avoid handling any weight greater than 10-15 pounds; avoid handling weight overhead or carrying weight over long distances and uneven terrain; he should not remain in a fixed position for any more than 30 to 45 minutes.

During cross examination Dr. Volarich was questioned regarding previous evaluations and treatment to Claimant's right shoulder, and whether those doctors had indicated that his shoulder condition had resolved. Dr. Volarich indicated that Dr. Coyle and Dr. Cantrell had not examined the shoulder, and that Claimant continues to have right shoulder complaints at the time he examined him in May, 2002. Dr. Volarich testified Claimant could return to work if there was a position available consistent with the limitations which he had recommended.

The deposition of Dr. Frank Petkovich was taken on behalf of Employer on December 15, 2003. Dr. Petkovich testified that he first saw Claimant on March 28, 2001. He testified that his first diagnosis of Claimant's condition was a muscular and ligamentous lumbar strain, and a right shoulder strain. Claimant then had persistent pain complaints and an MRI was performed which revealed a disc herniation at the L5-S1 level. Dr. Petkovich performed surgery on June 4, 2001 to repair the herniated disk. After the surgery, Claimant continued to have subjective pain complaints in his lower back. He was referred to Dr. Graham for pain management and to Dr. Russell Cantrell for an independent medical evaluation. Dr. Petkovich testified that both of those doctors reported that in their opinions Claimant was magnifying his pain symptoms. Dr. Petkovich opined that Claimant reached maximum medical improvement on January 21, 2002. He testified that Claimant had a 10% permanent partial disability to the body as a whole due to the disc herniation, and that the shoulder condition had resolved so there was no permanent partial disability to the shoulder. Dr. Petkovich recommended a lifting restriction of 35 pounds and felt Claimant could return to work at the light to medium demand level.

Psychiatric Testimony

The deposition of Dr. Wayne A. Stillings was taken on November 23, 2005 on behalf of Claimant. Dr. Stillings is a board certified psychiatrist. Dr. Stillings examined Claimant on July 21, 2004. Prior to the examination, Dr. Stillings was provided with records of Claimant's treatment for the injury of January 24, 2001. When Dr. Stillings saw Claimant he appeared to be in significant pain and his mood was depressed.

Dr. Stillings administered an MMPI-II test to Claimant. From the test results, Dr. Stillings found Claimant is suffering from a severe psychological disorder, including personality decompensation, social withdrawal, a disordered affect, and erratic behavior, with confusion and withdrawal along with a paranoid construct to his personality. He also testified Claimant is preoccupied with feelings of guilt and unworthiness, with feelings of desiring punishment for wrongs, regret about the course of his life, unhappiness and anxiety. Routine affairs would be difficult, suggestive of a poor memory, concentration problems, and indecisiveness. He opined that these results indicate that Claimant is depressed. Dr. Stillings also evaluated Claimant using the Revised Owestry Disability Index, which he testified rates a person's functional limitation due to low back pain. The results indicate moderate symptoms and moderate impairment.

Dr. Stillings diagnosed Claimant with chronic mood disorder related to a general medical condition. The condition is a back injury and a failed back syndrome. (Exhibit B, p. 14). Dr. Stillings further found that the January 24, 2001 work injury was a substantial factor in causing the chronic mood disorder; and as a result, Claimant sustained a permanent partial disability of 50% due to psychiatric injury. Dr. Stillings also testified that due to a combination of psychiatric and physical disabilities, he is permanently and totally disabled from gainful employment in the open labor market. (Exhibit B, p. 15).

During cross examination, Dr. Stillings testified that although he had not been provided with all the records from Doctors Petkovich and Graham, he was aware of the suggestion that Claimant had engaged in symptom magnification from Dr. Cantrell's report and reference to the functional capacity evaluation (FCE). He also testified that Claimant had made no complaints of shoulder pain to him. He further noted that while Claimant's intelligence was in the normal range, he had flunked two grades, and had a work history of low level labor jobs.

The deposition of Dr. Stacey Smith was taken on behalf of Employer on December 13, 2005. Dr. Smith is a board certified psychiatrist. Dr. Smith evaluated Claimant on December 9, 2004. She reviewed the records of Claimant's medical

treatment, as well as the reports from the vocational experts. Dr. Smith diagnosed Claimant as having a pain disorder associated with a medical condition and symptom exaggeration. The pain disorder is when an individual continues to complain of pain beyond what would be supported by objective findings on scans and is generally considered to have some type of physiologic basis. The primary basis for her diagnosis was the pattern of complaints that seemed out of proportion to the exam findings, and that the complaints were felt to be exaggerated by a number of his examining or treating clinicians.

Dr. Smith opines that the symptom exaggeration is both conscious and unconscious in that Claimant is consciously exaggerating his pain symptoms for secondary gain, but also that he believes the work injury has led to his pain syndrome. She further states "...we don't really know to what extent the refrigerator incident contributed." (Exhibit 2, p. 13-14). Dr. Smith testified that the timing of the incident is conspicuous in that it occurred just after he was married to an older woman who is employed. She opines that now he is in the "illness role" and his new wife can take care of him.

Dr. Smith assigns permanent partial disability for Claimant's psychological conditions at 5%, with 2.5% being related to the work injury, and 2.5% from moving into the husband role given his pre-existing personality profile. She testified that she believes he will never be free of the subjective pain complaints based on his personality profile, but that he can perform some type of work within his education and training and within the physical restrictions that are appropriate due to the surgery. (Exhibit 2, p. 15-16 & 25). She believes he could sabotage that by having a presentation of invalidism. (Exhibit 2, p. 25). Dr. Smith opines that Claimant has some depressive complaints associated with his circumstances, but that he does not have an illness called depression. (Exhibit 2, p. 21).

On cross examination Dr. Smith agrees that Claimant does have some level of impairment from pain. (Exhibit 2, p. 27). She further testifies that she is not in agreement with the opinions of the doctors who have diagnosed that Claimant is suffering from depression.

Vocational Testimony

The deposition of James England was taken on behalf of Claimant on October 9, 2003. Mr. England is a vocational rehabilitation counselor. Mr. England was engaged to provide an opinion regarding Claimant's employability in the future. Mr. England reviewed Claimant's records of treatment, he observed Claimant, he administered the Wide Range Achievement Test for basic reading and math, and interviewed Claimant to understand his background, vocational history and work history. Mr. England indicated that Claimant's math score was at the fourth grade level and his reading score was at the seventh grade level.

Mr. England testified that in his opinion, applying the restrictions placed by any of the doctors in this case, Claimant could not go back to work in any of his previously held positions. He described Claimant's presentation as "miserable" and thought he would not make a good impression on a prospective employer. Mr. England ultimately came to the conclusion that Claimant was not employable.

The deposition of Donna Abram was taken on behalf of Employer on February 4, 2004. Ms. Abram is a vocational rehabilitation counselor. Ms. Abram conducted a vocational assessment of Claimant on June 30, 2003. Ms. Abram reviewed the medical records provided to her of Claimant's treatment. She also interviewed Claimant to ascertain his relevant history, and conducted some testing. She testified that Claimant left prior to completing all the testing. She testified that he informed he had to leave because he didn't realize that the assessment would take as much time as it did. Ms. Abram spoke to the friend who had brought Claimant to the assessment and the friend stated there was no problem, but Claimant insisted on leaving because he did not want to inconvenience his friend. Ms. Abram stated that she did not get a complete picture, but that she still had a "fairly good assessment." She did, in fact, go on to render her professional opinion, which indicates

Employer position was not prejudiced by Claimant's action. ^[1]

Ms. Abram formed the opinion that Claimant is able to work in the open labor market and is employable at this time. She further testified that he locate employment that earned in the range of \$7.60 to \$15.25 per hour. During cross examination, Ms. Abram testified that she did not prepare an evaluation with the recommendations of Dr. Volarich, since his restrictions took Claimant's subjective complaints into account.

FINDING OF FACT AND CONCLUSIONS OF LAW

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also *Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo.1968); *McCoy v. Simpson*, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing *Cook v. Sunnen Prods. Corp.*, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)). However, the employee must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995); *Griggs v. A. B.*

Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974).

1. Medical Causation of Depression.

The diagnosis of depression itself is disputed by Employer. Claimant offers the report and deposition of Dr. Stillings (Exhibits B & B1) and the treatment records of Dr. Chaganti (Exhibit D). There have been no records provided regarding a review of the MMPI –II test by a Dr. Wetzel, however, his review and resulting diagnosis are discussed in the deposition of Dr. Smith (Exhibit 2). Employer offers the report and deposition of Dr. Smith.

Dr. Stillings' diagnosis is that Claimant suffers from major depression, and that the January 24, 2001 work injury is a substantial factor in causing the depression. His diagnosis is based on his review of the medical records as well as his review of the MMPI-II test. Apparently, Dr. Wetzel also diagnosed Claimant with depression based on the results of that test. (Exhibit 2, p. 27-28). Dr. Smith, in her report, recommended that the test results be submitted to Dr. Wetzel for evaluation. Dr. Chaganti has also diagnosed Claimant with major depression and is currently treating him for it.

In light of the fact that Dr. Stillings based his diagnosis, at least in part, on the results of the MMPI-II test, and that those results seem to have been confirmed by Dr. Wetzel, and the fact that Dr. Chaganti is a treating physician, not engaged as an expert witness for the purpose of providing an opinion for litigation, the diagnoses that Claimant is in fact suffering from depression are more credible.

As stated above, causation of the depression must be demonstrated by reasonable probability. Dr. Stillings attributes it to the work injury. Although Dr. Smith does not agree that Claimant suffers from depression, rather he has an Axis I diagnosis of pain disorder associated with a medical condition and symptom exaggeration, she does attribute at least 2.5% of his overall psychiatric permanent partial disability to the work injury. Having already found that the more credible diagnosis of Claimant's psychiatric injury is in fact depression, and that the psychiatric experts testifying for each party agree there was a psychiatric injury sustained, it is reasonably probable that Claimant's depression is causally related to the work injury of January 24, 2001.

2. Permanent Partial or Permanent Total Disability.

Section 287.020.7 RSMo. (2000) defines total disability as the "inability to return to any employment and not merely... [the] inability to return to the employment in which the employee was engaged at the time of the accident." The words "inability to return to any employment" mean "that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." **Kowalski v. M-G Metals and Sales, Inc.**, 631 S.W.2d 919, 922 (Mo. App. 1982). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition." **Id.** at 922; **Brown v. Treasurer of Missouri**, 795 S.W.2d 479, 483 (Mo. App. 1990). The primary determination for permanent-total disability is whether the claimant is able to compete in the open labor market given her physical condition and situation. **Messex v. Sachs Elec. Co.**, 989 S.W.2d 206, 210 (Mo.App. E.D. 1999).

Claimant has presented a prima facie case regarding permanent total disability. He suffered a work injury; he presented medical, psychiatric and vocational evidence that he is in fact permanently and totally disabled. The defense in this case is based on the fact that Claimant has exaggerated his injuries and is not credible. Employer has presented evidence and argument on a number of facts in order to advance its position.

There is the note in the records from PRORehab (Exhibit 7) that therapist Joe Hostler witnessed Claimant climbing into his truck with his weight supported on one leg. Claimant rebutted this at hearing, saying that he had to grab the steering wheel to help support his weight while he stepped up into the truck, therefore he was not bearing weight on one leg. This explanation does have merit, as one would expect to grab the wheel or a handle to pull oneself into a truck even if they did not have a disability.

The reports of Dr. Graham and Dr. Cantrell which reference symptom magnification were presented. However, the testimony of these two physicians was not elicited at hearing or in deposition to further develop that theory beyond the fact that the objective findings do not correlate with Claimant's subjective complaints. Instead, Dr. Petkovich was questioned in his deposition if he had seen their reports making the allegation of symptom magnification. Further, evidence was not elicited during Dr. Petkovich's testimony if he had an opinion as to whether Claimant was magnifying his pain complaints, and why he thought that; and there were no references to symptom magnification in Dr. Petkovich's records, thus leaving the evidence of symptom magnification to the undeveloped notations in reports.

The note in the ConnectCare records (Exhibit F) that Claimant was exhibiting narcotic drug seeking behavior was presented. There is no indication from the record of September 9, 2004 that this was addressed with Claimant. Further, there is only one notation in a large volume of records from ConnectCare, and his treatment there continued without any further reference to drug seeking behavior.

The inconsistencies in the grip strength testing as noted in the records of PRORehab (Exhibit 7) are certainly troubling, and Claimant provided no explanation other than maybe the information was not recorded correctly. While this fact is presented to demonstrate that Claimant is exaggerating his condition and not giving his full effort, the grip strength of his hands is unrelated to his back injury.

The fact that for a few weeks Claimant was able to work half days of light duty and report to work hardening regimen in the afternoons was presented. He did continue to complain of pain throughout the program, in other words, his pain complaints did not increase towards the end of the program. The fact that he could sustain this activity for a limited time period does not necessarily demonstrate that he can return to work permanently. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. **Grgic v. P&G Construction**, 904 S.W.2d 464, 466 (Mo.App.1995).

There are however, facts that also support Claimant's position. In addition to the diagnosis of failed back syndrome by Dr. Volarich, Dr. Walentynowicz also diagnosed failed back syndrome. (Exhibit H). Further, despite his opinion regarding disability, Dr. Cantrell noted that the post operative MRI of August 2, 2001 revealed degenerative disk disease at L5-S1 and post operative changes.

On December 5, 2001, Claimant was examined by Dr. James Coyle. Dr. Coyle notes in his report that Claimant "was observed walking down the hall when he was not aware he was being observed. He walked with a slow guarded gait pattern in a forward flexed posture. He walks with an antalgic gait on the left using a cane on the right side." (Exhibit 5). This record indicates his behavior was consistent with his complaints when he was unaware he was being observed.

Ultimately, this case, and the opinions expressed by the physicians and vocational specialists, rests on the credibility of Claimant's reporting of complaints. Admittedly, the facts referenced above and others in the record for both parties make this case very close.

Section 287 RSMo. underwent significant changes through legislative amendments which took effect August 28, 2005. Therefore, it must be determined which law applies to injuries sustained prior to August 28, 2005. Article I, §13 of the Missouri Constitution provides: That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities can be enacted.

There are two exceptions to the rule that a statute shall not be applied retrospectively. First, where the statute is only procedural and does not affect any substantive right of the parties and, second, where the legislature manifests a clear intent for retrospective application. *Gershman Investment Corp. v. Duckett Creek Sewer Dist.*, 851 S.W.2d 765 (Mo.App.1993). Section 287, as amended, does not contain a manifestation of legislative intent for retroactive application. Therefore, for any provision of §287 to apply retroactively, it must only be procedural in scope, as the retroactive application of statutory provisions which affects substantive rights violates the constitution. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 406 (Mo.App.1996).

The distinction between substantive and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used to effect the suit. **Wilkes v. Missouri Highway and Transp. Com'n**, 762 S.W.2d 27, (Mo. banc 1988). Substantive statutes take away or impair vested rights acquired under existing law, or create a new obligation or impose a new duty. **Brenneka v. Director of Revenue**, 855 S.W.2d 509, 511 (Mo.App.1993).

Prior to the 2005 amendments, §287.800 stated "All of the provisions of this chapter shall be liberally construed with a view to the public welfare, and a substantial compliance therewith shall be sufficient to give effect to rules, regulations, requirements, awards, orders or decisions of the division and the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto."

The appellate courts have construed this to mean all doubts be resolved in favor of a claimant. 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). All provisions of the Workers' Compensation Act must be liberally construed; accordingly we resolve all doubts in favor of employee. § 287.800 RSMo. *Hall v. Wagner Division-McGraw-Edison*, 755 S.W.2d 594, 596 (Mo.App.1988); *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195, 198 (Mo.App.1990). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson* at 398.

A statutory provision which requires that doubts be resolved in favor of a particular party is a substantive statute, as the claim vests when the injury occurs. Applying the 2005 revision of § 287.800 would impair the cause of action itself, therefore, § 287.800 as it existed at the time of Claimant's injury applies to this case. As stated

previously, Claimant has established a prima fascia case, in that he is not lacking evidence on any essential element. There is evidence both supporting and contradicting Claimant's credibility, resolving the doubts in favor of Claimant supports a finding that he is permanently and totally disabled as described in § 287.020.7.

It is undisputed that Claimant suffered a work related injury on January 24, 2001. Claimant suffered an injury to his back and right shoulder as a result of the incident.^[2] The injury to his back required surgery to repair a herniated disk. As a result of the pain in his back and his inability to work, Claimant became depressed. The work restrictions placed on Claimant by both Dr. Petkovich and Dr. Volarich render him unable to return to his former employment, with Dr. Volarich's being more restrictive due to his diagnosis of failed back syndrome.

Dr. Stillings and Mr. England both testified that Claimant is not employable in the open labor market due to the injury of January 24, 2001. Mr. England reviewed the medical records and noted the restrictions recommended by the physicians. Mr. England personally interviewed claimant and solicited responses to questionnaires and achievement testing. He observed the claimant's behavior during the interview. His report concludes that Claimant is not employable in the open labor market as a result of his physical limitations. Mr. England clearly testified that claimant is unemployable and that he will remain unemployable in the future. He testified that he took into account Claimant's education level, work history and his presentation. He further testified that he relied on the ratings and limitations found by all of the physicians. Ms. Abrams had not considered any of the evidence of psychological injury in reaching her conclusions. While Mr. England also did not have the records regarding depression, he reached his conclusion based on physical limitations (restrictions of the doctors), his education and employment history, and his poor presentation (to which his depression contributes). In other words, Mr. England could find permanent disability without having the additional fact of depression, which would only further support his conclusion; however, Ms. Abram found in the negative, that Claimant was not totally disabled, without any analysis of the depression, which theoretically could have changed her conclusions.

Dr. Stillings' opinion supports the determination that Claimant is permanently and totally disabled and not able to compete in the open labor market. His opinion that Claimant suffers from depression as a result of the work injury is credible, as is his opinion that the combination of his physical and psychological injuries renders Claimant permanently and totally disabled and unable to compete in the open labor market. Dr. Stillings reviewed relevant treatment records, administered independent tests, and personally interviewed Claimant. He further testified that he was aware of, and considered, the claims of symptom magnification in reaching his conclusions.

Dr. Smith concedes that Claimant does continue to have pain (Exhibit 2, p. 13, 26, 27), that pain is subjective and there is no way to measure it (Exhibit 2, p.26-27), and that he will always have the complaints (Exhibit 2, p.16). She also testified that while she does not believe Claimant suffers from depression, she would in fact treat him with antidepressants (Exhibit 2, p.27). These factors militate against her opinions regarding his alleged symptom magnification and his mental status.

Based on the credible opinions of Dr. Stillings and the credible vocational assessment by Mr. England, and taking into account claimant's educational and employment background, and the permanent restrictions recommended by Dr. Petkovich and Dr. Volarich, it is reasonably certain that the claimant was and remains unemployable in the open labor market, and is therefore permanently and totally disabled as a result of the combination of the work-related injury to his lumbar spine and the resulting chronic mood disorder.

Claimant reached maximum medical improvement and was released from care January 21, 2002; I further find that claimant became permanently and totally disabled as of January 21, 2002. The obligation to pay permanent disability compensation commences under Section 287.160.1 RSMo. (2000) on the date when the claimant's permanent disability begins. Kramer v. Labor & Indus. Rel. Com'n, 799 S.W.2d 142, 145 (Mo. App. 1990); Hall v. Wagner Div.-McGraw-Edison, 782 S.W.2d 441, 443-44 (Mo. App. 1989). The permanent total disability payments shall therefore commence effective January 21, 2002, and shall continue to be paid in accordance with the provisions of this award and Section 287.200 RSMo. The applicable weekly rate for permanent total disability benefits is \$358.40 as determined by stipulation of the parties.

ATTORNEY'S FEE

Attorney Ron Caimi formerly represented Claimant. At the time Mr. Caimi withdrew as Claimant's attorney, he filed a lien against the claim on June 23, 2004. The lien requested \$2,752.04 for expenses plus \$10,000 for attorney's fees. Mr. Librach has requested a fee of 25% for his representation of Claimant. Neither Mr. Caimi, nor any member of his firm appeared at hearing to present evidence regarding the lien. Mr. Librach stated on the record that in the past, in situations just as this, he has been able to reach agreements with Mr. Caimi's firm.

The Division is charged with approving reasonable attorney fees. Section 287.260.1 RSMo (2000). The factors to be considered in determining reasonable value of attorney's fees in Missouri are time, nature, character and amount of services

rendered, nature and importance of the litigation, degree of responsibility imposed on or incurred by the attorney, the amount of money or property involved, the degree of professional ability, skill and experience called for and used, and the result achieved. **Cervantes v. Ryan**, 799 S.W.2d 111, 115 (Mo.App. 1990). It is impossible to ascertain this information from the lien filed. Therefore, 25% is awarded as and for attorney's fees, with \$2,752.04 of that amount awarded to Ron Caimi for expenses advanced, and the remainder to Burton Librach. It is hoped that the attorneys will reach an amicable agreement regarding the payment of attorney fees.

CHILD SUPPORT LIEN

This award is subject to a lien for child support filed by the Missouri Department of Social Services.

Date: February 6, 2007

Made by: /s/ Grant C. Gorman
 Grant C. Gorman
 Administrative Law Judge
 Division of Workers' Compensation

A true copy: Attest:

 /s/ Patricia "Pat" Secret
 Patricia "Pat" Secret
 Director
 Division of Workers' Compensation

[\[1\]](#) It should also be noted that Employer did not take any remedial measures available in this administrative court in order to compel Claimant to compete the evaluation by Ms. Abram.

[\[2\]](#) Claimant presented no testimony at hearing regarding disability in his right shoulder, therefore there is no discussion of the alleged shoulder injury and it is not considered as a basis for this award.