COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS
BEFORE EDWARD D. HAYS, ALJ
CLAIM NO. 08-77367

MATTHEW ARCHER **PLAINTIFF**

VS.

BACK CONSTRUCTION COMPANY, INC. **DEFENDANT**

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OPINION, AWARD AND ORDER

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INTRODUCTION

Plaintiff, Matthew Archer, seeks income benefits and payment of medical expenses as the result of work-related injuries to his back sustained on September 4, 2008 during employment by Back Construction Company, Inc. The issues for resolution are whether there has been an injury as defined by the Act; whether it is a temporary injury versus permanent injury; preexisting active; work-relatedness/causation; extent and duration including multipliers; and future medical expenses.

STIPULATIONS

A Benefit Review Conference was conducted on December 2, 2009 at which the parties stipulated the following facts:

- An employment relationship existed between the Plaintiff and Defendant-Employer at all times herein relevant and the parties operated under the provisions of the Act.
- Plaintiff sustained alleged work-related injuries on September 4, 2008.
- Defendant-employer had due and timely notice of Plaintiff's injuries.

- Temporary total disability benefits were paid at the rate of $390.73 per week from August 5, 2008 through April 13, 2009, for a total of $12,335.91.
- Defendant-employer has paid medical expenses in the amount of $36,630.34.
- Plaintiff's average weekly wage was $586.15.
- Plaintiff's date of birth is October 4, 1971.
- Plaintiff completed 12th grade in school, has an associate degree and has vocational or specialized training in carpentry.

SUMMARY OF LAY EVIDENCE

Plaintiff, Matthew J. Archer, testified by deposition on August 25, 2009 and at the hearing on December 17, 2009. Mr. Archer is 39 years old. He graduated from high school in 1989 and was in the US Navy from 1991 to 1993. Mr. Archer attended school at Blue Grass Community College from 2003 to 2007 and obtained an associate degree in carpentry. Mr. Archer's work history includes work as a carpenter, work in contractor sales, lumber and building material sales for 84 Lumber, work as a working owner of a coffee shop, work as a maintenance supervisor at Kohl's Department Store, and work as a carpenter with Lincoln Patch Log Homes.

Mr. Archer gave a prior history of a back injury while working with a heavy mirror at Kohl's in 2003. He indicated that he also had pain down into his legs. Mr. Archer stated that Dr. Paul Brooks gave him a series of Cortisone injections and eventually Dr. Vascello performed a rhizotomy. Mr. Archer thought he was off work for about four months. Mr. Archer stated that his symptoms resolved but he ended up having another rhizotomy done.

Mr. Archer testified that on September 4, 2008 he was tearing off a second level deck where they were going to build a room addition. He stated that he was walking across a beam, pulled his foot back to keep from stepping on a nail, lost his balance and fell from the beam onto the ground. Mr. Archer stated that he landed funny on his feet and then fell to the ground, landing on his back. He stated that he told everyone he was fine and that he had just jarred himself. Mr. Archer stated that he was getting something out of the truck within five or ten minutes later and while pulling the cab lid down pain shot through him, putting him on the ground. He stated the pain was from about mid-chest and went through his arms, through his low back and down through his legs. Mr. Archer stated that his supervisor, John Beyers, told him to stop and go to the doctor right then. Mr. Archer stated that he was referred to Saint Joe East where he thought he had x-rays and an MRI. He stated that he was given some pain medicine and an appointment to see Dr. Lockstadt the following day. Mr. Archer stated that Dr. Lockstadt referred him to physical therapy and sent him to Blue Grass Orthopedics for epidurals. Mr. Archer indicated neither the physical therapy nor epidurals helped but were more of a detriment. He stated that Dr. Lockstadt referred him to Dr. Paul Clark for a series of three facet joint injections, a sacroiliac joint injection and for two rhizotomies. Mr. Archer stated the procedures helped for maybe a week to ten days, but then his symptoms would return.

Mr. Archer stated that Dr. Paul Clark at the Bluegrass Pain Treatment Center was prescribing Tegretol and Opana for him; and Dr. Cindy McAllister at Beaumont Behavioral Health was prescribing Tegretol and Seroquel for him. Mr. Archer indicated he was originally on a morphine sulfate, but it was too much for him because of the

narcotic part of it. He stated that he was switched to Opana and it seemed to work better, as far as the side effects, sustained pain treatment and pain relief. Mr. Archer indicated he was on Percocet more or less for break through pain. Mr. Archer indicated he was sent to Dr. Thornberry for a psychological consult as part of his pain management.

Mr. Archer testified he still has pain radiating from his low back and down through his buttocks area on the back of his thigh and then around the side of his calf and down into the tops of his feet. He stated the pain is in both of his legs and he has numbness in his toes.

At the hearing Mr. Archer indicated he last worked on September 4, 2008. Mr. Archer testified the shooting pain he had in the middle of his chest right after he fell went away after a few weeks. He stated that nothing has changed as far as his low back was concerned. He stated that Dr. Lockstadt sent him to the Pain Treatment Center to get epidurals and rhizotomies. Mr. Archer indicated his back did not get any better with the rhizotomy, cortisone injections, epidural injections or medication. Mr. Archer indicated that Dr. Lockstadt referred him to Dr. Clark at the Pain Treatment Center and Dr. Clark prescribed Percocet and Opana for him. He stated the Percocet made him sick at his stomach so Dr. Clark was prescribing Phenergan for him to take with the Percocet.

SUMMARY OF MEDICAL EVIDENCE

Luis A. Vascello, M.D. first evaluated Mr. Archer for a complaint of low back pain on September 21, 2005. He obtained a history of Mr. Archer experiencing immediate back pain while moving heaving objects with his arms above head level. Dr.

Vascello noted that Mr. Archer treated with Dr. Paul Brooks and Dr. Douglas and had undergone S1 injections which provided pain relief for a few weeks. Dr. Vascello noted that Mr. Archer described the pain as an aching sensation and reported sharp pain at the level of the S1 joints with radiation of the pain onto both legs, stopping at the knee level. Dr. Vascello noted that Mr. Archer was taking Flexeril, Tylox and Indomethacin. He examined Mr. Archer and reviewed an MRI of his lumbar spine dated August 26, 2005. He found the MRI to be normal. Dr. Vascello diagnosed mechanical low back pain, lumbar facet arthropathy/pain, myofascial pain affecting the right multifidus and quadratus lumborum and a history of previous sacroiliac joint arthropathy/pain, resolved. Dr. Vascello recommended diagnostic lumbar medial branch blocks in order to determine the origin of Mr. Archer's pain and plan his treatment accordingly. On September 28, 2005 Dr. Vascello noted that Mr. Archer underwent diagnostic medial branch blocks from L1 to the sacral ala and obtained complete pain relief. Dr. Vascello then performed a right lumbar facet radiofrequency and noted that Mr. Archer's pain level was again 0/10.

On October 25, 2005 Dr. Vascello noted that Mr. Archer continued to experience bilateral lower extremity pain with some subjective numbness in both feet. He noted that Mr. Archer was on Flexeril and Tylox for pain and Depakote and Neurontin for depression. Dr. Vascello diagnosed chronic low back pain; lumbar facet arthropathy, resolved after lumbar facet radiofrequency; bilateral piriformis muscle syndrome, inducing significant sciatic-mediated lower extremity pain, bilaterally; right psoas bursitis; history of S1 joint arthropathies, resolved; and myofascial pain component as evidenced by previous multifidus and quadratus lumborum spasm, improved after

lumbar radiofrequency. Dr. Vascello recommended a week or two of conservative management. He also discussed the need for orthotics due to the fact Mr. Archer presented with a leg-length discrepancy. On November 2, 2005 Dr. Vascello performed a right greater trochanteric bursa injection.

On June 26, 2008 Dr. Vascello treated Mr. Archer for severe lower back pain. He noted that Mr. Archer underwent lumbar medial branch rhizotomies on his right side which provided excellent pain relief until recently. He noted that Mr. Archer had left-sided pain which was worse than his right-sided pain. He noted that Mr. Archer began experiencing left-sided pain a year earlier. Dr. Vascello noted that Mr. Archer suffered an Achilles tendon injury in March 2008 which apparently exacerbated his back pain even more. Dr. Vascello noted that Mr. Archer saw Dr. Paul Brooks, who referred him back for lumbar medial branch rhizotomies. Dr. Vascello noted that Mr. Archer described his pain as a spasm, an aching sensation in his lower back with radiation into the outer most aspect of his thighs up to the knee level and numbness on the medial aspect of his great toe. Dr. Vascello noted that Mr. Archer had failed conservative measures including physical therapy, chiropractic therapy, exercising and medication. He noted that Mr. Archer had a significant intolerance to most oral pain medications and could not tolerate Lortab or Percocet. Dr. Vascello noted that Mr. Archer had obtained excellent pain relief with right lumbar medial branch rhizotomies that lasted for more than two years. Dr. Vascello diagnosed mechanical lower back pain, lumbar facet arthropathy and left sacroiliac joint dysfunction and recommended bilateral lumbar medial branch rhizotomies. He performed the diagnostic bilateral lumbar medial branch blocks at L1, L2, L3, L4 and L5 on July 11, 2008. He repeated the left lumbar medial

branch rhizotomies at L1, L2, L3, L4 and L5 on August 5, 2008. On August 19, 2008 Dr. Vascello noted that Mr. Archer reported 90% pain relief on his left side after the left-sided rhizotomies. He then repeated the right lumbar medial branch rhizotomies at L1, L2, L3, L4 and L5.

Paul V. Brooks, M.D. with Commonwealth Rehabilitation & Sports Medicine saw Mr. Archer on May 19, 2008 and noted that he had seen him approximately three to four years earlier for difficulties involving bilateral great toe numbness, low back pain, leg pain and buttock pain. Dr. Brooks noted that at that point Mr. Archer had significant L5-S1 and bilateral S1 joint dysfunction and was sent for lumbar rhizotomies that worked very well. Dr. Brooks noted that Mr. Archer had just got out of a right foot boot for an Achilles tendon injury and thought the boot had re-injured his back. Dr. Brooks noted that Mr. Archer had increasing difficulties with his toes going numb, tightness in his back, and he was hurting in his buttocks and down into the right greater than left leg. Dr. Brooks noted that the numbness in Mr. Archer's right great toe had been constant over the last year and he was having intermittent numbness in his left great toe. Dr. Brooks noted that this restarted with the injury to his Achilles. He noted that Mr. Archer had aching, sharp, shooting pain that was worse with work, sitting and standing. He noted that Mr. Archer had been tried on Ibuprofen, Lortab, Percocet, Flexeril and Neurontin, had been to physical therapy, was on a home exercise program, uses a TENS unit, had chiropractic manipulation, had a previous rhizotomy with Dr. Vascello and had Cortisone injections. Dr. Brooks examined Mr. Archer and diagnosed L5-S1 facet dysfunction with referred pain. He referred Mr. Archer to Dr. Vascello for a

possible rhizotomy. Dr. Brooks prescribed Tylox and Phenergan for Mr. Archer and requested an MRI of his lumbar spine.

The MRI report of Dr. James Simpson at Nicholasville Road MRI dated July 10, 2008 was filed with Dr. Brooks' records. Dr. Simpson reviewed the MRI of Mr. Archer's lumbar spine and noted no acute abnormalities, dominant dural sac defect, spinal stenosis or lateralizing impingement.

On August 5, 2008 Dr. Brooks noted that Mr. Archer had a terrible time with the rhizotomy. On September 25, 2008 Mr. Archer was referred to Bluegrass Ortho for an epidural.

Harry Lockstadt, Jr., M.D. with Bluegrass Orthopaedic & Hand Care treated Mr. Archer for back pain on September 10, 2008. He obtained a history of Mr. Archer having immediate pain in the mid-thoracic spine with pain that appeared to go through his chest and some lower back pain when he fell from a beam, landed on his feet and rolled over onto his side. Dr. Lockstadt noted that Mr. Archer had a long history of variable lower back pain in the past and had had a rhizotomy for his lower back. Dr. Lockstadt noted that Mr. Archer was hurting from the mid-thoracic level to the lower lumbar spine which radiated into his anterior thighs and legs and had thoracic pain which radiated anteriorly into his chest. Dr. Lockstadt examined Mr. Archer and reviewed x-rays of his back. He noted the x-rays demonstrated some loss of disc space and degeneration at T8-9 and T11-12. He thought there might be thinning and loss of vertebral body height in one of the mid-thoracic levels around the T8-9 level. Dr. Lockstadt noted a possible subtle instability pattern at L4-5 and L5-S1. He requested MRI scans of Mr. Archer's lumbar and thoracic spine. Dr. Lockstadt reviewed the MRI

scan of Mr. Archer's lower back and thoracic spine on September 24, 2008. He saw some minor loss of disc space at L5-S1 and early retrolisthesis of L5 on S1 but no evidence of nerve root compression. On review of the thoracic MRI, Dr. Lockstadt noted some minor degeneration of the disc. Dr. Lockstadt found no evidence of any nerve root compression. He diagnosed thoracic spine injury without nerve root compression and low back injury with evidence of right-sided sciatica involving the right S1 nerve root and the right L5 nerve root. Dr. Lockstadt opined there was clearly evidence of irritation of the S1 and L5 nerve root. He suspected Mr. Archer mashed the two nerve roots where they exit the spinal column when he fell and opined this was causing Mr. Archer to have sciatic pain. Dr. Lockstadt recommended a series of three epidural injections. On September 29, 2008 Dr. Lockstadt noted that Mr. Archer had his first epidural injection and his upper back and low back pain had improved. He expressed concern that Mr. Archer had almost complete numbness in the right and left L5 dermatome in his foot with associated weakness. Dr. Lockstadt opined that Mr. Archer had an axial load that was transmitted through the spine compressing the L4-5 and L5-S1 disc levels when he fell off of the beam landing on his feet, then falling onto his side. He opined this mashed the nerve roots producing the symptoms Mr. Archer described. Dr. Lockstadt requested an EMG nerve conduction study to confirm Mr. Archer had some abnormality in the nerve roots.

On October 21, 2008 Mark E. Brooks, a Board Certified Electroneuromyographer at Bluegrass Orthopedics & Hand Care performed an EMG/NCS study of Mr. Archer's lower extremities. Mr. Brooks noted axonal pathology affecting the right mid to lower lumbosacral nerve root levels with no evidence of electromyographic abnormalities in

any right lower extremity myotome. He noted that Mr. Archer had a history of facet rhizotomy in the lumbar region and the abnormal electromyographic findings in the right lumbosacral paraspinals were typical of those seen in patients that had undergone this procedure. He saw no evidence of left lumbosacral nerve root pathology, focal mononeuropathy in the bilateral lower extremities, proximal nerve or plexus pathology or myopathy and no evidence of motor neuron pathology or polyneuropathy.

On October 23, 2008 Dr. Lockstadt noted that Mr. Archer was not willing to have rhizotomies done. He reviewed Mr. Archer's MRI and noted no herniated discs or pinched nerves. Dr. Lockstadt noted that Mr. Archer has arthritis in the facet joint at L3-4, L4-5 and L5-S1 with facet joint effusions in those joints and lumbar spondylosis with arthritis in the facet joints. Dr. Lockstadt recommended a series of facet blocks at L3-4, L4-5 and L5-S1.

On October 29, 2008 Dr. Lockstadt noted that Mr. Archer had undergone a facet rhizotomy in September 2005, trochanteric injection on the right in November 2005, repeat facet from L1 all the way down to L5 rhizotimies on the right in August of 2008 and from L1 all the way down to L5 on the left in August 2008. He was not optimistic that a repeat rhizotomy would be of much benefit to Mr. Archer.

On January 15, 2009 Dr. Lockstadt noted that Mr. Archer had been suffering from lower back pain since his fall in September 2008. He noted that Mr. Archer had lower back pain radiating into the back of his thighs, down to the knee, but not to the feet. He noted that Mr. Archer had undergone facet blocks and also had rhizotomies. He reviewed Mr. Archer's x-rays and MRI studies and noted widening of the facet joints at L4-5, L3-4 and then lesser so at L5-S1. He opined the right and left S1 joints looked

relatively normal. Dr. Lockstadt diagnosed spondylosis at L3-4, L4-5 and lesser so at L5-S1 and right and left sacroiliac joint pain. He was convinced Mr. Archer's pain was coming from the arthritic L3-4 and L4-5 joints and the right and left S1 joint. Dr. Lockstadt opined Mr. Archer's only options were to continue pain management and flexion exercises. He referred Mr. Archer to Dr. Clark at the Pain Management Center for right and left S1 joint injections. On February 16, 2009 Dr. Lockstadt noted that Mr. Archer had dramatic improvement in pain and function after the left-sided S1 joint injection, more than any other injections he has had. He opined the only reasonable treatment was a left-sided L3-4 facet rhizotomy and a rhizotomy of the left S1 joint and recommended rhizotomies on both the left and right side as his pain tended to be from both sides.

On June 5, 2009 Dr. Lockstadt prepared a Medical Report, Form 107. He diagnosed lumbar spine mechanical facet joint pain and indicated Mr. Archer's injury was within medical probability the cause of his complaints. Using the AMA Guides Dr. Lockstadt assessed 8% whole body impairment based on the injury to Mr. Archer's lumbar spine. He apportioned 5% of the impairment due to Mr. Archer's prior active condition. Dr. Lockstadt indicated Mr. Archer does not retain the physical capacity to return to the type of work performed at the time of his injury and would have restrictions in the light physical demand level.

Dr. Lockstadt testified by deposition on October 8, 2009. He stated that Mr. Archer had a very significant history of back pain prior to September 4, 2004. Dr. Lockstadt stated there was no question Mr. Archer fell nine feet on September 4, 2008, hurt his back and made his preexisting back pain worse. He opined that with the

recommended treatment, medication and injections they would be able to get some of Mr. Archer's pain back pretty close to his pre-fall status. Dr. Lockstadt indicated Mr. Archer was probably doing everything he was prior to September 4, 2008 but with more pain. He indicated Mr. Archer was close to his pre-fall status. Dr. Lockstadt indicated the fall Mr. Archer suffered on September 4, 2008 impacted his functional capacity but he was not sure of the scope of that impact. He stated the fall increased Mr. Archer's pain at T9, T10, T11, T12 and at L4, L5 and S1 and he definitely has pathology in those areas with abnormality at the discs and joints and has abnormal nerve conduction studies. He indicated the negative impact on Mr. Archer would endure for the foreseeable future.

Dr. Lockstadt stated that he looked at the record of Dr. Brooks dated August 5, 2008 and on that date Dr. Brooks talked about doing a right-sided facet rhizotomy from L1 to L5. Dr. Lockstadt stated this was a very aggressive procedure for pain so he knew Mr. Archer had significant pain.

Dr. Lockstadt stated that according to his notes Mr. Archer has been able to return to work, functioning at the clerical level, and was dealing with his pain. He indicated Mr. Archer would probably not need further medical treatment at this point, but if his symptoms worsen he would work him up further. Dr. Lockstadt indicated Mr. Archer continues to suffer substantial negative impact in his functional capabilities, making his restrictions applicable. Dr. Lockstadt indicated Mr. Archer has a permanent harmful change as demonstrated by objective medical findings. He indicated the objective findings were widening of the facet joint with wear on the facet joint at L2-3 based on the MRI study (he indicated this was why Mr. Archer gets a good response

with his rhizotomies) and widening of the facet joints at L3-4 on the right and left. Dr. Lockstadt stated that Mr. Archer's discs looked pretty good and there were no ruptured discs or pinched nerves. He stated that Mr. Archer has instability from where the small joints of his back were worn down.

In his second report and in his deposition, Dr. Lockstadt indicated Mr. Archer had a temporary exacerbation as far as permanent impairment was concerned due to the September 4, 2008 incident. He stated that Mr. Archer already had a permanent impairment prior to the incident which would have been between five and eight percent. He stated that with this accident, Mr. Archer's impairment really does not change based on the AMA Guidelines. He stated that his pain and function may be worse, but according to the Guidelines, he was not any worse. Dr. Lockstadt said that Mr. Archer still has eight percent impairment rating and he understood Mr. Archer had an eight percent rating prior to his fall. Dr. Lockstadt indicated that he put Mr. Archer at maximum medical improvement when he last saw him on April 13, 2009 and at that time his functional capacity was at the light, supervisory level.

Ballard Wright, M.D. (filed as records of Dr. Thomas Thornberry) – Mr. Archer was treated for complaints of lower back, lower extremity and bilateral foot pain by a physician assistant in Dr. Wright's office on July 31, 2009. According to the record Mr. Archer was doing very well until he pulled started a mower the day before. He complained of being stiff after he pull started the mower and also complained of having a short temper and having trouble sleeping, which thought was due to taking Avenza. The Avenza was discontinued and he was started on Opana. His prescription for Percocet was also increased.

William J. Lester, M.D. performed an independent medical evaluation on November 2, 2009. He obtained a history of Mr. Archer falling from a beam and jarring his back when he landed on his feet on September 4, 2008. Dr. Lester noted that Mr. Archer had a positive history for fractures in the past and had knee surgery in 1988. Dr. Lester examined Mr. Archer and reviewed the medical records of Dr. Wright, Dr. Lockstadt, Dr. Clark, Dr. Evans, Dr. Hawes, Dr. Stanley, Dr. Brooks, Dr. Vascello, Dr. Dome, Dr. Marlowe, Physician Assistant Barbara Jarboe, Physician Assistant DeShana Collett and Physician Assistant Barry Williams. Dr. Lester diagnosed lumbar strain. He noted that Mr. Archer already had chronic back pain related to a November 10, 2003 injury with active facet arthropathy at the time of his injury on September 4, 2008. Dr. Lester noted that Mr. Archer received rhizotomies in July 2008 and August 2008 and was being treated for his chronic back condition. He opined Mr. Archer's fall was a temporary exacerbation of his previous active condition. Dr. Lester opined Mr. Archer's complaints of low back pain were not due to the work incident on September 4, 2008. He noted that Mr. Archer's current condition was exactly like his previous complaint from the injury on November 10, 2003. Dr. Lester indicated the problem with the rhizotomies was the nerve regrows and the symptoms are repeated. Dr. Lester noted that Mr. Archer already had an active impairment prior to the incident of September 4, 2008. He noted that Mr. Archer stated that on June 20, 2005 he could not do any heavy construction or heavy lifting anymore. Dr. Lester noted that Mr. Archer may need treatment related to his November 10, 2003 injury but not related to his September 4, 2008 injury. He noted the MRI after Mr. Archer's injury on September 4, 2008 showed no changes from his previous MRI and facet arthropathy. He opined Mr. Archer would

have no restrictions from the September 4, 2008 injury but had restrictions related to his November 10, 2003 injury. He opined Mr. Archer needs a functional capacity evaluation.

DISCUSSION OF THE CLAIM

The evidence in this case presents a difficult decision which must be made by the Administrative Law Judge. From a monetary approach, this is a relatively small claim. The permanent impairment suffered by Plaintiff on September 4, 2008, if any, is not more than 3%. The Defendant maintains that 0% permanent impairment resulted from the September 4, 2008 incident and that all of Mr. Archer's permanent impairment pre-existed the work incident. The Defendant claims that although there was a temporary exacerbation of his pre-existing condition, he has now returned to baseline – a position where he was prior to the injury. Even the Plaintiff acknowledges he was having similar pain prior to the accident on September 4, 2008 and that during the month prior to the accident he had undergone two (2) rhizotomies.

The primary medical evidence in this case comes from Dr. Harry Lockstadt, treating orthopedic surgeon, and from Dr. William J. Lester, who performed an independent medical evaluation on behalf of the Defendant/Employer. Dr. Lester maintains that all of Mr. Archer's impairment pre-existed September 4, 2008 and that Mr. Archer had an active impairment prior to the work incident. Dr. Lester says that Mr. Archer does not need any medical treatment at present that is related to the September 4, 2008 injury. Dr. Lester would attribute any necessary medical treatment at this time to the old injury of November 10, 2003. Dr. Lester says that the MRI after the September 4, 2008 injury showed no changes from a previous MRI. He would place no

restrictions on the claimant as a result of the September 4, 2008 injury. He said that all restrictions are attributable to the 2003 injury.

It is undisputed that Matthew Archer fell at least 9 feet from a beam, landing on his feet and then collapsing or falling onto his side or back. Dr. Lockstadt described how an axial load was transmitted through the spine compressing the L4-5 and L5-S1 disc levels when Mr. Archer fell from the beam landing on his feet and then falling onto his side. Dr. Lockstadt was of the opinion that the force of the fall mashed the nerve roots and produced the symptoms described by the claimant.

A thorough review of Dr. Lockstadt's medical records, including his 107 medical report dated June 10, 2009; his supplemental report dated September 24, 2009; and his testimony given during his deposition on October 8, 2009, together with the attached exhibits of his progress notes, does not make the job any easier for the ALJ, but merely complicates the task at hand. Dr. Lockstadt's testimony during his deposition is "all over the board", at times supporting the proposition as argued by Defendant and at other times supporting a finding of a 3% permanent impairment resulting from the work incident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon a review of this file, and giving consideration to the entire record, including the summary of the evidence as set forth above and considering the discussion of the case as set forth above, the ALJ does hereby make the following findings of fact and conclusions of law:

1. The Stipulations entered into between the parties at the Benefit Review Conference on December 2, 2009, and as set forth above on pages 1 and 2 are adopted and incorporated herein by reference as findings of fact.

2. The education history and the work history of the Plaintiff, together with Plaintiff's description of his 2003 injury and the subject injury of September 4, 2008, as summarized above on pages 2 – 4 is adopted and incorporated herein as findings of fact.

3. (A). The difficult issue in this claim is whether or not the Plaintiff, Matthew Archer, suffers any greater permanent impairment under the AMA Guides, 5th Edition, than he did immediately prior to his work related injury on September 4, 2008. It is acknowledged by everyone that the Plaintiff had a pre-existing active condition which was requiring medical treatment. Dr. Lockstadt's initial report dated June 5, 2009 assesses a permanent impairment of 8% to the body as a whole under the AMA Guides, 5th Edition. Dr. Lockstadt found 5% of the impairment attributable to the prior active lumbar facet degeneration. Thus, 3% of the permanent impairment would be attributable to the work related injury. Dr. Lockstadt goes on to opine that claimant does not retain the physical capacity to return to the type of work that he was doing prior to the injury. He also places Plaintiff on physical limitations and restrictions, including restrictions against lifting, bending, walking, standing, sitting, climbing, reaching, grasping, and operating machinery. The claimant's testimony is in step with Dr. Lockstadt's initial opinion with respect to his capacity to do his former work. At the hearing conducted on December 17, 2009, the Plaintiff testified that his work required him to sometimes operate a jackhammer, carry building materials, including lumber,

bags of concrete, and boxes of tile, sometimes weighing up to about 80 pounds. In fact, he approximated the jackhammer at 120 to 150 pounds. Mr. Archer testified that prior to the work injury, he had undergone at least three prior rhizotomies on July 11, 2008, August 5, 2008 and August 19, 2008, but that after each procedure, he was able to go back to work the following day, or, if done on a Friday, he could return to work at the beginning of the following week. After September 4, 2008, the date of the injury in question, Mr. Archer testified that "everything" had changed after the work injury of September 4, 2008. He complained that he is not even close to being able to do the types of heavy duties that he was performing prior to the injury. The Plaintiff's testimony on this subject does constitute substantive evidence which can be considered by the ALJ. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

(B). To this point, the evidence favors the Plaintiff and supports his contention that the amount of his permanent impairment has increased as a result of the injury in question.

(C). On or about September 25, 2009, the Defendant/Employer filed a medical report from Dr. Lockstadt which consisted of eight questions, which were followed by "yes or no" choices for six of the questions. For example, the report indicates that Dr. Lockstadt did have an opportunity to review the claimant's medical records from Dr. Paul Brooks and Dr. Luis Vascello at the time he completed the Form 107 dated June 5, 2009 and he also acknowledged he has now had the opportunity to review those medical records. The Defendant in its brief has erroneously argued that Dr. Lockstadt did not have the medical records of Dr. Paul Brooks and Dr. Luis Vascello at the time Dr. Lockstadt issued his 107 report. When one looks closely at the questions 1 and 2 of

the supplemental report (Exhibit 2), one finds that Dr. Lockstadt answered "yes" to both questions, first that he had been afforded the opportunity to review those medical records and, secondly, that he had (again) the opportunity to review the records. In other words, he stated that he had the records available both before the filing of his 107 report and afterwards. The report next asks Dr. Lockstadt "do you still believe that Mr. Archer experienced a permanent impairment as a result of the September 4, 2008 work incident?". The doctor is provided with a "yes or no" choice. The "no" blank has been checked and a handwritten notation "see dictated note Sept, 24/09" is inserted at that point. The report further indicates that he does not still believe Mr. Archer requires any permanent restrictions as a result of the work incident and he does not believe that Mr. Archer requires any additional medical treatment as a result of the work incident.

(D). Dr. Lockstadt's deposition was taken by the Plaintiff on October 8, 2009. Dr. Lockstadt acknowledged he was aware of the fact that Mr. Archer was engaged in construction work prior to his injury. Dr. Lockstadt testified that he had placed restrictions on the claimant restricting him to light work, allowing him to lift up to 20 pounds on an intermittent basis, 10 pounds on a more frequent basis; minimizing repetitive bending, twisting through the spine; alternating between sitting, standing and walking; and allowing for frequent changes in posture; minimum use of a ladder, and minimum repetitive work above the shoulder and minimum amount of bending. (Deposition of Dr. Lockstadt, pages 6 and 7; page 65 of Exhibit 1 to deposition of Dr. Lockstadt). Those restrictions were imposed on April 13, 2009. Dr. Lockstadt testified that he thinks as a consequence of the work related fall that Plaintiff suffered "a temporary exacerbation of the worsening of his pain . . .". Dr. Lockstadt testified he

believed the Plaintiff was very close to his pre-fall status. He then expressed surprise when told by Plaintiff's counsel that two days prior to the work related injury, the claimant was operating a jackhammer. Dr. Lockstadt then acknowledged it is fair to conclude that his opinion is that "the fall Mr. Archer suffered on September 4, 2008 has had an impact on his functional capacity, but you're not sure the scope of that impact?" Dr. Lockstadt says that he can "fully agree" with that statement. (see page 11 of Deposition). Dr. Lockstadt goes on to agree with Plaintiff's counsel that the impact had on claimant's functional capacity by the September 4, 2008 work injury is "substantial" (at page 13). Dr. Lockstadt also acknowledged that this negative impact on Mr. Archer would "endure for the foreseeable future". Dr. Lockstadt verified that he believes Mr. Archer was honest with him throughout his examinations, straightforward, and not hiding anything. He saw no evidence of secondary gain. In summary, Dr. Lockstadt agrees with the proposition that it is his opinion that "Mr. Archer continues to suffer from substantial negative impact in his functional capabilities, therefore, making applicable the restrictions . . ." (page 20).

(E). In response to questions from defense counsel, Dr. Lockstadt at first acknowledged that the subject work injury had a permanent harmful change on claimant's back injury as demonstrated by objective medical findings. He even identified those objective findings as (1) a widening of the facet joint at L2-2 with wear in the facet joint, (2) widening of the facet joint at L3-4, and (3) widening of the facet joint at L4-L5. He testified the Plaintiff has a problem where the small joints of the back are worn down and he has instability. He characterized those findings as "objective". Moments later, in response to a question from defense counsel, Dr. Lockstadt affirmed

that it was still his position that "this work incident was a temporary exacerbation" of the permanent impairment. He was then asked if there was any permanent impairment attributable to the work incident. His answer was as follows:

> "I think prior to his accident he had a permanent impairment already, which would have been at between 5 and 8%. With this accident, if you go to the AMA Guidelines, his impairment really doesn't change based on the Guidelines." (at page 24)

Plaintiff's counsel then questions Dr. Lockstadt again and he then acknowledges his Form 107, including the portion thereof which stated Plaintiff has an 8% impairment to the whole person, of which 5% was attributable to the prior active condition. When asked what is different now from the time of his initial Form 107, Dr. Lockstadt gives a confusing answer "What's different is he still has the 8% impairment rating, and it has been my understanding that he's had an 8% impairment rating prior to his fall." (at pages 27 – 28). Under examination again by Defendant's counsel, Dr. Lockstadt confirms that he thinks the Plaintiff had an 8% rating prior to the fall.

(F). Obviously, the testimony of Dr. Lockstadt given during his deposition is inconsistent. It is also inconsistent with his 107 report. It is confusing. It is difficult to know and determine Dr. Lockstadt's position in this matter. The ALJ is not sure if Dr. Lockstadt was aware that his second report was different and inconsistent with his 107 report. In the second report, the questions had already been posed to him and most of them were answerable by merely checking the "yes" or "no" line.

(G). Based on the evidence contained in the file, including all of the evidence discussed hereinabove, the ALJ must make a determination as to whether or not Matthew J. Archer sustained any additional permanent impairment under the AMA

Guides, 5th Edition, as a result of the work related fall of September 4, 2008. Does the evidence submitted by Dr. Lockstadt lend itself to a finding of pre-existing active impairment of only 5% or does it compel a finding of 8%? What was Dr. Lockstadt really trying to say? Did he intentionally change his opinion? Did he understand the impact of his answers?

(H). As fact finder, the ALJ has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burdhardt, 695 S.W.2d 418 (Ky. 1985). Furthermore, the ALJ has the absolute right to believe part of the evidence and disbelieve other parts, whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). It is not enough to show there was some evidence which would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

(I). When considering all of the evidence submitted by Dr. Lockstadt "on balance", and when considered in its entirety and under the totality of the factual circumstances found herein to exist, the ALJ believes and does hereby find that Matthew Archer has a permanent impairment to the body as a whole of 8% based on the AMA Guides, 5th Edition and that prior to the work related injury his active impairment was only 5%, thereby resulting in a 3% permanent impairment to the body as a whole attributable to the work event of September 4, 2008. This finding is supported by Dr. Lockstadt's 107 report and it is certainly supported by the Plaintiff's testimony to the effect that he is in a worse condition now than he was prior to the injury and that his work capacity has been reduced as a result of the injury. It is also

supported by the fact that Dr. Lockstadt placed rather strict restrictions upon the Plaintiff, whereas prior to the accident, Mr. Archer was working without apparent restrictions and was performing physical tasks which far exceed the restrictions later imposed by Dr. Lockstadt. It is also supported by the fact that Plaintiff fell approximately 9 feet, perhaps as much as 12 feet. This constituted a significant traumatic event and one which would be expected to produce a permanent impairment.

4. Pursuant to KRS 342.730(1)(c)1, the claimant does not retain the physical capacity to return to the type of work which he was performing at the time of the injury and he is therefore entitled to a multiplier of 3.0 of the 3% impairment found herein that is attributable to the work injury. This finding is supported not only by the testimony of the claimant, but is also supported by the 107 report of Dr. Lockstadt in which he states that Plaintiff does not have the capacity to do his former work.

5. Based on average weekly wages of $586.15 stipulated by the parties, the claimant is entitled to temporary total disability benefits in the sum $ 390.77 and he is entitled to permanent partial disability benefits calculated as follows: $390.77 per week x 3% x 0.65 x 3.0 = $22.86 per week. The parties stipulated that TTD benefits were paid at the rate of $390.73 per week from September 5, 2008 through April 13, 2009. It appears that the period of time for which TTD benefits have already been paid is appropriate.

6. Pursuant to KRS 342.020, the Plaintiff is entitled to reasonable and necessary medical treatment in the future for the injury sustained on September 4, 2008.

AWARD

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. Plaintiff, Matthew J. Archer, shall recover of the Defendant, Back Construction Company, Inc., and/or its insurance carrier, the sum of $390.77 per week for temporary total disability that extended from September 5, 2008 through April 13, 2009, together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation; and the Defendant shall take credit for any payment of such compensation heretofore made.

2. Plaintiff, Matthew J. Archer, shall recover of the Defendant, Back Construction Company, Inc., and/or its insurance carrier, as and for permanent partial disability benefits the sum of $22.86 per week commencing April 14, 2009, and continuing thereafter for a period not to exceed 425 weeks, together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation; and the Defendant shall take credit for any payment of such compensation heretofore made.

3. Plaintiff, Matthew J. Archer, shall further recover of the Defendant, Back Construction Company, Inc., and/or its insurance carrier, for the cure and relief from the effects of the injury such medical, surgical and hospital treatment including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability.

4. All motions for approval of attorney fees shall be filed within thirty (30) days following the final disposition of this Award.

Rendered and copies deposited in the U.S. Mail addressed to the parties listed below on this the 16th day of February, 2010.

EDWARD D. HAYS
ADMINISTRATIVE LAW JUDGE

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