

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 09-086714

Employee: Peter Wing
Employer: Troostwood Garage & Body Shop
Insurer: Lumbermens Underwriting Alliance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated September 17, 2010.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued September 17, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 30th day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY AWARD

Employee: Peter Wing Injury Nos. 09-044196 & 09-086714
Dependents: N/A
Employer: Troostwood Garage & Body Shop
Insurer: Lumbermens Underwriting Alliance
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: June 24, 2010 & August 9, 2010 Checked by: MSS/pd

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: June 10, 2009 & July 1, 2009
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri
6. Was above Employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was attempting to align a transmission with an engine when the transmission fell and Claimant instinctively caught it causing injury to his lumbar back and lower extremities.
12. Did accident or occupational disease cause death? No. Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: Body as a whole
14. Nature and extent of any permanent disability: To be determined
15. Compensation paid to date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? Unknown
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$672.20
19. Weekly compensation rate: \$448.16
20. Method wages computation: Paid by the day, Section 287.250.1(4)

COMPENSATION PAYABLE

21. Amount of compensation payable: None

Attorney's fee of 25 percent of sums recovered or to be recovered is due John Stanley, attorney for the Claimant.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Peter Wing Injury Nos. 09-044196 & 09-086714
Dependents: N/A
Employer: Troostwood Garage & Body Shop
Insurer: Lumbermens Underwriting Alliance
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: June 24, 2010 & August 9, 2010 Checked by: MSS/pd

On June 24, 2010, the Employee and the Employer appeared for Hardship Hearing. The Division had jurisdiction to hear this case pursuant to §287.110. Additional exhibits were admitted on August 9, 2010, completing the record. The Employee, Peter Wing, appeared in person and with counsel, John Stanley. The Employer appeared in person and with counsel, Bill Richerson. The Second Injury Fund is a party but did not appear at hearing. The primary issue the parties requested the Division to determine was whether or not Mr. Wing suffered an accident arising out of and in the course of employment and whether or not the accident(s) were the prevailing factor to necessitate additional medical treatment. I find that Mr. sustained a compensable accident on both June 10, 2009 and July 1, 2009 and he is entitled to medical treatment.

STIPULATIONS

The parties stipulated that:

1. At all times relevant herein, Troostwood Garage & Body was an employer operating subject to Missouri's Workers' Compensation law with its liability fully insured by Lumbermens Underwriting c/o Cambridge Integrated Services;
2. At all times relevant herein, Claimant, Peter Wing was its employee working subject to the law in Kansas City, Jackson County, Missouri;
3. The Claimant, Peter Wing notified Troostwood Garage & Body of each of his alleged injury and filed his claims within the time allowed by law; and
4. The average weekly wage for the Claimant was \$672.20; the compensation rate is \$448.16.

ISSUES

The parties requested the Division to determine:

1. Whether the Claimant sustained an accident or an occupational disease arising out of and in the course of his employment in Injuries No. 09-044196 and 09-086714.
2. Whether the injury was the prevailing factor in causing the resulting medical condition and disability.
3. Whether any injury was caused by the failure of the employee to use safety devices, as contemplated by Section 287.120.5.
4. Whether the Claimant is entitled to temporary total disability from August 3, 2009 to the present date.
5. Whether the Employer/Insurer is to provide medical treatment.

FINDINGS:

Claimant testified on his own behalf and presented the following exhibits:

- Claimant's Exhibit A -- Deposition of Dr. Glenn Amundson with exhibits*
- Claimant's Exhibit B -- Deposition of Donald Wood with exhibits*
- Claimant's Exhibit C -- Deposition of Ryan Roof with exhibits*
- Claimant's Exhibit D -- Deposition of Shaun Campbell*
- Claimant's Exhibit E -- Deposition of Bradford Wood*
- Claimant's Exhibit F -- Deposition of Annette Braam with exhibits*
- Claimant's Exhibit G -- Dr. Truett Swain's Curriculum Vitae*
- Claimant's Exhibit H -- Dr. Truett Swain's report of 9/8/09*
- Claimant's Exhibit I -- Dr. Christine Moore's report*
- Claimant's Exhibit J -- Dr. Simon's report*
- Claimant's Exhibit K -- Dr. Koprivica's report*
- Claimant's Exhibit L -- Dr. Ebelke's rpeort*
- Claimant's Exhibit M -- Dr. Hanson's report*
- Claimant's Exhibit N -- Mercy Hospital records*
- Claimant's Exhibit O -- Dr. Temple's records*
- Claimant's Exhibit P -- Providence Medical Center records*
- Claimant's Exhibit Q -- Diagnostic Imaging Center records*
- Claimant's Exhibit R -- Dr. Holliday's records*
- Claimant's Exhibit S -- Dr. Charochak's records*
- Claimant's Exhibit T -- Dr. Bernhardt's records*
- Claimant's Exhibit U -- St. Joseph Medical Center records*
- Claimant's Exhibit V -- Business & Industrial Health Group records*
- Claimant's Exhibit W -- Dr. Carroll's records*
- Claimant's Exhibit X -- Research Belton Hospital records*
- Claimant's Exhibit Y -- Dr. Pazell's records*
- Claimant's Exhibit Z -- KU Medical Center records*
- Claimant's Exhibit AA -- Wage Statement*
- Claimant's Exhibit BB -- Claim Form -- 6/10/09 injury*
- Claimant's Exhibit CC -- Claim Form -- 7/1/09 injury*

Claimant's Exhibit DD – Claim Form – 6/10/09 injury - amended

Claimant's Exhibit EE – Troostwood Safety & Health Program

Claimant's Exhibit FF – Picture 1

Claimant's Exhibit GG – Picture 2

Claimant's Exhibit HH – Picture 3

The Employer/Insurer presented the live testimony of Ryan Roof, Shaun Campbell and Brad Wood. In addition, the Employer/Insurer presented the following exhibits, all of which were admitted except Exhibit 15 which was objected to and sustained. There was also an objection by the Claimant to Exhibits 1 through 7 and the Court, after taking the matter under advisement, overruled the Claimant's objection and allowed Exhibit 1-7.

Employer/Insurer's Exhibit 1 – Interrogatory Questions and Answers of Claimant, Cause #99-CV-216066

Employer/Insurer's Exhibit 2 – Transcript of Compromise Settlement, Injury No. 89-062473

Employer/Insurer's Exhibit 3 – Stipulation for Compromise Settlement, Injury No. 84-103891

Employer/Insurer's Exhibit 4 – Settlement Hearing Transcript dated 8/19/02

Employer/Insurer's Exhibit 5 -- Stipulation for Compromise Settlement, Injury No. 99-180944

Employer/Insurer's Exhibit 6 – Stipulation for Compromise Settlement, Injury No. 00-162507

Employer/Insurer's Exhibit 7 – Summary of Claimant's Prior Settlements

Employer/Insurer's Exhibit 8 – Photo of jack stand and blocks

Employer/Insurer's Exhibit 9 – Photo of jack stand, blocks and safety strap

Employer/Insurer's Exhibit 10 – Photo of transmission

Employer/Insurer's Exhibit 11 – Photo of transmission

Employer/Insurer's Exhibit 12 – Photo of rear of vehicle showing transmission

Employer/Insurer's Exhibit 13 – Troostwood Garage & Body Shop Employee Handbook

Employer/Insurer's Exhibit 14 – Workplace Safety Policy reminder

Employer/Insurer's Exhibit 15 – Ex Parte Order of Protection against Claimant

Employer/Insurer's Exhibit 16 – Photo of wheel of jack stand

Employer/Insurer's Exhibit 17 – Photo of base of jack stand

Employer/Insurer's Exhibit 18 – Photo of transmission

Employer/Insurer's Exhibit 19 – Photo of bottom of transmission

Employer/Insurer's Exhibit 20 – Photo of table of jack stand depicting dimensions on width

Employer/Insurer's Exhibit 21 – Photo of table of jack stand depicting length with arms extended

Employer/Insurer's Exhibit 22 – Statement of Ryan Roof, dated 8/17/09

Employer/Insurer's Exhibit 23 – Deposition of Dr. Jeffrey MacMillan (with exhibits), dated 12/11/09 & 1/18/10 (Volumes I & II)

Employer/Insurer's Exhibit 24 – Deposition of Claimant, dated 9/23/09

Based on the above exhibits and testimony of the witnesses, the Court makes the following findings.

Peter Wing. The Claimant, Peter Wing (Wing or Claimant), testified that he is 50 years old and resides in Cass County, Missouri. He stated that he was employed by the Employer, Troostwood Garage and Body Shop (Troostwood) beginning in 2006 until his termination. He was terminated as a result of Dr. Moore ordering him off work on August 3, 2009. (Exhibit I, page 14) He worked as a mechanic. He testified that he never applied for the job, but had been contacted by Brad Wood, the co-owner of Troostwood and offered a job. He worked on a 40% commission basis. Mr. Wing testified at length concerning the circumstances surrounding the injury of June 10, 2009 and the aggravating injury of July 1, 2009. He also testified at length as to his prior medical condition and previous injuries over the past 30 or so years. His credibility and character was fiercely challenged by the Employer's witnesses, however I find his testimony to be credible.

Accident(s). Wing was attempting to align a transmission to a Porsche Boxster when the accident of June 10, 2010 occurred. The transmission was extremely heavy and was supported on a "jack". The transmission was not tied down or secured to the jack. Wing testified that because of the condition of the floor, the jack did not roll smoothly along the floor causing the transmission to slide off of the jack. As a matter of reflexes and in order to prevent the transmission from being damaged he "caught" it as it slid off the jack – the force of which caused sudden and sharp pain to his low back.

Although Wing was initially sent out for authorized medical treatment, the employer subsequently took the position that he did not suffer a work related injury and theorized that the June 10, 2010 incident was staged. The employer contends that just prior to the accident, Wing jokingly pretended that the transmission had fallen off the jack causing his supervisor, Ryan Roof to turn around suddenly. Wing does not deny that he made this joke or prank. Because the transmission did fall off a minute or so later, the Employer contends the incident was staged. The Court finds that the accident was not staged. It does not make sense that Wing would provide a preview of staged accident in order to buttress the fact of the real accident. Ryan Roof (Roof) testified that such pranks were common in the shop:

- Q. Have you known Pete to be a chain puller or do stuff like that?
- A. Yeah. We all joke around with each other up there. I mean, maybe not so much in a case like that where someone could get hurt. We all joke around up there. It makes the day go by quicker. (Exhibit C, page 31: 25 to 32: 5)

Further and although his testimony differed at the hearing, in his deposition, Wing's supervisor, Roof, testified that he did not believe the accident was staged:

- Q. Do you believe that because of that little prank that Pete pulled and made you jerk around and think he was in trouble, do you think that when the thing actually did happen that Pete planned to do it on purpose?
- A. I can't say yes or no because I didn't see it actually roll off the transmission stand.

- Q. But it's your testimony today that Pete may have planned to have it drop into his hands?
- A. No. I think that it was an accident. (Exhibit C. 32: 6-16)

Apparently, the “staged accident conspiracy theory” was fueled by co-owner, Brad Wood’s belief that Mr. Wing had injured his low back in a similar fashion some 20 years previously when he “caught” a motorcycle engine:

- Q. What is it about his prior Work Comp injuries that cause you to question his credibility?
- A. Just seems unlikely to me that a person would happen to be standing someplace and catch an engine out of a motorcycle at one point and a transmission at another. (Exhibit E, 28: 10-15)

The Report of Injury from the June 19, 1989 work injury states: “At employer’s direction, Claimant started to take engine from motorcycle frame, via a lift, rocked engine from frame, lift collapsed, claimant carried engine to the ground” (Employer Exhibit 23 Dr. McMillan’s file)

Although it may be unusual that a person suffers injury 20 year previously involving similar (but not identical) facts, the similarity of the mechanism of injury does not in any way prove that the instant accident was feigned or staged.

It was reported that the transmission weighed approximately 180 lbs. (Exhibit A, pg 10: 13). The Court finds that a work-related accident occurred on June 10, 2009 when the Claimant unexpectedly and reflexively “caught” the falling transmission and cradled it. The Court further finds that the accident was not fraudulently “staged” or feigned.

The second, accident occurred on July 1, 2010 when Wing was attempting to align a motor onto motor mounts using a hoist. Wing was in an awkward position. He thought the motor was connected, but it slipped off, causing his body to jolt suddenly. Wing testified that the incident caused increased symptoms to his low back and legs. The fact of this reported injury was not challenged by the employer.

Facts surrounding the issue of “safety straps”. Wing testified that use of “safety straps” in the re-attaching of the transmission to the Porsche was not feasible. Wing testified that the bottom of the transmission was concave and would not be secure on the flat surface of the jack stand even if safety straps were used. He testified that the yellow straps depicted in the photograph were not available. He pointed out that the yellow straps in the photograph did not have any dirt or grease on them, that they appeared to be brand new and he had never seen them before. He acknowledged that there were straps that he did use on other applications – but those straps were simple straps containing only “rings” to tighten and did not contain the ratcheting mechanism as shown in the photograph (Exhibit GG). Wing also testified that he had the transmission within a fraction of an inch of alignment and at that stage any strap that might have been attached would have been removed for the final alignment. Wing also testified that the matter of not using the safety straps was discussed immediately before the accident with his supervisor, Ryan Roof, and Roof did not insist that the straps be used. Roof thought that Wing should make an effort to use

the straps but essentially deferred to Wing's judgment. In fact, it was this discussion that prompted the prank by Wing in calling out in jest as if the transmission was falling.

Brad Wood testified that it was feasible to use the straps and that it was a safety rule and that Wing repeatedly ignored the rule after it was pointed out to him. Brad Wood acknowledged that Ryan Roof was Wing's immediate supervisor.

Ryan Roof testified at the hardship hearing that it was a rule that safety straps be used at all times. This testimony, however contradicted his sworn testimony at his deposition three months following the incident. At his deposition, Roof did not refer to safety "straps" – but rather, he referenced "safety chains". It was Roof that assisted Wing in putting the transmission onto the floor jack, however he testified that he did not insist that the "safety chains" be utilized:

Q. So who is it at Troostwood, if you know, that assisted Pete in getting the transmission up on the floor jack?

A. I did.

Q. Did you see to it that the safety chains were all in place?

A. No, sir.

Q. Why is that?

A. Because we have never, we don't enforce them to use it. We don't require them to use them, but we would like for them to use them.

Q. But it's not a rule that is enforced?

A. It's never been something that someone has been reprimanded and wrote up over, no, sir. (Exhibit C, 24:21 to 25:9)

In further testimony, Supervisor Roof acknowledged that Wing had told him why the use of safety chains was not feasible in this application, and that he (Roof) did not insist that the chains (straps) be used:

Q. But you as the service manager, that would have been within your duties to point that out to Pete Wing in this case, wouldn't it?

A. To use the safety chains?

Q. Yes.

A. Yeah. I asked him to use the safety chains. Or I shouldn't say I asked. I suggested that we should use safety chains.

Q. Did you ever have a discussion with Pete about the safety chains or did Pete ever tell you that he didn't feel that the safety chains would be of any benefit for the Porsche Boxster transmission?

- A. Yes, sir.
- Q. What did he tell you about that?
- A. He said that you cannot use the safety chains because when the transmission is inside the car, there is no room for it to move around with the safety chains on it.
- Q. That didn't make sense to me. Did it make sense to you?
- A. I guess I probably didn't word it as best. When you strap the transmission on the jack, it's on there securely. When you get it up into the back of the vehicle, which on the Porsche it's in the rear. You jack it up in there. Once you get it up in there, there is no room to move the transmission around because it's strapped down. So therefore there is no way to get the transmission to go on the end of the crank shaft, especially with the chains on it. (Exhibit C, 24:15 to 26:19)

The sworn deposition testimony of the supervisor, Ryan Roof is persuasive and is consistent with the testimony of the Claimant. The Claimant felt that the safety straps were not appropriate in the application of the Porsche transmission, and the supervisor did not disagree with that assessment and did not insist that the straps be utilized.

Allegations of pre-existing injuries. The Employer alleges that Wing had suffered two injuries in the months preceding the June 10 and July 1, 2009 accidents. Wing acknowledges there were incidents that occurred at his home, but denies he suffered any permanent injuries as a result. He also denies that one of the incidents happened only a few months prior to the work-related injuries. One incident involved a donkey or a burrow which was refusing to nurse its colt and Wing's corralling of the beast using a rope and a four wheeler. There was an insinuation that Wing was somehow injured in the incident, however, his co-worker Sean Campbell (Campbell) testified at his deposition that Wing never indicated he was injured in the incident:

- Q. Did he tell you that he was injured in that accident?
- A. No.
- Q. Did he tell anybody that he had been injured in that accident?
- A. No. (Exhibit D, 9: 4-9)

Wing testified that he fell over the front handlebars of the four wheeler during the fall of 2008 at the acreage surrounding his home. He had a specific memory when it happened because it was during dove-hunting season and he had taken off a few days of work. He acknowledged that the accident produced scrapes and that he was sore where he had been scraped – but he denies that he reinjured his back in the incident. He further testified that he never went to a doctor or otherwise sought any medical treatment following the incident. Although he first indicated the

four-wheeler accident occurred in August, Shaun Campbell corrected himself and testified that the incident happened in the Spring, maybe in March. (Exhibit D, 10: 1- 10). He acknowledges that Wing did not have any complaints about injuring his back:

Q. Did he tell you he hurt his back in that accident?

A. No, he said he was sore all over.

At his deposition, Brad Wood attempted to correlate the four-wheeler incident with a doctor visit in the Spring. (Exhibit D, 54: 8-23) In fact, the records from Wing's family physician, Dr. Christine Moore, show that his appointment with her in the Spring (April 2, April 30 and May 29, 2009) involved checking a general check up and subsequent lab testing.

The Claimant testified credibly that he was not injured in either incident. He did not seek medical treatment for either incident. The evidence is clear that he never complained about either incident causing him any injury to his back. I find that Mr. Wing did not suffer any prior injuries in the months (going back to the Fall of 2008) prior to the work-related injuries.

Other Challenges to Credibility. The Employer takes the position that the Claimant, Peter Wing is a charlatan and cannot be believed. Some of these issues involving credibility have been discussed supra, however in each instance, it the Court's finding that any lapse in credibility involves the Employer and co-employees and not the Claimant. Nevertheless, there are other matters that the Employer contends are evidence that the Claimant is not telling the truth. The Court has observed all witnesses, listened to all the testimony and has reviewed all exhibits and finds that the Employer/Respondent has produced no evidence that the Claimant is not credible.

In particular, the Employer argues that Wing's claims in these proceedings are suspect because he has sustained numerous injuries and has made numerous claims over more that 25 years. Most of these injuries were serious and required surgeries. He injured his back in California in a work-related accident in 1983 that did not require surgery. Wing was hospitalized for two weeks following a serious motorcycle accident in 1987 requiring open reduction of his left femur. He injured his back in 1989 working as a motorcycle mechanic in Missouri. As a result of that injury he received vocational rehabilitation and received a degree in electronics in 1993. In 1994 he slipped and fell at a hospital in Independence when calling upon a customer. That injury resulted in his first back surgery. He recovered and returned to work but was rear-ended in 1999 resulting in another back surgery in 2000. Unfortunately he did not have a good result from this surgery and was left with significant lifting and postural limitations and could not return to work. He testified that the second back surgeon, Dr. Bernhardt encouraged and assisted him in obtaining SSDI – which he received. He also received Medicare. Through Medicare, in 2004, Dr. Glenn Amundson performed a successful anterior interbody fusion with posterior instrumented fusion at levels L4-5 and L5-S1 two level fusion in 2004. The surgery was so successful that Mr. Wing was able to eventually “get off” of SSDI and was able to return to being a mechanic.

Although Wing made claims on many of the prior injuries referenced above – the records bear out that the injuries underlying those claims were serious and debilitating. He underwent three back surgeries. For five years he was disabled by the social security administration. All of his workers compensation claims were settled and two of the workers compensation claims included

“third party” litigation – where the workers compensation carrier was subrogated for much of the benefits it paid out. The record indicates that Wing did not give up and that his efforts were rewarded with an eventual surgery that “gave him his life back” and he was able to throw the yoke of disability from his shoulders and return to being a full time productive member of society. Although the Employer asks that the Court to consider these prior claims to be evidence that Wing is litigious and therefore the present claims should be greatly scrutinized, the Court finds that the prior claims represent serious and substantial injuries and as such enhance rather than detract from the Claimant’s credibility.

There was other testimony from Shaun Campbell and Brad Wood that, if true, disparaged the character of Wing. Testimony included the following allegations:

- Campbell alleged that Wing told him that his wife tried to defraud Wal-Mart in an insurance scam.
- Campbell alleged that Wing told him (prior to the work injury) that he “was better off on disability”
- Campbell alleged that Wing threatened him in a text message after the claim was denied
- Wood testified that he was aware of the alleged texted threat to Campbell
- Wood testified that Wing had told employees that he had smoked marijuana the weekend following the June 10, 2009 injury.
- Wood testified that Wing sexually harassed two female co-employees
- Wood testified that Wing inappropriately flirted with a property insurance adjuster
- Wood testified that Wing embellished about his past and his family
- Wood testified that Wing brandished a gun in the body shop
- Wood testified that Wing had financial problems

Each of these allegations were refuted by Wing:

- Wing denied that his wife has ever made an insurance claim and that he never said that she had made a false claim.
- Wing denied making a statement about would cause the listener to believe that was “considering” returning to a life of being an SSDI recipient.
- Wing denied that he made any threats to Campbell and testified that Campbell initiated the texting where it was alleged that Wing made the threat
- Wing testified that he did not sexually harass anyone
- Wing testified that he never told anyone that he had smoked marijuana the weekend following the injury, but acknowledged that he may have told a co-worker that he felt like smoking marijuana that weekend following the injury.

- Wing acknowledged that he may have flirted with the female who was in the shop but that he did not realize that she was there on business as an insurance adjuster.
- Wing testified that he lives on property owned by a good friend who he has always referred to him as a “brother” and that he never said that he owned the acreage where he lives – although he owned the mobile home situated on the acreage.
- Wing testified that he has a concealed weapon permit and carries a pistol with him. He denied ever brandishing it and testified that he stopped taking it to work when he learned it was a problem for Brad Wood.
- Wing testified that he has not had financial problems until in June/July 2009 work related injuries.

Prior to the June 10, 2010 injury the owners and employees of Troostwood seemed to appreciate and respect Peter Wing. Co-owner, Brad Wood could not find a good mechanic. He had heard about Pete Wing and went out and recruited him. Wood testified that “we always tried to handle things on a personal level. You know, in the past, I like Pete. I had tried to help Pete. I tried to do things for Pete.” (Exhibit E, 30: 10-13) Wing was asked by Brad Wood to come to work based upon Wing’s reputation as a mechanic. According to Ryan Roof, “Pete, by hands down is the best mechanic we have had back in that corner in the last ten years”. (Exhibit C, 19: 12-13) Co-owner, Don Wood testified that he considered Pete Wing to be a good employee. (Exhibit B, 18: 20-23). Co-owner, Brad Wood testified that Wing was “a good technician”. (Exhibit E, 79: 1-4). According to the personnel records, Wing had never received any “write-ups” until after the work related injury.

According to the Employer, the claimant has personal character flaws. The claimant denies many of the allegations, but also acknowledges that he is not perfect. The Court finds that the bulk of the Employer’s allegations into the Claimant’s character have nothing to do with whether the claimant is truthful. The Court finds the Claimant to be credible.

Previous Medical Treatment/Surgeries. Wing never tried to hide the fact that he has undergone three previous back surgeries. All of three prior surgeries are well documented in the voluminous medical records included in the various exhibits.

Medical Evidence. The Claimant found himself unexpectedly catching and cradling a transmission estimated to weigh approximately 180 lbs. (Exhibit 23, 10: 8-13), or according to Dr. MacMillan’s report between “100 and 150 lbs). (Employer’s Exhibit 23) Three orthopedic surgeons examined and evaluated the Claimant: Dr. Truett Swaim, Dr. Jeffrey MacMillan, and Dr. Glenn Amundson. All three doctors testified that the incident on June 10, 2009 would have been sufficient trauma to cause permanent injury. Doctor MacMillan acknowledged that unexpectedly catching or holding such a heavy object could result in injury: (Exhibit 23, MacMillan Transcript, 53: 1-2)

Dr. Swaim. Dr. Swaim examined and evaluated the Claimant on September 8, 2009 at the request of the Claimant’s attorney. Dr. Swaim’s report was entered into evidence (Exhibit H), however he did not testify. Dr. Swaim’s 23-page independent medical report reflects that he reviewed all of Mr. Wing’s prior medical records and reports going back to 1983 to the present.

Dr. Swaim also reviewed MRI films including the lumbar spine MRI taken on July 20, 2009 at the direction of Dr. Amundson. Following his examination of Wing, including the history of the accident, and his review of all records and films, Dr. Swaim concluded: “ The occupational injury of June 10, 2009...caused or was the prevailing factor to cause him to develop the L3-L4 disc herniation with radiculopathy. He also concluded that the “occupational injury of July 1, 2009...aggravated and exacerbated his lumbar condition...” (Exhibit H, pg 21-22). Dr. Swaim did not think Mr. Wing was at maximum medical improvement and as to prognosis and recommended further treatment, opined:

Mr. Wing will have ongoing back pain with lumbar radicular symptoms. Considering his symptoms, physical examination, and most recent MRI scan, his lumbar condition will necessitate additional surgical intervention including L3-L4 discectomy and extension of the instrumentation/fusion to include the L3-L4 level.

Dr. Swaim went on to opine that the Claimant, without treatment, had a permanent disability of 18 percent of the whole person.

Dr. MacMillan. Dr. MacMillan examined and evaluated the Claimant on September, 29, 2009. He also had all prior medical records and reports for review. Although Dr. MacMillan acknowledged that the incident on June 10, 2009 was of sufficient trauma to cause injury – it did not cause any additional permanent injury to Wing and was not the prevailing factor causing Wing’s symptoms.

In Dr. MacMillan’s opinion, Wing was already symptomatic in his low back due to a condition called “adjacent segment degenerative disc disease”. He notes that Wing underwent an L4-5 to L 5-S1 fusion in 2003. He acknowledges that according to the 2009 MRI, the disc directly above the fusion (L3-4) “is considerably different than the appearance of the disc on the 2003 MRI” (Exhibit 23, MacMillan Depo on 12/11/09, Exhibit 2, page 3) –however he concludes that this is “consistent with adjacent segment disk disease”. Unlike, Dr. Swaim’s characterization of the L3-L4 being a herniation, Dr. MacMillan states that there “is no evidence of frank disc herniation, characteristic of an acute injury. Consequently, Mr. Wing’s current symptoms may well be the result of a history of natural deterioration of normal healthy disc adjacent to multi-level fusion”.

Dr. MacMillan agreed with Dr. Swaim, that the Claimant was not at maximum medical improvement. He recommended a third epidural injection and work hardening. Dr. MacMillan recommended that the Claimant not return to heavy labor occupation but that he would be better served by a vocational rehabilitation program. (Exhibit 23, MacMillan Depo on 12/11/09, Exhibit 2, page 4)

Dr. MacMillan testified that his opinion that Wing suffered from on-going, “adjacent segment disc disease” was based upon his studies that “15-20 percent of people who undergo a lumbar fusion will develop adjacent segment disease within two years of their surgery”. He testified “that was based on research I did as a spine fellow”. Dr. MacMillan testified that he actually researched and wrote about this “adjacent segment disease”. The article is referenced in Dr. MacMillan’s CV: “The Indidence [sic] of Spinal Stenosis above a Lumbar Fusion”, by JT MacMillan, M.D. and Dr. Kraus, MD”. Dr. MacMillan clarified that “indidence” was a mistake

and the word should be "Incidence". Dr. MacMillan testified that although he wrote and completed the article and it was reviewed by his "fellowship director", Dr. Kraus, it was never published. Dr. MacMillan testified that the figures recited in his September 29, 2009 report about 15 to 20% of people will develop "adjacent segment disease within two years of their surgery" was taken from the data he collected in that research article. (Exhibit 23, MacMillan Depo, page 59: 8-19). Dr. MacMillan went on to testify that not only is it non-published, but that it no longer exists because it has been "trashed". (Exhibit 23, MacMillan Depo, page 60: 1-5) Dr. MacMillan indicated that there were other studies but he could not give the names or references to any of them. (Exhibit 23, MacMillan Depo, page 60: 6-10).

Dr. MacMillan testified that Wing was not asymptomatic and continued to have lumbar pain following his release from Dr. Amundson after his third lumbar surgery. In support of this statement, Dr. MacMillan states that Wing was taking Oxycontin in February 2006. On cross-examination, Dr. MacMillan acknowledges that Oxycontin can cause physical dependence and in the case of Wing, he was weaned down from 120 milligrams per day to 1/12 that amount – to only 10 milligrams per day. The records from Dr. Amundson show that April 4, 2005, Wing reports to Dr. Amundson that he is very happy with his results and that Dr. Amundson has "given his life back":

"He states that I have given him his life back. He states that he has some residual mild backache but with good biomechanics. He has actually returned to some of his previous auto mechanics and is starting to feel like he is living life for real again. He is neurologically intact today. His x-rays appear excellent...The patient is going to return to clinic in three months. I have indicated that this can be a PA clinic as this is basically for Oxycontin 10 mg refills. He has really done a great job in weaning himself down." (Exhibit 23, MacMillan Depo, Exhibit 9, 04/06/05 Dr. Amundson office note)

The records indicate that he did not return to the clinic until February 15, 2006. He returned on that occasion and complained of having a fall in December. He was evaluated and x-rayed and everything checked out but was given an Rx of 10 mg Oxycontin. (Exhibit 23, MacMillan Depo, Exhibit 9, 02/15/06 Dr. Amundson office note) Wing did not return to Dr. Amundson until after the June 10 and July 1, 2009 injuries, and based upon his testimony, his symptoms resolved.

Although there are nearly five years of extensive records from his family physician, Dr. Christine Moore (Exhibit I), containing medical records from February 17, 2005 through 2009 – there are no instances where Wing was treated for low back pain or prescribed medications for low back pain. It was acknowledged that Dr. MacMillan never read the transcript of Peter Wing's deposition. (MacMillan Depo Tr., 01/08/10, page 13: 21-25) Although, Dr. MacMillan was given extensive background concerning the alleged prior injuries involving the ATV and the donkey, he admitted that he did not ask Mr. Wing about those incidents stating: "No. That's for you guys to fight about". (Exhibit 23, MacMillan Depo Tr. on 12/11/2009, 67: 6-8).

Dr. MacMillan's testimony was inconsistent and somewhat contradictory with regard to whether he believed the Claimant experienced on-going pain symptoms following his recovery from the surgery of January 15, 2004. He points out that he was on pain medications up to February 15, 2006, but that there is nothing in the records that he sought out pain medications for his back

pain after February 15, 2006 and prior to June 10, 2009 – the date of the initial work-related injury. Dr. MacMillan acknowledged that Mr. Wing complained of low back pain immediately following the “transmission catching” incident, but insisted that the Claimant was already experiencing pain:

Q. What is your opinion as to whether or not the incident caused Mr. Wing’s symptoms?

A. Well, the problem that I have is there is nothing in the medical record that indicates that his pain ever completely recovered following his surgery. So I don’t honestly know that he was asymptomatic in the 12-month period that you alluded to in your initial line of questioning. (Exhibit 23, MacMillan Depo Tr. on 01/18/10, 6:9-17).

Yet, earlier, Dr. MacMillan acknowledged that there was nothing in the record within a year of the transmission incident to indicate that Mr. Wing was experiencing low back and leg pain:

Q. I’m talking about in the period of one year prior to June 10th, 2009. That would make it June 10th, 2008. Do you find anything in the medical records or the history that you took from Mr. Wing that indicates that he was experiencing low back and leg pain?

A. Not that I recall. (Exhibit 23, MacMillan Depo Tr. on 01/18/2010, 5:24 to 6:5).

When pressed, Dr. MacMillan testified that it was his *opinion* that Mr. Wing could not have been pain free in the 12 months prior to his injury and that he simply did not believe Mr. Wing:

“In addressing that situation, I would say that it is more likely than not that the circumstances that you identify, mainly that he was pain free in the 12 months prior to the accident, was not a true and correct circumstance for Mr. Wing.” (Exhibit 23, MacMillan Depo Tr. on 01/18/2019, 8:16-21)

Yet, this statement contradicts, Dr. MacMillan’s testimony earlier in the deposition (four weeks previously). When asked if he asked Mr. Wing about whether he experienced any periods of pain or incidents producing pain in the months prior to the work-related incident, Dr. MacMillan replied:

“No. The information that Mr. Wing conveyed to me was that he did great after his fusion. I took him at his word”. (Exhibit 23, MacMillan Depo Tr. on 12/11/09, 67: 3-5).

In what appears to be an attempt to “cover all bases”, Dr. MacMillan, who had testified that he did think there was a disc herniation, acknowledged that if it turned out to be a disc herniation, then it still isn’t work related because there is no knowing when the accident took place...due to testimony relating to the allegations of the “ATV” and “donkey” incidents:

“I suppose you could take the other tact and say well, if Dr. Swaim is correct and there is an acute disc herniation, then you can’t distinguish whether it was from the four wheeler versus the donkey, the four wheeler versus the pot hole, or the transmission episode. (Exhibit 23, MacMillan Depo Tr. on 12/11/2009, 38:11-15).

In Dr. MacMillan’s opinion, the MRI shows only a “broad based disc bulge” and as such it could not have resulted from an acute injury described by the Claimant. (Exhibit 23, MacMillan Depo Tr. on 12/11/2009, 53:11-17). He states that this is the “rule” and he cannot think of any exception, “off the top of my head, but I’m sure somebody can come along with an exception”. (Exhibit 23, MacMillan Depo Tr. on 12/11/2009, 54:18 to 55-1) Dr. MacMillan acknowledged that his report was less definite about this and referred to causation being something other than acute using the terminology: “*may well be*”:

“Consequently, Mr. Wing’s current symptoms *may well be* the result of a history of natural deterioration of normal healthy disc adjacent to multi-level fusion” (Exhibit 23, MacMillan Depo on 12/11/2009, Exhibit 2, page 3) [emphasis added]

When asked about why his testimony at deposition was absolute and “black and white”, Dr. MacMillan testified, “That’s just the way I talk”. (Exhibit 23, MacMillan Depo Tr. on 12/11/09, 55:139

The Court takes notice that the Employer’s attorney went to great lengths to provide information to Dr. MacMillan as to his client’s opinion of the Claimant’s character. Included in Exhibit 9 of Dr. MacMillan’s deposition are three separate letters. Although there were medical records attached, employer’s counsel included other documents and made statements, several of which for the purpose of attempting to convince the doctor that Mr. Wing is a fake and a charlatan:

Statements in September 9, 2009 letter from employer’s attorney to Dr. MacMillan:

- Wing thinks Dr. Amundson “walks on water”
- Wing joked to his supervisor that the transmission was “going to fall” (statement of supervisor included)
- Wing settled previous compensation claim for \$85,000
- Wing reported a similar “engine catching” incident 20 years earlier – and that the odds of this happening twice 20 years apart seem “remote to us”
- Wing has been on light duty but now says he cannot afford gas money to drive into work because he works on commissions...but the employer believes he is self-limiting the pace of his work
- “We believe the issues in this case are similar to those that you addressed for us when you compared pre- and post-MRI studies on the patient involved in the case of **Jack Johnson v. IWX.**” (enclosing a copy of Court of Appeals case).

Statements from September 29, 2009 letter from employer's attorney to Dr. MacMillan:

- Settled prior Kansas claim for \$85,000 and companion case for additional \$50,000
- Recovered \$300,000 in a civil action for a slip and fall accident
- The underlying workers compensation claim was settled for \$8,832 (10%)
- Settled 1989 work comp claim for 16% (9,068.60)
- We think that Dr. Ebelke made some "prophetic statements in that earlier report"

Statements from October 30, 2009 letter from employer's attorney to Dr. MacMillan:

- One witness (Shaun Campbell) believes the transmission accident was "staged"
- Campbell has expressed apprehension of "some type of retaliation" from Wing and as a result is reluctant to testify in the case
- "As you know Dr. Swaim has been retired from surgery for many years"... "that does not mean that he cannot recommend it [surgery] but it still rings a little hallow [sic] if he cannot perform the surgery he is recommending..."

Dr. Amundson Dr. Amundson was neither retained by the Claimant's attorney or the Employer's attorney – but is the treating orthopedic surgeon. Dr. Amundson had performed an anterior lumbar interbody fusion with posterior instrumented fusion, L45 and L5-S1 on the Claimant on January 15, 2004. At Claimant's request, Dr. Amundson did provide a written opinion as to causation.

Dr. Amundson's records and the testimony of the Claimant make it very clear that the January 2004 surgery was a complete success. At the time of the surgery, Wing was unable to work and was receiving Social Security Disability Income. Approximately one year later, Wing's prescription for medication's had been weaned down from Oxycontin 120 mg to only 10 mg per day. His last doctor's visit was on April 06, 2005 and he was told to come back in three months for purposes of Rx maintenance. Dr. Amundson commented:

"He states that I have given his life back. He states that he has some residual mild backache but with good biomechanics. He actually returned to his previous auto mechanics and is starting to feel like he is living life for real again. He is neurologically intact today." (Exhibit 23, MacMillan Depo on 12/11/2009, Exhibit 9, 04/06/05 Dr. Amundson office note)

Mr. Wing did not return to the clinic until February 2006. In December 2005, Wing had suffered a minor injury (he had fallen) and wanted to be checked out. He was x-rayed and he checked out and was again given an Rx of 10 mg. Oxycontin. There is no record that he returned for refills – either to Dr. Amundson or to any other doctor.

Dr. Amundson had never met the employee's attorney prior to his deposition, nor did the two meet to discuss his testimony just prior to the deposition. (Exhibit A, 3: 1-17). Dr. Amundson reviewed his file and noted that he was first introduced to Mr. Wing through the Kansas workers compensation system. Dr. Amundson testified that he examines employees for both claimant's attorneys, employer's attorneys, insurance companies and administrative law judges. (Exhibit A, 6:20-24) Dr. Amundson was appointed as an examining physician by the presiding Kansas

administrative law judge on September 28, 2001. (Exhibit 23, MacMillan Depo on 12/11/2009, Exhibit 9, September 28, 2001, Dr. Amundson IME to Judge Howard)

After February 2006, Dr. Amundson next saw Mr. Wing on July 10, 2009. At that time, Dr. Amundson noted the details as to the onset of the work-related injury and noted that his pain was 75% back pain and 25% leg pain – both left and right, more on the right, down to his foot. An MRI was ordered. (Exhibit 23, MacMillan Depo on 12/11/2009, Exhibit 9, 07/10/09, office note)

Dr. Amundson next saw the Claimant on July 27, 2009 following the MRI. In his July 27, 2009 office note, Dr. Amundson describes the disc at L3-L4 as a “diffuse bulge/protrusion of disc, bordering on herniation”. (Exhibit 23, MacMillan Depo on 12/11/2009, Exhibit 9, 07/27/09, Dr. Amundson office note) In his subsequent IME dated December 10, 2009, Dr. Amundson describes the L3-4 disc “as moderate to markedly bulging almost to the point of protrusion with lateral recess and neural foramen impingement at L3-L4.” (Exhibit A, Dr. Amundson Deposition, Exhibit 2). Dr. Amundson also pointed out in his deposition, “I thought it was close to a herniation and that is consistent with the radiologist’s report of moderate to marked protrusion or bulging.” (Exhibit A, 16: 21-23) In Dr. Amundson’s opinion, the L3-4 disc condition is consistent with an acute injury. He summed up the difference between his opinion and that of Dr. MacMillan’s thusly:

I think the difference between my opinion and Dr. MacMillan’s is that I believe the patient had a super-imposed acute injury on top of a pre-existing degenerative change that I think was the initiating event of his pain syndrome and Dr. MacMillan is saying that no, it’s all due to his original disease and subsequent fusion. And I disagree with that. (Exhibit A, 17: 6-12)

I think catching a 180-pound transmission, having an inciting event that could have injured a normal patient, a person who never had a back history, in a patient that doesn’t have history of missing days of work and continued medication use, is the prevailing and inciting event, and I’m not going to change my opinion. (Exhibit A, 13:12-19)

Dr. Amundson testified and pointed out in his report that there are studies showing that 15 to 30 percent of patients develop supra-adjacent disc disease at *ten years post fusion* (Exhibit A, 12: 16, 20 and Exhibit 2 of Exhibit A). Dr. MacMillan’s report and testimony indicates that 15 to 20 percent of patients develop adjacent disc disease *within two years post fusion*. (Exhibit 23, MacMillan Depo on 12/11/09, Exhibit 3). Dr. Amundson acknowledged that Mr. Wing may have had some initial level of “adjacent disc disease”, but that the prevailing factor causing the injury was the incident where he found himself catching a 180-pound transmission. (Exhibit A, 13:9-18) Even then, Dr. Amundson opined that five years post fusion; he would have expected Mr. Wing to have further degeneration of the L3-L4 level – than what actually appears. (Exhibit A, 25:24 to 26:2).

Dr. Amundson did point out that a “slight” disk bulge described as in the “lower limits of normal measuring 11 millimeters. Ten millimeters being the lower limit of normal” was present as early as 1994. (Exhibit A, 26: 5-7) He noted that there MRI reports referred to it as a “slight left

lateral disk bulge without neural compression at L3-L4". However, on a CT scan in 2001, the report indicates that the L3-4 disk is "unremarkable". (Exhibit A, 29: 8-11)

Temporary Total Disability. All three orthopedic doctors who examined the Claimant testified or reported that he was not at maximum medical improvement. Dr. MacMillan and Dr. Swaim both opined that he could not continue to perform the heavy work he did at Troostwood. His family physician, Dr. Moore specifically took him off work on August 3, 2009. (Exhibit II) Brad Wood testified that was not to return to work unless he was released to full duty. There is no evidence of the Claimant's inability to work at any job, and at least one doctor felt the Claimant was able to be employed with some lifting restrictions.

APPLICATION OF LAW TO FACTS

Both Dr. MacMillan and Dr. Amundson generally describe adjacent segment disc disease is a degenerative disc disease affecting lumbar discs over time. I find no cases discussing pre-existing adjacent segment disc disease in a "prevailing factor" context, however there are several cases involving pre-existing degenerative changes in a joint or a disc in the context of the "prevailing factor" standard (2005 and subsequent injuries).

In *Savage vs. Treasurer of Missouri*, 308 S.W. 771, (2010), the claimant had had injured her left knee on three previous occasions and had undergone two surgeries. Despite preexisting degenerative changes in the knee, the Commission (subsequently affirmed by the Court of Appeals) found that the slip and fall injury in 2007 was the prevailing factor in causing the injury and not the post surgical condition of the knee.

The Commission has held consistently that the mere existence of asymptomatic preexisting degenerative disc disease does not preclude a subsequent injury to the same disc as being the prevailing factor. *Jones v. Laclede County, et al*, Injury No. 08-020145 (July 15, 2010); *Salzman, vs. Tiffany Care Centers, Inc., et al*, Injury No. 07-001329 (April 29, 2010); *Dreiman v. Central Paper Stock, Inc., et al*, Injury No. 05-065111; (June 24, 2009);

The facts in these injury claims are distinguishable from the facts in *Gordon vs. City of Ellisville*, 268 S.W. 3d 454. Gordon involved a man who sustained a shoulder injury in 1993 but reportedly had no long term problems with it. Twelve years later he re-injured the same shoulder in a traumatic accident at work and suffered a rotator cuff tear. Initially it appeared that the injury was a result of the work injury, however when the orthopedist operated on the shoulder "he expected to see a re-tear of Claimant's previous rotator cuff repair, but instead found no evidence of any good rotator cuff tissue" *Id*, at 457. "...he found no evidence of acute injury ...and concluded that the damage was long-term in nature." *Id* 460. The orthopedist concluded that the trauma caused only a strain and the strain had effect on the claimant's rotator cuff and as a result he concluded that the disability was not the prevailing factor in causing the work accident. A family physician opined that the work accident was the prevailing factor in causing the work accident however, in denying the claim; the Court found that the family practitioner's opinion was found "less persuasive" because, among other factors, he did not have experience in performing shoulder surgeries. *Id*, 458.

Here, the Claimant suffered an injury to the low back after being asymptomatic following surgery over five years previously. However, unlike *Gordon*, two orthopedic surgeons,

including the treating orthopedic surgeon were of the opinion that Wing's MRI demonstrated evidence of an acute injury.

Also distinguishable is the case of *Johnson vs. Indiana Western*. The employer provided Dr. MacMillan a written copy of this case ruling in this case prior to the evaluation of Wing along with what appeared to be some "coaching": "We believe the issues in this case are similar to those that you addressed for us when you compared pre- and post-MRI studies on the patient involved in the case of Jack Johnson v. IWX." The claimant in Johnson was a truck driver whose body was jerked when a gust of wind blew the truck door she was holding on to. That case featured the same Dr. MacMillan and the same employer's attorney, Bill Richerson. That case is clearly distinguishable on at least three prongs. In that case, Dr. MacMillan testified that there were no real differences between the before and after MRI's:

"So you have MRIs bracketing the alleged injury but there is really no significant change between those two studies. So, on the second study there is no evidence of a new injury and, typically, there has to be some objective evidence that something happened or something changed."
Johnson, at 888

In the case at bar, Dr. MacMillan notes in his report that according to the 2009 MRI, the disc directly above the fusion (L3-4) "is considerably different than the appearance of the disc on the 2003 MRI". Dr. MacMillan then attempts to explain the "considerably different" appearances by taking the tact that differences are the result of "adjacent segment disc disease" and not the work injury.

Another major distinguishing fact is that the Claimant in *Johnson* had undergone back surgery less than one year previously and his last visit with the orthopedic surgeon was less than eight months before the alleged work injury. At the time of his last office visit he reported to continue to have pain and spasm tightness in his back. *Id* at 887. In that last visit his back surgeon wrote in the office note:

"[T]he back pain itself as well as muscle spasm tightness is significant, virtually disabling [claimant] from doing his normal work activities." Dr. Marks recommended physical therapy. He requested a follow-up visit. He discussed a need to undergo future surgery, a discectomy and fusion, in order "for any definitive care to be rendered." *Id*, at 887.

There was no follow-up and less than 8 months later, the incident with the wind blowing the truck door occurs and claimant returns to the same doctor. Another MRI is taken that is virtually identical to the previous MRI.

Dr. MacMillan, in *Johnson* testifies that the absence of medical treatment in the months following his discharge (on June 30, 2005) from the treating doctor is not an indication that the Claimant was asymptomatic during that time. In response to this issue, the Johnson Court quotes the following exchange between the attorney and Dr. MacMillan:

Q. ...When you say "last entry," you mean the entry of June 30th of 2005?

A. Yes

Q. What is the basis for that opinion, the fact that there is no evidence of any medical treatment with Dr. Marx [sic] or anyone else between June 30th, 2005, and February 9th, 2006?

A. Well, [claimant] says that he was able to go back to work and he had some back aching and stiffness, particularly after he sat for long periods of time, and so on. But there is nothing in the record that documents that fact.

Q. Is that significant to your opinion; I mean, is your opinion based solely on the fact that there is no medical documentation that there was ever a change in his condition?

A. No, not at all. It's based on the fact that there is no change in the MRI and if we are in a situation where you have a patient who goes in to the doctor and says I'm better and I'm ready to return to work and then he has a period of time where he receives no ongoing treatment and then he hurts himself at work and has an MRI which documents a significant change or an objective change in his spine, we say, okay, here is a guy who appears to have been better but then he goes and hurts himself and now he has an objective change in his MRI.

In this situation, we have a guy whose last medical entry he's disabled and then we have no idea what happens and he goes for a very short period of time and all of a sudden he comes back with a new alleged injury, but there is no change in his MRI. So there is no objective evidence that anything happened between his first treatment and the second injury. So, the assumption that you have to make is that there is no new injury. This is all part -- it's all a continuation of the first injury. Id at 888-889.

Yet in *Wing*, according the medical records, it is the first situation and not the second situation that applies. It is documented in the records in April 2005 that Wing "had his life back" and was returning to work. He receives no ongoing treatment over a long period of time (three and half years) and hurts himself at work and has an MRI that documents a "completely different" appearance in the affected disc. Indeed, by his own words, Dr. MacMillan distinguishes the two cases.

Here, in *Wing*, despite the record and Wing's testimony, Dr. MacMillan refuses to acknowledge that Mr. Wing was able to function without pain following his 2004 fusion. Even though there was neither evidence that he treated with a doctor after February 2006 nor any documentation that Wing continued to take pain medications, Dr. MacMillan hypothesized:

“The fact that he may not have been receiving any prescriptions doesn’t necessarily mean that he was pain free. People self-medicate. People buy street drugs. Some people suffer in silence.” (Exhibit 23, MacMillan Depo Tr. on 1/18/10, 9:5-9)

Similarly, although he had to acknowledge the “completely different” appearance of the before and after MRI’s, Dr. MacMillan holds fast to his position that the second MRI is merely a “broad-based disc bulge” – a position that is refuted by the radiologist and two other orthopedic surgeons. It is as if Dr. MacMillan did everything in his power to conform the facts in this case to those facts in *Johnson*.

Both Dr. MacMillan and Dr. Amundson generally describe adjacent segment disc disease is a degenerative disc disease affecting lumbar discs over time. I find no cases discussing pre-existing adjacent segment disc disease in a “prevailing factor” context, however there are several cases involving pre-existing degenerative changes in a joint or a disc in the context of the “prevailing factor” standard (2005 and subsequent injuries).

RULINGS

The Claimant sustained an accident arising out of and in the course of his employment in Injuries No. 09-044196 and 09-086714.

MO STAT 286.020.2 provides: “The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.” There were allegations but absolutely no evidence that the accident of June 10, 2009 was “staged”. I find that the Claimant sustained an accident as defined by this section when he unexpectedly “caught and cradled” a 180 pound transmission that slid off the platform supporting it on June 10, 2009. I further find that the Claimant sustained a second, aggravating accident on July 1, 2009 when his body was in an awkward position and “jerked” while attempting to align an engine to motor mounts.

The injury was the prevailing factor in causing the resulting medical condition and disability.

MO STAT 287.020.3 provides:

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

The Claimant had undergone previous back surgeries. His last back surgery was on January 15, 2004 and involved a fusion of L4-5 and L5-S1. By all accounts, the fusion surgery was very successful. The Claimant was given a full release. The office note of April 2005 states that the Claimant described the successful surgery as “giving his life back”. With the exception of minor

temporary symptoms in December 2005 for which he was briefly prescribed pain medications – the Claimant was essentially pain free since his last office visit on in February 2006. Indeed the Claimant was able to return to heavy labor as a mechanic in 2005. The Claimant testified that he was able to resume every aspect of his life and was able to perform the necessary work tasks of a mechanic by using proper body mechanics. He acknowledged that he occasionally experienced some low back pain following a long day's work – but he did not suffer from chronic pain. Following his surgery he never experienced leg pain or radiculopathy until the June 10, 2009 and July 1, 2009 injuries. The medical records attest to the fact that the Claimant never returned to a doctor for complaints of back pain after February 2006. Dr. Swaim and Dr. Amundson both state that the Claimant was asymptomatic prior to the work injury. Dr. MacMillan does not agree. Even though he acknowledges that the Claimant states that he has been pain free and even though the medical records do not show any evidence of any treatment for back pain after February 2006, Dr. MacMillan insists that the Claimant is lying and even hints that the claimant maybe doing “street drugs”. Based upon the claimant's testimony and the medical records, I find that the claimant was pain free from February 2006 through and until his June 10, 2009 work related injury.

After reviewing the July 20, 2009 MRI report, Dr. Swaim opines that the L3-4 disc is herniated as a result of an acute injury. Likewise, the treating orthopedic surgeon, Dr. Amundson characterizes the disc as “nearly herniated” due to an acute injury. Dr. Amundson also testifies that the description given to the disc by the radiologist “moderate to marked protrusion” is basically stating that the disc is herniated. Only Dr. MacMillan disagrees. He characterizes the disc as a “broad based bulge”, and opines that its pathology is not related to acute trauma. Dr. MacMillan acknowledges that the “appearance of the L3-4 disk on the 2009 MRI is considerably different than the appearance of the disc on the 2003 MRI”. He attributes this difference to “adjacent segment disk disease”.

Dr. Amundson does not disagree that there is a process going on termed “adjacent segment disc disease” – however he opines that it is not this condition but rather the nearly herniated condition of the disc caused by the acute trauma of catching and cradling the 180 pound transmission that is the prevailing factor in causing the injury.

Dr. Amundson is the treating orthopedic specialist. Unlike Dr. MacMillan, he was not retained by the insurance carrier. Nor was he retained by the claimant. He has a reputation of being a neutral examiner in workers compensation settings. Dr. Amundson treated the Claimant over a period of two years and performed surgical fusion on the Claimant five and a half years prior to the work related accident. Diagnostically, clinically and historically, the condition of the disc is consistent with the sudden trauma described by the Claimant. I find that Dr. Amundson's opinions to be more credible than those of Dr. MacMillan.

The injury was not caused by the failure of the employee to use safety devices, as contemplated by Section 287.120.5.

MO STAT 287.120.5 provides:

Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of

employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

The testimony of the Claimant and the deposition testimony of his immediate supervisor, Ryan Roof, clearly show that the use of "safety straps" was not a required by the employer. In his deposition, the supervisor stated that the rule was not enforced and therefore not required. He also testified that Wing had a legitimate reason for not using the straps in every application. The supervisor's testimony at the hearing was contrary to what he testified to at his deposition, even though the deposition testimony was within three months of the incident and the testimony at trial was more than one year following the incident. The supervisor explained the change in his testimony: "I wasn't prepared for the deposition". The Court finds the supervisor's deposition testimony to be truthful, and as such, MO STAT 120.5 does not apply.

I find based on the evidence and testimony presented, much of which is largely contested on a factual basis involving credibility of witnesses, that the Claimant, I believe, has met his burden of proof to establish accidents arising out of and in the course and scope of his employment and to be the prevailing factor in his ongoing conditions of ill. I find somewhat persuasive the opinion of Dr. Swaim who finds that while he believes the Claimant is in need of ongoing treatment including pain management and diagnostic testing to determine if other treatment is appropriate, he also felt that the Claimant, if treatment was not rendered, had only 18 percent permanent partial disability to the whole body attributable to these injuries. I find that the other doctors who have presented testimony, including Dr. Amundson and MacMillan, while disputing the Claimant's conditions of ill and whether or not a treatment is appropriate, do not address the Claimant's unemployability; and at least one doctor found the Claimant able to lift up to 50 pounds on an occasional basis and 35 pounds on a semi-regular basis and able to do sedentary work. The consensus of the medical opinions appears to be the Claimant cannot go back to heavy mechanics work, but that does not determine whether the Claimant is, in fact, temporarily and totally disabled.

I find, therefore, the Claimant is entitled to treatment from the Employer/Insurer which appears to be, from the consensus of the medical opinion, pain management with potentially further diagnostic testing to determine if other treatment is appropriate. I do not find the Claimant has been temporarily and totally disabled since the last day of his work at Troostwood Garage and Body Shop and do not award temporary total disability for the 40-plus weeks as claimed by the Claimant. I do find the Claimant is entitled to reimbursement of \$77 from the Employer, which is the amount of the service of process fee for Donald Wood which transpired on the day of the hearing.

Finally, I find the Employer shall provide and pay for reasonable and necessary medical treatment as may be required to cure and relieve from the effects of the injury of the Claimant. To that end, if the medical providers find the Claimant to be unemployable in the open labor market and entitled to temporary total disability benefits, then those benefits would be due from

the date of that opinion forward until the date the Claimant is deemed able to return to the labor market.

I find Claimant's attorney, John R. Stanley, is entitled to attorney's fees of 25 percent of sums recovered and to be recovered from this proceeding.

This award being temporary in nature is to be remanded to the open docket for final determination at such time as the parties are ready to present for final award.

Date: _____

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this ____ day of _____
2010 by:

Naomi Pearson
Division of Workers' Compensation