

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

Injury No.: 02-011152

Employee: Donna Bolerjack
Employer: Country Mart
Insurer: Arrowood Indemnity Co.

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

The parties dispute: (1) whether employer is liable for employee's medical expenses after employer's authorized treating doctors released her; (2) the nature and extent of employee's disability referable to the work injury; and (3) employer's liability for unpaid temporary total disability benefits. The parties have provided competing medical expert testimony on the question whether employee was at maximum medical improvement from the effects of her work injury when employer's authorized treating doctors released her, or instead at some later date. As a result, the disputed issues turn on a determination as to which of the parties' experts is able to provide the more credible theory with regard to employee's low back condition and disability.

Employer argues throughout its brief that this Commission must "as a matter of law" reverse the administrative law judge's credibility determinations. Employer's invocation of legal principles to argue why we should reach certain factual medical findings necessarily implicates case law such as *Wright v. Sports Associated*, 887 S.W.2d 596, 600 (Mo. 1994) (holding that the fact-finder may not substitute personal opinion on the question of medical causation for the uncontradicted testimony of a qualified medical expert), or *Bock v. City of Columbia*, 274 S.W.3d 555, 560 (Mo. App. 2008) (holding that expert testimony is necessary to guide the fact-finder's apportionment of disability where there is more than one injury affecting the same body part). But this case clearly does not involve any such circumstances, and so employer's argument constitutes a misstatement of Missouri law, as the cases are consistent in reiterating that "[w]hether to accept conflicting medical opinions is a fact issue for the Commission." *Hornbeck v. Spectra Painting, Inc.*, 370 S.W.3d 624, 632 (Mo. 2012).

Employer also states, on page 9 of its brief that Dr. Lange opined that most spine surgeons would not offer the surgery performed by Dr. Satterly. Employer fails to mention that this was an earlier opinion from Dr. Lange that he in fact *retracted* during his deposition. See *Transcript*, pages 4018, 3935. Here and elsewhere in its brief, we believe that employer's selective recitation of the facts has worked the effect of misrepresenting the record.

Employee: Donna Bolerjack

Employer is referred to Commission rule 8 CSR 20-3.030(5) (C) which states the requirements for an appellant’s brief to the Commission; among these is “a fair and concise statement of facts without argument.” This rule is intended not only to benefit the Commission in narrowing the issues and providing a clear factual background, but also the parties, because when the rule is observed, the Commission is able to avoid unnecessary and time-consuming forays into the record simply to determine which party has accurately stated the evidence. Here, employer’s suggestion that certain factual medical determinations are required in this case “as a matter of law” combined with its incomplete and unfair statement of the facts needlessly diverted our time and attention from the substantive issue of which expert provides the more credible account of employee’s low back condition and disability.

In any event, after a careful review of the expert medical opinions, we agree with the administrative law judge’s determination that Dr. Satterly and Dr. Volarich provide the more credible testimony in this matter. We discern no reason to disturb the administrative law judge’s thorough and well-reasoned award. But we write this supplemental opinion to make clear the imposition upon the Commission that results when parties, such as employer here, misstate both the facts and the law in their briefs.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Vicky Ruth, issued March 20, 2012, is attached and incorporated by this reference.

We approve and affirm 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 26th day of November 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Donna Bolerjack

Injury No. 02-011152

Dependents: N/A

Employer: Country Mart

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

Additional Party: N/A

Insurer: Arrowood Indemnity Co.

Hearing Date: December 14, 2010

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: January 23, 2002.
5. State location where accident occurred or occupational disease was contracted: Dent County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The employee was struck on her left shoulder by several falling boxes.
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: Body as a whole referable to the low back, the mid-back, the neck, and the left shoulder.
14. Nature and extent of any permanent disability: Permanent and total disability.
15. Compensation paid to-date for temporary disability: \$5,895.14.
16. Value necessary medical aid paid to date by employer/insurer? \$69,986.80.
17. Value necessary medical aid not furnished by employer/insurer? See award.

- 18. Employee's average weekly wages: \$252.69.
- 19. Weekly compensation rate: \$168.46.
- 20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

- 21. Amount of compensation payable from employer:

Permanent and total disability benefits of \$168.46/week from February 11, 2004, and thereafter for claimant's lifetime as provided by statute.

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

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder (excluding payments for future medical treatment) in favor of the following attorney for necessary legal services rendered to the claimant: Stephen Gaunt.

Employee: Donna Bolarjack

Injury No. 02-011152

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Donna Bolarjack

Injury No: 02-011152

Dependents: N/A

Before the
DIVISION OF WORKERS'
COMPENSATION

Employer: Country Mart

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

Additional Party: N/A

Insurer: Arrowood Indemnity Co.

On December 14, 2011, Donna Bolarjack and Country Mart/Arrowood Indemnity Co. appeared for a final award hearing. Donna Bolarjack, the claimant, was represented by attorney Stephen Gaunt. Country Mart and Arrowood Indemnity Co., the employer/insurer, were represented by attorney John Pazell. Claimant testified in person at the hearing and by two depositions. Dr. Thomas Satterly, Dr. Russell Cantrell, Dr. Michael Chabot, and Dr. David Lange testified by deposition. Late-filed exhibits were filed on January 4, 2011. The parties filed briefs/proposed awards on January 11, 2012, and the record closed at that time.

STIPULATIONS

The parties stipulated to the following:

1. On or about January 23, 2002, Country Mart (the employer) was an employer operating subject to the Missouri Workers' Compensation law.
2. The employer's liability for workers' compensation was insured by Arrowood Indemnity Co. (the insurer).
3. Donna Bolarjack (the claimant) was an employee of the employer on January 23, 2002, when she sustained an injury by accident that arose out of and in the course and scope of employment.
4. Notice is not an issue.
5. Claimant filed a Claim for Compensation within the time prescribed by law.
6. The Missouri Division of Workers' Compensation has jurisdiction.
7. The accident occurred in Dent County and venue for trial purposes is proper in Phelps County.
8. Claimant's average weekly wage was \$252.69, yielding a weekly compensation rate of \$168.46.
9. The employer has provided medical benefits in the amount of \$69,986.80.
10. The employer has provided temporary total disability benefits in the amount of \$5,895.14. The periods covered were January 24, 2002 through March 31, 2002 (temporary total disability benefits); April 1, 2002 through April 17, 2002 (temporary partial disability benefits); April 18, 2002 through July 21, 2002 (temporary total disability benefits); and July 22, 2002 through October 20, 2002 (temporary partial disability benefits).

Employee: Donna Bolarjack

Injury No. 02-011152

ISSUES

At the hearing, the parties agreed that the issues to be resolved in this proceeding are as follows:

1. Liability for unpaid temporary total disability benefits.
2. Nature and extent of permanent partial disability or permanent total disability.
3. Whether claimant's unpaid medical treatment was reasonable and necessary to cure or relieve the effects of the work injury.
4. Liability of the employer/insurer for unpaid medical treatment.
5. Liability for future medical care.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence:

- Exhibit A Medical records from Dr. Yvonne Prince.
- Exhibit B Medical records from Ozarks Health Services (2/01/02).
- Exhibit C Medical records from St. John's Regional Health Center.
- Exhibit D Medical records from Springfield Physical Medicine.
- Exhibit E Medical records from Salem Memorial (2/14/02 - 2/14/03).
- Exhibit F Medical records from Dr. Thomas Satterly.
- Exhibit G Medical records from Phelps County Regional Medical Center (4/01/02 - 12/13/02).
- Exhibit H Medical records from Orthopedic Specialists/Dr. Chabot.
- Exhibit I Medical records from Des Peres Hospital.
- Exhibit J Medical records from Sport Rehab.
- Exhibit K Medical records from Orthopedic & Sports Medicine.
- Exhibit L Medical records from Pro Rehab (10/15/02).
- Exhibit M Medical records from Salem Memorial (12/04/02 - 1/08/03).
- Exhibit N Medical records from Pro Rehab (9/23/02 - 10/04/02).
- Exhibit O Medical records from Phelps County Regional Medical Center (4/25/03 - 11/03/03).
- Exhibit P Medical records from Ozark Health Services (5/16/03 - 6/24/03).
- Exhibit Q Medical records from Phelps County Regional Medical Center (4/12/04).
- Exhibit R Medical records from Dr. Satterly/Phelps County Regional Medical Center (4/02/04 - 6/08/04).
- Exhibit S Medical records from Salem Memorial (9/24/03 - 7/5/04).
- Exhibit T Medical records from Cox Medical Center (8/11/04 - 9/22/04).
- Exhibit U Medical records from Phelps County Regional Medical Center (9/26/004 - 10/07/04).
- Exhibit V Medical records from Salem Memorial (2/21/05 - 4/06/07).
- Exhibit W Medical records from Phelps County Regional Medical Center (12/22/06-10/30/07).

Employee: Donna Bolarjack

Injury No. 02-011152

- Exhibit X Medical records from Poplar Bluff Regional Medical Center (12/26/06 - 1/11/07).
- Exhibit Y Medical records from Poplar Bluff Regional Medical Center (8/04/06 - 12/20/06).
- Exhibit Z Medical records from Gray Family Chiropractic.
- Exhibit AA Medical records from Dr. Satterly (4/02/04 - 2/08/07).
- Exhibit BB Medical records from Cox Medical Center (3/15/05 - 12/24/06).
- Exhibit CC Medical records from Parkland Health Center.
- Exhibit DD Medical records from Advanced Pain Center.
- Exhibit EE Medical records from Missouri Home Care.
- Exhibit FF Medical records from Seville Care Center.
- Exhibit GG Medical records from Central Missouri Pain Center.
- Exhibit HH Medical records from Salem Family Healthcare.
- Exhibit II Medical records from Central Missouri Pain Management.
- Exhibit JJ Medical records from Phelps County Regional Medical Center (4/08/08 - 1/14/08).
- Exhibit KK Medical records from Central Missouri Pain Management.
- Exhibit LL Medical records from Phelps County Regional Medical Center (5/15/08 - 5/20/11).
- Exhibit MM Bill from Cox Medical Center.
- Exhibit NN Bill from Salem Memorial (\$3,536.55).
- Exhibit OO Bill from Phelps County Regional Medical Center.
- Exhibit PP Bill from Dr. Thomas Satterly.
- Exhibit QQ Bill from Poplar Bluff Regional.
- Exhibit RR Bill from Advanced Pain Center.
- Exhibit SS Bill from Parkland Health Center.
- Exhibit TT Bill from Poplar Bluff Neurology.
- Exhibit UU Bill from Seville Care Center.
- Exhibit VV Bill from Dr. James Bass.
- Exhibit WW Bill from Missouri Home Care.
- Exhibit XX Bill from Central Missouri Pain Management.
- Exhibit YY Bill from Smith Imaging.*
- Exhibit BBB Bill from Salem Family Health Care.
- Exhibit CCC Bill from Central Missouri Pain Management.
- Exhibit DDD Bill from Phelps County Regional Medical Center.
- Exhibit EEE Bill from Central Missouri Pain Management.*
- Exhibit FFF Bill from Bond Clinic.*
- Exhibit GGG Bill from Salem Memorial District Hospital.
- Exhibit HHH Bill from Salem Memorial Home Health.
- Exhibit III Bill from Dr. Thomas Satterly.
- Exhibit JJJ Bill from Phelps County Regional Medical Center.
- Exhibit KKK Bill from Phelps County Regional Medical Center.
- Exhibit LLL Bill from Ozarks Health Services.
- Exhibit MMM Bill from Complete Care.*
- Exhibit NNN Bill from Country Mart Pharmacy.
- Exhibit OOO Bill from Salem Family Health Care.
- Exhibit PPP Bill from Country Mart Pharmacy.

Employee: Donna Bolarjack

Injury No. 02-011152

- Exhibit QQQ Bill from Phelps Country Regional Medical Center.
 - Exhibit RRR Bill from Central Missouri Pain Management.
 - Exhibit SSS Deposition of Dr. David Volarich.
 - Exhibit TTT Deposition (Volarich) Exhibit A.
 - Exhibit UUU Deposition (Volarich) Exhibit B.
 - Exhibit VVV Deposition (Volarich) Exhibit C.
 - Exhibit WWW Deposition of Dr. Satterly.
 - Exhibit XXX Deposition (Satterly) Exhibit A.
 - Exhibit YYY Deposition (Satterly) Exhibit B.
 - Exhibit ZZZ Deposition (Satterly) Exhibit C.
 - Exhibit AAAA Deposition (Satterly) Exhibit D.
 - Exhibit BBBB Deposition (Satterly) Exhibit E.
 - Exhibit CCCC Deposition (Satterly) Exhibit F.
 - Exhibit DDDD Deposition (Satterly) Exhibit G.
 - Exhibit EEEE Vocational analysis of Sherry Browning.
 - Exhibit FFFF Resume of Sherry Browning.
 - Exhibit GGGG Medical bill summary.
 - Exhibit HHHH Lien information.
 - Exhibit IIII Pump refill cost information.*
- *Exhibits with objections due to certification issues, which were later clarified by claimant's counsel in affidavit form; objections subsequently waived by employer/insurer.

Although claimant offered Exhibit ZZ - Bill from Three Rivers Anesthesia, and Exhibit AAA - Bill from PBR Anesthesia, the employer/insurer objected to their admission and those objections are sustained.

The following exhibits were admitted on behalf of the employer/insurer:

- Exhibit 1 Vocational report of James England.
- Exhibit 2 Deposition of claimant (4/13/11).
- Exhibit 3 Deposition of claimant (1/15/04).
- Exhibit 4 Deposition of Dr. Russell Cantrell.
- Exhibit 5 Deposition of Dr. Michael Chabot.
- Exhibit 6 Deposition of Dr. David Lange.
- Exhibit 7 Affidavit - printout of temporary benefits paid to claimant (late-filed exhibit).

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence. All depositions were received subject to the objections contained therein..

FINDINGS OF FACT

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

Employee: Donna Bolarjack

Injury No. 02-011152

1. Claimant was born on February 12, 1969. She did not graduate from high school and did not obtain a GED.
2. On the date of the injury, January 23, 2002, claimant was employed by Country Mart in Salem, Missouri. Her employment with Country Mart began in 1996, and she had various job duties in the deli department.
3. On January 23, 2002, while working at Country Mart, claimant was removing plastic wrapping from a pallet of frozen goods needed when several boxes of frozen food fell off the pallet. Claimant turned in an attempt to avoid the impact, but was struck on her left shoulder and back by several boxes weighing up to 25 pounds each. Claimant immediately began having pain in her left shoulder and back. She reported her injury to the deli supervisor, Sherry Hodges, who instructed her to wait and report it to the store owner, Wayne Gott, which claimant did.
4. Mr. Gott subsequently sent claimant to Dr. Powell, a chiropractor, whom she saw that same day. Dr. Powell referred claimant to an orthopedic physician, Dr. Marti. Claimant saw Dr. Marti on February 1, 2002. Claimant was then referred to Dr. Corsolini in Springfield, Missouri. Claimant first saw Dr. Corsolini on February 12, 2002; he prescribed physical therapy, injections, and more therapy.
5. After this conservative care failed, claimant asked to see an orthopedist again and received authorization from her employer's owner, Mr. Gott, to see Dr. Satterly. She saw Dr. Satterly on March 26, 2002, and he ordered an MRI. The MRI was taken at Phelps County Regional Medical Center and showed a left-sided disc protrusion at L5-S1. On April 17, 2002, claimant again saw Dr. Corsolini, but he offered no further treatment.
6. The employer/insurer then arranged treatment for claimant with Dr. Michael Chabot, an orthopedic doctor. Claimant's first visit with Dr. Chabot was on May 6, 2002. Dr. Chabot diagnosed claimant with back pain, neck and shoulder contusion, a left sacroiliitis, herniated nucleus pulposus at L5-S1, and sciatica. He recommended surgery.
7. On May 22, 2002, Dr. Chabot performed surgery at Des Peres Hospital; the surgery consisted of an L5-S1 laminectomy with excision of L5-S1 secondary to herniated nucleus pulposus and sciatica. Post operatively, claimant continued to see Dr. Chabot and obtained physical therapy treatment at Salem Memorial Hospital and Sport Rehab.
8. On August 7, 2002, Dr. Chabot released claimant to light duty with limited hours. On August 28, 2002, when claimant indicated she could not perform the light duty, Dr. Chabot referred claimant to Dr. Cantrell, a physiatrist. Dr. Cantrell ordered additional therapy.
9. On October 15, 2002, Dr. Chabot released claimant with a 25-pound lifting restriction and opined that she was at maximum medical improvement.
10. Claimant next saw Dr. Satterly on December 3, 2002, because of her continued symptoms, including pain in her neck, arm, left leg, and lower back. Claimant testified

Employee: Donna Bolarjack

Injury No. 02-011152

that her treatment with Dr. Satterly on December 3, 2002, was once again with the authorization of the store owner, Wayne Gott. Claimant's testimony on this issue is credible and uncontradicted, and I find that the treatment with Dr. Satterly in December 2002, including the back surgery performed on December 12, 2002, was authorized by the employer.

11. I also find, consistent with claimant's testimony, that she continued to request treatment from her employer after being released by Dr. Chabot, and that the employer/insurer did not authorize any medical care providers other than those such as Dr. Satterly (who was already treating her) or Dr. Lange (who the employer hired to conduct an independent medical evaluation).
12. On November 3, 2003, the employer/insurer had Dr. Lange perform an independent medical examination. Dr. Lange opined that claimant was at maximum medical improvement, although she has does have some significant impairment. He also indicated that it was unlikely that further treatment, whether conservative or surgical, would make claimant more functional. He agreed that the January 23, 2002 work-related incident was a substantial factor in regard to injuring the L5-S1 disc.
13. Claimant, with the exception of the period from August 8, 2002 through August 28, 2002, has not returned to work. She testified credibly that she testified that she has been unable to work. I find that from August 8, 2002 through August 28, 2002, claimant attempted to return to work at Country Mart on light duty and with restricted hours. During this time, she was worked between 10 to 12 hours a week and obtained help with lifting and other strenuous activities. However, this trial return to work exacerbated her symptoms to the point where she was unable to continue.
14. Claimant testified, and I find, that she had never been treated for injuries to her back, neck, or left shoulder prior to January 23, 2002.
15. Claimant's only current treatment for her January 23, 2002 work injuries is pain management, including medication and maintenance and refilling of an implanted intrathecal pump that provides morphine to help control her pain.
16. Claimant currently has significant pain in the middle and lower part of her back; the pain radiates into her left leg and is sharp, stabbing, and aching. She has to change positions frequently, including lying down. She testified that she tries to recline every half hour or so. Her standing, sitting, and walking is limited to fifteen minutes or less, and she utilizes a cane that was prescribed by Dr. Satterly. She avoids lifting more than five pounds. Claimant has weakness in her legs and has difficulty balancing. She avoids chores that involve bending, such as loading the dishwasher. Claimant's husband or daughter mop, sweep, vacuum, remove trash, dust, and do most of the laundry. Claimant also has difficulty sleeping; she wakes up frequently from the pain and the need to change positions.
17. Claimant testified that she did apply for social security disability while under treatment with Dr. Chabot, although the evidence is unclear as to exactly when that application was

Employee: Donna Bolarjack

Injury No. 02-011152

made. Claimant explained that she was receiving some benefits, such as food stamps, while she was unable to work, and that she applied for social security disability because she was told she should by the agency administering those benefits; she believes that the agency was the Division of Family Services.

Dr. Satterly

18. Dr. Satterly testified by deposition on September 15, 2010. He is a board-certified orthopedic surgeon and was one of claimant's treating physicians. Dr. Satterly first saw claimant on March 26, 2002. At that visit, claimant complained of pain in her neck, arm, left leg, and lower back. His examination revealed decreased sensation along the distribution of the S1 nerve in her left leg; back spasms in her lower back were limiting her range of motion. Dr. Satterly indicated that both of those tests were objective tests. Dr. Satterly's treatment plan was to place claimant into a back brace, put her on a steroid pack to decrease inflammation along the nerve and pain medicine, and directed her to follow up in a week. He noted that he was also going to review her MRI.
19. On April 2, 2002, Dr. Satterly saw claimant and noted that she felt that she was not doing any better. The evidence indicates that at this point the employer/insurer transferred claimant's care from Dr. Satterly to Dr. Corsolini, then to Dr. Chabot and Dr. Cantrell.
20. Dr. Satterly's December 3, 2002, records indicate that claimant had undergone surgery with Dr. Chabot at the L5-S1 level. Dr. Satterly reviewed claimant's MRI done on August 3, 2002 (following her May 22, 2002 surgery). Dr. Satterly noted that severe scarring was showing up on that MRI around the surgical site. His clinical examination of claimant on that date continued to show a positive straight leg raising test on the left, and weakness in push off and lift off to the left lower extremity, which Dr. Satterly believed indicated that claimant was starting to develop some muscle weakness in her gait pattern through the S1 nerve root. The records reflect that Dr. Satterly's treatment plan was to perform surgery, including a laminectomy/discectomy at L5-S1 and decompression of the scar tissue around the S1 nerve root.
21. On December 11, 2002, Dr. Satterly performed that surgery. The doctor testified that when he performed the procedure he found a hypermobility of the L5-S1 segment and that L4 was also quite mobile. Dr. Satterly indicated that as to the microdiscectomy, claimant was scarred down that entire area, so he removed the scar tissue. Dr. Satterly also found disc material that was a "free fragment." It was out of the disc space and was up against the nerve root on the bottom side. Dr. Satterly testified further that after the scar tissue was removed on the posterior side and the free disc material was removed, he found that claimant's nerve root was now mobile and was no longer "scarred down." Dr. Satterly also did a posterior instrumentation fusion at the L4-L5 and S1 areas.
22. Dr. Satterly testified that claimant basically had three problems that he tried to address in that surgery: the recurrent ruptured disc; scar tissue around the nerve root; and hypermobility. When asked about further details, he indicated that the disc fragment he removed was large, "half the size of your thumb," and that the amount of scar tissue was severe and more than typically seen with patients who have had this type of surgery.

Dr. Satterly explained that some people develop more scar tissue than others. Some people who have post-operative scarring will have just a little string or a band. But in claimant's case, Dr. Satterly indicated that it was like someone poured concrete in her back where she had undergone surgery before. When asked if and how the conditions he observed when he performed the December 11, 2002 surgery were causing Ms. Bolarjack problems, Dr. Satterly explained as follows:

Well, basically what happened in her case is that because she had this recurrent large fragment [of disc] that was anterior, or in front of the nerve, and then she had all this scar tissue on the back side of the nerve, her nerve was getting pinched like it was in vise. And because of this pinching effect, when she would try to walk, move her leg, bend over, the nerve is supposed to slide as we bend, so the nerve has this ability to move as we move. Well, it no longer could move. And when that happens, it gives you your pain. And then as she gets more and more pinching effect, then she could develop the sensory loss. And in her case, she developed even some muscle weakness¹

23. Dr. Satterly testified that he not only observed the epidural fibrosis or neurofibrosis on the MRI film, but he visualized it directly when he did the surgical procedure. In addition, he testified that what he observed during the surgery was consistent with claimant's clinical presentation and her complaints.
24. Dr. Satterly testified extensively regarding the significance of claimant's post-operative scarring and its potential for causing physical pain, disability, and claimant's complaints. His testified that "[s]car tissue can adhere to the nerve and prevent it from sliding. Basically, the nerve is supposed to slide in your back, but not very much distance. We are talking, you know gosh, probably a few millimeters of distance that the nerve slides when you bend over, but it's important that the nerve has that slide. If it can't slide, then gets the pressure on it, and the pressure, then, allows the nerve to no longer function properly." He stated that this condition causes pain as well as loss of muscle strength and weakness.
25. Dr. Satterly also discussed the complications that claimant developed from the microdiscectomy performed by Dr. Chabot:

In the procedure that was done before, a microdiscectomy you take a little portion of the bone out and you lift up the ligament that lays over the dura and then you open up this epidural space. And then when you complete the removal of the disc material, then you let that ligament and flaval tissue lay back down, so it's like putting a blanket back over the nerve sac. But in her case, that blanket turned into all scar tissue where it laid on the top, and then went all the way around, down to the nerve, and then where the nerve exits out through the window called the foramin.

26. Dr. Satterly testified that he physically observed the scar tissue adhering to the nerve root/nerve.

¹ Claimant's Exh. XXX.

27. In his testimony, Dr. Satterly clarified why he did the surgery on December 11, 2002:

In her particular case, she had progressive neurologic loss from the time I first saw her, then after her surgery, to the next time I saw her. That's an important factor because progressive neurological loss is an indication for surgery. In looking at her MRI with the severity of the scar tissue, you could go through the epidurals. But my clinical experience of many years has found that they don't work very well when you have that much scar tissue. Now, there is one other treatment option. It's not always a really good one. But the other treatment option is to do nothing. Say this is what you have. We are not going to do anything. You are going to have to do the best you can. However, that is not a very good option, especially with someone who's had just one surgery, a relatively young person, healthy. And when I say relatively young, I believe Donna was in her early thirties. But a relatively young person, as opposed to someone who is over sixty and who has other health issues So as we all sat down and talked about all these things, my medical opinion was at that time that Donna's best choice would be to proceed with the surgical procedure...

28. Dr. Satterly also explained why the large disc fragment he found might not have been visible on the MRI. He testified that MRIs cannot always distinguish between a disc and scar tissue, particularly where it is a free fragment as it was in claimant's case. Dr. Satterly noted that the fragment has no blood flow to it anymore, so on the MRI, it looked like a scar.
29. On January 16, 2003, Dr. Satterly recorded that claimant had a negative straight leg raising test, which he noted meant that the nerve root didn't have the pressure on it. He believed that at that point in time, it was a successful surgery as far as getting the pressure off the nerve. However, by March 18, 2003, Dr. Satterly noted that the muscle spasms were returning. He testified that by this time, he was beginning to suspect that claimant might be having a recurrence of scar tissue around the nerve root. He noted that with respect to the neurofibrosis, it would have to be considered because claimant already had a history of it and it is something that can return.
30. On April 15, 2003, an EMG was performed at Dr. Satterly's request. That test indicated that claimant had nerve root changes at S1. Dr. Satterly added Neurontin to claimant's pain medicine to help improve the function of the nerve. Although the Neurontin appeared to help initially, by October 23, 2003, claimant was getting numbness and tingling down into her left leg. An MRI dated November 3, 2003, did indicate recurrent scar tissue.
31. Dr. Satterly tried Marcaine and Decadron injections at the lumbar sacral junction and also increased claimant's Neurontin on December 23, 2003.
32. On February 10, 2004, Dr. Satterly noted that claimant once again had a positive straight leg raising on the left side and now had no ankle reflex on the left; he felt this constituted a further progression of neurologic loss. Dr. Satterly continued to note decreased sensation over the S1 dermatome in the left leg and limitations in the range of motion in her back. The doctor testified that even with the fusion, some people can get back to 80 to 95 degrees out of

Employee: Donna Bolarjack

Injury No. 02-011152

a normal 90 and backward bending up to 25 to 30 degrees. However, claimant only had forward bending to 20 degrees and backward bending to 10. Dr. Satterly stated that at that point he thought she had reached maximum medical benefit and gave her a permanent partial disability rating of 33% to the whole body. Dr. Satterly testified that by maximum medical benefit, he meant that he did not anticipate that claimant would get much better. In fact, he continued to treat her and her condition did worsen.

33. On April 2, 2004, Dr. Satterly discussed treatment options with claimant including electrical devices that could override the nerve sensation to decrease her back and leg pain. The purpose of those devices, he explained, is to make the muscles contract to strengthen them. He was not, at that point, recommending any additional surgery.
34. Dr. Satterly tried an RS sequential stimulation therapy device. On June 8, 2004, he discussed with claimant the possibility of a nerve root block to alleviate her pain. He found her complaints of pain credible and borne out by the objective findings in his clinical examinations of claimant.
35. On September 28, 2004, Dr. Satterly tried a manipulation to claimant's lumbar spine under anesthesia, along with an epidural injection of Marcaine, Dilaudid, and steroids. He described that procedure as another technique to attempt to alleviate some of the neurofibrosis along the nerve; the physical maneuver was to gently stretch the tissue to help free up the nerve.
36. Dr. Satterly moved his medical practice to Poplar Bluff in December 2005, and claimant continued to treat with him. The records indicate that on October 26, 2004, the scar tissue had returned along the S1 nerve root and that the epidural injection and manipulation did not help. The doctor noted that claimant would probably need continued pain medicine and/or a spinal cord stimulator.
37. According to Dr. Satterly, claimant had some relief from placement of a temporary spinal cord stimulator on July 13, 2006, so a permanent spinal cord stimulator was implanted on August 4, 2006. Unfortunately, claimant developed complications. First, the spinal cord stimulator apparently shifted from the initial placement and was no longer giving her any relief. Then, when an attempt was made to revise the position of the spinal cord stimulator on October 10, 2006, it turned out that claimant had developed adhesions along the spinal cord stimulator wires causing a small tear in the dura. Dr. Satterly testified that claimant was such a prolific scar manufacturer that she developed scarring along the leads to the stimulator.
38. He testified that pinhole tears such as claimant sustained are more difficult to treat than big ones. As a result of the tear, claimant developed severe headaches and nausea. A blood patch was done to attempt to alleviate the problem.
39. According to Dr. Satterly, the spinal cord stimulator was inserted at around the T9 level, but was treating the pain at S1. He testified that this treatment was related to her lower back work injury. He explained that the stimulator is positioned higher up to get the desired effects. In December 2006, claimant underwent several other procedures, including treatment for a fluid leak from the dorsal spine, removal of batteries and wires, repair of the dural tear, and other complications associated with the spinal cord stimulator, its failure, and its removal. On

Employee: Donna Bolarjack

Injury No. 02-011152

February 8, 2007, Dr. Satterly saw claimant for the last time for a follow-up on the spinal cord stimulator removal.

40. With respect to Ms. Bolarjack's credibility, Dr. Satterly stated that he believed she had a real injury with objective findings that were consistent with her complaints throughout the process of his treatment. He did not see anything that caused him to believe she might be magnifying symptoms or malingering.
41. Dr. Satterly opined that claimant's January 23, 2002 work was the prevailing factor in causing the conditions that he treated her for and was the prevailing factor in causing her disability. He further testified that all the treatment he provided to her was necessary to cure and relieve the effect of her work-related injury on January 23, 2002, and that all the charges for his treatment, including treatment at the hospital, were fair and reasonable. In redirect examination, Dr. Satterly testified that neurofibrosis is related to a traumatic event which, in this case, was the original surgery done by Dr. Chabot. I find Dr. Satterly's testimony to be credible.

Dr. Volarich

42. On October 18, 2004, and September 19, 2008, Dr. David Volarich performed independent medical examinations on claimant at the request of her attorney. During his examination on October 18, 2004, he noted asymmetric bulk in claimant's lower extremities with the right larger than the left. Furthermore, in the left lower extremity, the quadriceps, hamstrings, and calf were diffusely weak at 3/5, about a 40% loss of power. He testified that the strength testing was both subjective and objective, but if the patient was not cooperating or was exaggerating complaints, both sides would be weak. He found no reason to doubt that the strength testing was valid in Ms. Bolarjack's case. Dr. Volarich testified that weakness of the left lower extremity reflected damage to the left sciatic nerve, specifically the S1 nerve root distribution.
43. Dr. Volarich also found diminished pin prick sensation in the left lower extremity along the L5 and S1 dermatomes; he indicated that this was consistent with the damage of that left sciatic nerve from the disc herniation. He testified the pin prick test is basically objective because patients really don't know dermatomal distributions. He believed the motor, sensory, and reflex examinations all indicated damage to the L5-S1 nerve roots on the left side.
44. Dr. Volarich conducted range of motion testing with respect to claimant's lumbar spine, and found a 24% loss in flexion, 20% loss in extension, 60% loss in right side bending, and 20% loss in left side bending. Trigger points were noted in the left sciatic notch. Dr. Volarich indicated that Waddell testing was negative and he found no reason to suspect that claimant was not giving full effort on the range of motion and other testing.
45. Dr. Volarich testified that his diagnosis regarding the January 2002 injury included (1) herniated nucleus pulposus L5-S1 to the left, causing left leg radiculopathy, status post discectomy; (2) failed back syndrome with recurrent disc herniation at L5-S1 and instability at L5-S1, and instability at L4-5 status post redo of L5-S1 discectomy with fusion and

Employee: Donna Bolarjack

Injury No. 02-011152

instrumentation at L4 through S1 (a two-level fusion); and (3) recurrent failed back syndrome, secondary to severe epidural fibrosis encasing the left S1 nerve root.

46. Dr. Volarich indicated that the epidural fibrosis, or scarring around the nerve, can cause physical pain; when it puts pressure on the nerve, it tends to pull on the nerve - which is called tethering. The pressure of the scar tissue encasing the nerve can cause the nerve to be damaged as well. The doctor noted that any pressure on a nerve, particularly on these peripheral nerves, is a very painful condition.
47. Dr. Volarich testified that due the conditions he diagnosed, claimant had a 65% permanent partial disability of the body as a whole at the lumbosacral spine and that she might also have some additional disability from depression. He testified that depression is not uncommon with people that have sustained back injuries, particularly when the patient has developed pain syndrome. Dr. Volarich explained that failed back syndrome, or post laminectomy syndrome, is a condition that occurs after a back surgery - it can be cervical, lumbar, even thoracic - where the patient does not respond as expected. That is, the radicular symptoms and/or the back pain syndrome does not improve or can sometimes worsen. He opined that the condition is not the result of something that the surgeon did wrong, but is caused by the patient not healing properly; these patients typically heal with excessive scar tissue, or epidural fibrosis, around the side of the surgical repair. In claimant's case, she had significant scarring around the nerves that were operated upon (at L5 and S1 on the left side). He indicated that condition is very difficult to treat.
48. Dr. Volarich testified that for his second examination of the claimant he reviewed additional medical records regarding treatment that occurred after his first examination. He noted that claimant now had about a 60% loss in power on the left calf. Dr. Volarich testified that claimant had multiple trigger points and low grade spasms were noted to the right of midline from T8 through T10, and thoracic range of motion testing established a 67% loss of flexion, 71% loss in extension, 67% loss in right side bending, 73% loss in left side bending, 33% loss in right rotation, and a 67% loss in left rotation. Range of motion testing of the lumbar spine revealed additional loss of flexibility. Loss in flexion had increased from 24 to 67%, in extension from 20 to 60%, and in left side bending from 20 to 68%. Right side bending range of motion loss remained at 60%. Dr. Volarich testified that, once again, he did not find any indication on the examination that claimant was giving less than her best effort or that she was magnifying her symptoms. His diagnoses included recurrent failed back syndrome, secondary to epidural fibrosis about the S1 nerve root; status post placement of the spinal cord stimulator at T8 with six separate revisions of the spinal cord stimulator due to improper lead placement, malfunction, and dural tears with spinal fluid leak; removal of the spinal cord stimulator, repeated unsuccessful attempt to place spinal cord stimulator; placement of a morphine intrathecal pump with one episode of reprogramming; persistent failed back syndrome; and depression.
49. Dr. Volarich felt claimant still had 65% permanent partial disability of the body as a whole at the lumbar sacral spine, but added 30% of the body as a whole for the thoracic spine problems. The doctor testified that the combination of claimant's disabilities, including the lumbosacral spine, the thoracic spine, and the depression, create a substantially greater disability than the simple sum of those disabilities and a loading factor is appropriate.

Employee: Donna Bolarjack

Injury No. 02-011152

50. When asked if he had an opinion as to whether claimant is capable of returning to the open labor market and obtaining employment, Dr. Volarich testified that in his medical assessment, claimant is permanently and totally disabled as a direct result of the work-related injury on January 23, 2002, by itself. He opined that the severity of her spinal injuries and resultant post laminectomy syndrome all preclude her from returning to the open labor market. He further testified that he attributed all the disability to the injury she sustained on January 23, 2002, and the complications in medical treatment for that injury.
51. Dr. Volarich indicated that in his opinion, within a reasonable degree of medical certainty, all the medical treatment claimant received was reasonably required to cure and relieve the effects of her work related injuries.
52. In redirect examination, Dr. Volarich explained that despite the fact that claimant had been released by Dr. Chabot and Dr. Cantrell, Dr. Satterly found objective abnormalities in December 2002 when he operated on claimant, including a recurrent herniated disc at L5-S1 and epidural fibrosis, with a lot of scar tissue around that nerve root. Dr. Volarich agreed that it turned out that claimant had something wrong with her, despite Dr. Corsolini, Dr. Chabot and Dr. Cantrell thinking otherwise just a few months earlier.
53. Dr. Volarich also testified that when Dr. Satterly did his surgical procedure in December 2002, conservative options had been exhausted. In his October 18, 2004 report, Dr. Volarich mentioned that claimant will require treatment at a pain clinic for her failed back syndrome, utilizing epidural steroid injections, foraminal nerve root blocks, trigger point injections, tens units, and possibly even a spinal cord stimulator. In his deposition, Dr. Volarich indicated that two years before Dr. Satterly attempted the spinal cord stimulator, he (Dr. Volarich) had anticipated that it might be needed.

Dr. Michael Chabot

54. Dr. Chabot was deposed by the employer/insurer on January 29, 2010. During cross examination, Dr. Chabot agreed that claimant had sustained a real injury at work on January 23, 2002. He also agreed that he performed surgery because of that injury and that claimant has a permanent disability as a result of the work injury that necessitated the back surgery. He acknowledged that he has not seen claimant since October 2002 and has not reviewed records from her treatment once he left his care. In addition, Dr. Chabot acknowledged that he found evidence of neurological changes suggesting nerve dysfunction at the time of his May 6, 2002 examination of claimant.
55. Although he had reviewed no records since his treatment of claimant, Dr. Chabot refused to agree that claimant had a recurrent herniation at L5-S1 after he released her from treatment, even when asked about Dr. Satterly's operative report that indicated Dr. Satterly had located and removed an additional large free fragmented disc material. Dr. Chabot testified as follows:

Q: If she did, in fact, have reherniation of her disc and a second surgery, would that change your opinion as to the extent of her permanent disability?

Employee: Donna Bolarjack

Injury No. 02-011152

A: Again, you're giving me limited information. Is there a possibility of a recurrent disc in a person who's had a prior microlaminectomy? Yes. Usually, the accepted incidence is less than 5%. If a person had a recurrent disc herniation following surgery, I probably would elevate their disability a small percentage. It, of course, would be, again, dependent on the response to the second surgical procedure that I would base that on.

56. I do not find Dr. Chabot's testimony regarding claimant's current condition and the necessity for additional treatment after she left his care to be credible. I find that claimant did sustain a re-herniation after Dr. Chabot's surgery. I also find the testimony of Dr. Satterly and Dr. Volarich as to claimant's adhesive scarring and its relation to claimant's symptoms to be credible, and do not find Dr. Chabot's testimony on those issues as credible.

Dr. Russell Cantrell

57. Dr. Cantrell was deposed by the employer/insurer on April 14, 2010. Like Dr. Chabot, he had not reviewed any medical records regarding claimant's treatment since he last saw her on October 7, 2002. He testified that he had not seen the post operative MRI scan, from August 31, 2002, of claimant's low back. When asked if it would be significant to him if it showed marked enhanced scar formation about the left S1 nerve root, Dr. Cantrell testified "well, certainly, that can be a source of persisting pain complaints, which would be less amenable to the traditional post operative therapy . . . that certainly could explain why her symptoms persist in an otherwise uncomplicated back surgery."²
58. Dr. Cantrell agreed that scarring around a nerve can impinge on the nerve or even adhere to it and agreed with the statement "that spinal adhesions appear to be an important contributor to refractory low back and/or lumbar radicular pain, especially in patients with previous failed lumbar spinal surgery."³ He further testified it was not unreasonable to agree that epidural adhesions may compromise nerve root nutrition and contribute to persistent inflammation. Dr. Cantrell agreed that claimant had a real, objective, anatomical injury.

Dr. David R. Lange

59. Dr. Lange testified that he is an orthopedic surgeon; he saw claimant at the request of the employer/insurer on November 11, 2003. On cross examination, he agreed that claimant injured her L5-S1 disc while working on January 23, 2002, and that she had significant permanency from that work-related injury. He further agreed that claimant has encountered significant complications and problems since that injury, including a fusion involving L4-5 and L5-S1, multiple procedures including manipulation under anesthesia, tens unit, spinal cord stimulator implantation with significant complications and ultimate removal, and a permanent intrathecal morphine pump. He agreed that claimant may now have a greater permanent partial disability than 35%. When asked whether he would agree that claimant's physical condition is worse now than it was when he first saw her, he said "I think that's true."⁴

² Employer/insurer Exh. 4.

³ *Id.*

⁴ Employer/insurer Exh. 6.

60. Dr. Lange testified that he had not, even up to the time of his deposition, ever seen the MRI films. Under questioning, he agreed that if the radiologist is correct, the findings of enhanced scarring about the left S1 nerve root on MRI reports dated November 3, 2003, April 12, 2004, and October 7, 2004, are significant. When asked about Dr. Satterly's operative report showing a recurrent herniation dated December 11, 2002, he agreed that Dr. Satterly was actually in a position to physically see that herniation and that anatomic finding would be an objective finding supporting claimant's complaints of low back pain and left radiculopathy. He further conceded that he has found things during surgery that did not show up on an MRI, that MRIs are not perfect, and that it does not mean something is not there just because an MRI does not necessarily disclose it.
61. Dr. Lange agreed that his second report states that "medical records do not suggest a recurrent herniation at L5-S1 subsequent to surgery performed by Dr. Chabot," although he acknowledged that Dr. Satterly's report is a medical record and it does indicate that claimant had recurrent herniation. Dr. Lange agreed that sometimes a second surgery after a microdiscectomy is appropriate and that he had even done fusions for many patients without recurrence.
62. Dr. Lange testified that even though he felt the second surgery was not an ideal option, "it would be difficult to excessively fault her treating physicians, including Dr. Satterly, for attempting to relieve her pain."⁵ On cross examination, Dr. Lange did not answer questions regarding whether the care given by Dr. Satterly in performing that surgery on December 12, 2002, was reasonable or unreasonable.

Vocational Evidence - Sherry Browning

63. Claimant presented a vocational analysis and report prepared by Sherry Browning, a certified rehabilitation counselor. In preparing her vocational analysis, Ms. Browning reviewed numerous documents, including claimant's medical records, the claimant's depositions, Dr. Cabot's deposition, Dr. Satterly's deposition, Dr. Volarich's deposition, and James England's vocational rehabilitation report dated August 15, 2005. She also conducted a thorough in-home interview with claimant on May 27, 2011. She obtained additional information from claimant by telephone on July 3, 2011.
64. Ms. Browning did achievement testing and claimant's proficiency was noted as limited in broad reading, limited in brief reading, limited to average in math calculation skills, very limited in letter word identification, limited to average in reading fluency, limited to average in calculations, average in math fluency, and limited to average in passage comprehension. Her highest percentile score was in passage comprehension, where she ranked in the thirty-ninth percentile as compared to others in her age group.
65. In her analysis, Ms. Browning noted that claimant had worked in a variety of jobs, including grocery clerk, dishwasher, cook, CNA, office cleaner, sawyer, cashier, and deli counter worker. She examined the Department of Labor's Specific Vocational Preparation values for

⁵ *Id.*

Employee: Donna Bolarjack

Injury No. 02-011152

the strength levels required by her previous employment. Ms. Browning noted that claimant's SVP ranges were from two as a dishwasher, cleaner, cashier, and deli counter worker up to four for the position she held for six months as a CNA. Her strength levels ranged from light to medium. Ms. Browning noted that theoretically, claimant could perform jobs at or below the highest SVP and Strength levels achieved. However, Ms. Browning noted a restriction to Light work alone would have precluded claimant from five of the eight jobs she had performed in her work history and a number of the jobs for which she could have otherwise qualified. Ms. Browning characterized Dr. Cabot's 2002 restrictions as essentially light work restrictions and Dr. Volarich's 2008 restrictions as between light and sedentary work demand levels. According to Ms. Browning, however, the doctors' changes in the frequency with which claimant should observe positional restrictions make it unlikely that she can perform virtually any work. Ms. Browning opined that claimant is not employable in the open labor market as a result of the January 2002 work injury and subsequent surgeries that resulted in chronic pain and multiple functional limitations.

66. Ms. Browning opined that any psychological issues subsequent to the 2002 work injury are a result of that injury and are only additive in their effect on her ability to work. Ms. Browning further opined that claimant is not employable because of the physical effects of the work injury alone.

James England

67. James England, a vocational rehabilitation counselor, testified on behalf of the employer/insurer, and his August 15, 2005 report was received into evidence. Mr. England did not interview or examine claimant, he instead performed a records review. His report does not list the records he reviewed; however, it appears that the records end with Dr. Satterly's October 7, 2004 records, Dr. Volarich's October 18, 2004 report, and Dr. Lange's April 27, 2005 letter. Thus, Mr. England could not have taken into account claimant's additional treatment after that time, including the numerous procedures and complications related to the spinal cord stimulator, nor does he have any information regarding claimant's complaints since that time. Furthermore, Mr. England did not interview, meet, or administer tests to claimant. I find that Ms. Browning's report is based upon more complete and better information. I also find that Ms. Browning's report is more thorough and is more credible.
68. Nevertheless, even Dr. England's report indicated significant impediments to claimant's employability in the open labor market. He noted that she has been involved primarily in unskilled service employment. Mr. England recorded that taking into consideration Dr. Volarich's [2004] restrictions, he felt that claimant could work as a parking lot cashier, a night clerk at a motel, a cashier in a self-service setting (as long as a stool was provided for her to alternately sit and stand), some security positions, an alarm monitor for a security company, and as a small parts assembler, etc. Mr. England's report, however, does not indicate whether those employment positions are consistent with Dr. Volarich's *September 19, 2008* restrictions, which include that claimant should change positions frequently to maximize comfort and rest when needed (including resting in a recumbent fashion). Claimant testified credibly to her need to lie down periodically. It seems the

Employee: Donna Bolarjack

Injury No. 02-011152

opportunities for claimant to lie down when needed would be non-existent in the type of positions Mr. England mentioned, and his report offers no contrary evidence.

CONCLUSIONS OF LAW

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

The injury in this case occurred on January 23, 2002. Therefore, the 2005 Amendments do not apply to the substantive law controlling the legal issues in this case. In *Thomas v. Hollister, Inc.*, the court held that “[a]ll the provisions of the workers’ compensation law shall be liberally construed with a view to the public welfare.”⁶

Section 287.020.2, RSMo., requires that the injury be “clearly work related” for it to be compensable. The employee must establish a causal connection between the accident and the claimed injuries.⁷ 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.”⁸ In this case, the employer has accepted the January 2002 injury as compensable and has agreed that work was the substantial factor in leading to the injury.

Under Missouri Workers’ Compensation law, the claimant bears the burden of proving all essential elements of his or her workers’ compensation claim.⁹ Proof is made only by competent and substantial evidence, and may not rest on speculation.¹⁰ Medical causation not within lay understanding or experience requires expert medical evidence.¹¹ When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.¹²

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.¹³ Where there are conflicting medical opinions, the fact finder may reject all or part of one party’s expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant’s expert.¹⁴

Issue 1: Past Due Temporary Total Disability

⁶ 17 S.W.3d 124, 126 (Mo.App.W.D. 1999).

⁷ *Thorsen v. Saches Electric Company*, 52 S.W.3d 611, 618 (Mo.App. 2001), overruled in part on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. 2003).

⁸ *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. 1999).

⁹ *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

¹⁰ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

¹¹ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

¹² *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

¹³ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

¹⁴ *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

Employee: Donna Bolarjack

Injury No. 02-011152

Temporary total disability is provided for in Section 287.170, RSMo. This section provides, in pertinent part, that "the employer shall pay compensation for not more than four hundred weeks during the continuance of such disability at the weekly rate of compensation in effect under this section on the date of the injury for which compensation is being made." The term "total disability" is defined in Section 287.020.6, as the "inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident." The purpose of temporary total disability is to cover the employee's healing period, so the award should cover only the time before the employee can return to work.¹⁵ Temporary total disability benefits are owed until the employee can find employment or the condition has reached the point of "maximum medical progress."¹⁶ Thus, TTD benefits are not intended to encompass disability after the condition has reached the point where further progress is not expected.¹⁷ This is reflected in the language that TTD benefits last only "during the continuance of such disability."¹⁸

The employer paid a total of \$5,895.14 in temporary disability compensation. The periods covered were January 24, 2002 through March 31, 2002 (temporary total disability benefits); April 1, 2002 through April 17, 2002 (temporary partial disability benefits); April 18, 2002 through July 21, 2002 (temporary total disability benefits); and July 22, 2002 through October 20, 2002 (temporary partial disability benefits). Claimant raises two challenges to the sufficiency of the amount of temporary disability paid.

First, claimant argues that the April 1, 2002 through April 17, 2002 period should have been paid as temporary total disability rather than temporary partial disability. Claimant testified, and the employer does not dispute, that she was not offered a position and did not return to work during that period of time. Furthermore, claimant testified that she was totally unable to work during this period of time. "A claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of temporary total disability."¹⁹ I find that Ms. Bolarjack was a credible witness, and I find that her testimony on this issue was further corroborated by the medical records in this case. On May 6, 2002, when the employer finally had claimant examined by Dr. Chabot, an orthopedic specialist, he diagnosed a herniated nucleus pulposus at L5-S1 with left sacroiliitis, and ended up performing a lumbar laminectomy with excision of disc on May 22, 2002. I find that claimant should have been paid temporary total disability benefits for this period (April 1, 2002 – April 17, 2002) instead of temporary partial disability benefits; the employer/insurer is liability for the difference in benefits.

Claimant also challenges the payment of temporary partial disability instead of temporary total disability from July 22, 2002 through August 7, 2002, and from August 29, 2002 through October 20, 2002. Claimant testified that the only time she returned to work was the period of August 8, 2002 through August 28, 2002, when she came back to light duty with restricted hours of 10-12 hours per week. She further testified that she was physically unable to continue to perform

¹⁵ *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo. App. W.D. 1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d at 226 (Mo. Banc 2003).

¹⁶ *Cooper* at 575.

¹⁷ *Cooper* at 575; *Smith v. Tiger Coaches, Inc.*, 73 S.W.3d 756, 764 (Mo. App. E.D. 2002), *overruled on other grounds by Hampton*, 121 S.W.3d at 225.

¹⁸ Section 287.170.1, RSMo.

¹⁹ *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. Bank 2003).

Employee: Donna Bolarjack

Injury No. 02-011152

even at light duty. Again, I find claimant's testimony on this issue credible. I also find that claimant should have been paid temporary total disability benefits for those two periods (July 22, 2002 – August 7, 2002 and August 29, 2002 – October 2002), and that the employer/insurer is liable for the difference.

The second challenge claimant raises to the amount of temporary total disability benefits paid by the employer is that benefits should have been extended beyond October 20, 2002. The purpose of temporary disability benefits is to cover the employee's healing period. Temporary total benefits are owed until the employee can find employment or the condition has reached the point of "maximum medical progress" or "maximum medical improvement."²⁰ An employee's unsuccessful attempt to resume some activities connected with the employment does not disqualify the employee from receiving temporary total disability benefits.²¹ The employer does not argue that claimant actually found employment and the undisputed evidence is she did not. Thus, the dispute centers around the point at which claimant reached maximum medical improvement.

In this case, Dr. Chabot indicated in a report, dated October 18, 2002, that he believed claimant had reached maximum medical improvement. However, I find the credibility of his opinion weakened by the fact that he seemed to dismiss claimant's physical and neurological claims and failed to recognize that she had developed adhesions that impinged on the nerve root along with a recurrent herniation (which was verified by Dr. Satterly in the course of the surgery he performed on December 12, 2002). Furthermore, it is clear from the records that claimant at least made temporary medical progress after Dr. Satterly's first surgical intervention, particularly with respect to her neurological complaints involving the S1 nerve root. I find that claimant was not at maximum medical progress when Dr. Chabot released her.

Dr. Satterly, who was claimant's primary treating doctor from December 2002 through February 8, 2007, continued to provide treatment and indicated a hope of medical progress at least through February 10, 2004, when he noted in his records that claimant had reached maximum medical benefit. At that time, Dr. Satterly gave her a permanent partial disability rating of 33% of the whole body. While Dr. Satterly continued to treat claimant after that point, he testified that by maximum medical benefit he meant that he did not anticipate that she would get much better. I find Dr. Satterly's testimony to be credible and I find that claimant reached maximum medical improvement on February 10, 2004.

In light of the above, I find that the employer/insurer owed temporary total disability benefits from January 23, 2002 through February 10, 2004, with the exception of August 8, 2002 through August 28, 2002, during which time claimant was entitled to temporary partial disability benefits. That is a period of 103.57 weeks of temporary total disability; at claimant's compensation rate of \$168.46 per week, this totals \$17,447.40. In addition, I find that claimant was owed, and employer paid, temporary partial disability during the period of August 8, 2002 through August 28, 2002. On January 3, 2012, the employer/insurer submitted late-filed Exhibit 7, a payout list regarding claimant's disability benefits; that document indicates that the benefits paid for temporary partial disability during that time period totaled \$398.03. Deducting that temporary partial disability from the total benefits paid of \$5,895.14, I find that the employer is entitled to a credit of \$5,497.11 for

²⁰ *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997).

²¹ *Reeves v. Midwestern Mortgage Co.*, 929 S.W.2d 293 (Mo.App. 1996).

Employee: Donna Bolarjack

Injury No. 02-011152

temporary total disability owed, leaving a balance due of \$11,950.29 (plus interest as provided by law).

Issue 2: Nature and Extent of Permanent Disability

Section 287.020.7, RSMo, provides that "total disability" is the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident.²² The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired.²³ The test for permanent and total disability is whether the claimant would be able to compete in the open labor market.²⁴

While the parties agree the claimant sustained an injury compensable under Chapter 287, they disagree on the nature and extent of the permanent disability. I find that the competent and credible evidence establishes that claimant is not employable in the open labor market as a result of her January 23, 2002 work injury and is permanently and totally disabled. As noted above, I find that claimant reached maximum medical improvement on February 10, 2004. Thus, I find that claimant is entitled to permanent total disability benefits of \$168.46 a week from February 11, 2004, and thereafter for claimant's lifetime subject to modification as provided by law.

Issue 3: Unpaid Medical Bills - Whether Reasonable and Necessary

Issue 4: Unpaid Medical Bills - Liability of Employer/Insurer

I find, consistent with claimant's testimony, that she continued to request treatment from her employer after being released by Dr. Chabot and the employer/insurer failed to provide the necessary additional medical treatment. I find that the employer/insurer waived its right to select the medical care providers after claimant was released from Dr. Chabot.²⁵

The evidence shows that claimant was billed the following amounts by medical providers for treatment related to her work injury:

Cox Medical Center	\$ 9,211.07
Salem Memorial District Hospital	\$ 14,299.55
Phelps County Regional Medical Center	\$123,925.18
Dr. Thomas Satterly	\$ 46,529.80
Poplar Bluff Regional Medical Center	\$207,220.82
Advanced Pain Center – Dr. Naushad	\$ 10,474.00
Parkland Health Center	\$ 507.00
Poplar Bluff Neurology Center	\$ 424.00
Seville Care Center	\$ 6,149.71
Dr. James Bass	\$ 125.00
Missouri Home Care	\$ 2,311.06

²² See also *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 178 (Mo.App. S.D. 2004).

²³ *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

²⁴ *Id.*

²⁵ *Martin v. Town and Country Supermarket*, 220 S.W.3d 836, 848 (Mo.App. 2007).

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Donna Bolarjack

Injury No. 02-011152

Central Missouri Pain Management	\$ 28,620.12
Smith Imaging	\$ 78.00
Salem Family Health Care	\$ 223.00
Bond Clinic	\$ 5,093.00
Salem Memorial Home Health	\$ 724.10
Ozarks Health Services	\$ 326.00
Complete Care	\$ 325.90
Country Mart Pharmacy	\$ 3,227.66
Salem Family Health Care	\$ <u>60.00</u>
	\$459,854.97 Total

Claimant testified that these were in fact bills she incurred for her work injury and treatment complications. Furthermore, Dr. Satterly testified that the treatment he provided and the associated charges were reasonable and necessary to cure and relieve the effects of claimant's injury. Likewise, Dr. Volarich testified that it was his opinion that all the medical treatment discussed in his report and deposition was reasonably required to cure and relieve the effects of claimant's work-related injuries. Claimant, Dr. Satterly, and Dr. Volarich were credible and convincing on this issue.

While there does not appear to be a dispute as to whether the bills submitted were "fair and reasonable for similar treatment of other similarly injured persons...", I find that the evidence in the record is sufficient to find that these unpaid medical bills are fair and reasonable, and I award compensation for them as noted above. Claimant testified that the bills she received were the result of treatment for this injury and the voluminous record in this case includes the medical records related to the bills in question. Where an employee testifies as to the bills being related to and the product of her injury, and when the bills relate to professional services rendered as shown by the medical records in evidence, a sufficient factual basis exists for the Commission to award compensation for those bills.²⁶

In this case, the employer/insurer's argument is not that the bills were unreasonable or unfair in amount, but that the treatment itself was not necessary. I find the testimony of Dr. Satterly and Dr. Volarich with respect to the reasonableness and necessity of the treatment to be more credible and compelling than those of the witnesses relied upon by the employer/insurer, who either missed a herniation (Dr. Corsolini); missed a recurrence of the herniation and adhesions (Dr. Cabot), or were called in after the fact to "second guess" a procedure that, unfortunately, had a less than optimal outcome (Dr. Lange). In particular, Dr. Satterly gives a very credible explanation of why he provided the treatment he did. Furthermore, the medical testimony relied upon by the employer/insurer on this issue is based on the erroneous position that claimant did not have a recurrence of herniation at L5-S1. No doctor testified that a second surgery is unreasonable or unnecessary to treat a recurrent herniation. Thus, the employer/insurer is ordered to pay the sum of \$459,854.97 for past due medical bills.

Issue 5: Future Medical Care

Section 287.140.1, RSMo. (1994), provides that "the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment...as may

²⁶ *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-112 (Mo. banc 1989).

Employee: Donna Bolarjack

Injury No. 02-011152

reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." The employee need only show that he is likely to need additional treatment "as may reasonably be required . . . to cure and relieve . . . the effects of the injury . . . that flow from the accident [or disease]."27 This has been interpreted to mean that an employee is entitled to compensation for care and treatment that gives comfort, i.e., relieves the employee's work-related injury, even though a cure or restoration to soundness is not possible, if the employee establishes a reasonable probability that he or she needs additional future medical care.28 "Probable" means founded on reason and experience that inclines the mind to believe but leaves room for doubt.29

Claimant testified, and the medical records reflect, that she is in need of ongoing medical treatment, including refilling her morphine pump every two to three months. In light of my previous conclusion that the installation of the intrathecal pump was reasonable and necessary to cure and relieve the effects of claimant's work-related injury, I likewise conclude that future medical care related to refilling and maintaining that pump is reasonable and necessary to cure and relieve the effects of claimant's work-related injury. Claimant is hereby awarded future medical treatment, included but not limited to the refilling of her morphine pump.

Summary

I find that claimant sustained a work injury on January 23, 2002, and that the injury arose out of and in the course of her employment with the employer. I also find that her injury and need for treatment was medically causally related to the work injury. I find that she is entitled to \$11,950.29 in past due temporary total disability; permanent total disability from February 11, 2004; \$459,854.97 for past due medical expenses; and future medical care, including but not limited to the refilling and maintaining of her intrathecal narcotic pump.

Any pending objections not expressly ruled on this award are overruled. Interest is applicable as provided by law.

This award is subject to a lien in the amount of 25% of the payments hereunder in favor the claimant's attorney, Stephen Gaunt, for necessary legal services rendered to claimant.

I certify that on 3/20/12 I mailed a copy of the foregoing award to the following entities at their address of record: 1) parties by certified mail, and 2) counsel for the parties by first-class mail.
By [Signature]

Made by: Vicky Ruth
Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation

27 Sullivan v. Masters and Jackson Paving, 35 S.W.2d 879, 888 (Mo.App. 2001).
28 Rana v. Landstar TLC, 46 S.W.3d 614 (Mo.App. W.D. 2001); Boyles v. USA Rebar Placement, Inc. 26 S.W.3d 418 (Mo.App. W.D. 2000).
29 Rana at 622, citing Sifferman v. Sears, Roebuck & Co., 906 S.W.2d 823, 828 (Mo.App. 1995).