

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

Injury No.: 00-082457

Employee: Jimmy Whitaker
Employer: Midwest Foundation Corporation
Insurer: St. Paul Fire & Marine Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 15, 2000
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 May 26, 2006. The award and decision of Chief Administrative Law Judge Leslie E. H. Brown, issued May 26, 2006, 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 28th day of September 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Jimmy Whitaker

Injury No. 00-082457

Dependents: N/A
Employer: Midwest Foundation Corporation
Additional Party: State Treasurer, as Custodian of the Second Injury Fund
Insurer: St. Paul Fire & Marine Insurance Company
Hearing Date: March 31, 2005 and April 14, 2005

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

Checked by: LEHB/lsn for df

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: July 15, 2000
5. State location where accident occurred or occupational disease was contracted: St. Charles County, MO
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:
Laborer work
12. Did accident or occupational disease cause death? No Date of death? --
13. Part(s) of body injured by accident or occupational disease: thoracic spine; PTD
14. Nature and extent of any permanent disability: 12% BAW re: thoracic spine; PTD
15. Compensation paid to-date for temporary disability: \$16,798.88
16. Value necessary medical aid paid to date by employer/insurer? \$10,669.33

17. Value necessary medical aid not furnished by employer/insurer? --
18. Employee's average weekly wages: maximum
19. Weekly compensation rate: \$599.96/\$314.26
20. Method wages computation: by agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: --

1 4/7 weeks of temporary total disability (or temporary partial disability) \$942.79

12% BAW re: thoracic spine permanent partial disability from Employer, or(\$15,084.48
 - credit of
 \$6,513.85 =
 \$8,570.63)

--- weeks of disfigurement from Employer

--- Permanent total disability benefits from Employer beginning , for
 Claimant's lifetime

22. Second Injury Fund liability: Yes
 PTD at \$285.70 per week for 48 weeks 03/19/01-02/17/02, and \$599.96 per week thereafter for life

TOTAL: \$9,513.42
 and PTD (See Award)

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:

Ronald J. Wuebbeling, Attorney for Claimant

NOTE: There is an attorney's lien for former Claimant's Attorney Jack J. Adams as follows: \$770.00 for Dr. Morrow's report and \$730.00 attorney fee for a total of \$1,500.00; this amount is to be paid from the 25% attorney's lien, and remainder attorney's lien thereafter to be paid to Ronald J. Wuebbeling, Attorney for Claimant.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jimmy Whitaker

Injury No: 00-082457

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

Dependents: N/A

Employer: Midwest Foundation Corporation

Additional Party State Treasurer, as Custodian of the Second Injury Fund

Insurer: St. Paul Fire & Marine Insurance Company

Checked by: LEHB/lsn for df

This is a hearing in Injury Number 00-082457. The claimant, Jimmy Whitaker, appeared in person and by

counsel, Attorney Ronald J. Wuebbeling. The employer/insurer, Midwest Foundation Corporation/ St. Paul Fire and Marine Insurance Company, appeared by and through counsel, Attorney Rhonda J. Kattleman. The Second Injury Fund appeared by and through Assistant Attorney General Barbara Toepke.

The parties entered into certain stipulations, and agreements as to the complex issues ^[1] and evidence to be presented in this hearing.

STIPULATIONS:

On or about July 15, 2000: a. the claimant while in the employment of Midwest Foundation Corporation sustained an injury by accident arising out of and in the course of his employment occurring in St. Charles County, Missouri; b. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law; c. the employer's liability was insured by St. Paul Fire and Marine Insurance Company; d. the employee's average weekly wage was at the maximum; the rate on the rate being \$599.96 over \$314.26.

e. The employer had notice of the injury. f. A Claim for Compensation was filed within the time prescribed by law. g. Temporary total disability benefits have been paid to the employee in the total amount of \$16,798.88; those payments represent 28 weeks of benefits covering four periods -- period one is July 16, 2000 through September 20, 2000; period two is January 15, 2001 through February 14, 2001; period three is February 26, 2001 through March 18, 2001, and the fourth period is October 2, 2002 through December 16, 2002. h. Medical aid has been provided in the total amount of \$10,669.33.

i. Re: a Notice of Services Provided & Request for Direct Payment filed with the Division on November 28, 2001, and concerns two bills -- a. July 15, 2000 bill from Missouri Baptist Medical Center/Dr. William Baber, thoracic sprain E.R. visit, \$1,396.06; and b. a January 19, 2001 bill for an MRI cervical spine ordered by Dr. Barry Samson and performed at Missouri Baptist Medical Center, \$1,270.00 (Court Exhibit No. A-1). It is agreed and stipulated to by the employer/insurer that they have paid these medical bills and/or are responsible for these bills.

ISSUES:

1. Medical causation
2. Liability of past medical expenses
3. Nature and extent of temporary total disability benefits re: three specific periods -- first is December 15, 2001 through January 14, 2001; second is February 15, 2001 through February 25, 2001; and third is March 19, 2001 through October 1, 2002
4. Nature and extent of permanent disability - whether partial or total
5. Liability of the Second Injury Fund

EXHIBITS:

The following exhibits were admitted into evidence:

Claimant's Exhibits:

Nos. A-F: Exhibits A through F were submitted at the hearing for the Temporary Award

No. G: Deposition transcript of Dr. Peggy Boyd Taylor, D.O., taken on May 23, 2002 on behalf of the claimant (No. G was offered into evidence in the hearing for the Temporary Award, and reoffered into evidence in the hearing for Final Award in this case)

No. H: Deposition transcript of Dr. Raymond F. Cohen taken June 7, 2004 on behalf of the claimant (Admitted subject to the objections therein)

No. I: No exhibit so marked.

No. J: Medical rating of Dr. Raymond F. Cohen dated November 13, 2003 (Ruling: Second Injury Fund's objection is overruled.)

No. J-1: Supplemental medical rating of Dr. Raymond F. Cohen dated December 12, 2003 (Ruling: Second Injury Fund's objection is overruled.)

No. K: Deposition transcript of James M. England, Jr., taken January 5, 2005 on behalf of the claimant. (Admitted subject to the objections therein, and objections at the hearing by the employer/insurer on grounds of lack of

foundation and Mr. England's reliance on hearsay, objections at the hearing by the Second Injury Fund of objections contained on page 19 of Mr. England's deposition regarding his conclusions and his reliance on a report by Dr. Buckles and motion to strike any reference to Dr. Buckles' report and Mr. England's conclusions as they rely on Dr. Buckles' report)

No. L: Report of James M. England, Jr., dated October 21, 2004 (Admitted, but the employer/insurer and the Second Injury Fund specifically note the objections which were previously voiced with regard to Mr. England's deposition testimony as to his opinions, and Second Injury Fund's request at the hearing that the objections made to the testimony can carry over to anything within the report itself.)

No. M: Medical records of Missouri Baptist Medical Center (192 pages)

No. N: Medical records of St. Peters Bone and Joint Surgery, Dr. Theodore S. Rummels (10 pages)

No. O: Open MRI report of St. Charles County (1 page)

No. P: Medical records of Dr. Barry Samson, M.D. (45 pages)

No. Q: Records of Pro Rehab (13 pages)

No. R: Records of SSM Rehab (185 pages)

No. S: WITHDRAWN (Medical records of Dr. Peggy Boyd Taylor, being offered by the Second Injury Fund – Roman Numeral II)

No. T: Medical records of Premier Care Orthopedics/Dr. Ravi V. Shitut, M.D. and Dr. George R. Schoedinger, III, M.D. (39 pages)

No. U: NOT ADMITTED (March 3, 2003 record of Dr. Richard B. Buckle/Claybrooke Medical Group, 3 pages)

[Ruling: Employer/Insurer's and Second Injury Fund's objections on grounds of hearsay and report prepared for litigation is sustained. It is found the sources of information, method and time of preparation are such as to not justify the admission of Dr. Buckles record in that: a. the doctor admits Whitaker "is personally known by me and is the patient I'm doing the physical on today" with no indication in the report of the doctor having treated Whitaker over the years; b. there is no indication of a knowledge of a complete medical history, particularly in regards to the claimant's thoracic spine (a causation issue in this case), thus bringing question to the competency of the medical diagnosis and opinion; and c. with a lack of a complete medical history, there is question as to the probative value of a medical opinion on the claimant's physical condition in 2003 when the issues in this case concern a 2000 injury and any preexisting injuries. See, generally, *Thomas v. Fred Weber Contractor, Inc.*, 498 S.W.2d 811, 812-813 (Mo.App. 1973).]

No. V: Medical records of Dr. Bruce Schlafly. M.D.

No. W: Medical records of Neurological Associates/Dr. John E. Krettek, M.D. (14 pages)

No. X: Medical records of Dr. John Tessier, M.D. (12 pages)

No. Y: Stipulation for Compromise Settlement for Injury Number 95-401541 approved on December 23, 1998

No. Z: Computer printouts from the Illinois Industrial Commission for Claim Numbers 87WC-38598, 88WC-10063, 88WC-46465, 92WC-41178, and 94WC-62020 (22 pages)

No. AA: NOT ADMITTED (Social Security Administration decision dated October 2, 2003)

No. BB: Warren County Ambulance District statement dated February 19, 2002

No. CC: Transcript of the claimant from East Alton-Wood River Community High School

No. DD: Certified copy of the transcript of the claimant from Jerseyville Community High School

No. EE: NOT ADMITTED (Summary of temporary total disability benefits and the dates and the amounts that they were paid, which is the same as agreed and stipulated to by the parties).

No. FF: Missouri Baptist Medical Center medical bills dated May 21, 2001 in the amount of \$1,250.28; and also a bill dated June 5, 2001 in the amount of \$2,180.45 (2 pages)

No. GG: Certificate of service of business records re: records for Claybrooke Medical Group/Richard Buckles, D.O.

Employer/Insurer's Exhibits:

Nos. 1-3: Exhibits 1 through 3 were submitted at the hearing for the Temporary Award

No. 4: Surveillance tape from Photofax, Inc. conducted in the latter part of May 2004

No. 5: Deposition transcript of Dr. Ravi Shitut, M.D. taken on behalf of the employer/insurer on May 21, 2004 (Admitted subject to the objections therein)

No. 6: Certified copies of records from the Division of Workers' Compensation pertaining to three separate injury numbers -- Injury Number 95-401541, Injury Number 00-082457, and Injury Number 00-166374, and included in the records are medical records, Claims for Compensation, Answers to the same claims by the employers and insurers, and a Temporary Award with regard to one of the injury numbers as well as Stipulations for Compromise

Settlements

No. 7: NOT ADMITTED (Uncertified Wood River Township Hospital record, for several dates of service from September 30, 1988 through October 13, 1988)

Second Injury Fund Exhibits:

Roman Numeral I: WITHDRAWN (Deposition of Jimmy Whitaker taken on April 21, 2004)

Roman Numeral II: Certified medical records of Med Care-RX (Ruling: Claimant's objection on grounds of -- not simply medical records in that there is one document entitled "Claim of Lien" that's dated August 12, 2002 is not part of a medical record and therefore is irrelevant -- is overruled.)

Court Exhibits:

No. A-1: Notice of Services Provided & Request for Direct Payment filed with the Division on November 28, 2001, and concerns two bills – a. July 15, 2000 bill from Missouri Baptist Medical Center/Dr. William Baber, thoracic sprain E.R. visit, \$1,396.06; and b. bill for an MRI cervical spine ordered by Dr. Barry Samson and performed at Missouri Baptist Medical Center on January 19, 2001, \$1,270.00

No. A-2: Notice of Services Provided & Request for Direct Payment filed with the Division on October 23, 2001, and concerns two bills – a. bill from Missouri Baptist Medical Center/Dr. Barbara Elizzy, strain and sprain of thoracic emergency room visit on May 21, 2001, \$1,250.28; and b. June 5, 2001 chest pain CT Scan ordered by Dr. Barry Samson and performed at Missouri Baptist Medical Center, \$2,180.45.

FINDINGS OF FACTS AND RULINGS OF LAW ^[2]

ISSUE: Medical causation

Jimmy Ray Whitaker, the claimant, testified that he was born on June 24, 1962 in East St. Louis, Illinois. The highest grade I attended I think was the eleventh grade, Whitaker stated. I never returned to school, but I tried to get a GED, he said, I took the classes and I took the test, but I failed the GED by one point. I never re-took the GED, Whitaker said. He agreed that this was when he entered into the labor work force. During the ten or twelve years my work varied, Whitaker said, I've did anything from building Wal-Marts, Walgreen's to Steak 'N Shakes, to streets, sidewalks, to school lots, to Shell Oil Refinery; he agreed that it was always as a hod carrier or a laborer which was all labor work. The work of a hod carrier and a laborer in general involves a lot of heavy lifting, a lot of heavy packing, heavy carrying; heavy duty work all day long, eight, ten hours a day, the claimant said.

In July of 2000 I was working for Midwest Foundation pouring concrete dams for the new Page Avenue extension, Whitaker testified. Agreeing that he sustained an injury a little before July 15, 2000 while working, Whitaker explained that for that week he was taking a break from the concrete and all that, and they had put him on a dredge pump. I was dredging and my dredge pump hit something in the ground and busted the dredge pump and bent a turn buckle at a forty-five degree angle and stopped us from dredging. When we pulled the dredger out I noticed the turn buckle, and everybody was half panicky, he said. While everybody was doing their thing, I grabbed a four or five foot piece of rebar approximately five foot off the ground, jumped up on it, ran my bar through the turn buckle, both of my hands above my head and put all my weight and jumped off that to straighten out the turn buckle, which straightened out the turn buckle but there was a bad pop sensation in my mid back area, the claimant said. I continued to work the rest of that day, Whitaker said. That day I just felt like I might have pulled a muscle in my back or something, he said. I think that I worked a couple more days after that doing my normal duties, the claimant stated. I was supposed to be on light duty, just kind of doing light stuff, Whitaker stated, we don't have no such as light duty and I picked up just a couple boards too heavy and my back went all the way out. It was just like, down on the floor, one knee down, couldn't breathe, thought actually I was shot in the back with something, the claimant said. He agreed that this happened on July 15, 2000, a few days after the actual accident.

I was taken by our superintendent in his pick-up truck on July 15, 2000 to Missouri Baptist Hospital for

treatment, Whitaker said. The first doctor I treated with after that, to the best of my knowledge, was Dr. Ted Rummels and an MRI was performed, he said. To my knowledge that MRI revealed various bulged discs in my thoracic vertebrae which is where I was having my complaints, the claimant stated.

The claimant was queried - You don't recall having any sort of prior thoracic injury or injury to your mid back before July of 2000? Anything that would hold me up or hinder or stop me, no, Whitaker responded. When asked again, Whitaker stated that he remembered having an injury to his mid back area before July 2000. Describing where in the mid back he had had this injury, Whitaker stated that he was not a doctor and didn't know the back, but for the longest time he had some kind of ganglion cyst or some kind of cyst or something in his mid back that had to be removed. I think this was before Dr. George Schoedinger did my back surgery, Whitaker stated. I had no ongoing problems after the cyst was removed, he said. The claimant was queried – he didn't remember straining his mid back area before July of 2000, and Whitaker answered - No. He was further queried – you don't remember ever hurting your mid back when you had injured your low back? I can remember a pull or possibly something, but nothing that ever stopped me or slowed me down, Whitaker answered. I do not remember ever having pain in the area between my shoulder blades before July 2000, the claimant stated.

Whitaker stated, during redirect examination, that he did not recall anything specific or ongoing as far as complaints related to his mid back prior to July of 2000. He agreed that as to things that happened fifteen to eighteen years ago, his memory would have been better back then. I didn't remember any problems but if the reports and medical records indicate that I said it at that time or that day, yeah, I don't have any reason to dispute that, Whitaker said. He stated that he did not recall a repeat thoracic MRI being performed in July of 1991; assuming this was in the medical records, a thoracic MRI done on July 1, 1991 which revealed a negative findings, I don't have no reason to dispute that, the claimant said. Whitaker agreed that that went along with his testimony that he didn't have any ongoing complaints.

Medical records of Missouri Baptist MedicalCenter (No. M) included treatment of the claimant for various injuries beginning in 1995, and included records of treatment for the July 15, 2000 work related injury beginning with a July 15, 2000 emergency room record. The E.R. record noted Whitaker's complaint of upper back pain for two days that increased that day when working. Whitaker's past medical history was noted, including that he had had lumbar fusion surgery. X-rays were taken on July 15, 2000 and the report noted the impression – 1. Mild degenerative spondylosis is seen in themed thoracic region, and 2. Mild rotoscolisos of the thoracic spine; the emergency room doctor noted that the x-rays showed degenerative disc disease in the thoracic spine and the lumbar spine. The clinical impression on July 15, 2000 was: thoracic strain. Medication was prescribed, and Whitaker was taken off work with a restriction of no lifting until July 18, 2000; it was written that Whitaker was instructed to see a doctor.

St. Peters Bone and Joint Surgery/Dr. Theodore S. Rummels' records (No. N) began with an 11/29/99 Doctors Hospital note which indicated that Whitaker had suffered a left foot injury in a dirt bike fall; it was written that he had suffered a possible mid foot subluxation, and compartment syndrome, and it was noted that there was no fracture. The record indicated that the foot wound was treated through 04/03/00. The next entry was dated 07/24/00, and noted the work related incident and that Whitaker had felt something in his mid thoracic back. Further written was:

He has pain really at T4-5 and 6. Right over the rib pad there. Thoracic spine films reveal no fracture. Upper extremities are good. I feel that he just has a ligamentous injury to his spinal rib ligament structures. No numbness radiating along the chest. No crepitans. See him back in 3 weeks. Therapy. Keep him on his Vicodin.

The 08/21/00 entry noted that Whitaker was in for follow-up after an MRI; the MRI was noted to reveal – “Bulging disc thoracic spine 5-6, 6-7, no impression on the cord”. It was written that Whitaker reported the pain as about 50% better, 6 on a scale of 10 being the worse, and pain radiating in his ribs bilaterally. Objective findings were noted as: No neurological deficits; it was noted that Whitaker did heavy labor. The assessment on 08/21/00 was – thoracic back sprain radiculitis. A 08/21/00 Report to Employer form indicated for the July 2000 work related injury, diagnosis back sprain thoracic spine, Whitaker was estimated to return to work 08/24/00. A report of a thoracic myelogram performed on Whitaker on 06/05/01 noted that the study was limited because of a mixed injection. “However”, it was further noted, “the canal was normal in size. There was no evidence of cord compression. No compression deformities were noted in the thoracic spine.” In the 06/26/01 entry it was written

that Whitaker had tried to go back to work; Whitaker's comments noted were – Any lifting over 30 – or pulling over 30-40 lbs “it goes out”. Further written was that Whitaker had been to the emergency room two times due to pain at work, and was in that day for a second opinion. After examination of Whitaker on 06/26/01 and a review of a CT scan which Dr. Rummels noted as “essentially read as normal, he has a degenerative disc at T7-8, 8-9”, Dr. Rummels' written opinions were:

He has degenerative disc in his thoracic spine. Complaints are all subjective. He says he has been to numerous ER's for this intractable pain. He has also been to numerous session of physical therapy and has been treated by Dr. Samson. He comes with a CT scan which is essentially normal. Not as discriminating as an MRI.

Dr. Rummels' diagnosis on 06/26/01 was: Degenerative disc disease thoracic spine. The written treatment recommendation was: Voc rehab, work hardening. There was no indication of a recommendation for a follow-up visit.

Medical records of Dr. Barry Samson, M.D. of St. Louis Spine Care Alliance (No. P) indicated that Whitaker was seen by the doctor for the first time on 08/14/00. Dr. Samson wrote of the July 2000 work related injury, that Whitaker continued to work for two more days at basically light duty then carried a couple of heavy objects and had a marked increase in his symptoms; it was written that Whitaker was seen in the emergency room, x-rays were taken, and he was taken off work, and was still not working at the time of the 08/14/00 visit. Whitaker's statements were noted, that he had been sent to physical therapy by Dr. Rummels and was now feeling 70% better than he did when he was first injured. After examination, Dr. Samson's diagnosis was – Thoracic strain; treatment recommendations were medication, an MRI “due to pain that radiates anteriorly”, and remain off work. In the 08/28/00 follow-up note, Dr. Samson wrote that he had personally reviewed the MRI and reviewed the MRI report [3] with which he agreed and “there is minimal bulging at T6-7, T8-9 which is not evidence of a herniated disk and is most likely secondary to degenerative change”. The diagnosis stayed the same; Dr. Samson's treatment recommendations were medication, physical therapy, and remain off work “until reevaluated at which time I anticipate letting him go back to work”. Dr. Samson wrote in the next entry of 09/11/00 of Whitaker's additional complaints of legs going to sleep when he crosses his legs and arms go numb when he raises them overhead. After examination the diagnosis remained the same; it was written that Whitaker was to finish the previously prescribed physical therapy, and “(r)esume normal occupational duties on September 21st”. In the 10/02/00 entry, the interim history The diagnosis remained that same, thoracic strain), pain medication was prescribed, and Whitaker was given work restrictions of limitations on lifting, bending, pushing, pulling and climbing. The interim history in the next entry of 10/23/00 was:

Mr. Whitaker has been back to work in a limited capacity although he was unloading some 50 pound bags of sand last week and noted increased pain after that for the next week and a half. His symptoms are now getting better again. He does feel about 50% better now than he did a month ago.

The diagnosis, treatment and work restrictions remained the same.

In the next entry of 11/29/00, Dr. Samson wrote the following interim history:

He returns today with a new complaint, that being a burning, painful, hot, numb feeling along the lateral left thigh that stays above the knee. This started a week or two after his last office visit of October 23rd. His upper back continues to be sore, but is not as severe as it was two months ago. He is working with a 40 pound lifting restriction.

The diagnosis on 11/29/00 was now thoracic strain and left sciatica. Treatment now included not only pain medication but also Vioxx; Dr. Samson wrote recommendations that Whitaker “switch his tool belt from the left to the right in case this is meralgia paresthetica”, and that if not better would get a lumbar MRI. In an entry dated 12/21/00, a Dr. Patricia Hurford in the St. Louis Spine Center wrote:

Jim Whitaker is a patient of Dr. Samson. He called because of a marked increase in left leg pain. The patient was on a 40 pound weight restriction at work. He was working on the Page Avenue extension building a bridge. Since last Friday he has been off because of increasing pain in the left lateral thigh. This is thought to be related to meralgia paresthetica versus a lumbar problem. He is, however, being treated for a thoracic level disorder. He did not the shoulder blade pain

he has is "tolerable". He completed physical therapy and has been back at work since at least October with progressive increases in the amount of weight he is allowed to lift.

About six to eight weeks ago he developed left leg pain in the lateral thigh. He states it has progressed somewhat distally and is described as a severe burning sensation which disrupts his sleep. He started on a Medrol Dosepak on Tuesday. He continues to use Lorcet....

Dr. Hurford's impressions on 12/21/00 were

1. Thoracic paraspinal pain
2. Left lateral thigh pain. Meralgia paresthetica versus radicular symptoms. Patient with a history of previous L3-4 surgery.

Dr. Hurford's treatment recommendation was that "until this pain can be better differentiated he is to be started in a work conditioning program with emphasis in total spine mobility". Additional work restriction was applied.

Dr. Samson wrote in a 01/15/00 entry that Whitaker had seen Dr. Hurford last time who had sent Whitaker for work hardening to do some lifting, and Whitaker now states he had increasing shoulder blade pain. Whitaker stated that his employer would not continue to pay for the work hardening so he quit going, was also noted; it was noted that Whitaker relayed that the left leg burning he had was improving. Whitaker has not worked for the past 29 days, the doctor noted. Whitaker indicated that the increase symptoms he had after the work hardening incident are starting to improve, but he still has a lot of scapular pain, was noted. Dr. Samson wrote that Whitaker was to be off work pending a cervical MRI, and if the MRI is okay Whitaker would be allowed to return to work with a 40 pound lifting restriction for two weeks and then resume his regular job. Dr. Samson wrote in a 01/31/01 entry the following interim history:

He returns with his cervical MRI which I reviewed and shows some mild degenerative disc changes but no evidence of focal disc herniation or protrusion. In addition to his scapula and upper back pain, he complains of left thigh burning after walking a mile (sic) or two.

After physical examination, Dr. Samson's diagnosis was: 1. Thoracic strain with negative MRIs of the cervical and thoracic region; and 2. Left sciatica secondary to a nonrelated work problem. Dr. Samson's treatment recommendation of 01/15/01 were physical therapy for 2 weeks "for general conditioning program", and resume normal occupational duties, no restriction, on February 15th. It was noted in the next entry of 02/26/01 that Whitaker reported developing nausea and sweating when getting off the bed at physical therapy and was taken by ambulance to the emergency room where he was told his cardiac exam was okay; he has not had physical therapy since that date. Dr. Samson further wrote:

He complains his low back hurts with activity that goes into his leg, but as I have stated before (and he has stated before) this is a preexisting condition. He notes that he still has thoracic pain. He is now not planning to return to construction work. He is planning to switch occupations to motorcycle repair.

Dr. Samson wrote in the 02/26/01 entry that since the emergency room said there was no cardiac problem, he was returning Whitaker to physical therapy for three weeks during which time Whitaker would remain off work, and upon his return visit in three weeks he expected to release Whitaker to return to work. In a 03/19/01 letter to the workers' compensation carrier, Dr. Samson wrote that Whitaker had a scheduled appointment that day and did not keep the appointment or call to cancel or reschedule. Dr. Samson further wrote:

In view of the 8/17/2000 MRI showing no acute abnormality, just some mild degenerative bulging at T6-7 and T8-9 as well as the cervical MRI from 1/19/2001 showing some mild degenerative change without herniation. It is my opinion there is no structural or spinal explanation for his persistent complaints other than a strain.

It is therefore my opinion that there is a 2% (two percent) permanent partial disability at the level of the thoracic spine as a result of the July 15, 2000 injury. He has reached maximum medical improvement and is discharged from care.

There is no medical reason why he cannot work, in my opinion, with regard to the July injury.

Dr. Samson's record contained a 06/07/01 entry in which he wrote that Whitaker returned on that date after being seen in the emergency room on 05/21/2001 for complaints of severe pain. Because of Whitaker's continued complaints I ordered a thoracic myelogram which was performed on 06/05/01, Dr. Samson wrote. I personally reviewed the myelogram and post-myelogram CAT scan, the doctor wrote, and "(a)lthough there was a subdural injection as well as subarachnoid injection, the only findings I noted were some osteophyte formation at the T8-9 level, but no focal or herniated disc seen. No tumor or spinal canal cyst was seen." Dr. Samson noted the conclusions in the official radiology report: "Evaluation limited as detailed. Poor opacification of the subarachnoid space in the upper thoracic spine. No focal abnormality demonstrated in the upper thoracic spine. High field MRI of the thoracic spine was recommended". After physical examination, Dr. Samson's diagnosis was - thoracic pain. I advised Whitaker that I had no specific orthopedic recommendations, and that a physiatrist might be useful and gave Whitaker some names, Dr. Samson wrote. The doctor further wrote on 06/07/01: "I advised him it was my opinion there was no orthopedic reason he could not be working and could work with restrictions. No follow-up appointment is scheduled."

Medical records of Premier Care Orthopedics/Dr. Ravi V. Shitut, M.D. and Dr. George R. Schoedinger, III, M.D. (No. T) reflected treatment and/or evaluation of Whitaker for back problems from 07/10/90 through approximately 12/16/02. The first treatment entry of 07/10/90 by Dr. Schoedinger included:

...the patient reported that since last being seen in this office he came under the care of Dr Bruce Best, this occurring in November of 1988. He was treated with physical therapy for about four weeks and during that time was evaluated with numerous studies, one of which revealed evidence of a thoracic disc rupture. He states that he attempted to return to work in January or February of 1989 and was able to work for about four days, however, his symptoms increased in severity thereafter. He states that since that time he has not worked.

Dr. Schoedinger wrote that Whitaker presented with numerous imaging studies performed on 09/11/89, and "(S)tudies of the thoracic spine...reveal evidence of a disc rupture at the T8-T9 level. Similar studies in the cervical and lumbar spine revealed degenerative changes without other evidence of abnormality". The doctor wrote that he discussed with Whitaker that he had disc pathology in the cervical, thoracic and lumbar spine areas. "I have told him that I do not believe a surgical procedure will necessarily relieve him of all of the complaints which he voices or permit him to engage in unrestricted activity such as that which he feels is necessary for his work-related and recreational well being", Dr. Schoedinger wrote. The doctor wrote that no specific treatment was being recommended "other than the maintenance of a low level of weight". The record indicated that Whitaker next presented on 05/21/91 reporting that he was not working, and that he had persistent pain about his back and right lower limb with numbness about the leg upon activity requiring ambulation of flexion of the lumbar spine; Whitaker was continued off work, and an MRI of the spine and an electromyographic exam of the lower extremities were ordered. The reports of the thoracic radiographic studies, performed on 07/01/91, reported impressions of - negative MR of the thoracic spine (specifically reported was - "(t)he discs and vertebral bodies appear within normal limits"), and normal thoracic spine (x-ray). Dr. Schoedinger wrote in a 07/09/91 examination letter that the thoracic and lumbar magnetic resonance imaging performed on 07/01/91 were normal in all respects, and the dermatomal evoked response that suggested a right-sided L4 and possible L5 nerve root lesion. These electrical abnormalities are consistent with the diagnosis of a disc rupture as noted previously at the L5-S1 level from CT scan, the doctor wrote, and Whitaker was told that until he is unable to live with his difficulty I would not recommend further workup or surgical treatment. A 08/16/91 operative report reflected that on or about that date, Dr. Schoedinger performed on Whitaker the procedure of -- lumbar discectomy L5-S1, for the diagnosis of - herniated nucleus pulposus L5-S1.

Dr. Peggy Boyd Taylor, D.O., board certified in family practice, testified by deposition on behalf of the claimant. (No. G) I have been treating Whitaker since October 1996, Dr. Taylor said, he came to me with lower back pain. On July 15, 2000, Dr. Taylor stated, "(Whitaker) sustained an injury to his thoracic spine or upper back". (Taylor Dp. pg 11) The doctor described the work related accident of July 15, 2000. I continued treating Whitaker as his family doctor after July 15, 2000, and am currently treating him, Dr. Taylor said.

Dr. Taylor's treatment records of May 5, 2000 and June 29, 2000 were noted, and the doctor acknowledged that her diagnoses at that time were gastroesophageal, reflux disease, peptic ulcer and lumbar laminectomy by history with no mention of any thoracic pain. (Ruling: Employer/Insurer's objection is overruled. Taylor Dp. pg. 13) I next saw Whitaker on August 4, 2000, the doctor said, and Whitaker relayed that he had suffered injury at

work on July 15, 2000, was seeing a company doctor, and was having upper back pain with radiation up the neck, arms and shoulders. My diagnoses in August 2000 after examination now included anxiety symptoms and thoracic sprain work related; "I provided no specific treatment other than giving him medication", Dr. Taylor said. (Taylor Dp. pg. 14) The doctor stated that she saw Whitaker subsequent to this for unrelated problems, but she also assessed his progress in relation to the work related injury. Dr. Taylor discussed Whitaker's next visit on October 5, 2000:

"At that time he had reported his MRI results to me. I have thoracic herniated

disk, thoracic bulging disk, GERD, which is again gastroesophageal reflux disease, peptic ulcer disease, laminectomy by history, lumbar radiculopathy, left carpal tunnel syndrome, lumbar sprain recurrent, low back syndrome, chronic." (Taylor Dp. pp. 16-17)

Dr. Taylor stated that the diagnoses of thoracic herniated disk and thoracic bulging disk were related to the injury. (Ruling: Employer/Insurer's objection is overruled. Taylor Dp. pg. 17) The lumbar radiculopathy was related to Whitaker's earlier injury, the doctor said. Dr. Taylor stated that her diagnoses at the next appointment on November 3, 2000 were: "Again, GERD, peptic ulcer disease, lumbar radiculopathy, DJD low back and knees, chronic low back syndrome, thoracic bulging disk, thoracic herniated disk." (Taylor Dp. pg. 17) Dr. Taylor agreed that she had provided a report in December 2001 of all of Whitaker's injuries up to that date; the doctor's listed included -

".....date unknown foreign body left index finger imbedded, degenerative spondylosis of the thoracic spine T6-7, rotoscoliosis, degenerative disk disease L5-S1, spina bifida occulta at S1, bulging thoracic disk T6-T7, focal disk herniation T8-T9, thoracic sprain severe, thoracic radiculitis, left sciatica, cervical radiculopathy, degenerative osteoarthritis cervical spine." (Taylor Dp. pp. 20-21)

The diagnoses related to the July 15, 2000 injury, Dr. Taylor stated, are "(B)ulging thoracic disk T6-T7, focal disk herniation T8-T9, thoracic sprain severe, thoracic radiculitis...(a)nd... degenerative spondylosis of the thoracic spine T6-T7". (NOTE: Ruling: Employer/Insurer's two objections on grounds of – form of question – are sustained. Taylor Dp. pg. 26)

Dr. Taylor testified that she does not have a back specialty in her practice, but in her practice she treats at least three to four back injuries in a day. I order a lot of MRIs, the doctor said, I don't read them but I interpret them for my patients.

On cross examination by the employer/insurer, Dr. Taylor agreed that she had said Whitaker first became a patient of hers in October 1996. Dr. Taylor testified as to the conditions and illnesses she treated Whitaker for from October 1996 through July or August 2000:

"Low back syndrome, backache, body aches, low back syndrome, low back syndrome, left ear infection, depression, low back syndrome, anxiety, low back syndrome, sinusitis, bronchitis, laryngitis, low back syndrome.

"Insomnia, insomnia, low back syndrome, low back syndrome, cephalgia (headache).

"Cephalgia, anxiety, anxiety, GERD, laminectomy." (Taylor Dp. pp. 31-32)

Dr. Taylor referred to her medical record, and stated that Whitaker was already taking the pain medications Lorcet and Fiorcet on July 15, 2000. "That was for his low back", the doctor explained. (Taylor Dp. pg. 33)

Dr. Taylor admitted, during cross examination, that she never got a copy of the MRI report or a copy of any diagnostic study reports, and never saw any of the actual films. When queried if Whitaker had told her that the MRI report or another study had confirmed that he had a herniated disc of the thoracic spine, Dr. Taylor responded: "I don't recall him telling me that, no," (Taylor Dp. pg. 40) Dr. Taylor agreed that she is not an orthopedic surgeon, and is not a neurologist. It was noted that Dr. Taylor had stated earlier while going through her records that a herniated disc in the thoracic spine was one of her diagnoses, and Dr. Taylor responded: "And the only results I would have would be what he came back and told me these results were. But as far as being able to view them I wasn't approved by the company, so I would have no copies of those reports other than what he had given me." (Taylor Dp. pg. 40) The following testimony then occurred:

Q. Okay. Well, is it your opinion to a reasonable degree of medical certainty that he sustained a bulging disk in his thoracic spine as a result of the work related injury, and a herniation in the thoracic spine as a result of the 7/15/2000 injury?

A. Yes, ma'am, it is my opinion that he received those injuries on July 15th, 2000 from that injury that I described while working as a hod carrier.

Q. And what is the basis for your opinion?

A. The basis goes on my exam now, and what the report – what has been reported to me from the results of his studies.

Q. Okay. Reported by Mr. Whitaker; correct?

A. Yes. (Taylor Dp. pg. 41)

Dr. Raymond Cohen, D.O., physician, testified by deposition on behalf of the claimant. (No. H) The doctor stated that he examined Whitaker at the claimant's request on November 13, 2003, and identified Employee's Deposition Exhibit B as his rating report. A history of the July 15, 2000 work related injury as relayed by the claimant was discussed by Dr. Cohen, including the following:

"...He was holding onto (a three to four foot piece of rebar) and jumped off in order to straighten one of the turnbuckles. Upon doing this he heard a pop in his mid back area. He had severe pain in that area. He has no prior history of any problems referable to that area...." (Cohen Dp. pg. 7)

Dr. Cohen noted the following from his review of outside medical records during his discussion of some of Whitaker's preexisting physical problems and treatment: a. Dr. Schoedinger's records of 1990 and 1991:

"Records from 1990 from Dr. Schoedinger were reviewed and he noted that an MRI from 1989 revealed a disc rupture at T8-9. The patient did not recall any injury that year. He states that whatever he may or may not have had in 1989 or 1990, that he recovered and was able to do heavy labor work up until the primary work-related injury. He states that he was able to do the heavy construction work without any problems.

An operative report of 1991 from Dr. Schoedinger notes a herniated disc at L5-S1." (Cohen Dp. pp. 11-12)

Findings upon his physical and neurological examination of Whitaker on November 13, 2003 were discussed by Dr. Cohen and included:

"The neck was negative. He had full range of motion of the neck. His thoracic spine revealed diffuse tenderness along the paraspinal muscles from T4 down to T9 and he had a loss of motion of the thoracic spine of approximately 50 percent in all directions. He complained of increased pain in his mid back with range of motion testing. The lumbar spine revealed a well healed surgical scar. The range of motion of the lumbar spine was full in all directions. The straight leg raising test was negative. Several tender areas were noted from L4 down to the sacrum." (Cohen Dp. pp. 13-14)

My diagnosis concerning the July 15, 2000 work related injury, Dr. Cohen said, was: "Number one, thoracic disc protrusions and a thoracic myofascial pain disorder." (Cohen Dp. pg. 14) Dr. Cohen testified as to his diagnoses for Whitaker's preexisting conditions:

"Status-post lumbar surgery for disc herniation of L5-S1, status-post left foot surgery for fracture and a cutaneous ulcer, status-post left knee surgery for medial plica, and status-post multiple right wrist surgeries for severe internal derangement and carpal tunnel syndrome. Ultimately he had a fusion of the right wrist." (Cohen Dp. pp. 14-15)

Dr. Cohen testified as to his conclusions in regards to the July 15, 2000 work related injury, which included:

"That those noted diagnoses listed under the primary work-related injury are as a direct result of injuries he sustained at work on or about 7-15-00 and that the work is the substantial factor in his disability and that he has a full person disability of 35 percent at the thoracic spine of which 2.5 percent is pre-existing and 32.5 percent is a direct result of the primary work related injury on or about 7-15 of 2000." (Cohen Dp. pp. 15-16)

On cross examination by the employer/insurer, Dr. Cohen agreed that at the time he saw Whitaker, Whitaker had told him that he hadn't had any prior problems with his thoracic spine before July 2000, but that he (Dr. Cohen) had referenced reports he had reviewed of MRI scans of the thoracic spine done in 1989 and in 1991. The doctor was queried if he had specifically asked Whitaker why he had had MRI's done if he never had a problem with his thoracic spine, and Dr. Cohen answered:

"On 1989 during that study in the records from Dr. Schoedinger he didn't recall any injury from that year. In my review of those records from Dr. Schoedinger he was treating him for his low back injury that he had been treating him for from before."
(Cohen Dp. pg. 19)

Dr. Cohen stated that he was not aware of Whitaker ever relaying to him that he had ever treated with a Dr. John Credic. The records I have from Dr. Peggy Taylor-Boyd are for treatment after the primary injury, Dr. Cohen stated. Dr. Cohen agreed, during cross examination, he had mentioned that Whitaker had complained to him of some stress and depression, but that he did not make a medical diagnosis in these regards. Whitaker did not relay that he had ever had any sort of psychological evaluation before July 2000, the doctor said.

On cross examination by the Second Injury Fund, the doctor was asked to characterize Whitaker's primary injury, would he describe the primary injury as a sprain of the thoracic area of the back; Dr. Cohen answered - "Regarding part of that condition or injury to the muscle part, part of it's a sprain. Part of it in my opinion is from the disc." (Cohen Dp. pg. 30) At the time of my examination, Dr. Cohen testified, "(Whitaker) had significant pain in his mid back, but he didn't have any findings of spinal cord compression" (Cohen Dp. pg. 32)

Dr. Ravi Shitut, M.D., board certified in orthopedic surgery and in spine surgery, testified by deposition on behalf of the employer/insurer. (No. 5) The doctor stated that he evaluated Whitaker on behalf of the employer/insurer on October 25, 2002. Dr. Shitut discussed the history of the work related injury as relayed by Whitaker:

:"This patient stated he took a three foot piece of rebar and put it inside a turnbuckle to try and pry it to come back into shape. And when he pressed that down, the rebar, using his body weight, he felt a pop in his upper back. And he also heard a pop in his upper back. He reported this to his co-workers who seemingly also heard the pop. He was able to finish the job that day and over the next couple of days, his employer gave him light duty using a radio.

When the patient returned to his regular job approximately two or three days later, he was carrying a four by four on his shoulder when he noted increasing pain in his upper back. And that is the history of the pain and the injury that he gave." (Shitut Dp. pg. 9)

Dr. Shitut discussed the treatment Whitaker received after the July 2000 work related injury, including x-rays, an MRI of the thoracic spine, and according to Whitaker, an attempt at a myelogram. Dr. Shitut then noted:

"Subsequently attempts were made to return him to work around December 2000. He was evaluated by work conditioning program and also underwent rehabilitation. Therapy initially offered him significant relief of his symptoms. But he had only a 10 pound weight restriction of the program, and when he attempted to lift some 30 pounds, he developed an increasing pain in his upper back. The work conditions program was subsequently stopped. It was recommended that the patient switch his tool belt from one side to the other side, but that did not offer him much relief." (Shitut Dp. pg. 10)

The doctor noted additional complaints and history from Whitaker:

"He stated that his pain started when he returned to the physical work activities two or three days following the initial injury of 7/15/00. He also was complaining of left lateral thigh pain and tingling in, that radiates into the left calf and dorsum of his injury. He's also complaining about tingling in his right buttock area that developed at the same time.

Patient reported that the symptoms in his lower extremity have been better over the last four to five weeks. He also noted numbness that encompasses both upper extremities, particularly all his fingers. Both are equal in intensity. The patient stated his symptoms started approximately three to four days after the injury and most

frequently occur when he held his arms in the front of his body. The patient is left-hand dominant.

“He also stated that over the course of time, he had made multiple trips to the emergency room with exacerbation of his pain. For that, he usually received injections of Demerol so that his symptoms would decrease. That was his overall history.” (Shitut Dp. pp. 11 and 12)

Dr. Shitut discussed Whitaker’s relayed history of past medical and surgical procedures.

Physical examination findings on October 25, 2002, Dr. Shitut testified, were:

“On that day, to me he appeared a healthy 40-year-old male who stood six feet tall and weighed 210 pounds. Predominant complaints were cervical-thoracic pain and then within that, thoracic pain. Thoracic spine was therefore examined and the spine, color in the spine – skin color in the spine was normal. A quick review of the lumbar spine showed longitudinal scar from his previous surgery which was consistent with the history he gave me, which was upper diskectomy performed in 1991. There was no obvious deformity of his spine.

Dr. Shitut stated that he looked at actual diagnostic films, and listed them: “Thoracic myelography CT that was performed on 6/5/01...and also looked at a post-myelographic CT scan...I looked at a thoracic MRI scan that was performed on 8/17/99.” (Shitut Dp. pg. 16)

Agreeing that he formed an opinion after his October 25, 2002 evaluation as to whether or not Whitaker had sustained an injury as a result of his job duties in July 2000^[4] while employed at Midwest Foundation, Dr. Shitut testified:

“Yes, my impression was that he had sustained a sprain of the surgical thoracic area as a result of an industrial injury sustained about two years ago. And based on the review of the work-up, which included the myelogram and the cat scan that we mentioned about and also an MRI scan of the thoracic spine, it seemed like he had an underlying degenerative disk disease in his thoracic spine and more specifically at T6-T7 and T8-T9. I thought that since the symptoms have lasted so long, at least some of his symptoms could be coming from the underlying degenerative disk disease that he had. And I’ve given you my C.V. and my main thing is I do surgery, and I was assuming that he was referred to me to see if he required surgery. I didn’t think he required surgery.” (Shitut Dp. pp. 16-17)

I recommended that the thoracic MRI be repeated, Dr. Shitut said, and explained that “part of the reason was there was some questions raised about what the thoracic myelogram showed and whether what that showed was anything clinically significant or not”. (Shitut Dp. pg. 17) Dr. Shitut discussed what the new MRI scan performed on November 12, 2001 showed: “The bony architecture, that is the bones looked all right. There was no compression of the spinal cord or nerves of any kind. He had small central extradural defects at many levels and that included the levels at T4-5, T7-8, and T8-T9.” (Shitut Dp. pp. 17) These abnormalities, “I would classify them as minor and what I would consider as clinically not very significant”, the doctor stated, abnormalities common in some body his age. (Shitut Dp. pg. 18)

Dr. Shitut discussed the MRI reports and studies he reviewed during cross examination. Comparing the report of an MRI performed July 1, 1991 with the August 2000 MRI and November 12, 2002 MRI, Dr. Shitut agreed that the 1991 study reported no extradural defects identified, and the 2000 and 2002 studies showed that there were a number of disk protrusions; the doctor agreed that some time between July 1991 and August 2000 Whitaker developed the extradural defects. The doctor was queried, wasn’t it true that Whitaker indicated to him that he didn’t have any symptoms or problems as far the degenerative condition of his thoracic spine prior to July 15, 2000. “He did not have any problems prior to the injury.” (Shitut Dp. pg. 35) The following testimony then occurred:

Q. And if -- however, your impression is that the injury was just a sprain as opposed to that he actually sustained these protrusions or bulges, is that correct?

A. That is correct, yes. I think the injury itself was an upper sprain.

Q. So you don’t believe that the disk or the disk bulges and the protrusions which are, which were shown in

August of 2000, that weren't there in July of '91, were not caused from this injury?

A. I don't think they are caused by the injury.

Q. What do you base that on?

A. It's based on the knowledge of the condition. Because the bulging we are talking about is a degenerative condition. It's not a problematic condition. And to go beyond that, it will be somewhat difficult to decide that those were actually causing some, it not all, of his symptoms. This kind of bulges are present in a significantly high percentage of totally asymptomatic people who won't even have any symptoms. And their association with when the actual presence and the symptoms is questionable at best. (Shitut Dp. pp. 35-36)

During redirect, Dr. Shitut was referred to a report of a MRI of the thoracic spine in Dr. Schoedinger's July 10, 1990 record; in reading the MRI report, Dr. Shitut noted that the study had been performed on 9/11/89, and further testified to the reported findings – “Studies of the thoracic spine...reveal evidence of a disk rupture at T8-T9 level. Similar studies in the cervical and lumbar spine revealed degenerative changes without other evidence of abnormality” (Shitut Dp. pg. 50) To my knowledge, Dr. Shitut stated, Whitaker did not tell me he had had MRIs of his thoracic spine done before the July 2000 work related injury. When queried if Whitaker had told him whether or not he was having any symptoms in his thoracic spine prior to July of 2000, Dr. Shitut answered – “To my knowledge, he did not have any symptoms to his thoracic spine.” (Shitut Dp. pg. 51)

On further cross examination, Dr. Shitut acknowledged that in a July 9, 1991 supplemental report by Dr. Schoedinger's findings included – “That the thoracic and lumbar magnetic resonance imaging performed on 7/1/90 were normal in all aspects” (Shitut Dp. pg. 51) It is possible to have a disk rupture in July 1990 and then have a normal MRI less than a year later, Dr. Shitut said, and explained that it could have been the technique by which the MRI was done, or possibly “some of the seemingly minor disk herniations might actually get better with time and that has been proven time and again”. (Shitut Dp. pg. 52).

“For an injury to be compensable the evidence must establish a causal connection between the accident and the injury. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause and extent of the disability when the facts fall within the realm of lay understanding.

“An injury may be of such a nature [however] that expert opinion is essential to show that it was caused by the accident to which it is ascribed.” (Citations omitted) ” Griggs v. A. B. Chance Co., 503 S.W.2d 697, 703 and 704 (Mo.App. 1973.)

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“...an injury may be of such a nature that expert opinion is essential to show that it was caused by the accident to which it is ascribed. When the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific techniques for diagnosis, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding...” *Knipp v. Nordyne, Inc.* 969 S.W.2d 236, 240 (Mo.App. 1998).

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“A medical expert's opinion must have in support of it reasons and facts supported by competent evidence which will give the opinion sufficient probative force to be substantial evidence.” (citations omitted) *Pippin v. St. Joe Minerals Corp.*, 799 S.W.2d 898, 904 (Mo.App. 1990).

It is found, considering the medical opinions, that the competent and substantial evidence establishes that as a result of the work related injury at Midwest Foundation Corporation on or about July 15, 2000, the claimant suffered the injury of – thoracic strain/sprain. It is found that Dr. Taylor's opinion that the claimant suffered a herniated thoracic disc is not supported by the other treatment records for the July 15, 2000 work related injury and not supported by the majority of the evaluating doctors; additionally, Dr. Taylor admitted that she did not review any of the radiographic studies herself, but rather relied on the history relayed to her by the claimant, thus there was an insufficient basis for making such a diagnosis of a sophisticated injury. It is found that Dr. Taylor's and Dr. Cohen's opinions that the claimant suffered bulging discs of the thoracic spine as a result of the July 15, 2000 work related injury is not supported by the substantial weight of opinions by the treating doctors

or the evaluating doctors; it is found that the competent and substantial medical opinion is that on the date of the July 15, 2000 work related injury, the claimant already had the condition of degenerative disc disease of the thoracic and lumbar spine.

ISSUE: Nature and extent of temporary total disability benefits re: three specific periods -- first is December 15, 2001 through January 14, 2001; second is February 15, 2001 through February 25, 2001; and third is March 19, 2001 through October 1, 2002

Whitaker testified that after the July 15, 2000 work incident, I was taken by our superintendent in his pick-up truck to Missouri Baptist Hospital for treatment. The first doctor I treated with after that, to the best of my knowledge, was Dr. Ted Rummels and an MRI was performed, he said. To my knowledge that MRI revealed various bulged discs in my thoracic vertebrae which is where I was having my complaints, the claimant stated.

Dr. Rummels had me off work, and when I first saw Dr. Samson in August of 2000 he also had me off work, the claimant stated, and I was receiving TTD payments during this time. After this treatment, I did try to work, this was in about September 2000, and I continued to work, Whitaker said. I was allowed to go back on light duty, but like I said before, there's no such thing as light duty, but I am a good worker, I am good at what I do, he said. Actually, I was the only guy working at that time because weather was getting bad, they found little jobs for me to do to keep me there; so I was kind of on light duty doing a lot of miscellaneous stuff, nothing heavy. Agreeing that he was the one who actually wanted to go back to work, Whitaker stated that Dr. Samson didn't want him to but allowed him to go back with restrictions.

I continued treating with Dr. Samson after I returned to light duty work, the claimant said. After returning to work my condition got worse, Whitaker stated, I got to where I couldn't breathe, and I was paranoid and freaking out that I was going to be paralyzed because I just knew something this time was really, really, really wrong, he said. Whitaker agreed that he continued working this light duty work through about mid December; he agreed that he saw Dr. Hurford, a physician with Dr. Samson's office, on December 21, 2000. Dr. Hurford didn't want me to go back to work and took me off work, and ordered I think some work hardening type deal for me, and gave me some different kind of meds, he stated. I saw Dr. Samson again on January 15, 2001, the claimant said, and on that date Dr. Samson also took me off work. Whitaker was asked if he was working from December 15, 2000 through January 14, 2001, and he answered - No. I did not receive any temporary total disability benefits for this period of December 15, 2000 through January 14, 2001, the claimant said. Whitaker agreed that he had indicated that at that point he'd said something about work hardening or some sort of physical therapy with Pro Rehab. I did do the work hardening, I did do Pro Rehab, he said, and the work that they asked me to do, it seemed like it was working and I was seemingly getting better, and they pumped me up on a little bit too much weight the day that they bumped me up, and, boy, it was all over again, started back from scratch. Whitaker agreed that he was taken to the hospital from the physical therapy that day, and this happened in February of 2001.

It was noted that there was a time, according to the medical records, when Whitaker couldn't attend physical therapy because he wasn't being paid TTD; Whitaker stated that he recalled stating this to Larry Bauer who was with the employer. Whitaker agreed that he received TTD benefits from January 15, 2001 through February 14, 2001, and that he was treating with Dr. Samson during this period of time who also had him doing physical therapy.

Concerning the incident at physical therapy when he lifted up too much weights and was taken by ambulance from the physical therapist, Whitaker acknowledged Plaintiff's Exhibit BB as a copy of the Warren County Ambulance District statement dated February 19, 2001 which had been mailed to him; the claimant agreed that on the statement was a listing of an invoice for treatment or services provided on February 7, 2001 including service at Dr. Oliver's office in Warrenton to Crossroads Regional Hospital in Wentzville, and also ambulance service and a charge of \$443.50; it was noted that the document also showed a payment of \$274.80. Whitaker agreed that he then received a bill for the balance of \$168.70. When asked who had called the ambulance for this treatment, the claimant answered - The physical therapist did. After this incident I did not receive any more physical therapy, Whitaker said. They took me off physical therapy for a short period of time, he agreed, and I was also still off work at this time. It was noted that the records indicated that he didn't receive any temporary total disability benefits from February 15, 2001 through February 25, 2001, and Whitaker responded that he did not

know why those benefits were not paid to him. He was asked if he was working at that period of time, February 15, 2001, which would have been eight days after the physical therapy incident and while he was treating with Dr. Samson. I'm not sure on my dates, but Dr. Samson did send me back to work after all that, Whitaker testified, I know I went to several different rehabs and therapies for Dr. Samson and continued to try to still be back on the job; you know, I did not go back to work after that.

I have not worked at all for Midwest Foundation, for construction or otherwise since December 15, 2000, Whitaker said. He agreed that he continued treating with Dr. Samson. Testifying about what happened at a March 19, 2001 appointment with Dr. Samson, Whitaker stated that usually when he got to that doctor's appointment he was usually right in and right out; but on the 19th of March appointment he sat for an hour and couldn't figure out why. I went up and asked why I was sitting, and one of the doctor's secretaries came out and told me that there was no more treatment from Dr. Samson, that the employer/insurer was not paying for anything else as far as treatment on this case. It was noted that Dr. Samson's note indicated that Whitaker was not at his appointment on March 19th. That is false, Whitaker said, I did go to that appointment. I actually talked with Dr. Samson, the claimant said, Dr. Samson actually called me into his office after all the arguing and stuff, and told me his hands were tied, the employer/insurer said no more pay, but if I would like further treatment I could come back and see him under my health care program. Dr. Samson did not examine me or treat me on that date, the claimant said. My temporary total disability benefits were stopped on March 18, 2001, the day before that appointment.

I was unable to go back to work in March 2001, the claimant said. I requested additional treatment, Whitaker testified, and when he okayed me to come back through my HealthLink, I talked that through with HealthLink and they weren't going to pay for nothing that was due to a workers' comp case. Neither my employer or their workers' compensation insurance carrier authorized any additional treatment for me, Whitaker stated. I continued to experience severe pain and was taken to the emergency room a few times, he said. Whitaker stated that he recalled being taken to St. Joseph Hospital West in Lake St. Louis on May 19, 2001 by way of ambulance, and identified Claimant's Exhibit BB as a bill he received for the ambulance service provided by Warren County Ambulance District on May 19, 2001. At the hospital on May 19, 2001 they called Dr. Samson, and also I was shot up with a bunch of different meds to get rid of the pain, then they sent me home and told me to follow up with my physician that I had been seeing, Whitaker stated. On May 21, 2001 I recall being taken by ambulance to Missouri Baptist Hospital for the same thing -- severe, chronic (pain) to the center of the back, the claimant said, and the ambulance bill for May 21, 2001 is also indicated on this exhibit. I have not paid these bills; I am not financially able to pay these bills, Whitaker said. I never received a bill from when I was treated at the emergency room at Missouri Baptist on May 21, 2001, he said, and further stated that he had indicated to them that it was workers' comp.

Whitaker agreed that while he was at Missouri Baptist Hospital Dr. Samson was contacted and he requested that Whitaker have a thoracic myelogram; he agreed that there was a mixed injection performed, which is not a myelogram, and this treatment was on June 5, 2001 at Dr. Samson's request. I don't think I received a bill for this, the claimant said. I knew that these bills were being submitted to the workers' compensation carrier, Whitaker said. It was noted that there had been a medical fee dispute filed with the Court concerning a bill from June 5, 2001 with Dr. Samson that hasn't been paid, and Whitaker was asked if he had received any bills for that date. Dr. Samson's not sending me nothing, and Missouri Baptist not sent me nothing, the claimant stated. It was noted that Court Exhibit A-2 indicated that it was for chest pain or CT Scan; Whitaker stated that he was familiar with this. My complaints at that time, he explained, were that the pain was coming around the front of me more than normally and it felt like my chest was caving in. And I thought I might actually be having a heart attack or something, and they was like your hurt in the back why are you hurting in the front, we need to do a CT Scan or whatever, Whitaker said. He agreed that this treatment was provided to him as requested by Dr. Samson. The claimant was queried - it was your understanding that was related to the injury which you sustained at work? Yes, definitely, Whitaker answered. I had a follow-up appointment with Dr. Samson on June 7, 2001 with Dr. Samson, the claimant stated, and that was the last time I saw Dr. Samson. He was asked if he recalled did Dr. Samson release him to return to work without restrictions. I didn't know it, but, yes, Whitaker answered. I didn't know I was returned back to work; I never received a letter or statement from anywhere, Dr. Samson's office, of no kind saying that I was able to return back to work, the claimant said. Stating that he saw it in the medical records a month later, Whitaker agreed that Dr. Samson apparently filled out a disability certificate saying that Whitaker could return to work. I also had follow-up treatment with Dr. Rummels in the latter part of June of 2001, the claimant agreed. Dr. Samson recommended another thoracic non-mixed injection, the claimant noted.

At this time, June 2001, I was feeling horrible, Whitaker stated, I was experiencing pain twenty-four hours a day. The more I would do, the more it would hurt, he said. If I took it easy, yes, I barely had any problems; if I would do anything, I would have a lot of problems, Whitaker said.

Whitaker agreed that during this time he was also treating with Dr. Peggy Boyd Taylor, his family physician who had been treating him since before the mid 1990's. The claimant acknowledged that Dr. Taylor was a friend, and had loaned him money. When all my meds were stopped, Dr. Taylor started providing me all the meds that I was on from the date of injury, the claimant said. Whitaker stated that Dr. Taylor had provided him with medications and pain pills on all of his old injuries.

The claimant agreed that he had filed a request for hardship in this case and had had a hearing, and an Award was handed down by Judge Karll on October 2, 2002. He was asked if he had received any TTD payments from March 18, 2001 through October 1, 2002, and Whitaker responded - I don't think so. I did not work during that period of time, he said, I was not able to work. Whitaker stated that his employer or their workers' compensation insurance company did not provide him with any additional treatment prior to the temporary award being issued. He agreed that beginning on October 2, 2002 through December 17, 2002 his employer paid him temporary total disability benefits pursuant to the Award, and he also received some additional treatment with Dr. Shitut.

Dr. Shitut obtained another MRI on my back, Whitaker said. He was asked what he recalled about his visits with Dr. Shitut, and the claimant answered that they were poor. No answers, no logic to none of it, what's really going wrong, he added. My expectations from this treatment was that I was hoping he would send me back to work or give me something to make this go away or something where I could continue on providing for my family, and that did not happen, Whitaker stated. Dr. Shitut told me that as far as being able to return to work - no way, no how. My last appointment with Dr. Shitut was on about December 16, 2002, Whitaker said. He was asked if Dr. Shitut had released him to return to work with Midwest Foundation. No, sir, Whitaker answered. Dr. Shitut did place me at maximum medical improvement as of December 15, 2002, he said. The claimant agreed that Dr. Shitut suggested to him that he might have to get some vocational rehabilitation. I have not received any other treatment from the employer or the insurer, Whitaker said. He agreed that he continues treating with Dr. Taylor.

I have not worked since December 16, 2002, Whitaker testified.

On cross examination by the employer/insurer, Whitaker agreed that he was sent to Dr. Samson by the workers' compensation carrier. Noted was the claimant's earlier testimony that he had appeared for an appointment with Dr. Samson in March of 2001 and the doctor refused to see him; the claimant agreed that he had stated this. Whitaker stated that he disagreed if Dr. Samson had provided a report indicating that Whitaker didn't keep that appointment, and that he didn't call to reschedule or didn't cancel. It was a couple of weeks after seeing Dr. Samson again at the June of 2001 appointment that I found out the doctor had released me to return to work, Whitaker stated. When asked how he had found out that Dr. Samson had released him to return to work, Whitaker responded - I think I called the office. And I had them send me a letter so I could send it to my boss at Midwest Foundation to show them because they have to have from that doctor to okay me back on the job, the claimant stated, they never received nothing of that that I know of still. Dr. Samson did not give me a release to return to work at the June of 2001 appointment and I didn't go there for the purposes of getting a release to return to work, the claimant stated. Whitaker's deposition testimony of June 3, 2002 was noted where he was asked and he had testified: 1. Q "And have you seen Dr. Samson since you talked to them about the mixed injection and his recommendation to have another myelogram?" A. "Just as of June when he finally give me my real slip to go back to work."; and 2. Q. "And did you go back to work when you were supposed to?" A. "No, I'm not able to." Q. "But you were there for the purpose of getting a back to work slip?" A. "Yes." Q. "But then you didn't go back to work?" A. "No.". The claimant was queried at the hearing if this deposition testimony refreshed his memory, did he get a release to return to work back in June of 2001 from Dr. Samson. "Not till a couple weeks after that", the claimant admitted.

Dr. Theodore S. Rummels of St. Peters Bone and Joint Surgery records (No. N) indicated that the claimant was treated for the July 15, 2000 work related injury. The entry dated 07/24/00 noted the work related incident and that Whitaker had felt something in his mid thoracic back. Further written was:

He has pain really at T4-5 and 6. Right over the rib pad there. Thoracic spine films reveal no fracture. Upper extremities are good. I feel that he just has a ligamentous injury to his spinal rib ligament structures. No numbness radiating along the chest. No crepitans. See him back in 3 weeks. Therapy. Keep him on his Vicodin.

The 08/21/00 entry noted that Whitaker was in for follow-up after an MRI; the MRI was noted to reveal – “Bulging disc thoracic spine 5-6, 6-7, no impression on the cord”. It was written that Whitaker reported the pain as about 50% better, 6 on a scale of 10 being the worse, and pain radiating in his ribs bilaterally. Objective findings were noted as: No neurological deficits; it was noted that Whitaker did heavy labor. The assessment on 08/21/00 was – thoracic back sprain radiculitis. A 08/21/00 Report to Employer form indicated for the July 2000 work related injury, diagnosis back sprain thoracic spine, Whitaker was estimated to return to work 08/24/00. A report of a thoracic myelogram performed on Whitaker on 06/05/01 noted that the study was limited because of a mixed injection. “However”, it was further noted, “the canal was normal in size. There was no evidence of cord compression. No compression deformities were noted in the thoracic spine.” In the 06/26/01 entry it was written that Whitaker had tried to go back to work; Whitaker’s comments noted were – Any lifting over 30 – or pulling over 30-40 lbs “it goes out”. Further written was that Whitaker had been to the emergency room two times due to pain at work, and was in that day for a second opinion. After examination of Whitaker on 06/26/01 and a review of a CT scan which Dr. Rummels noted as “essentially read as normal, he has a degenerative disc at T7-8, 8-9”, Dr. Rummels’ written opinions were:

He has degenerative disc in his thoracic spine. Complaints are all subjective. He says he has been to numerous ER’s for this intractable pain. He has also been to numerous sessions of physical therapy and has been treated by Dr. Samson. He comes with a CT scan which is essentially normal. Not as discriminating as an MRI.

Dr. Rummels’ diagnosis on 06/26/01 was: Degenerative disc disease thoracic spine. The written treatment recommendation was: Voc rehab, work hardening. There was no indication of a recommendation for a follow-up visit.

Medical records of Dr. Barry Samson, M.D. of St. Louis Spine Care Alliance (No. P) indicated that Whitaker was seen by the doctor for the first time on 08/14/00. Dr. Samson wrote of the July 2000 work related injury, that Whitaker continued to work for two more days at basically light duty then carried a couple of heavy objects and had a marked increase in his symptoms; it was written that Whitaker was seen in the emergency room, x-rays were taken, and he was taken off work, and was still not working at the time of the 08/14/00 visit. Whitaker’s statements were noted, that he had been sent to physical therapy by Dr. Rummels and was now feeling 70% better than he did when he was first injured. After examination, Dr. Samson’s diagnosis was – Thoracic strain; treatment recommendations were medication, an MRI “due to pain that radiates anteriorly”, and remain off work. In the 08/28/00 follow-up note, Dr. Samson wrote that he had personally reviewed the MRI and reviewed the MRI report ^[5] with which he agreed and “there is minimal bulging at T6-7, T8-9 which is not evidence of a herniated disk and is most likely secondary to degenerative change”. The diagnosis stayed the same; Dr. Samson’s treatment recommendations were medication, physical therapy, and remain off work “until reevaluated at which time I anticipate letting him go back to work”. Dr. Samson wrote in the next entry of 09/11/00 of Whitaker’s additional complaints of legs going to sleep when he crosses his legs and arms go numb when he raises them overhead. After examination the diagnosis remained the same; it was written that Whitaker was to finish the previously prescribed physical therapy, and “(r)esume normal occupational duties on September 21st”. In the 10/02/00 entry, the interim history was:

He has been at work but “not doing too much”. He is not lifting more than 25 pounds. His symptoms are better than they were a month ago but he still has pain between the shoulder blades. He is not having arm complaints.

The diagnosis on 10/02/00 remained that same (thoracic strain), pain medication was prescribed, and Whitaker was given work restrictions of limitations on lifting, bending, pushing, pulling and climbing. The interim history in the next entry of 10/23/00 was:

Mr. Whitaker has been back to work in a limited capacity although he was unloading some 50 pound bags of sand last week and noted increased pain after that for the next week and a half. His symptoms are now getting better again. He does feel about 50% better now than he did a month ago.

The diagnosis, treatment and work restrictions remained the same.

In the next entry of 11/29/00, Dr. Samson wrote the following interim history:

He returns today with a new complaint, that being a burning, painful, hot, numb feeling along the lateral left thigh that stays above the knee. This started a week or two after his last office visit of October 23rd. His upper back continues to be sore, but is not as severe as it was two months ago. He is working with a 40 pound lifting restriction.

The diagnosis on 11/29/00 was now thoracic strain and left sciatica. Treatment now included not only pain medication but also Vioxx; Dr. Samson wrote recommendations that Whitaker "switch his tool belt from the left to the right in case this is meralgia paresthetica", and that if not better would get a lumbar MRI. In an entry dated 12/21/00, a Dr. Patricia Hurford in the St. Louis Spine Center wrote:

Jim Whitaker is a patient of Dr. Samson. He called because of a marked increase in left leg pain. The patient was on a 40 pound weight restriction at work. He was working on the Page Avenue extension building a bridge. Since last Friday he has been off because of increasing pain in the left lateral thigh. This is thought to be related to meralgia paresthetica^[6] versus a lumbar problem. He is, however, being treated for a thoracic level disorder. He did note the shoulder blade pain he has is "tolerable". He completed physical therapy and has been back at work since at least October with progressive increases in the amount of weight he is allowed to lift.

About six to eight weeks ago he developed left leg pain in the lateral thigh. He states it has progressed somewhat distally and is described as a severe burning sensation which disrupts his sleep. He started on a Medrol Dosepak on Tuesday. He continues to use Lorcet....

Dr. Hurford's impressions on 12/21/00 were

1. Thoracic paraspinal pain
2. Left lateral thigh pain. Meralgia paresthetica versus radicular symptoms. Patient with a history of previous L3-4 surgery.

Dr. Hurford's treatment recommendation was that "until this pain can be better differentiated he is to be started in a work conditioning program with emphasis in total spine mobility". Dr. Hurford further wrote: "Work restrictions include no lifting greater than 20 pounds, and change positions for comfort as needed".

Dr. Samson wrote in a 01/15/01 entry that Whitaker had seen Dr. Hurford last time who had sent Whitaker for work hardening to do some lifting, and Whitaker now states he had increasing shoulder blade pain. Also noted was Whitaker's statement that his employer would not continue to pay for the work hardening so he quit going; it was noted that Whitaker relayed that the left leg burning he had was improving. Whitaker has not worked for the past 29 days, the doctor noted. Whitaker indicated that the increase symptoms he had after the work hardening incident were starting to improve, but he still had a lot of scapular pain, was noted. Dr. Samson wrote that Whitaker was to be off work pending a cervical MRI, and if the MRI is okay Whitaker would be allowed to return to work with a 40 pound lifting restriction for two weeks and then resume his regular job. Dr. Samson wrote in a 01/31/01 entry the following interim history:

He returns with his cervical MRI which I reviewed and shows some mild degenerative disc changes but no evidence of focal disc herniation or protrusion. In addition to his scapula and upper back pain, he complains of left thigh burning after walking a mile (sic) or two.

After physical examination, Dr. Samson's diagnosis was: 1. Thoracic strain with negative MRIs of the cervical and thoracic region; and 2. Left sciatica secondary to a nonrelated work problem. Dr. Samson's treatment recommendation on 01/15/01 were physical therapy for 2 weeks "for general conditioning program", and resume normal occupational duties, no restriction, on February 15th. It was noted in the next entry of 02/26/01 that

Whitaker reported developing nausea and sweating when getting off the bed at physical therapy and was taken by ambulance to the emergency room where he was told his cardiac exam was okay; he has not had physical therapy since that date. Dr. Samson further wrote:

He complains his low back hurts with activity that goes into his leg, but as I have stated before (and he has stated before) this is a preexisting condition. He notes that he still has thoracic pain. He is now not planning to return to construction work. He is planning to switch occupations to motorcycle repair.

Dr. Samson wrote in the 02/26/01 entry that since the emergency room said there was no cardiac problem, he was returning Whitaker to physical therapy for three weeks during which time Whitaker would remain off work, and upon his return visit in three weeks he expected to release Whitaker to return to work. In a 03/19/01 letter to the workers' compensation carrier, Dr. Samson wrote that Whitaker had a scheduled appointment that day and did not keep the appointment or call to cancel or reschedule. Dr. Samson further wrote:

In view of the 8/17/2000 MRI showing no acute abnormality, just some mild degenerative bulging at T6-7 and T8-9 as well as the cervical MRI from 1/19/2001 showing some mild degenerative change without herniation. It is my opinion there is no structural or spinal explanation for his persistent complaints other than a strain.

It is therefore my opinion that there is a 2% (two percent) permanent partial disability at the level of the thoracic spine as a result of the July 15, 2000 injury. He has reached maximum medical improvement and is discharged from care.

There is no medical reason why he cannot work, in my opinion, with regard to the July injury.

Dr. Samson's record next contained a 06/07/01 entry in which he wrote that Whitaker returned on that date after being seen in the emergency room on 05/21/2001 for complaints of severe pain. Because of Whitaker's continued complaints I ordered a thoracic myelogram which was performed on 06/05/01, Dr. Samson wrote. I personally reviewed the myelogram and post-myelogram CAT scan, the doctor wrote, and "(a)lthough there was a subdural injection as well as subarachnoid injection, the only findings I noted were some osteophyte formation at the T8-9 level, but no focal or herniated disc seen. No tumor or spinal canal cyst was seen." Dr. Samson noted the conclusions in the official radiology report: "Evaluation limited as detailed. Poor opacification of the subarachnoid space in the upper thoracic spine. No focal abnormality demonstrated in the upper thoracic spine. High field MRI of the thoracic spine was recommended". After physical examination, Dr. Samson's diagnosis was - thoracic pain. I advised Whitaker that I had no specific orthopedic recommendations, and that a physiatrist might be useful and gave Whitaker some names, Dr. Samson wrote. The doctor further wrote on 06/07/01: "I advised him it was my opinion there was no orthopedic reason he could not be working and could work with restrictions. No follow-up appointment is scheduled."

SSM Rehab records (No. R) indicated in an initial evaluation and treatment note of 02/06/01 that Whitaker had been referred by Dr. Samson; it was noted that Whitaker's mother had died in a motor vehicle accident and he had experienced increased pain since going to ProRehab pulling on chains and bands, and wanted to increase weight tolerance for work. The 02/07/01 entry noted Whitaker's comments that he had felt better with treatment until carrying about a 15-pound bag of groceries, including a case of soda, and now had increased pain and difficulty breathing. The 02/07/01 entry indicated that with therapy Whitaker had increased difficulty with breathing, and it was written that he was walked next door to the Urgent Care Center; it was written that the therapist felt Whitaker's condition needed urgent medical attention before continuing physical therapy. The record indicated that Whitaker returned on 02/15/01 ready to resume physical therapy; it was written that in the interim Whitaker had not returned to the doctor because he did not feel worse upon returning home. Written observations on 02/15/01 were: "Pt presents in (no) apparent distress – breathing normal & although (complains of pain & tightness, does not display slow or guarded mvmt, wincing etc"; the therapist further wrote they would not continue therapy at that time unless cleared by a doctor, that they did not feel Whitaker's condition at that time warranted him stable enough to receive PT, and that this was to be conveyed to Dr. Samson & Dr. Rummels.

Dr. Ravi Shitut, M.D., board certified in orthopedic surgery and in spine surgery, testified by deposition on behalf of the employer/insurer. (No. 5) The doctor stated that he evaluated Whitaker on behalf of the employer/insurer on October 25, 2002. Whitaker's complaints were thoracic pain, some pain in the lower extremity and intermittent pain in the anterior chest wall, the doctor said. Dr. Shitut discussed the history of the work related

injury as relayed by Whitaker:

"This patient stated he took a three foot piece of rebar and put it inside a turnbuckle to try and pry it to come back into shape. And when he pressed that down, the rebar, using his body weight, he felt a pop in his upper back. And he also heard a pop in his upper back. He reported this to his co-workers who seemingly also heard the pop. He was able to finish the job that day and over the next couple of days, his employer gave him light duty using a radio.

When the patient returned to his regular job approximately two or three days later, he was carrying a four by four on his shoulder when he noted increasing pain in his upper back. And that is the history of the pain and the injury that he gave." (Shitut Dp. pg. 9)

Dr. Shitut discussed the treatment Whitaker received after the July 2000 work related injury, including x-rays, an MRI of the thoracic spine, and according to Whitaker, an attempt at a myelogram. Dr. Shitut then noted:

"Subsequently attempts were made to return him to work around December 2000. He was evaluated by work conditioning program and also underwent rehabilitation. Therapy initially offered him significant relief of his symptoms. But he had only a 10 pound weight restriction of the program, and when he attempted to lift some 30 pounds, he developed an increasing pain in his upper back. The work conditions program was subsequently stopped. It was recommended that the patient switch his tool belt from one side to the other side, but that did not offer him much relief." (Shitut Dp. pg. 10)

The doctor noted additional complaints and history from Whitaker:

"He stated that his pain started when he returned to the physical work activities two or three days following the initial injury of 7/15/00. He also was complaining of left lateral thigh pain and tingling in, that radiates into the left calf and dorsum of his foot that began about three or four months after his injury. He's also complaining about tingling in his right buttock area that developed at the same time.

Patient reported that the symptoms in his lower extremity have been better over the last four to five weeks. He also noted numbness that encompasses both upper extremities, particularly all his fingers. Both are equal in intensity. The patient stated his symptoms started approximately three to four days after the injury and most frequently occur when he held his arms in the front of his body. The patient is left-hand dominant.

"He also stated that over the course of time, he had made multiple trips to the emergency room with exacerbation of his pain. For that, he usually received injections of Demerol so that his symptoms would decrease. That was his overall history." (Shitut Dp. pp. 11 and 12)

Dr. Shitut discussed Whitaker's relayed history of past medical and surgical procedures. Whitaker's social and work history was discussed by the doctor. Dr. Shitut noted that the "last time (Whitaker) had worked was in December of 2001". (Shitut Dp. pg. 14) The doctor noted that when Whitaker described the July 2000 work injury he was not performing the hod carrier job. Stating that it possibly appeared as though Whitaker was doing more of a laborer's job at the time of the injury, Dr. Shitut further noted that it was "(s)omething physically demanding." (Shitut Dp. pg. 14) The doctor was asked if Whitaker had told him that he had stopped working as a hod carrier any time before the July 2000 due to any of his prior physical problems or physical limitations. "I don't have any knowledge of that", Dr. Shitut answered. (Shitut Dp. pg. 15)

Physical examination findings on October 25, 2002 were discussed by Dr. Shitut. Dr. Shitut stated that he looked at actual diagnostic films, and listed them: "Thoracic myelography CT that was performed on 6/5/01...and also looked at a post-myelographic CT scan...I looked at a thoracic MRI scan that was performed on 8/17/99." (Shitut Dp. pg. 16)

Agreeing that he formed an opinion after his October 25, 2002 evaluation as to whether or not Whitaker had sustained an injury as a result of his job duties in July 2000 [7] while employed at Midwest Foundation, Dr. Shitut testified:

"Yes, my impression was that he had sustained a sprain of the surgical thoracic area as a result of an industrial injury sustained about two years ago. And based on the review of the work-up, which included the myelogram and the cat scan that we mentioned about and also an MRI scan of the thoracic spine, it seemed like he had an underlying degenerative disk disease in his thoracic spine and more specifically at T6-T7 and T8-T9. I thought that since the symptoms have lasted so long, at least some of his symptoms could be coming from the underlying degenerative disk disease that he had. And I've given you my C.V. and my main thing is I do surgery, and I was assuming that he was

referred to me to see if he required surgery. I didn't think he required surgery." (Shitut Dp. pp. 16-17)

I recommended that the thoracic MRI be repeated, Dr. Shitut said, and explained that "part of the reason was there was some questions raised about what the thoracic myelogram showed and whether what that showed was anything clinically significant or not". (Shitut Dp. pg. 17) Dr. Shitut discussed what the new MRI scan performed on November 12, 2001 showed: "The bony architecture, that is the bones looked all right. There was no compression of the spinal cord or nerves of any kind. He had small central extradural defects at many levels and that included the levels at T4-5, T7-8, and T8-T9." (Shitut Dp. pp. 17) These abnormalities, "I would classify them as minor and what I would consider as clinically not very significant", the doctor stated, abnormalities common in some body his age. (Shitut Dp. pg. 18) Dr. Shitut was asked if he felt Whitaker had reached maximum medical improvement, and the doctor answered: "And I was seeing him two years later, and I think he had reached maximum medical improvement." (Shitut Dp. pg. 18) Dr. Shitut further stated:

"But my – the evaluation was that it was myofascial type sprain and if there was, there probably was some aggravation of his underlying degenerative disk disease. And these conditions usually reach maximum medical improvement over a period of several months. So at least at one year, I would think it would be maximum medical. Definitely by the time I saw him." (Shitut Dp. pg. 19)

On cross examination by the claimant, Dr. Shitut was asked his opinion of whether or not it was possible for Whitaker to return to work as a hod carrier or anything that requires heavy physical demand. The doctor answered:

"And two years after his injury, if he has not returned to work, I think just statistical chances of his going back to work are very little. I think if he attempts some type of work, it would be something less strenuous, not as heavy as the Hod-carrier construction worker. Maybe medium to light duties type of status. With or without rehabilitation."^[8] (Shitut Dp. pg. 29) (Ruling: Employer/Insurer's and Second Injury Fund's objections are overruled. Shitut Dp. pg. 29)

Dr. Shitut discussed the MRI reports and studies he reviewed during cross examination. Comparing the report of an MRI performed July 1, 1991 with the August 2000 MRI and November 12, 2002 MRI, Dr. Shitut agreed that the 1991 study reported no extradural defects identified, and the 2000 and 2002 studies showed that there were a number of disk protrusions; the doctor agreed that some time between July 1991 and August 2000 Whitaker developed the extradural defects. The doctor was queried, wasn't it true that Whitaker indicated to him that he didn't have any symptoms or problems as far as the degenerative condition of his thoracic spine prior to July 15, 2000. "He did not have any problems prior to the injury." (Shitut Dp. pg. 35) The following testimony then occurred:

- Q. And if -- however, your impression is that the injury was just a sprain as opposed to that he actually sustained these protrusions or bulges, is that correct?
- A. That is correct, yes. I think the injury itself was an upper sprain.
- Q. So you don't believe that the disk or the disk bulges and the protrusions which are, which were shown in August of 2000, that weren't there in July of '91, were not caused from this injury?
- A. I don't think they are caused by the injury.
- Q. What do you base that on?
- A. It's based on the knowledge of the condition. Because the bulging we are talking about is a degenerative condition. It's not a problematic condition. And to go beyond that, it will be somewhat difficult to decide that those were actually causing some, it not all, of his symptoms. This kind of bulges are present in a significantly high percentage of totally asymptomatic people who won't even have any symptoms. And their association with when the actual presence and the symptoms is questionable at best. (Shitut Dp. pp. 35-36)

On redirect, Dr. Shitut was referred to a report of a MRI of the thoracic spine in Dr. Schoedinger's July 10, 1990 record; in reading the MRI report, Dr. Shitut noted that the study had been performed on 9/11/89, and further testified to the reported findings – "Studies of the thoracic spine...reveal evidence of a disk rupture at T8-T9 level. Similar studies in the cervical and lumbar spine revealed degenerative changes without other evidence of abnormality" (Shitut Dp. pg. 50) To my knowledge, Dr. Shitut stated, Whitaker did not tell me he had had MRIs of his thoracic spine done before the July 2000 work related injury. When queried if Whitaker had told him whether or not he was having any symptoms in his thoracic spine

prior to July of 2000, Dr. Shitut answered – “To my knowledge, he did not have any symptoms to his thoracic spine.” (Shitut Dp. pg. 51)

On further cross examination, Dr. Shitut acknowledged that in a July 9, 1001 supplemental report by Dr. Schoedinger’s findings included – “That the thoracic and lumbar magnetic resonance imaging performed on 7/1/90 were normal in all aspects” (Shitut Dp. pg. 51) It is possible to have a disk rupture in July 1990 and then have a normal MRI less than a year later, Dr. Shitut said, and explained that it could have been the technique by which the MRI was done, or possibly “some of the seemingly minor disk herniations might actually get better with time and that has been proven time and again”. (Shitut Dp. pg. 52).

Dr. Cohen (No. H), who evaluated the claimant on the claimant’s behalf,, agreed that he also drew conclusions from his evaluation as to Whitaker’s temporary total disability, and testified: “That he was temporarily totally disabled from 7-15 of 2000 through 10-1 of '02 and then from 10-1-02 through the present time. Dr. Cohen agreed that he offered an additional opinion in a supplemental report^[9], (Employee’s Dp. Exh. C), “(t)o show the dates when, in my opinion, that he could not work and then there was a brief time that he did work, and I wanted to have that show the current dates”. (Cohen Dp. pg. 18) Dr. Cohen agreed that it was still his opinion that Whitaker was temporarily totally disabled from December 16, 2000 through the present time at his June 7, 2004 deposition.

Section 287.020.7 RSMo defines the term "total disability" as an “inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident”. “Temporary total disability” is not defined by the workers’ compensation statute, but is intended to be an award intended to cover a healing period and is a benefit granted only for the time prior to when the employee can return to work; an award for temporary total disability is not intended to encompass disability after the condition has reached the point where further progress is not expected. See, *Williams V. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo.App. E.D. 1985). The claimant’s testimony of an inability to work during treatment for the work-related injury with corroborating medical evidence constitutes substantial evidence on which to award temporary total disability benefits. See, generally, *Patterson v. Engineering Evaluations*, 913 S.W.2d 344, 347 (Mo.App. E.D. 1995).

It is found, as to the first period in issue – 12/15/00-01/24/01, the evidence reveals that the claimant was released to return to work by Dr. Samson on 09/21/00 and was to “(r)esume normal occupational duties on September 21st”. Dr. Samson’s record reflected that Whitaker was unable to perform his regular duties, giving an undisputed history to Dr. Samson on 10/02/00 of an inability to perform his regular duties (i.e. reporting that he was not lifting more than 25 pounds) and a continuation of his symptoms; the record indicated that work restrictions were then placed Whitaker which were increased over time, but that Dr. Samson did not make a recommendation for the claimant to be off work as a result of the July 15, 2000 work related thoracic spine injury. The record reveals that Whitaker saw Dr. Hurford, an associate in Dr. Samson’s office on 12/21/00 and informed the doctor that because of a marked increase in left leg pain he had been off work since the previous Friday; after examination, Dr. Hurford, [who had noted “(t)his is thought to be related to meralgia paresthetica versus a lumbar problem. He is, however, being treated for a thoracic level disorder”] wrote that “until this pain can be better differentiated he is to be started in a work conditioning program with emphasis in total spine mobility”, and Dr. Hurford did not make a recommendation that Whitaker be off work, writing -- “Work restrictions include no lifting greater than 20 pounds, and change positions for comfort as needed”. In the next entry of 01/15/01, Dr. Samson noted that Whitaker had been sent by Dr. Hurford after a previous visit for work hardening, and Whitaker was now stating he had increasing shoulder blade pain; Dr Samson wrote in the 01/15/01 entry that Whitaker was to be off work pending a cervical MRI and physical therapy for two weeks “for general conditioning program”, and if the MRI was okay Whitaker would be allowed to return to work with a lifting restriction for two weeks and then resume his normal occupational duties, no restriction, on February 15, 2001. It is found that there is no medical opinion supporting the claimant’s allegation of an inability to work at any job for the period in issue of 12/15/00-01/14/01; it is found that Dr. Cohen’s opinion that in regards to the July 2000 work related injury the claimant was temporarily totally unable to work during this time period in issue is not supported by the substantial weight of the evidence. Thus temporary total disability benefits for the period of 12/15/00-01/14/01 are denied.

As to the second period in issue – 02/15/01-02/25/01, Whitaker testified and Dr. Samson’s records corroborate that Dr. Samson had Whitaker in physical therapy during this time period. I did do the work hardening and I was seemingly getting better, Whitaker said, and they pumped me up on a little bit too much weight that day, and, boy, it was all over again, started back from scratch. Whitaker agreed that he was taken to the hospital from

the physical therapy that day, and this happened in February of 2001. Dr. Samson's 01/15/01 entry reveals that the doctor took Whitaker off work during treatment for the work related injury and Whitaker was to receive physical therapy for 2 weeks "for general conditioning program", and thereafter was to return to work on February 15, 2001. The evidence reveals that Whitaker started physical therapy at SSM Rehab on 02/06/01, was found by the physical therapist to have developed breathing problems at the 02/07/01 visit and was refused physical therapy treatment on therapist's criteria that Whitaker be cleared by a doctor by a phone message to the claimant's wife on 02/08/01 and upon Whitaker's appearance for physical therapy treatment on 02/15/01. Dr. Samson's record indicated that he next saw Whitaker on 02/26/01 at which time the doctor noted Whitaker reported developing nausea and sweating when getting off the bed at physical therapy and was taken by ambulance to the emergency room where he was told his cardiac exam was okay; and that Whitaker had not had physical therapy since that date. Dr. Samson noted that Whitaker still had thoracic pain and complaints of low back pain with activity that went into his leg; Dr. Samson wrote in the 02/26/01 entry that since the emergency room said there was no cardiac problem, he was returning Whitaker to physical therapy for three weeks during which time Whitaker would remain off work, and upon his return visit in three weeks he expected to release Whitaker to return to work. It is found that Dr. Samson's record indicates Whitaker was to remain off work until completion of physical therapy the doctor had prescribed on 01/15/01, that the claimant was unable to complete the physical therapy due to refusal of treatment by the physical therapist, and that upon seeing Whitaker on 02/26/01 Dr. Samson felt Whitaker was still in the same physical status until able to complete the physical therapy; thus continued Whitaker on an off work status until Whitaker was able to complete the previously prescribed physical therapy. It is found that there is substantial and credible evidence establishing that the claimant is entitled to temporary total disability benefits during the period in issue of - - 02/15/01-02/25/01, or 1 4/7 weeks. This would be: 1 4/7 weeks x \$599.96/week = \$942.79.

As to the third period in issue - - 03/19/01-10/01/02, Whitaker testified that he had not returned to work. He stated that he continued treating with Dr. Samson, but on March 19, 2001, unlike on other days where he got to that doctor's appointment and was usually right in and right out; on the March 19, 2001 he sat for an hour and went up and asked why, and one of the doctor's secretaries came out and told him that there was no more treatment from Dr. Samson, that the employer/insurer was not paying for anything else as far as treatment on this case. Whitaker stated that Dr. Samson's note indicating that Whitaker was not at his appointment on March 19th was false, he did go to that appointment and actually talked with Dr. Samson. Dr. Samson actually called me into his office after all the arguing and stuff, and told me his hands were tied, the employer/insurer said no more pay, but if I would like further treatment I could come back and see him under my health care program, Whitaker testified. My temporary total disability benefits were stopped on March 18, 2001, the day before that appointment, the claimant said. I was unable to go back to work in March 2001, the claimant said. I requested additional treatment, Whitaker testified, and when he okayed me to come back through my HealthLink, I talked that through with HealthLink and they weren't going to pay for nothing that was due to a workers' comp case. Neither my employer or their workers' compensation insurance carrier authorized any additional treatment for me, Whitaker stated. Dr. Samson's record included a 03/19/01 letter to the workers' compensation carrier in which the doctor wrote that Whitaker had a scheduled appointment that day and did not keep the appointment or call to cancel or reschedule. Dr. Samson further wrote that in view of the 8/17/2000 MRI showing no acute abnormality, just some mild degenerative bulging in the thoracic spine and the cervical spine without herniation, it was his opinion there was no structural or spinal explanation for Whitaker's persistent complaints other than a strain. In the 03/19/01 letter, Dr. Samson assessed a percentage of permanent partial disability at the level of the thoracic spine as a result of the July 15, 2000 injury, and wrote that Whitaker had reached maximum medical improvement and was discharged from care. Missouri Baptist Medical Center 05/21/01 emergency room record (See No. N) noted Whitaker's comments of a history of chronic back pain that started one year earlier; further noted was "Yes" to question of whether or not there was a recent injury; further noted was - "c/o back popping with severe"; the record noted that Dr. Samson was contacted and stated old injury fro 2000 shoed only strain no other abnormality besides degenerative disease; radiographic studies performed on the lumbar and thoracic spine on 05/21/01; the diagnosis on 05/21/01 - acute myofascial strain. Dr. Samson's record revealed that Whitaker returned on 06/07/01; the doctor noted that Whitaker had returned on that date after being seen in the emergency room on 05/21/2001 for complaints of severe back pain. Dr. Samson wrote on 06/07/01 that because of Whitaker's continued complaints he had ordered a thoracic myelogram which had been performed on 06/05/01; the doctor noted that he had personally reviewed the myelogram and post-myelogram CAT scan, and after a physical examination on 06/07/01, his diagnosis was - thoracic pain. Dr. Samson further wrote on 06/07/01 that he had advised Whitaker that he had no specific orthopedic recommendations, and that a physiatrist might be useful; Dr.

Samson further wrote that no follow-up appointment was scheduled. Dr. Rummels' record indicates that Whitaker returned to him for treatment in June 2001. In a 06/26/01 entry Dr. Rummels wrote that Whitaker had tried to go back to work; Whitaker's comments noted were – Any lifting over 30 – or pulling over 30-40 lbs “it goes out”. Further written was that Whitaker had been to the emergency room two times due to pain at work, and was in that day for a second opinion. After examination of Whitaker on 06/26/01 and a review of a CT scan which Dr. Rummels noted as “essentially read as normal, he has a degenerative disc at T7-8, 8-9”, Dr. Rummels' written opinions were:

He has degenerative disc in his thoracic spine. Complaints are all subjective. He says he has been to numerous ER's for this intractable pain. He has also been to numerous sessions of physical therapy and has been treated by Dr. Samson. He comes with a CT scan which is essentially normal. Not as discriminating as an MRI.

Dr. Rummels' diagnosis on 06/26/01 was - - Degenerative disc disease thoracic spine; the written treatment recommendation was - - Voc rehab, work hardening; there was no indication in the 06/26/01 entry of a recommendation for a follow-up visit. Dr. Shitut saw Whitaker on October 25, 2002 at the request of the employer/insurer per the Temporary Award entered in this case.

The claimant testified that he had filed a request for hardship in this case and had had a hearing, and an Award was handed down by Judge Karll on October 2, 2002. He agreed that beginning on October 2, 2002 through December 17, 2002 his employer paid him temporary total disability benefits pursuant to the Award, and he also received some additional treatment with Dr. Shitut. Dr. Shitut obtained another MRI on my back, Whitaker said. He stated that what he recalled about his visits with Dr. Shitut were that they were poor; he received no answers, and his expectations from this treatment was that he was hoping Dr. Shitut would give him something to make this go away or something where I could continue on providing for my family, and that did not happen. My last appointment with Dr. Shitut was on about December 16, 2002, Whitaker said. Dr. Shitut placed me at maximum medical improvement as of December 15, 2002, he said. The claimant agreed that Dr. Shitut suggested to him that he might have to get some vocational rehabilitation.

Dr. Shitut testified as to his impression in regards to the July 15, 2000 work related injury after evaluation of Whitaker:

“Yes, my impression was that he had sustained a sprain of the surgical thoracic area as a result of an industrial injury sustained about two years ago. And based on the review of the work-up, which included the myelogram and the cat scan that we mentioned about and also an MRI scan of the thoracic spine, it seemed like he had an underlying degenerative disk disease in his thoracic spine and more specifically at T6-T7 and T8-T9. I thought that since the symptoms have lasted so long, at least some of his symptoms could be coming from the underlying degenerative disk disease that he had. And I've given you my C.V. and my main thing is I do surgery, and I was assuming that he was referred to me to see if he required surgery. I didn't think he required surgery.” (Shitut Dp. pp. 16-17)

I had recommended that the thoracic MRI be repeated, Dr. Shitut said, and explained that “part of the reason was there was some questions raised about what the thoracic myelogram showed and whether what that showed was anything clinically significant or not”. (Shitut Dp. pg. 17) Dr. Shitut discussed what the new MRI scan performed on November 12, 2001 showed, and noted that the abnormalities, “I would classify them as minor and what I would consider as clinically not very significant”, they were abnormalities common “(i)n somebody his age”. (Shitut Dp. pg. 18) Dr. Shitut was asked if he felt Whitaker had reached maximum medical improvement, and the doctor answered: “And I was seeing him two years later, and I think he had reached maximum medical improvement.” (Shitut Dp. pg. 18) Dr. Shitut further stated:

“But my – the evaluation was that it was myofascial type sprain and if there was, there probably was some aggravation of his underlying degenerative disk disease. And these conditions usually reach maximum medical improvement over a period of several months. So at least at one year, I would think it would be maximum medical. Definitely by the time I saw him.” (Shitut Dp. pg. 19)

It is found, in regards to the period in issue as to temporary total disability benefits - - 03/19/01-10/01/02, the evidence does not reflect any further improvement for the claimant's July 15, 2000 work related injury of a thoracic strain after 03/19/01, per Dr. Samson who wrote on that date as a result of the July 15, 2000 injury to the thoracic

spine Whitaker had reached maximum medical improvement and was discharged from care. It is found that subsequent medical records reflect treatment for acute exacerbations of chronic problems or evaluations resulting in no recommendation for further treatment; this finding is supported by the additional evidence from Dr. Shitut (subsequent to the October 2, 2002 Temporary Award issued in this case) ^[10] who, it is found, ultimately determined from his examination beginning on October 26, 2002 that his was only an evaluation and that no further treatment for the work related injury was needed. Dr. Shitut noted that injuries like the claimant sustained on July 15, 2000 “usually reached maximum medical improvement over a period of several months”, so at least one year and definitely by the time he saw Whitaker, Whitaker was at maximum medical improvement as to the July 15, 2000 work related injury. Thus, as the competent and substantial evidence establishes that the claimant was at maximum medical improvement on March 19, 2001 in regards to the July 15, 2000 work related injury, temporary total disability benefits for the period in issue of 03/19/01-10/01/02 is denied.

ISSUE: Liability of past medical expenses

At issue are bills from Warren County Ambulance District (No. BB) for ambulance service on February 7, 2001, May 19, 2001 and May 21, 2001. Also at issue are bills from Missouri Baptist Medical Center (No. FF) for treatment on May 21, 2001 in the amount of \$1,250.28, and on June 5, 2001 in the amount of \$2,180.45; Missouri Baptist Medical Center filed a Notice of Services Provided & Request for Direct Payment (Court Exh. A-2) on October 23, 2001 concerning the treatment on May 21, 2001 described as -- Dr. Barbara Elizzy, strain and sprain of thoracic emergency room, and on June 5, 2001 described as – chest pain CT Scan ordered by Dr. Barry Samson.

It has been determined in this Award that the competent and substantial evidence establishes that the claimant reached maximum medical improvement on March 19, 2001 in regards to the July 15, 2000 work related injury. It has been found that medical records subsequent to March 19, 2001 reflect treatment for unrelated conditions, or for acute exacerbations of chronic problems, or were evaluations resulting in no recommendation for further treatment. Consequently, all bills in evidence reflecting service subsequent to March 19, 2001 are found not to be compensable.

There remains a question as to the compensability of a February 7, 2001 bill from Warren County Ambulance District for ambulance service. Whitaker testified that he continued treating with Dr. Samson after returning to light duty work from the July 15, 2000 work related injury. After returning to work my condition got worse, Whitaker stated, I got to where I couldn't breathe, and I was paranoid and freaking out that I was going to be paralyzed because I just knew something this time was really, really, really wrong. Whitaker agreed that he continued working this light duty work through about mid December; he agreed that he saw Dr. Hurford, a physician with Dr. Samson's office, on December 21, 2000. Dr. Hurford didn't want me to go back to work and took me off work, and ordered I think some work hardening type deal for me, and gave me some different kind of meds, he stated. I saw Dr. Samson again on January 15, 2001, the claimant said, and on that date Dr. Samson also took me off work. Whitaker agreed that he had indicated that at that point he'd said something about work hardening or some sort of physical therapy with Pro Rehab. I did do the work hardening, I did do Pro Rehab, he said, and the work that they asked me to do, it seemed like it was working and I was seemingly getting better, and they pumped me up on a little bit too much weight the day that they bumped me up, and, boy, it was all over again, started back from scratch. Whitaker agreed that he was taken to the hospital from the physical therapy that day, and this happened in February of 2001.

Concerning the incident at physical therapy when he lifted up too much weights and was taken by ambulance from the physical therapist, Whitaker acknowledged Plaintiff's Exhibit BB as a copy of the Warren County Ambulance District statement dated February 19, 2002 which had been mailed to him; the claimant agreed that on the statement was a listing of an invoice for treatment or services provided on February 7, 2001 including service at Dr. Oliver's office in Warrenton to Crossroads Regional Hospital in Wentzville, and also ambulance service and a charge of \$443.50; it was noted that the document also showed a payment of \$274.80. Whitaker agreed that he then received a bill for the balance of \$168.70. When asked who had called the ambulance for this treatment, the claimant answered - The physical therapist did. After this incident I did not receive any more physical therapy, Whitaker said. They took me off physical therapy for a short period of time, he agreed, and I was

also still off work at this time. He was asked if he was working at that period of time, February 15, 2001, which would have been eight days after the physical therapy incident and while he was treating with Dr. Samson. I'm not sure on my dates, but Dr. Samson did send me back to work after all that, Whitaker testified, I know I went to several different rehabs and therapies for Dr. Samson and continued to try to still be back on the job; you know, I did not go back to work after that. I have not worked at all for Midwest Foundation, for construction or otherwise since December 15, 2000, Whitaker said. He agreed that he continued treating with Dr. Samson. Testifying about the March 19, 2001 appointment with Dr. Samson, Whitaker stated that he did go to that appointment and one of the doctor's secretaries came out and told him that there was no more treatment from Dr. Samson, that the employer/insurer was not paying for anything else as far as treatment on this case. I actually talked with Dr. Samson, the claimant said, Dr. Samson actually called me into his office and told me his hands were tied, the employer/insurer said no more pay, but if I would like further treatment I could come back and see him under my health care program. I was unable to go back to work in March 2001, the claimant said. I requested additional treatment, Whitaker testified, and when he okayed me to come back through my HealthLink, I talked that through with HealthLink and they weren't going to pay for nothing that was due to a workers' comp case. Neither my employer or their workers' compensation insurance carrier authorized any additional treatment for me, Whitaker stated. The claimant agreed that he had filed a request for hardship in this case and had had a hearing, and an Award was handed down by Judge Karll on October 2, 2002, and as a result he saw Dr. Shitut. I got no answers from Dr. Shitut, Whitaker said. My expectations from this treatment was that I was hoping he would send me back to work or give me something to make this go away, and that did not happen, Whitaker stated.

Dr. Samson (No. P) wrote in a 01/31/01 entry the following interim history:

He returns with his cervical MRI which I reviewed and shows some mild degenerative disc changes but no evidence of focal disc herniation or protrusion. In addition to his scapula and upper back pain, he complains of left thigh burning after walking a mild (sic) or two.

After physical examination, Dr. Samson's diagnosis was: 1. Thoracic strain with negative MRIs of the cervical and thoracic region; and 2. Left sciatica secondary to a nonrelated work problem. Dr. Samson's treatment recommendation on 01/15/01 were physical therapy for 2 weeks "for general conditioning program", and resume normal occupational duties, no restriction, on February 15th. It was noted in the next entry of 02/26/01 that Whitaker reported developing nausea and sweating when getting off the bed at physical therapy and was taken by ambulance to the emergency room where he was told his cardiac exam was okay; he has not had physical therapy since that date. Dr. Samson further wrote:

He complains his low back hurts with activity that goes into his leg, but as I have stated before (and he has stated before) this is a preexisting condition. He notes that he still has thoracic pain. He is now not planning to return to construction work. He is planning to switch occupations to motorcycle repair.

Dr. Samson wrote in the 02/26/01 entry that since the emergency room said there was no cardiac problem, he was returning Whitaker to physical therapy for three weeks during which time Whitaker would remain off work, and upon his return visit in three weeks he expected to release Whitaker to return to work.

SSM Rehab records (No. R) indicated in an initial evaluation and treatment note of 02/06/01 that Whitaker had been referred by Dr. Samson; it was noted that Whitaker's mother had died in a motor vehicle accident and he had experienced increased pain since going to ProRehab pulling on chains and bands, and wanted to increase weight tolerance for work. The 02/07/01 entry noted Whitaker's comments that he had felt better with treatment until carrying about a 15-pound bag of groceries, including a case of soda, and now had increased pain and difficulty breathing. The 02/07/01 entry indicated that with therapy Whitaker had increased difficulty with breathing, and it was written that he was walked next door to the Urgent Care Center; it was written that the therapist felt Whitaker's condition needed urgent medical attention before continuing physical therapy. The record indicated that Whitaker returned on 02/15/01 ready to resume physical therapy; it was written that in the interim Whitaker had not returned to the doctor because he did not feel worse upon returning home. Written observations on 02/15/01 were: "Pt presents in (no) apparent distress – breathing normal & although (complains) of pain & tightness, does not display slow or guarded mvmt, wincing etc"; the therapist further wrote they would not continue therapy at that time unless cleared by a doctor, that they did not feel Whitaker's condition at that time warranted him stable enough to receive PT, and that this was to be conveyed to Dr. Samson & Dr. Rummels.

Dr. Shitut (No. 5) noted the following when discussing additional complaints and history from Whitaker:

“He also stated that over the course of time, he had made multiple trips to the emergency room with exacerbation of his pain. For that, he usually received injections of Demerol so that his symptoms would decrease. That was his overall history.” (Shitut Dp. pg. 12)

On cross examination by the claimant, Dr. Shitut was queried about his statement in his report that Whitaker had made multiple trips to the emergency room for exacerbation of his pain, and was this as a result of the July 15, 2000 accident. Dr. Shitut answered: “Most likely it was. At least by the history it seems like it was.” (Shitut Dp. pg. 21) The doctor was asked if an emergency room was a reasonable course of treatment, and Shitut answered: “The first choice is to go to the treating doctor if you have one. I don’t know that he had any treating doctors at that particular point in time or not.” (Shitut Dp. pg. 22) The doctor admitted that emergency room treatment would be reasonable if Whitaker lived in Warrenton, Missouri and had no authorized provider. Dr. Shitut agreed that an injection of Demerol would be a reasonable course of treatment for Whitaker’s pain.

On redirect by the employer/insurer, Dr. Shitut was queried if it at the time Whitaker was seeking treatment at the emergency room for acute exacerbations of his pain and he was under the care of his private physician at the time, would it be reasonable to assume that he would have first called his family physician? “It would seem reasonable, but I don’t know that he had one or not”, Dr. Shitut answered. Dr. Shitut agreed that he never saw Dr. Taylor’s records, but further testified that giving Whitaker the benefit of the doubt, some times private physicians are hesitant to treat injuries to the spine of injuries coming from a workers’ compensation case and refer the patient to the emergency room, this could have potentially happened in Whitaker’s case. It was noted that Whitaker’s family physician had testified that she had been writing prescriptions for medication for his prior back condition and was doing so at the time of Whitaker’s July 2000 accident; Dr. Shitut was asked if it would have been reasonable to assume Whitaker could have just called Dr. Taylor and asked for a prescription if he had an acute exacerbation. Dr. Shitut responded: “I would expect -- if he had a treating doctor, I would expect him to call the doctor first. Or if the doctor’s treatment did not help for some reason, then go to the emergency room.” (Shitut Dp. pg. 44)

It is found that Claimant’s Exh. No. BB consisted of three (3) bills from Warren County Ambulance Service District for ambulance service on 02/07/01, 05/19/01 and 06/21/01. The description of services given on 02/07/01 included: Baby ASA; EKC, 12 lead; Electrodes; IV catheter; IV therapy; IV tubing; Normal Saline; Oxygen. There was no listing in the 02/07/01 bill of the administering of pain medication such as Demerol or Morphine as was listed in the other two bills of 05/19/01 and 06/21/01. SSM Rehab and Dr. Samson records indicated referral for emergency treatment and treatment at the emergency room for cardiac problems on 02/07/01; the ambulance bill reflects that Whitaker was taken to Crossroads Regional Hospital, Wentzville, Missouri on 02/07/01, and as these hospital records were not in evidence there is no further source of the nature of treatment at Crossroads Regional Hospital on 02/07/01. It is found that the competent and substantial evidence does not establish that the ambulance service on February 7, 2001 was for thoracic spine problems as a result of the July 15, 2000 work related injury, but rather to address possible cardiac problems. An employer shall provide such medical care as may reasonably be required after the injury to cure and relieve *from the effects of the injury*. (emphasis added) See, Section 287.140 RSMo. Consequently, compensation for the February 7, 2001 Warren County Ambulance Service District bill is denied.

ISSUES: Nature and extent of permanent disability - whether partial or total; Liability of the Second Injury Fund

Jimmy Ray Whitaker, the claimant, testified that he was born on June 24, 1962. I have been married to Toni for twenty-one years, Whitaker said, and we have children, Jimmy, Frankie, and Toni Lee, two twenty year old boys, and a fourteen year old daughter. My wife does not work for several medical reasons, he said.

I was born in East St. Louis, Illinois, the claimant said. The highest grade I attended I think was the eleventh grade, Whitaker stated. I recall that I got very poor grades, Whitaker said, and I did not graduate from high school. He identified the document marked as Plaintiff’s Exhibit CC as his transcript from East Alton-Wood

River Community High School. Whitaker identified the document marked as Plaintiff's Exhibit DD as his transcript from Jerseyville, the prior school where he attended ninth grade. Whitaker read out loud his grades for tenth grade, first semester: E, E, E, E, E, D, E for the classes Speech, general math, world history, something mechanics, and health. He stated that he didn't know but assumed an E is the equivalent of an F. He agreed that this transcript indicated that he earned only one-half credit for that entire semester. Whitaker stated that the Jerseyville transcript indicated that in ninth grade he received a "C" in math, and in the fourth quarter his grade was F; the transcript indicated a "D" as his language arts or reading grade. The transcript of my eleventh grade, Exhibit CC, indicates that work study, P.E., art, and INSS; and I did not take any math or English, Whitaker said. After the eleventh grade, I did not go back to high school, the claimant testified, they said I was wasting their time and my time.

It was noted that his tenth grade report card showed him missing the second semester, and Whitaker explained he was hurt and had had eye surgery, that he got cut in a motorcycle accident and was blind for like six months. I used to race professional motocross years ago and my dad let me ride his new street bike after a race one weekend, and I picked up one of my neighbor's girls and flew off a little ditch and the windshield cut my eyes open, Whitaker explained. It cut all the way across my eyes and there's a big scar here still today, he said. He explained that it peeled his forehead back up and laid his forehead on the back of his neck, and he lost the use of his eyes for a period of six months. I had 163 stitches, and was in the hospital for I think two days, Whitaker said. He agreed that he missed a semester then returned to school.

After completing three years of high school, according to the transcript, I earned only 9.5 credits, the claimant said, and I think at that time you needed twenty, twenty-one credits in order to graduate from high school. He agreed that even though he attended school for three years, he was not even halfway there. Agreeing that this played into his decision on why he didn't continue with high school, Whitaker further stated that he had a job, an open market job field probably through the labors at that time, that he went straight out of high school straight into labor. I never returned to school, but I tried to get a GED, he said, I took the classes and I took the test, but I failed the GED by one point. I never re-took the GED, Whitaker said. He agreed that this was when he entered into the labor work force.

I worked at Shell Oil Refinery in Wood River, Illinois as a hod carrier, Whitaker testified, I basically got hod, carried brick, did the stacks and whatever. He agreed that this was a union job through Local 338, Wood River. I was still living in Illinois at this time, and continued to live in Illinois for approximately ten or twelve years and work out of Local 338, a laborers' union, until he moved. During that ten or twelve years my work varied, Whitaker said, I've did anything from building Wal-Marts, Walgreen's to Steak 'N Shakes, to streets, sidewalks, to school lots, to Shell Oil Refinery; he agreed that it was always as a hod carrier or a laborer which was all labor work. The work of a hod carrier and a laborer in general involves a lot of heavy lifting, a lot of heavy packing, heavy carrying; heavy duty work all day long, eight, ten hours a day, the claimant said.

Whitaker stated that during the time frame he was working as a hod carrier or laborer he sustained some injuries and filed some workers' compensation claims in Illinois. I was injured in May of 1987 while working for a company in Illinois called M. L. Vasquez, Whitaker stated, I was doing a Wal-Mart for Sam Walton at that time and a scaffold collapsed at the very front entrance of the store. At that time I think I might have broken my left foot, he said. He agreed that he filed a workers' compensation claim. In February of 1988 while working for Biz Craft Power Cleaning I was in an accident where a ten-passenger van backed into a telephone pole at forty miles an hour with fifteen guys in it, Whitaker stated. I sustained a blow to the head, it cracked my hard hat, and like a low hip, back problem, he said. I was working for a company called B. S. & W. Engineering at the Shell Oil Refinery in September of 1988 removing HAZMAT material and sustained an injury on about September 30, 1988 picking up hundred pound bags of cement all day long. Whitaker agreed that he eventually had to have surgery by Dr. Schoedinger in August of 1991 of a lumbar discectomy at L5-S1 as a result of this injury; he agreed that as a result of this injury he was off work for most of 1989, 1990, and 1991. Prior to this injury most of my complaints were related to my low back, Whitaker said. He agreed that since having surgery on his low back he has had complaints related to his low back. Whitaker was queried if he recalled a Dr. Krettek indicating to him that it was not reasonable for him to return to his job as a hod carrier. I think every doctor that I have ever talked to has told me that, the claimant responded. I recall Dr. Krettek referring me to a pain therapy, a pain clinic, Whitaker stated, and I did this. Whitaker agreed that he was referring to a July 15, 2000 injury. Agreeing that his low back problems have become worse since the July 2000 injury, Whitaker further stated that this was because he can't

keep everything in shape. It's killing me, he said. After the surgery on my low back, I do not recall having any significant or lasting complaints related to my mid or upper back, Whitaker

I returned to work in like early 1992 after my back surgery, Whitaker stated. I worked for Keller Construction, he said, and agreed that he was injured in July of 1992. I was on a bridge there, too, doing the biggest bridge over there on 111 that they've ever done, and jumped off a bridge to avoid an air hose, the sular compressor hose busted, Whitaker said, and I injured my left knee. I had knee surgery with Dr. Tessier, Whitaker said. He agreed that he filed a workers' compensation claim for this injury. I also injured my left knee in August of 1994 while working for ECC Environmentalists, Whitaker said, and explained that he was using an X-Acto knife and sustained a severe cut to the knee. I went to the hospital and received treatment for this injury, Whitaker said. The claimant testified about a non work-related accident involving a horse in February of 1994. I was raising quarter horses at that time, and I had one that was high spirited, Whitaker testified, and when I jumped up on her, she flipped over backwards and run the saddle through my stomach into my lower abdomen. I think I received treatment with Dr. Krettek at St. Luke's for this injury, Whitaker said.

The claimant agreed that the first five injuries he had discussed were all work related and he filed workers' compensation claims and received settlements on them. Whitaker identified Claimant's Exhibit Z as documents from the Illinois Industrial Commission concerning these claims.

I worked for a company named Pace Construction where I sustained an injury in June of 1995, Whitaker testified. It was another bridge job, doing a bridge basically by myself; I was pulling three foot Afco [phonetically] patent walls throwing three foot shoe bolts out of the patent walls into the ground below me, spearing into the ground below me, and a crane from up above come down, boomed down and swiped my plank board out from underneath me. I was hung up on the shoe bolt on the scaffold with my right arm about ripped off, he said. I injured my right wrist in this June 26, 1995 accident, Whitaker stated, and I filed a workers' compensation claim in Missouri. He agreed that he treated with Dr. Schlafly for this injury. I think I had seven surgeries on my wrist, and I was off work for the rest of 1995, 1996, 1997, and 1998 as a result of the right wrist injury. They put hardware, steel in, plates in, plates out, screws in, screws fell out, he said. I had overworked the arm, that's why there was a lot; I tried to continue to do my job and stuff would keep falling out of it, and it would bleed, the claimant stated. The last surgery they performed was a bone graft fusion; they fused my hand so I ain't got no range of motion at all in my right wrist; I cannot move this hand, he said. Whitaker was queried if he had injured any other part of his body as a result of this injury, was there anything that gave him any lasting complaints. I had some pulling, I felt maybe, through the shoulder from the pull and the jerk, you know, but nothing that I had ever complained about besides my hand, he answered. He agreed that the hand was the main problem he had. Whitaker agreed that he settled this claim at 78% of the right shoulder.

I returned to work after the right wrist injury; back to the same -- hod, carrying heavy equipment, heavy hard everything, main duties, the claimant stated. Still doing labor; new local, Local 660, still a laborers union; continuing the same aggressive hard work, Whitaker said. Agreeing that was still the same type of job duties -- heavy duties, heavy physical activity; Whitaker stated that it was all he knows, actually.

The claimant stated that he sustained an injury in November of 1999 to his left foot in a motorcycle accident. Like I said my boys raced all over the world, and I was their pit man and boss on their bikes and stuff, Whitaker explained, I went out to Hot Shot to make sure it was running right and went and jumped on one of their motorcycles to go test riding and I hit a wet spot and went down and injured my ankle. I was treated for this injury by Dr. Theodore Ted Rummel in Wentzville, Whitaker said, and he did surgery in January of 2000. I would put a golf ball in there and put a Band Aid over it and tell him I was healed, and he'd just laugh about it, say, you're never going to work construction again, the claimant stated, and I said, I guess I will. I actually had a hole in my foot big enough to drop a golf ball down in and not see it, Whitaker said. The claimant agreed that he did return to work after this injury and was working for Midwest Foundation in the latter part of 1999 and in 2000. He agreed that this was the employer he was working for at the time of the injury in July of 2000.

I began working for Midwest Foundation in about September of 1999 as a laborer, Whitaker testified. My job duties were just a little bit of everything, he said, hands on everything because I know how to do everything, the claimant said, but actually carrying forms, carrying big lumber, big stacks of lumber, big 16 by 20 foot, 16 by 12, and 16 by 14, twenty, thirty foot boards for pouring two to three thousand yards of concrete a day every day. I did

policing the whole area, making sure the area's always clean; always carrying rebar and materials to other people, other crafts on the job; and just heavy, hard manual stuff that I like to do at work, Whitaker stated. He agreed it was the same type of work that he had been doing for twenty years. The claimant was asked if he was able to perform those job duties without any significant restrictions at that time, and he answered - Yes.

In July of 2000 I was working for Midwest Foundation pouring concrete dams for the new Page Avenue extension, Whitaker testified. Agreeing that he sustained an injury a little before July 15, 2000 while working, Whitaker explained that for that week he was taking a break from the concrete and all that, and they had put him on a dredge pump. I was dredging and my dredge pump hit something in the ground and busted the dredge pump and bent a turn buckle at a forty-five degree angle and stopped us from dredging. When we pulled the dredger out I noticed the turn buckle, and everybody was half panicky, he said. While everybody was doing their thing, I grabbed a four or five foot piece of rebar approximately five foot off the ground, jumped up on it, ran my bar through the turn buckle, both of my hands above my head and put all my weight and jumped off that to straighten out the turn buckle, which straightened out the turn buckle but there was a bad pop sensation in my mid back area, the claimant said. I continued to work the rest of that day, Whitaker said. That day I just felt like I might have pulled a muscle in my back or something, he said. I think that I worked a couple more days after that doing my normal duties, the claimant stated. I was supposed to be on light duty, just kind of doing light stuff, Whitaker stated, we don't have no such as light duty and I picked up just a couple boards too heavy and my back went all the way out. It was just like, down on the floor, one knee down, couldn't breathe, thought actually I was shot in the back with something, the claimant said. He agreed that this happened on July 15, 2000, a few days after the actual accident.

I was taken by our superintendent in his pick-up truck on July 15, 2000 to Missouri Baptist Hospital for treatment, Whitaker said. The first doctor I treated with after that, to the best of my knowledge, was Dr. Ted Rummels and an MRI was performed, he said. To my knowledge that MRI revealed various bulged discs in my thoracic vertebrae which is where I was having my complaints, the claimant stated.

Dr. Rummels had me off work, and when I first saw Dr. Samson in August of 2000 he also had me off work, the claimant stated, and I was receiving TTD payments during this time. After this treatment, I did try to work, this was in about September 2000, and I continued to work, Whitaker said. I was allowed to go back on light duty, but like I said before, there's no such thing as light duty, but I am a good worker, I am good at what I do, he said. Actually, I was the only guy working at that time because weather was getting bad, they found little jobs for me to do to keep me there; so I was kind of on light duty doing a lot of miscellaneous stuff, nothing heavy, Whitaker said. Agreeing that he was the one who actually wanted to go back to work, Whitaker stated that Dr. Samson didn't want him to but allowed him to go back with restrictions.

I continued treating with Dr. Samson after I returned to light duty work, the claimant said. After returning to work my condition got worse, Whitaker stated, I got to where I couldn't breathe, and I was paranoid and freaking out that I was going to be paralyzed because I just knew something this time was really, really, really wrong. Whitaker agreed that he continued working this light duty work through about mid December; he agreed that he saw Dr. Hurford, a physician with Dr. Samson's office. on December 21, 2000. Dr. Hurford didn't want me to go back to work and took me off work, and ordered I think some work hardening type deal for me, and gave me some different kind of meds, he stated. I saw Dr. Samson again on January 15, 2001, the claimant said, and on that date Dr. Samson also took me off work. Whitaker was asked if he was working from December 15, 2000 through January 14, 2001, and he answered - No. Whitaker agreed that he had indicated that at that point he'd said something about work hardening or some sort of physical therapy with Pro Rehab. I did do the work hardening, I did do Pro Rehab, he said, and the work that they asked me to do, it seemed like it was working and I was seemingly getting better, and they pumped me up on a little bit too much weight that day, and, boy, it was all over again, started back from scratch. Whitaker agreed that he was taken to the hospital from the physical therapy that day, and this happened in February of 2001.

Concerning the incident at physical therapy when he lifted up too much weights and was taken by ambulance from the physical therapist, Whitaker agreed that after this incident he did not receive any more physical therapy. They took me off physical therapy for a short period of time, he agreed, and I was also still off work at this time. He was asked if he was working at that period of time, February 15, 2001 through February 25, 2001, which would have been eight days after the physical therapy incident and while he was treating with Dr.

Samson. I'm not sure on my dates, but Dr. Samson did send me back to work after all that, Whitaker testified, I know I went to several different rehabs and therapies for Dr. Samson and continued to try to still be back on the job; you know, I did not go back to work after that. Whitaker agreed that he continued treating with Dr. Samson. He stated at a March 19, 2001 appointment he talked with Dr. Samson who told him his hands were tied, the employer/insurer said no more pay, but if Whitaker would like further treatment he could come back and see the doctor under his health care program. Dr. Samson did not examine me or treat me on that date, the claimant said.

I have not worked at all for Midwest Foundation, for construction or otherwise since December 15, 2000, Whitaker said.

I was unable to go back to work in March 2001, the claimant said. I requested additional treatment, Whitaker testified, and when he okayed me to come back through my HealthLink, I talked that through with HealthLink and they weren't going to pay for nothing that was due to a workers' comp case. Neither my employer or their workers' compensation insurance carrier authorized any additional treatment for me, Whitaker stated. I continued to experience severe pain and was taken to the emergency room a few times, he said. Whitaker stated that he recalled being taken to St. Joseph Hospital West in Lake St. Louis on May 19, 2001 by way of ambulance. At the hospital on May 19, 2001 they called Dr. Samson, and also I was shot up with a bunch of different meds to get rid of the pain, then they sent me home and told me to follow up with my physician that I had been seeing, Whitaker stated. On May 21, 2001 I recall being taken by ambulance to Missouri Baptist Hospital for the same thing -- severe, chronic (pain) to the center of the back, the claimant said.

Whitaker agreed that while he was at Missouri Baptist Hospital Dr. Samson was contacted and he requested that Whitaker have a thoracic myelogram; he agreed that there was a mixed injection performed, which is not a myelogram, and this treatment was on June 5, 2001 at Dr. Samson's request. My complaints at that time, he explained, were that the pain was coming around the front of me more than normally and it felt like my chest was caving in. And I thought I might actually be having a heart attack or something, and they was like you're hurt in the back why are you hurting in the front, we need to do a CT Scan or whatever, Whitaker said. He agreed that this treatment was provided to him as requested by Dr. Samson. The claimant was queried - it was your understanding that was related to the injury which you sustained at work? Yes, definitely, Whitaker answered. I had a follow-up appointment with Dr. Samson on June 7, 2001 with Dr. Samson, the claimant stated, and that was the last time I saw Dr. Samson. He was asked if he recalled did Dr. Samson release him to return to work without restrictions. I didn't know it, but, yes, Whitaker answered. I didn't know I was returned back to work; I never received a letter or statement from anywhere, Dr. Samson's office, of no kind saying that I was able to return back to work, the claimant said. Stating that he saw it in the medical records a month later, Whitaker agreed that Dr. Samson apparently filled out a disability certificate saying that Whitaker could return to work. I also had follow-up treatment with Dr. Rummels in the latter part of June of 2001, the claimant agreed.

At this time, June 2001, I was feeling horrible, Whitaker stated, I was experiencing pain twenty-four hours a day. The more I would do, the more it would hurt, he said. If I took it easy, yes, I barely had any problems; if I would do anything, I would have a lot of problems, Whitaker said.

Whitaker agreed that during this time he was also treating with Dr. Peggy Boyd Taylor, his family physician who had been treating him since before the mid 1990's. The claimant acknowledged that Dr. Taylor was a friend, and had loaned him money. When all my meds were stopped, Dr. Taylor started providing me all the meds that I was on from the date of injury, the claimant said. Whitaker stated that Dr. Taylor had provided him with medications and pain pills on all of his old injuries.

The claimant agreed that he had filed a request for hardship in this case and had had a hearing, and an Award was handed down by Judge Karll on October 2, 2002. I had not received any TTD payments from March 18, 2001 through October 1, 2002, Whitaker said, and I was not able to work. He agreed that beginning on October 2, 2002 through December 17, 2002 his employer paid him temporary total disability benefits pursuant to the Award, and he also received some additional treatment with Dr. Shitut.

Dr. Shitut obtained another MRI on my back, Whitaker said, but I got no answers of what's really going wrong. My expectations from this treatment was that I was hoping Dr. Shitut would send me back to work or give

me something to make this go away or something where I could continue on providing for my family, and that did not happen, Whitaker stated. Dr. Shitut told me that as far as being able to return to work - no way, no how, the claimant said. My last appointment with Dr. Shitut was on about December 16, 2002, Whitaker stated. He was asked if Dr. Shitut had released him to return to work with Midwest Foundation. No, sir, Whitaker answered. Dr. Shitut did place me at maximum medical improvement as of December 15, 2002, he said. The claimant agreed that Dr. Shitut suggested to him that he might have to get some vocational rehabilitation. I have not received any other treatment from the employer or the insurer, Whitaker said. He agreed that he continues treating with Dr. Taylor.

I have not worked since December 16, 2002, Whitaker testified. He was asked if he believed he could work in the open labor market. I believe I can do anything for about an hour or two, but after that I'm not doing nothing for a week or two, the claimant answered. So to answer your question, open field job market, no, I do not think I can handle anything like that at this time, he said. It makes me feel like crap, Whitaker testified, suicidal, depressed, not worth a crap; non provider for my family; no sports, no hunting, no nothing. Agreeing that he kind of defined himself by being a worker, Whitaker stated that he loved working.

Prior to July 15, 2000 my daily activities were basically racing and it was a work all day, all week type deal, the claimant testified, and in the evenings play, play, play, weekends, play, play, play. I'm not going to say I never had no pain in performing my jobs prior to my injury in July of 2000, Whitaker said, but I could perform my jobs a hundred percent. I could do my routine daily heavy lifting, he said, I could do anything.

A typical day for me after July 15, 2000, Whitaker testified, is a lot of church, lot of little, small faith groups through my church, a lot of family, a lot of fellowship, a lot of laying in my room, and praying, a lot of nothing really, just miserable, horrible, excruciating life that I wouldn't wish on nobody. I don't sleep, he said. I take medications and it just makes me stay awake even more, the claimant stated. I take sleeping medicine, he said, and I take about three or four pain pills a day. I've been doing this for a long time, the claimant said, since when I first hurt my low back. Never had a pain pill in my whole lifetime until I had my low back surgery, Whitaker said. I am able to go on long car drives and carry heavy objects, he stated, but I pay for it severely. I can pick that table up and carry it out of this office, but I'll be in bed for the next four days if I do it, the claimant said.

Whitaker testified about how his July 2000 injury is interacting with his other pre-existing injuries. The only thing has to do with everything else is this injury is keeping me from putting all the other stuff back in shape, the claimant stated. The wrist injury and all the other prior injuries were all minute, Whitaker said, this here is serious stuff, this here's probably going to put me in a wheelchair one day, I can feel it getting worse every time I do something stupid; it gets worse and it comes easier every time now. I can sit or stand for long periods of time, but I better move around, he said. Agreeing various doctors from Dr. Shitut to Dr. Cohen placed weight restrictions on him, Whitaker stated that the maximum was twenty-five pounds. On occasion I can pick up five hundred pounds, but I'd go to the emergency room afterwards, the claimant said. Lately in the past few years I've been having problems when lifting just small things, Whitaker said, like at this angle I can feel it, it's not going to put it out, but I can feel that it's not right through here [indicating]; when I pour a full gallon of milk, or I twist a lid, or just little bitty stuff, little simple stuff that you guys take for granted every day. Whitaker was asked about how his arm and wrist were doing currently. It's just sore, he answered, and ain't really strong because I ain't got to do anything with it. Everything has been going downhill since July 2000, the claimant indicated.

I have some degree of pain on a daily basis without my meds, Whitaker said, my meds actually make me feel invincible, which I realize you shouldn't eat meds because you can hurt yourself by eating medication and because you really don't feel that you're hurt as bad as you are.

Whitaker was asked if he thought there was any job he could do. Besides ministry, I doubt it, the claimant answered. He was asked if he had any training or experience in ministry. I got nine years of just reading the word, but not as far as going right into it, not without going to school or anything like; the answer is no, Whitaker answered. I have no job experience outside of the construction or labor field, the claimant stated, construction, labor field, that's the only thing that's me. That's what I've been doing since age eighteen, Whitaker said. He was asked if his math skills had improved at all since high school, and Whitaker responded - My math's horrible. I have not had any other education since high school, the claimant said.

Whitaker stated that he had applied for social security a couple of times before the July 15, 2000 injury and was declined, and then recently after the July 15, 2000 injury he applied and was automatically approved for social security. The claimant stated that he continues to see Dr. Taylor and she continues to prescribe pain medication for him, and his treatment is paid for by Medicaid/Medicare disability. I was examined by several doctors in relation to being approved for social security on October 2, 2003, the claimant said, and I think one of the doctors the State of Missouri sent me to was Dr. Buckles, a doctor who knows my family. I've tried looking into doing vocational rehabilitation, but they say to do that you have to have a high school diploma or GED, Whitaker said. When queried if he has a GED, Whitaker responded that just last year or maybe the year before he had tried to take his GED again, and had evaluations through a specialist GED guy who told him that he was not going to waste my time or his.

On cross examination by the employer/insurer, Whitaker agreed that he was sent to Dr. Samson by the workers' compensation carrier. Whitaker stated that he disagreed if Dr. Samson had provided a report indicating that Whitaker didn't keep that March 2001 appointment, and that he didn't call to reschedule or didn't cancel. It was a couple of weeks after seeing Dr. Samson again in June of 2001 appointment that I found out the doctor had released me to return to work, Whitaker stated. When asked how he had found out that Dr. Samson had released him to return to work, Whitaker responded - I think I called the office. And I had them send me a letter so I could send it to my boss at Midwest Foundation to show them because they have to have from that doctor to okay me back on the job, the claimant stated, they never received nothing of that that I know of still. Dr. Samson did not give me a release to return to work at the June of 2001 appointment and I didn't go there for the purposes of getting a release to return to work, the claimant stated. Whitaker's deposition testimony of June 3, 2002 was noted where he was asked and he had testified: 1. Q "And have you seen Dr. Samson since you talked to them about the mixed injection and his recommendation to have another myelogram?" A. "Just as of June when he finally give me my real slip to go back to work."; and 2. Q. "And did you go back to work when you were supposed to?" A. "No, I'm not able to." Q. "But you were there for the purpose of getting a back to work slip?" A. "Yes." Q. "But then you didn't go back to work?" A. "No.". The claimant was queried at the hearing if this deposition testimony refreshed his memory, did he get a release to return to work back in June of 2001 from Dr. Samson. "Not till a couple weeks after that", the claimant stated.

During cross examination, Whitaker stated that the July 2000 injury he was claiming as a result of his employment with Midwest Foundation was to the thoracic spine. I never experienced this kind of pain or had any sorts of physical problems in my thoracic spine before July of 2000, the claimant said. It was noted that Dr. Schoedinger, when treating Whitaker's low back, performed an MRI of the thoracic spine. That was due to an accident, they do the whole body like that to make sure, Whitaker responded. But did I know anything of that, no, he further stated. Whitaker agreed that Dr. Schoedinger treated him only for the low back, including performing a diskectomy, surgery on his low back. Whitaker agreed that he settled his low back case with the employer at that time. He agreed that he has had several compensation claims and signed settlement contracts. Employer/Insurer's Exhibit No. 6 was noted to be a group of records from the Division of Workers' Compensation concerning Whitaker's prior claims; Whitaker identified in the exhibit a Stipulation for Compromise Settlement regarding his right wrist, and it was noted that that case was settled for 78% of the right shoulder. Whitaker agreed that subsequent to this he had a claim against the Second Injury Fund for prior injuries, and identified the Stipulation for Compromise Settlement for the Second Injury Fund claim; the claimant agreed that this stipulation reflected that the pre-existing disability percentage was alleged to be 21.5% left knee for a left knee operation, 25% of the low back for the prior injury and surgery performed by Dr. Schoedinger, and 17-1/2% of the thoracic spine. Whitaker was queried if it was correct that he had never had an injury to his thoracic spine. No, never read any of that when I signed it, just signed and went away, the claimant responded. I never had any treatment for my thoracic spine before July of 2000, he stated, no doctor has ever told me that I would need surgery for any condition involving my thoracic spine.

With regard to my prior medical history, the claimant said during cross examination, I was off work after the low back surgery performed by Dr. Schoedinger for maybe eight or nine months, and then I went back to work. With regard to my left knee injury I was off work probably three to four months, the claimant said. He agreed that he had said he had had approximately seven surgeries for his right wrist injury, and stated that he was off work for this injury a few years. The claimant was asked if he had had some restrictions and limitations upon the things that he could do at work for Midwest Foundations when he finished treating for his right wrist; he wasn't working as a hod carrier there, was he? I was restricted from the get-go, Whitaker answered, but I turned all that around, I

made this hand work again is what I'm trying to say. Agreeing that he has no range of motion in the right wrist, Whitaker further stated -- I can still do my job as far as my hand if it wasn't for this back; it just limits me to doing things a different way with this hand. In July of 2000 when I injured my thoracic spine at the time I was doing everything, anything, the claimant said. When further queried - But in July of 2000 when you were working for Midwest Foundation, weren't you working as a laborer and no longer carrying hod because of your residual problems with your wrist and your low back? Right, I was done with the hod, the claimant admitted. He agreed that in regards to his prior low back injury, knee injury and right wrist injury, all of which required surgery, most every doctor pretty much told him he shouldn't go back to work as a hod carrier. Whitaker stated that in each of these instances he went back to work either as a hod carrier or laborer because that's all he knows. It was noted that with this injury, the one that occurred in July of 2000 for which he had no surgery, Whitaker felt that he cannot return to work. There's no way, Whitaker responded. This is because this injury in my mind is much more significant than all of the prior injuries by so much farther, he said. The claimant was queried, hadn't he been taking medication back in July of 2000 when this injury occurred? I've been taking medication for twenty years, he answered. He agreed that before July 2000 when this injury took place, he was seeing Dr. Taylor on pretty much a monthly basis, and was taking Lorcet which was prescribed by Dr. Taylor; he agreed that he was getting medications from the doctor because he was having residual problems with his low back.

During cross examination, Whitaker stated that he has not tried to look for any kind of employment since he left Midwest Foundations.

With regard to things around the house, the claimant stated that at the beginning he couldn't mow his own yard and was paying to get it done. But here in the last couple years I've been doing it myself, he stated. It kills me; like I said, I ain't dead, I ain't going to no emergency room after I'm done, but I have did it recently, like in the last summer and stuff, Whitaker testified. I cannot use a push mower, he said, I use a riding lawn mower. With regard to household chores, I am not able to do laundry because it's downstairs, three flights of stairs to get down there, the claimant stated. And I am not able to do laundry because of having to carry them heavy loads, he added. I mean, yeah, I can do laundry, if it was downstairs and not bring it up, the claimant then admitted. I am unable to carry the baskets of laundry up and down the steps because of the thoracic problem, Whitaker stated. The claimant was queried that it was not because of his low back injury for which he had had surgery or his knee injury or ankle injury. The last couple months it would be because of all of them, but prior, just the back, Whitaker answered. The claimant was asked, since you were injured in July of 2000 have you pretty much avoided using your arms overhead? No, I try to use them, I try to keep my body moving, the claimant answered, I have used my hands, and when I do it's so severe, I'm just basically in the last year said I'm not going to do nothing with my hands again.

During cross examination, Whitaker testified as to how he spends his days now. I do not sit around and watch television most of the day, he said, I move around, I do little odd things here and there. A friend of my cousin's dad owns a junkyard called Quality Auto Salvage, and he's got wreckers and cars, and I may go and try to help somebody pick up a car or take a car to somebody or something similar with a touch tone roll back sensor in a truck, it's called roll back, the claimant stated. He explained that a touch tone roll back sensor is what you pick up cars with and you don't have to use your physical body; your trailer rolls back and you winch your cable cars on it, which is by a button. Whitaker was asked if he was paid for this, and he answered - Yeah, every once in a while. You know, just a survival mode, because I'm not good for a day, I'm only good for a couple hours, an hour; I'm never good for anything after a week, you know, to get paid, he said. I was not engaged in this professional motocross activity when I was injured in July 2000, the claimant said, I had already given that up, I gave that up after my ankle injury. I think I still had horses in July 2000, Whitaker said, because I fed them every evening. I think I've gotten rid of them since that injury, because I couldn't take care of them anymore, he said.

Whitaker agreed, during cross examination, that at about the time of the July 2000 work related accident he had been thinking about getting out of the labor or construction business all together and going into business with a friend or acquaintance and opening up a motorcycle shop. The plan fell through because of a divorce my acquaintance went through, he said. The claimant was asked what kind of experience did he have in repairing or maintaining motorcycles. Like any motorcycle you bring here and put on that table, blind, I'll take it apart and put it back together blinded, Whitaker answered. He was queried if he had had any particular training for this. Don't need any, Whitaker answered. It's the same scenario with regard to cars, he stated. I considered myself pretty mechanical until the June 2000 injury, the claimant said. The physical problems I would have trying to fix a

motorcycle now is with weight, torqueness on the bolts, everything that I need my thoracic, my muscles for, he stated. As far as holding the tire and putting the chain back on, or putting the struts on the front shocks, or swing arm on, you've got to have some strength, I ain't got that no more, that's out; thank God he did get a divorce, thank God that fell through, Whitaker testified. The most weight I can lift comfortably is two or three pounds; five, a little heavy; ten, touching it; twenty, too much, he stated. The claimant was asked if he could carry the trash out, had he ever told a physician that he couldn't carry the trash. I can do anything, Whitaker responded, I wouldn't have told them I couldn't; I told them I shouldn't as it causes problems for me.

Re: Surveillance tape from Photofax, Inc. conducted in the latter part of May 2004:

a. Testimony during viewing of a videotape (Employer-Insurer's Exhibit No. 4): Whitaker was asked, by the Second Injury Fund, if it was his truck on the video. No, I have no idea whose truck it is, the claimant said. I am driving the truck, he stated, it's a rental.

b. STIPULATION BY THE CLAIMANT: At the beginning of the tape, at least for the first six minutes of the time running of the tape, Whitaker will stipulate to the fact that Whitaker is the individual driving the truck, entering and exiting the truck, going into and out of his church and a gas station.

c. Testimony subsequent to off-the-record viewing of the videotape. Whitaker agreed, during cross examination by the employer/insurer, that he had previously viewed the videotape and had just watched some of the same videotape at the hearing. The claimant agreed that it was he depicted on the tape. In the beginning of the tape I am driving a red truck and this truck does not belong to me, it belongs to a friend of mine, Whitaker stated. He agreed that it had been his testimony that he had gone to church, and his wife was shown with him. Further into the tape I am seen outside of my residence loading blankets and cardboard in the back of a pick-up truck, Whitaker said. That was all our stuff out of our winter barn that I was taking to throw away, he said. I wasn't taking then to a dump, but I was loading them to go to the dump, the claimant stated. He explained that all this stuff came out of their old barn where normally his horses would have been. Well, the claimant further stated, it was outside in front of my driveway, and then the city ordinance wrote me a ticket and said I had to clean up that driveway. Whitaker admitted that there also was an exercise bike sitting on the ground, and he picked it up and moved it. He stated that at one point in time on the video he was breaking down not a pallet but a futon bed that was leaning against the garage. Whitaker stated that the blankets he was loading were in the back of the truck were horse blankets, and a lot of them were loft blankets for like around the hay that the kids played on and camped in there; just all basically camping supply equipment type stuff, just all being thrown away. I have no idea who took all these items to the dump, the claimant stated, I think probably Roger, I don't know, maybe my neighbor unloaded it. When asked if this was his truck that he was loading, Whitaker responded - Yeah, that was my truck; that red truck that was being loaded was my truck.

The claimant was queried that at one point in time it looked like he was planting grass seed or something to that effect, and he had a gardening tool and put down some soil. The claimant responded - "Now, if you guys just filmed a couple days before that, my mother-in-law and my father-in-law just left in a forty-eight foot motorhome, and my father-in-law accidentally pulled his poop button in my driveway. I was taking the scraper and scraping all that shit out". The claimant stated that he also took out some mulch and put it down; he stated that the mulch weighed twenty-five pounds. Then there was a half a bucket of rain water that was in that bucket and I dumped it over on the side of the mulch to try to get the smell stuff off my driveway, and then threw the bucket in the truck, the claimant said. I was aware that somebody was taping me at that time, he said, I seen them. He was asked how he was feeling once he had completed doing those things that day. Well, I still ain't feeling too bad, Whitaker answered, but I did pick up a pallet which you'll see in a little bit, that did lay me down; I think that's the last thing to go on my truck to hold everything down, he said. I'm sure you ain't got no video for the days after; it did lay me down about four or five hours after I did it, the claimant further stated.

d. Subsequent to off-the-record viewing of the remainder of the videotape: During continued cross examination by the employer/insurer, Whitaker agreed that the video tape showed him carrying bags of mulch which he was putting down using a rake to even it out. He agreed that it was a blue wooden pallet that he lifted overhead put into the back of his pick-up truck. And then I was lifting keystone stepping stone rock halves and loading then into my pick-up truck, and also mowed my lawn in the same day, he agreed. The claimant was queried if he would say that on the tape he was able to do all the things he was doing that day without any difficulty. No, it's quite difficult, Whitaker answered, what you didn't see in the tape is the times that I rested and taken breaks and basically laid down. You must have shut the tape off, whoever did the taping; you seen all the bad and none of the good, the claimant stated. And that day was one of the worst days I've had in a year, two

years, he said. Whitaker stated that he remembered that day because he remembered loading up his pick-up truck. Stating that basically on the other days he doesn't do anything, this was just the one day that we pretty much saw him doing a lot, Whitaker further testified that this was a have-to type deal, that there was a violation from city hall to clean his yard up.

Whitaker explained that the bald gentleman with glasses on the videotape was his "oldest", his fifty-two year old adopted brother-in-law who's disabled from the army that he has raised for twenty-three years. He explained that at the point where he goes over and speaks with the neighbor who appeared to be working on the engine, the neighbor was trying to start their boat after the winter. The claimant was queried, couldn't he have asked the neighbor for help in loading his pick-up truck or helping with his lawn work. I'm a hindrance already and they do that all the time; they do everything but that day's work, so my answer would be no, Whitaker answered. He agreed that it would be his testimony that he pretty much limits himself to hardly doing anything. It was noted that he could grasp things, that he was seen on the videotape using a cell phone and throwing things into the truck; Whitaker agreed, as far as grasping. I have problems with grasping with my right hand mostly; he said, my left hand is pretty good still. The claimant was asked - what about, your hand is so weak that you can't hardly grasp anything. You can see I was getting ready to drop the bricks I was carrying; it was also halves, they wasn't full bricks, Whitaker responded.

During cross examination, Whitaker was asked what would be a typical day for him, other than what was seen on the videotape of May 31, 2004. A typical day for me is actually not doing a whole lot at all, he answered. I don't watch television all day, he stated, some days I get out and scavenge around and see if I can borrow, beg, steal for a dollar or whatever I got to do. When Whitaker denied that he shopped about once a day; he was reminded of his April 21, 2004 deposition testimony: Q.: "Do you like to shop?" A: "Not like women but I like to shop." Q: "And how often do you go shopping?" A: "Once a day at least, probably once a day maybe.". When again asked at the hearing if he goes to the store pretty much once a day, Whitaker answered - If you call going and getting milk and bread shopping, then I guess.

On redirect examination, Whitaker stated that on the video, what he put in the truck was stuff that had accumulated in his yard and driveway for the past year and a half. I never picked it up because I was never physically able to pick it up, the claimant stated, and my boys are so lazy during their school and all that stuff it just accumulated, I didn't pay no attention, the claimant said. He stated that he had received a citation from the City of Warrenton ordering him to pick it up or he'd be fined. Whitaker agreed that during the video he went over to the fence and rested on the fence. Acknowledging that he had stated during cross-examination that there were skips in the video, Whitaker stated that the rests leaning against the fence were not the only rests he took during the time; I taken a few other rests than that that's not on the video, he testified, like a fifteen minute job there, took me all day that whole tape and some time. My lawn is a quarter acre in size, the claimant said. He agreed that he used a riding lawn mower, and, according to the times on the tape, it took him probably more than forty-five minutes to cut it. I used a riding lawn mower instead of a push mower because I just cannot push a push mower without excruciating pain the day after, Whitaker stated. He agreed that the video showed that he was twisting and adjusting his back at various times; this is something I do frequently, the clamant agreed.

Whitaker agreed, during cross examination, that before his injury in July 2000 he had pretty much worked only about five or six months out of the year, as far as Midwest Foundations. As far as any contractor in the five years before July of 2000, the claimant was asked, did he pretty much work regularly throughout the entire year for contractors?

Seems like I would be, but I built so many houses for the family and so much other stuff besides construction, it's hard for me to answer that, Whitaker stated. He stated that it was fair to say that he'd take about half a year off and build homes for family members. He was queried - You didn't charge anything for your services? They paid a few bills for me here and there, the claimant stated. He stated that he could get by financially with just working five or six months out of the year at that time.

The claimant was queried - You don't recall having any sort of prior thoracic injury or injury to your mid back before July of 2000? Anything that would hold me up or hinder or stop me, no, Whitaker responded. When asked again, Whitaker stated that he remembered having an injury to his mid back area before July 2000. Describing where in the mid back he had had this injury, Whitaker stated that he was not a doctor and didn't know the back, but for the longest time he had some kind of ganglion cyst or some kind of cyst or something in his mid back that

had to be removed. I think this was before Dr. George Schoedinger did my back surgery, Whitaker stated. I had no ongoing problems after the cyst was removed, he said. The claimant was queried – he didn't remember straining his mid back area before July of 2000, and Whitaker answered - No. He was further queried – you don't remember ever hurting your mid back when you had injured your low back? I can remember a pull or possibly something, but nothing that ever stopped me or slowed me down, Whitaker answered. I do not remember ever having pain in the area between my shoulder blades before July 2000, the claimant stated.

My pain now is between my shoulder blades, Whitaker said, all over actually, but that's the main thing. He was asked if he remembered treating with Dr. Krettek in 1990. I can't say I do; I remember the name but as far as any information, that's a long time ago, the claimant answered. It was noted that Dr. Krettek's 1990 records indicated that he was treating Whitaker for a history that focused on Whitaker's thoracic area where previously he had had total spine pain. If that's what's written down, then I wouldn't disagree, Whitaker said. That day, that time I might have been hurting in that area, he further stated. Whitaker was queried if he remembered during his treatment at SSM Rehabilitation following his July 1992 left knee injury indicating to them that he had also hurt his thoracic spine in July of 1992. If you have it wrote down, I assume, he answered, that day maybe. It was noted that that the left knee occurred while Whitaker was working for Keller Construction, and that he was off six months as a result of this injury; the claimant responded that this was possible if that was what was written down.

After my 1995 right wrist injury I was off work for maybe a couple of years, the claimant stated during cross examination. He was queried - weren't there permanent restrictions of no lifting over five pounds when he was released from care for the right wrist injury. For a while, Whitaker stated, that was until I realized I could do it. I've never been stopped after that, he said. Whitaker stated that he recalled treating with Dr. Schlafly for his right wrist injury and that Dr. Schlafly was the one who performed the numerous surgeries he had. When queried if he recalled telling Dr. Schlafly in September 1997 that he had injured the thoracic portion of his back in the same fall at work when he injured his wrist in June of 1995. I think that was a statement as a pull; common sense would be a pull when you're hung up by your hand, Whitaker responded. I guess I recall telling the doctor that; if you have that down that day, he stated.

During cross examination, Whitaker agreed that just before the July 2000 injury he had actually been off work for some time as a result of a left foot injury as a result of a motorcycle or motocross accident.

The claimant agreed, during cross examination, that he had testified on direct examination about doing some kind of work for a towing outfit and was paid for that. I have not done anything else since July 2000 for money by way of employment, he said.

During cross examination by the employer/insurer, Whitaker agreed that he had a work-related injury to his left foot in May 1987 in Illinois claim; and, if the records so indicated, did not return to work until August 1987. With regard to the second work-related Illinois injury, the claimant stated that if the records so indicate, he had an injury to his back in February 1988, and was off work for approximately six months for that injury. Whitaker agreed that he then sustained another injury to his back in September 1988 while employed by E. S. & W and was off work and being provided with TTD benefits for a period of almost three years as a result of this work-related back injury. I then had an injury to my knee in July 1992, Whitaker agreed. He agreed that he then had a subsequent injury to his knee, a cut or something more insignificant, in August 1994 while employed by E. C. C. Environmental.

The claimant was queried, during cross examination, if he thought he could work at Wal-Mart. I would like to but can I, no, Whitaker answered. It was noted that at his deposition he gave the following testimony: Q. "Just for example you see people greet you when you go to your local Wal-Mart sitting on a little stool and they get up and they bring carts in or something but their main purpose is to help and greet customers, is that something, if you could alternate between standing and sitting in that kind of position more of a sedentary type job, is that something you think you could do?" A. "If it's going to pay my bills at \$3,000.00 a month, maybe." Whitaker stated that he did not deny that he said that. He admitted that he had applied for social security disability benefits on a couple of occasions before July 2000. Agreeing that his own physician, Dr. Peggy Boyd Taylor, had told him before July 2000 that he should apply for social security; Whitaker further stated - Every one of them doctors has told me that. But each time he went back to work; except for this time; he agreed.

On cross examination by the Second Injury Fund, Whitaker stated it was fair to say that he was lifting up to a hundred and fifty pounds on a daily basis. I would describe my job at Midwest Foundation as very heavy work, the claimant said. My job at Midwest Foundation involved twisting, kneeling and working overhead, the claimant agreed. He agreed that when he was working for Pace Construction, between approximately 1995 and 1999 he was not working under any medical restrictions. Before my July 2000 injury I did not have any difficulty with lifting, the claimant said. Whitaker denied that before the work injury in July 2000 he had no trouble with grasping with his right hand. I learned how to do things different, he explained. Whitaker admitted his deposition testimony that his right hand was as strong as an ox sounded familiar; he agreed that having learned to do things differently with his right hand, he was able to do everything he needed to do with his right hand. When queried, isn't it correct that he had no problems with climbing stairs before his July 2000 injury; Whitaker responded – "I'm not going to say that I didn't have no problems, but I pulled everything off without a problem, but I've always hurt; always." The claimant admitted that his deposition testimony that he could climb stairs like Rocky Balboa sounded familiar to him. Whitaker agreed that before his July 2000 injury he had no problems with walking distances. When queried about sitting for long periods of time before the July 2000 injury, Whitaker stated that sitting always kind of bothered him. I'm a moving type guy; I need to stay moving he stated. For several years before the July 2000 injury I was able to drive straight through to Florida; which is about a twelve-hundred mile/fifteen hour trip, the claimant stated. Following my prior back injury I returned to work full duty, the claimant agreed.

During cross examination by the Second Injury Fund, the claimant discussed his hobbies prior to July of 2000. At that time one of my hobbies was horses, he said, I trained them from fillies to two or three year olds. I would also ride horses every evening, he said, and agreed that, therefore, at the end of a work day he would still be able to come home and get up on a horse. Another of my hobbies was working with my children on motocross racing, and riding a motorcycle. When asked if he could still ride a motorcycle, Whitaker answered that he was sure he could, but he has not ridden a motorcycle since his July 2000 injury. It was noted that Whitaker had testified at his deposition that he goes over and watches softball and baseball games across the street from his house. I don't do that very often, he said. I use to be a season ticket holder for the Rams; but it's been two years since he has had tickets, Whitaker said. Prior to this I tried to go to all the Rams' home games, he said. I had a son who was in college at Moberly Community College and I would drive up to Moberly to take him some money and to watch basketball games because he was a trainer for the team. Moberly is about ninety miles from my home, the claimant stated, and sometimes I stayed and sometimes I'd go back home. It all varied on how I felt after the game, he said. The claimant was queried if he recalled his deposition testimony when he was talking about shopping that he had talked about going to Kohl's or T. J. Maxx and doing shopping there. If I stated that, yes, the claimant responded, but we're not talking about an every day deal as far as shopping. It was noted that at his deposition in April 2004, he had given the following testimony: Q. "How often do you go shopping?" A. "Once a day at least. Probably once a day maybe. I'm married to an Italian who loves stores." Whitaker admitted that that sounded about right.

The claimant agreed it would be his testimony that prior to the July 2000 work injury he was able to keep the symptoms from all his other injuries in check by moving, exercising and keeping himself in shape, but since the July 2000 work injury, that has caused a deterioration in all of his other conditions.

On redirect examination, Whitaker stated that he did not recall anything specific or ongoing as far as complaints related to his mid back prior to July of 2000. He agreed that as to things that happened fifteen to eighteen years ago, his memory would have been better back then. I didn't remember any problems but if the reports and medical records indicate that I said it at that time or that day, yeah, I don't have any reason to dispute that, Whitaker said. He stated that he did not recall a repeat thoracic MRI being performed in July of 1991; assuming this was in the medical records, a thoracic MRI done on July 1, 1991 which revealed a negative findings, I don't have no reason to dispute that, the claimant said.

Concerning his current limitations, Whitaker stated during redirect examination, I think all the doctors, nobody had me lifting over twenty or twenty-five pounds. He agreed that the doctors had also indicated that he had limitations on standing and sitting for periods of time. I did not have any of those significant limitations prior to my July of 2000 injury, Whitaker stated. I am, on occasion, able to do things that exceed these limitations, he agreed, for example I lifted a pallet that weighed more than ten pounds. I don't do things like that very often, he said, but occasionally. If I exceed the limitations I pay dearly, Whitaker testified, there's not enough pain medicine in the world to get me feeling back even halfway normal. It's excruciating, want to commit suicide type pain, the

claimant stated, it's just unbelievable. When I experience this excruciating pain, I have to lay flat on my back for two to three days; no movement whatsoever, Whitaker said. He agreed that when he had gone to the emergency room several times in 2001 it was after doing things where he exceeded the limitations he has. Noted was a cross examination question posed to Whitaker during his April 21, 2004 deposition about if he could work at a job like Wal-Mart; he agreed it was his testimony that if one load of laundry or one bag of groceries or one gallon of milk can make his back hurt, why would I take the chance of pushing a chair around and getting a person a cart and maybe dealing with it again, I don't feel that I should have to, it's too painful. .

On recross examination Whitaker was asked, while working for Midwest Foundation as a laborer, did he do that just to take a break from being a hod carrier. I was doing that because there wasn't a lot of mortar work going on, and that was a different job for me, and a lot lighter job for me normally carrying hod. Break wasn't the right word that I should use, Whitaker said, not working as a hod carrier for Midwest Foundation in July of 2000 never had anything to do with any of my prior problems, back problems. Whitaker was reminded of his deposition testimony on April 21, 2004: Q: "Now you had been working as a hod carrier but when you were working for Midwest you worked just concrete?" A: "Just a laborer." Q: "Was that because of problems with your right wrist or your low back?" A: "Basically to get -- yes, to be honest with you, yes, to back off some work because my body was slowly not being able to do what -- I don't know if you watched a bricklayer or a hod carrier, it's one of the hardest jobs a man could have." Q: "As demanding as a concrete work is, it's even more demanding as a hod carrier; right?" A: "Yes, it's twice as intense. And I love the bridges because they are easier to me." Whitaker admitted that he recalled this deposition testimony.

During recross examination, Whitaker stated that as a result of the prior left foot injury from the motorcycle incident when he went back to work he had to wear boots because of the left ankle. If I go on any kind of walk or anything for over an hour, yeah, I need some support, he said. Whitaker was queried if he recalled treating with a Dr. Marressi before July of 2000 and Dr. Marressi doing a myelogram on his thoracic spine and talking to him about there being a herniation and the possibility of doing a rib removal. The claimant responded that he remembered the doctor's name, but did not recall these statements by the doctor. Whitaker was shown a document marked as Employer/Insurer's 7 and it was noted that on 10-11-88 a myelogram was performed. I remember Dr. Vest, not with the thoracic or anything, but I don't remember this discussion with Dr. Marressi at all, Whitaker said. .

On further cross examination by the Second Injury Fund, Whitaker stated that he recalled having a settlement with the Second Injury Fund on his June 26, 1995 case. When further queried if he recalled alleging injury to his thoracic spine in this settlement, Whitaker responded - Actually, ma'am, I don't. He was asked if at the time of that settlement was he having problems with his thoracic spine, and Whitaker answered - No. You would agree the stipulation reflects that one of the pre-existing disabilities you were paid for was 17.5% of the body as a whole referencing your thoracic spine, the claimant was queried. Actually, I did not know that, Whitaker answered. He agreed that it was his signature on the bottom of the stipulation (See Employer/Insurer's Exhibit 6). But I'm so bad at that I didn't read none of it that day or since; I didn't read none of it, Whitaker said.

On redirect, Whitaker agreed that the September 30, 1988 injury to his back which he filed a workers' comp claim in Illinois was the injury in which he ultimately had low back surgery by Dr. Schoedinger. When I settled my workers' compensation claim over in Illinois, to my knowledge I did not receive any compensation for any injury other than to my low back, Whitaker said, and my low back was the only thing I was having complaints for at the time I settled the case.

Considering the medical opinions, Dr. Samson (No. P), an authorized treating doctor, wrote in a 03/19/01 letter to the workers' compensation carrier:

In view of the 8/17/2000 MRI showing no acute abnormality, just some mild degenerative bulging at T6-7 and T8-9 as well as the cervical MRI from 1/19/2001 showing some mild degenerative change without herniation. It is my opinion there is no structural or spinal explanation for his persistent complaints other than a strain.

It is therefore my opinion that there is a 2% (two percent) permanent partial disability at the level of the thoracic spine as a result of the July 15, 2000 injury. He has reached maximum medical improvement and is discharged from care.

There is no medical reason why he cannot work, in my opinion, with regard to the July injury.

The records of Dr. Peggy Boyd Taylor, D.O. of Med Care-RX (Roman Numeral II) indicated the doctor began treating Whitaker for various ailments (i.e. blood pressure was checked) beginning 10/28/96; this entry noted that Whitaker's complaint was back pains, and it was noted that he had had laminectomy as a result of a work related injury in 1985; the entry reflected that among the medications prescribed were Vicodin, and another medication (illegible). Dr. Taylor's record included a 09/25/97 letter of inquiry from the National Prescription Administration about medications prescribed for Whitaker. In an October 4, 1998 letter to an attorney, Dr. Taylor wrote that Whitaker had been a patient of hers since October 28, 1996, the doctor further wrote - - "I have advised Mr. Whitaker to apply for Social Security Disability Benefits as I consider him to be 100% disabled.". In about October of 1997 the prescribed medications began to include Xanax. The record indicated that treatment continued, including refill of medications, with Whitaker being seen about one to four times a year through 2004; the record reflected that Whitaker was seen monthly beginning in August 2000 through December 2000, and then returned pretty much to his regular treatment pattern. Dr. Taylor provided a disability opinion in response to the claimant's attorney in a 02/11/02 letter: "in my opinion - there is a 45% disability of the thoracic spine with relation to the body as a whole".

Dr. Peggy Boyd Taylor, D.O. testified by deposition on behalf of the claimant (No. G), and stated that she is board certified in family practice. I have been treating Whitaker since October 1996, Dr. Taylor said, he came to me with lower back pain. The doctor agreed, from her information, Whitaker was able to work from 1996 through July 15, 2000. On July 15, 2000, Dr. Taylor stated, "(Whitaker) sustained an injury to his thoracic spine or upper back". (Taylor Dp. pg 11) The doctor described the work related accident of July 15, 2000. I continued treating Whitaker as his family doctor after July 15, 2000, and am currently treating him, Dr. Taylor said.

Dr. Taylor's treatment records of May 5, 2000 and June 29, 2000 were noted, and the doctor acknowledged that her diagnoses at that time were gastroesophageal, reflux disease, peptic ulcer and lumbar laminectomy by history with no mention of any thoracic pain. (Ruling: Employer/Insurer's objection is overruled. Taylor Dp. pg. 13) I next saw Whitaker on August 4, 2000, the doctor said, and Whitaker relayed that he had suffered injury at work on July 15, 2000, was seeing a company doctor, and was having upper back pain with radiation up the neck, arms and shoulders. My diagnoses in August 2000 after examination now included anxiety symptoms and thoracic sprain work related; "I provided no specific treatment other than giving him medication", Dr. Taylor said. (Taylor Dp. pg. 14) The doctor stated that she saw Whitaker subsequent to this for unrelated problems, but she also assessed his progress in relation to the work related injury. Agreeing that she provided a report in December 2001 of all of Whitaker's injuries up to that date, Dr. Taylor listed the injuries:

"I have 1996 herniated lumbar disk with subsequent lumbar laminectomy L3-L4, 1988 torn medial meniscal cartilage left knee with subsequent arthroscopy, 1990 fracture of the right wrist with subsequent wrist fusion, 1995 disruption of pins with....instability of the wrist after returning to work in 1995 with subsequent reinsertion of pins to the right wrist, 1996 bone graft right hand, 1996 carpal tunnel release right hand, date unknown laceration right thumb, date unknown foreign body left eye, date unknown foreign body left index finger imbedded, degenerative spondylosis of the thoracic spine T6-7, rotoscoliosis, degenerative disk disease L5-S1, spina bifida occulta at S1, bulging thoracic disk T6-T7, focal disk herniation T8-T9, thoracic sprain severe, thoracic radiculitis, left sciatica, cervical radiculopathy, degenerative osteoarthritis cervical spine." (Taylor Dp. pp. 20-21)

The diagnoses related to the July 15, 2000 injury, Dr. Taylor stated, are"(B)ulging thoracic disk T6-T7, focal disk herniation T8-T9, thoracic sprain severe, thoracic radiculitis...(a)nd... degenerative spondylosis of the thoracic spine T6-T7". (NOTE: Ruling: Employer/Insurer's two objections on grounds of - form of question - are sustained. Taylor Dp. pg. 26)

Dr. Taylor testified that she does not have a back specialty in her practice, but in her practice she treats at least three to four back injuries in a day. I order a lot of MRIs, the doctor said, I don't read them but I interpret them for my patients.

The doctor was asked if she felt Whitaker was able to return to work in his current condition at the time of

her May 23, 2002 deposition, and Dr. Taylor answered: "In his current condition, Mr. Whitaker cannot return to his occupation as a hod carrier". (Taylor Dp. pg. 29) (Ruling: Employer/Insurer's objection is overruled. Taylor Dp. pg. 29) To my knowledge, Whitaker is not currently working, the doctor further stated. Dr. Taylor stated that she didn't know the specific dates that Whitaker last worked, but she knew that he hadn't worked since the July 2000 injury. The doctor was queried if she believed Whitaker's inability to work was as a result of the July 15, 2000 injury, and Dr. Taylor answered: "Yes, I do." (Taylor Dp. pg. 29) Agreeing that on 02/11/02 she had assessed a permanent partial disability for Whitaker in regards to the injury he had sustained on July 15, 2000, Dr. Taylor testified as to what her belief was: "Forty-five percent disability of the thoracic spine with radiation to the body as a whole".

On cross examination by the employer/insurer, Dr. Taylor agreed that she had said Whitaker first became a patient of hers in October 1996. Dr. Taylor testified as to the conditions and illnesses she treated Whitaker for from October 1996 through July or August 2000:

"Low back syndrome, backache, body aches, low back syndrome, low back syndrome, left ear infection, depression, low back syndrome, anxiety, low back syndrome, sinusitis, bronchitis, laryngitis, low back syndrome.

"Insomnia, insomnia, low back syndrome, low back syndrome, cephalgia (headache).

"Cephalgia, anxiety, anxiety, GERD, laminectomy." (Taylor Dp. pp. 31-32)

Dr. Taylor referred to her medical record, and stated that Whitaker was already taking the pain medications Lorcet and Fiorcet on July 15, 2000. "That was for his low back", the doctor explained. (Taylor Dp. pg. 33)

During cross examination, Dr. Taylor agreed it was her opinion that Whitaker was unable to return to work as a hod carrier due to the combination of July 2000 work related injury with his preexisting injuries and conditions that were listed in her December 30, 2001 report.

Dr. Taylor admitted, during cross examination, that she never got a copy of the MRI report or a copy of any diagnostic study reports, and never saw any of the actual films. It was noted that Dr. Taylor had stated earlier while going through her records that a herniated disc in the thoracic spine was one of her diagnoses, and Dr. Taylor responded: "And the only results I would have would be what he came back and told me these results were. But as far as being able to view them I wasn't approved by the company, so I would have no copies of those reports other than what he had given me." (Taylor Dp. pg. 40)

Dr. Raymond Cohen, D.O., physician, testified by deposition on behalf of the claimant. (No. H) The doctor stated that he examined Whitaker at the claimant's request on November 13, 2003. Dr. Cohen noted the doctors Whitaker had seen for treatment of the primary work injury. Whitaker's current complaints were discussed by Dr. Cohen, which included:

"He continues to have severe mid back pain. He cannot cut his grass or carry the trash. Any similar activity will cause him to have to go to bed and lie down. He has difficulty doing any twisting of the mid back....He states that mid back pain radiates toward the front....Any type of significant activity with arms such as pushing or lifting increases the mid back pain. Basically he avoids lifting if at all possible. He states he has had severe stress and depression since his injury. He has no prior history of any similar psychological complaints..." (Cohen Dp. pg. 8)

Whitaker's relayed history of prior injuries were discussed by Dr. Cohen: a. 1985 – low back and lumbar surgery; "Whitaker stated he has always had pain in his back on a daily basis, but work through the pain", Dr. Cohen noted. b. 1987 – left foot fracture. c. 1999 left foot surgery for a foot peg on a motorcycle went through his foot; "He has to wear high top boots and has to have them very tight for support for his foot and ankle", Dr. Cohen noted. d. 1992 – left knee surgery; "He has had pain including burning pain and throbbing in the left knee since that injury", Dr. Cohen noted. e. 1995 – right wrist and forearm injury with five surgeries on the arm; Dr. Cohen noted the following about the 1995 injury –

“He no longer has a full range of motion of the right wrist. He cannot bend the wrist. He had to learn how to turn his right arm so he could hold onto the hod pole. He had to change to use his left arm for most activities. He states it took twice as long to do anything after the right wrist injury. It was difficult for him to load the hod after the injury.”
(Cohen Dp. pp. 9-10)

Dr. Cohen noted from his review of outside medical records other preexisting physical problems and treatment Whitaker had: a. “He had surgery on the left ankle on 1-25-2000 and this was a debridement of an ulcer of the left foot.” (Cohen Dp. pg. 11) b. Dr. Schoedinger’s records of 1990 and 1991:

“Records from 1990 from Dr. Schoedinger were reviewed and he noted that an MRI from 1989 revealed a disc rupture at T8-9. The patient did not recall any injury that year. He states that whatever he may or may not have had in 1989 or 1990, that he recovered and was able to do heavy labor work up until the primary work-related injury. He states that he was able to do the heavy construction work without any problems.

An operative report of 1991 from Dr. Schoedinger notes a herniated disc at L5-S1.” (Cohen Dp. pp. 11-12)

Dr. Cohen noted Whitaker’s educational and occupational history, discussed the outside medical records he had reviewed, and noted Whitaker’s high school and Social Security Award of 10/02/03 that he had reviewed. The doctor discussed his findings upon physical and neurological examination of Whitaker on November 13, 2003.

My diagnosis concerning the July 15, 2000 work related injury, Dr. Cohen said, was: “Number one, thoracic disc protrusions and a thoracic myofascial pain disorder.” (Cohen Dp. pg. 14) Dr. Cohen testified as to his diagnoses for Whitaker’s preexisting conditions:

“Status-post lumbar surgery for disc herniation of L5-S1, status-post left foot surgery for fracture and a cutaneous ulcer, status-post left knee surgery for medial plica, and status-post multiple right wrist surgeries for severe internal derangement and carpal tunnel syndrome. Ultimately he had a fusion of the right wrist.” (Cohen Dp. pp. 14-15)

Dr. Cohen testified as to his conclusions in regards to the July 15, 2000 work related injury, which included:

“That those noted diagnoses listed under the primary work-related injury are as a direct result of injuries he sustained at work on or about 7-15-00 and that the work is the substantial factor in his disability and that he has a full person disability of 35 percent at the thoracic spine of which 2.5 percent is pre-existing and 32.5 percent is a direct result of the primary work related injury on or about 7-15 of 2000.....(H)e needs to be restricted from any work in which he has to do any bending of the mid back area. He should not do any lifting greater than five to ten pounds. He should not do any type of work in which he has to do any pushing or pulling with his arms.” (Cohen Dp. pp. 15-16)

Dr. Cohen gave his conclusions in regards to Whitaker’s pre-existing conditions or disabilities:

“That he has a whole person disability of 35 percent at the lumbar spine, a 30 percent permanent partial disability at the left ankle, a 30 percent permanent partial disability to the left knee, and an 80 percent permanent partial disability at the right wrist. It’s further my medical opinion that his pre-existing conditions or disabilities combined with the primary work-related injury to create a greater overall disability than their simple sum and that due to the combination of the disabilities –

“And that due to his combination of his disabilities he is permanently and totally disabled and not capable of gainful employment and that his pre-existing conditions or disabilities are a hinderance or obstacle to his employment or re-employment.” (Cohen Dp. pp. 16-17) (Ruling: Second Injury Fund’s objection is overruled. Cohen Dp. pg. 16)

On cross examination by the employer/insurer, Dr. Cohen stated that he was not aware Whitaker had settled a claim in 1999 with the Second Injury Fund for 17.5 percent of the body as a whole referable to the thoracic spine. (Ruling: Second Injury Fund’s objection on grounds of hearsay is overruled. Cohen Dp. pg. 21) Dr. Cohen stated that he was not aware of Whitaker ever relaying to him that he had ever treated with a Dr. John Krettek. The records I have from Dr. Peggy Taylor-Boyd are for treatment after the primary injury, Dr. Cohen

noted.

Dr. Cohen agreed, during cross examination, he had mentioned that Whitaker had complained to him of some stress and depression, but that he did not make a medical diagnosis in these regards. Whitaker did not relay that he had ever had any sort of psychological evaluation before July 2000, the doctor said. Dr. Cohen agreed that he is not a vocational rehabilitation expert. The doctor further agreed, during cross examination by the Second Injury Fund, that he would defer to a vocational expert whether there was any employment out there available for Whitaker within his restrictions. Dr. Cohen agreed that Whitaker was a fairly young worker as far as his chronological age, and stated "That's correct" when queried that Whitaker's age by itself would not be a hinderance to obtaining employment. (Cohen Dp. pg. 36)

On cross examination by the Second Injury Fund, Dr. Cohen agreed that he is a board certified neurologist. The doctor agreed that the work Whitaker described doing before the July 2000 work injury would be considered heavy physical work, and, as far as he knew, Whitaker was working full duty. I am not aware of any restrictions from physicians while Whitaker was working, the doctor said. Dr. Cohen indicated that he understood the duties of a hod carrier, and stated that as far as he knew Whitaker returned to hod carrier work after his 1985 back surgery, after his 1992 left knee surgery, and after returning to work from an extensive time off work as a result of a 1999 motorcross left foot injury. The doctor further testified, when asked to comment on what Whitaker had relayed as to his capabilities before the primary injury: "That he was able to work as a hod carrier and laborer. Although he was having problems referable to several parts of his body which I described. As far as work he could do those types of activities." (Cohen Dp. pg. 35) Dr. Cohen testified as to Whitaker's capabilities outside of work prior to the primary injury:

"Well, at least cutting his grass and taking out the trash he could do that, but he could no longer do that like he could before and he said that it was difficult for him to do anything that required pushing or lifting and he avoids lifting. So my understanding was he was able to do some of that prior to the primary work-related injury." (Cohen Dp. pg. 35)

During cross examination, Dr. Cohen was asked, wasn't it true from the records that following the primary injury Whitaker had gained a good amount of relief from a work hardening like program The doctor stated that he did not recall this. The doctor was further queried if he recalled Whitaker telling him that he had hurt himself lifting at one of the work hardening programs, and Dr. Cohen responded – "No, I don't." (Cohen Dp. pg. 32) When queried, wasn't it correct that he was not aware of Whitaker taking any sort of medication before his primary injury, Dr. Cohen answered – "That's correct." (Cohen Dp. pg. 37)

Dr. Ravi Shitut, M.D., board certified in orthopedic surgery and in spine surgery, testified by deposition on behalf of the employer/insurer. (No. 5) The doctor stated that he began his evaluation of Whitaker on behalf of the employer/insurer on October 25, 2002. Dr. Shitut discussed the history of the work related injury. Dr. Shitut discussed the treatment Whitaker received after the July 2000 work related injury, including x-rays, an MRI of the thoracic spine, and according to Whitaker, an attempt at a myelogram. Dr. Shitut then noted:

"Subsequently attempts were made to return him to work around December 2000. He was evaluated by work conditioning program and also underwent rehabilitation. Therapy initially offered him significant relief of his symptoms. But he had only a 10 pound weight restriction of the program, and when he attempted to lift some 30 pounds, he developed an increasing pain in his upper back. The work condition program was subsequently stopped. It was recommended that the patient switch his tool belt from one side to the other side, but that did not offer him much relief." (Shitut Dp. pg. 10)

The doctor noted additional complaints and history from Whitaker:

"He stated that his pain started when he returned to the physical work activities two or three days following the initial injury of 7/15/00. He also was complaining of left lateral thigh pain and tingling in, that radiates into the left calf and dorsum of his foot that began about three or four months after his injury. He's also complaining about tingling in his right buttock area that developed at the same time.

Patient reported that the symptoms in his lower extremity have been better over the last four to five weeks. He also noted numbness that encompasses both upper extremities, particularly all his fingers. Both are equal in

intensity. The patient stated his symptoms started approximately three to four days after the injury and most frequently occur when he held his arms in the front of his body. The patient is left-hand dominant.

“He also stated that over the course of time, he had made multiple trips to the emergency room with exacerbation of his pain. For that, he usually received injections of Demerol so that his symptoms would decrease. That was his overall history.” (Shitut Dp. pp. 11 and 12)

Dr. Shitut discussed Whitaker’s relayed history of past medical and surgical procedures. Whitaker’s social and work history was discussed by the doctor. Dr. Shitut noted that the “last time (Whitaker) had worked was in December of 2001”. (Shitut Dp. pg. 14) The doctor noted that when Whitaker described the July 2000 work injury he was not performing the hod carrier job. Stating that it possibly appeared as though Whitaker was doing more of a laborer’s job at the time of the injury, Dr. Shitut further noted that it was “(s)omething physically demanding.” (Shitut Dp. pg. 14) The doctor was asked if Whitaker had told him that he had stopped working as a hod carrier any time before the July 2000 due to any of his prior physical problems or physical limitations. “I don’t have any knowledge of that,” Dr. Shitut answered. (Shitut Dp. pg. 15)

Dr. Shitut testified as to his physical examination findings on October 25, 2002. Dr. Shitut stated that he looked at actual diagnostic films, and listed them: “Thoracic myelography CT that was performed on 6/5/01...and also looked at a post-myelographic CT scan...I looked at a thoracic MRI scan that was performed on 8/17/99.” (Shitut Dp. pg. 16)

Agreeing that he formed an opinion after his October 25, 2002 evaluation as to whether or not Whitaker had sustained an injury as a result of his job duties in July 2000 ^[11] while employed at Midwest Foundation, Dr. Shitut testified:

“Yes, my impression was that he had sustained a sprain of the surgical thoracic area as a result of an industrial injury sustained about two years ago. And based on the review of the work-up, which included the myelogram and the cat scan that we mentioned about and also an MRI scan of the thoracic spine, it seemed like he had an underlying degenerative disk disease in his thoracic spine and more specifically at T6-T7 and T8-T9. I thought that since the symptoms have lasted so long, at least some of his symptoms could be coming from the underlying degenerative disk disease that he had. And I’ve given you my C.V. and my main thing is I do surgery, and I was assuming that he was referred to me to see if he required surgery. I didn’t think he required surgery.” (Shitut Dp. pp. 16-17)

I recommended that the thoracic MRI be repeated, Dr. Shitut said, and discussed what the new MRI scan performed on November 12, 2001 showed: “The bony architecture, that is the bones looked all right. There was no compression of the spinal cord or nerves of any kind. He had small central extradural defects at many levels and that included the levels at T4-5, T7-8, and T8-T9.” (Shitut Dp. pp. 17) These abnormalities, “I would classify them as minor and what I would consider as clinically not very significant”, the doctor stated, abnormalities common in somebody his age. (Shitut Dp. pg. 18) Dr. Shitut was asked if he felt Whitaker had reached maximum medical improvement, and the doctor answered: “And I was seeing him two years later, and I think he had reached maximum medical improvement.” (Shitut Dp. pg. 18) Dr. Shitut further stated:

“But my – the evaluation was that it was myofascial type sprain and if there was, there probably was some aggravation of his underlying degenerative disk disease. And these conditions usually reach maximum medical improvement over a period of several months. So at least at one year, I would think it would be maximum medical. Definitely by the time I saw him.” (Shitut Dp. pg. 19)

Agreeing that he had assessed permanent partial disability suffered by Whitaker as a result of the injury on July 15, 2000, Dr. Shitut testified: “Based on my evaluation, and it was pretty much based on my diagnosis, which was myofascial pain, I rated him at 5 percent of his whole body.” (Shitut Dp. pg. 20)

On cross examination by the claimant, Dr. Shitut was queried about his statement in his report that Whitaker had made multiple trips to the emergency room for exacerbation of his pain, and was this as a result of the July 15, 2000 accident. Dr. Shitut answered: “Most likely it was. At least by the history it seems like it was.”

(Shitut Dp. pg. 21)

During cross examination, Dr. Shitut was asked his opinion of whether or not it was possible for Whitaker to return to work as a hod carrier or anything that requires heavy physical demand. The doctor answered:

“And two years after his injury, if he has not returned to work, I think just statistical chances of his going back to work are very little. I think if he attempts some type of work, it would be something less strenuous, not as heavy as the Hod-carrier construction worker. Maybe medium to light duties type of status. With or without rehabilitation.” (Shitut Dp. pg. 29) (Ruling: Employer/Insurer’s and Second Injury Fund’s objections are overruled. Shitut Dp. pg. 29)

It was noted, during cross examination, that Dr. Shitut had indicated Whitaker was at maximum medical improvement; Dr. Shitut was queried if he believed there was any sort of treatment that would allow Whitaker to be able to go back to heavy duty work. The doctor answered: “I think he has received adequate treatment. Nothing more than what was already done.” (Shitut Dp. pg. 30) (Ruling: Employer/Insurer’s and Second Injury Fund’s objections are overruled. Shitut Dp. pg. 30) Dr. Shitut opined that Whitaker’s condition could not be cured, and further testified:

“I think he’ll have some kind of pain on an intermittent basis all the time. I don’t think he is, he’ll have pain all the time, he’s already admitted that, when he’s awake. But he may experience some pain with changes in weather, doing something he’s not used to doing, physical activity type of thing. But I don’t think he will have pain all the time.” (Shitut Dp. pp. 30-31)

Dr. Shitut discussed the MRI reports and studies he reviewed during cross examination. Comparing the report of an MRI performed July 1, 1991 with the August 2000 MRI and November 12, 2002 MRI, Dr. Shitut agreed that the 1991 study reported no extradural defects identified, and the 2000 and 2002 studies showed that there were a number of disk protrusions; the doctor agreed that some time between July 1991 and August 2000 Whitaker developed the extradural defects. The doctor was queried, wasn’t it true that Whitaker indicated to him that he didn’t have any symptoms or problems as far the degenerative condition of his thoracic spine prior to July 15, 2000. “He did not have any problems prior to the injury.” (Shitut Dp. pg. 35) Agreeing that it was his opinion the July 15, 2000 work related injury was an upper thoracic sprain, Dr. Shitut further agreed that he didn’t believe the disk bulges and the protrusions which were shown in August of 2000 but weren’t there in July of 1991 were caused from the July 15, 2000 work related injury. Dr. Shitut explained:

“It’s based on the knowledge of the condition. Because the bulging we are talking about is a degenerative condition. It’s not a problematic condition. And to go beyond that, it will be somewhat difficult to decide that those were actually causing some, it not all, of his symptoms. This kind of bulges are present in a significantly high percentage of totally asymptomatic people who won’t even have any symptoms. And their association with when the actual presence and the symptoms is questionable at best. (Shitut Dp. pp. 35-36)

On redirect, Dr. Shitut acknowledged that as of July 2000 Whitaker was working as a “Hod-carrier or some laborer’s job is what my understanding is”. (Shitut Dp. pg. 45) The following testimony occurred:

Q. Doctor, you don’t have any kind of vocational rehabilitation training, do you?

A. Not other than just general knowledge with regard to the duties of a Hod-carrier.

Q. You don’t have any particular knowledge with regard to the duties of a Hod-carrier.

A. The only thing I know, it’s a pretty heavy-duty job. It’s one of the heaviest jobs around.

Q. But you don’t have any particular knowledge concerning what those job duties entail per se.

A. No, I don’t. (Shitut Dp. pg. 48)

During redirect, Dr. Shitut was referred to a report of a MRI of the thoracic spine in Dr. Schoedinger’s July 10, 1990 record; in reading the MRI report, Dr. Shitut noted that the study had been performed on 9/11/89, and further testified to the reported findings – “Studies of the thoracic spine...reveal evidence of a disk rupture at T8-T9 level. Similar studies in the cervical and lumbar spine revealed degenerative changes without other evidence of abnormality” (Shitut Dp. pg. 50) To my knowledge, Dr. Shitut stated, Whitaker did not tell me he had had MRIs of his thoracic spine done before the July 2000 work

related injury. When queried if Whitaker had told him whether or not he was having any symptoms in his thoracic spine prior to July of 2000, Dr. Shitut answered – “To my knowledge, he did not have any symptoms to his thoracic spine.” (Shitut Dp. pg. 51)

On further cross examination, Dr. Shitut acknowledged that in a July 9, 1001 supplemental report by Dr. Schoedinger’s findings included – “That the thoracic and lumbar magnetic resonance imaging performed on 7/1/90 were normal in all aspects” (Shitut Dp. pg. 51) It is possible to have a disk rupture in July 1990 and then have a normal MRI less than a year later, Dr. Shitut said, and explained that it could have been the technique by which the MRI was done, or possibly “some of the seemingly minor disk herniations might actually get better with time and that has been proven time and again”. (Shitut Dp. pg. 52).

James M. England, Jr., rehabilitation counselor, testified by deposition on behalf of the claimant. (No. K) I met with Whitaker on October 8, 2004, England stated, “(t)o determine whether or not I thought he would be employable in the open labor market”. (England Dp. pg. 5) England noted the documents and records he had reviewed prior to meeting with Whitaker: “Well, most of the information was medical records and doctors’ reports, and then I also looked at depositions of Drs. Cohen and Shitut, and I saw Mr. Whitaker’s deposition, and I also looked at his school transcripts.” (England Dp. pg. 5) England noted the following about what Whitaker’s school transcripts revealed: “Rather a dismal performance. He had anywhere from a .4 grade point to the highest grade point he ever had I think was a 1.0 for like one semester of school. But overall, very few credits and very poor performance overall.” (England Dp. pp. 5-6)

England discussed the most noticeable things about Whitaker at the meeting was that Whitaker was “unlike most of the people that come in here, he was actually on his feet almost more than he was sitting”. (England Dp. pg. 6) England further stated:

“I mean, I offer him the option of whatever position you want to be in, that’s fine, but he had to get up and move around quite a bit. And he actually said that walking around was better on him than sitting.

And as I thought that was a little unusual, but that and the fact that he seemed really emotionally upset I think were probably the two most noticeable things.” (England Dp. pg. 6)

Agreeing that he tested Whitaker, England testified:

“I gave him a work recognition test, and then a reading comprehension test to test his reading, and then I also gave him a written math test. And it looked to me like he was trying but – and he did not do better on the reading comprehension than he did on the work recognition. His math was just poor. He just didn’t do very well.” (England Dp. pg. 7)

England discussed Whitaker’s relayed history of prior injuries, time off from work as a result, and any continuing problems. Whitaker’s present medications were noted. England discussed what Whitaker relayed about his present symptoms, and his physical limitations, which included: “He said he changes positions a lot during the day. He said lying down is really the only way he can get adequate relief from his pain. The primary complaint was pain in his mid back going down into his arms.” (England Dp. pg. 12) England discussed the family and social background information he had received from Whitaker. England’s discussion of the vocational work history information he had received from Whitaker included the following:

“Essentially everything that he’s ever done was heavy construction type work. The most recent job had been in Midwest Foundation from '98 to the injury in 2000. He was a laborer. He said that he helped with concrete work on highway extensions.

“...He would be on his feet throughout the day lifting a hundred pounds on a regular basis. He said he did a lot of bending, kneeling, squatting, climbing, reaching, pushing, pulling, stooping, handling and that he worked a fair amount of overtime.

Before that he had said he spent most of the twenty plus years in construction as a hod carrier. This would have involved supplying masons, brick masons and stone masons with mortar. He would mix the mortar and then carry it on a hod which is a device that you put on your shoulder and carry it up the ladders.

He said he had to handle other supplies such as concrete blocks. He would set up and take down scaffolds.

It was a heavy job. He said he was really proud of the fact that somehow he was able to keep going back even though he'd had these other injuries. He said it was a struggle but he considered himself indestructible until the last injury.

He said he did not have experience with things like office machines. He had operated a variety of construction equipment like mortar mixers and things like that. He was familiar with a number of hand tools and some power tools. He had driven trucks all the way up through tractor trailer size, but only on parking lots. He wasn't licensed to do that out on a regular highway.

He said that he did not have to do any paperwork and had never been a formal supervisor. And it did not appear to me that he would have any transferable skills that would be usable at either light or sedentary levels of exertion." (England Do. pp. 16-17)

Agreeing that he had administered vocational tests to Whitaker, England testified as to the results:

"First I gave him the reading work recognition part of the Wide-Range Achievement Test. He scored at the seventh grade level on that. The written math test, he scored at the fourth grade level. The only math he was able to answer was basic addition and subtraction.

He did not appear to know how to multiply very well. He couldn't divide at all and was not able to handle fractions or decimals.

I also gave him a reading comprehension test and on that he scored at the eighth grade level. And I think overall, he can read at around the eighth grade level, but his math is very limited. His math is so bad that I don't think he could pass a test that's typically given for people that are applying for a cashier type position." (England Do. pp. 17-18)

England was asked to testify as to the functional restrictions and limitations indicated from his review of depositions and medical records, and England noted the opinions of Dr. Shitut, Dr. Cohen and Dr. Buckles.

England testified as to his conclusions in regard to Whitaker:

"At the time I saw him he was 41. That would make him a younger worker under U. S. Department of Labor Guidelines. He had a number of different what I would call significant injuries in the past. I think they certainly had an impact on his ability to function in the work world and I felt that the injuries would have constituted a significant hindrance to his being able to continue particularly work as a construction worker.

To his credit, he did keep going back and trying to do this even though I think it probably wasn't a good idea from a vocational standpoint. He wanted to keep the earnings up and so he kept trying to do it.

It appeared to me that with his current functional ability, he would not be able to successfully compete for employment. I felt just the impression that he made on me when he was in here with the inability to stay seated very long, the need to get up and move around, that type thing in a job interview I think would certainly be viewed negatively by a prospective employer.

I think that the fact that he can't stay in one position very long, that he has trouble even with his upper extremities, that he has difficulty thinking clearly, staying on task, combining that with his academic deficiencies, the lack of very formal – you know, much in the way of formal education, all those things combined with his physical problems, I don't think he's gonna be able to compete successfully for alternative employment, nor do I believe that he would be able to sustain it in the long run, in particular, taking into consideration what Dr. Buckles talked about, the inability to sustain a regular work week.

Assuming that's correct, then I don't see how he would be able to do any type of work on a regular basis." (England Dp. pp. 20-21) (Ruling: Employer/Insurer's and Second Injury Fund's objections on grounds of hearsay, lack of foundation and opinion based on medical records not introduced at the time of hearing are overruled. England Dp. pg. 19)

England was asked if he believed Whitaker was a candidate for any type of vocational rehabilitation, and he answered: "Not with the factors, the overall factors in his case. I don't think so, no." (England Do. pg. 21)

On cross examination by the employer/insurer, England was asked if his opinion that Whitaker was unable to work was due to the way Whitaker presented himself or due to some sort of physical limitation. England answered:

“Well, I think that as for as the competing part, as he comes across, the combination of what I would describe when he was in here of kind of the emotional combined with the physical, I didn’t think he would make a very good impression on a prospective interviewer.

As far as the ability to do – inability to do the job, I think it would be based on, from what I understand, like in Dr. Buckles’ report where he says the man’s combination of the various injuries has him to the point where he can’t sustain regular work activity, I mean, that’s what I’m basing that on.” (England Dp. pg. 24)

England was queried if he had given Whitaker any recommendations that perhaps he see a career counselor who could give Whitaker advice on how to present himself during the course of an interview with a prospective employer, and England answered – “No.”. (England Do. pg. 27) “I always give them an overview of what’s available as far as vocational rehabilitation”, England added. (England Do. pg. 27) He was asked why Whitaker was unable to go the route of a career counselor at the present time, and England answered:

“I’m not saying he couldn’t take it if he had an interest in doing that. I think with as poorly as this guy functions academically, combined with all the different medical problems, I just don’t see him as likely to be successful in being able to do anything.”

(England Dp. pp. 27-28)

England stated that Whitaker did not tell him that at the time of the July 2000 accident he was contemplating opening up a motorcycle repair business with an associate of his. England stated that he was aware that in July 2000 Whitaker was not working as a hod carrier, that prior to July 2000 he had changed to the concrete forms job, but that he did not think Whitaker had told him he had stopped being a hod carrier because of his physical problems.

England agreed, during cross examination, that it was his understanding Whitaker did return to work on September 21, 2000 and continued to work up through December 15, 2000.

On cross examination by the Second Injury Fund, England agreed that it was possible that the emotional or psychiatric overlay to Whitaker’s condition could impede his recovery from an illness or make it a little more difficult in his own mind to recover from an injury. England was asked about Whitaker’s duties in the concrete job he performed right before the last injury, and England responded:

“Well, the concrete work was the very last thing, and that’s when he told me that he was still handling a hundred pounds on a regular basis, a lot of bending, kneeling, squatting, I mean that’s how he described the job at Midwest Foundation.” (England Dp. pg. 32)

England stated that the concrete job was in the heavy category. England stated that as far as he knew, Whitaker was doing the concrete job full time. I was not aware that he was under any restrictions in the concrete job, England said. Agreeing that he had asked Whitaker about any hobbies he had before the last injury, England further stated: “He said that motocross, hunting, fishing, he was still doing those up to the point of the primary injury is what he indicated to me.” (England Dp. pp. 32-33) Whitaker never mentioned owning or raising quarter horses, England said. He stated that he could not think of how raising or racing quarter horses would amount to anything vocationally.

England was queried if he had asked Whitaker how long he had been depressed, and England answered: “The only thing he told me was that once he got to the point where he couldn’t work, but I don’t know specifically when that happened.” England Dp. pg. 38)

On further cross examination by the employer/insurer, England was queried if his opinion that Whitaker was not a candidate for vocational rehabilitation was because of his understanding that Whitaker could not functionally use his arms; the following testimony then occurred:

A. Well, I wouldn’t say functionally use them, but use them to the extent where they would be something that he could use effectively in a work setting throughout a regular workday.

Q. Okay. Could he pick up and lift say a ten-pound object?

A. He said that he could lift like a gallon of milk, which is eight or nine pounds, as long as he kept his arms in close to

his torso.

Q. So his difficulty is pushing those arms out?

A. He said as soon as he reaches out, then he starts getting more pain.

Q. So for example if he were to pick up something off the ground or something else and throw it, that would be something he wouldn't do or that would cause pain, correct?

A. He said even reaching out away, when he does stuff, he keeps his arms in close to his torso, from what he told me, as soon as he moves his arms out away from his body, then he gets more pain.

Q. So it's your understanding that he wouldn't be doing any kind of activity on a regular basis or an extended basis where he'd have to extend his arms outward, correct?

A. Correct.

Q. And would your opinions change if you were to see documentation or evidence that he had been doing such things?

A. If he could do that consistently and he didn't have the other limitations that the doctors have talked about, then that's possible. (England Dp. pp. 40-41)

It is found, firstly, that there is an issue as to the claimant's credibility in this case, and thus whether or not the claimant is reliable or can be believed in his reporting of symptoms and capabilities. The claimant alleges that he is permanently and totally disabled; Whitaker, the claimant, indicated in his testimony that he believes his present inability to work is due to his last work related injury herein on July 15, 2000. It is found that with his demonstrated low level of mental capacity/understanding/teachability, Whitaker is forgetful and easily confused, and he compensates for this with an argumentative, sometimes hostile reaction; this has resulted in contradictory testimony. It is found that subsequent to his failure academically, Whitaker has compensated for his mental weakness by endeavoring in the most physically challenging hobbies (i.e. motorcycle racing) and work (hod carrier), and takes great pride in his physical capabilities. Whitaker has exaggerated in the area of his physical capabilities to both his credit and to his detriment [i.e. the claimant testified at hearing that his not working as a hod carrier for Midwest Foundation in July of 2000 had nothing to do with any of his prior problems or back problems, but when reminded of his earlier deposition testimony -- Q: "Now you had been working as a hod carrier but when you were working for Midwest you worked just concrete?" A: "Just a laborer." Q: "Was that because of problems with your right wrist or your low back?" A: "Basically to get -- yes, to be honest with you, yes, to back off some work because my body was slowly not being able to do what -- I don't know if you watched a bricklayer or a hod carrier, it's one of the hardest jobs a man could have."]. Whitaker downplayed his preexisting injuries, though it was noted, for example: A. During cross examination, Whitaker admitted that as a result of the prior left foot injury from the motorcycle incident when he went back to work he had to wear boots because of the left ankle. B. During cross examination Whitaker agreed that he had a work-related injury to his left foot in May 1987 and did not return to work until August 1987, that he had an injury to his back in February 1988, and was off work for approximately six months, that he then sustained another injury to his back in September 1988 while employed with another employer and was off work and being provided with TTD benefits for a period of almost three years. C. The claimant's testimony at hearing and to doctors (acknowledged by Dr. Cohen) that -- "He states that he was able to do the heavy construction work without any problems". Nevertheless, during cross examination, Whitaker stated that after his 1995 right wrist injury (which resulted in a fusion of the wrist) he was off work for maybe a couple of years; when queried weren't there permanent restrictions of no lifting over five pounds when he was released from care for the right wrist injury, Whitaker responded -- For a while, that was until I realized I could do it. I've never been stopped after that, he said. England, though, noted Whitaker's comments to him: "He said he was really proud of the fact that somehow he was able to keep going back even though he'd had these other injuries. He said it was a struggle but he considered himself indestructible until the last injury." Dr. Cohen noted what Whitaker relayed to him:

"He no longer has a full range of motion of the right wrist. He cannot bend the wrist. He had to learn how to turn his right arm so he could hold onto the hod pole. He had to change to use his left arm for most activities. He states it took twice as long to do anything after the right wrist injury. It was difficult for him to load the hod after the injury."
(Cohen Dp. pp. 9-10)

On cross examination by the Second Injury Fund, Dr. Cohen was asked to comment on what Whitaker had relayed as to his capabilities before the primary injury: "That he was able to work as a hod carrier and laborer. Although he was having problems referable to several parts of his body which I described. As far as work he could do those types of activities." (Cohen Dp. pg. 35) Additionally, there was undisputed testimony from the claimant

indicating that for several years before the July 15, 2000 work related injury he worked only about six months out of the year, performing just enough work to pay his bills, and performing other piece-meal labor for less pay. In light of all of this, Whitaker is found to be a marginally credible witness.

In addition to the above indicating that the claimant's preexisting conditions were a hindrance or obstacle to the claimant's employment or re-employment, in evidence are Stipulations of Compromise Settlements reflecting disability from an 06/26/05 work related injury of 78% of the right shoulder, and Second Injury Fund liability for preexisting disability of 21.5% left knee, 25% body as a whole referable to the low back, and 17.5% body as a whole referable to the thoracic spine. (See No. 6) Printouts from the Illinois Industrial Commission for Claim Numbers 87WC-38598, 88WC-10063, 88WC-46465, 92WC-41178, and 94WC-62020 (No. Z) and reflected, in addition to the injuries previously listed, a left foot injury on 05/01/87 which resulted in a compromise settlement for permanent disability. Dr. Taylor, who had been treating Whitaker since October 1996, indicated in her treating records her opinion that Whitaker suffered from permanent disability prior to the July 15, 2000 work related injury; Dr. Cohen, from his evaluation of Whitaker assessed preexisting permanent partial disability. It is found that there is sufficient and competent evidence establishing that the claimant was suffering from preexisting permanent partial disability prior to the July 15, 2000 work related injury. See, generally, *Conley v. Treasurer of Missouri*, 999 S.W.2d 269 (Mo.App.E.D. 1999); and *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).

There is no dispute among the opining doctors that Whitaker sustained permanent partial disability as a result of the July 15, 2000 work related thoracic spine injury. It is found that Drs. Taylor and Shitut acknowledged that Whitaker had a preexisting thoracic spine condition, but their assessment of permanent partial disability apparently was only for the July 15, 2000 work related injury; it was clear that the treating doctor, Dr. Samson, assessed a percentage of permanent partial disability in regards to the July 15, 2000 work related thoracic spine injury; Dr. Cohen assessed both a preexisting permanent partial disability to the thoracic spine and a permanent partial disability for the July 15, 2000 work related thoracic spine injury. Considering all of the medical opinions and all of the evidence, it is found that as a result of the July 15, 2000 work related injury of thoracic spine strain, the claimant sustained an additional permanent partial disability of 12% of the body as a whole at the level of the thoracic spine. This would be: $400 \text{ weeks} \times 12\% = 48 \text{ weeks}$; $48 \text{ weeks} \times \$314.26/\text{week} = \$15,084.48$.

The claimant is alleging that he is permanently and totally disabled. In *Massey v. Missouri Butcher & Cafe Supply*, 890 S.W.2d 761, 763 (Mo.App. E.D. 1995), the Court noted:

"Section 287.020.7 RSMo 1986 defines total disability as an "inability to return to any employment" and not merely an "inability to return to the employment in which the employee was engaged at the time of the accident." To determine if claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition. *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 694 (Mo.App.E.D.1992)."

It has been determined that there is evidence in this case of both preexisting permanent partial disability, and permanent partial disability as a result of the July 15, 2002 work related injury herein, thus there is a question of Second Injury Fund liability. In the situation where the claimant suffers from a previous disability, the first determination is the degree of disability as a result of the last injury, then the next determination is "the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained....". See §287.220.1, RSMo (1994), the section setting forth the Second Injury Fund liability parameters; and See, generally, *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo.App. E.D. 1995). Considering the medical opinions in regards to the issue of permanent total disability, it is found that Dr. Samson, the authorized treating doctor, wrote an opinion only as to the July 15, 2000 work related injury he treated, writing in a 03/19/01 letter to the workers' compensation carrier -- "There is no medical reason why he cannot work, in my opinion, with regard to the July injury." Dr. Shitut, who evaluated Whitaker only for the July 15, 2000 work related injury at the request of the employer/insurer, was asked during cross examination his opinion of whether or not it was possible for Whitaker to return to work as a hod carrier or anything that requires heavy physical demand, and the doctor answered:

"And two years after his injury, if he has not returned to work, I think just statistical chances of his going back to work are very little. I think if he attempts some type of work, it would be something less strenuous, not as heavy as the Hod-carrier construction worker. Maybe medium to light duties type of status. With or without rehabilitation."

Dr. Peggy Boyd Taylor, D.O., who had previously indicated in her treatment record by an October 4, 1998 letter to an attorney the following - - "I have advised Mr. Whitaker to apply for Social Security Disability Benefits as I consider him to be 100% disabled", was queried at her May 23, 2002 deposition if she believed Whitaker's inability to work was as a result of the July 15, 2000 injury, and Dr. Taylor initially answered -- "Yes, I do." On cross examination by the employer/insurer, Dr. Taylor agreed it was her opinion that Whitaker was unable to return to work as a hod carrier due to the combination of July 2000 work related injury with his preexisting injuries and conditions that were listed in her December 30, 2001 report. Dr. Cohen, who evaluated the claimant on the claimant's behalf, was of the opinion: "And that due to his combination of his (work related and preexisting) disabilities he is permanently and totally disabled and not capable of gainful employment and that his pre-existing conditions or disabilities are a hinderance or obstacle to his employment or re-employment." In regards to the doctors giving opinions on the claimant's ability to work, Dr. Shitut admitted that he had no vocational rehabilitation training, Dr. Cohen agreed that he is not a vocational rehabilitation expert and that he would defer to a vocational expert whether there was any employment out there available for Whitaker within his restrictions, and Dr. Taylor noted that her specialty and certification was in family practice and she was not a back specialist and additionally admitted that she did not review any of the pertinent radiographic studies. . England, the only vocational rehabilitation expert opinion in the case, testified as to his conclusions after evaluation of Whitaker:

"At the time I saw him he was 41. That would make him a younger worker under U. S. Department of Labor Guidelines. He had a number of different what I would call significant injuries in the past. I think they certainly had an impact on his ability to function in the work world and I felt that the injuries would have constituted a significant hindrance to his being able to continue particularly work as a construction worker.....

I think that the fact that he can't stay in one position very long, that he has trouble even with his upper extremities, that he has difficulty thinking clearly, staying on task, combining that with his academic deficiencies, the lack of very formal - you know, much in the way of formal education, all those things combined with his physical problems, I don't think he's gonna be able to compete successfully for alternative employment, nor do I believe that he would be able to sustain it in the long run, in particular, taking into consideration what Dr. Buckles talked about, the inability to sustain a regular work week."

The Court in *Hines v. Conston of Missouri No. 852, 857 S.W.2d 546, 547 (Mo.App. E.D. 1993)* noted the following in determining permanent total disability:

"In *Brown*, we said:

The test for permanent total disability is whether, given the claimant's situation and condition, he is competent to compete in the open labor market. *Lurno v. Carnahan*, 640 S.W.2d 470, 472 (Mo.App.1982). This test measures the worker's prospects for returning to employment. *Patchin v. National Supermarkets Inc.*, 738 S.W.2d 166, 167 (Mo.App.1987). Total disability means the inability to return to any reasonable or normal employment, it does not require that the employee be completely inactive or inert. The central question is whether in the ordinary course of business, an employer would reasonably be expected to hire the claimant in his present physical condition reasonably expecting him to perform the work for which he is hired. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App.1982). *Brown*, 795 S.W.2d at 483.

This is the approved legal test for determining permanent total disability."

In this case, the claimant stated that he did not return to work or look for work after December 15, 2000, and that after the July 15, 2000 work related injury and prior to December 2000 he had been released to light duty work by Dr. Samson only in regards to the July 15, 2000 work related injury; the evidence reveals that on December 21, 2000 Dr. Hurford, a physician with Dr. Samson's office ordered work hardening and when Dr. Samson saw the claimant on January 15, 2001, Dr. Samson took the claimant off work. The evidence reveals that at the time of the July 15, 2000 work related injury, Whitaker was treating with Dr. Taylor for his prior low back condition, and that the Missouri Baptist Medical Center 07/15/00 emergency room record (See No. M) noted Whitaker had a past history of prior back pain and intervertebral disc disease and chronic back pain, and an x-ray of the thoracic spine as well as the lumbar spine was taken on 07/15/00. There is indication in the evidence that after the July 15, 2000 work related injury the claimant's physical condition was such that he was never able to return to the duties of his

lifetime profession, as he had returned to after prior serious injuries. There is no evidence that the employer at the time of the July 15, 2000 work related injury would have subsequently been able to accommodate the restrictions set by Dr. Cohen, and the claimant gave undisputed testimony that there was no light duty work with his employer. It is found that this case is further distinguished from *Massey* in that in this case with the claimant's extremely limited intellectual abilities, the only vocational expert felt that the claimant was not capable of retraining and that combined with the claimant's physical disabilities and limitations (noted by doctors such as Dr. Cohen) Whitaker would not be employable in the open labor market. It is found that the competent and substantial evidence in this case establishes that the claimant's physical/mental condition is such that no employer could expect him to perform work in the ordinary course of business, and thus Whitaker is found to be permanently and totally disable due to a combination of his preexisting disabilities with his work related disability.

In light of the history of this case, liability for any permanent disability is found to be as follows: It has been determined in this Final Award that the claimant reached maximum medical improvement on March 19, 2001, and the employer/insurer are liable for the determined permanent partial disability of 12% of the body as a whole referable to the thoracic spine for 48 weeks at \$314.26/week, or a total of \$15,084.48. However, due to the prior Temporary Award in this case, the employer/insurer paid benefits of temporary total disability for a period of October 2, 2002 through December 16, 2002 at a rate of \$599.96/week for this 10 6/7 week period, or a total of \$6513.85. It is found that, as it has been determined in this Final Award that the claimant was at a maximum medical improvement status prior to the October 2, 2002 through December 16, 2002 period, the employer is entitled to a credit of this earlier payment against the permanent partial disability benefit now owed. In *Morris v. National Refractories & Minerals*, 21 S.W.3d 866, 869 (Mo.App. E.D., 2000), the Court held that under section 287.270 the employer/insurer were entitled to a credit on workers' compensation benefits for all payments made by employer in relation to a workers' compensation benefit (i.e. employee's medical bills). The *Morris* Court noted:

“Section 287.270, RSMo (Cum.Supp.1999) provides in pertinent part:

No savings or insurance of the injured employee, or any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder....

Payments from an insurance company or from any source other than the employer or the employer's insurer for liability for workers' compensation are not credited on workers' compensation benefits. *Shaffer v. St. John's Regional Health Center*, 943 S.W.2d 803, 807 (Mo.App. S.D.1997). “ *Morris*, 21 S.W.3d at 868 –869.

Therefore, in this case, the employer/insurer now owes a balance on the permanent partial disability benefit as follows: \$15,084.48 - \$6513.85 = \$8,570.63. In regards to the Second Injury Fund's liability for permanent total disability, it is found that for the 48 week period when the employer/insurer was liable for permanent partial disability benefits of \$314.26/week, or until February 17, 2002, the Second Injury Fund was liable for permanent total disability benefit, or the balance of (\$599.96 - \$314.26 = \$285.70/week) until February 17, 2002, and then \$599.96/week thereafter for life.

Date: June 1, 2006

Made by: /s/ LESLIE E.H. BROWN
LESLIE E.H. BROWN
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA “PAT” SECREST
PATRICIA "PAT" SECREST
Director
Division of Workers' Compensation

[\[1\]](#) It should be additionally noted that subsequent to the hearing in this case, an extraordinary situation occurred in that the administrative law judge who heard the case suffered serious illness with extensive loss of time from work delaying the issuing of this Award.

[2] Issue: Medical causation begins on pg. 6.

Issue: Nature and extent of temporary total disability benefits begins on pg. 20.

Issue: Liability of past medical expenses begins on pg. 36.

Issue: Nature and extent of permanent disability/SIF liability begins on pg. 40.

[3] The 08/17/00 report of the MRI of the thoracic spine was in evidence (No. O), and stated the following impression: a. No acute abnormality; and b. Mild bulging of the T6-T7 and T8-T9 level discs.

[4] Deposition reflects an incorrect date of July 2001. Shitut Dp. pg. 16)

[5] The 08/17/00 report of the MRI of the thoracic spine was in evidence (No. O), and stated the following impression: a. No acute abnormality; and b. Mild bulging of the T6-T7 and T8-T9 level discs.

[6] meralgia paresthetica: paresthesia, pain, and numbness in the outer surface of the thigh due to entrapment of the lateral femoral cutaneous nerve at the inguinal ligament. Dorland's Pocket Medical Dictionary, 22nd edition, 1977.

[7] Deposition reflects an incorrect date of July 2001. Shitut Dp. pg. 16)

[8] Dr. Shitut's and Dr. Schoedinger's/Premier Care Orthopedic's records were admitted into evidence (No. T); in his October 25, 2002 evaluation report to the insurer, Recommendations Section, Dr. Shitut included:

The job that this patient needs to return to is a hod-carrier and I do not think he can return to this type of heavy duty work based on today's clinical evaluation. I have recommended the patient look for alternative employment of medium to light duty activities. The patient's education is very poor, and because of this, re-employment at a light duty job will be difficult and vocational rehabilitation and retraining may be in order. The patient was somewhat disappointed that his condition cannot be surgically cured. I do not think this patient's pain is going to resolve and his chronic pain may linger for a long time and conceivably may be permanent. I believe the best treatment for him would be long-term nonoperative treatment and rehabilitation to a different type of employment.

[9] In his supplemental report, dated December 12, 2003, Dr. Cohen adjusted a time period in which he felt Whitaker was temporarily totally disabled based on his knowledge of a period of time when Whitaker had worked:

....It is my medical opinion that within a reasonable degree of medical certainty, he was temporarily totally disabled from June (sic) 15, 2000 through September 20, 2000. As he worked from 9-21-00 through 12-15-00, he was not temporarily totally disabled....

[10] See, Diallo v. City of Maryland Heights, 996 S.W.2d 675, 677 (Mo.App. E.D. 1999) in which the Court stated that a modification of a temporary award requires "additional significant evidence" not before the ALJ at the time of the original award.

[11] Deposition reflects an incorrect date of July 2001. Shitut Dp. pg. 16)