

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

Injury No.: 11-072406

Employee: Sharon Barnhart
Employer: Eldon Nursing and Rehabilitation Center
Insurer: Missouri Nursing Home Insurance

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Future medical treatment

The parties asked the administrative law judge to resolve the issue whether employer is obligated to provide employee with future medical treatment to cure and relieve the effects of employee's work injury. The administrative law judge concluded that employer is liable for future medical expenses for treatment including but not limited to (1) ongoing appointments with Dr. Bernabe or another physician pertaining to employee's low back pain and radicular symptoms into the legs, (2) prescriptions for pain medications such as Hydrocodone or Soma pertaining to low back pain and radicular symptoms into the legs as prescribed by Dr. Bernabe or another physician, and (3) those treatments recommended by Dr. Volarich, including but not limited to treatment at a pain clinic, epidural steroid injections, foraminal nerve blocks, trigger point injections, and radiofrequency ablation procedures. Employer appeals, arguing that the administrative law judge is not authorized to order employer to provide certain, specified medical treatments and procedures, because the determination which treatment is appropriate should be left to the discretion of the medical professionals selected by employer.

In general, a conclusion by the fact finder that an employee is entitled to future medical treatment under § 287.140 RSMo does not result in an award of specific treatment modalities, because such an award would require the fact finder to speculate as to what treatments may reasonably be required in an unknown future. Here, however, the administrative law judge specifically relied on the expert medical opinion of Dr. Volarich, who opined that employee will require ongoing care for her low back injury using modalities including but not limited to narcotics and non-narcotic medications, muscle relaxants, physical therapy, and similar treatments, as well as treatment at a pain clinic including epidural steroid injections, foraminal nerve blocks, trigger point injections, and radiofrequency ablation. Given this testimony from Dr. Volarich, we are of the opinion that there was sufficient evidence to warrant the administrative law judge's (implied) finding that there is a reasonable probability that these treatments may reasonably be

Employee: Sharon Barnhart

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required to cure and relieve the effects of employee's work injuries, and for this reason we affirm the award as written.

Practically speaking, we do not anticipate that employer will be required to provide all of the modalities identified by Dr. Volarich, but we do believe that employee is entitled to any or all of them that she chooses to pursue and that any doctor contemporaneously recommends. To conclude otherwise would be to permit employer to avoid its liability under the award simply by selecting a treating physician who, contrary to the findings of Dr. Volarich as adopted by the administrative law judge, determines that such treatments are not reasonable or required. We will not endorse such a result.

Conclusion

We affirm and adopt the award of the administrative law judge with this supplemental opinion.

The award and decision of Administrative Law Judge Vicky Ruth, issued February 11, 2014, is attached and incorporated by this reference.

The Commission approves and affirms as fair and reasonable the administrative law judge's allowance of a 25% lien in favor of employee's attorney on compensation awarded herein.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 6th day of May 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Sharon Barnhart

Injury No. 11-072406

Dependents: N/A

Employer: Eldon Nursing and Rehabilitation Center

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: N/A

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Missouri Nursing Home Insurance
c/o Maxim Insurance Solutions, LLC.

Hearing Date: November 12, 2013

Checked by: VR/cs

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: September 11, 2011.
5. State location where accident occurred or occupational disease was contracted: Eldon, Miller County, Missouri.
6. Was above employee in the employ of above employer at the time of the 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: Claimant felt pain in her low back while attempting to lift a heavy patient from the toilet.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: lumbar spine.
14. Nature and extent of any permanent disability: 20% of the body as a whole referable to the lumbar spine.
15. Compensation paid to-date for temporary disability: \$22,665.69.
16. Value necessary medical aid paid to date by employer/insurer? \$12,963.63.
17. Value necessary medical aid not furnished by employer/insurer? \$796.44.

- 18. Employee's average weekly wages: \$331.53.
- 19. Weekly compensation rate: \$221.02.
- 20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable from employer:

Unpaid medical expenses:	\$ 796.44
<u>80 weeks PPD x \$221.02 =</u>	<u>\$17,681.60</u>
Subtotal:	\$18,478.04
<u>Minus credit for TTD overpayment:</u>	<u>\$ 1,768.16</u>
TOTAL DUE:	\$16,709.88

- 22. Second Injury Fund liability: N/A.
- 23. Future medical awarded: Yes.

Said payments to begin immediately and to be payable and 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: Timothy McDuffey.

Employee: Sharon Barnhart

Injury No. 11-072406

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Sharon Barnhart

Injury No. 11-072406

Dependents: N/A

Employer: Eldon Nursing and Rehabilitation Center

Additional Party: N/A

Insurer: Missouri Nursing Home Insurance
c/o Maxim Insurance Solutions, LLC.

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

Hearing Date: November 12, 2013

On November 12, 2013, Sharon Barnhart (the claimant), Eldon Nursing and Rehabilitation Center, and Missouri Nursing Home Insurance, in care of Maxim Insurance Solutions, LLC (the employer/insurer), appeared in Jefferson City, Missouri, for a final award hearing. Claimant was represented by attorney Timothy McDuffey. The employer/insurer was represented by attorney Patrick Reidy. Claimant testified in person at the hearing. The parties submitted briefs on December 6, 2013, and the record closed at that time.

STIPULATIONS

The parties stipulated to the following:

1. On or about September 11, 2011, Sharon Barnhart (the claimant) was an employee of Eldon Nursing and Rehabilitation Center (the employer) when she sustained an injury by accident to her lumbar spine. The accident occurred while Claimant was acting in the course and scope of her employment with the employer.
2. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was insured by Missouri Nursing Home Insurance, in care of Maxim Insurance Solutions, LLC.
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Miller County is proper. For trial purposes, venue is also proper in Jefferson City, Missouri.
5. Notice is not an issue.
6. Claimant filed a Claim for Compensation within the time prescribed by law.
7. Claimant's average weekly wage is \$331.53, yielding a weekly compensation rate of \$221.02 for permanent partial disability benefits.
8. The employer/insurer paid temporary total disability (TTD) benefits in the amount of \$22,665.69, representing 102.57 weeks of wages, for the periods from September 13, 2011 to September 14, 2011, and October 6, 2011 to May 27, 2013.

Employee: Sharon Barnhart

Injury No. 11-072406

9. The parties agree that the employer/insurer is entitled to a credit for an overpayment of TTD benefits in the amount of \$1,768.16, representing 8 weeks, for the period of April 1, 2013 to May 27, 2013.
10. The employer/insurer paid medical benefits in the amount of \$12,963.63.
11. The parties agree that the employer/insurer should be ordered to pay unpaid medical bills (prescription costs) in the amount of \$796.44.

ISSUES

The parties agreed that the following issues were to be resolved in this proceeding:

1. Nature and extent of permanent partial disability.
2. Liability for future medical aid.
3. Liability for unpaid medical treatment in the amount of \$796.44.
4. Liability for an overpayment of temporary total disability benefits in the amount of \$1,768.16.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence without objection:

Exhibit A	Medical records from Lake Regional Hospital.
Exhibit B	Medical records from LLRM-Eldon.
Exhibit C	Medical records from LLRM-Eldon.
Exhibit D	Medical records from Spine Midwest.
Exhibit E	Medical records from Dr. Norregaard.
Exhibit F	Medical records from Lake Regional Clinic-Eldon.
Exhibit G	Medical records from Eldon Rehabilitation Therapy.
Exhibit H	Functional Capacity Evaluation from Eldon Rehabilitation.
Exhibit I	Medical report of Dr. Volarich.
Exhibit J	Pharmacy bills (Gerbes).
Exhibit K	Medical records from Lake Regional Clinic-Eldon.
Exhibit L	Prescription receipt.
Exhibit M	Prescription receipt.

The employer/insurer did not offer any exhibits.

The parties jointly requested that that Administrative Law Judge take judicial notice of the Claim for Compensation, the Answer, and the Temporary Award (from the hearing held in March 2012). The Administrative Law Judge agreed to do so.

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. Claimant was born on March 30, 1956. She was 57 years old at the time of the hearing. Claimant testified that she did not finish high school and made it through the eighth grade. Claimant testified that she is a certified nurse's assistant.
2. Claimant testified that she has worked for Employer for the three years leading up to her injury. Claimant worked as a certified nurse's assistant and earned \$7.60 per hour.
3. Her job duties included assisting patients with their activities of daily living, including personal care, ambulation, getting residents up for meals, cleaning soiled beds and residents, and other general cleaning. Physical movements to perform her job duties included kneeling, standing, squatting, walking, sitting, climbing, reaching, and working overhead with her arms and hands. Claimant testified that she frequently lifted and manipulated adult residents.
4. Claimant testified that before the work injury of September 11, 2011, she had no low back pain and had no problems doing her job. Claimant testified she had never been to a doctor for low back pain prior to the September 11, 2011 work-related injury.
5. On Sunday, September 11, 2011, at approximately 11:00 a.m., Claimant and three co-workers were attempting to lift a 450-pound resident off of a toilet. Claimant was behind the resident in a crouched position trying to push up and lift when she felt sudden pain in her low back that radiated to her right buttock. She reported her injury to the charge nurse and to Amaylee Mennard. Claimant filled out an accident report and took a drug test, but Employer refused to send her for medical treatment.
6. Claimant testified that she continued to feel pain in her low back and radiating pain into her right buttock into the night of September 11, 2011, and into the following morning. Claimant testified she returned to work on the next morning, September 12, 2011, and asked the administrator, Matthew Woods, if he was going to send her to a doctor. Claimant testified that no treatment was provided and she attempted to work. Claimant testified that low back pain prevented her from doing her full duties and at 12:00 p.m. she returned to Mr. Woods' office to again request treatment. Mr. Woods was not in the office so she testified she informed the front office that she was leaving the nursing home and going to get an appointment for medical treatment. Claimant testified that she called back to her employer at 4:00 p.m. to see if they were going to send her to a doctor. Mr. Woods did not refer Claimant for treatment and she was forced to seek medical treatment on her own.
7. Claimant testified that at 6:30 p.m. on September 12, 2011, she went to the emergency department at the Lake Regional Health System.¹ The hospital records indicate Claimant

¹ Exh. B; see also Exh. A.

reported low back pain that radiated into her hips since a work injury the day before. X-rays were obtained and they were read to show disc narrowing at L2-L3 with slight disc space narrowing at L5-S1. The emergency department physician noted that after reviewing the x-rays he recommended that Claimant see a back surgeon. He prescribed prednisone and Vicodin for pain. The doctor restricted Claimant from working the next two days and no lifting greater than 15 pounds for the following two weeks.

8. When Claimant went to see Mathew Woods and Angela Woods the following day, a Tuesday, with the paperwork restricting her from work and referring her to a back surgeon, she was told that she had not followed the appropriate protocol. Employer again refused to refer Claimant for treatment. Claimant was off the following two days and then returned to light duty at the Eldon Nursing and Rehabilitation Center.
9. When Claimant sought an appointment with another physician as recommended by the emergency room personnel, Angela Woods told her that she was suffering from scoliosis, a pre-existing condition. Claimant then called the adjuster on her case, who referred her for treatment with Dr. Paul Bernabe.
10. On September 21, 2011, Claimant saw Dr. Paul Bernabe at the Lake Regional Health Clinic in Eldon, Missouri.² Dr. Bernabe noted the injury and ongoing back pain. He diagnosed Claimant with back pain, prescribed medications, and placed her on light duty. Dr. Bernabe's records indicate that Claimant returned on September 28, 2011, and October 4, 2011, and she complained of persistent back pain. Dr. Bernabe issued light duty restrictions of no lifting greater than 15 pounds, prescribed Tramadol, and ordered a CT scan of her lumbar spine. The CT scan was not approved.
11. On October 5, 2011, Claimant presented Dr. Bernabe's light duty slip to Employer. She worked that day, but then after clocking out and going home she received a call from the director of nursing, Angela Woods, and was instructed not to return to work until she received a full release from the doctor.
12. Despite being taken off work Employer/Insurer did not begin paying temporary total disability (TTD) benefits. Claimant testified that although she called the claims adjuster and informed him she had been told to stay home until released to full duty, he did not start TTD benefits. After about two weeks she called a mediator at the Division of Workers' Compensation; following that conversation with the mediator, TTD benefits were paid for the period of September 13th and 14th and October 6, 2011 through October 24, 2011. On about October 24, 2011, despite the ongoing light duty restriction from Dr. Bernabe, TTD benefits were again halted and no reason was given.
13. On October 17, 2011, Claimant returned to Dr. Bernabe and complained that her low back was still bothering her.³ The doctor's notes indicate that Claimant complained of nausea due to the medication and she was prescribed Ranitidine. Claimant was kept on restricted work duty.

² Exh. B.

³ Exh. B.

14. On October 25, 2011, Claimant returned to Dr. Bernabe, who again indicated Claimant complained of low back pain.⁴ Dr. Bernabe recommended that Claimant begin receiving physical therapy and that she be referred to a physical medicine specialist for back pain evaluation and treatment. He kept her on restricted work duty.
15. Claimant indicated that the physical therapy prescription was not filled by Employer/Insurer and the referral to a physical medicine specialist was not immediately made either.
16. On November 1, 2011, Dr. Bernabe noted ongoing low back pain complaints and again ordered a CT scan of Claimant's lumbar spine.⁵
17. On November 7, 2011, Claimant was suffering from abdominal pain unrelated to her work accident and injury.⁶ Claimant was seen in the Lake Regional Health System emergency department with complaints of low back and left flank pain that radiated around to her left lower quadrant. A CT scan of her abdomen and pelvis were obtained and revealed possible mild thickening of the wall of her retrosigmoid colon, with no signs of obstructive uropathy or other acute findings. She was diagnosed with chronic and acute low back pain and prescribed Tylenol #3 and Methocarbamol.
18. On or about the morning of November 8, 2011, Claimant received a phone call from her Employer asking why she was not at work. Claimant explained she had not been released by Dr. Bernabe to return to work and that on the last visit of November 1, 2011, he had given her a two-week light duty restriction, which she had turned that in to the Employer. Claimant informed the employer's office that she was seen at the emergency room the night before for back pain and had a work release the next two days. Claimant was then fired on November 8, 2011, for not showing up for work and not calling in, despite not being released by any doctor to return to work.
19. On November 10, 2011, Dr. Bernabe's records reflect that he again saw Claimant for back pain and recommended that she rest the back and continue with work restrictions and physical therapy for back pain.⁷ The doctor again made a referral to Physical Medicine and Rehabilitation. On November 21, 2011, Dr. Bernabe saw Claimant again for low back pain.
20. On January 4, 2012, Claimant returned to Dr. Bernabe and he recommended a referral to Dr. William B. Rodgers for orthopedic surgery.⁸ The employer/insurer did not approve the referral to Dr. Rodgers and refused to pay TTD.
21. Claimant returned to Dr. Bernabe on January 19, 2012, and February 14, 2012,

⁴ Exh. B.

⁵ Exh. B.

⁶ Exh. B; see also Exh. A.

⁷ Exh. B.

⁸ Exh. C.

complaining of ongoing back pain.⁹

22. On March 26, 2012, a hardship hearing was held. Following the hardship hearing, Judge Hannelore Fischer issued a Temporary Award granting Claimant unpaid and ongoing TTD benefits from October 25, 2011, through the date of maximum medical improvement. The Temporary Award indicates that Claimant was awarded attorney fees in the amount of \$4,100.00 for Employer/Insurer's failure to offer a reasonable explanation for the cessation of TTD benefits in this case as well as an inadequate effort at procuring appropriate medical care for Claimant. The Temporary Award also ordered Employer/Insurer to approve Dr. Bernabe's referral to Dr. Rodgers.
23. Claimant continued with physical therapy. Dr. Bernabe's records reflect a continuing diagnosis of low back pain; the doctor also kept prescribing Vicodin through April 3, 2012.¹⁰ At that April 2012 visit, Dr. Bernabe specifically counseled claimant to stop smoking.¹¹
24. On May 1, 2012, Claimant saw Dr. William Rodgers at Spine Midwest, Inc.¹² The doctor's records reflect the history of the work injury and claimant's ongoing complaints of low back pain. X-rays were obtained and read to show chronic degenerative scoliosis and hinging kyphosis. Dr. Rodgers diagnosed low back pain, continued medications, and ordered an MRI.
25. On May 2, 2012, an MRI of the low back was obtained. The report, by Dr. Ravi Bodiwala, indicates the MRI revealed likely severe type 1 Modic type degenerative changes within the lower half of L2 and superior half of L3 vertebra, multi-level disc protrusions that resulted in up to moderate spinal canal stenosis, and multi-level neuroforaminal stenosis and facet arthropathy.¹³
26. On May 8, 2012, the records of Dr. Rodgers indicate that he reviewed the MRI and noted ongoing back pain; he also refilled Claimant's prescription for Vicodin.
27. Dr. Rodgers' records indicate that Claimant saw Dr. James B. Hough at the Center for Pain Management on or about May 15, 2013.¹⁴ Dr. Hough's report, contained within the Spine Midwest medical records, indicates that Dr. Hough diagnosed low back pain, lumbar radiculopathy, lumbar disc protrusion, degenerative disc disease, and lumbar disc herniation without cord compression. He recorded that claimant smokes one pack of cigarettes per day. Dr. Hough administered an epidural steroid injection at L5-S1. Claimant testified that the epidural steroid injection caused increased pain and was not helpful with her low back pain.

⁹ Exh. C.

¹⁰ Exh. G.

¹¹ Exh. C.

¹² Exh. D.

¹³ Exh. D.

¹⁴ Exh. D.

28. On June 6, 2012, Claimant returned to Dr. Bernabe.¹⁵ The doctor's records indicate that Claimant did not tolerate the epidural steroid injection well. Claimant requested a stronger dose of Hydrocodone. Dr. Bernabe increased Claimant's pain management prescription of Oxycodone.
29. On June 22, 2012, Claimant saw Dr. Thorkild Vad Norregaard, a neurosurgeon at the University of Missouri, at the request of Dr. Bernabe.¹⁶ Dr. Norregaard's records indicate that he reviewed the MRI scan and confirmed the diagnosis of significant disc degeneration between L2 and L3, as well as some disc degeneration at the lower levels. He also diagnosed grade 1 L5-S1 spondylolisthesis with a fair amount of canal narrowing at the L5 laminar level. Dr. Norregaard referred Claimant for flexion/extension x-rays of the lumbar spine. He also referred Claimant for six weeks of physical therapy and recommended core muscle exercises. Dr. Norregaard sent Claimant for x-rays of the lumbar spine; that x-ray report provides the following impression:
- Lumbar spine scoliosis apex 3 vertebra Cobb's angle of 15 degrees. Prominent sclerosis anterior endplates L2-L3 vertebra with decreased intervertebral disc space. Approximately 3 to 4 mm retrolisthesis L2 over L4. Small margin osteophytes. Aortic calcifications.¹⁷
30. On July 2, 2012, Dr. Bernabe noted ongoing low back pain and refilled Claimant's prescription for Oxycodone.¹⁸
31. On August 3, 2012, Claimant returned to Dr. Norregaard.¹⁹ Dr. Norregaard's records indicate that physical therapy did not carry out the core muscle exercises as he had specifically requested. Claimant complained that she was not any better with regard to her low back complaints and she was not able to do a sit up. Dr. Norregaard instructed Claimant on core muscle exercises. The doctor also discussed the possibility of surgical intervention and noted that it would be a fairly sizable operation given the presence of multilevel degenerative lumbar scoliosis. Dr. Norregaard further advised Claimant that her continued smoking was bad for her back and that she should quit and would have to quit in order to be considered a surgical candidate. He advised Claimant that there was no medical proof that a narcotic medication regimen was of any value in treating back pain. Dr. Norregaard recommended claimant take ibuprofen, 600-800 mg, as often as three times per day if needed. Claimant was released, referred back to Dr. Bernabe, and advised to follow up as needed.
32. The records indicate that Claimant returned to Dr. Bernabe on August 13, 2012, and on September 14, 2012, with ongoing complaints of low back pain.²⁰ Dr. Bernabe continued physical therapy and prescribed Oxycodone. On October 3, 2012, Dr. Bernabe prescribed Tramadol and Soma. On January 22, 2013, and February 20, 2013, he

¹⁵ Exh. C.

¹⁶ Exh. E.

¹⁷ Exh. E.

¹⁸ Exh. C.

¹⁹ Exh. E.

²⁰ Exhs. C and F.

prescribed Vicodin.²¹

32. On January 7, 2013, Claimant underwent a functional capacity evaluation at Eldon Rehab.²² The Eldon Rehab records indicate that Claimant suffers a limited ability to stoop and a decreased range of motion. The records indicate that Claimant is capable of light to medium strength demands, exerting up to 20 pounds of force occasionally and/or 10 pounds frequently. Claimant exhibited a sitting tolerance of 1.25 hours and she was able to tolerate full-time sitting with breaks after every 1-2 hours. The records indicate she was able to tolerate standing for approximately 1.5 hours at a time. The records further indicate that Claimant does meet the demands of her job as a CNA except for the lifting requirement, although she was able to complete a simulated pivot transfer with 35 pounds, and simulated sit to stand with a resident. The records indicate Claimant does not meet the 25-pound lifting demands from the floor to a 3-foot height.
33. On June 17, 2013, Dr. David Volarich performed an independent medical examination of Claimant.²³ Dr. Volarich examined Claimant and reviewed various medical records. Dr. Volarich's report indicates that Claimant experienced sudden onset of low back pain that radiated into her right buttock when she and three co-workers attempted to lift a 450-pound patient off the toilet. Dr. Volarich indicated that Claimant continues to experience ongoing difficulties as a result of the September 11, 2011 injury:

She reports persistent low back pain she describes as aching and burning and moderate in intensity. Activity causes increased pain, and rest and medications helps to alleviate her symptoms somewhat. She is intolerant of fixed positions, and walking long distances and on uneven surfaces increases her symptoms. Standing, stooping, squatting, kneeling, climbing, or crawling and performing complex back movements, for example, bending, lifting and twisting simultaneously also exacerbate her symptoms.²⁴

34. As to the low back injury, Dr. Volarich diagnosed lumbar right lower extremity radiculopathy secondary to aggravation of degenerative disc disease, degenerative joint disease, and multiple disc protrusions from L1-2 through L5-S1. He opined that the 2011 work injury resulted in permanent partial disability of 25% of the body as a whole rated at the lumbar spine. He indicated the rating accounts for ongoing back pain syndrome, lost motion, recurrent right buttock and leg radicular symptoms, and paresthesias.
35. Dr. Volarich noted in his report that Claimant will require future medical treatment to cure and relieve the effects of her work related injury of September 11, 2011:

In order to maintain her current state, she will require ongoing care for her pain syndrome using modalities including but not limited to narcotics and non-narcotic medications (NSAIDs), muscle relaxants, physical therapy, and similar

²¹ Exh. F.

²² Exh. H.

²³ Exh. I.

²⁴ Exh. I.

treatments as directed by the current standard of medical practice for symptomatic relief of her complaints.²⁵

Dr. Volarich further states that “[t]reatments at a pain clinic including epidural steroid injections, foraminal nerve blocks, trigger point injections and radiofrequency ablation procedures are all indicated.”²⁶ Dr. Volarich also imposed various restrictions on claimant.

36. Claimant returned to Dr. Bernabe on April 19, 2013, June 12, 2013, and August 7, 2013.²⁷ Dr. Bernabe’s records indicate that Claimant continued to complain of back pain and require refills of her pain medication, including Hydrocodone and Soma. The records reflect that on each of the April 19, 2013, June 12, 2013, and August 7, 2013 appointment dates, Dr. Bernabe recommended that Claimant continue to follow up every three to four months to monitor her ongoing low back pain and to refill pain medications. At the April visit, the doctor advised claimant to quit smoking. Claimant further testified that on November 11, 2013, the day before the final hearing in this matter, she saw Dr. Bernabe and he re-filled her prescriptions for Hydrocodone and Soma and instructed her to see him when her prescription ran out.
37. Claimant testified that she continues to experience aching and burning low back pain, which she describes as moderate in intensity. Claimant testified that activity increases pain and that rest and medications help alleviate her pain somewhat. Claimant testified that she experiences tingling and pain into her legs when she sits for an extended period of time.
38. Claimant testified that she is unable to walk long distances or on uneven surfaces due to increased low back pain when she does so. Claimant testified that she is able to perform household chores but that she is unable to sweep or maintain her house as she did prior to September 11, 2011. Claimant testified that she used to garden and plant flowers in front of her home but that she is no longer able to do so due to the pain. Claimant testified that her low back pain is exacerbated by driving long distances.
39. Claimant testified that she continues to do the home exercises and bending recommended by Dr. Rodgers.
40. Claimant testified that after she was fired by Employer she found work at American Health Care on or about April 1, 2013. Her job duties included fixing meals, cleaning, and bathing patients. Claimant testified that the physical work exacerbated her low back pain and that she was forced to quit after only six months due to pain.
41. Claimant testified that she continues to treat with Dr. Bernabe regarding low back pain. Dr. Bernabe’s records indicate he has continued to prescribe pain medication to cure and relieve the effects of the work related injury. Claimant testified that she continues to re-

²⁵ Exh. I.

²⁶ Exh. I.

²⁷ Exh. K.

fill prescriptions Hydrocodone and Soma every month. Claimant further testified that she has paid out of pocket for prescription drug costs since she was first prescribed Naproxen on September 21, 2011, following her first appointment with Dr. Bernabe.

42. A prescription bill from Gerbes Pharmacy indicates that Claimant continues to be charged \$24.85 per Hydrocodone prescription and \$16.45 per Soma prescription.²⁸ Claimant indicated that she spent \$796.44 of her own money on refilling these prescriptions. Employer/Insurer stipulated that they owe Claimant \$796.44 in prescription costs.
43. Claimant continues to take the prescribed Hydrocodone 7.325 mg and Soma 350 mg as prescribed by Dr. Bernabe. When she takes her prescriptions she still has some low back pain at a 5 on a 10-point scale, but is at least able to move around. Claimant indicated that when she does not take her prescription medication she is in severe pain, which she described as a 10 out of 10.
44. Claimant testified that she intends to continue treating with Dr. Bernabe regarding pain management of her low back symptoms arising out of the September 2011 work injury. Claimant indicated that Dr. Bernabe agreed to continue treating her for her low back pain. Claimant, however, is concerned Employer/Insurer will simply refer her to a different physician who will arbitrarily withdraw ongoing pain management and halt her treatment.
45. Claimant testified that she has had no new injury to her low back since the September 11, 2011 work injury. There was no evidence presented that Claimant had any injury or complaints of pain pertaining to her low back prior to the September 11, 2011 work injury.
46. Employer/Insurer presented no evidence or medical opinion at the hearing.

CONCLUSIONS OF LAW

Based upon the findings of fact and the applicable law, I find the following:

Issue 1: Nature and extent of permanent partial disability

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.²⁹ Proof is made only by competent and substantial evidence, and may not rest on speculation.³⁰ Medical causation not within lay understanding or experience requires expert medical evidence.³¹ When medical

²⁸ Claimant's Exhs. J, L, and M.

²⁹ *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

³⁰ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

³¹ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.³²

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.³³ Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.³⁴

The fact finder is encumbered with determining the credibility of witnesses.³⁵ It is free to disregard that testimony which it does not hold credible.³⁶

The word "accident" as used by the Missouri workers' compensation law means "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."³⁷

An "injury" is defined to be "an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."³⁸ An injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and 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 non-employment life.³⁹

The determination of the specific amount or percentage of disability to be awarded to an injured employee is a finding of fact within the unique province of the ALJ.⁴⁰ The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated.⁴¹ A determination of the percentage of disability arising from a work-related injury is to be made from the evidence as a whole.⁴² It is the duty of the ALJ to weigh the medical

³² *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

³³ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

³⁴ *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

³⁵ *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo.App. E.D. 2008).

³⁶ *Id.* at 908.

³⁷ Section 287.020.3(1), RSMo. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005, unless otherwise noted.

³⁸ Section 287.020.3(1).

³⁹ Section 287.020.3(c).

⁴⁰ *Hawthorne v. Lester E. Cox Medical Center*, 165 S.W.2d 587, 594-595 (Mo.App. S.D. 2005); *Sifferman v. Sears & Robuck*, 906 S.W.2d 823, 826 (Mo.App. S.D. 1999).

⁴¹ *Rana v. Land Star TLC*, 46 S.W.3d 614 626 (Mo.App. W.D. 2001).

⁴² *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo.App. E.D. 1998).

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evidence, as well as all other testimony and evidence, in reaching his or her own conclusion as to the percentage of disability sustained.⁴³

I find that Claimant was credible and persuasive. Her appearance, attitude, and demeanor at the hearing were appropriate and she testified forthrightly and candidly. Taking into consideration the evidence as a whole, I further find that Claimant has met her burden of establishing that she is permanently and partially disabled as a result of the September 11, 2011 work injury.

I also find Dr. Volarich's report credible and persuasive. Dr. Volarich's report indicates that he examined Claimant in person, took a complete history, and reviewed Claimant's medical records. Dr. Volarich opines that with regard to the extent of disability from the September 11, 2011 work injury, claimant sustained a permanent partial disability of 25% of the body as a whole rated at the lumbar spine. As noted above, Claimant also provided credible testimony as to Claimant's permanent partial disabilities. The Employer/Insurer offered no evidence of the extent of Claimant's disability.

Based on a careful review of the evidence, I find that as a result of the September 11, 2011 work injury, Claimant suffered the following permanent partial disability: 20 percent of the body as a whole rated at the lumbar spine. Thus, Employer/Insurer is liable for 80 weeks of permanent partial disability at a compensation rate of \$221.02 per week, for a total of \$17,681.60.

Issue 2: Future medical

Issue 3: Unpaid medical

Subsection 1 of RSMo Section 287.140 states, in pertinent part, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability to cure and relieve from the effects of the injury.

I find that Employer/Insurer is liable for the unpaid medical care prescribed by their own physician, Dr. Bernabe, including \$796.44 in unpaid prescription costs from the date of September 21, 2011 through the date of the hearing. I find that these prescriptions for Hydrocodone and Soma were necessary to cure and relieve the effects of Claimant's September 11, 2011 work injury, as indicated in the credible and persuasive medical records of Dr. Bernabe. Moreover, the parties stipulated to payment of this unpaid medical care. The Employer/Insurer is ordered to pay to Claimant \$796.44 for the unpaid medical care.

As for future medical care, the employee need only show that he is likely to need additional treatment "as may reasonably be required . . . to cure and relieve . . . the effects of the

⁴³ *Rana* at 626.

injury . . . that flow from the accident [or disease].”⁴⁴ This has been interpreted to mean that an employee is entitled to compensation for care and treatment that gives comfort, i.e., relieves the employee’s work-related injury, even though a cure or restoration to soundness is not possible, if the employee establishes a reasonable probability that he or she needs additional future medical care.⁴⁵ “Probable” means founded on reason and experience that inclines the mind to believe but leaves room for doubt.⁴⁶ Claimant need not show evidence of the specific nature of the treatment required, but only that treatment is going to be required.⁴⁷

In this case, Claimant presented credible and convincing evidence she continues to suffer the ill effects of the September 11, 2011 work injury. She testified she continues to suffer low back pain and sometimes radicular symptoms down each of her legs. Dr. Bernabe continues to treat Claimant for her work-related injury and continues to prescribe Hydrocodone, Soma, and other prescriptions and treatments. Dr. Volarich indicates in his report that claimant will require ongoing pain management, including epidural steroid injections, foraminal nerve blocks, trigger point injections, and radiofrequency ablation procedures.

Employer/insurer, in its brief, argues that the request for future medical should be denied because receiving prescriptions for ‘pain management’ does not satisfy the statutory test that future medical aid should ‘cure and relieve’ the effects of the work related injury. Employer/insurer notes that Dr. Norregaard, a neurosurgeon, opined that there was no medical proof that a narcotic medication regimen was of any value in treating back pain.

Upon careful review, I find that Employer/Insurer shall be liable for future medical expenses to cure and relieve the effects of the work related injury of September 11, 2011, including but not limited to ongoing appointments with Dr. Bernabe or another physician pertaining to Claimant’s low back pain and radicular symptoms into the legs. I also find that Employer/Insurer shall be liable for providing Claimant with prescriptions for pain medications such as Hydrocodone and Soma pertaining to low back pain and radicular symptoms into the legs as prescribed by Dr. Bernabe or another physician. I further find that Employer/Insurer shall be liable for future medical expenses for treatments recommended by Dr. Volarich, including but not limited to treatments at a pain clinic, epidural steroid injections, foraminal nerve blocks, trigger point injections, and radiofrequency ablation procedures.

Issue 4: Credit for TTD overpayment

Temporary total disability is provided for in Section 287.170, RSMo. This section provides, in pertinent part, that “the employer shall pay compensation for not more than four hundred weeks during the continuance of such disability at the weekly rate of compensation in effect under this section on the date of the injury for which compensation is being made.” The term “total disability” is defined in Section 287.020.6, 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.” The purpose of temporary total disability is to cover

⁴⁴ *Sullivan v. Masters and Jackson Paving*, 35 S.W.2d 879, 888 (Mo.App. 2001).

⁴⁵ *Rana v. Landstar TLC*, 46 S.W.3d 614 (Mo.App. W.D. 2001); *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418 (Mo.App. W.D. 2000).

⁴⁶ *Rana* at 622, citing *Sifferman v. Sears, Roebuck & Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995).

⁴⁷ *Aldredge v. Southern Missouri Gas*, 131 S.W. 3rd 786 at 833 (Mo. App. D. D. 2004).

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the employee's healing period, so the award should cover only the time before the employee can return to work.⁴⁸ Temporary total disability (TTD) benefits are owed until the employee can find employment or the condition has reached the point of "maximum medical progress."⁴⁹ Thus, TTD benefits are not intended to encompass disability after the condition has reached the point where further progress is not expected.⁵⁰ This is reflected in the language that TTD benefits last only "during the continuance of such disability."⁵¹

I find that Employer/Insurer is entitled to a credit for an overpayment of TTD benefits in the amount of \$1,768.16, an amount representing 8 weeks from April 1, 2013 to May 27, 2013, a period during which Claimant was employed and Employer/Insurer continued to issue a weekly TTD check of \$221.02. The parties stipulated to this credit at trial.

Summary

I find that Claimant sustained a work injury on September 11, 2011, and that the injury arose out of and in the course of her employment with Employer. I also find that her injuries, including lumbar and lower extremity radiculopathy injuries, were medically causally related to the work injury.

As a result of the 2011 work injury, Claimant sustained a permanent partial disability of 20% of the body as a whole referable to the lumbar spine. Thus, Employer/Insurer is liable for permanent partial disability benefits of \$17,681.60 (80 weeks x \$221.02/week).

In addition, Employer/Insurer is liable for unpaid medical expenses in the amount of \$796.44 as per the parties' stipulation. Employer/Insurer is also liable for future medical expenses as discussed in this Award.

I further find that Employer/Insurer is entitled to reimbursement for overpayment of TTD in the amount of \$1,768.16.

Any pending objections not expressly ruled on in this award are overruled. This Award is subject to a lien in the amount of 25% of the payments hereunder in favor of the claimant's attorney, Timothy McDuffey, for necessary legal services rendered to the claimant.

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation

⁴⁸ *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo. App. W.D. 1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d at 226 (Mo. Banc 2003). See also *Birdsong v. Waste Management*, 147 S.W.3d, 132, 140 (Mo.App. S.D. 2004).

⁴⁹ *Cooper* at 575.

⁵⁰ *Cooper* at 575; *Smith v. Tiger Coaches, Inc.*, 73 S.W.3d 756, 764 (Mo. App. E.D. 2002), *overruled on other grounds by Hampton*, 121 S.W.3d at 225.

⁵¹ Section 287.170.1, RSMo.