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

Injury No.: 02-040236

Employee: Lisa M. Ambrose

Employer: Wal-Mart Associates, Inc.

Insurer: American Home Assurance Company
c/o Claims Management, Inc.

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. We have reviewed the evidence, heard the parties' arguments, and considered the whole record. Pursuant to section 286.090 RSMo, we modify the award. The award and decision of Administrative Law Judge Robert B. Miner, issued March 16, 2009, is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award, and decision herein.

We disagree with the conclusion of the administrative law judge that employee failed to establish that she sustained a compensable mental injury causally related to her work injury.

Like the administrative law judge, we consider the opinion of Dr. Patrick Hughes to be credible. However, we do not agree with the administrative law judge that the opinions of Dr. Hughes, as established by his testimony and medical report, support a conclusion that employee did not sustain a compensable mental injury as a result of her work injury. To the contrary, Dr. Hughes assessed a 10-12% psychiatric impairment of the body as a whole based on a diagnosis of ongoing adjustment disorder with mixed features. Of that 10-12%, Dr. Hughes opined that one third was related to a combination of being unemployed and employee's distress over life limitations from pain, and that a further one third of that one third was directly caused by employee's back pain stemming from her work injury. In this fashion, Dr. Hughes arrived at a 1.33% psychiatric impairment of the body as a whole caused by employee's work injury.

Thus, when considered in its entirety, the opinion of Dr. Hughes is in agreement, however minutely, with the opinion of Dr. Daily that employee sustained a compensable mental injury as a result of her work injury. As a result, virtually all of the medical evidence provided by mental health professionals in this case is in agreement that employee sustained some measure of mental injury as a result of her work injury.

Having reviewed the competent medical evidence on the record, we find that employee has sustained a permanent partial psychiatric disability of 5% of the body as a whole as a result of a compensable injury to her back sustained in the course of her employment for employer. Accordingly, we find that, in addition to the amount awarded by the administrative law judge as compensation for her physical injuries, employee is entitled to 20 weeks of compensation at a rate of $214.75, for a total of $4,295.00 in permanent partial psychiatric disability benefits from employer, and we modify the March 16, 2009 award accordingly.

As stated above, all remaining findings of fact and conclusions of law are affirmed.

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 10th day of November, 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Lisa M. Ambrose Injury No. 02-040236

Employer: Wal-mart Associates, Inc.

Insurer: American Home Assurance Company, c/o Claims Management, Inc.

Hearing Date: December 29, 2008 and December 31, 2008 Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.

2. Was the injury or occupational disease compensable under Chapter 287? Yes.

3. Was there an accident or incident of occupational disease under the Law? Yes.

4. Date of accident or onset of occupational disease: Continuing to April 20, 2004.

5. State location where accident occurred or occupational disease was contracted: Kansas City, Platte County, Missouri.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? Yes.

9. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee engaged in cumulative repetitive work for Employer including lifting, carrying, bending and stocking as a stocker, causing injury to her back.

12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: Back.

14. Nature and extent of any permanent disability: 40% permanent partial disability of the body as a whole.

15. Compensation paid to-date for temporary disability: None.

16. Value necessary medical aid paid to date by employer/insurer? $1,872.00.

17. Value necessary medical aid not furnished by employer/insurer? None.

18. Employee's average weekly wages: $322.13.

19. Weekly compensation rate: $214.75 for temporary total disability, permanent total disability, and permanent partial disability.

20. Method wages computation: Section 287.250, RSMo.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None.

No weeks of temporary total disability.

160 weeks of permanent partial disability from Employer, or $34,360.00 for permanent partial disability at the weekly rate of $214.75.

No weeks of disfigurement from Employer.

22. Second Injury Fund liability: N/A

TOTAL: $34,360.00.

23. Future requirements awarded:

Employer/Insurer is directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of her April 20, 2004 work injury, including the treatment that Dr. Bernhardt has recommended, in accordance with Section 287.140, RSMo.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Jeffrey S. Bloskey and Joani W. Harshman.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Lisa M. Ambrose Injury No. 02-040236

Employer: Wal-mart Associates, Inc.

Insurer: American Home Assurance Company, c/o Claims Management, Inc.

Hearing Date: December 29, 2008 and December 31, 2008 Checked by: RBM

PRELIMINARIES

A final hearing was held in this case on Employee's claim against Employer on December 29, 2008 and December 31, 2008 in St. Joseph, Missouri. Employee, Lisa M. Ambrose, ("Claimant") appeared in person and by her attorneys, Jeffrey S. Bloskey and Joani W. Harshman. Employer, Wal-Mart Associates, Inc., ("Employer") and Insurer, American Home Assurance Company, c/o Claims Management, Inc. ("Insurer") appeared by their attorney, Charles R. Brown. The Second Injury Fund is not a party to this case. Jeffrey S. Bloskey and Joani W. Harshman requested an attorney's fee of 25% from all amounts awarded.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following issues:

1. On or about April 4, 2002, Lisa M. Ambrose ("Claimant") was an employee of Wal-Mart Associates, Inc. ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.

2. On or about April 4, 2002, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was insured by American Home Assurance Company, c/o Claims Management, Inc. ("Insurer").

3. No compensation had been paid by Employer for temporary disability.

4. Employer/Insurer has paid $1,872.00 in medical aid.

ISSUES

The parties agreed that there were disputes on the following issues:

1. Whether on or about April 4, 2002, Claimant sustained an injury by accident or occupational disease arising out of and in the course of her employment for Employer?

2. Whether Claimant's current condition is medically causally related to the alleged work injury of April 4, 2002?

3. Was Claimant's claim filed within the time allowed by law?

4. Did Employer have notice of Claimant's alleged injury?

5. What is Employer's liability, if any, for past medical expenses?

6. What is Employer's liability, if any, for future medical expenses?

7. What are Claimant's average weekly wage and compensation rates?

8. What is Employer's liability, if any, for past temporary total disability benefits?

9. What is the nature and extent of Claimant's permanent disability, including whether Claimant is permanently and totally disabled?

10. Is Employer liable for costs under Section 287.560, RSMo?

Claimant testified in person. In addition, Claimant offered the following exhibits which were admitted in evidence without objection:

A – Associate Statement--Workers' Compensation (4/4/02).
B – Workers' Compensation Request for Medical Care (4/24/02).
C – Treatment records Clay-Platte Family Medicine Clinic.
D – Additional Clay-Platte Family Medicine Clinic records (5/26/02 through 11/26/06).
E – Treatment records Dr. Griffith and North Kansas City, Hospital.
F – Treatment records of James Waddell, D.C.
G – Treatment records of Shawnee Mission Medical Center.
H – Treatment records of Tri-County Mental Health.
I – Treatment records of Northland Pysch & Associates.

J – 10/21/08 Report of Dr. Koprivica (with 60 day letter).
K – 10/20/2007 Report of Dr. Koprivica (with 60 day letter).
L – 1/3/08 Report of Dr. Griffith (with 60 day letter).
M – 8/5/08 Report of Steve Daily, MS (with 60 day letter).
N – Deposition and Reports of Dr. Bernhardt.
O – CV of Michael J. Dreiling.
P – 12/16/07 Report of Michael J. Dreiling.
Q – Claimant's Out of Pocket Medical Expenses.
R – Medical bills of Shawnee Mission Medical Center.
S – Medical bills of Dr. Anya/Tri-County Mental Health.
T – Medical bills of James Waddell, D.C.
U – Medical bills of Medical Imaging, Inc.
V – Medical bills of Pain Source Solutions, LLC.
W – Medical bills of Clay-Platte Family Medical.
X – Medical bills of North Kansas City Hospital.

Employer and Insurer offered the following exhibits which were admitted in evidence without objection:

2 – Dr. Hughes' Deposition (8/25/08).
3 – Dr. Hughes' Deposition (8/28/08).
4 – Terry Cordray Deposition (12/9/08).
6 – Clay-Platte Family Medicine records.
8 – Report of Injury.
9 – W/C Request for Medical Care.
10 – Associate's Statement--W/C.
11 – Earnings History--8 pages.
12 – North Kansas City Hospital records--8 pages.
13 – Clay Platte Family Medicine records--37 pages.
14 – Farm Bureau Insurance Letter.
17 – Shawnee Mission Medical Center records--19 pages.
18 – OHS Report--2 pages.
19 – North Kansas City Hospital records--35 pages.
20 -- Photographs.

Also, Employer and Insurer offered Exhibits 7, 15, and 16. Claimant's counsel objected to those Exhibits. The objections were sustained and Exhibits 7, 15, and 16 were not admitted in evidence.

Findings of Fact

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational opinions and deposition, the medical records and reports, the testimony of Pamela Roberts, the report of Steven Dailey, and my personal observations of Claimant at the hearing, I find:

Claimant was born on October 13, 1971. Claimant quit high school in the 10th grade. She received a GED at age twenty-one, but did not attend college, vocational school, or technical school.

Claimant began working for Employer on April 12, 2001 as an overnight stocker. She worked full-time. She helped unload trucks, put boxes on a belt, put boxes on a non-motorized pallet jack. She opened boxes and put items on shelves. She also helped customers find items. She was also on an overnight safety team. She was a sponsor and trained new-hires how to stack. She also tore down and built displays. She moved shelving, climbed ladders when stocking shelves, and cleaned bins. She replenished sold items and carried boxes down ladders. The items that she took out of boxes were as small as twenty lipsticks to as heavy as weight benches and laundry soap. She also stocked weights, dog food, chemicals, safes in the stationery department, and vacuum cleaners. She stocked items and placed them on shelves every day. She also performed duties as a cashier. She constantly stood, walked, bent, stooped, lifted, and pushed.

Claimant was promoted to Seasonal Department Manager. She also still loaded and unloaded trucks as needed, picked up freight from the dock, and put it on pallets for the departments. She continued to climb ladders with boxes, and also was responsible for stocking shelves. She performed those duties on a daily basis.

Claimant testified she earned $11.78 per hour before she was promoted to Seasonal Department Manager. She testified she earned $1.00 less per hour when she was Department Manager.

Claimant testified that she began getting physical symptoms in her left hip in January 2002. There was no specific incident. She was walking one day and noticed her left hip started hurting. She did not slip or fall. She was not working for any other employer then. She went to her own doctor. Her hip pain got worse and started going into her back. Her legs also started hurting. The pain came on slowly over time. She had symptoms when loading and stocking shelves.

Claimant did not tell her supervisor or a manager when she first started having problems in January 2002, because her husband had insurance and she thought her pain

would go away. She saw Dr. Donaldson at Clay-Platte Clinic. She was sent to a chiropractor and got treatment. Her left hip pain and low back pain got worse. She had constant dull pain and, at times, piercing pain in the back and leg. She reported her complaints to her manager in April 2002. She identified Exhibit A, an Associate's Statement, that she wrote and signed.

Claimant reported to Employer on April 4, 2002 that her problem happened over time. She reported that she had been treating with her own doctors. Employer did not tell her to stop treating with her doctors. She testified that Employer did not tell her that the treatment was not authorized. Claimant requested medical treatment from Employer then. Employer did not send her to a doctor at that time, but sent her to a doctor a few weeks later. The doctor examined her and gave her a prescription. She testified that no one told her that the doctor recommended that she see a surgeon. She said no one contacted her after that, and no one told her of a follow-up appointment or additional treatment. She testified that no one told her to stop treating with her own doctor. She continued to work during this time.

Claimant testified that she continued to see her primary care doctors at Clay-Platte. She was prescribed Vicodin for pain. She was referred to Pain Management at North Kansas City Hospital and was treated by Dr. Griffith there. She also saw Dr. Scowcroft for pain management before going to North Kansas City Hospital. He gave her epidurals and trigger shots. Claimant continued to work during the time she treated with Dr. Griffith and Dr. Scowcroft in 2003 and 2004, but she said she got worse. Dr. Scowcroft recommended physical therapy and a TENS unit, but they did not help. The epidurals and trigger injections did not help. She also saw Dr. Kuennen while seeing Dr. Scowcroft in 2002 and 2003. She had piercing pains down her legs and her leg would go numb on the left.

Claimant testified she fell at a cousin's house in September of 2003. She had seen Dr. Scowcroft days before that fall. When she fell at her cousin's house, she fell forward and put her arms down. She complained of left shoulder and left neck pain, and was treated at Clay-Platte for that. She was also having problems with mid and low back and leg pain. Dr. Kuennen took her off work for a few weeks after the fall. She returned to work and continued to have problems at work.

Claimant continued to receive medical treatment from Dr. Griffith in 2004 and 2005. They discussed the possibility of additional treatment with a Morphine pump or spinal cord stimulator. She chose not to use either of those.

Claimant last worked at Employer on April 20, 2004. She said her symptoms got worse from January 2004 until April 20, 2004. She said she did not have a specific

accident. She was terminated due to excessive absences. She testified those absences were due to back pain.

Claimant was prescribed several pain medications by doctors beginning in 2002 including Vicodin, Morphine, Oxycontin, and methadone. Claimant testified she had been on narcotic pain medication for five years and became addicted to narcotics. On April 30, 2007 Claimant overdosed on her methadone and Vicodin and spent four days in the hospital at North Kansas City. She said she had to get off the pain medication and she put herself through detox at Shawnee Mission Medical Center where she was a patient for four days. She had a psychological evaluation at North Kansas City and additional psychological treatment was recommended.

Claimant said she had never overdosed or had any psychological treatment before being injured at Employer. She has been off narcotic pain medication since her detoxification program at Shawnee Mission.

Claimant received psychological treatment at Tri-County in 2007. Dr. Anya prescribed medication. She has received treatment from Dr. Daily, a psychologist, who treats for anxiety, depression and feelings of guilt. She felt guilty about not being able to work. She now treats with Dr. Blocks, a psychiatrist, who prescribes anti-depressants and a sleeping pill.

Claimant described her current symptoms. She said she hurts every day. Her pain is constant. Claimant testified that she has a constant dull pain in her mid back. At times the pain is sharp and piercing. She has aching pain in both legs. Claimant stated she also has constant dull pain in her low back. She sometimes has throbbing pains on the right side of her back. She has aching pain and pins-and-needles feelings in her legs. She said, at times, the pain is so bad she cannot move.

Claimant testified she cannot do activities she used to be able to do. Her relationship with her husband has suffered. She is very irritable and easily upset. Her concentration is not as good as it was. Claimant said the pain medication has turned her memory to mush. Her pain takes her focus away. She is no longer active, full of energy, or outgoing.

Claimant testified the doctors told her that she is at maximum medical improvement and there is nothing else to do except provide a Morphine pump. She said to manage her pain, she takes scalding hot baths that give her ten minutes of relief. She reclines, lays down on the couch on her right side, uses a heating pad, uses a massage chair, uses a popcorn bag, which is a warm bag, and uses Bio-Freeze, which is like Ben-Gay. She said those do not provide long lasting relief.

Claimant said she can still drive short distances of less than one mile. She does not like to drive alone because she does not know when her leg will go out. She tries to help around the house. She does Spray & Wash on the laundry, takes the laundry out of the dryer and folds it. She said she cannot vacuum, use the sweeper or bathe the dogs. She can do light pick-up around the house. She can cook, but her daughter helps. She cannot do sports with her children anymore because the pain is too intense.

Claimant testified that now her daughter helps curl and straighten her hair. She needs helps getting in and out of the bath tub at times. She is not able to participate in activities with her children because pain is always there. She said she does not do anything like she used to do.

Claimant said she had seen the report of Mike Dreiling. She said the work history contained in his report was accurate, except she had also worked two weeks as a receptionist at an animal hospital after she left Wal-Mart. She left the receptionist's job because she could not do the sitting and filing because of pain. She has applied for cashier's jobs at several places, but she did not feel that she could perform those jobs. She said she does not feel like she is able to work now. She said she has to be able to lie down and has to have access to a recliner and a hot tub. She said she is not taking any pain medication. She said she would need someone drive her back and forth to work.

Claimant said Employer had not paid for any of her medical treatment except for the occupational doctor. Employer never paid for any of her medications. Her husband's health insurance paid for her medications, but there were co-pays. She identified Exhibit Q, a list of out-of-pocket medical expenses. She testified the prescription expenses identified were all written for her back pain.

Claimant testified on cross-examination that she did not recall going to North Kansas City Hospital in 1991 for low back pain that developed while lifting her daughter. She did not recall reporting back pain in January 1997 to Dr. Ortez. She did not recall seeing Dr. Ortez's nurse practitioner on November 11, 1997 for low back pain.

Claimant went on vacation to Cancun on January 27, 2002. The pain was still a five then. She rode 4-wheelers in Cancun and went on a fifteen to twenty-minute boat ride with her husband there. She said that nothing on her vacation at Cancun increased her pain. She went back to work after her vacation.

Claimant said she was not aware of Employer's requirement that she report work injuries in 2002. However, she acknowledged that in her deposition on April 4, 2008, she said she did understand that if she got hurt on the job, she was to report it to management. She said she did not report her pain to Employer by the end of February 2002 because she thought it would go away. She said that after she reported her injury to

Employer, she waited for someone to schedule an appointment with a company doctor. She saw a company doctor on April 24, 2002.

Claimant did not recall that the company recommended that she see a back specialist. She testified she never got a message to see a Dr. Jones at Dixon-Diveley. Claimant later testified that she did not recall telling the adjustor that she had waited too long, and that was why Claimant went to the doctor on her own. She did not recall the adjustor telling her that any treatment that Claimant got on her own would be unauthorized, and the treatment would not be paid for. Claimant could not recall ever asking Employer for follow-up treatment.

Claimant said that while she was Department Manager, she sometimes moved around in a chair on wheels, and her manager knew she was doing that. She testified that she applied for five or six jobs after working for Employer. She received unemployment benefits. She said she wanted to go back to work, but she wanted to stop hurting.

Claimant admitted that she was treated for anxiety at Clay-Platte on August 30, 1999 when her brother got shot. She said that she had overdosed in 2007 because she and her husband had an argument, she hurt all the time, her daughter had an abortion, she could not work, she had marital problems, her husband had lost his job, and everything.

Claimant testified that she started using marijuana and alcohol at age eleven and continued until she was an adult. She said she did not use on a daily basis.

Claimant said she had been molested twice as a child. She did not require counseling or therapy to deal with her abuse. She had issues with her father. She had counseling for marital problems right after Shawnee Mission.

Claimant said that she had not injured her low back and thoracic spine when she fell on September 21, 2003. She said the North Kansas City medical record dated September 21, 2003 that refers to severe pain in the thoracic spine and low back is wrong. She said she did not have physical therapy or epidural injections as a result of the fall, and that the MRIs on her thoracic and lumbar spine were not done as a result of the fall. She made a claim for injuries from the fall. She was off work thirty days from the fall and obtained a settlement from that fall.

Claimant said that before she went to work for Employer, she had not had complaints regarding her back, hip or legs similar to those she had while working at Employer. She said she worked in pain at Employer for around two years, and that her problems all began while she worked at Employer performing her job duties. She said that after April 4, 2002, there was never a time that she did not have pain in her mid and low back.

Claimant testified that before January 2002, she was very active and did not have any problems performing her work duties. She was also very active with her children and engaged in sports activities. She said she did not have any physical problems before January 2002. Before then she was active with friends and attended barbecues and went shopping. She and her husband went on boat rides, went to concerts, and drove around. She did housework and bathed dogs. She had no problems with personal care or hygiene.

Pamela Roberts testified that she is an adjustor/case manager with Claims Management for Employer. She was assigned Claimant's case in May 2002. She contacted Claimant and gave Claimant her name and telephone number and said she would be gathering past medical records. Ms. Roberts testified that she scheduled an appointment with Dr. Jones at Dixon-Diveley and called Claimant and left messages regarding the appointment. The appointment was first set on July 9, 2002. She called and talked to a young female at Claimant's phone number who said that Claimant was not awake. Ms. Roberts reset the appointment with the doctor on July 29, 2002.

Ms. Roberts testified that Claimant called her back and said she was tired of waiting and would go to the doctor on her own. Ms. Roberts testified she told Claimant that she had set the appointment for her with Dr. Jones, and told Claimant the treatment she got on her own would be unauthorized and workers' compensation would not pay for it.

Ms. Roberts also identified Claimant's pay history, Exhibit 11 and calculated Claimant's average weekly wage to be $441.79 and her compensation rate to be $294.54 per week. She used the pay periods of October 19, 2001 through January 25, 2002 and divided the oldest pay period by two, and then divided the total 13 weeks after that of $5,743.36 by thirteen. Ms. Roberts acknowledged she did not see a note that a letter had been sent to Claimant regarding her appointment with Dr. Jones. Employer had sent Claimant to an occupational doctor who recommended a follow-up with a specialist.

I find that Ms. Roberts was a credible witness.

The court notes that Claimant stood up several times during the course of the hearing for periods of a few minutes each time. She also requested permission to use a pillow while sitting at approximately 2:00 p.m. on December 29, 2008. Claimant occasionally grimaced as if in pain during the hearing. Claimant did appear to be in pain at times during the hearing. At no time did Claimant lie down or request permission to lie down during the course of the hearing. The hearing began at approximately 9:30 a.m. on December 29, 2008, recessed for lunch at about noon that day, reconvened at approximately 1:00 p.m. and then recessed again at 4:45 p.m. The hearing reconvened at

approximately 9:00 a.m. on December 31, 2008 and concluded at approximately noon on December 31, 2008.

Exhibits 9 and 10 document Claimant's notice of her injury to Employer. Exhibit 9, worker's compensation request for medical care form signed by Claimant and dated April 24, 2002, included a portion completed by Employer, stating "date of injury January, date reported: 4-04-02". In response to the question, "How did accident happen?" the response was, "Excessive lifting-stretching, lifting heavy freight, climbing ladders with freight." Exhibit 10, "Associate's Statement-Workers' Compensation" was signed by Claimant with a date of 4-4-02. In the response to the question "How were you injured?" the answer was, "Excessive lifting, stretching and bending with heavy freight."

Exhibit 11 is Employer's earnings history pertaining to Claimant. It notes the following gross wages for the following pay periods:

Period ending	Hours	Gross earnings	Rate
4-16-04	53.77	$577.48	$10.68
4-2-04	68.01	$702.21	$10.27
3-19-04	67.37	$695.64	$10.27
3-5-04	68.43	$706.53	$10.27
2-20-04	59.61	$615.94	$10.27
2-6-04	54.86	$567.16	$10.27
1-23-04	62.48	$645.42	$10.27

Medical Treatment Records

Exhibit 12 includes records from North Kansas City Hospital referring to an admission on June 24, 1991 by Claimant. She reported at age 19, she was lifting her daughter two days before and developed low back pain. She was discharged with a diagnosis of acute lumbar strain.

Clay-Platte Family Medicine Clinic records pertaining to Claimant, Exhibit 6, included a note dated August 30, 1999 in which Claimant complained of increased anxiety, stress, and trouble sleeping over the last couple of weeks. She stated that she was having a lot of family problems with her father and her brother. She had been crying a lot as well.

Exhibit F contained records of James Waddell, D.C. of North Oak Chiropractic for the period of March 7, 2002 through April 8, 2002. Dr. Waddell noted Claimant had complained of low and mid back pain. He performed manipulations.

Exhibits C and D contained records of Clay-Platte Family Medicine Clinic pertaining to Claimant for the period January 24, 2002 through November 27, 2006. The first record notes Claimant complained of low back and thoracic back pain. She treated with Dr. Nathan Granger in 2002 for chronic low back pain and chronic thoracolumbar pain and strain and was prescribed medication. Physical therapy was prescribed.

The treatment record of OHS (Exhibit 18) is Dr. Ramon Nichols' April 24, 2002 note pertaining to Claimant. He saw Claimant that day due to injury to the back and left hip. Claimant stated she believed that her injury was due to doing a large amount of heavy lifting. Dr. Nichols' assessment was degenerative disk disease, lumbar and thoracic spine; paracentral disk protrusion L5-S1 with displacement of left S1 nerve posteriorly; T10-11 small left paracentral disk protrusion; protruded disk displacement of the left T11 nerve root posteriorly; a moderately enlarged left central disk protrusion at T11-12; degenerative joint disease thoracic and lumbar spine. Dr. Nichols' plan was to refer Claimant to a spinal surgeon for further evaluation for treatment. Otherwise she was to return to work with restrictions of no lifting for than 5-7 lbs., alternate sitting with standing and no repetitive bending, and continue medications.

Dr. Scott Kuennen examined Claimant on May 29, 2002 and noted an approximate five months of low back and thoracic back pain. Medications were prescribed and Claimant was referred for pain management. Claimant saw Dr. James Scowcroft at North Kansas City Hospital on June 17, 2002 for epidural steroid injection at L5-S1. She had other injections by Dr. Scowcroft in 2002 and 2003.

Dr. Kuennen saw Claimant on June 18, 2002. His note stated Claimant said the pain had been going on basically since the beginning of the year and Claimant thought it was work-related, though she denied any particular injury. Vicodin was refilled. Claimant went to Clay-Platte Family Medicine on December 23, 2002 with chronic thoracic and low back pain. Oxycontin was started. Claimant continued to see Dr. Kuennen approximately monthly for chronic thoracic and low back pain during 2003, 2004, and 2005. Dr. Kuennen assessed depression in August and September, 2003. Claimant was prescribed Oxycontin and Vicodin.

The North Kansas City records contained a report of Dr. Chris Wilson dated March 5, 2003. He examined Claimant and reviewed thoracic and lumbar MRIs. He noted Claimant presented with earlier bilateral carpal tunnel syndrome, thoracic disk bulges and L5-S1 disk protrusion. He recommended Claimant avoid repetitive bending and twisting activities, as well as, consideration for a supportive back brace. He recommended nocturnal brace use for the early carpal tunnel syndrome.

The North Kansas City records also contain a report dated May 5, 2003 of Dr. Ira Fishman, Physical Medicine and Rehabilitation, pertaining to Claimant. He examined Claimant that day. He recommended additional physical therapy.

Dr. Kuennen's September 24, 2003 note stated that Claimant slipped on a large crack in her driveway at home while walking and trying to catch herself by landing on her outstretched hands and holding herself up from landing on the cement. It caused severe pain in her thoracic back, as well as, her low back, mainly on the left side, and the left side of her neck in the trapezious region. She went to the ER. CT scan of her neck and x-rays were unremarkable. Claimant continued to have severe spasm, tightness and pain in the thoracic back, left side of the neck and the left low back. His assessment was acute thoracic strain, acute cervical strain, acute lumbar strain, and chronic multi-level DJD. Her current medications were continued and physical therapy was prescribed. He noted a follow-up appointment in October and "have her off work until then due to the severity of her pain." Dr. Kuennen saw Claimant on October 3, 2003 and noted she was still not able to return to work. Medications and physical therapy were continued.

Dr. Kuennen saw Claimant on November 3, 2003 and noted she had been having more and more cervical pain since her fall. She continued to have problems with her thoracic and lumbar back pain. His assessment was chronic thoracic pain, chronic lumbar pain, cervical strain with worsening cervical pain and chronic pain medication monitoring. MS Contin and Vicodin were prescribed. On December 1, 2003, Dr. Kuennen recommended arrangements for pain management referral and monitoring for pain meds due to her escalating doses of narcotics.

Dr. Kuennen followed Claimant in 2004 and 2005 and prescribed physical therapy and medication. Claimant had a left ankle sprain in June 2004 which was treated by Dr. Kuennen as well. Claimant continued to complain of back pain to Dr. Kuennen. His assessment continued to be chronic multi-level disk pain. He continued to prescribe medication including MS Contin, Vicodin and methadone. Dr. Kuennen's last treatment note is dated May 5, 2006.

The medical treatment records of North Kansas City Hospital (Exhibit E) document Claimant's treatment there. These records include the records of Dr. Patrick D. Griffith. Dr. Griffith first saw Claimant on February 6, 2004. His record noted she suffered with pain across her bra line and the left side of her lower back. She had been seen by Dr. James Scowcroft and had epidural steroid injections at L5-S1 without any relief of her pain. She had been placed on morphine and desired to get off that. She attributed her pain to her work. He noted she worked as a stocker at Employer and continued to work. She rated her pain at an 8 to 10. He noted limited range of motion at the lumbar spine. She had tenderness about the entire paravertebral region from the base of the skull to the lumbar region. He noted MRI of the cervical spine was read as normal.

MRI of the thoracic spine showed evidence of disk bulging/protrusion at T9-10, T10-11 and T11-12. MRI of the lumbar spine showed left-sided disk bulging at L3-4, L4-5, and a left paracentral disk protrusion at L5-S1. His impression was multi-level degenerative disk disease/disk protrusions and chronic pain syndrome.

Dr. Griffith treated Claimant approximately monthly during 2004 and 2005. He monitored Claimant's medication during that time. He prescribed physical therapy and injections. A CT lumbar spine post-discogram report dated April 12, 2005 indicated prominent disk protrusion in the L5-S1 disk. Dr. Griffith performed percutaneous disk decompression L4-5 and L5-S1, as well as discography at L4-5, L5-S1, T8-9, T9-10, T10-11 and T11-12 on October 4, 2005.

Claimant saw Dr. Griffith again September 6, 2006. His impression was chronic pain syndrome, as well as, chronic low back pain and thoracic pain secondary to intervertebral disk disruption and opioid tolerance. Medications were not changed.

Claimant saw Dr. Griffith on December 14, 2006. His report noted that Claimant's pain medications had seemed to have lost their effectiveness. The report also stated: "She has lost her job for a while but now has regained employment." His impression was the same as the last visit. He provided her information regarding spinal chord stimulation.

Claimant saw Dr. Griffith on January 10, 2007. His impression was as before. He noted that Claimant had been having some issues with her marriage with her husband. He noted Claimant was not interested in spinal chord stimulation. He stopped methadone and switched Claimant back to MS-Contin. Claimant returned to Dr. Griffith on January 24, 2007 with complaints of increased pain and he switched Claimant back to methadone.

Claimant returned to Dr. Griffith on March 12, 2007. Dr. Griffith's March 17, 2007 report noted that in regard to her pain, Claimant continued to be stable. The report further noted:

> From a personal standpoint, she is having quite a bit of difficulty. Number one, her husband was recently fired again from his job which puts their insurance at risk. Number two, her seventeen year old daughter has moved out of the house and that is causing quite a bit of stress. Number three, she has been having some intimacy issues with her husband and is not sure why. Finally, her seventeen year old daughter has moved out to live with her mother-in-law, and that has created a huge amount of stress as well.

Dr. Griffith's impression on March 12, 2007 was chronic pain syndrome, chronic lumbar radiculitis, chronic thoracic radiculitis, history of intervertebral disk disruption at the L4-5 and L5-S1 disks, and history of thoracic pain and thoracic radiculitis secondary to T8-9 disk disruption. Medications were refilled.

The North Kansas City Hospital records include a report of Dr. Robert McNab dated April 30, 2007. Claimant was hospitalized there on April 29, 2007 for methadone overdose. The history of present illness noted that Claimant had a history of chronic methadone use for chronic back and leg pain for approximately four or five years. She was noted to have no history of psychiatric evaluation, inpatient psychiatric stay, or previous suicide attempt. The report further noted:

> The patient reports that she has a long-term history of marital issues with her husband; that they have been crescendoing for a number of months. She had been arguing with him on the night of admission. She had had one alcoholic beverage and some marijuana. She became more and more frustrated with her husband. She took 30 methadone, all at one time.

Dr. McNab's report also noted that Claimant reported she was just very frustrated with her marital issues. The past medical history noted that Claimant carried a diagnosis of depression, but had never seen a psychiatrist and was on medications from her primary care physician. The impressions included intentional methadone overdose, chronic pain issues with chronic methadone use, and depression, for which she will see a psychiatrist that day.

Dr. Griffith's May 4, 2007 report noted that Claimant was discharged from the hospital the past Wednesday. The report noted he would not recommend that Claimant continue opioid therapy. He provided names for psychiatric follow-up. The report noted Claimant's husband had lost his job and the insurance was gone. She was not scheduled for follow-up. The North Kansas City Hospital records do not contain any records of treatment by Dr. Griffith after May 4, 2007, nor do they reflect that he examined Claimant after May 4, 2007.

Dr. Griffith's report dated May 6, 2007 addressed to Claimant's attorney, Ms. Harshman, stated that as of that time, Claimant was physically unable to work secondary to her pain and its psychological stress, both dealing with her pain.

Exhibit G contains records of Shawnee Mission Medical Center from May 27, 2007 through May 30, 2007. Claimant was admitted for opioid abuse and was treated with drug detoxification. The record noted Claimant had appointments at Tri-County

Mental Health Center, and had called her pharmacies and asked that they not fill any more opiate prescriptions.

The final report of Dr. Sherman Cole, dated May 29, 2007 in the Shawnee Mission Medical Center Records (Exhibit 17), notes that Claimant had had increasing complications relating both to pain and opiate prescription use. The report noted there had been stressors such as discord with her husband. She was noted to have been taking methadone for about two years. She wanted to stop methadone and Vicodin. The record noted Claimant began using marijuana and alcohol at about age 11. Diagnosis was Axis I: substance abuse, opiate dependence, including methadone, Vicodin and others; II: mood disorder with depression secondary to multiple factors including opiate dependence; III: back pain; Axis IV severe. She was to be hospitalized for evaluation and treatment. A BH intake assessment dated May 27, 2007 in Exhibit 17 noted that Claimant's substance abuse started approximately one year after she was sexually assaulted by a male cousin and had never received treatment for her sexual abuse.

Exhibit H contains records of Tri-County Mental Health pertaining to Claimant. A Progress Note dated May 21, 2007 stated that Claimant had a fight with her husband and after the fight drank alcohol and used drugs and took 50-60 methadone pills (10 mg each). The note stated Claimant was scheduled for an appointment with Dr. Anya. A record regarding date of service of May 18, 2007 regarding History Presenting Problem/Precipitating Event noted Claimant "was frustrated over fight with husband, issues with family and physical pain. Husband was recently fired after getting hurt on the job, has no insurance and little income." Psychiatric history noted in part: "Sx: depression, irritable, angry, poor sleep, nightmares about suicide attempt, crying spells, frustration. Sx began around month-long separation of her and husband in October of 2006." Social/Family History noted that Claimant had "separated a few times due to marital problems consisting of financial (not working), sexual (he won't have sex with her). Husband is a recovering alcoholic. Has two children, son (12) doing okay and daughter (17) left home on bad terms, got pregnant and had an abortion." Medical history noted that Claimant reported she had gained a lot of weight over the past few years which contributed to her depression. Clinical Impression and Plan in the record noted in part that: "Recently, the stress of husband being unemployed, issues with her daughter and mother all became too much and she took 50-60 methadone pills as suicide attempt." The diagnostic impression was Axis 1: major depressive disorder, single episode, severe w/o, acute stress disorder.

Exhibit I contained records of Dr. Anya for the period May 1, 2007 through December 7, 2007 and reflected approximately monthly visits. Dr. Anya's June 1, 2007 note included reference to Axis 1: major depressive single episode and opioid dependence, Axis 3: degenerative back disease, severe back pain and radiculopathy. Medications were prescribed. Dr. Anya's last note dated December 7, 2007 noted

Claimant exhibited a depressed and tearful affect. His assessment was "MDD". Claimant was continued on Cymbalta and Trasadone.

The deposition of Dr. Mark Bernhardt taken on December 10, 2008 was admitted as Exhibit N. Objections contained in Exhibit N are overruled. Dr. Bernhardt testified that he is an orthopedic surgeon who sees patients on a regular basis. Dr. Bernhardt is with Dickson-Diveley Midwest Orthopedic Clinic. He is a graduate of Harvard Medical School and is a diplomate of the American Board of Orthopedic Surgery. His twenty-six page CV admitted in evidence details numerous publications and presentations. He is highly qualified.

Dr. Bernhardt authored several reports pertaining to Claimant that were admitted into evidence. His first report, dated April 26, 2005, noted that he had reviewed medical records described pertaining to Claimant. He interviewed and examined Claimant, and reviewed several MRI studies and CT scan of the lumbar spine and discogram. He noted Claimant's chief complaint of left-sided low back/hip pain and mid-back pain near the bra line. He noted Claimant's history of present illness and past work history. He performed a physical examination and described the X-ray and imaging studies. His impressions noted were: 1) Disk herniation left L5-S1, without significant radiculopathy, but activity-related discogenic low back pain; 2) Left T10-11 disk herniation, without thoracic myelopathy; 3) Multiple degenerative disks in the thoracic spine; 4) Mild cervical degenerative disk disease. His report noted he thought her treatment to date had been reasonable and it was unlikely that traditional surgical treatments would be beneficial to her. He noted that she had chronic thoracic pain, chronic lumbar pain associated degenerative lumbar, thoracic and cervical disk disease. His report further noted that it was his opinion that she herniated the L5-S1 disk during her work activities and that she probably herniated the T10-11 disk during her work activities. He noted that she had no complaints of back pain and no prior medical care for back pain prior to January 2002.

Dr. Bernhardt's April 26, 2005 report further stated: "It is my opinion that she will always need continued medical care. It is my opinion that she will need pain medications for the rest of her life. It is unlikely that her problem will resolve with additional treatment, including surgery." The report also stated: "It is my opinion she will need continued prescription of pain medications and chronic pain management, that is monitoring of medications, their effects and side effects."

Dr. Bernhardt also stated that Claimant had reached medical stability and that he did not think further medical treatment would lead to substantial incremental benefit. He stated that Claimant had sustained 20% permanent partial disability due to her work injury sustained at Wal-Mart. He stated that he did not think any reconstructive spine surgery would be of any benefit to Claimant and that nucleoplasty would be a reasonable

option for helping her with her left-sided low back and hip pain. He stated he was not optimistic that it would be of much benefit in her thoracic spine. He stated his opinions have been given within a reasonable degree of medical probability.

Dr. Bernhardt's May 15, 2007 report addressed to Employer's attorney noted that he had reviewed additional medical records. He noted that on October 4, 2005, Dr. Griffith had performed discography at L4-5 and L5-S1 and at T8-9, T9-10, T10-11, and T11-12, and had performed percutaneous disk decompressions at L4-5 and L5-S1. He noted those procedures did not solve her pain problem and that she was currently taking methadone and Vicodin for pain. He also noted that Claimant had slipped in her driveway in 2003. She rated her pain at 7 on a scale of 1-7, with 7 being severe pain. He performed a physical examination of Claimant on May 15, 2007 and noted Waddell's signs were positive, 4/5 (positive for superficial tenderness, distraction, simulation and axial loading and axial rotation, and regional findings).

Dr. Bernhardt's impression on May 15, 2007 was: 1) Chronic thoracic lumbar and cervical spine pain; 2) Status-post percutaneous disk decompression, L4-5 and L5-S1, without improvement; and 3) Thoracic disk herniation, T10-11. He noted that he did not think further surgical treatment can be of benefit to her and that only chronic pain management measures are indicated. He further stated that he did not think Claimant's fall in the driveway at home contributed to her disability rating. He also stated that her further treatment, in particular, the percutaneous decompression and discography, was due to the work injuries, and not her fall in 2003. He also noted that Claimant will require chronic pain management, that is, monitoring of her pain medications. He stated that if she developed significant side effects from narcotics, the pain management physician will have to perhaps change the method of administration of the type of medications administered. He stated that Claimant had reached MMI for the work injury. His opinions have been given within a reasonable degree of medical probability.

Dr. Bernhardt's March 11, 2008 report addressed to Employer's attorney stated that in his opinion, based on a reasonable degree of medical certainty, Claimant's work activities in or around January 2002 caused her T10-11 disk herniation. He also noted that he had rated Claimant as having sustained 20% permanent partial disability as a result of her work related injuries, and that 50% of her disability was due to her thoracic disk herniation at T10-11 and 50% of her disability was due to her lumbar injuries. His opinions were given within a reasonable degree of medical certainty.

Dr. Bernhardt's April 23, 2008 report addressed to Employer's attorney noted that he had reviewed the records of Dr. Koprivica, Michael Dreiling, and Dr. Patrick Griffith. His report stated: "All things considered, I agree with Drs. Koprivica, Dreiling and Griffith that the combination of Ms. Ambrose's physical and psychological conditions and chronic pain make her essentially unemployable; and therefore, the Claimant is thus

permanently and totally disabled." The report noted his opinions had been given within a reasonable degree of medical certainty.

Dr. Bernhardt's September 3, 2008 report addressed to Employer's attorney noted that Dr. Bernhardt had reviewed the report of Dr. Patrick Hughes of May 20, 2008, the report of Terry Cordray of July 21, 2008 and the report of Steve Daily dated August 5, 2008. Dr. Bernhardt stated his opinions with respect to Claimant's physical disability had not changed. Dr. Bernhardt's report further stated:

> It is and has been my opinion that she is capable of some physical tasks. After reviewing the psychiatric and psychological evaluations, I have learned that she has been successful in discontinuing of the use of addicting opioid medications. This is a good sign that she may be able to return to restricted work.
>
> It is my opinion that she could return to light work but for her psychological and psychiatric conditions. In other words, from a physical standpoint, I think she would be capable of sedentary work as long as she can change her position frequently from sitting to standing and vice versa. He noted his opinions had been given within a reasonable degree of medical probability.

Dr. Bernhardt testified that Claimant reported that she had worked for Wal-Mart approximately four years as an overnight stocker unloading trucks, putting freight on the pallets, then putting product on the shelves and moving shelves around. She denied prior significant back pain before January of 2002.

Dr. Bernhardt testified that percutaneous disk decompression is a procedure in which a needle is passed into the disk, and then some of the nuclear material inside the center of the disk is aspirated or sucked out, and then energy is applied to the disk with an electrode or probe that emits radio frequency energy. It heats up or burns the disk material. He said that is a procedure that does not have a lot of evidence that it is efficacious, and the biggest proponent for doing it is that it is minimally invasive. It is generally done on an outpatient basis.

Dr. Bernhardt testified in response to the question, "And what is your opinion concerning whether or not she is employable?", "I think given her physical, psychological, and chronic pain, she's essentially unemployable." He stated that the impairment that Dr. Hughes had assigned as well as the physical impairment that he had assigned - those two things essentially made her unemployable. Dr. Bernhardt further stated that from a physical standpoint, he thought Claimant was capable of sedentary work as long as she can change her position frequently from sitting to standing or vice

versa. He stated he would defer any opinions regarding Claimant's mental status and how that affects her ability to work to the psychiatric and psychological providers or evaluators. He testified he felt Claimant's treatment received from April 2005 until he evaluated her in May 2007 was reasonable and customary. He said, in retrospect, that treatment was not necessary because it did not do any good. He testified that if Claimant's psychological conditions and psychiatric conditions were as significant on December 10, 2008 as they were in 2007, that Claimant is essentially unemployable. He also testified that even with the chronic pain, Claimant is capable of sedentary work from a physical standpoint.

Dr. P. Brent Koprivica evaluated Claimant on October 20, 2007. His October 20, 2007 medical report addressed to Claimant's attorney was admitted as Exhibit K. Dr. Koprivica is board certified in emergency medicine and occupational medicine. He reviewed Claimant's treatment records. His report recited Claimant's educational and vocational history and past medical history. He noted a report of injury of June 22, 1991. The report noted that Claimant did not have chronic problems with her back before January of 2002. His report noted Claimant's stocking activities at Employer and Claimant's description of progressive problems with thoracolumbar and lumbosacral pain, as well as, insidious onset of left hip pain. Dr. Koprivica noted Claimant's medical treatment beginning January 24, 2002 at Clay-Platte Family Medicine.

Dr. Koprivica noted Claimant sought treatment on her own with Dr. Kuennen in 2002 and received treatment for chronic pain from Dr. Griffith. He noted Dr. Wilson saw Claimant on March 1, 2003 and advised against discectomy after reviewing MRI scans. Dr. Fishman examined Claimant on May 5, 2003 and recommended rehabilitation. Claimant received trigger injections and epidural steroid injections under Dr. Griffith.

Dr. Koprivica noted Dr. Bernhardt's evaluation of Claimant on April 26, 2005. He noted Dr. Griffith performed percutaneous nucleoplasties on Claimant at L4-L5 and L5-S1 on October 4, 2005 and that provocative discography in the thoracic region revealed annular tears at T8-T9, T9-T10 and T10-T-11. He noted Dr. Griffith diagnosed a chronic pain syndrome on October 27, 2006 and that Claimant became addicted to narcotics, went through detoxification in May 2007, and was hospitalized for four days at Shawnee Mission Medical Center to detox.

Dr. Koprivica noted Claimant's current complaints that included she said she has "lots of pain." She stated her sitting tolerance was less than an hour as a maximum and her standing and walking tolerances were less than thirty minutes. He noted she reported she lays down during the day primarily on her right side where she gets some relief.

Dr. Koprivica performed a physical examination of Claimant. His report stated that he believes she has psychological overlay in her presentation. He noted that under

Waddell's criteria, he considered her to be positive for over-reaction, positive for simulated rotation testing, and positive on disparity testing. He noted she had overwhelming thoracolumbar and lumbosacral pain on examination. He noted she was using no assistive devices. Dr. Koprivica's report set forth his conclusions. These include the following:

> 1. Ms. Ambrose presents with a history of overwhelming disabling thoracolumbar pain based on multi-level thoracic disk herniations with left T9-T10, T9-T10 and T11-T12 disk herniations demonstrated on workup. I do not believe there is evidence of radiculopathy or myelopathy at this point on an active basis. I believe she has discogenic pain as proven by discography.
>
> Separately, Ms. Ambrose has chronic lumbosacral pain with a left-sided disk herniation at L5-S1. Again, I believe this is diskogenic in origin as proven by diskography.
>
> Separate from the physical impairments, Ms. Ambrose also presents with problems with major depression along with a chronic pain syndrome at this point.
>
> 2. In my opinion, Ms. Ambrose's job duties, particularly the stocking activities, while working for Wal-Mart, represent the prevailing factor producing repetitive injury that resulted in the above disabling conditions I have just diagnosed.
>
> I would defer to a mental health care expert to look at the issue of causation regarding the psychological/psychiatric conditions that I have diagnosed.
>
> 3. The treatment which Ms. Ambrose has received from a chronic pain management standpoint was medically reasonable and a direct necessity of the work-related exposure to repetitive trauma as I have diagnosed.
>
> 4. In my opinion, Ms. Ambrose is at maximal medical improvement in reference to the repetitive injury claim from January of 2002 through April 4, 2002, continuing to her last exposure at Wal-Mart.
>
> 5. In assigning restriction at this point, I would point out the fact that psychological factors are involved in the presentation. Excluding

those considerations, I would restrict Ms. Ambrose to sedentary physical demand level of activity as defined by The Dictionary of Occupational Titles.

I would restrict Ms. Ambrose from frequent or constant bending at the waist, pushing, pulling or twisting. She should avoid sustained or awkward postures of the lumbar spine.

Posturally, Ms. Ambrose should have the ad lib ability to change posture. As a general guideline, captive sitting, standing or walking intervals of thirty minutes would be recommended with the flexibility of being able to change between those activities as necessary.

I would point out that Ms Ambrose is reclining throughout the day. With the discogenic pain, this is felt to be, at least in part, consistent with the nature of the physical impairments with which she presents.

6. It will be important to have a mental health evaluation in this particular case to validate her overall presentation. Assuming that the mental health care expert establishes a causal relationship between the psychological/psychiatric impairment presentation and validates the presentation, any additional permanent partial disability on a psychological/psychiatric basis that is apportioned for the primary work injury would be combined with the permanent partial disability that would be assigned based on the physical impairments with which she presents.

In addition, Dr. Koprivica assigned a 25% permanent partial disability to the body as a whole to be appropriate in isolation in the thoracolumbar region with the multi-level involvement. In addition, he assigned a 25% permanent partial disability to the body as a whole in isolation in the lumbar region where the two-level percutaneous nucleoplasty had been performed. He also stated that, "It is unrealistic to believe that Ms. Ambrose can effectively compete in the open labor market for any employment." He also stated:

Clinically I do not believe any ordinary employer could reasonably be expected to hire Ms. Ambrose to perform duties of employment in the usual and customary way. I believe her restrictions are so overwhelming that it is unrealistic to believe that she can be accommodated.

Assuming that the vocational expert supports that Ms. Ambrose is permanently and totally disabled, it is my opinion that permanent and total disability arises based on consideration of the residual physical and

> psychological impairments and resultant permanent partial disabilities attributable to the repetitive injury claim from January of 2002 through April 4, 2002, and ongoing each and every day worked until her last exposure at Wal-Mart in isolation, in and of itself.

Dr. Koprivica's report stated that his opinions had been given with a reasonable degree of medical certainty.

Dr. Koprivica provided an addendum report dated October 21, 2008 (Exhibit J). That report noted that he had received billing information for services from North Kansas City Hospital, Pain Source Solutions, Medical Imaging, North Oak Chiropractic, Clay-Platte Family Medicine, Tri-County Mental Health and Shawnee Mission Medical Center. He stated that the charges incurred for Claimant's medical treatment necessitated by the April 4, 2002 work injury claim represented charges that were fair, reasonable, usual and customary for the treatment that was necessitated by the work injury. His report stated his opinions had been given within a reasonable degree of medical certainty.

The medical report of Dr. Patrick Griffith dated January 3, 2008 addressed to Claimant's attorney, Ms. Harshman, was admitted as Exhibit L. Dr. Griffith's CV was also admitted as a part of the exhibit. It noted that he is a diplomate of the American Board of Anesthesiology and American Board of Pain Medicine. He is a graduate of the University of Missouri-Kansas City School of Medicine and is founder and president of Pain Source Solutions, L.L.C. He is not a psychiatrist.

Dr. Griffith's January 3, 2008 report noted he had treated Claimant since March 2005. The report described the treatment Claimant had undergone. The report also stated:

> She continues to have chronic pain secondary to her intervertebral disk protrusions at T8-9 and L4-5 and L5-S1. It is my opinion that her pain conditions will make it difficult for her to find employment and to keep employment. Mrs. Ambrose needs to be able to change positions chronically from sitting to standing and also have the opportunity to lie down if her pain becomes quite severe. Her activities are quite limited at home because of her continued chronic pain. It is my opinion that the physical and psychological stress, even associated with a sedentary job, would be quite difficult for her to perform.

The report of Steve Daily, MS, licensed psychologist, dated August 5, 2008, with Mr. Daily's CV, were admitted as Exhibit M. Mr. Daily's August 5, 2008 report addressed to Claimant's attorney regarding Claimant noted that he had met with Claimant

for five therapy sessions between May 19 and July 29, 2008. His diagnoses for Claimant were major depression, recurrent, severe, and generalized anxiety disorder. Mr. Daily's report stated further:

> In working with Mrs. Ambrose, it is my opinion that her inability to work following her injury has significantly contributed to both her high level of depression and anxiety. During our therapy sessions, she has repeatedly expressed feelings of guilt related to her inability to work and to provide financially for her family. She has stated that she feels badly because she cannot provide so many of the simple things for her daughter and son that she would have been able to provide if she were not injured and could still work.
>
> It is my opinion that Mrs. Ambrose is unable to work. She grimaces and shows evidence of being in pain in just walking from the waiting area to my office. She typically apologizes before she stands up during our sessions in an apparent effort to relieve her back pain. She has on many occasions expressed a strong desire to be able to work, but realizes she is unable to do so due to her injury and ongoing chronic pain.
>
> Based upon my five therapy sessions with Mrs. Ambrose, I believe that her injury coupled with her self-blame has contributed much to marital problems with her husband. I am attempting to help her realize that her self-blaming thoughts intensify her depression. I sincerely doubt that Mrs. Ambrose would need therapy, if she had not been injured at work.

Dr. Patrick Hughes was deposed on August 25, 2008 and August 28, 2008. Objections contained in Dr. Hughes' depositions, Exhibits 2 and 3, are overruled. Dr. Hughes testified that he is a board certified psychiatrist practicing clinical psychiatry on a daily basis. He is licensed in Missouri and Kansas. Sixty to sixty-five percent of his time is spent treating patients and thirty-five to forty percent of his time is spent in medicolegal activities. The vast majority of the evaluations he performs are conducted on behalf of employers. Ninety-five percent or plus of Dr. Hughes' evaluations are performed at the request of an employer or an insurance carrier. He has seen probably twenty Wal-Mart people through the years. He did not perform any psychiatric or psychological testing in evaluating Claimant.

Dr. Hughes was asked to conduct an independent medical evaluation at the request of Employer/Insurer's attorney. He performed his evaluation of Claimant on May 20, 2008. He testified that his opinions were based upon a reasonable degree of medical certainty.

Dr. Hughes reviewed medical records pertaining to Claimant including psychiatric treatment records from Dr. Anya at Tri-County Mental Health Center, and records of Dr. Bernhardt. He noted that Claimant had not had surgery for her low back pain and bilateral knee pain, and was treated largely with oral pain approaches. He noted that the records pretty clearly documented Claimant's very severe opioid dependency in the course of her treatment for attempted relief of back pain.

Dr. Hughes stated that Claimant had an adjustment disorder in April 2007, when in the context of great distress and discord with her family, she attempted suicide by overdosing on methadone. He did not believe that Claimant had a major depressive disorder at that time. He stated that her distress was caused by her struggle with her family, not from her back injury or back pain.

Claimant told Dr. Hughes that she had been free of opiate medications since April of 2007. He did not see any signs of opioid intoxication.

Dr. Hughes interviewed Claimant. He thought it was crucial that she was raised in a grossly dysfunctional home with neglectful parents who were substance abusers. He noted she began to abuse substances at age eleven continuing on through her teenage years, and she was sexually abused repeatedly by her cousin during teenage years, and got pregnant at an early age. He stated that childhood victims are much more likely to develop the tendency to somatize later in life, which is to report various physical symptoms of a subjective type that usually elude medical evaluation and objective evidence of such things. He stated that chronic physical pain either in excess of or even the absence of demonstrable physical cause "is surely the most common of the somatization conditions. . . ." He did not view any particular abnormalities about Claimant's facial demeanor. There was nothing unusual about her speech. He did not observe any evidence of paranoia or delusion. He did not note any abnormalities in her thought process.

Dr. Hughes testified that Claimant's opioid addiction was certainly from the back pain treatment that she was getting from the prescribing doctors which was directly attributable to the work place injuries. He thought her opioid dependence in its relapse form was a consequence of the treatment that she received for her work place injuries. He also testified that Claimant has no psychiatric impairment presently that was currently attributable to the opioid pain medication treatment she received for her back pain. He noted that had been addressed, resolved, and she was no longer opioid addicted. He also said that he currently did not see a need for any additional treatment for drug dependency. He also testified that he did not think that Claimant's back injury was even a significant factor in the methadone overdose in April 2007. He noted that the records indicated Claimant impulsively took the overdose after becoming upset with family disagreements with her spouse, daughter and her mother, and there was no reference to

psychiatric distress over her back pain at any time during the inpatient stay after the overdose attempt.

Dr. Hughes stated that in order of intensity, the biggest distresses when he saw Claimant were her significant marital discord to the point that she and her husband had physically separated, her grief and bereavement over the unexpected death of her father fairly recently, ongoing discord with her daughter, distress that comes from unemployment, and lastly, continued frustrations over the activities that she had to curtail or avoid because of her back pain. He testified that he did not find a reference in the records or his hand-written notes to Claimant specifically having discord with her mother at the time of her admission for the overdose. He noted that Claimant's starting to work with a psychotherapist came rather quickly after the death of her father, not months earlier. He stated that Claimant's ongoing need for psychotherapy was not in any way related to the work injuries.

Dr. Hughes stated that Claimant's overall impairment or disability was somewhere between ten and twelve percent of the body as a whole, and of that, a third was from a combination of being unemployed and her distress over life limitations from pain, and one-third of that one-third was from the back pain and presumably permanent. He also stated that were Claimant to return to gainful employment, which he felt was entirely possible and likely from a psychiatric standpoint, then her distress from being unemployed would resolve. He stated that Claimant has 1.33% permanent psychiatric impairment from her back pain and life limitations standing alone. He also stated that Claimant's adjustment disorder does not preclude her from gainful employment from a psychiatric standpoint. Dr. Hughes also said Claimant does not need psychotherapy to cope with ongoing pain.

Dr. Hughes noted that Claimant demonstrated pain behaviors during the evaluation. He did not interpret those to be theatrical or exaggerated. He believed that Claimant was in bonafide and neurological pain when he saw her. Claimant told him that she had become short-tempered and easily angered due to pain. She advised that her sleep was erratic due to pain. She said she felt guilty about being a burden to her family. She reported she needed assistance of family members to do things around the house because of pain.

Dr. Hughes did not provide any opinion with respect to Claimant's physical condition, physical disability, or physical limitations. He said that the need for Claimant to go through a detoxification program at Shawnee Mission Medical Center was causally attributed to the consequence of the back injury.

Vocational Evidence

Michael Dreiling testified at the hearing that he works in the field of vocational rehabilitation. He has a Master's in Guidance and Counseling. He worked ten years for the Department of Rehabilitation Services in Kansas and seventeen years for the Menninger Clinic where he worked with people who had disabilities and with employers looking for employees. He has spent the last seven years doing vocational assessments in legal settings.

Mr. Dreiling interviewed Claimant on December 12, 2007 at the request of her attorney. He evaluated Claimant's capacity to return to work and whether any employer would reasonably be expected to hire her. He prepared a report relating to Claimant after his interview and assessment of her and after his review of medical records. He noted relevant restrictions from Dr. Koprivica dated April 20, 2007 and Dr. Griffith in May 2007. He relied on the restrictions that he identified. He noted Claimant's educational history. He also noted that Claimant had no computer skills. He identified Claimant's medical history, work history, and job skills. He testified that Claimant had not acquired transferable job skills consistent with her medical condition restrictions.

Mr. Dreiling gave Claimant the Wunderlich personality test. He stated Claimant would probably be better for short term vocational training, but pain would significantly affect her going to school. He stated that Claimant was not a realistic candidate for retraining unless her pain issues were dealt with better.

Mr. Dreiling testified that Claimant is unemployable in the open labor market and that an employer in the usual course of business would not reasonably be expected to employ Claimant. He based that on her education, limited training, her work history, her lack of significant job skills, her pain issues, and her need to alternate sitting, standing and lying down. He was aware that Claimant had been diagnosed with depression and anxiety. He said that would be one more factor that would impede her ability vocationally. He noted that Dr. Koprivica had concluded that Claimant needed to sit or stand as needed and needed to be able to lie down. He stated that the sit/stand restriction is very limiting, and most jobs do not allow that. He said Claimant is not realistically employable. He said cashier's positions are not realistic because Claimant would need to be at work eight hours a day, five days a week, and she would not be able to do that with her significant pain issues. His opinions were within a reasonable degree of vocational certainty.

Michael Dreiling's CV was admitted as Exhibit O. It notes that he is a vocational consultant and has spent thirty-three years in the field of vocational rehabilitation. He is a diplomate of the American Board of Vocational Experts. He has a Master's Degree in Guidance and Counseling. Michael Dreiling's report regarding Claimant dated

December 16, 2007 was admitted as Exhibit P. He interviewed Claimant on December 12, 2007. Portions of records of Dr. Koprivica including restrictions were noted. A portion of Dr. Patrick Griffith's May 6, 2007 report including his opinion that Claimant is physically unable to work was also noted. Michael Dreiling's report noted Claimant's educational background, social background, prior medical information, work background and Claimant's prospective of her injury were noted in his report.

Mr. Dreiling's report noted that Claimant participated in the Wunderlich personality test. Claimant's raw score was 19 and the average score for all applicants is approximately 21. Mr. Dreiling's report stated that when taking into account the totality of Claimant's vocational profile and the medical concerns expressed regarding her medical condition, it was his opinion "That she is essentially and realistically unemployable in the open labor market and furthermore, I would not expect that any employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ this individual in her existing physical condition.

Mr. Dreiling's report also stated Claimant would not appear to be an appropriate candidate for referral to the State Vocational Rehabilitation Agency for any type of training services or placement services. The report further noted that unless Claimant's medical condition would improve and her pain level would lessen, it is not anticipated that her vocational opportunities or capacities will improve significantly in the foreseeable future. The report further noted it is highly unlikely that Claimant would be able to tolerate full time schooling activities based on her ongoing pain issues and current level of functioning.

Terry Cordray, a vocational rehabilitation counselor, evaluated Claimant at the request of Employer/Insurer on November 19, 2008. He testified by deposition on December 9, 2008. His CV and report were admitted into evidence. He is a vocational rehabilitation counselor in private practice. Mr. Cordray said all of his opinions have been based on a reasonable degree of certainty within his field of expertise.

Mr. Cordray reviewed records Dr. Bernhardt, Dr. Hughes, Dr. Griffith, Dr. Koprivica and Michael Dreiling. He consulted the Dictionary of Occupational Titles and reviewed jobs that were posted at the state employment office. He noted that Claimant completed nine grades and received her GED when she was twenty-one. He was provided her social background, work history and a description of her job duties at Employer. He noted that Claimant was not skilled. She worked at medium physical demand at Employer but also had done sedentary and light physical demand jobs. She primarily would be looking at unskilled, sedentary jobs, or the job of a receptionist. She reported she had not attempted to find employment after working at the veterinary medical clinic.

Claimant described her pain and limitations to Mr. Cordray. He noted she was taking Wellbutrin and Cymbalta for depression from a psychiatrist, but was not taking any pain medications, and was not undergoing any therapy or medical treatment regarding her back.

Mr. Cordray performed vocational tests on Claimant including the wide range achievement test that indicated that she read slightly below average, which is at the high school range. She spelled at the borderline range. Her arithmetic was at the below average range. Claimant has 6th grade ability in math and spelling. He performed the Wunderlich test, which is a short form IQ test. She scored a 19. The average score for all high school graduates is 21. Her IQ is 98. Average intelligence is 90-109.

Mr. Cordray administered a career ability placement survey. Claimant had average and below average scores. He performed an interest inventory survey. Claimant's interests were skilled arts, consumer economics, and skilled service occupations. He noted the restrictions of Dr. Koprivica and Dr. Bernhardt. He also noted that Dr. Griffith stated that Claimant needed to be able to have the opportunity to lie down if her pain became severe. That did not allow her to work at any jobs. Mr. Cordray stated that based upon the restrictions, other than Dr. Griffith's, Claimant is capable of working, and there are jobs in the metropolitan Kansas City area that would be available for her. He did not see any reason why any employer would not be willing to hire her. He said there are jobs that are sedentary that offer Claimant the opportunity to sit or stand as a cashier, including working at a parking lot at the airport, working as a receptionist, working at a hotel as a front desk clerk, working an electronics assembly job, working as a bank teller, and working as a security monitor. Mr. Cordray said that Claimant is capable of receiving training for sedentary type jobs.

Mr. Cordray was not provided any records of Claimant's treating psychiatrist or psychologist. Claimant told Mr. Cordray that she was getting counseling from one and medications from the other. He agreed that chronic pain can, in certain circumstances, make someone unemployable. He agreed that a person's inability to be medicated for his or her pain would negatively impact his or her ability to secure employment. He agreed that chronic pain can negatively impact a person's ability to engage in or complete vocational rehabilitation or vocational retraining.

Mr. Cordray agreed that depression and anxiety can make someone realistically unemployable and can negatively impact a person's ability to engage in vocational rehabilitation or vocational training. He was shown Exhibit 6, an August 5, 2008 letter Steve Daily, MS, psychologist, that stated Claimant was unable to work. Mr. Cordray agreed that based on the opinion of Mr. Daily and Dr. Griffith, Claimant was realistically unemployable.

Mr. Cordray testified that according to the definition of the Department of Labor, the word "frequently," when referring to changing Claimant's position from sitting to standing, refers to two-thirds of the time. He did not know what Dr. Bernhardt meant when he used that term. He agreed that Dr. Griffith's restriction that Claimant have the ability to lie down would preclude all employment for an unskilled worker, and would make Claimant realistically unemployable and permanently and totally disabled.

Mr. Cordray said he did not put great weight on the letter from Mr. Daily. Mr. Daily had seen Claimant five sessions, not over a long period of time. Mr. Daily is not a psychiatrist or a doctor-level psychologist.

Mr. Cordray said he was with Claimant for four hours at least, and at no time did she indicate to him that she needed to lie down. She did not have the kinds of behaviors that told him that she was really in pain during that time. She was not grimacing or making sounds indicating pain.

Rulings of Law

1. Did Claimant sustain an injury by accident or occupational disease arising out of and in the course of her employment for Employer, and if so, 2., was her injury medically causally related to an accident or occupational disease arising out of and in the course of employment?

Occupational diseases are compensable under the Missouri Workers' Compensation Act.[1] The statute requires that the condition be an "identifiable disease arising with or without human fault and in the course of the employment." Section 287.067.1, RSMo. For an injury to be compensable under the Act, the work performed must have been a substantial factor in causing the medical condition or disability. *Kent v. Goodyear Tire and Rubber Company*, 147 S.W.3d 865, 867-68 (Mo.App 2004).

[1] Sections 287.067.1, 2, RSMo (2000). All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted. See *Lawson v. Ford Motor Co.*, 217S.W.3d 345 (Mo.App. 2007) where the Eastern District Court of Appeals held that the 2005 amendments to Sections 287.020, RSMo and 287.067, RSMo do not apply retroactively. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000).

An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067.1, RSMo. It defines occupational disease as:

> . . . an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Section 287.067.2, RSMo, provides that an occupational disease is compensable "if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor." Section 287.067.7, RSMo, provides: "With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease."

Section 287.063, RSMo, provides:

> 1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion as set forth in subsection 287.067, RSMo.
> 2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time of such last exposure.
> 3. The statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that a compensable injury has been sustained. . . .

Claimant must present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life. The

Courts have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort." *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63, 65 (Mo.App. 1995); *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App 1994), *overruled in part on other grounds by Hampton v. Big Boy Steel*, 121 S.W.3d 220, 228 (Mo. banc 2003)[2]; *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 300 (Mo.App 1991); *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App 1988); *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 415 (Mo.App 1988); *Jackson v. Risby Pallet and Lumber Co.*, 736 S.W.2d 575, 578 (Mo.App. 1987). In proving up a work-related occupational disease, "[a] claimant's medical expert must establish the probability that the disease was caused by conditions in the work place." *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006) (citing *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991) (quoting *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795,797) (Mo.App. 1987)); *Dawson*, 885 S.W.2d at 716. There must be medical evidence of a direct causal connection between the conditions under which the work is performed and the occupational disease. *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755 (Mo.App. 1997); *Dawson*, 885 S.W.2d at 716; *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 797 (Mo.App. 1987); *Estes v. Noranda Aluminum, Inc.*, 574 S.W.2d 34, 38 (Mo.App. 1978). Even where the causes of the disease are indeterminate, a single medical opinion relating the disease to the job is sufficient to support a decision for the employee. *Dawson*, 885 S.W.2d at 716; *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App. 1988).

The cause of an employee's medical condition need not be a single traumatic event. An employee may obtain compensation pursuant to The Workers' Compensation Law for gradual and progressive medical conditions which result from repeated or constant exposure to hazards encountered by the employee in the workplace. *Smith v. Climate Engineering*, 939 S.W.2d 429 (Mo.App. 1996); *Rector v. City of Springfield*, 820 S.W.2d 639 (Mo.App. 1991). Diseases resulting from the chronic traumata of repetitive occupational body movements qualify for compensation if they cause an employee to sustain a loss of earning capacity. *Collins v. Neevel Luggage Manufacturing Company*, 481 S.W.2d 548, 555 (Mo.App. 1972); *Coloney*, 952 S.W.2d at 759.

In claims for compensation for medical conditions associated with repetitive activities, a claimant must prove: 1) the injury arose out of and in the course of

[2] Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (*Id*. at 224-32). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus *Hampton's* effect thereon will not be further noted.

employment; 2) causation from job-related activities; and 3) nature and extent of disability. *Kintz v. Schnucks Markets, Inc*., 889 S.W.2d 121, 124 (Mo.App. 1994). Manipulations and flexions, iterated and reiterated within a concentrated time, are unusual conditions, and if they inhere in an employment task being performed by an employee, they expose the employee who performs them to a risk not shared by the public generally and to which the employee would not have been exposed outside of employment, and thus qualify for compensation pursuant to The Law. *Collins*, 481 S.W.2d at 555.

Missouri courts have interpreted Section 287.063, RSMo to provide that an employee with an occupational disease is "injured" within the meaning of the section 287.120, RSMo when the disease causes a "compensable injury." *Coloney*, 952 S.W.2d at 759, citing *Hinton v. National Lock Corp.*, 879 S.W.2d 713, 717 (Mo.App. 1994) (citing *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 228 (Mo.App. 1988)). The "injury" requirement of the Act necessitates that the employee's "injury" create a harm that tangibly affects the employee's earning ability. *Coloney*, 952 S.W.2d at 763; *Johnson v. Denton Constr. Co.*, 911 S.W.2d 286, 287 (Mo. banc 1995). Requiring that the harm tangibly affect the employee's earning ability upholds the intent of the legislature in enacting the Worker's Compensation Act which was to provide indemnity for loss of earning power and disability to work and not for pain, suffering, or mere physical ailment. *Coloney*, 952 S.W.2d at 760.

Section 287.020.2, RSMo requires that the injury be "clearly work related" for it to be compensable. Section 287.020, RSMo provides:

> 2. The word ‘accident’ as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.
> 3. (1) In this chapter the term ‘injury’ is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.
> (2) An injury shall be deemed to arise out of and in the course of the

> employment only if:
> (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and
> (b) It can be seen to have followed as a natural incident of the work; and
> (c) It can be fairly traced to the employment as a proximate cause; and
> (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

The employee must establish a causal connection between the accident and the claimed injuries. *Thorsen v. Sachs Electric Company*, 52 S.W.3d 611, 618 (Mo.App. 2001), *Williams v. DePaul Ctr*, 996 S.W.2d 619, 625 (Mo.App. 1999); *Fisher v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo.App 1990). Section 287.020.2, RSMo requires that the injury be "clearly work related" for it to be compensable. An injury is clearly work related, "if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor." *Kasl v. Bristol Care, Inc*., 984 S.W.2d 852 (Mo. 1999). Injuries that are triggered or precipitated by work may nevertheless be compensable if the work is found to be a "substantial factor" in causing the injury. *Kasl*, 984 S.W.2d at 853; *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App 1998). A substantial factor does not have to be the primary or most significant causative factor. *Bloss v. Plastic Enterprises*, 32 S.W.3d 666, 671 (Mo.App 2000); *Cahall*, 963 S.W.2d at 372. An accident may be both a triggering event and a substantial factor in causing an injury. *Bloss*, 32 S.W.3d at 671. Further, there is no “bright-line test or minimum percentage set out in the Workers’ Compensation Law defining ‘substantial factor.’” *Cahall*, 963 S.W.2d at 372. The claimant in a workers' compensation case has the burden to prove all essential elements of his or her claim, *Royal v. Advantica Restaurant Group, Inc*., 194 S.W. 3d 371, 376 (Mo.App 2006), (citing *Cook v. St. Mary's Hosp.*, 939 S.W.2d 934, 940 (Mo.App. 1997)); *Fischer v. Arch Diocese of St. Louis-Cardinal Ritter Inst.*, 793 S.W.2d 195, 198 (Mo.App. 1990); *Griggs vs. A.B. Chance Co.*, 503 S.W.2d 697, 705 (Mo.App. 1973), including "a causal connection between the injury and the job." *Royal*, 194 S.W. 3d at 376, (citing *Williams v. DePaul Health Ctr.*, 996 S.W.2d 619, 631 (Mo.App. 1999)).

“Under Missouri Workers' Compensation law, a psychological injury allegedly caused by a physical injury is clearly work-related *if* the claimant's work was a *substantial factor* in the cause of the psychological disorder, but an injury is not compensable merely because work was a triggering or precipitating factor. *See* § 287.020.2 (R.S.Mo.2000).” *Royal*, 194 S.W.3d at 376.

Prior to August 28, 2005, Section 287.800, RSMo provided in part: "Law to be liberally construed.—All of the provisions of this chapter shall be liberally construed with a view to the public welfare. . . ." The fundamental purpose of the Workers' Compensation Law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted with a view to the public interest, and is intended to extend its benefits to the largest possible class. Any doubt as to the right of an employee to compensation should be resolved in favor of the injured employee. *West v. Posten Const. Co*. 804 S.W.2d 743, 745-46 (Mo. 1991). Although all doubts should be resolved in favor of the employee and coverage in a workers' compensation proceeding, if an essential element of the claim is lacking, it must fail. *Thorsen*, 52 S.W.3d at 618; *White v. Henderson Implement Co*., 879 S.W.2d 575, 579 (Mo.App. 1994).

The quantum of proof is reasonable probability. *Thorsen*, 52 S.W.3d at 620; *Downing v. Willamette Industries, Inc*., 895 S.W.2d 650, 655 (Mo.App. 1995); *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Thorsen*, 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App 1986); *Fischer*, 793 S.W.2d at 198. Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). Expert testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992). "Medical causation of injuries which are not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause." *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App 1991). Compensation is appropriate as long the performance of usual and customary duties led to a breakdown or a change in pathology. *Bennett v. Columbia Health Care*, 134 S.W.3d 84, 87 (Mo.App. 2004).

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc*., 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp*., 826 S.W.2d 51, 54 (Mo.App. 1992), 29; *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const*., 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co*., 132 S.W.3d 260, 263 (Mo.App. 2004). The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause,

and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc*., 847 S.W.2d 203, 206 (Mo.App. 1993), 29; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson, 721 S.W.2d* at 161-2; *Barrett v. Bentzinger Brothers, Inc*., 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993).

Based on substantial and competent evidence, including the testimony of fact and opinion witnesses, the medical records, my credibility determinations, and the application of Missouri Workers' Compensation Law, I find that Claimant has met her burden to prove that she sustained an injury that was clearly work related, and that her work for Employer was a substantial factor in causing her back injury and resulting disability. I find that she sustained a compensable occupational disease from cumulative repetitive trauma that continued through April 20, 2004, her last day of work for Employer, that resulted in injury to her back and in permanent partial disability. I find that she was exposed to a risk that was greater than and different from that which affects the public generally. I find that medical evidence credibly proved the probability that Claimant sustained an occupational disease from repetitive trauma that was caused by conditions in Claimant's workplace. I find that the credible evidence established that her current back complaints are the result of her work for Employer, and not from any other condition or incident.

I do not find that Claimant's injury was from a single accident. Claimant did not attribute it to a single accident, and the medical evidence did not either. I find that the credible evidence established that Claimant sustained a gradual and progressive injury which resulted from repeated and constant exposure to hazards encountered by Claimant in Employer's workplace that resulted in injury to her back. I find that the performance of Claimant's usual and customary duties working for Employer led to a breakdown or change in pathology.

Claimant began to have back pain in 2002 while working for Employer. Claimant worked for Employer for more than three consecutive years. She performed duties during that period that required her to repetitively and continuously use her back. Claimant's symptoms began while she was working for Employer. Her pain came on slowly over time. Her symptoms got worse while she worked for Employer. She was engaged in repetitive lifting, carrying, standing, stacking, and bending in her duties as a stocker for Employer.

Dr. Bernhardt wrote on April 26, 2005 that Claimant herniated the L5-S1 disk during her work activities and that she probably herniated the T10-11 disk during her

work activities. He noted that she had no complaints of back pain and no prior medical care for back pain prior to January 2002. Dr. Koprivica stated that Claimant's duties, particularly the stocking activities, while working for Employer, represented the prevailing factor producing repetitive injury that resulted in the disabling conditions he diagnosed.

I find that the medical evidence and testimony supports the conclusion that Claimant's work for Employer was a substantial factor in causing her back injury and disability. I find that Claimant sustained a compensable injury to her back arising out of and in the course of her employment for Employer.

I also find that Claimant did not establish that she sustained a compensable mental injury in this case that resulted in her need for treatment for her overdose and subsequent treatment for depression and anxiety.

Dr. Griffith noted on March 12, 2007 that Claimant was having quite a bit of difficulty from a personal standpoint. His report discussed Claimant's husband was recently fired again from his job which puts their insurance at risk, her seventeen year old daughter had moved out of the house and that was causing quite a bit of stress, and Claimant had been having some intimacy issues with her husband and was not sure why. He also noted that Claimant's seventeen year old daughter had moved out to live with her mother-in-law, and that had created a huge amount of stress as well.

Dr. McNab's April 30, 2007 report noted Claimant reported that she had a long-term history of marital issues with her husband that had been crescendoing for a number of months. She had been arguing with him on the night of admission. She had had one alcoholic beverage and some marijuana. She became more and more frustrated with her husband. She took thirty methadone all at one time.

The Tri-County Mental Health record dated May 21, 2007 noted that the history of Claimant's presenting problem was that she was frustrated over a fight with her husband, issues with family, and physical pain. The record noted her husband had been recently fired, they did not have insurance, and had little income. The psychiatric history noted symptoms began around month-long separation of her and husband in October of 2006. Social/Family History noted that Claimant had "separated a few times due to marital problems consisting of financial (not working), sexual (he won't have sex with her). The record also noted Claimant's husband was a recovering alcoholic, and her daughter (17) had left home on bad terms, got pregnant, and had an abortion. Claimant had reported she had gained a lot of weight over the past few years which contributed to her depression. Clinical Impression and Plan in the record noted in part that "Recently, the stress of husband being unemployed, issues with her daughter and mother all became too much and she took 50-60 methadone pills as suicide attempt."

Dr. Cole's May 29, 2007 report noted there had been stressors such as discord with her husband. His Axis I diagnosis was substance abuse, opiate dependence, Axis II was mood disorder with depression secondary to multiple factors including opiate dependence, and Axis III: back pain.

Steven Daily stated in his August 5, 2008 report that it was his opinion that Claimant's inability to work following her injury had significantly contributed to both her high level of depression and anxiety. He believed that her injury coupled with her self-blame has contributed much to her marital problems with her husband.

Dr. Hughes testified that Claimant had an adjustment disorder in April 2007 when in the context of great distress and discord with her family, she attempted suicide by overdosing on methadone. He did not believe that Claimant had a major depressive disorder at that time. He stated that her distress was caused by her struggle with her family, not from her back injury or back pain. He also testified that he did not think that Claimant's back injury was even a significant factor in the methadone overdose in April 2007. Dr. Hughes stated that in order of intensity, the biggest distresses when he saw Claimant were her significant marital discord to the point that she and her husband had physically separated, her grief and bereavement over the unexpected death of her father fairly recently, ongoing discord with her daughter, distress that comes from unemployment, and lastly, continued frustrations over the activities that she had to curtail or avoid because of her back pain. Dr. Hughes also said Claimant did not need psychotherapy to cope with ongoing pain. He stated that Claimant's ongoing need for psychotherapy was not in any way related to the work injuries.

I find Dr. Hughes' opinions to be credible and more persuasive than the opinions of Mr. Daily. The treatment records support Dr. Hughes' opinion that Claimant's distress was caused by family problems. Further, Dr. Hughes is a board certified psychiatrist who treats patients. He is a medical doctor. Mr. Daily is a masters-level psychologist. He is not a medical doctor and does not have a PhD degree. Claimant did not offer a report or deposition of a psychiatrist.

I find that Claimant did not prove that her hospitalization for her overdose in April 2007, her treatment at Tri-County, and her treatment with Steven Daily were clearly work related. I find that Claimant did not prove that her work injury was a substantial factor in the cause of her mental condition that resulted in her April 2007 hospitalization and subsequent treatment for depression and anxiety.

3. Was Claimant's claim filed within the time prescribed by law?

Section 287.063, RSMo, provides: "The statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that a compensable injury has been sustained. . . ." For claims made for compensation in regard to occupational diseases, The Workers' Compensation Law's period of limitation does not commence until it becomes reasonably discoverable and apparent that a compensable injury has been sustained. Section 287.063.3, RSMo; *Marie v. Standard Steel Works*, 319 S.W.2d 871 (Mo.1959); *Wiele v. National Super Markets, Inc.*, 948 S.W.2d 142 (Mo.App. 1997); *Sellers v. Trans World Airlines, Inc*., 752 S.W.2d 413, 416 (Mo.App. 1988). The Court in *Sellers* states at 416:

> The standard for beginning the running of the statute of limitations, as developed in the cases, requires (1) a disability or injury, (2) that is compensable. Compensability, as noted, turns on establishing a direct causal connection between the disease or injury and the conditions under when the work is performed. Logically, an employee cannot be expected and certainly cannot be required to institute claim until he has reliable information that his condition is the result of his employment. Just as logically, given that there must be competent and substantial evidence of this link, the claimant is entitled to rely on a physician's diagnosis of his condition rather than his own impressions.

In the case at hand, Claimant continued to work for Employer until April 20, 2004. She continued to perform repetitive duties of lifting, carrying, stacking, bending, and lifting during that time. She continued to be exposed to the hazards of her work to her last day of work. I find that her date of injury is April 20, 2004, the date of her last exposure to the risk that caused her back injury.

Claimant's Claim for Compensation was filed on March 31, 2004. I find that her claim was filed within the time prescribed by law.

4. Notice of Injury.

Claimant was not required to prove notice of her repetitive trauma occupational disease upper extremity injury. The notice requirement in Section 287.420, RSMo does not apply to occupational diseases. *Endicott v. Display Technologies, Inc*., 77 S.W.3d 612, 616 (Mo. 2002).

Nevertheless, Claimant did report her injury to Employer on April 4, 2002. (Exhibits 9 and 10.) She reported she was injured from excessive lifting, stretching and bending with heavy freight.

I find that Claimant's claim is not barred by her alleged failure to give notice of her injury to Employer.

5. What is Employer's liability, if any, for past medical bills?

The employee must prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury. *Chambliss v. Lutheran Medical Center*, 822 S.W.2d 926 (Mo.App. 1991); *Jones v. Jefferson City School District*, 801 S.W.2d 486, 490-91 (Mo.App. 1990); *Roberts v. Consumers Market*, 725 S.W.2d 652, 653 (Mo.App. 1987); *Brueggemann v. Permaneer Door Corporation*, 527 S.W.2d 718, 722 (Mo.App. 1975). The employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence that relate to the services provided. *Martin v. Mid-America Farm Lines, Inc*., 769 S.W.2d 105 (Mo. 1989); *Meyer v. Superior Insulating Tape*, 882 S.W.2d 735, 738 (Mo.App. 1994); *Lenzini v. Columbia Foods*, 829 S.W.2d 482, 484 (Mo.App. 1992); *Wood v. Dierbergs Market*, 843 S.W.2d 396, 399 (Mo.App. 1992). The medical bills in *Martin* were shown by the medical records in evidence to relate to the professional services rendered for treatment of the product of the employee's injury. *Martin*, 769 S.W.2d at 111.

Section 287.140.1, RSMo, provides in part: 'If the employee desires, he shall have the right to select his own physician, surgeon, or other requirement at his own expense." The Court in *Blackwell v. Puritan-Bennett Corp*., 901 S.W.2d 81 (Mo.App. 1995) states at 85:

> An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those costs against his employer. Therefore, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 880 (Mo.App.1984).

The law in Missouri provides that while the employer has the right to name the treating physician, it waives that right by failing or neglecting to provide necessary medical aid to the injured worker. *Emert v. Ford Motor Co.*, 863 S.W.2d 629, 631 (Mo.App.1993); *Shores v. General Motors Corp.*, 842 S.W.2d 929, 931 (Mo.App.1992); *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816, 822 (Mo.App. 1995); *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 879 (Mo.App. 1984).

The court in *Reeves v. Fraser-Brace Engineering Co.*, 237 Mo.App. 473, 172 S.W.2d 274 (Mo.App. 1943) states at 282:

> Under the decisions construing Section 3701, we find several situations in which an employee will be denied recovery. Obviously, where an employee after receiving an injury which he knows is compensable refuses medical attention offered by an employer, and selects his own physician, he cannot recover under Section 3701 for those services. Moorman v. Central Theatres Corp., Mo.App., 98 S.W. 2d 987. Also, where an employer has no notice of such an injury to the workman, nor opportunity to furnish medical aid for him, the employer is not liable for the medical aid furnished. Schutz v. Great American Ins. Co., 231 Mo.App. 640, 103 S.W.2d 904; Aldridge v. Reavis, Mo.App., 88 S.W.2d 265.

Claimant testified that she did not recall telling the adjustor that she had waited too long, and that was why Claimant went to the doctor on her own. She did not recall the adjustor telling her that any treatment that Claimant got on her own would be unauthorized, and the treatment would not be paid for. I do not find Claimant's testimony to be credible.

Insurer's claims' adjuster, Ms. Roberts, testified that Claimant called her and said she was tired of waiting and would go to the doctor on her own. Ms. Roberts testified she told Claimant that she had set the appointment for her with Dr. Jones, and told Claimant the treatment she got on her own would be unauthorized and workers' compensation would not pay for it. I find Ms. Roberts' testimony to be credible. I find that Ms. Roberts told Claimant that she had scheduled an appointment for her to be evaluated by a doctor, but that Claimant refused to go to that appointment. I find that Ms. Roberts told Claimant the treatment she got on her own would be unauthorized and workers' compensation would not pay for it. I find that Claimant refused to treat with the medical provider selected by Employer/Insurer in 2002. I further find that Claimant was told, and that she knew in 2002 that the treatment she got on her own would be unauthorized and workers' compensation would not pay for it.

I find that Claimant refused medical attention offered by Employer/Insurer in 2002 and selected her own physician. I find that Employer/Insurer are not responsible for any of the past medical expenses incurred by Claimant.

I further find that Claimant did not make demand on Employer/Insurer for payment of her medical expenses before they were incurred, and that she did not give notice to Employer/Insurer of the medical treatment that she sought to obtain and give them an opportunity to furnish medical aid to her. Claimant could not recall ever asking

Employer for follow-up treatment after she talked to the workers' compensation insurance adjuster in 2002. Claimant did not offer evidence that she had ever informed Employer/Insurer that she was requesting or demanding that they provide any of the treatment she obtained.

I have previously found that Claimant's hospitalization for her overdose was not caused by her work injury. I further find that Claimant's medical bills relating to her hospitalization for her overdose were not caused by her work injury.

I find that Claimant selected her own medical providers at her own expense. I further find that Employer did not have notice of Claimant's need for medical treatment and that Claimant did not make demand that Employer provide needed treatment which Employer neglected. I find under the reasoning of *Blackwell, Hawkins and Reeves* that Employer/Insurer are not liable for any past medical aid.

Claimant's request for payment of past medical expenses is denied.

6. What is Employer's liability for future medical aid?

Claimant is requesting an award of future medical aid. Section 287.140, RSMo requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment … as may reasonably be required … to cure and relieve [the employee] from the effects of the injury." This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Bowers,* 132 S.W.3d at 266. Medical aid is a component of the compensation due an injured worker under section 287.140.1, RSMo. *Bowers,* 132 S.W.3d at 266; *Mathia v. Contract Freighters, Inc*., 929 S.W.2d 271, 277 (Mo.App. 1996). The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co*., 676 S.W.2d 1 (Mo.App. 1984). Conclusive evidence is not required. *Bowers,* 132 S.W.3d at 270; *Landers v. Chrysler Corp.,* 963 S.W.2d 275, 283 (Mo.App. 1997). It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment. *Bowers,* 132 S.W.3d at 270; *Mathia,* 929 S.W.2d at 277; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Tate v. Southwestern Bell Telephone Co.,* 715 S.W.2d 326, 329 (Mo.App. 1986); *Sifferman* at 828. Section 287.140.1, RSMo does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992); *Bradshaw v. Brown Shoe Co.,* 660 S.W.2d 390, 394 (Mo.App. 1983).

The type of treatment authorized can be for relief from the effects of the injury even if the condition is not expected to improve. *Bowers*, 132 S.W.3d at 266; *Landman v. Ice Cream Specialties, Inc*., 107 S.W.3d 240, 248 (Mo.banc 2003). Future medical care must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible. *Bowers*, 132 S.W.3d at 270. Medical aid may be required even though it merely relieves the employee's suffering and does not cure it, or restore the employee to soundness after an injury or occupational disease. *Mathia*, 929 S.W.2d at 277; *Stephens v. Crane Trucking, Incorporated*, 446 S.W.2d 772, 782 (Mo. 1969); *Brollier v. Van Alstine*, 236 Mo.App. 1233, 163 S.W.2d 109, 115 (1942). To relieve a condition is to give ease, comfort or consolation, to aid, help, alleviate, assuage, ease, mitigate, succor, assist, support, sustain, lighten or diminish. *Stephens*, 446 S.W.2d at 782; *Brolier*, 163 S.W. 2d at 115. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. *Hall v. Spot Martin*, 304 S.W.2d 844, 854-55 (Mo. 1957).

Claimant has been off narcotic pain medication since her detoxification program at Shawnee Mission in 2007. Claimant and Dr. Griffith discussed treatment with a Morphine pump or spinal cord stimulator for her chronic pain. Claimant had chosen not to use either of those as of the time of the hearing.

Dr. Bernhardt wrote on April 26, 2005 that it was unlikely that traditional surgical treatments would be beneficial to Claimant. Dr. Bernhardt's April 26, 2005 report further stated: "It is my opinion that she will always need continued medical care. It is my opinion that she will need pain medications for the rest of her life. It is unlikely that her problem will resolve with additional treatment, including surgery." The report also stated: "It is my opinion she will need continued prescription of pain medications and chronic pain management, that is monitoring of medications, their effects and side effects."

Dr. Bernhardt wrote on March 15, 2007 that Claimant will require chronic pain management, that is, monitoring of her pain medications. He stated that if she developed significant side effects from narcotics, the pain management physician will have to perhaps change the method of administration of the type of medications administered.

I find Dr. Bernhardt's opinions regarding Claimant's need for future medical care to be credible. I find that Claimant will need future medical aid, including chronic pain management.

Employer/Insurer is directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of her April 20, 2004 work injury, including

the treatment that Dr. Bernhardt has recommended, in accordance with Section 287.140, RSMo.

7. What is Claimant's average weekly wage and what are the compensation rates?

Pursuant to Section 287.250, RSMo the average weekly wage is determined in the following manner:

> (4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by 13 the wages earned while actually employed by the employer in each of the last 13 calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than 13 weeks, by the number of calendar weeks, or any portion of the week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered an absence for a calendar week if the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the earnings earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision.

I have found that the date of Claimant's incidence of occupational disease was April 20, 2004. Exhibit 11 reveals that the total wages paid for the 13 weeks ending April 16, 2004, after deducting one-half of the wages earned in the period ending 1-23-04, or $322.71, amount to $4,187.67. When that amount is divided by thirteen, the average weekly wage is $322.13. Two-thirds of the average weekly wage amounts to a compensation rate of $214.75 per week.

Claimant testified that she earned $11.78 per hour before she became Seasonal Department Manager when she earned $1.00 per hour less. I find that Employer's payroll records are accurate. I find that Claimant's testimony about her earnings is not as persuasive as her actual payroll records, and is not credible. I find that Claimant's average weekly wage is $322.13 and that her compensation rate is $214.75 per week for temporary total disability, permanent total disability, and permanent partial disability.

8. What is Employer/Insurer's liability for past temporary total disability?

The burden of proving entitlement to temporary total disability benefits is on the Employee. *Boyles v. USA Rebar Placement, Inc*. 26 S.W.3d 418, 426 (Mo.App. 2000);

Cooper v. Medical Center of Independence, 955 S.W.2d 570, 575 (Mo.App. 1997). Section 287.170.1, RSMo provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7, RSMo as the "inability to return to any employment and not merely . . . [the] inability to return to the employment in which the employee was engaged at the time of the accident." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. *Cooper*, 955 S.W.2d at 575; *Vinson v. Curators of Un. of Missouri*, 822 S.W.2d 504, 508 (Mo.App. 1991); *Phelps v. Jeff Wolk Construction Co*., 803 S.W.2d 641, 645 (Mo.App. 1991); *Williams v. Pillsbury Co*., 694 S.W.2d 488, 489 (Mo.App. 1985).

Temporary total disability benefits should be awarded only for the period before the employee can return to work. *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Phelps*, 803 S.W.2d at 645; *Williams*, 649 S.W.2d at 489. With respect to possible employment, the test is "whether any employer, in the usual course of business, would reasonably be expected to employ Claimant in his present physical condition." *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Brookman v. Henry Transp*., 924 S.W.2d 286, 290 (Mo.App. 1996). A nonexclusive list of other factors relevant to a claimant's employability on the open market includes the anticipated length of time until claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that claimant will return to his or her former employment. *Cooper*, 955 S.W.2d at 576. A significant factor in judging the reasonableness of the inference that a claimant would not be hired is the anticipated length of time until claimant's condition has reached the point of maximum medical progress. If the period is very short, then it would always be reasonable to infer that a claimant could not compete on the open market. If the period is quite long, then it would never be reasonable to make such an inference. *Boyles*, 26 S.W.3d at 425; *Cooper*, 955 S.W.2d at 575-76.

Claimant has requested temporary total disability benefits from April 21, 2004, the day after her last day of work for Employer, until April 26, 2005. Claimant did not offer specific evidence of the date that Claimant reached maximum medical improvement. Dr. Bernhardt examined Claimant in April 2005 and stated on April 26, 2005 that Claimant had reached medical stability, and that he did not think further medical treatment would lead to substantial incremental benefit. Dr. Koprivica's October 20, 2007 report stated that Claimant was at maximal medical improvement in reference to the repetitive injury claim from January of 2002 through April 4, 2002, continuing to her last exposure at Employer.

Claimant has the burden to prove entitlement to temporary total disability. Claimant did not work after April 21, 2004, but she did not offer medical evidence that

she was unable to work after that date as a result of her work injury for any specific period or periods of time. The treatment records do not note that Claimant had been taken off work or that she was restricted from working. I find that Claimant failed to prove that she is entitled to temporary total disability benefits. Claimant's claim for temporary total disability benefits is denied.

9. What is the nature and extent of Claimant's permanent disability, if any, as a result of an injury by accident or occupational disease arising out of and in the course of her employment for Employer?

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Sellers v. Trans World Airlines, Inc*., 776 S.W.2d 502, 505 (Mo.App. 1989). While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett*, 595 S.W.2d at 443; *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co*., 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

The finding of disability may exceed the percentage testified to by the medical experts. *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289. The Commission "is free to find a disability rating higher or lower than that expressed in medical testimony." *Jones v. Jefferson City School Dist*., 801 S.W.2d 486, 490 (Mo.App. 1990); *Sellers*, 776 S.W.2d at 505. The Court in *Sellers* noted that "[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, 'the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.'" *Sellers*, 776 S.W.2d at 505. The uncontradicted testimony of a medical

expert concerning the extent of disability may even be disbelieved. *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. 1995); *Jones*, 801 S.W.2d at 490.

Section 287.020.7, RSMo provides: "The term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident." The phrase "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. 1982). 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. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo. App. 2007); *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo.App. 2001); *Reiner v. Treasurer of the State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.1992); *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 792 (Mo.App. 1992).

Total disability means the "inability to return to any reasonable or normal employment." *Lawrence*, 834 S.W.2d at 792; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990); *Kowalski*, 631 S.W.2d at 992. An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Brown*, 795 S.W.2d at 483 The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Knisley*, 211 S.W.3d at 635; *Brown*, 795 S.W.2d at 483; *Reiner*, 837 S.W.2d at 367; *Kowalski*, 631 S.W.2d at 922. See also *Thornton v. Hass Bakery*, 858 S.W. 2d 831, 834 (Mo.App. 1993).

I find that Employer/Insurer did not prove that Claimant's past medical treatment in 1991 and in 1999 for anxiety and stress resulted in any permanent disability or contributed to Claimant's current condition. I also find that Employer/Insurer did not prove that Claimant's activities during her 2002 vacation in Cancun or her September 2003 fall resulted in any permanent disability or contributed to Claimant's current condition. Dr. Bernhardt wrote on May 15, 2007 that he did not think Claimant's fall in the driveway at home contributed to her disability rating. I find his opinion credible.

Claimant testified she hurts every day and that her pain is constant. She testified that she has a constant dull pain in her mid-back. At times the pain is sharp and piercing. She has aching pain in both legs. Claimant stated she also has constant dull pain in her low back. She sometimes has throbbing pains on the right side of her back. She has aching pain and pins-and-needles feelings in her legs. She said, at times, the pain is so bad she cannot move.

Claimant testified she cannot do activities she used to be able to do. Her relationship with her husband has suffered. She said she is very irritable and easily upset. Her concentration is not as good as it was. Claimant said the pain medication affected her memory. Her pain takes her focus away. She is no longer active, full of energy, or outgoing.

Claimant said that to manage her pain, she takes scalding hot bathes that give her ten minutes of relief. She reclines, lays down on the couch on the right side, uses a heating pad, uses a massage chair, uses a popcorn bag, which is a warm bag, and uses Bio-Freeze, which is like Ben-Gay. She said those do not provide long lasting relief.

Claimant said she can still drive short distances of less than one mile. She said she cannot vacuum, use the sweeper, or bathe the dogs. She can do light pick-up around the house. She can cook, but her daughter helps. She cannot do sports with her children anymore because the pain is too intense. Claimant's daughter helps curl and straighten her hair. She needs helps getting in and out of the bath tub at times. She is not able to participate in activities with her children because of pain.

Claimant is 37 years old. The only surgery she had relating to her back injury was minimally invasive percutaneous disk decompression L4-5 and L5-S1. She exhibited pain behaviors when she was examined by Dr. Koprivica, Dr. Bernhardt, and Dr. Hughes.

Dr. Bernhardt wrote on April 26, 2005 that Claimant had sustained 20% permanent partial disability due to her work injury sustained at Wal-Mart. He wrote on March 11, 2008 that that 50% of her disability was due to her thoracic disk herniation at T10-11 and 50% of her disability was due to her lumbar injuries. Dr. Bernhardt wrote on May 15, 2007 that Claimant's noted Waddell's signs were positive, 4/5 (positive for superficial tenderness, distraction, simulation and axial loading and axial rotation, and regional findings).

Dr. Bernhardt's April 23, 2008 report addressed to Employer's attorney noted that he had reviewed the records of Dr. Koprivica, Michael Dreiling, and Dr. Patrick Griffith. His report stated: "All things considered, I agree with Drs. Koprivica, Dreiling and Griffith that the combination of Ms. Ambrose's physical and psychological conditions and chronic pain make her essentially unemployable; and therefore, the Claimant is thus permanently and totally disabled."

Dr. Bernhardt's September 3, 2008 report addressed to Employer's attorney noted that Dr. Bernhardt had reviewed the report of Dr. Patrick Hughes of May 20, 2008, the report of Terry Cordray of July 21, 2008 and the report of Steve Daily dated August 5,

2008. Dr. Bernhardt stated his opinions with respect to Claimant's physical disability had not changed. Dr. Bernhardt's report further stated:

> It is and has been my opinion that she is capable of some physical tasks. After reviewing the psychiatric and psychological evaluations, I have learned that she has been successful in discontinuing of the use of addicting opioid medications. This is a good sign that she may be able to return to restricted work.
>
> It is my opinion that she could return to light work but for her psychological and psychiatric conditions. In other words, from a physical standpoint, I think she would be capable of sedentary work as long as she can change her position frequently from sitting to standing and vice versa.

Dr. Bernhardt testified on December 10, 2008 in response to the question "And what is your opinion concerning whether or not she is employable?", "I think given her physical, psychological, and chronic pain, she's essentially unemployable." He stated that the impairment that Dr. Hughes had assigned, as well, as the physical impairment that he had assigned - those two things essentially made her unemployable. Dr. Bernhardt further stated that from a physical standpoint, he thought Claimant was capable of sedentary work as long as she can change her position frequently from sitting to standing or vice versa. He stated he would defer any opinions regarding Claimant's mental status and how that affects her ability to work to the psychiatric and psychological providers or evaluators. He also testified that even with the chronic pain, Claimant is capable of sedentary work from a physical standpoint. Dr. Bernhardt is not a psychiatrist.

Dr. Koprivica examined Claimant on October 20, 2007. He noted in his report that under Waddell's criteria, he considered Claimant to be positive for over-reaction, positive for simulated rotation testing, and positive on disparity testing. He noted she had overwhelming thoracolumbar and lumbosacral pain on examination. He noted she was using no assistive devices. She stated her sitting tolerance was less than an hour as a maximum and her standing and walking tolerances were less than thirty minutes. He noted she reported she lays down during the day primarily on her right side where she gets some relief. Excluding psychological factors, he restricted Claimant to sedentary physical demand level of activity as defined by The Dictionary of Occupational Titles. He restricted her from frequent or constant bending at the waist, pushing, pulling or twisting. He said she should avoid sustained or awkward postures of the lumbar spine. He said that posturally, she should have the ad lib ability to change posture. As a general guideline, captive sitting, standing or walking intervals of thirty minutes would be recommended with the flexibility of being able to change between those activities as necessary.

In addition, Dr. Koprivica assigned a 25% permanent partial disability to the body as a whole to be appropriate in isolation in the thoracolumbar region with the multi-level involvement and a 25% permanent partial disability to the body as a whole in isolation in the lumbar region where the two-level percutaneous nucleoplasty had been performed. He also stated that, "It is unrealistic to believe that Ms. Ambrose can effectively compete in the open labor market for any employment." Dr. Koprivica is not a psychiatrist.

Steven Daily wrote on August 5, 2008 that in his opinion, Claimant is unable to work. Mr. Daily is not a psychiatrist or a vocational expert. He is not a PhD level psychologist. He had seen Claimant for five sessions.

Dr. Hughes stated that Claimant's overall impairment or disability was somewhere between ten and twelve percent of the body as a whole, and of that, a third was from a combination of being unemployed and her distress over life limitations from pain, and one-third of that one-third was from the back pain and presumably permanent. He also stated that were Claimant to return to gainful employment, which he felt was entirely possible and likely from a psychiatric standpoint, then her distress from being unemployed would resolve. He stated that Claimant has 1.33% permanent psychiatric impairment from her back pain and life limitations standing alone. He also stated that Claimant's adjustment disorder does not preclude her from gainful employment from a psychiatric standpoint.

Claimant did not present testimony from a psychiatrist that Claimant sustained any permanent disability as a result of her work injury.

Mr. Dreiling testified that Claimant is unemployable in the open labor market and that an employer in the usual course of business would not reasonably be expected to employ Claimant. He based that on her education, limited training, her work history, her lack of significant job skills, her pain issues, and her need to alternate sitting, standing and lying down. He relied on Dr. Griffith's and Dr. Koprivica's restrictions. He was aware that Claimant had been diagnosed with depression and anxiety. He said that would be one more factor that would impede her ability vocationally. He noted that Dr. Griffith had concluded that Claimant needed to sit or stand as needed and needed to be able to lie down. He stated that the sit/stand restriction is very limiting, and most jobs do not allow that. He said Claimant is not realistically employable. He said cashier's positions are not realistic because Claimant would need to be at work eight hours a day, five days a week, and she would not be able to do that with her significant pain issues.

Mr. Dreiling's December 16, 2007 report noted it is highly unlikely that Claimant would be able to tolerate full time schooling activities based on her ongoing pain issues and current level of functioning.

Mr. Cordray stated that based upon the restrictions, other than Dr. Griffith's, Claimant is capable of working, and there are jobs in the metropolitan Kansas City area that would be available for her. He did not see any reason why any employer would not be willing to hire her. He tested Claimant and noted she has an average IQ. He said there are jobs that are sedentary that offer Claimant the opportunity to sit or stand as a cashier, including working at a parking lot at the airport, working as a receptionist, working at a hotel as a front desk clerk, working an electronics assembly job, working as a bank teller, and working as a security monitor. Mr. Cordray said that Claimant is capable of receiving training for sedentary type jobs.

Mr. Cordray said he did not put great weight on the letter from Mr. Daily. Mr. Daily had seen Claimant five sessions, not over a long period of time. Mr. Daily is not a psychiatrist or a doctor-level psychologist.

Mr. Cordray said he was with Claimant for four hours at least, and at no time did she indicate to him that she needed to lie down. She did not have the kinds of behaviors that told him that she was really in pain during that time. She was not grimacing or making sounds indicating pain.

Claimant asserts that an important factor in assessing her disability is her alleged need to lie down during the day because of pain. Dr. Griffith last saw Claimant in May 2007. He wrote on January 3, 2008 that Claimant needs to be able to change positions chronically from sitting to standing and also have the opportunity to lie down if her pain becomes quite severe. I do not find credible Dr. Griffith's opinion that Claimant needs to have the opportunity to lie down.

I have previously noted that Claimant did not lie down during the hearing in this case, and did not request permission to lie down, despite the hearing having lasted over nine hours over two days. The medical and vocational reports did not note that Claimant lay down during the examinations because of pain. Claimant did not offer lay testimony to substantiate her claim that she lay down during the day due to pain. Dr. Koprivica examined Claimant on October 20, 2007. He did not provide a restriction that Claimant be able to lie down during the day. I find that Claimant does not need to be able to lie down during the day.

I find the opinions of Mr. Cordray more persuasive than the opinions of Mr. Dreiling regarding whether Claimant is capable of working. Dr. Bernhardt stated that even with the chronic pain, Claimant is capable of sedentary work from a physical standpoint. I find that opinion credible. I find that Claimant failed to prove that she is permanently and totally disabled as a result of her work injury.

I find that as a result of her work injury, Claimant has significant restrictions and is limited to sedentary work and should be able to change her position frequently from sitting to standing and vice versa. I also find that Claimant has chronic pain from her work injury.

Based on the substantial and competent evidence, including the testimony, medical records and reports, and the vocational evidence, and my observations of Claimant, and based on the application of the Missouri Workers' Compensation Law, I find that Claimant has sustained a permanent partial disability of 40% of the body as a whole as a result of a compensable injury to her back sustained in the course of his employment for Employer, and is entitled to 160 weeks of compensation at a rate of $214.75, for a total of $34,360.00 in permanent partial disability benefits from Employer. I hereby order Employer/Insurer to pay Claimant the sum of $34,360.00 in permanent partial disability benefits at the rate of $214.75 per week.

10. Liability for costs.

Claimant seeks payment of cost of the proceedings under Section 287.560, RSMo. Section 287.560 provides in part:

> All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

Missouri courts have stated: "The commission should only exercise its discretion to order the cost of proceedings under section 287.560 where the issue is clear and the offense egregious." *Landman v. Ice Cream Specialties, Inc*., 107 S.W.3d 240, 250 (Mo.banc 2003); *Monroe v. Wal-Mart Associates, Inc.*, 163 S.W.3d 501, 506 (Mo.App 2005). I find that the issues were not clear and that Employer/Insurer had a reasonable defense to this claim. I find that Employer/Insurer's action in defending this claim was not egregious. Claimant's request for cost of the proceedings under Section 287.560, RSMo is denied.

11. Attorneys Fees.

Claimant's attorneys are entitled to a fair and reasonable fee in accordance with Section 287.260, RSMo. An attorney's fee may be based on all parts of an award, including the award of medical expenses. *Page v. Green*, 758 S.W.2d 173, 176

(Mo.App. 1988). Claimant's attorneys did not offer a written fee agreement in evidence at the hearing. However, during the hearing, and in Claimant's presence, Claimant's attorneys requested a fee of 25% of all benefits to be awarded. Claimant did not object to that request. I find Claimant's attorneys are entitled to and are awarded an attorneys' fee of 25% of all amounts awarded for necessary legal services rendered to Claimant. The compensation awarded to Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorneys for necessary legal services rendered to Claimant: Jeffrey S. Bloskey and Joani W. Harshman.

Date: March 16, 2009 Made by: /s/ Robert B. Miner
Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Peter Lyskowsi
Peter Lyskowski, Acting Director
Division of Workers' Compensation