

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

Injury No.: 04-012678

Employee: Johnny Wyatt
Employer: Blair Packaging
Insurer: American Home Assurance Company
c/o AIG Claim Services
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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 March 10, 2008. The award and decision of Administrative Law Judge Lawrence C. Kasten, issued March 10, 2008, 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 12th day of March 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed to award employee permanent total disability benefits.

The administrative law judge correctly found that the employee met his burden of proof that he sustained a work injury to his back (and/or aggravated a pre-existing condition at L5-S1 which caused low back to become more symptomatic and disabling) on February 2, 2004. The administrative law judge also correctly found that employee's recurrent herniated disc at L5-S1 and need for medical treatment, including surgery by Dr. Cheung, through November 30, 2004 was medically causally related to the February 2, 2004 work accident.

However, the administrative law judge found that employee did not meet his burden of proof on the issue of medical causation for the treatment and surgery performed on September 15, 2005. The administrative law judge erred in finding that stenosis at L4-5 and the recurrent L5-S1 herniated disc diagnosed in 2005 was not related to his February 2, 2004 work accident and that the September 15, 2005 surgery was not medically causally related to the February 2, 2004 work accident. The administrative law judge further found that employee failed to meet his burden of proof as to what percentage of permanent partial disability he sustained as a result of the February 2, 2004 accident and that employee was not permanently and totally disabled. The administrative law judge erred in not finding that employee was permanently and totally disabled.

Medical Causation

Employee has the burden of proving all the essential elements of a claim for workers' compensation benefits by reasonable probability, not absolute certainty. *McDermott v. City of Northwoods Police Dep't*, 103 S.W.3d 134, 138 (Mo.App. E.D. 2002). The Commission may accept or reject medical evidence; and is free to accept one of two conflicting medical opinions. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 233-234 (Mo.App. S.D. 2003).

Employee had two prior back surgeries in 2002; however was able to return to work after he recovered from his second surgery. Employee testified that he was careful with lifting but overall did not have problems with back pain following the 2002 surgeries. Employee sustained another injury to his back at work on February 2, 2004 and was sent to Dr. Ryan by employer. In April of 2004, employee learned that employer was denying his workers' compensation claim and sought treatment on his own from Dr. Chueng. Dr. Chueng diagnosed employee with a disc protrusion at L5-S1 and noted a previous laminectomy defect at L5-S1 on the right. Employee underwent bilateral laminectomy and right sided discectomy at L5-S1 in August of 2004. Employee was released to return to work on September 20, 2004. Employee testified that he would have attempted to return to his position with employer following his surgery, but was notified by employer that his position was no longer available. Employee testified that he was denied job opportunities as a result of his back condition and attempted to work as a truck driver for a short period of time. After completing the training course and obtaining his commercial driver's license, employee was only able to work as a truck driver for approximately 30 days. Employee was forced to stop driving because he began having increased leg pain as well as leg numbness to the point where he could not feel the pedals.

An MRI in July 2005 showed a recurrent disc herniation at L5-S1 on the right and persistent spinal stenosis at L4-5 which appeared to be more significant than before. Employee underwent a fourth surgery for his

back in September 2005. The evidence, including employee's testimony, shows that employee never fully recovered from his 2004 injury, remaining symptomatic up and until his 2005 surgery. The 2005 surgery was clearly due to employee's February 2, 2004 injury. Employee was unable to sustain work after his 2004 injury, only briefly working as a truck driver in the Spring of 2005. Employee was forced to quit that position because of his physical condition and inability to perform his duties safely.

The evidence supports a finding that employee's February 2, 2004, work-related accident was the substantial factor in causing the herniations that required surgery in 2004 and 2005. The medical experts that gave opinions as to causation were Dr. Zoffuto on behalf of employee, and Dr. Lange on behalf of employer. I find the opinion of Dr. Zoffuto more credible than that of Dr. Lange. Dr. Zoffuto performed an independent medical examination on employee in May 2006. Dr. Zoffuto opined that employee's February 2, 2004, injury was the prevailing factor which required him to undergo the August 10, 2004 and September 15, 2005 surgeries. He believed the treatment sought by employee was reasonable and that the February 2, 2004 injury was the prevailing cause for him to seek those remedies. Dr. Zoffuto suspected that the accident in 2004 was not only responsible for the recurrent injury at L5-S1, but for the injury at L4-S1; and that employee's condition deteriorated causing employee to become increasingly symptomatic over time. Dr. Zoffuto believed that employee's activities, including his brief time as a truck driver, may have caused the L4-5 disc to become symptomatic, but that the injury related back to his 2004 accident.

Permanent Total Disability

When a partially disabled employee incurs a new injury and is rendered permanently and totally disabled, the first step in ascertaining liability is to determine the amount of disability caused by the new accident alone. *Vaught v. Vaughts, Inc./Southern Mo. Constr.*, 938 S.W.2d 931, 939 (Mo.App. S.D. 1997), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). If the new accident, by itself, renders employee permanently and totally disabled, then the employer at the time of the new accident is liable for that disability. *Id.*

Under the Missouri Workers' Compensation Law employee is considered totally disabled if he is unable to return to any employment, not merely the employment in which he was engaged at the time of the accident. §287.020.7 RSMo. The test for permanent-total disability is whether employee is able to competently compete in the open labor market given his condition and situation. *Reiner v. Treasurer of State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. E.D. 1992). Therefore, the ultimate question is whether an employer can reasonably be expected to hire employee, given his present physical condition, and reasonably expect employee to successfully perform the work. *Id.*; *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849, 853 (Mo.App. S.D. 1995).

Having established the two surgeries (February 10, 2004 and September 15, 2005) were causally related to employee's February 2, 2004 injury, the analysis begins with whether employee was permanently and totally disabled as a result of that injury and subsequent treatment. I believe the evidence shows that employee is permanently and totally disabled as a result of the February 2, 2004 injury alone.

Following employee's surgery in 2005, claimant testified that he once again attempted to find work, but due to his physical condition was not hired by any employer. Employee stated that he was willing to try to return to work for employer, but did not believe he would have been physically capable of performing the work. Employee had worked for employer for 24 years at the time of his injury in 2004. It is clear from the record that employee made effort to return to work and was unable to do so, given his back condition and residual symptoms. As a result, employee applied for and obtained Social Security disability benefits.

Employee testified that he continues to have problems related to his 2004 injury and surgeries. Employee testified that his back bothers him occasionally, but that his right leg aches all the time. Employee testified

that his leg twitches at night causing disruption in his sleep. Employee reported discomfort sitting requiring him to shift positions often. He also had difficulty standing for long periods and driving; requiring him to stop and take breaks to walk around when he drives. Employee further testified that his injury and subsequent unemployment affected his mood causing him to be depressed and irritable.

Employee's testimony was supported by his wife who testified that employee could not do any heavy lifting and watched what he did following his 2004 injury. Employee's wife testified that there was a change in what employee was capable of doing and the way that he moved. Employee was no longer able to pick up his grandchildren, had to change positions often while seated, and was forced to get up at night due to his leg twitching. Employee's wife also noticed that employee got frustrated and was more irritable because of his physical condition and limitations.

Ms. Susan Shea, vocational expert, opined that employee was disabled from any substantial work as performed in the national economy. Ms. Shea noted that employee was limited in his ability to sit, stand, and walk which would eliminate sedentary or light work. Ms. Shea found that employee did not have transferable skills and given employee's age, that it would be difficult for him to adjust to new types of work. Ms. Shea concluded that it would be highly doubtful that an employer would consider hiring employee; and that if employee did attempt to return to work, it would be highly unlikely that employee would be able to maintain work on a regular basis.

Additionally, Dr. Zoffuto opined given employee's education and that his non-labor skills were substantially limited, he had minimal functional residual capacity and was limited to less than sedentary work. Dr. Zoffuto did not apportion ratings for employee's 2004 injury, but opined that the surgery in August 2004 and September 2005, each caused additional permanent partial disability. Dr. Zoffuto found employee to be permanently and totally disabled as a result of the combination of the two surgeries stemming from the 2004 injury. Dr. Zoffuto concluded that the 2004 injury was the prevailing cause for his current situation of 100% permanent total disability.

I believe employee has shown that due to his back injury on February 2, 2004, he is unable to compete in the open labor market and that no employer would reasonably be expected to hire employee in his present physical condition. Consequently employee is entitled to permanent and total disability benefits against employer for his February 2, 2004 work-related injury. Accordingly, I would reverse the decision of the administrative law judge and award permanent total disability benefits.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Johnny Wyatt

Injury No. 04-012678

Employer: Blair Packaging

Additional Party: Second Injury Fund

Insurer: American Home Assurance Company
c/o AIG Claim Services

Hearing Date: Commenced November 14, 2007
Completed December 6, 2007

Checked by: LK/kh

SUMMARY OF FINDINGS

- Are any benefits awarded herein? Yes.
- Was the injury or occupational disease compensable under Chapter 287? Yes.
- Was there an accident or incident of occupational disease under the Law? Yes.
- Date of accident or onset of occupational disease? February 2, 2004
- State location where accident occurred or occupational disease contracted: Cape Girardeau County, Missouri.
- Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
- Did employer receive proper notice? Yes.
- Did accident or occupational disease arise out of and in the course of the employment? Yes.
- Was claim for compensation filed within time required by Law? Yes.
- Was employer insured by above insurer? Yes.
- Describe work employee was doing and how accident happened or occupational disease contracted: The employee was moving a mold and injured his low back.

- Did accident or occupational disease cause death? No.
- Parts of body injured by accident or occupational disease: Low back and body as a whole.
- Nature and extent of any permanent disability: None awarded.
- Compensation paid to date for temporary total disability: None.
- Value necessary medical aid paid to date by employer-insurer? \$3,700.28.
- Value necessary medical aid not furnished by employer-insurer? \$9,323.00.
- Employee's average weekly wage: \$653.84
- Weekly compensation rate: \$435.89/\$347.05
- Method wages computation: By agreement.
- Amount of compensation payable:

\$9,323.00 in previously incurred medical bills.
\$2,553.07 in temporary total disability

TOTAL: \$11,876.07

- Second Injury Fund liability: None.
- Future requirements awarded: None.

Said payments to begin (See Rulings of Law) and 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: Joe Rice.

FINDINGS OF FACT AND RULINGS OF LAW

On November 14, 2007, the employee, Johnny Wyatt, appeared in person and by his attorney, Joe Rice, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Hugh O'Sullivan. The Second Injury Fund was represented by Assistant Attorney General, Frank Rodman. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

- Blair Packaging was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was fully insured by American Home Assurance Company c/o AIG Claim Services.
- On or about February 2, 2004, Johnny Wyatt was an employee of Blair Packaging and was working under the Workers' Compensation Act of Missouri.
- On or about February 2, 2004, the employee sustained an accident arising out of and in the course of his employment.
- The employer had notice of the employee's accident.
- The employee's claim was filed within the time allowed by law.
- The employee's average weekly wage was \$653.84. The rate of compensation for temporary total disability and permanent total disability is \$435.89. The rate of compensation for permanent partial disability is \$347.05.
- The employer-insurer has paid a total of \$3,700.28 in medical aid.
- The employer-insurer has not paid any temporary total disability benefits.
- The parties agreed that the employer-insurer will pay the mileage for the independent medical examination of Dr. Lange on August 20, 2007.

ISSUES:

- Medical causation
- Claim for previously incurred medical
- Claim for additional or future medical
- Temporary total disability benefits
- Nature and extent of permanent disability
- Liability of the Second Injury Fund for permanent total or permanent partial disability

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical records of Dr. Bender
- B-1. Medical records of Dr. Price
- B-2. Medical records of Dr. Price

- B-3. Medical records of Dr. Price
- C. Medical records of Orthopedic Associates
- D. Medical records of Dr. Young
- E. Medical records of St. Anthony's Medical Center
- G-1. Medical records of St. Francis Medical Center
- G-2. Medical records of St. Francis Medical Center
- G-3. Medical records of St. Francis Medical Center
- H-1. Medical records of Dr. Cheung
- H-2. Medical records of Dr. Cheung
- I. Medical records of Dr. LaFoe
- J. Report of Susan Shea
- K. Report of Dr. Zoffuto
- L. CV of Dr. Zoffuto
- N. Compromise settlement in Injury No. 02-042389
- O. Compromise settlement in Injury No. 02-114324
- P. Prior Second Injury Fund settlements
- Q. Medical records of St. Francis Medical Center
- R-1. Medical Bills of Dr. Cheung
- R-2. Medical Bill of River City Imaging
- R-3. Healing Arts Pharmacy
- R-4. St. Francis Medical Center
- R-5. Southeast Missouri Hospital
- R-6. St. Francis Medical Center
- R-7. St. Francis Medical Center
- R-8. (Withdrawn prior to being offered)
- S. (Withdrawn prior to being offered)
- T. Report of Dr. Lange
- U. Deposition of Dr. Zoffuto
- V. Deposition of Susan Shea including exhibits
- W. Bankruptcy exhibits (The record was left open for 30 days for the submission of this exhibit which was received and admitted on December 6, 2007. The record was closed.)

Employer-insurer's Exhibits

- 1. Deposition of Dr. Lange including exhibits
- 2(a). Photograph of the employee on April 3, 2004
- 2(b). Photograph of the employee on April 3, 2004
- 2(c). Photograph of the employee on April 3, 2004
- 2(d). Photograph of the employee on April 3, 2004

Second Injury Fund Exhibits – No exhibits offered

Exhibits Not Admitted

- F. August 27, 2003 report of Dr. Eaton (The employee made an offer of proof. This report shall be part of the Division's file for appellate purposes.)
- M. Social Security Administration Decision

Witnesses: Johnny Wyatt, the employee; and Karla Wyatt, the wife of the employee

Judicial notice of the contents of the Division's files for the employee was taken.

Briefs: The employee filed his brief on December 17, 2007. The Second Injury Fund its brief on December 7, 2007. As of the date of the award, the employer-insurer had not filed a brief.

FINDINGS OF FACT:

The employee was born in 1956. He stopped school in the 10th or 11th grade and has not obtained a GED. The employee's primary hobby has been working on and racing cars. He did a lot of mechanic work on cars including building motors, and changing motors.

Prior to Blair Industries, the employee worked as a laborer, roofer and did construction work. The employee started working for Blair in October of 1980. He was a material handler, was trained in machine set up, and then became an assistant supervisor. He became a supervisor in charge of production. He performed machine maintenance and mechanic work and did whatever was needed to make the machines operate. He rolled 250-300 pound rolls onto their sides and lifted molds that normally weighed from 10 to 70 pounds. His normal shift was 8-10 hours a day. He spent two to three hours in the office doing paperwork including production schedules, inventory and materials used in production. The rest of the time he was on the floor.

Pre-existing Conditions:

In 1999, the employee underwent cardiac catheterization which showed blockage in four arteries or vessels. Dr. Bender performed coronary artery bypass grafting on four vessels for coronary artery disease. In April of 2002, Dr. Price noted the employee had chest discomfort and was admitted to the hospital for angina and had a cardio light stress test. After the heart surgery, the employee stopped driving race cars due to the stress of racing. He continued to work on cars and went back to work without problems.

In March of 2002, the employee injured his low back at work. He had a right sided lumbar radiculopathy. A May 15 MRI showed degenerative disc disease at L4-5 with a posterior annular tear and a central disc bulge. At L5-S1 there was a large extruded disc fragment with caudal migration. Dr. Ritter performed a discectomy on June 4 for the central and right sided L5-S1 disc herniation with caudal migration. Dr. Ritter rated the employee's permanent partial impairment at 5% of the body at the level of the lumbar spine.

The employee went back to work. On July 15 he tripped over an angle iron and re-injured his back. Dr. Ritter diagnosed a recurrent L5-S1 disc herniation with right sided S1 nerve root irritability and ordered another MRI. The employee saw Dr. Young. He reviewed the MRI scan, which showed a large recurrent disc herniation at L5-S1 with a lot of nerve root compression. Dr. Young recommended surgical intervention. In September Dr. Price noted that the employee came in for a pre-operative clearance for a repeat lumbar laminectomy. Since his last visit, the employee had been in the hospital, had been evaluated by a cardiologist and had heart catheterization. On September 13, 2002, Dr. Young performed a microdiscectomy at L5-S1 on the right for a recurrent disc herniation.

In February 2003, Dr. Price noted that the employee had been hospitalized under the care of Dr. LaFoe for chest pain and had undergone arteriogram. In April 2003, Dr. Price's impression was coronary artery disease with recent heart attack and ischemic heart disease.

In 2003 Dr. Park noted that the employee was having some leg pain that he thought was coming from his back.

After his two surgeries, the employee testified that he was weaker but was able to do most of what he did before. He had no pain or discomfort in his back but had a little bit of leg pain in his right leg and lower buttocks which bothered him from time to time. At work he did the same thing but in a cautious way. He lifted with his legs and not his back. He was in a supervisory position and directing as many as six employees. He had leeway on what he did physically. He would get help with lifting things that he would have previously done by himself including moving the rolls and other items. Outside of work, he went back to doing what he was doing before.

On November 21, 2003, the employee settled his two work-related low back claims. In injury number 02-042389, the March 27, 2002 injury, the settlement was based on a 21.5% permanent partial disability of the body as a whole referable to the low back. In the July 15, 2002 injury (02-114524) the employee settled his claim for 17.5%

permanent partial disability of the body as a whole referable to the lumbar back.

In April of 2004, the employee settled his claims against the Second Injury Fund in both 02-042389 and 02-114324 for a combination of the low back injury and his pre-existing heart condition. In 02-042389 the Second Injury Fund Claim settled for 21.5% permanent partial disability of the low back and a 12.5% pre-existing disability to the body as a whole referable to the heart condition with a 10% loading factor. In injury number 02-114324, the Second Injury Fund Claim settled for 17.5% permanent partial disability of the low back and a 12.5 % pre-existing disability of the body as a whole referable to the heart condition with a 10% load.

2004:

On February 2, 2004 the employee was standing over a table moving a 35-45 pound mold when he felt like a knife had been stuck in his back. He went to his knees and the mold slid down on his legs. He had pain in the low back and his leg. He was sent by the employer to Dr. Ryan that day.

Dr. Ryan noted in 2002, the employee had two discectomies at L5-S1. After the second surgery, he was fully recovered and did not have any problems with back pain. The employee was picking up a mold and dragging it across a table when he felt a pull in his low back. He had pain in the middle and right side of his low back. He denied any numbness, tingling, or weakness in his legs. The employee had muscle spasms in his low back. Dr. Ryan assessed a lumbar strain and prescribed Bextra, Skelaxin and Ultram. She put him on limited duty of no lifting, pushing or pulling over 15 to 20 pounds. Dr. Ryan said that based on the history the injury was work related. The employee testified that when he was put on limited duty, he changed how he did his job, was more of a manager and mostly did paperwork.

On February 9, the employee reported intermittent numbness in the left posterior thigh and right buttock pain. Dr. Ryan ordered physical therapy. On February 16, the employee's back was doing better. On February 23, Dr. Ryan stated that the employee had been pain free for the last few days, stated that his lumbar strain resolved, and released him from care with no permanent impairment.

The employee testified that a week or two later his back started bothering him again. He had no additional injuries or accidents but his symptoms just came back. He waited a couple more weeks and then was sent back to Dr. Ryan. On March 11, the employee saw Dr. Ryan due to a reoccurrence of low back pain in the left side. He had back pain off and on which became constant on March 2. There was no specific incident preceding the onset of pain. The employee had pain radiating down the leg to the knee and some numbness in the anterior thigh intermittently. The employee had muscle spasms on the left side. Dr. Ryan's assessment was recurrent lumbar strain and the employee was put on limited duty. The employee was to resume physical therapy and was prescribed Bextra, Skelaxin, and Ultram. Dr. Ryan restricted the employee to no lifting, pushing or pulling over twenty pounds. Dr. Ryan stated that based on the history, the injury was work related.

The employee saw a therapist on March 19 with increasing pain into his left low back region and into the back of his left leg over the past one to two weeks. The employee felt like it was a continuation of the February 2, 2004 injury. The employee had significant positive findings on the slump test and straight leg raise test on the left indicating a possible disc problem. The employee demonstrated bilateral weakness of the L5 myotome extensor hallucis longus.

On March 25, the employee saw Dr. Ryan with left sided low back pain and constant pain in his left lower leg down to the ankle. The employee's straight leg raise was positive on the left. Dr. Ryan assessed a lumbar strain with possible radiculopathy and ordered an MRI.

The employee saw Dr. Ryan on April 1. A February 2, 2004 date of injury was shown. The employee continued to have low back and left leg pain. He had brief numbness in his left foot after he had traction and physical therapy which had resolved. The employee was not sleeping well and was in mild to moderate distress due to back pain. The employee's straight leg raise was positive on the left side. He had decreased strength in the great toe extensors bilaterally, left greater than the right. Dr. Ryan's assessment was lumbar strain with possible radiculopathy and prescribed Lodine XL; Norflex for muscle spasms; Zanaflex; and Darvocet for severe pain. Dr. Ryan requested

authorization for an MRI but was advised by the adjuster that the employee would be sent to an orthopedist for an evaluation prior to authorizing an MRI. The employee was returned to limited duty with restrictions of no lifting, pushing or pulling.

In April of 2004 the employee testified that he was participating at the racetrack but was not racing or working on cars. He helped in the "tech area" which included weighing the cars on scales. Employer-Insurer Exhibit 2 are pictures taken on April 3, 2004. Exhibit 2A is a picture of him looking at the person taking the picture. He knew the person taking the picture but not his name. The employee was kneeling down looking at the scale. He kneeled down, got up and walked around at Blair. The employee had been to physical therapy and had been doing leg and arm weights, walking on the treadmill and muscle toning. Exhibit 2B, is a picture of him on all fours looking at the wiring on the scale and trying to get the scale working. Exhibit 2C is a picture of the employee leaning on a car telling the driver to pull the car up to get on the scale because he was unable to see where it was located. The employee was not pushing the car since it weighs about 3,400 pounds. In a six hour period of time at the racetrack there was 8 races and in each race 3 cars would be weighed. Exhibit 2D is a picture of the employee leaning into and steering the car. He was not pushing the car but the other people in the picture were. He was just walking. He stated that there were no photographs doing anything more physical than what he was doing at Blair at the time.

The employee testified that two weeks after his last visit with Dr. Ryan, he had not heard from the insurance company about sending him to an orthopedist. He called them and was told that his claim was denied and his treatment was cut off. He continued to work and did what he had to do to keep his job. He continued working with the same duties. He did not miss work until August 10, 2004. During that period of time, he would ask for help lifting.

The employee went to the emergency room on July 20, 2004 due to a flare up of chronic low back pain radiating down the right leg that started in February of 2004. Dr. Ryan in April of 2004 recommended an MRI which was declined by workers' compensation. On July 30, the employee saw Dr. Price who noted that the employee had several back surgeries and thought he might have ruptured his back again when he pulled something heavy towards him at work. He had low back pain that radiated down the posterior aspect of his right leg.

The employee saw Dr. Cheung on August 2, who noted that the employee had a 2002 work related injury with two surgeries and was doing fine until February of this year when he injured himself again with pain in the same location. The pain appeared to have shifted to the left but came back to the right side. The employee had pain in the posterior aspect of the thigh and calf with positive straight leg raising on the right with pain coming all the way down to the heel. The employee appeared to have S1 radiculopathy that according to the employee was along the same distribution as before. Dr. Cheung noted it was probably from a pre-existing condition.

Dr. Cheung ordered an MRI which was done on August 6, 2004. It showed lateral recessed stenosis at L3-4. At L4-5, there was more advanced lateral recessed stenosis with a central disc bulge, ligamentum flavum hypertrophy and facet hypertrophy. At L5-S1 on the right, the employee had a large herniated disc in the lateral recess area that caused displacement of the thecal sac. There was a disc protrusion at L5-S1 on the left side which abutted the S1 nerve root and explained the bilateral pain along the L5 distribution. There was a previous laminectomy defect at L5-S1 on the right. Dr. Cheung stated that since it was at the same level as the previous workers' compensation case, it was related to the prior work injury and therefore should be covered by workers' compensation. Dr. Cheung stated that the left side disc was fresh and the right side disc was old. Dr. Cheung stated that the stenosis at L3-4 and L4-5 were not causing him immediate problems so he would not do anything until it got worse.

On August 10, 2004, Dr. Cheung performed a bilateral laminectomy and right sided L5-S1 discectomy redo for a recurrent disc. In the history it is noted that the employee had two prior lumbar discectomies at L5-S1 on the right side and was involved in a work related injury in February. The MRI showed a large herniated nucleus pulposus on the right with enhancement of scar tissue and a disc protrusion at L5-S1 on the left. Dr. Cheung did the right sided discectomy first and then did a laminectomy on the left side to remove the disc protrusion. The disc space was much collapsed after the disc material had been removed from the right. Dr. Cheung did not do a left sided discectomy but performed scar revision.

Dr. Cheung on September 7 noted that the employee had some pain coming down his right leg but otherwise was doing well. He released the employee back to work on September 20. On October 9, the employee had some pain across the top of the right side of the buttock but otherwise had no problems. The employee had apparently lost his job due to personnel cuts. On November 30, the employee had occasional back pain and leg pain which was not as significant and was released from care.

The employee testified that after the September 20, 2004 release to return to work, he was getting around pretty well. He thought he was getting back into shape. He had limited problems with his right leg and right buttock. He had an achy feeling in the back of the legs like a charleyhorse. His left sided pain had been eliminated by the surgery. The employee testified that when he tried to go back to work, Blair told him that his position had been discontinued. He signed up for unemployment and went through the Career Center in Cape Girardeau. He applied at Wal-Mart because he had worked there at Christmas for extra money, loading and unloading trucks. In the application he stated that he had back injuries and did not get a call back. In his December 2004 deposition, the employee stated that he thought he could return to work at Blair in the same type capacity.

The employee tried to get a job in the trucking industry. Around April of 2005, he attended a truck driving training program in order to get a commercial drivers license. It was a three week course. One week was in the classroom and included how to do paperwork and to pass the CDL test. The other two weeks was actually driving. At that time, his back was not bothering him too much. He had a little bit of right leg pain that would come and go occasionally. If he was on his feet too long, he would have right lower extremity pain. The employee received his Commercial Driver's License. He had a week of orientation with CSRT Trucking, was hired and was on the road driving a truck for approximately thirty days. During this period of time, the problems with his right leg increased. He started having more leg pain and his leg went completely numb. He stopped driving because he thought it was not safe.

On July 20, 2005 the employee was prescribed Soma by Dr. Price. On July 27, Dr. Price prescribed Lortab and scheduled an MRI of the lumbar spine for low back and right leg pain. The radiologist stated that the July 28 MRI showed 1) Slightly bulging degenerative and atrophic L5-S1, with slight marginal sclerosis. Medium to large size recurrent extruded disc on the right. Small to medium recurrent extruded on the left. 2) Slightly bulging degenerative disc at L4-5 with small to medium sized central disc protrusion.

The employee saw Dr. Cheung on August 1, 2005. The employee had been having pain for three weeks. An MRI scan showed a recurrent disc herniation at L5-S1 on the right and persistent spinal stenosis at L4-5 which appeared to be more significant than before. The disc was quite large and caused compression of the S1 nerve root. He had a positive straight leg test.

On September 9, Dr. Cheung noted that the employee had a history of recurrent disc herniations at L5-S1. He had three surgeries at L5-S1 most recently in August of 2004 when Dr. Cheung did a bilateral laminectomy and redo right discectomy at L5-S1. The employee was doing well until the end of July when he developed back and lower extremity pain. The employee had spinal stenosis at L4-5. The employee had positive straight leg raising on the right. Dr. Cheung's impression was a recurrent L5-S1 disc herniation that caused compression of the S1 nerve root and persistent spinal stenosis at L4-5. Dr. Cheung recommended an L4-5 laminectomy and L5 right discectomy.

Dr. Cheung performed surgery on September 15, 2005, for a diagnosis of spinal stenosis of L4-5 bilaterally with facet hypertrophy, ligamentum flavum hypertrophy, and central disc short pedicle syndrome; and recurrent herniated disc at L5-S1 on the right. Dr. Cheung performed an L5-S1 right discectomy and a bilateral laminectomy foraminotomy of L4-5 bilaterally. With regard to the indication for the operation, Dr. Cheung stated that the employee had spinal stenosis at L4-5. He had pain in both legs with standing, sitting and walking which was suggestive of both herniated nucleus pulposus as well as spinal stenosis. During the surgery at L5-S1, Dr. Cheung removed four to five large pieces of disc.

On October 10, the employee was doing fine. On November 11, Dr. Cheung noted that the employee had occasional pain in his right leg but otherwise was doing fine. It was noted that the employee did not plan to go back to work and had filed for disability. Otherwise Dr. Cheung stated he had no other problems and released him.

On April 12, 2006, the employee told Dr. Price that he was unable to work. The employee continued to have pain from his buttock down the right side of his leg since his most recent back surgery.

The employee testified that at present his problems are on the right side of his body. His back does not really bother him. His right leg aches all the time. He cannot walk or drive too long because of his leg. When driving to St. Louis, he has to stop half way to get out and walk around. When watching television, he has a recliner but does not recline. He sits by putting weight on his arms and not on his rear end. He leans forward because it does not hurt as much. He shifts to different positions. He cannot do what he wants to do and is depressed due to not working. The employee has put in several applications but no one has hired him. He is willing to try his old job at Blair but doubts that he would be able to perform it. The employee supervised 6 or more employees, was on his feet a lot, did paperwork and was involved in disciplinary issues including firing employees. He has no problems with his hands or arms.

The employee testified that since August 10, 2004, he has been restricted in working on cars. The last time he was at the track in 2007 he just watched the tech support and did not operate the scale. He no longer does heavy work or builds motors. He will occasionally change his own oil and might lift a starter that weighs 8-10 pounds. The employee tinkers on vehicles for family members and is asked for assistance on other people's cars. He cannot lean over cars and cannot torque bolts. He has had to pay someone to change a head gasket. He will help with fixing things around the house. He can lift his youngest grandchild who is 6 or 7 pounds but cannot lift his grandchildren that weigh 35 to 40 pounds. When he goes shopping with his wife, he pushes a car and leans on it. He can walk for a block or a block and a half without problems. He takes over the counter Excedrin for pain and NyQuil to help him sleep due to leg twitches. The employee is not on any pain medications, anti-inflammatories or muscle relaxers. The employee can drive his pickup truck. He can walk stairs with limited flights. He limits his lifting and does not lean over.

The first surgery medical bills were paid by private insurance through his employer. The employee was receiving dunn letters. The health insurance has asked for reimbursement on the first surgery. The second surgery was paid with his wife's insurance company. With regard to the second surgery, he has paperwork from the health insurance asking if it is work related. The employee has filed bankruptcy. The final discharge was scheduled in November of 2007.

Mrs. Wyatt testified that after February 2, 2004 the employee could not do any heavy lifting and watched what he did. She can see the pain that he is having by the way he gets out of his chair, straightens up and walks. When they go shopping, he pushes the cart and leans on the cart. He cannot pick up his older grandchildren and has become more irritable. Sometimes she will hear him in the night get up due to his legs jerking. With regard to the changes since his last surgery in 2005, the employee cannot sit still for very long and shifts around while seated. He gets frustrated but does not complain of pain.

The employee saw Susan Shea, a certified rehabilitation counselor on July 12, 2005. Her deposition was taken on February 27, 2007. She also met with the employee on the day of her deposition. Her report and her deposition were part of the record. It was Ms. Shea's opinion that the employee's prior conditions were hindrances in his ability to work in the open work force. Ms. Shea stated that an individual with one or more back surgeries is something that employers take into consideration in hiring employees. It would have an effect on employability because an employer looking at someone's past medical history might be less inclined to hire someone who had a back injury and it is something that an employer would consider in determining the type of work an individual might do. The fact that someone had four bypasses is something that employers take into consideration in employing someone and in determining the types of work that they may or may not be able to do.

Ms. Shea stated that the employee was 49-years-old when she met with him. At 50-years and older it is considered difficult for an individual to adjust to new types of work. The employee has less than a high school education. He has had three back surgeries in as many years. The employee was limited in his ability to sit, stand and walk. The tolerances for those did not allow his abilities to fit in either sedentary or light work. The employee cannot climb, balance, stoop, kneel, crouch or crawl. The employee has chronic low back pain and the pain is inhibitory to work. The degree of pain expressed by the employee precludes work. He does not have skills which transfer to work at a lesser strength level. The employee has supervisory skills and had been a supervisor for almost all of his time at Blair. Despite performing skilled supervisory work, it would be difficult for him to obtain supervisory work. Ms. Shea

did not necessarily agree that his supervisory skills could be used in a different occupation. She stated that the supervisory skills could be transferable to the same type of work but it would be difficult to supervise individuals if he did not know what their work was. There is no work which is available which allows for the physical limitations required by the employee. Ms. Shea stated that if the employee were to attempt to obtain employment, it was highly doubtful that any typical employer would consider him as an employee. If he did attempt to work at any capacity, it is highly unlikely that he could maintain work on a regular basis. Ms. Shea thought his attempt to work for 30 days as an over the road truck driver was a failed attempt to return to work.

It was her opinion that the employee was disabled from any substantial work as it is performed in the national economy. It was Ms. Shea's opinion that any typical employer would not be expected to employ Mr. Wyatt. His tolerances would be less than sedentary work and his pain level would make it difficult to work. Ms. Shea did not consider the employee permanently and totally disabled prior to the 2004 injury.

The employee saw Dr. Zoffuto on May 10, 2006. Dr. Zoffuto's deposition was taken on August 23, 2006. His report and deposition were part of the evidence. When asked if the employee's pre-existing coronary artery and low back conditions were of such significance that they constituted a hindrance or obstacle to employment or re-employment, Dr. Zoffuto stated that perhaps the back ailments would give an employer pause in hiring an individual to perform work of a medium to a heavy nature. When asked if those pre-existing conditions of the lower back gave him any permanent partial disability prior to February 2, 2004, Dr. Zoffuto stated that they did and that according to the records the employee was judged to have a 65% permanent partial disability of body as a whole. Dr. Zoffuto did not assign any formal disability ratings to the employee's pre-existing conditions but agreed with Dr. Eaton's rating opinion of 65% for the low back condition.

It was Dr. Zoffuto's opinion that the employee sustained an injury at work on February 2, 2004 which caused a reoccurrence of disc disease, and the need for the August of 2004 surgery. It was his opinion that the February 2, 2004 injury was the prevailing factor for the employee's treatment and physical abnormalities. It was Dr. Zoffuto's opinion that the February of 2004 work injury was the prevailing factor which caused the employee's need for the August of 2004 surgery but was not the only factor that required him to have the surgery. The first two surgeries from 2002 at L5-S1 was a substantial factor in contributing to the employee's need to undergo the third procedure in August of 2004.

It was Dr. Zoffuto's opinion that the February of 2004 work injury was the prevailing factor which caused the employee's need to undergo the September of 2005 surgery but it was not the only factor that required him to have the surgery. Dr. Zoffuto was not aware of any medical treatment that the employee received between November 30, 2004 and when he returned to see Dr. Cheung in August of 2005. During this period of time, the employee worked as a truck driver for at least thirty days and started having pain in his legs which ultimately resulted in an additional surgery on September 15, 2005. Dr. Zoffuto stated that the February of 2004 accident was a severe injury to an already impaired back which set off a cascade of events and has to be considered a factor in his progressive disc disease.

When asked how the additional surgery at L5-S1 and the new surgery at L4-5 in September of 2005, was related to the February 2, 2004 injury, Dr. Zoffuto's stated that in the August of 2004 surgery, Dr. Cheung performed a limited microdiscectomy at L5-S1 which was the only level that required surgery. Dr. Zoffuto suspected that the February of 2004 accident initially injured the L4-5 disc and with time and with whatever happened while driving trucks, quite possibly caused the L4-5 disc to become symptomatic and required the additional surgery. Dr. Zoffuto stated that it was quite possible that driving a truck aggravated and worsened his low back condition but since the employee did not describe any event that occurred while driving, he could not really say. However, it may have occurred without him driving a truck.

Dr. Zoffuto did not assign any disability ratings to the February 2, 2004 work injury. It was Dr. Zoffuto's opinion that the August of 2004 surgery caused additional permanent partial disability and that the September 15, 2005 surgery also caused additional permanent partial disability. Dr. Zoffuto stated that it was difficult to say what additional disability each single surgery caused. Dr. Zoffuto did not parse out the extent to which each of the two surgeries contributed to increase the employee's disability. Dr. Zoffuto stated that was unaware of any way that that he could assign a value to each individual surgical procedure.

Dr. Zofutto stated that after both surgeries by Dr. Cheung, the employee was released to return to work at full duty. The only thing Dr. Cheung noted was that the employee had some occasional right leg pain. In his physical exam, Dr. Zoffuto stated that the employee's gait and posture was unremarkable. It was Dr. Zoffuto's opinion that due to the employee's back injuries and limitations; and given the employee's limited level of education and non-labor skills; the employee has minimal functional residual capacity and was limited to less than sedentary work. It was Dr. Zoffuto's opinion that the employee went from having permanent partial disability of the body as a whole to having 100% permanent total disability and that the February 2, 2004 low back injury was the prevailing cause. It was Dr. Zoffuto's opinion that the employee's permanent total disability was based upon a combination of all of his back injuries and not just one back injury.

The employee saw Dr. Lange on August 20, 2007. Dr. Lange's report and his deposition were part of the evidence. One of the deposition exhibits is a letter from the attorney from the employer-insurer which stated as a result of surveillance and photographs on April 3, 2004 the employee's authorized course of medical care was stopped.

The employee stated to Dr. Lange that after his first surgery on August 11, 2004, he was better. While driving a truck in 2005, there was a gradual onset of recurrent symptoms without new injury and his right lower extremity pain returned which resulted in another operative procedure in 2005. In his examination, Dr. Lange noted that the Waddell's testing was totally normal. Dr. Lange stated that with having four back surgeries at the same level, everything fit as far as his clinical presentation and there was nothing remarkable. He expected an absent ankle jerk, a positive straight leg exam and limitations of motion. Dr. Lange stated that the employee had a pretty good result from each of the four surgeries. The employee stated that the serious part of his low back pain had improved following the last surgery. Dr. Lange would not say that the employee was totally disabled for all occupations. Dr. Lange did not think that the employee was permanently and totally disabled as a result of his low back condition. The employee had other health issues that might figure into accumulative concept of disability. Dr. Lange suggested an occupational demand level appropriate for someone with four back surgeries. Dr. Lange's restrictions would be squatting and going down on one knee rather than bending at the waist, putting him at what would be called meeting physical demand level which would be occasional lifting up to fifty pounds with lesser amounts more frequently.

Dr. Lange stated subsequent to L5-S1 discectomies, the chances of a recurrent herniation even without trauma is approximately 10%. After the first discectomy at L5-S1, the employee sustained a recurrent herniation in July of 2002 and was awarded additional permanency. The employee developed a third disc herniation at L5-S1 in February of 2004, which the employee associated with lifting and moving a mold. In 2005, he sustained a fourth herniation which was the third recurrence while working as a truck driver without any specific traumatic event. Dr. Lange stated the third and fourth herniations at L5-S1 were consistent with the natural history of degenerative disc at L5-S1 with discectomies.

Dr. Lange stated that the substantial factor involved in the second and third recurrent herniations in 2004 and 2005 was the initial 2002 disc injury. Dr. Lange stated that recurrent herniations can occur randomly. It was Dr. Lange's opinion that the substantial factor in the employee's current lumbar condition was the initial injury in 2002 as opposed to his activities in 2004 and 2005, and that the surgeries in 2004 and 2005 were not substantially related to the employee's employment at Blair Packaging in 2004 and probably not to his employment for the trucking company in 2005. Any permanency is most substantially related to the 2002 injury.

Dr. Lange stated that in purely hypothetically fashion almost any activity can precipitate a recurrent herniation including working as an over the road truck driver. Recurrent herniations can occur due to degenerative conditions that continue and can occur due to trauma.

It was Dr. Lange's opinion that the substantial factor in regard to the February of 2004 herniation and the need for surgery on August 11, 2004 were related to his employment in the year 2002 with the previous disc herniations and two surgeries at L5-S1.

It was Dr. Lange's understanding that prior to his employment as a truck driver, he had been released from medical care for approximately seven months and did not require the 2005 discectomy until after his employment as an

over the road truck driver. It was his opinion that the need to undergo the discectomy in 2005 was not related to the February 2, 2004 work injury.

Dr. Lange stated that there was no reason to doubt the employee's veracity and the employee was very credible with his history given. Prior to February of 2004, the employee was doing fine and did not indicate any pain at that time. The employee reported a traumatic event in February of 2004. There would be no reason to doubt that the event precipitated symptoms. Dr. Lange felt that there was in fact a traumatic event on February 2, 2004 which occurred at work which by history produced immediate low back pain.

RULINGS OF LAW:

Issue 1. Medical causation

In 2002, the employee had two low back injuries and surgeries at L5-S1. The employee testified that after that he was weaker but was able to do most of what he did before. He had no back pain, but had a little pain in his right leg and lower buttocks which bothered him from time to time. On February 2, 2004 the employee was standing over a table moving a mold when he felt like a knife had been stuck in his back. He had pain in his low back and his right leg. The employee reported to Dr. Ryan after 2002, that he had no problems with back pain until he was picking up the mold, felt a pull in his low back, and had pain.

Under Missouri law, the employee can be held responsible for accidents that aggravate preexisting conditions which were asymptomatic prior to the date of the accident. See Indelicato v. Missouri Baptist Hospital, 690 S.W.2d 183 (Mo. App. 1983). The Court of Appeals in Weinbrauer v. Gray Eagle Distributors, 661 S.W.2d 652,654 (Mo. App. 1983) and Miller v. Wefemeyer, 890 S.W.2d 372 (Mo. App. 1994), held that "a preexisting but non-disabling condition does not bar recovery under the Workers' Compensation Law if a work-related accident causes the condition to escalate to the level of disability." The worsening of a preexisting condition is a change in pathology needed to show a compensable injury. See Windsor v. Lee Johnson Const. Co., 950 S.W. 2d 504, 509 (Mo. App. 1997).

The aggravation of a pre-existing symptomatic condition is also compensable. See Rector v. City of Springfield, 820 S.W.2d 639 (Mo. App. 1991) and Parker v. Mueller Pipeline, 807 S.W. 2d 518 (Mo. App. 1991). In Kelly v. Banta and Stude Construction Company, Inc., 1 S.W.3d 43 (Mo. App. 1999), the Court of Appeals held that the employer-insurer was liable for hip replacements based on a finding that the employee's work activity aggravated the employee's pre-existing osteoarthritis.

Low back condition and treatment through November 30, 2004:

In 2004, the employee was diagnosed with a recurrent L5-S1 herniated disc and had surgery by Dr. Cheung on August 10, 2004. He was released from treatment on November 30, 2004. The employer-insurer is disputing that the employee's recurrent L5-S1 disc herniation is medically causally related to the February 2, 2004 work accident.

The employer-insurer did not dispute medical causation until after the April 3, 2004 surveillance photographs. With regard to the pictures, it was the employee's credible testimony that he did not push race cars and his physical activities were not any more physical than what he was doing at Blair or at physical therapy.

It is important to note that prior to April 3, Dr. Ryan and a physical therapist thought the employee had a disc problem. In March, the physical therapist stated that the employee had significant positive findings on the slump test and straight leg raise test and demonstrated bilateral weakness of the L5 myotome extensor hallucis longus, indicating a possible disc problem. At the end of March, Dr. Ryan noted that the straight leg raise was positive and thought that the employee had possible radiculopathy and wanted to do an MRI. In February and March Dr. Ryan stated that the employee's injury was work related. On April 1, Dr. Ryan continued to note the positive straight leg raise test on the left with decreased strength in the great toe extensors bilaterally; continued to diagnose possible radiculopathy; and requested authorization for an MRI. Her request for an MRI was denied by the insurance company until an orthopedic evaluation was done. Dr. Ryan continued to note a February 2, 2004 date of injury. Additional medical treatment,

including an MRI, was denied by the employer-insurer as a result of the April 3 surveillance photos.

After April 3, the employee continued to work at Blair. The employee got medical treatment on his own on July 20 when he went to the emergency room for low back and right leg pain that he had since February of 2004. On July 30, Dr. Price noted that the employee thought he might have ruptured his back when he pulled something heavy towards him at work. The employee saw Dr. Cheung on August 2. He noted that the employee had a 2002 work injury with two surgeries and was doing fine until February 2004 when he injured himself again with pain in the same location. The pain shifted to the left but came back to the right side. The August 6, 2004 MRI confirmed Dr. Ryan's and the therapist's suspicions in March and April that the employee had a disc problem. Dr. Cheung stated on the right at L5-S1 there was a large herniated disc, and on the left at L5-S1 there was a disc protrusion which explained the bilateral pain along the L5 distribution.

It was Dr. Lange's opinion that the 2004 herniation at L5-S1 was consistent with the natural history of degenerative disc with discectomies. It was Dr. Lange's opinion that the substantial factor in the employee's lumbar condition including the 2004 recurrent disc herniation was the initial injury in 2002 and not his activities in 2004, and that the 2004 surgery was not substantially related to the employment at Blair in 2004. However, Dr. Lange stated that the employee was very credible with his history and reported a traumatic event in February of 2004. Dr. Lange felt that there was a traumatic event on February 2, 2004, which occurred at work, and by history produced immediate low back pain, and that recurrent herniations can occur due to trauma.

It was Dr. Zoffuto's opinion that the employee sustained an injury at work on February 2, 2004 which caused a reoccurrence of disc disease, and the need for the August of 2004 surgery. It was his opinion that the February 2, 2004 injury was the prevailing factor for the employee's treatment and physical abnormalities. It was Dr. Zoffuto's opinion that the February 2004 work injury was the prevailing factor in which caused the employee's need for the August 2004 surgery, but was not the only factor that required him to have the surgery. The first two surgeries from 2002 at L5-S1 were substantial factors in contributing to the employee's need to undergo the third procedure in August of 2004.

Based on a review of the evidence, I find that the opinions of Dr. Zoffuto and Dr. Ryan are more credible than the opinion of Dr. Lange on the issue of medical causation for the treatment and surgery in 2004 by Dr. Cheung at the L5-S1 level.

I find that the February 2, 2004 work accident either caused a new injury and/or aggravated a preexisting condition at L5-S1 which caused the employee's low back to become more symptomatic and disabling. I find that the employee's February 2, 2004 accident was a substantial factor in causing the employee's low back injury, resulting medical condition, disability, and the need for treatment at the L5-S1 level through November 30, 2004. I find that the February 2, 2004 accident caused the need for the surgery by Dr. Cheung at the L5-S1 level. I find that the employee's recurrent herniated disc at L5-S1 and the need for medical treatment through November 30, 2004 is medically causally related to the February 2, 2004 work accident.

Low back condition and treatment after November 30, 2004:

Dr. Cheung performed an L5-S1 right discectomy and a L4-5 bilateral laminectomy and foraminotomy on September 15, 2005, due to bilateral spinal stenosis at L4-5 and recurrent herniated disc at L5-S1 on the right. The employer-insurer is disputing that the injury, treatment and surgery on September 15, 2005 is medically causally related to the February 2, 2004 work accident. The employee has the burden of proving that the need for that surgery is clearly work related and that the February 2, 2004 work accident and injury was a substantial factor in the cause of the resulting medical condition, the treatment, and need for the September 15, 2005 surgery at L4-5 and L5-S1.

In order to prove a medical causal relationship between the accident and the medical conditions, the employee in cases such as this one involving any significant medical complexity must offer competent medical testimony to satisfy his burden of proof. See Brundrige v. Boehringer Ingelheim, 812 S.W.2d 200 (Mo. App. 1991) and Downs v. A.C.F. Industries, Inc., 460 S.W.2d 293 (Mo. App. 1973). Given these established principals, I find that the employee

has failed to meet his burden of proof of the issue of medical causation for the September 15, 2005 surgery by Dr. Cheung for the L4-5 stenosis and L5-S1 recurrent disc herniation.

The employee's burden of proof on the L4-5 level is affected by the fact that in 2002, the employee was diagnosed by an MRI with degenerative disc disease, a posterior annular tear and a central disc bulge at L4-5 which was not treated. An August 6, 2004 MRI was similar and showed a lateral recessed stenosis with a central disc bulge. Dr. Cheung stated that the L4-5 stenosis was not causing the employee problems and did not treat that level during the 2004 surgery. The employee had an approximate 8 month gap in treatment from the end of November of 2004 until the end of July of 2005. During that period of time the employee did not work for the employer, had gone to truck driving school, and then worked for a trucking company. In August of 2005, Dr. Cheung stated that the employee's spinal stenosis at L4-5 appeared to be more significant than before and recommended surgery. The sequence of these events makes it difficult to medically causally connect the treatment to the L4-5 disc including the September 15, 2005 with the employee's February 2, 2004, accident.

With regard to the 2005 recurrent L5-S1 herniated disc, the employee testified that after the September 20, 2004 release to return to work after the L5-S1 surgery, he was getting around pretty well and had limited problems with his right leg and right buttock. He had a little right leg pain that would come and go. In his December of 2004 deposition, the employee thought he could return to work at Blair in the same type capacity. The employee did not go back to work for the employer. Around April of 2005, the employee attended a three week truck driving training course, received his commercial driver's license, had a week of orientation at a trucking company, and then drove a truck over the road for approximately one month. During this period of time, the problems with his right leg increased with more leg pain and numbness. At the end of July of 2005, an MRI showed another recurrent L5-S1 herniated disc. Dr. Cheung noted that the employee was doing well until the end of July when he developed back and lower extremity pain. This eight month gap in time, the fact that the employee no longer was working at Blair Industries, and the fact that the employee was working as a truck driver when he started having additional problems makes it difficult to medically causally connect the treatment for the recurrent L5-S1 herniated disc including the September 15, 2005, surgery with the employee's February 2, 2004, accident.

It was Dr. Zoffuto's opinion that the February of 2004 work injury was the prevailing factor which caused the employee's need for the September of 2005 surgery, but it was not the only factor that required him to have the surgery. Dr. Zoffuto stated that in February 2004 the employee sustained a severe injury to an already impaired back which set off a cascade of events and which has to be considered a factor in his progressive disc disease. Dr. Zoffuto was not aware of any medical treatment that the employee received between November 30, 2004 and August of 2005. During this period of time, the employee worked as a truck driver for at least thirty days and started having pain in his legs which ultimately resulted in an additional surgery. When asked how the surgery at L5-S1 and at L4-5 in September of 2005, was related to the February 4, 2004 injury, Dr. Zoffuto stated that in the August of 2004 surgery, Dr. Cheung performed a limited microdiscectomy at L5-S1 which was the only level that required surgery. Dr. Zoffuto suspected that the February of 2004 accident initially injured the L4-5 disc and with time and with whatever happened while driving trucks, it quite possibly caused the L4-5 disc to become symptomatic and required the additional surgery. Dr. Zoffuto stated that it was quite possible that driving a truck aggravated and worsened his low back condition but since the employee did not describe any event that occurred while driving, he could not really say.

It was Dr. Lange's opinion that the substantial factor in the 2005 recurrent herniation was the employee's initial injury in 2002 and not the activities in 2005. He also opined that the surgery in September 2005 was not substantially related to the employee's employment at Blair in 2004 and probably not to his employment for the trucking company in 2005. Dr. Lange stated that prior to working as a truck driver; the employee had been released from medical care for approximately seven months. In 2005, the employee sustained a recurrent disc herniation while working as a truck driver. He did not require the 2005 discectomy until after his employment as an over the road truck driver. Dr. Lange stated that almost any activity can precipitate a recurrent herniation including working as an over the road truck driver. It was his opinion that the need to

undergo the surgery in 2005 was not related to the February 2, 2004 work injury.

Based on a review of the evidence, I find that the opinion of Dr. Lange is more credible than the opinion of Dr. Zoffuto on the issue of medical causation for the treatment beginning in July of 2005, including the September 15, 2005 surgery at the L4-5 and L5-S1 levels.

I find that the employee has failed to meet his burden of proof that the need for the low back surgery on September 15, 2005 is clearly work related and that the February 2, 2004 work accident was a substantial factor in the cause of the need for the September 15, 2005 surgery and any resulting disability. I find that the employee has failed to meet his burden of proof on the issue of medical causation for the treatment and surgery performed on September 15, 2005. I further find that the February 2, 2004 accident did not cause or aggravate the employee's stenosis at L4-5 or the recurrent L5-S1 herniated disc that Dr. Cheung operated on September 15, 2005. I find that the problem at the L4-5 level and the recurrent L5-S1 herniated disc diagnosed in 2005 was not related to his February 2, 2004 work accident and that the September 15, 2005 surgery was not medically causally related to and was not a result of the February 2, 2004 work accident.

The employee's request for previously incurred medical bills, future medical treatment, temporary total disability and permanent partial disability with regard to the L4-5 level and the recurrent herniated disc in 2005 at L5-S1 level is denied.

Issue 2. Claim for previously incurred medical

The employee is claiming medical bills for treatment through November 30, 2004 which includes Dr. Cheung's August 10, 2004 surgery, and for treatment after November 30, 2004 which includes Dr. Cheung's September 15, 2005 surgery. The employer-insurer is disputing the authorization and the causal relationship of those medical bills. The employer-insurer is not disputing the reasonableness or necessity of those bills.

2005 Treatment and Bills:

The employee is claiming \$34,607.88 for the following medical bills contained in Employee Exhibit R for his treatment after November 30, 2004:

R-1 Dr. Cheung (2005) \$13,414.00
R-7 St. Francis Medical Center (2005) \$21,193.88

Based on my rulings in Issue 1 regarding medical causation for the treatment and surgery in 2005 by Dr. Cheung, I find that those medical bills are not medically causally related to the work accident of February 2, 2004, and are not recoverable by the employee. The claim for these bills is denied.

2004 Treatment and Bills:

The employee is claiming \$27,981.17 for the following medical bills contained in Employee Exhibit R for his treatment through November 30, 2004:

R-1	Dr. Cheung (2004)	\$ 8,429.00
R-2	River City Imaging	\$ 1,400.00
R-3	Healing Arts Pharmacy	\$ 919.00
R-3	Healing Arts Pharmacy	\$ 195.95
R-4	St. Francis Medical Center	\$ 346.00
R-5	Southeast Missouri Hospital	\$ 374.25
R-5	Southeast Missouri Hospital	\$15,419.97
R-6	St. Francis Medical Center	\$ 897.00

With regard to the issue of authorization, Section 287.140 RSMo gives the employer the right to select the treating physician, but also gives the employee the option of selecting his own physician at his own expense. The employer waives the right to select the treating physician by failing or neglecting to provide necessary medical aid. See Banks v. Springfield Park Care Center, 981 S.W.2d 161 (Mo. App. 1998). The employer-insurer provided treatment for the employee under the care of Dr. Ryan from February 2, 2004 through April 1, 2004. I find that the employee's treatment was authorized through April 1, 2004. The employee testified in mid April, he was told by the insurance company that his claim was denied and that his treatment was cut off. His testimony was confirmed in a letter from the employer-insurer's attorney that as a result of surveillance and photographs on April 3, 2004, the employee's authorized course of medical care was stopped. I find that the employer-insurer has waived its right to select the doctor and that the alleged defense of authorization is not valid.

The employer-insurer has alleged that they are not obligated for part or all of the medical bills including the bills that were discharged in bankruptcy under Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818 (Mo. 2003). The Supreme Court held that the aim of the law is to remedy the losses incurred by an employee as a result of a compensable injury. However to award the employee compensation for medical expenses for which he has no liability would result in a windfall rather than compensation. The burden is on the employer-insurer to establish by a preponderance of the evidence that the employee is not legally subject to further liability for those bills. If the employee is not legally liable for those bills, he is not entitled to any windfall recovery.

Exhibit W contains a Discharge of Debtor for the employee dated November 28, 2007 by the United States Bankruptcy Court for the Eastern District of Missouri. It states that the Chapter 7 discharge order eliminates a debtor's legal obligation to pay a debt that is discharged.

Schedule F in Employee Exhibit W is the Creditors Holding Unsecured Non-Priority Claims. With regard to Dr. Cheung's treatment the only bill listed is \$13,414.00. I find that bill which was discharged is for treatment in 2005. The discharge does not affect the remaining bills for Dr. Cheung's treatment in 2004 contained in Employee Exhibit R-1. Employee Exhibit R-2, the bill to River City Imaging was discharged. In Employee Exhibit R-3, \$195.95 of the Healing Arts Pharmacy bill was discharged but the remaining \$919.00 was not. Employee Exhibits R-4 and R-7, the bills to St. Francis Medical Center; and Employee Exhibit R-5 the bills to Southeast Missouri Hospital were discharged. I find that the above bills were discharged, and that the employee is not legally subject to further liability for those bills. Therefore under the Farmer-Cummings case the employer-insurer is not responsible for the payment of those bills to the employee and the employee's claim for those bills is denied.

With regard to Employee Exhibit R-1, the total amount of Dr. Cheung's bill for his 2004 treatment is \$8,429.00. There were several adjustments and one write-off. The employer-insurer is apparently suggesting that they are entitled to a reduction or credit under Farmer-Cummings for the adjustments and write off by the healthcare provider. The employer-insurer has the burden of establishing that the employee is no longer personally liable for any adjustments or write-offs. The employer-insurer offered no testimony or other evidence on this issue. The documents contain no explanation for these adjustments and the write off. There is no evidence to support a finding that the employee is no longer personally liable for the amount of the adjustments or write off. I find that the employer-insurer is not entitled to a reduction or credit for the adjustments or write off.

With regard to the remaining \$919.00 bill to Healing Arts Pharmacy in Employee Exhibit R-3, there is a \$25.00 prescription charge for medicine prescribed by Dr. LaFoe, the employee's cardiologist. I find that that this charge is not causally related to the employee's February 2, 2004 work accident and the employee's claim for this \$25.00 charge is denied. Based on my ruling in Issue 1, I find that the remainder of the medical bills for the treatment in 2004 are medically causally related to the February 2, 2004 work accident.

I therefore find that the employer-insurer is responsible for and is directed to pay the employee the sum of \$ 9,323.00 for the following previously incurred medical bills:

R-1	Dr. Cheung	\$8,429.00
R-3	Healing Arts Pharmacy	\$ 894.00

Issue 3. Claim for additional or future medical

The employee is requesting future medical aid. Under Section 287.140 RSMo, the employee is entitled to medical treatment to cure and relieve him from the effects of the injury. In Sifferman v. Sears, Roebuck and Company, 906 S.W.2d 823 (Mo. App. 1995), the Court held that future medical care must flow from the accident before the employer-insurer is responsible.

The employee has the burden of proof to show that the future medical care flows from the compensable accident. In my ruling in Issue 1, I held that the low back conditions and treatment after November 30, 2004, including the September 15, 2005 surgery at L4-5 and L5-S1 were not medically causally related to the February 2, 2004, work accident. In order for the employee to meet his burden of proof there must be sufficient medical evidence showing that the employee needs additional treatment for the low back at the L5-S1 level that resulted and flowed from the accident. The only medical care that the employee is receiving is over the counter medications. He is not on any prescription medicine. There is no medical opinion that the employee needs future medical treatment. Dr. Cheung did not recommend any additional treatment. Neither Dr. Zofutto nor Dr. Lange stated that the employee needed any further medical treatment.

I find that there is not sufficient medical evidence that the employee needs medical treatment that is the result of the compensable injury or condition, and/or flows from the compensable accident. I find that the employee has failed to meet his burden of proof that he needs future medical treatment that is medically causally related to the conditions caused by the work-related accident. The employee's claim for additional or future medical aid is denied.

Issue 4. Temporary total disability benefits

The employee is claiming temporary disability benefits for two different periods of times. The first is from August 10, 2004 through September 19, 2004. The second is from July 1, 2005 through November 11, 2005. Temporary total disability benefits are intended to cover healing periods and are payable until the employee is able to return to work or until the employee has reached the point where further progress is not expected. Brookman v Henry Transportation, 924 S.W.2d 286 (Mo.App.1996).

The employee started missing work on August 10, 2004, the date of his surgery by Dr. Cheung. He was under active medical treatment and was released to work on September 20, 2004. I find that from August 10, 2004 through September 19, 2004, the employee was not able to return to work, was under active medical treatment, and had not reached the point where further progress was not expected. I find that the employee is entitled to temporary total disability from August 10, 2004 through September 19, 2004. The employer-insurer is ordered to pay the employee 5 6/7 weeks of compensation at \$435.89 per week for a total of \$2,553.07.

Based on a review of the evidence and my ruling on medical causation in Issue 1, I find that on September 20, 2004, the employee's conditions that were caused by the February 2, 2004 work accident had reached the point where further progress was not expected, the employee was at maximum medical improvement, and was released to work. The employee's claim for temporary total disability from July 1, 2005 through November 11, 2005 is denied.

Issue 5. Nature and extent of permanent disability and Issue 6. Liability of the Second Injury Fund for permanent total or permanent partial disability

Permanent Total Disability:

The employee has alleged that he is permanently and totally disabled. Section 287.020.7 RSMo. provides as follows:

The term "total disability" as used in this chapter shall

mean the 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.

The phrase “the inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. Kowalski v M-G Metals and Sales, Inc., 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. Reiner v Treasurer of the State of Missouri, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the “inability to return to any reasonable or normal employment”. Brown v Treasurer of the State of Missouri, 795 S.W.2d 479, 483(Mo.App.1990). The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s physical condition, reasonably expecting the employee to perform the work for which he or she is hired. Reiner at 365. See also Thornton v Haas Bakery, 858 S.W.2d 831, 834 (Mo.App.1993).

Ms. Shea testified that the employee was limited in his ability to sit, stand and walk and cannot climb, balance, stoop, kneel, crouch or crawl. She testified that the employee has chronic low back pain and the level of pain expressed by the employee precluded work. She further testified that the employee does not have skills which transfer to work at a lesser strength level and his tolerances were less than sedentary work. Despite performing skilled supervisory work, Ms. Shea stated it would be difficult for the employee to obtain supervisory work. The employee’s supervisory skills could be transferable to the same type of work but it would be difficult to supervise individuals in a different occupation. Ms. Shea stated that it was highly doubtful that any typical employer would consider Mr. Wyatt as an employee and that if the employee attempted to work at any capacity; it is highly unlikely that he could maintain work on a regular basis. It was her opinion that the employee was disabled from any substantial work as it is performed in the national economy. Ms. Shea’s opinion is substantially affected by the fact that she met with the employee on July 12, 2005, which was after the employee had stopped working as a truck driver due to increased back and leg pain, and prior to his September of 2005 surgery which improved his pain substantially.

Dr. Zoffuto noted that after both surgeries by Dr. Cheung, the employee was released to return to work at full duty. In his physical exam, Dr. Zoffuto stated that the employee’s gait and posture was unremarkable. It was Dr. Zoffuto’s opinion that given his limitations, his limited level of education and non-labor skills; the employee had minimal functional capacity and was limited to less than sedentary work. It was Dr. Zoffuto’s opinion that the employee was permanently and totally disabled.

Dr. Cheung’s records show that after his first surgery, the employee had occasional back pain and leg pain which was not significant and he was released from care. The employee testified that he was getting around pretty well and had limited problems with his right leg and right buttock. Although the employee’s position at Blair had been discontinued, he thought he could have returned to Blair in the same capacity. The employee signed up for unemployment and went through the Career Center. After the second surgery in September 2005, Dr. Cheung noted on November 11, that the employee had pain in the right leg but no other problems, and otherwise was doing fine, and he released him.

The employee had been a supervisor for many years at Blair. He supervised 6 or more employees, did paperwork and was involved in disciplinary issues including firing employees. He has no problems with his hands or arms. He takes over the counter Excedrin for pain and NyQuil to help him sleep, but is not on any prescription pain medications, anti-inflammatories or muscle relaxers. The employee’s back does not bother him, but his right leg aches.

The employee was observed for several hours both prior to and during the hearing. The employee did not move around very much in his seat during this period of time. The employee did not appear to be in pain and did not appear to be uncomfortable.

Dr. Lange stated that there was nothing remarkable about the employee's clinical presentation, and that the employee had a pretty good result from each of the back surgeries. The serious part of the employee's low back pain had improved following the last surgery. Dr. Lange suggested restrictions of squatting and going down on one knee rather than bending at the waist, and to restrict him to occasional lifting up to fifty pounds with lesser amounts more frequently. It was his opinion that employee was not permanently and totally disabled from all occupations.

Based on a review of the evidence, I find that the opinion of Dr. Lange is more credible than the opinions of Ms. Shea and Dr. Zoffuto on the issue of employability.

Based on the medical and vocational evidence, the employee's testimony and his observed behavior at the time of the hearing, I find that the employee has failed to satisfy his burden of proof on permanent total disability. Although the employee's injuries will likely preclude the employee from performing any medium or heavy work, the evidence does not support a finding that the employee is unemployable in the open labor market. I find that the employee is not permanently and totally disabled. The employee's request for an award of permanent total disability against the Employer-Insurer and the Second Injury Fund is denied.

My ruling on permanent total disability would be the same regardless of whether just the treatment and low back condition from February 2, 2004 until November 30, 2004 which includes Dr. Cheung's August of 2004 surgery is considered or whether the treatment and low back condition from February 2, 2004 through the last treatment record in 2006 which includes both Dr. Cheung's August of 2004 and September of 2005 surgeries are considered.

Permanent Partial Disability:

Employer-Insurer:

A claimant must show that a disability resulted and the extent of such disability. Proof of permanent disability requires reasonable certainty. The claimant must produce evidence from which it reasonably may be found that such injury resulted from the causes for which the employer would be liable. See Griggs v. A. B. Chance, 503 S.W.2d 697 (Mo App. 1973).

In Plaster v. Dayco, 760 S.W.2d 911 (Mo. App. 1988), the employee had preexisting disability to her back and reinjured her back at work. The employee had a rating of about 60% permanent partial disability for the overall back condition. There was no expert evidence as to what percentage of the 60% preceded the workers' compensation injury. The Court held that it was the employee's burden to offer sufficient expert testimony to prove the extent of the preexisting disability in order to determine what percentage of permanent partial disability is attributable to the job related injury. Failure to do so bars the employee from recovering permanent partial disability benefits.

In Bersett v. National Supermarkets, Inc., 808 S.W.2d 34 (Mo. App. 1991), the employee had two injuries to his ankle. The only claim filed was on the first injury. The Court held that when there are two events, one compensable and one not compensable, which contribute to the disability, it is the claimants burden to prove the nature and extent of disability attributed to the job related injury. The employee failed to present any evidence to exclude a finding that the non-compensable event did not cause some or all of the employee's disability. There was no evidence to support a finding of a separate percentage of disability.

In Goleman v. MCI Transporters, 844 S.W.2d 463 (Mo. App. 1992), the Court held that it was the employee's burden to prove the nature and extent of the disability attributed to the compensable injuries. The employee had two work related injuries to his low back. The employee filed a claim on the second low back injury. A doctor rated the employee's permanent partial disability at 50%, but did not differentiate between the two work injuries. The Court held that the employee was not entitled to recover for the second injury where part or all of the disability was the result of the first accident. The Court held that it was the employee's burden to prove the nature and extent of disability attributed to the compensable injury even though both injuries were work related and sustained while employed by the same company where separate claims were pending for each injury.

Based on my ruling on medical causation, the employee would be entitled to the disability attributable to the August 10, 2004 surgery for the recurrent herniated disc at L5-S1. The employee is not entitled to the disability attributable to the September 15, 2005 surgery to the L4-5 disc and the L5-S1 recurrent herniated disc. As set forth in the above cases, the employee has the burden to prove the nature and extent of disability attributable to the compensable surgery.

Dr. Cheung and Dr. Lange did not rate the employee's permanent partial disability. Dr. Zoffuto did not rate the employee's permanent disability for the February 2, 2004 accident. It was Dr. Zoffuto's opinion that the August 10, 2004 surgery caused permanent partial disability, and that the September 15, 2005 surgery caused additional permanent partial disability but he did not assign any disability ratings to the surgeries. Dr. Zoffuto stated that it was difficult to say what additional disability each single surgery caused and he did not parse out the extent each of the two surgeries contributed to increase the employee's disability. Dr. Zoffuto was unaware of any way that that he could assign a value to each individual surgical procedure.

Since Dr. Zoffuto did not separate what disability the employee had from the surgery that was causally related to the February 2, 2004 accident and injury from the surgery that was not compensable, I find that based on the above cited cases, Dr. Zoffuto's medical opinion is not sufficient for the employee to meet his burden of proof on his claim for permanent partial disability. To award permanent partial disability from the August 10, 2004 surgery to the L5-S1 disc level, when there were two preexisting injuries and surgeries at the same disc level and a subsequent non-compensable surgery in September of 2005 at the same disc level and at an another level would be based on speculation and conjecture.

Based on a review of all the evidence and case law, I find that the employee has failed to meet his burden of proof as to what percentage of permanent partial disability he sustained as a result of the February 2, 2004 accident. The employee is therefore not awarded any permanent partial disability benefits. His Claim for permanent partial disability is denied.

Second Injury Fund:

In order for the Second Injury Fund to be liable for permanent partial disability, the primary injury must meet a statutory minimum permanent partial disability of 50 weeks of compensation. Since there was no permanent partial disability awarded, the employee's Second Injury Fund claim is denied.

ATTORNEY'S FEE:

Joe Rice, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Date: _____

Made by:

Lawrence C. Kasten
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Jeff Buker
Division Director
Division of Workers' Compensation