

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

Injury No.: 03-142261

Employee: Lois Billingslea
Employer: Wal-Mart Stores, Inc.
Insurer: American Home Assurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: September 26, 2003

Place and County of Accident: Branson West (Stone County), Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 3, 2007. The award and decision of Chief Administrative Law Judge L. Timothy Wilson, issued July 3, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 2nd day of January 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Dependents: N/A

Employer: Wal-Mart Stores, Inc.

Insurer: American Home Assurance

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

Hearing Date: April 5, 2007

Checked by: LTW

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 26, 2003
5. State location where accident occurred or occupational disease was contracted: Branson West (Stone County), MO
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: The employee sustained an injury to her low back while lifting a pallet onto a shopping cart.
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: Low back
14. Nature and extent of any permanent disability: 5 percent to the body as a whole (20 weeks)
14. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$5,714.67

Employee: Lois Billingslea

Injury No. 03-142261

17. Value necessary medical aid not furnished by employer/insurer? Alleged \$97,477.50
18. Employee's average weekly wages: \$340.00
19. Weekly compensation rate: 227.31
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: \$4,546.20

Unpaid medical expenses: None

No weeks of temporary total disability (or temporary partial disability)

20 weeks of permanent partial disability from Employer

No weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning, for Claimant's lifetime: None

22. Second Injury Fund liability: No

TOTAL: N/A

23. Future requirements awarded: None

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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Jeffrey C. Goodnight, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Lois Billingslea

Injury No. 03-142261

Dependents: N/A

Employer: Wal-Mart Stores, Inc.

Insurer: American Home Assurance

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

The above-referenced workers' compensation claim, which involved the joining of two workers' compensation cases for hearing, was heard before the undersigned Administrative Law Judge on April 5, 2007.^[1] The parties were afforded an opportunity to submit briefs, resulting in the record being completed and submitted to the undersigned on or about May 18, 2007.

The parties entered into a stipulation of facts in Injury No. 03-142261. The stipulation is as follows:

- (1) On or about September 26, 2003 Wal-Mart Stores, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by American Home Assurance.
- (2) On the alleged injury date of September 26, 2003 Lois J. Billingslea was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The above-referenced employment and alleged accident occurred in Stone County, Missouri. The parties agree to venue lying in Ozark (Christian County), Missouri. Venue is proper.
- (4) The employee notified the employer of her injury as required by Section, 287.420, RSMo.
- (5) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.

- (6) At the time of the alleged accident the claimant's average weekly wage was sufficient to allow a compensation rate of \$227.31 for temporary and permanent disability compensation.
- (7) Temporary disability benefits have not been provided to the employee.
- (8) The employer and insurer have provided medical treatment to the employee, having paid \$5,714.67 in medical expenses.

The sole issues to be resolved by hearing in Injury No. 03-142261 include:

- (1) Whether the employee sustained an accident on or about September 26, 2003; and, if so, whether the accident arose out of and in the course of employment?
- (2) Whether the alleged accident caused the injuries and disabilities for which benefits are now being claimed?
- (3) Whether the employer and insurer are obligated to pay for certain past medical care and expenses in the amount of \$97,477.50?
- (4) Whether the claimant has sustained injuries that will require additional or future medical care in order to cure and relieve the employee of the effects of the injuries?
- (5) Whether the employee is entitled to temporary disability benefits? (The employee seeks TTD for the period of March 1, 2004 to September 1, 2004.)
- (6) Whether the employee sustained any permanent disability as a consequence of the alleged accident; and, if so, what is the nature and extent of the disability?
- (7) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

The parties entered into a stipulation of facts in Injury No. 04-142244. The stipulation is as follows:

- (1) On or about September 22, 2004 Wal-Mart Stores, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by American Home Assurance.
- (2) On the alleged injury date of September 22, 2004 Lois J. Billingslea was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The above-referenced employment and alleged accident occurred in Stone County, Missouri. The parties agree to venue lying in Ozark (Christian County), Missouri. Venue is proper.
- (4) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (5) At the time of the alleged accident the claimant's average weekly wage was sufficient to allow a compensation rate of \$227.31 for temporary and permanent disability compensation.
- (6) Temporary disability compensation and medical care have not been provided to the employee.

The sole issues to be resolved by hearing in Injury No. 04-142244 include:

- (1) Whether the employee sustained an accident on or about September 22, 2004; and, if so, whether the accident arose out of and in the course of employment?
- (2) Whether the employee gave the employer proper notice of the alleged accident?
- (3) Whether the alleged accident of September 22, 2004 caused the injuries and disabilities for which benefits are now being claimed?
- (4) Whether the employer and insurer are obligated to pay for certain past medical care and expenses in the amount of \$27,997.78?

- (5) Whether the employee is entitled to temporary disability benefits? (The employee seeks TTD for period of October 1, 2004 to March 1, 2005.)
- (6) Whether the employee sustained any permanent disability as a consequence of the alleged accident; and, if so, what is the nature and extent of the disability?
- (7) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

EVIDENCE PRESENTED

The claimant testified at the hearing in support of her claim. Also, the claimant offered for admission the following exhibits:

- Exhibit A..... Medical Records from Skaggs Occupational Health Center
(Dated October 6, 2003 -- October 16, 2004)
- Exhibit B..... Medical Records from Orthopedists Specialists of Springfield
(Dated March 18, 2004 -- November 9, 2004)
- Exhibit C..... Medical Records from Cox Medical Center
(Dated March 18, 2004 -- November 6, 2004)
- Exhibit D..... Medical Records from Oxford HealthCare
(Dated April 26 2004 -- May 12, 2004 and Oct. 19, 2006 -- Nov. 9, 2006)
- Exhibit E..... Medical Records from Skaggs Community Health Center
(Branson West Rehabilitation Services, Dated Dec. 11, 2003 – Jan. 25, 2005)
- Exhibit F..... Medical Records from Skaggs Community Hospitals
(Dated Dec. 5, 2003 – April 16, 2004)
- Exhibit G..... Medical Records from Kymberly Rittman, D.O.
(Dated Oct. 7, 2002 – Oct. 18, 2002)
- Exhibit H..... Medical Records from William Cunningham, M.D.
(Dated Oct. 9, 2002 – Feb. 3, 2003)
- Exhibit I..... Medical Records from Barnes Jewish Cancer Center
(Dated Feb. 12, 2003 – July 10, 2003)
- Exhibit J..... Medical Records from Barnes Jewish Hospital
(Dated April 14, 2003 – July 10, 2003)
- Exhibit K..... Medical Records from Ted A. Lennard, M.D.
- Exhibit L..... Medical Records from William Wester, M.D.
- Exhibit M..... Medical Report from Brent Koprivica, M.D.
- Exhibit N..... Deposition of Brent Koprivica, M.D.
- Exhibit O..... Vocational Evaluation Report from Wilbur Swearingin, CRC
- Exhibit P..... Deposition of Wilbur Swearingin, CRC
- Exhibit Q..... Deposition of Christine Menias, M.D.
- Exhibit R Summary of Medical Expenses in Injury No. 03-142261 & Billing Records from:
 - Emergency Physicians of Springfield
 - Cox Medical Centers
 - Ozark Anesthesia Associates
 - Skaggs Hospital
 - OSS
 - Litton & Giddings
 - Oxford Healthcare
- Exhibit S Summary of Medical Expenses in Injury No. 04-142244 & Billing Records from:
 - Cox Medical Centers
 - Ozark Anesthesia Associates
 - William Wester, M.D.
 - Skaggs (PT)
 - Springfield Neurological Institute

- Litton & Giddings
- Ozark Anesthesia Associates

Exhibit T Summary of Prescription Charges & Billing Records from Wal-Mart

The exhibits were received and admitted into evidence.

The employer and insurer did not present any witnesses at the hearing of this case. The employer and insurer, however, offered for admission the following exhibits:

- Exhibit 1..... Complete Medical Report from Randall Cross, M.D.
- Exhibit 2..... Deposition of Lois Billingslea
- Exhibit 3..... Deposition of Thomas Corsolini, M.D. (with medical report)
- Exhibit 4..... Deposition (Cross-examination) of William Wester, M.D.

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses or offer any exhibits at the hearing of this case.

In addition, the parties identified several documents filed with the Division of Workers' Compensation in Injury No. 03-142261, which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File, which include:

- Minute Entries of the Division of Workers' Compensation
- Request for Hearing
- Notice of Hearing
- Answer of Employer & Insurer to Amended Claim for Compensation
- Answer of Second Injury Fund to Amended Claim for Compensation
- Amended Claim for Compensation
- Answer of Employer & Insurer to Claim for Compensation
- Answer of Second Injury Fund to Claim for Compensation
- Claim for Compensation

Similarly, in Injury No. 04-142244, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File, which include:

- Minute Entries of the Division of Workers' Compensation
- Request for Hearing
- Notice of Hearing
- Answer of Employer & Insurer to Claim for Compensation
- Answer of Second Injury Fund to Claim for Compensation
- Claim for Compensation

DISCUSSION

The employee, Lois J. Billingslea, is 61 years of age, having been born on August 16, 1945. Ms. Billingslea is a resident of Branson West, Missouri. Additionally, Ms. Billingslea is a high school graduate, and attended some technical college classes in floral design.

In or around September or October 2000, Ms. Billingslea obtained employment with Wal-Mart, working in its Branson West, Missouri store. Initially, in this employment, Ms. Billingslea worked as a stocker, and later became the manager of the store's floral department. In this employment, Ms. Billingslea's duties included ordering flowers, processing flowers, stocking the floral cooler, waiting on customers, and general upkeep of the department.

Ms. Billingslea asserts that, in September 2003, while working in the store's floral department, she sustained an injury to her low back and left hip. Later, in September 2004, Ms. Billingslea asserts that, while working in the floral department she sustained an injury to her right hip and leg. Ms. Billingslea is alleging permanent total disability. The employer and insurer, as well as the Second Injury Fund, dispute the contentions and claims of Ms. Billingslea.

Prior Medical History

In 1977, Ms. Billingslea suffered a motor vehicle accident, which resulted in her sustaining a fracture to her

jaw, a laceration to the left side of her head, a fracture to her right clavicle and a dislocated left hip. This injury necessitated receipt of multiple reconstructive surgeries to repair lacerations. Yet, according to Ms. Billingslea, she recovered from all of these injuries without continuing problems or any medical restrictions, and suffered no residual permanent disability referable to this injury. Similarly, approximately 20 years later, in 1997, according to Ms. Billingslea, she injured her left knee, which resulted in her experiencing symptoms that resolved with conservative treatment.

In October 2002, Ms. Billingslea suffered an illness in the nature of anorectal cancer. Subsequent to receiving this diagnosis, Ms. Billingslea underwent 27 radiation treatments and two rounds of chemotherapy at Barnes Hospital Cancer Center in St. Louis. She completed her cancer treatment in April 2003, without having to undergo surgery for her cancer. A colonoscopy performed in July 2003 showed no evidence of Ms. Billingslea's prior cancer, and in September 2003 Ms. Billingslea returned to work at Wal-Mart. According to Ms. Billingslea, she is cancer free. However, in the latter part of 2003 her attending physicians diagnosed her with osteopenia, and thereafter osteoporosis.

In addition, the medical records include a history of Ms. Billingslea undergoing a hysterectomy and oophorectomy at the age of 28, and a notation that she took estrogen for years. The medical records, however, note that she had not taken estrogen for a couple years prior to March 2004.

Ms. Billingslea returned to her job at Wal-Mart in September 2003 following her cancer treatment. According to Ms. Billingslea, at the time of her release to return to work, she felt fine and her strength had returned.

September 26, 2003

Ms. Billingslea alleges that, on or about September 26, 2003, while assisting another employee in lifting a 70-80 lb. cedar pallet to place it onto a shopping cart, she sustained an injury to her low back and left hip. According to Ms. Billingslea, she felt immediate pain in her low back and left hip, and she began walking with a limp. Ms. Billingslea reported this incident to her employer, which resulted in Ms. Billingslea receiving a referral to Randall Cross, M.D. for evaluation and treatment.

On or about October 6, 2003, Ms. Billingslea presented to Dr. Cross for complaints of pain in her low back and left hip and a limp with her left leg. Dr. Cross diagnosed a low back strain with left-sided sacroillitis. Dr. Cross provided Ms. Billingslea with conservative care that included prescriptions for pain medication and muscle relaxants. Ms. Billingslea continued to treat with Dr. Cross approximately every two weeks thereafter. While treating with Dr. Cross, Ms. Billingslea worked on a restricted duty basis, until being released to regular duty on November 19, 2003. Notably, on November 19, 2003, at the time of her appointment with Dr. Cross, Ms. Billingslea reported that she was no longer experiencing pain in her low back, but did continue to limp.

On or about December 1, 2003, Ms. Billingslea returned to see Dr. Cross presenting with an increase in her pain level. Thereafter, Ms. Billingslea underwent diagnostic studies, which included x-rays of her left hip. The diagnostic studies indicated osteoporosis in the lumbar spine, otherwise normal, with a negative left hip X-ray. Thereafter, on or about December 11, 2003, Dr. Cross referred Ms. Billingslea for physical therapy, which she reported did help alleviate some of her pain. Additionally, Ms. Billingslea testified that her low back was somewhat better following the physical therapy; however, she continued to have pain in her left hip and continued to limp with her left leg. According to Ms. Billingslea, although she continued to work in the Floral department she used a grocery cart as a walker, leaning on the cart for support.

On or about January 13, 2004, Dr. Cross determined Ms. Billingslea to be at maximum medical improvement, and released her from his care. During Ms. Billingslea's treatment with Dr. Cross, from Sept. 26, 2003 through Jan. 13, 2004, Ms. Billingslea continued to work full-time and at full-duty for Wal-Mart. However, she notes, she changed the way she worked during this time, making fewer trips on the store floor and relying more on using a shopping cart when moving goods around the store.

In January 2004, Ms. Billingslea traveled to Barnes Hospital in St. Louis for a check-up with her cancer doctor. During this treatment period, the attending physicians administered a bone density test and CT scan of Ms. Billingslea's pelvis. These tests did not reveal any recurring cancer, but did show bone loss.

Ms. Billingslea returned to see Dr. Cross on March 2, 2004, reporting that, since "this past Friday" (February 27, 2004), she had experienced "acute onset of severe, excruciating pain in her left buttock, into the left lateral hip and her limp has gotten worse." (On cross-examination, Ms. Billingslea admitted that, for the period of January 13, 2004 to March 2, 2004, she sought no treatment for her left hip.) In light of his examination and findings, Dr. Cross recommended that Ms. Billingslea undergo a diagnostic study of the left hip and low back in the nature of an MRI. This study occurred on March 12, 2004, and revealed mild degenerative changes of the lumbar spine at L4-L5 and L5-S1, without significant stenosis; a stress fracture of the left femoral neck; and an insufficiency type fracture involving the left side of the sacrum with edema in the left inferior pubic ramus.

Thereafter, upon reviewing the results of the MRI study, Dr. Cross opined that Ms. Billingslea's left hip fractures occurred between the time of her CT scan in January 2004 and the onset of her acute left hip and low back pain on Feb. 27, 2004. In this context, in March 2004, Dr. Cross propounded the following comments:

I have systematically and painstakingly reviewed with Lois and her niece the history of Lois' present situation from the beginning of my treatment of her back strain on a job on September 26, 2003 through all that has transpired to this date....The present MRI films demonstrate the development of 3 stress fractures in her left femoral neck, left inferior pubic ramus and left side of her sacrum. These findings are in addition to the objective demonstration of osteopenia noted on bone density testing that her oncologist had performed. The stress fractures had to have occurred between the time of her normal CT scan in December (sic) and the acute onset of excruciating left hip and lower back pain that occurred simply while walking on February 27, 2004. I tried to explain to Lois and her niece the progressive nature of the development of osteoporosis as a common side effect of Radiation therapy and that this is the cause of the development of these pathologic stress fractures which are now evident on her MRI films. I tried to explain the difference between a simple strain of the lower back which she sustained by stooping over to move a wooden pallet in September and the onset of this more severe, debilitating pain as the result of the 3 stress fractures from the radiation induced osteoporosis.

* * *

I also tried to impress upon Lois the urgency with which she needs to follow up with her oncologist to get started on VERY AGGRESSIVE therapy for her osteoporosis lest she develop more pathologic stress fractures. I also, discussed the pathology and the usual time course of healing as well as the likely delayed time course of healing of these stress fractures due the inherent weakness of her bone structure. I suggested that she seek at the very least, short term Social Security Disability or short term medical disability if it is offered as a benefit through her employer to allow her adequate time and rest to heal these fractures and get established on a regimen of medication and calcium supplementation to treat her osteoporosis to help prevent further stress fractures.

In light of the foregoing, Dr. Cross released Ms. Billingslea from his care, with the recommendation that she follow-up with other individual providers, including her oncologist. Notably, in releasing Ms. Billingslea from his care, Dr. Cross initiated a referral plan, wherein he propounded the following comments:

Plan 1: I will assist her with a prescription for narcotic analgesics to use until such time as she can expedite an earlier than scheduled follow-up with her oncologist. I will leave the treatment of her osteoporosis to his discretion.

Plan 2: I have recommended that she be non-weight-bearing for 4 to 6 weeks to allow for ample healing of her stress fractures. She will not be able to resume gainful employment until such time as her fractures have healed sufficiently to allow her to ambulate comfortably which she obviously cannot do at the present time.

Thereafter, in March 2004 Ms. Billingslea experienced increasing discomfort and pain in her right flank, which resulted in her presenting to Cox South Emergency Room for treatment. The attending physician provided certain treatment and referred Ms. Billingslea to William Wester, M.D. for evaluation and treatment. Subsequently,

on or about March 31, 2004, Ms. Billingslea presented to Dr. Wester with complaints of pain. In light of his examination and evaluation of Ms. Billingslea on March 31, 2004, Dr. Wester recommended that Ms. Billingslea undergo surgery in the nature of pinning the fractures. Notably, in examining the cause of this condition, Dr. Wester propounded a contradictory opinion, as follows:

I would anticipate all of her stress fractures are a result of her significant osteoporosis. It is my opinion that all the fractures are related to the injury back in September.

Intervening Incident

In preparation for the surgery recommended by Dr. Wester, Ms. Billingslea presented to Skaggs Hospital on or about April 16, 2004 to pick up her medical records and a copy of the MRI for review by Dr. Wester. While at Skaggs Hospital, Ms. Billingslea fell down a flight of stairs, which resulted in her presenting to the emergency room of Skaggs Hospital for examination and evaluation. The attending physician notes the history of this incident, as follows:

This 58-year-old Caucasian female patient came to the emergency room by ambulance. Apparently she was on our property picking up copies of an MRI and other x-rays when she inadvertently was walking down steps with crutches and fell down an unknown number of steps. Apparently, in this incident she struck the back of her head and she sustained an approximately 1 inch laceration. Approximately 2.5 cm. She did not have any loss of consciousness. She also reinjured her left hip that apparently had a stress fracture present. She ironically was on her way to Cox South Hospital where she was going to be admitted for repair of the left hip. It appears, at least on the surface, that the hip fracture now is more than a simple stress fracture. She is scheduled for surgery at Cox South Hospital for the hip. She is a patient of Dr. Kym Rittman and Dr. Randy Cross. The pain is apparently now is (sic) severe.

Diagnosing Ms. Billingslea with a fracture of the left hip, the attending emergency room physician transferred Ms. Billingslea to Dr. Wester and Cox South Hospital for the scheduled surgery (ORIF) of the left hip. Notably, in making the transfer, the attending physician indicated acknowledgement on the part of Dr. Wester that he would be accepting Ms. Billingslea in a condition that "was accelerated from a prior status to 2 or more acute one."

Thus, proceeding as scheduled, on April 17, 2004, Dr. Wester performed a closed reduction and percutaneous pinning of Ms. Billingslea's left femoral neck fracture. Subsequently, Ms. Billingslea underwent physical therapy and received prescription medication and follow-up treatment with Dr. Wester. Further, according to Ms. Billingslea, she was off work from on or about March 1, 2004 to on or about Sept. 10, 2004. Notably, the medical records of Dr. Wester indicate that, on September 10, 2004, he released Ms. Billingslea to return to work full duty, effective on September 17, 2004; and, he released her from his care, with instructions to return as needed.

September 22, 2004

Ms. Billingslea alleges that, on September 22, 2004, she suffered a second work-related injury when she attempted to lift a bucket full of flowers and water out of a box on a pallet and into a shopping cart. According to Ms. Billingslea, at the time of this incident, she experienced immediate pain in her right hip. Further, Ms. Billingslea testified that she told her assistant manager Josh Moore that her right hip hurt and she needed to leave early. Ms. Billingslea received permission to leave work early. However, Ms. Billingslea did not tell Mr. Moore that she hurt her right hip while at work or because of work activity. Similarly, Ms. Billingslea did not identify or inform her employer that she had sustained a work injury. Nor did she request medical treatment from her employer for this medical concern.

Ms. Billingslea saw Dr. Wester on Sept. 24, 2004, reporting that she began having sharp pain in her right hip after returning to work. An MRI performed on Sept. 27, 2004, indicated edema in the right femoral neck with a dark signal in the medial half of the femoral neck, suggesting an insufficiency fracture. In light of this examination and finding, Dr. Wester recommended an intramedullary hip screw for the right side. Notably, in responding to a question asked by Ms. Billingslea, relative to how the injury occurred, Dr. Wester propounded the following opinion and comments:

I do think it is as a result of her significant osteoporosis. She has an appointment with the endocrinologist in December. We will set her up for surgery as soon as possible.

Thereafter, on or about October 14, 2004, Dr. Wester performed an intramedullary hip screw insertion to stabilize the fracture. Post-operatively, Ms. Billingslea participated in physical therapy at Skaggs Hospital and continued to take pain medication and muscle relaxers. She was off work from on or about October 1, 2004 to on or about March 1, 2005. The employer permitted Ms. Billingslea to return to work on a restricted duty basis, insofar as she was governed by a permanent lifting restriction of 10 pounds. According to Ms. Billingslea, the accommodations provided by Wal-Mart permitted her to perform an easier job in the cosmetic division of the Home and Beauty Aid Department. Also, it is noted that Ms. Billingslea's private health insurance paid for both her left and right hip surgeries.

In April 2006 Ms. Billingslea again developed problems with her left hip. She testified that her left leg would give out on her, she felt as if she was dragging her leg and she could hardly walk. Dr. Wester sent Ms. Billingslea to physical therapy and recommended surgery. On October 12, 2006, Ms. Billingslea underwent a left hip replacement. Post-operatively she went through physical therapy and was off work for three months.

Present Employment

Ms. Billingslea returned to work in January 2007 working three days per week, five hours a day. In her present employment, Ms. Billingslea is responsible for reshelving returned items and assisting customers. Ms. Billingslea testified that she uses a shopping cart to aid her in walking around the store while putting away returned items. Notably, at the time of the hearing, and in light of the accommodations provided by Wal-Mart, Ms. Billingslea continues to enjoy employment working under these restrictions and averaging 15 hours of work per week.

Medical Testimony

Dr. Randall Cross

On or about Oct. 6 2003, Ms. Billingslea began treating with Dr. Randall Cross for a lower back strain and left-sided sacroiliitis. Additionally, in his initial diagnosis, Dr. Cross notes a "strong possibility that Ms. Billingslea may have sustained some weakening of the pelvic architecture; i.e. the S/I joint, sacrum and pelvis, as a result of the radiation therapy, as she certainly did develop radiation dermatitis in the area of her pelvis." Dr. Cross continued to treat Ms. Billingslea's low back and left hip complaints conservatively. When Dr. Cross released Ms. Billingslea from his care and determined her to be at maximum medical improvement (MMI) on November 19, 2003, he again pointed out that due to the radiation she had undergone for her anorectal cancer, she might be suffering from radiation induced and/or age-related osteoporosis of her pelvis.

William Wester, M.D.

In his deposition, dated January 3, 2007, Dr. Wester noted that Ms. Billingslea had several risk factors for osteoporosis – not only her extensive radiation and chemotherapy treatments for cancer, but also the fact that she underwent a hysterectomy and oophorectomy at the age of 28. Also, in explaining his linking of the fractures, including the left hip fracture, to the September 2003 injury, Dr. Wester testified that he made the connection primarily due to Ms. Billingslea's description and history, and not through any objective diagnostic testing or finding. Further, Dr. Wester stated that he had not reviewed any diagnostic studies other than the MRI taken in March 2004; although he noted that Ms. Billingslea's previous X-rays taken on December 6, 2003, showed no obvious bony abnormality, and the CT scan taken in January 2004 was not made available to him for review. In this context, Dr. Wester propounded the following comment,

The question about the dating based on an MRI is an interesting one, you know, can you tell from an MRI in March how long the process has been going on, and I don't really know anybody that can do that.

In addition, in his October 4, 2006 letter to Ms. Billingslea's attorney, Dr. Wester opined that Ms. Billingslea's work activities were a substantial contributing factor in her right hip fracture, as well. In his deposition, however, he again notes that he based his opinion on Ms. Billingslea's history that she returned to work at Wal-Mart and began experiencing pain in her right hip. Under cross-examination, he admitted that Ms. Billingslea never

reported to him a specific traumatic injury at work that caused her right hip fracture. Finally, Dr. Wester testified that, while he did place significant restrictions on Ms. Billingslea, relative to both her left and right hips, he believed she could return to work and, in fact, believed she was looking forward to returning to work at Wal-Mart.

Christine Menias, M.D.

On January 20, 2004, Ms. Billingslea underwent a CT scan of her abdomen and pelvic area performed at Barnes Hospital Cancer Center to determine if her anal carcinoma had returned. Dr. Christine Menias read the scan. In her deposition of March 12, 2007, Dr. Menias stated that Ms. Billingslea was clear of metastatic disease. She also testified that, at the time she examined Ms. Billingslea on January 20, 2004, she detected no stress fractures in Ms. Billingslea's left hip.

Thomas Corsolini, M.D.

Dr. Thomas Corsolini, who is an independent medical examiner for the employer, opined in his report dated October 2, 2006, that Ms. Billingslea's injuries to both her left and right hips would not be considered compensable under workers' compensation, insofar as they were pathological fractures caused by her significant osteoporosis. When asked by the claimant's attorney during cross-examination whether a person with chips to the honeycomb structure of a bone, but without a complete break, can still walk without complete pain, Dr. Corsolini responded:

Well my experience has been that when there's stress fractures of the hip it becomes very difficult to walk. So I feel like in the case of Ms. Billingslea to somehow have remained functional for almost five months before her pain became excruciating, that would be unlikely in the event that a stress fracture had been present since September of '03.

P. Brent Koprivica, M.D.

P. Brent Koprivica, M.D., who is a physician practicing in the specialty of occupational medicine, testified by deposition on behalf of the employee. Dr. Koprivica _____ performed an independent medical examination of Ms. Billingslea on December 20, 2005. At the time of this examination, Dr. Koprivica took a history from Ms. Billingslea, reviewed various medical records, and performed a physical examination of her. In light of his examination and evaluation of the claimant, Dr. Koprivica opined that the September 26, 2003 work incident caused Ms. Billingslea to sustain an injury to her low back and left hip. According to Dr. Koprivica, the injury to the low back included multiple stress fractures, including the left femoral neck, left pubic ramus, and left sacrum. And, the injury to the left hip involved a "significant pelvic and left hip fracture." In addition, Dr. Koprivica opined that the September 22, 2004 work incident caused Ms. Billingslea to sustain an injury to the right hip, which involved stress fractures of the right femur, including the right femoral neck and the right femoral diaphysis.

In assessing the nature and extent of each claim, Dr. Koprivica opined that, relative to the September 26, 2003 injury, Ms. Billingslea sustained a permanent partial disability of 35 percent, referable to the left hip at the 207-week level. Similarly, Dr. Koprivica opined that this incident caused Ms. Billingslea to sustain a 15 percent partial disability to the body as a whole, referable to the pelvic fractures and development of chronic mechanical back pain. Globally, Dr. Koprivica opined that the September 26, 2003 incident caused Ms. Billingslea to sustain a permanent partial disability of 35 percent to the body as a whole. In regards to the second claim, Dr. Koprivica opined that the September 22, 2004 incident caused Ms. Billingslea to sustain a permanent partial disability of 25 percent, referable to the right hip at the 207-week level.

Further, Dr. Koprivica opined that Ms. Billingslea could not predictably work on a full-time basis and found her permanently and totally disabled. He attributes Ms. Billingslea's permanent total disability to the combination of her alleged work injuries of September 26, 2003 and September 24, 2004. In this regard, Dr. Koprivica is of the opinion that, prior to September 26, 2003, Ms. Billingslea had no preexisting disabilities.

Yet, on cross-examination, Dr. Koprivica acknowledges that he found Ms. Billingslea to be a poor historian and often confused without her notes. He admits that Ms. Billingslea's history to him was somewhat contradicted by her deposition testimony. In his deposition, Dr. Koprivica indicated, "I think she told me exactly what she believed, and so I didn't view that, but certainly if there's any factual change from what I've recorded, that has the potential to influence my opinion." Further, Dr. Koprivica admitted under cross-examination that there was no

mention of a specific work injury in any of Dr. Wester's medical records related to the September 2004 injury, only a sharp pain in her right hip after she had returned to work following the surgery to her left hip. And, Dr. Koprivica admitted that, at the time of his examination, Ms. Billingslea continued to be employed with Wal-Mart and actively working for the company.

Vocational Testimony / Wilbur Swearingin, CRC

Wilbur Swearingin, who is a vocational rehabilitation expert hired by the employee, found Ms. Billingslea to be permanently and totally disabled due to the combination of her two hip injuries, despite the fact that she had returned to work at Wal-Mart part-time. Mr. Swearingin acknowledged in his deposition of August 15, 2006, that nowhere in the medical records he reviewed related to the injury of September 2004 was there mention of a specific work related incident. Ms. Swearingin also acknowledged that he was relying on Ms. Billingslea's history of how she believed she was injured in September 2004.

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying workers' compensation case involving alleged accident date of September 26, 2003, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on September 26, 2003, which is substantive in nature, and not procedural, governs substantively the adjudication of this case. Accordingly, in this context, several familiar principles bear reprise.

The fundamental purpose of The Workers' Compensation Law for the State of Missouri 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 and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo. App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo. Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo. App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo. App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Brufflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo. App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo. App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo. App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575, 577 (Mo. App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo. App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo. App. W.D. 1993).

I. Accident

The employee asserts that, on September 26, 2003, while assisting a co-worker lift a wooden pallet onto a shopping cart, she sustained an accident that arose out of and in the course of her employment with Wal-Mart Stores, Inc. The employee further asserts that this incident caused her to suffer an injury to her low back and left hip. In particular, the employee asserts, the injury to the left hip involved a significant pelvic and left hip fractures, which necessitated receipt of surgeries, including a left hip replacement in October 2006.

The employer and insurer do not readily dispute that the employee sustained an accident on September 26, 2003, and this accident arose out of and in the course of her employment with Wal-Mart Stores, Inc. Further, the employer and insurer do not readily dispute that the September 26, 2003 accident caused the employee to sustain an injury to her low back. The employer and insurer, however, dispute that the September 26, 2003 accident caused the employee to sustain an injury to her left hip.

After consideration and review of the evidence, I find and conclude that, on September 26, 2003, the employee sustained an injury by accident, which arose out of and in the course of her employment with Wal-Mart Stores, Inc. I further find and conclude that this injury occurred while Ms. Billingslea assisted another employee lift a cedar pallet onto a shopping cart.

II. Nature of Injury

The primary issue before the undersigned is whether the September 26, 2003 caused the employee to sustain an injury to her pelvis and left hip. Having reviewed all of the evidence, including the claimant's own testimony, the content of the medical records and the medical expert opinions, I decide this issue in favor of the employer and insurer, and the Second Injury Fund. I am persuaded that, and thus find and conclude, the September 26, 2003 accident did not cause Ms. Billingslea to suffer an injury to her pelvis and left hip.

Section 287.020, subsection 2, states in part, "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." Ordinary gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the degeneration follows as an incident of employment. Section 287.020.3(1) RSMo.

In a workers' compensation claim, the employee has the burden of proving a causal relationship between the accident and the claimed injury. *Davies v. Carter Carburator, Division ACF Industries, Inc.*, 429 S.W.2d 738, 749 (Mo. 1968); *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo.App. 1973). Medical causation, 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. *Brundage v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. W.D. 1991); *Matzker v. St. Joseph Minerals Corp.*, 740 S.W.2d 362, 363 (Mo.App. E.D. 1987). Expert testimony is required where the cause and effect relationship between a claimed injury or condition and the alleged cause is not within the realm of common knowledge. *McGrath v. Satellite Sprinkler Systems, Inc.* 877 S.W.2d 704, 708 (Mo.App. E.D. 1994); *Brundage* at 202. Where the condition presents itself as a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, proof of causation is not within the realm of lay understanding. *Silman v. William Montgomery & Assoc*, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995). Expert testimony is essential where the issue is whether a preexisting condition was aggravated by a subsequent injury. *Modlin v. Sun Mark, Inc.*, 699 S.W.2d 5, 7 (Mo.App. 1985).

Where the opinions of medical experts are in conflict, the fact-finding body determines whose opinion is the most credible. *Kelly v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999); see also, *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo.App. 1984). 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 evidence given by the other litigant's expert. *Id.*, see also *George v. Shop n Save Warehouse Foods, Inc.*, 855 S.W.2d 460, 462 (Mo.App. E.D. 1993); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992); *Hutchison v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo.App. 1986).

In the context of the present case, the parties offer conflicting medical opinions relative to the cause of Ms. Billingslea's pelvic and left hip fractures, and subsequent surgeries that included a left hip replacement. The employee relies principally upon the medical opinions of Dr. Wester and Koprivica, who attribute the September stress fractures and subsequent surgeries to the September 26, 2003 lifting incident. Additionally, the employee relies upon the testimony of Dr. Lennard for support. The employer and insurer, as well as the Second Injury Fund, rely principally upon Drs. Cross and Corsolini, who opine that Ms. Billingslea's stress fractures in her left hip is the result of osteoporosis caused at least in part by her radiation treatments for her anorectal cancer.

In considering the opinions of Doctors Koprivica and Wester, both acknowledge that they premise their opinions of causation more on Ms. Billingslea's subjective reporting than any objective medical evidence. Similarly, both indicate that hip fractures are very painful and it is unlikely Ms. Billingslea could have continued to work for 10 days without providing notice or receiving medical treatment.

In addition, although Dr. Wester offers an opinion of causation relative to the September 26, 2003 incident, he indicates that osteoporosis was a significant factor in Ms. Billingslea's stress fractures. Similarly, he

acknowledges that Ms. Billingslea possesses several risk factors for osteoporosis – not only her extensive radiation and chemotherapy treatments for cancer, but also the fact that she underwent a hysterectomy and oophorectomy at the age of 28. Also, in explaining his linking of the fractures, including the left hip fracture, to the September 2003 injury, Dr. Wester testified that he made the connection primarily due to Ms. Billingslea's description and history, and not through any objective diagnostic testing or finding.

Dr. Cross, on the other hand, indicates that the stress fractures had to have occurred between the time of Ms. Billingslea's normal x-ray in December 2003 and the acute onset of excruciating left hip and lower back pain that occurred simply while walking at work on February 27, 2004. In rendering this opinion, Dr. Cross notes that the MRI in March 2004 was positive, while the x-rays in December 2003 and CT scan in January 2004 revealed no stress fractures. Admittedly, the CT scan occurred in context of addressing Ms. Billingslea cancer treatment, and not for the purpose of detecting stress fractures. Notwithstanding, the CT scan did not detect any stress fractures, and if such fractures had been detected, Dr. Menias would have alerted other health care providers.

After consideration and review of the evidence, I resolve the differences in medical opinions in favor of the testimony of Drs. Cross and Corsolini, who, in this case, I find to be more credible and persuasive. I am persuaded, and thus find and conclude, that Ms. Billingslea's pelvic and left hip fractures occurred as a result of an ordinary disease of life caused by her osteoporosis, including radiation-induced osteoporosis, and not as a result of the September 26, 2003 incident. Although the September 26, 2003 incident may have served as a triggering or precipitating event to the sustaining of the pelvic and left hip fractures, the September 26, 2003 incident was not a substantial factor in the cause of the pelvis and left hip fractures. The September 26, 2003 incident caused the employee to sustain an injury in the nature of a low back strain, but nothing more.

III.

Medical Care

The evidence is supportive of a finding that the September 26, 2003 injury, in the nature of a low back strain, necessitated receipt of certain medical care, which the employer and insurer provided for Ms. Billingslea. Similarly, the evidence is supportive of a finding that Ms. Billingslea completed treatment for this injury, and the additional treatment sought and obtained by Ms. Billingslea related to her pelvic and left hip fractures, and not for her low back strain. Therefore, for the reasons set forth above, and having found the pelvic and left hip fractures to be not work-related, the employee's request for payment of past medical care and expenses is denied. Similarly, the employee's request for future medical care is denied.

IV.

Temporary Disability Compensation

The evidence is supportive of a finding that the September 26, 2003 injury, in the nature of a low back strain, did not cause Ms. Billingslea to miss any time from work. Notably, relative to the low back strain, the employer afforded Ms. Billingslea with accommodations that allowed her to continue working in her employment with the employer. Ms. Billingslea subsequent absence from work is not causally related to the low back strain and the September 26, 2003 accident, but rather is causally related to the pelvic and left hip fractures.

Therefore, after consideration and review of the evidence, for the reasons set forth above, the employee's request for payment of temporary disability compensation is denied.

V.

Nature & Extent of Permanent Disability

The September 26, 2003 accident caused Ms. Billingslea to sustain an injury in the nature of a low back strain, which resulted in her suffering certain residual discomfort and pain. However, this injury does not preclude Ms. Billingslea from working or otherwise being governed by permanent work restrictions. Rather, the permanent restrictions governing Ms. Billingslea are attributable to the pelvic and left hip fractures, which are not causally related to the accident.

Therefore, after consideration and review of the evidence, and for the reasons set forth above, I find and conclude that the September 26, 2003 accident caused Ms. Billingslea to sustain a permanent partial disability of 5 percent to the body as a whole, referable to the low back strain. I further find and conclude that the accident of September 26, 2003, considered alone, does not render Ms. Billingslea permanently and totally disabled. Accordingly, the employer and insurer are ordered to pay to the employee the sum of \$4,546.20, which represents 20 weeks of permanent partial disability compensation payable at the applicable compensation rate of \$227.31.

VI.
Second Injury Fund Liability

The burden of proof is on the claimant to establish Second Injury Fund liability, which necessitates a finding of a permanent "previous disability." *Leutzinger v. Treasurer of Missouri*, 895 S.W.2d 591, (MoApp. E.D. 1995). Notably, this disability must exist at the time the work-related injury was sustained, and be of such seriousness to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed. *Messex v. Sachs Electric Company*, 989 S.W.2d, 206 (MoApp. E.D. 1999).

In 1977, Ms. Billingslea suffered a motor vehicle accident, which resulted in her sustaining a fracture to her jaw, a laceration to the left side of her head, a fracture to her right clavicle and a dislocated left hip. This injury necessitated receipt of multiple reconstructive surgeries to repair lacerations. Yet, according to Ms. Billingslea, she recovered from all of these injuries without continuing problems or any medical restrictions, and suffered no residual permanent disability referable to this injury. Similarly, approximately 20 years later, in 1997, according to Ms. Billingslea, she injured her left knee, which resulted in her experiencing symptoms that resolved with conservative treatment.

In October 2002, Ms. Billingslea suffered an illness in the nature of anorectal cancer. Subsequent to receiving this diagnosis, Ms. Billingslea underwent 27 radiation treatments and two rounds of chemotherapy at Barnes Hospital Cancer Center in St. Louis. She completed her cancer treatment in April 2003, without having to undergo surgery for her cancer. A colonoscopy performed in July 2003 showed no evidence of Ms. Billingslea's prior cancer, and in September 2003 Ms. Billingslea returned to work at Wal-Mart. According to Ms. Billingslea, she is cancer free.

Also, at the time of the September 26, 2003 accident, Ms. Billingslea suffered from a progressive disease in the nature of osteoporosis. The progressive nature of this condition continued to worsen and cause debilitating conditions associated with pelvic and hip fractures subsequent to, and unrelated to the September 26, 2003 accident.

After consideration and review of the evidence, I find and conclude that the preexisting medical conditions, in combination with the September 26, 2003 low back injury, do not render Ms. Billingslea unemployable in the open and competitive labor market. Unfortunately, subsequent to and unrelated to the accident of September 26, 2003 the progressive nature of the osteoporosis began to cascade rapidly, resulting in several stress fractures to her pelvis and both hips, causing the progression and rapid deterioration of Ms. Billingslea's overall medical condition. It is the combination of all of Ms. Billingslea's medical conditions, including the subsequent developing medical conditions, unrelated to the accident of September 26, 2003, which rendered her permanently and totally disabled. Further, there can be no Second Injury Fund liability for permanent partial disability in light of the statutory threshold not being met.

Accordingly, in light of the foregoing, there is no Second Injury Fund liability. The Claim for Compensation, as filed against the Second Injury Fund, is denied.

The award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Date: _____ July 3, 2007 _____

Made by: _____

L. Timothy Wilson
Chief Administrative Law Judge
Division of Workers' Compensation
(signed June 20, 2007)

A true copy: Attest:

Lucas Boling
Acting Director
Division of Workers' Compensation

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

Injury No.: 04-142244

Employee: Lois Billingslea
Employer: Wal-Mart Stores, Inc.
Insurer: American Home Assurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: September 22, 2004

Place and County of Accident: Branson West (Stone County), Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 3, 2007, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge L. Timothy Wilson, issued July 3, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2nd day of January 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Dependents: N/A

Employer: Wal-Mart Stores, Inc.

Insurer: American Home Assurance

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

Hearing Date: April 5, 2007

Checked by: LTW

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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 22, 2004
5. State location where accident occurred or occupational disease was contracted: Branson West (Stone County), MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? N/A
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: The employee sustained an incident on September 22, 2004 while lifting or picking-up of flowers.
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: None
14. Nature and extent of any permanent disability: None
14. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Lois Billingslea

Injury No.04-142244

17. Value necessary medical aid not furnished by employer/insurer? Alleged \$27,997.78
18. Employee's average weekly wages: \$340.00
19. Weekly compensation rate: \$227.31
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None

Unpaid medical expenses: None

Weeks of temporary total disability (or temporary partial disability): None

Weeks of permanent partial disability from Employer: None

Weeks of disfigurement from Employer: None

Permanent total disability benefits from Employer beginning, for Claimant's lifetime: None

22. Second Injury Fund liability: No

TOTAL: NONE

23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Lois Billingslea

Injury No. 04-142244

Dependents: N/A

Employer: Wal-Mart Stores, Inc.

Insurer: American Home Assurance

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

The above-referenced workers' compensation claim, which involved the joining of two workers' compensation cases for hearing, was heard before the undersigned Administrative Law Judge on April 5, 2007.^[1] The parties were afforded an opportunity to submit briefs, resulting in the record being completed and submitted to the undersigned on or about May 18, 2007.

The parties entered into a stipulation of facts in Injury No. 03-142261. The stipulation is as follows:

- (1) On or about September 26, 2003 Wal-Mart Stores, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by American Home Assurance.
- (2) On the alleged injury date of September 26, 2003 Lois J. Billingslea was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The above-referenced employment and alleged accident occurred in Stone County, Missouri. The parties agree to venue lying in Ozark (Christian County), Missouri. Venue is proper.

- (4) The employee notified the employer of her injury as required by Section, 287.420, RSMo.
- (5) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (6) At the time of the alleged accident the claimant's average weekly wage was sufficient to allow a compensation rate of \$227.31 for temporary and permanent disability compensation.
- (7) Temporary disability benefits have not been provided to the employee.
- (8) The employer and insurer have provided medical treatment to the employee, having paid \$5,714.67 in medical expenses.

The sole issues to be resolved by hearing in Injury No. 03-142261 include:

- (1) Whether the employee sustained an accident on or about September 26, 2003; and, if so, whether the accident arose out of and in the course of employment?
- (2) Whether the alleged accident caused the injuries and disabilities for which benefits are now being claimed?
- (3) Whether the employer and insurer are obligated to pay for certain past medical care and expenses in the amount of \$97,477.50?
- (4) Whether the claimant has sustained injuries that will require additional or future medical care in order to cure and relieve the employee of the effects of the injuries?
- (5) Whether the employee is entitled to temporary disability benefits? (The employee seeks TTD for the period of March 1, 2004 to September 1, 2004.)
- (6) Whether the employee sustained any permanent disability as a consequence of the alleged accident; and, if so, what is the nature and extent of the disability?
- (7) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

The parties entered into a stipulation of facts in Injury No. 04-142244. The stipulation is as follows:

- (1) On or about September 22, 2004 Wal-Mart Stores, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by American Home Assurance.
- (2) On the alleged injury date of September 22, 2004 Lois J. Billingslea was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The above-referenced employment and alleged accident occurred in Stone County, Missouri. The parties agree to venue lying in Ozark (Christian County), Missouri. Venue is proper.
- (4) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (5) At the time of the alleged accident the claimant's average weekly wage was sufficient to allow a compensation rate of \$227.31 for temporary and permanent disability compensation.
- (6) Temporary disability compensation and medical care have not been provided to the employee.

The sole issues to be resolved by hearing in Injury No. 04-142244 include:

- (1) Whether the employee sustained an accident on or about September 22, 2004; and, if so, whether the accident arose out of and in the course of employment?
- (2) Whether the employee gave the employer proper notice of the alleged accident?
- (3) Whether the alleged accident of September 22, 2004 caused the injuries and disabilities for which benefits are now being claimed?
- (4) Whether the employer and insurer are obligated to pay for certain past medical care and expenses in

the amount of \$27,997.78?

- (5) Whether the employee is entitled to temporary disability benefits? (The employee seeks TTD for period of October 1, 2004 to March 1, 2005.)
- (6) Whether the employee sustained any permanent disability as a consequence of the alleged accident; and, if so, what is the nature and extent of the disability?
- (7) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

EVIDENCE PRESENTED

The claimant testified at the hearing in support of her claim. Also, the claimant offered for admission the following exhibits:

- Exhibit A..... Medical Records from Skaggs Occupational Health Center
(Dated October 6, 2003 -- October 16, 2004)
- Exhibit B..... Medical Records from Orthopedists Specialists of Springfield
(Dated March 18, 2004 -- November 9, 2004)
- Exhibit C..... Medical Records from Cox Medical Center
(Dated March 18, 2004 -- November 6, 2004)
- Exhibit D..... Medical Records from Oxford HealthCare
(Dated April 26 2004 -- May 12, 2004 and Oct. 19, 2006 -- Nov. 9, 2006)
- Exhibit E..... Medical Records from Skaggs Community Health Center
(Branson West Rehabilitation Services, Dated Dec. 11, 2003 – Jan. 25, 2005)
- Exhibit F..... Medical Records from Skaggs Community Hospitals
(Dated Dec. 5, 2003 – April 16, 2004)
- Exhibit G..... Medical Records from Kymberly Rittman, D.O.
(Dated Oct. 7, 2002 – Oct. 18, 2002)
- Exhibit H..... Medical Records from William Cunningham, M.D.
(Dated Oct. 9, 2002 – Feb. 3, 2003)
- Exhibit I..... Medical Records from Barnes Jewish Cancer Center
(Dated Feb. 12, 2003 – July 10, 2003)
- Exhibit J..... Medical Records from Barnes Jewish Hospital
(Dated April 14, 2003 – July 10, 2003)
- Exhibit K..... Medical Records from Ted A. Lennard, M.D.
- Exhibit L..... Medical Records from William Wester, M.D.
- Exhibit M..... Medical Report from Brent Koprivica, M.D.
- Exhibit N..... Deposition of Brent Koprivica, M.D.
- Exhibit O..... Vocational Evaluation Report from Wilbur Swearingin, CRC
- Exhibit P..... Deposition of Wilbur Swearingin, CRC
- Exhibit Q..... Deposition of Christine Menias, M.D.
- Exhibit R Summary of Medical Expenses in Injury No. 03-142261 & Billing Records from:
- Emergency Physicians of Springfield
 - Cox Medical Centers
 - Ozark Anesthesia Associates
 - Skaggs Hospital
 - OSS
 - Litton & Giddings
 - Oxford Healthcare
- Exhibit S Summary of Medical Expenses in Injury No. 04-142244 & Billing Records from:
- Cox Medical Centers
 - Ozark Anesthesia Associates
 - William Wester, M.D.
 - Skaggs (PT)

- Springfield Neurological Institute
- Litton & Giddings
- Ozark Anesthesia Associates

Exhibit T Summary of Prescription Charges & Billing Records from Wal-Mart

The exhibits were received and admitted into evidence.

The employer and insurer did not present any witnesses at the hearing of this case. The employer and insurer, however, offered for admission the following exhibits:

- Exhibit 1..... Complete Medical Report from Randall Cross, M.D.
- Exhibit 2..... Deposition of Lois Billingslea
- Exhibit 3..... Deposition of Thomas Corsolini, M.D. (with medical report)
- Exhibit 4..... Deposition (Cross-examination) of William Wester, M.D.

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses or offer any exhibits at the hearing of this case.

In addition, the parties identified several documents filed with the Division of Workers' Compensation in Injury No. 03-142261, which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File, which include:

- Minute Entries of the Division of Workers' Compensation
- Request for Hearing
- Notice of Hearing
- Answer of Employer & Insurer to Amended Claim for Compensation
- Answer of Second Injury Fund to Amended Claim for Compensation
- Amended Claim for Compensation
- Answer of Employer & Insurer to Claim for Compensation
- Answer of Second Injury Fund to Claim for Compensation
- Claim for Compensation

Similarly, in Injury No. 04-142244, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File, which include:

- Minute Entries of the Division of Workers' Compensation
- Request for Hearing
- Notice of Hearing
- Answer of Employer & Insurer to Claim for Compensation
- Answer of Second Injury Fund to Claim for Compensation
- Claim for Compensation

DISCUSSION

The employee, Lois J. Billingslea, is 61 years of age, having been born on August 16, 1945. Ms. Billingslea is a resident of Branson West, Missouri. Additionally, Ms. Billingslea is a high school graduate, and attended some technical college classes in floral design.

In or around September or October 2000, Ms. Billingslea obtained employment with Wal-Mart, working in its Branson West, Missouri store. Initially, in this employment, Ms. Billingslea worked as a stocker, and later became the manager of the store's floral department. In this employment, Ms. Billingslea's duties included ordering flowers, processing flowers, stocking the floral cooler, waiting on customers, and general upkeep of the department.

Ms. Billingslea asserts that, in September 2003, while working in the store's floral department, she sustained an injury to her low back and left hip. Later, in September 2004, Ms. Billingslea asserts that, while working in the floral department she sustained an injury to her right hip and leg. Ms. Billingslea is alleging permanent total disability. The employer and insurer, as well as the Second Injury Fund, dispute the contentions and claims of Ms. Billingslea.

Prior Medical History

In 1977, Ms. Billingslea suffered a motor vehicle accident, which resulted in her sustaining a fracture to her

jaw, a laceration to the left side of her head, a fracture to her right clavicle and a dislocated left hip. This injury necessitated receipt of multiple reconstructive surgeries to repair lacerations. Yet, according to Ms. Billingslea, she recovered from all of these injuries without continuing problems or any medical restrictions, and suffered no residual permanent disability referable to this injury. Similarly, approximately 20 years later, in 1997, according to Ms. Billingslea, she injured her left knee, which resulted in her experiencing symptoms that resolved with conservative treatment.

In October 2002, Ms. Billingslea suffered an illness in the nature of anorectal cancer. Subsequent to receiving this diagnosis, Ms. Billingslea underwent 27 radiation treatments and two rounds of chemotherapy at Barnes Hospital Cancer Center in St. Louis. She completed her cancer treatment in April 2003, without having to undergo surgery for her cancer. A colonoscopy performed in July 2003 showed no evidence of Ms. Billingslea's prior cancer, and in September 2003 Ms. Billingslea returned to work at Wal-Mart. According to Ms. Billingslea, she is cancer free. However, in the latter part of 2003 her attending physicians diagnosed her with osteopenia, and thereafter osteoporosis.

In addition, the medical records include a history of Ms. Billingslea undergoing a hysterectomy and oophorectomy at the age of 28, and a notation that she took estrogen for years. The medical records, however, note that she had not taken estrogen for a couple years prior to March 2004.

Ms. Billingslea returned to her job at Wal-Mart in September 2003 following her cancer treatment. According to Ms. Billingslea, at the time of her release to return to work, she felt fine and her strength had returned.

September 26, 2003

Ms. Billingslea alleges that, on or about September 26, 2003, while assisting another employee in lifting a 70-80 lb. cedar pallet to place it onto a shopping cart, she sustained an injury to her low back and left hip. According to Ms. Billingslea, she felt immediate pain in her low back and left hip, and she began walking with a limp. Ms. Billingslea reported this incident to her employer, which resulted in Ms. Billingslea receiving a referral to Randall Cross, M.D. for evaluation and treatment.

On or about October 6, 2003, Ms. Billingslea presented to Dr. Cross for complaints of pain in her low back and left hip and a limp with her left leg. Dr. Cross diagnosed a low back strain with left-sided sacroilitis. Dr. Cross provided Ms. Billingslea with conservative care that included prescriptions for pain medication and muscle relaxants. Ms. Billingslea continued to treat with Dr. Cross approximately every two weeks thereafter. While treating with Dr. Cross, Ms. Billingslea worked on a restricted duty basis, until being released to regular duty on November 19, 2003. Notably, on November 19, 2003, at the time of her appointment with Dr. Cross, Ms. Billingslea reported that she was no longer experiencing pain in her low back, but did continue to limp.

On or about December 1, 2003, Ms. Billingslea returned to see Dr. Cross presenting with an increase in her pain level. Thereafter, Ms. Billingslea underwent diagnostic studies, which included x-rays of her left hip. The diagnostic studies indicated osteoporosis in the lumbar spine, otherwise normal, with a negative left hip X-ray. Thereafter, on or about December 11, 2003, Dr. Cross referred Ms. Billingslea for physical therapy, which she reported did help alleviate some of her pain. Additionally, Ms. Billingslea testified that her low back was somewhat better following the physical therapy; however, she continued to have pain in her left hip and continued to limp with her left leg. According to Ms. Billingslea, although she continued to work in the Floral department she used a grocery cart as a walker, leaning on the cart for support.

On or about January 13, 2004, Dr. Cross determined Ms. Billingslea to be at maximum medical improvement, and released her from his care. During Ms. Billingslea's treatment with Dr. Cross, from Sept. 26, 2003 through Jan. 13, 2004, Ms. Billingslea continued to work full-time and at full-duty for Wal-Mart. However, she notes, she changed the way she worked during this time, making fewer trips on the store floor and relying more on using a shopping cart when moving goods around the store.

In January 2004, Ms. Billingslea traveled to Barnes Hospital in St. Louis for a check-up with her cancer doctor. During this treatment period, the attending physicians administered a bone density test and CT scan of Ms. Billingslea's pelvis. These tests did not reveal any recurring cancer, but did show bone loss.

Ms. Billingslea returned to see Dr. Cross on March 2, 2004, reporting that, since "this past Friday" (February 27, 2004), she had experienced "acute onset of severe, excruciating pain in her left buttock, into the left lateral hip and her limp has gotten worse." (On cross-examination, Ms. Billingslea admitted that, for the period of January 13, 2004 to March 2, 2004, she sought no treatment for her left hip.) In light of his examination and findings, Dr. Cross recommended that Ms. Billingslea undergo a diagnostic study of the left hip and low back in the nature of an MRI. This study occurred on March 12, 2004, and revealed mild degenerative changes of the lumbar spine at L4-L5 and L5-S1, without significant stenosis; a stress fracture of the left femoral neck; and an insufficiency type fracture involving the left side of the sacrum with edema in the left inferior pubic ramus.

Thereafter, upon reviewing the results of the MRI study, Dr. Cross opined that Ms. Billingslea's left hip fractures occurred between the time of her CT scan in January 2004 and the onset of her acute left hip and low back pain on Feb. 27, 2004. In this context, in March 2004, Dr. Cross propounded the following comments:

I have systematically and painstakingly reviewed with Lois and her niece the history of Lois' present situation from the beginning of my treatment of her back strain on a job on September 26, 2003 through all that has transpired to this date....The present MRI films demonstrate the development of 3 stress fractures in her left femoral neck, left inferior pubic ramus and left side of her sacrum. These findings are in addition to the objective demonstration of osteopenia noted on bone density testing that her oncologist had performed. The stress fractures had to have occurred between the time of her normal CT scan in December (sic) and the acute onset of excruciating left hip and lower back pain that occurred simply while walking on February 27, 2004. I tried to explain to Lois and her niece the progressive nature of the development of osteoporosis as a common side effect of Radiation therapy and that this is the cause of the development of these pathologic stress fractures which are now evident on her MRI films. I tried to explain the difference between a simple strain of the lower back which she sustained by stooping over to move a wooden pallet in September and the onset of this more severe, debilitating pain as the result of the 3 stress fractures from the radiation induced osteoporosis.

* * *

I also tried to impress upon Lois the urgency with which she needs to follow up with her oncologist to get started on VERY AGGRESSIVE therapy for her osteoporosis lest she develop more pathologic stress fractures. I also, discussed the pathology and the usual time course of healing as well as the likely delayed time course of healing of these stress fractures due the inherent weakness of her bone structure. I suggested that she seek at the very least, short term Social Security Disability or short term medical disability if it is offered as a benefit through her employer to allow her adequate time and rest to heal these fractures and get established on a regimen of medication and calcium supplementation to treat her osteoporosis to help prevent further stress fractures.

In light of the foregoing, Dr. Cross released Ms. Billingslea from his care, with the recommendation that she follow-up with other individual providers, including her oncologist. Notably, in releasing Ms. Billingslea from his care, Dr. Cross initiated a referral plan, wherein he propounded the following comments:

Plan 1: I will assist her with a prescription for narcotic analgesics to use until such time as she can expedite an earlier than scheduled follow-up with her oncologist. I will leave the treatment of her osteoporosis to his discretion.

Plan 2: I have recommended that she be non-weight-bearing for 4 to 6 weeks to allow for ample healing of her stress fractures. She will not be able to resume gainful employment until such time as her fractures have healed sufficiently to allow her to ambulate comfortably which she obviously cannot do at the present time.

Thereafter, in March 2004 Ms. Billingslea experienced increasing discomfort and pain in her right flank, which resulted in her presenting to Cox South Emergency Room for treatment. The attending physician provided certain treatment and referred Ms. Billingslea to William Wester, M.D. for evaluation and treatment. Subsequently,

on or about March 31, 2004, Ms. Billingslea presented to Dr. Wester with complaints of pain. In light of his examination and evaluation of Ms. Billingslea on March 31, 2004, Dr. Wester recommended that Ms. Billingslea undergo surgery in the nature of pinning the fractures. Notably, in examining the cause of this condition, Dr. Wester propounded a contradictory opinion, as follows:

I would anticipate all of her stress fractures are a result of her significant osteoporosis. It is my opinion that all the fractures are related to the injury back in September.

Intervening Incident

In preparation for the surgery recommended by Dr. Wester, Ms. Billingslea presented to Skaggs Hospital on or about April 16, 2004 to pick up her medical records and a copy of the MRI for review by Dr. Wester. While at Skaggs Hospital, Ms. Billingslea fell down a flight of stairs, which resulted in her presenting to the emergency room of Skaggs Hospital for examination and evaluation. The attending physician notes the history of this incident, as follows:

This 58-year-old Caucasian female patient came to the emergency room by ambulance. Apparently she was on our property picking up copies of an MRI and other x-rays when she inadvertently was walking down steps with crutches and fell down an unknown number of steps. Apparently, in this incident she struck the back of her head and she sustained an approximately 1 inch laceration. Approximately 2.5 cm. She did not have any loss of consciousness. She also reinjured her left hip that apparently had a stress fracture present. She ironically was on her way to Cox South Hospital where she was going to be admitted for repair of the left hip. It appears, at least on the surface, that the hip fracture now is more than a simple stress fracture. She is scheduled for surgery at Cox South Hospital for the hip. She is a patient of Dr. Kym Rittman and Dr. Randy Cross. The pain is apparently now is (sic) severe.

Diagnosing Ms. Billingslea with a fracture of the left hip, the attending emergency room physician transferred Ms. Billingslea to Dr. Wester and Cox South Hospital for the scheduled surgery (ORIF) of the left hip. Notably, in making the transfer, the attending physician indicated acknowledgement on the part of Dr. Wester that he would be accepting Ms. Billingslea in a condition that "was accelerated from a prior status to 2 or more acute one."

Thus, proceeding as scheduled, on April 17, 2007, Dr. Wester performed a closed reduction and percutaneous pinning of Ms. Billingslea's left femoral neck fracture. Subsequently, Ms. Billingslea underwent physical therapy and received prescription medication and follow-up treatment with Dr. Wester. Further, according to Ms. Billingslea, she was off work from on or about March 1, 2004 to on or about Sept. 10, 2004. Notably, the medical records of Dr. Wester indicate that, on September 10, 2004, he released Ms. Billingslea to return to work full duty, effective on September 17, 2004; and, he released her from his care, with instructions to return as needed.

September 22, 2004

Ms. Billingslea alleges that, on September 22, 2004, she suffered a second work-related injury when she attempted to lift a bucket full of flowers and water out of a box on a pallet and into a shopping cart. According to Ms. Billingslea, at the time of this incident, she experienced immediate pain in her right hip. Further, Ms. Billingslea testified that she told her assistant manager Josh Moore that her right hip hurt and she needed to leave early. Ms. Billingslea received permission to leave work early. However, Ms. Billingslea did not tell Mr. Moore that she hurt her right hip while at work or because of work activity. Similarly, Ms. Billingslea did not identify or inform her employer that she had sustained a work injury. Nor did she request medical treatment from her employer for this medical concern.

Ms. Billingslea saw Dr. Wester on Sept. 24, 2004, reporting that she began having sharp pain in her right hip after returning to work. An MRI performed on Sept. 27, 2004, indicated edema in the right femoral neck with a dark signal in the medial half of the femoral neck, suggesting an insufficiency fracture. In light of this examination and finding, Dr. Wester recommended an intramedullary hip screw for the right side. Notably, in responding to a question asked by Ms. Billingslea, relative to how the injury occurred, Dr. Wester propounded the following opinion and comments:

I do think it is as a result of her significant osteoporosis. She has an appointment with the endocrinologist in December. We will set her up for surgery as soon as possible.

Thereafter, on or about October 14, 2004, Dr. Wester performed an intramedullary hip screw insertion to stabilize the fracture. Post-operatively, Ms. Billingslea participated in physical therapy at Skaggs Hospital and continued to take pain medication and muscle relaxers. She was off work from on or about October 1, 2004 to on or about March 1, 2005. The employer permitted Ms. Billingslea to return to work on a restricted duty basis, insofar as she was governed by a permanent lifting restriction of 10 pounds. According to Ms. Billingslea, the accommodations provided by Wal-Mart permitted her to perform an easier job in the cosmetic division of the Home and Beauty Aid Department. Also, it is noted that Ms. Billingslea's private health insurance paid for both her left and right hip surgeries.

In April 2006 Ms. Billingslea again developed problems with her left hip. She testified that her left leg would give out on her, she felt as if she was dragging her leg and she could hardly walk. Dr. Wester sent Ms. Billingslea to physical therapy and recommended surgery. On October 12, 2006, Ms. Billingslea underwent a left hip replacement. Post-operatively she went through physical therapy and was off work for three months.

Present Employment

Ms. Billingslea returned to work in January 2007 working three days per week, five hours a day. In her present employment, Ms. Billingslea is responsible for reshelving returned items and assisting customers. Ms. Billingslea testified that she uses a shopping cart to aid her in walking around the store while putting away returned items. Notably, at the time of the hearing, and in light of the accommodations provided by Wal-Mart, Ms. Billingslea continues to enjoy employment working under these restrictions and averaging 15 hours of work per week.

Medical Testimony

Dr. Randall Cross

On or about Oct. 6 2003, Ms. Billingslea began treating with Dr. Randall Cross for a lower back strain and left-sided sacroiliitis. Additionally, in his initial diagnosis, Dr. Cross notes a "strong possibility that Ms. Billingslea may have sustained some weakening of the pelvic architecture; i.e. the S/I joint, sacrum and pelvis, as a result of the radiation therapy, as she certainly did develop radiation dermatitis in the area of her pelvis." Dr. Cross continued to treat Ms. Billingslea's low back and left hip complaints conservatively. When Dr. Cross released Ms. Billingslea from his care and determined her to be at maximum medical improvement (MMI) on November 19, 2003, he again pointed out that due to the radiation she had undergone for her anorectal cancer, she might be suffering from radiation induced and/or age-related osteoporosis of her pelvis.

William Wester, M.D.

In his deposition, dated January 3, 2007, Dr. Wester noted that Ms. Billingslea had several risk factors for osteoporosis – not only her extensive radiation and chemotherapy treatments for cancer, but also the fact that she underwent a hysterectomy and oophorectomy at the age of 28. Also, in explaining his linking of the fractures, including the left hip fracture, to the September 2003 injury, Dr. Wester testified that he made the connection primarily due to Ms. Billingslea's description and history, and not through any objective diagnostic testing or finding. Further, Dr. Wester stated that he had not reviewed any diagnostic studies other than the MRI taken in March 2004; although he noted that Ms. Billingslea's previous X-rays taken on December 6, 2003, showed no obvious bony abnormality, and the CT scan taken in January 2004 was not made available to him for review. In this context, Dr. Wester propounded the following comment,

The question about the dating based on an MRI is an interesting one, you know, can you tell from an MRI in March how long the process has been going on, and I don't really know anybody that can do that.

In addition, in his October 4, 2006 letter to Ms. Billingslea's attorney, Dr. Wester opined that Ms. Billingslea's work activities were a substantial contributing factor in her right hip fracture, as well. In his deposition, however, he again notes that he based his opinion on Ms. Billingslea's history that she returned to work at Wal-Mart and began experiencing pain in her right hip. Under cross-examination, he admitted that Ms. Billingslea never

reported to him a specific traumatic injury at work that caused her right hip fracture. Finally, Dr. Wester testified that, while he did place significant restrictions on Ms. Billingslea, relative to both her left and right hips, he believed she could return to work and, in fact, believed she was looking forward to returning to work at Wal-Mart.

Christine Menias, M.D.

On January 20, 2004, Ms. Billingslea underwent a CT scan of her abdomen and pelvic area performed at Barnes Hospital Cancer Center to determine if her anal carcinoma had returned. Dr. Christine Menias read the scan. In her deposition of March 12, 2007, Dr. Menias stated that Ms. Billingslea was clear of metastatic disease. She also testified that, at the time she examined Ms. Billingslea on January 20, 2004, she detected no stress fractures in Ms. Billingslea's left hip.

Thomas Corsolini, M.D.

Dr. Thomas Corsolini, who is an independent medical examiner for the employer, opined in his report dated October 2, 2006, that Ms. Billingslea's injuries to both her left and right hips would not be considered compensable under workers' compensation, insofar as they were pathological fractures caused by her significant osteoporosis. When asked by the claimant's attorney during cross-examination whether a person with chips to the honeycomb structure of a bone, but without a complete break, can still walk without complete pain, Dr. Corsolini responded:

Well my experience has been that when there's stress fractures of the hip it becomes very difficult to walk. So I feel like in the case of Ms. Billingslea to somehow have remained functional for almost five months before her pain became excruciating, that would be unlikely in the event that a stress fracture had been present since September of '03.

P. Brent Koprivica, M.D.

P. Brent Koprivica, M.D., who is a physician practicing in the specialty of occupational medicine, testified by deposition on behalf of the employee. Dr. Koprivica _____ performed an independent medical examination of Ms. Billingslea on December 20, 2005. At the time of this examination, Dr. Koprivica took a history from Ms. Billingslea, reviewed various medical records, and performed a physical examination of her. In light of his examination and evaluation of the claimant, Dr. Koprivica opined that the September 26, 2003 work incident caused Ms. Billingslea to sustain an injury to her low back and left hip. According to Dr. Koprivica, the injury to the low back included multiple stress fractures, including the left femoral neck, left pubic ramus, and left sacrum. And, the injury to the left hip involved a "significant pelvic and left hip fracture." In addition, Dr. Koprivica opined that the September 22, 2004 work incident caused Ms. Billingslea to sustain an injury to the right hip, which involved stress fractures of the right femur, including the right femoral neck and the right femoral diaphysis.

In assessing the nature and extent of each claim, Dr. Koprivica opined that, relative to the September 26, 2003 injury, Ms. Billingslea sustained a permanent partial disability of 35 percent, referable to the left hip at the 207-week level. Similarly, Dr. Koprivica opined that this incident caused Ms. Billingslea to sustain a 15 percent partial disability to the body as a whole, referable to the pelvic fractures and development of chronic mechanical back pain. Globally, Dr. Koprivica opined that the September 26, 2003 incident caused Ms. Billingslea to sustain a permanent partial disability of 35 percent to the body as a whole. In regards to the second claim, Dr. Koprivica opined that the September 22, 2004 incident caused Ms. Billingslea to sustain a permanent partial disability of 25 percent, referable to the right hip at the 207-week level.

Further, Dr. Koprivica opined that Ms. Billingslea could not predictably work on a full-time basis and found her permanently and totally disabled. He attributes Ms. Billingslea's permanent total disability to the combination of her alleged work injuries of September 26, 2003 and September 24, 2004. In this regard, Dr. Koprivica is of the opinion that, prior to September 26, 2003, Ms. Billingslea had no preexisting disabilities.

Yet, on cross-examination, Dr. Koprivica acknowledges that he found Ms. Billingslea to be a poor historian and often confused without her notes. He admits that Ms. Billingslea's history to him was somewhat contradicted by her deposition testimony. In his deposition, Dr. Koprivica indicated, "I think she told me exactly what she believed, and so I didn't view that, but certainly if there's any factual change from what I've recorded, that has the potential to influence my opinion." Further, Dr. Koprivica admitted under cross-examination that there was no mention of a specific work injury in any of Dr. Wester's medical records related to the September 2004 injury, only

a sharp pain in her right hip after she had returned to work following the surgery to her left hip. And, Dr. Koprivica admitted that, at the time of his examination, Ms. Billingslea continued to be employed with Wal-Mart and actively working for the company.

Vocational Testimony / Wilbur Swearingin, CRC

Wilbur Swearingin, who is a vocational rehabilitation expert hired by the employee, found Ms. Billingslea to be permanently and totally disabled due to the combination of her two hip injuries, despite the fact that she had returned to work at Wal-Mart part-time. Mr. Swearingin acknowledged in his deposition of August 15, 2006, that nowhere in the medical records he reviewed related to the injury of September 2004 was there mention of a specific work related incident. Ms. Swearingin also acknowledged that he was relying on Ms. Billingslea's history of how she believed she was injured in September 2004.

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying workers' compensation case involving an alleged accident date of September 22, 2004, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on September 22, 2004, which is substantive in nature, and not procedural, governs substantively the adjudication of this case. Accordingly, in this context, several familiar principles bear reprise.

The fundamental purpose of The Workers' Compensation Law for the State of Missouri 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 and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo. App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo. Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo. App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo. App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Brufat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo. App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo. App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo. App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575, 577 (Mo. App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo. App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo. App. W.D. 1993).

I. Accident

The employee alleges that, on September 22, 2004, she suffered a second work-related injury, involving a stress fracture to her right hip, when she attempted to lift a bucket full of flowers and water out of a box on a pallet and into a shopping cart. Yet, in her deposition she identifies this lifting incident to involve the picking-up of a mixed bouquet of flowers, and not a bucket of full of flowers and water. Regardless, the lifting or picking-up of flowers is sufficient to establish a work-related incident, arising out of and in the course of her employment with Wal-Mart Stores, Inc. Indeed, I find and conclude that the September 22, 2004 incident did not cause Ms. Billingslea to suffer any injury.

II. Medical Causation

Notwithstanding, I am persuaded that the September 22, 2004 incident did not cause Ms. Billingslea to sustain an injury in the nature of a stress fracture to her right hip. Preeminently, having reviewed all of the evidence, including the claimant's own testimony, the content of the medical records and the medical expert opinions, I find and conclude that the September 22, 2004 incident did not cause Ms. Billingslea to suffer an injury to her right hip.

Section 287.020, subsection 2, states in part, "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." Ordinary gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the degeneration follows as an incident of employment. Section 287.020.3(1) RSMo.

In a workers' compensation claim, the employee has the burden of proving a causal relationship between the accident and the claimed injury. *Davies v. Carter Carburator, Division ACF Industries, Inc.*, 429 S.W.2d 738, 749 (Mo. 1968); *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo.App. 1973). Medical causation, 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. *Brundage v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. W.D. 1991); *Matzker v. St. Joseph Minerals Corp.*, 740 S.W.2d 362, 363 (Mo.App. E.D. 1987). Expert testimony is required where the cause and effect relationship between a claimed injury or condition and the alleged cause is not within the realm of common knowledge. *McGrath v. Satellite Sprinkler Systems, Inc.* 877 S.W.2d 704, 708 (Mo.App. E.D. 1994); *Brundage* at 202. Where the condition presents itself as a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, proof of causation is not within the realm of lay understanding. *Silman v. William Montgomery & Assoc.*, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995). Expert testimony is essential where the issue is whether a preexisting condition was aggravated by a subsequent injury. *Modlin v. Sun Mark, Inc.*, 699 S.W.2d 5, 7 (Mo.Ct.App. 1985).

Where the opinions of medical experts are in conflict, the fact-finding body determines whose opinion is the most credible. *Kelly v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999); see also, *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo.App. 1984). 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 evidence given by the other litigant's expert. *Id.*, see also *George v. Shop n Save Warehouse Foods, Inc.*, 855 S.W.2d 460, 462 (Mo.App. E.D. 1993); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992); *Hutchison v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo.App. 1986).

In the context of the present case, the parties offer conflicting medical opinions relative to the cause of Ms. Billingslea's right hip fracture. As in the 2003 claim, the employee relies principally upon the medical opinions of Drs. Wester, Koprivica and Lennard, while the employer and insurer rely upon the medical opinions of Drs. Cross and Corsolini.

Although the employee looks to Dr. Wester for support, Dr. Wester notes in his medical report dated October 1, 2004 that Ms. Billingslea's right hip insufficiency fracture is not related to her employment. Notably, in responding to a question asked by Ms. Billingslea, relative to how the injury occurred, Dr. Wester propounded the following opinion and comments:

I do think it [right hip fracture] is as a result of her significant osteoporosis. She has an appointment with the endocrinologist in December. We will set her up for surgery as soon as possible.

Further, Dr. Wester admitted on cross-examination that Ms. Billingslea did not experience a twisting injury at work, such that she would sustain a right hip injury. Nor did Ms. Billingslea inform Dr. Wester of having sustained a traumatic injury at work. In this regard, two days after the claim of injury, on September 24, 2004, Ms. Billingslea presented to Dr. Wester for treatment. At the time of this examination, Ms. Billingslea provided Dr. Wester with a history and complaints of pain, as follows:

Lois Billingslea returns. She is having trouble with her right hip. She had gone back to work and noticed that she started having sharp pain. It has gotten to the point where she is unable to tolerate weight bearing on the right side. The left side is doing well other than some deep seeded pain in the

ischial region when she sits.

Notably, at no time did Ms. Billingslea reference a September 22, 2004 incident, or even specific work activity causing an injury to her right hip.

After consideration and review of the evidence, I resolve the differences in medical opinions in favor of the testimony of Drs. Cross and Corsolini, who, in this case, I find to be more credible and persuasive. I am persuaded, and thus find and conclude, that Ms. Billingslea's right hip fracture occurred as a result of an ordinary disease of life caused by her osteoporosis, including radiation-induced osteoporosis, and not as a result of the September 22, 2004 incident. At most, the September 22, 2004 incident served as a triggering or precipitating event; but, it was not a substantial factor in the cause of the sustaining of a right hip fracture.

Therefore, insofar as all benefits sought by the employee relate to the allegation that the September 22, 2004 accident caused Ms. Billingslea to suffer a right hip fracture, and having found the right hip fracture to be not work-related, the employee, Lois Billingslea failed to sustain her burden of proof. The September 22, 2004 incident did not cause any injury for which benefits are sought, or available under Chapter 287, RSMo.

The Claim for Compensation, as filed against the employer and insurer, and as filed against the Second Injury Fund, is denied. All other issues are rendered moot.

Date: _____ July 3, 2007 _____

Made by: _____

L. Timothy Wilson
Chief Administrative Law Judge
Division of Workers' Compensation
(signed June 20, 2007)

A true copy: Attest:

Lucas Boling
Acting Director
Division of Workers' Compensation

[\[1\]](#) The two workers' compensation files include Injury Nos. 03-142261 & 04-142244.