

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

Injury No.: 03-143411

Employee: Dawn Callahan

Employer: Booksource, Inc.

Insurer: Employer's Fire and Insurance Co.

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the award and decision of the administrative law judge. We adopt the findings, conclusions, decision and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision and modifications set forth below.

Preliminaries

The issues stipulated in dispute at the hearing were: (1) nature and extent of permanent partial disability; (2) medical causation; (3) future medical treatment; and (4) future temporary total disability.

The administrative law judge made the following findings: (1) employee's left hand and elbow injury arose out of and in the course and scope of employment with the employer; (2) work was a substantial factor causing employee's left hand and elbow injury; (3) employee sustained a permanent partial disability of 25% of the left arm at the level of the elbow; (4) employee met her burden of proof regarding her need for additional medical treatment and employer is obligated to provide the surgeries recommended by Dr. Schlafly; and (5) it is appropriate to order that temporary total disability benefits be provided to employee in conjunction with the award of future medical treatment.

Employer submitted a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in making internally inconsistent findings that employee is at MMI and sustained 25% disability of the left arm while simultaneously finding employee was entitled to a recommended surgery or surgeries; (2) in finding the accident caused the injuries and disabilities for which benefits are now being claimed to the elbow; (3) in finding it appropriate to order surgery to the elbow depending on the outcome of carpal tunnel surgery; (4) in finding employee sustained a carpal tunnel injury to her hand when the medical evidence established that her complaints on exam were to the ulnar nerve distribution; and (5) in ordering surgical treatment for carpal tunnel syndrome when the diagnostic test and clinical findings on exam were inconsistent with a diagnosis of carpal tunnel syndrome.

For the reasons set forth in this award and decision, the Commission modifies the award of the administrative law judge.

Discussion

Conflicting medical expert testimony

We disagree with the administrative law judge's credibility determination. We find Dr. Strecker more credible than Dr. Schlafly on the issue of medical causation. Dr. Schlafly opined that, as a result of the work injury, employee is suffering from carpal tunnel syndrome and in need of surgery to correct this condition. Yet, on cross-examination, he acknowledged that the majority of people with carpal tunnel syndrome who have a surgical need will have abnormal

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neuropathy—which employee does not. He also acknowledged that employee does not exhibit a number of the typical signs and physical symptoms of carpal tunnel syndrome which doctors use to determine whether or not a person has an operable condition for carpal tunnel syndrome.

Dr. Strecker, on the other hand, did not turn a blind eye to the nerve conduction studies and employee's actual symptoms when he rendered his opinion that employee was not suffering from carpal tunnel syndrome the last time he saw her (which was after Dr. Schlafly's examination), but instead was suffering from cubital tunnel syndrome. Dr. Strecker opined that employee's work was not a substantial factor in causing her to develop cubital tunnel syndrome, because the mechanism of injury suffered by employee is inconsistent with injury to the ulnar nerve. Dr. Strecker opined that it would be possible for employee to suffer carpal tunnel syndrome secondary to a crushing injury like that described by employee, and rendered an initial diagnosis that she suffered from sub-acute possible carpal tunnel syndrome, but opined that nerve conduction studies and employee's complaints and physical symptoms did not match up with a diagnosis of carpal tunnel syndrome. Dr. Strecker opined that the work injury is not the cause, or a contributing factor, to employee's need for surgery for cubital tunnel syndrome. Dr. Strecker believes employee has a 7% permanent partial disability at the level of her elbow.

We resolve the conflicting medical expert testimony as follows. We find Dr. Strecker's causation opinion more credible than Dr. Schlafly's. We find that employee's work was not a substantial factor causing her to sustain carpal tunnel syndrome or cubital tunnel syndrome. We find Dr. Strecker's opinion as to future medical care more credible than Dr. Schlafly's. We find employee is not a surgical candidate as a result of the work injury because that injury did not cause her cubital tunnel syndrome and because she does not have carpal tunnel syndrome.

Future medical treatment

The parties dispute the issue whether employee is entitled to future medical treatment as a result of the work injury of March 28, 2003. Section 287.140.1 RSMo provides, as follows:

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

Employer argues that the administrative law judge's decision to award a disputed surgery while simultaneously awarding permanent partial disability is inconsistent and an inappropriate application of the Missouri Workers' Compensation Law. We agree. As the court in *Cardwell v. Treasurer of Mo.*, 249 S.W.3d 902, 910 (Mo. App. 2008) explained:

After reaching the point where no further progress is expected, it can be determined whether there is either permanent partial or permanent total disability and benefits may be awarded based on that determination. One cannot determine the level of permanent disability associated with an injury until it reaches a point where it will no longer improve with medical treatment. ... Although the term maximum medical improvement is not included in the statute, the issue of whether any further medical progress can be reached is essential in determining when a disability becomes permanent and thus, when payments for permanent partial or permanent total disability should be calculated.

It is unclear how the administrative law judge could have determined employee's permanent disability, when by virtue of her decision to award a disputed surgery, employee's medical

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condition would have necessarily changed or progressed. But in any event, we have adopted Dr. Strecker's opinion with respect to future medical treatment referable to the work injury. Our credibility finding is dispositive of the issue.

The claimant is not required to present evidence of the specific medical care that will be needed but he is required to establish through competent medical evidence that the care requested flows from the accident. An employer is required to compensate for future medical care only if the evidence establishes a reasonable probability that additional medical treatment is needed and, to a reasonable degree of medical certainty, that the need arose from the work injury.

ABB Power T & D Co. v. Kempker, 236 S.W.3d 43, 52 (Mo. App. 2007) (citations omitted).

We have found that employee does not have a surgical need flowing from the work injury for carpal tunnel syndrome or cubital tunnel syndrome, because those conditions were not caused by work. We modify the award of the administrative law judge. We find employee does not have a need for future medical treatment that flows from the work injury. We conclude employer is not obligated under § 287.140 to provide future medical care in connection with the work injury of March 28, 2003. Likewise, as the administrative law judge linked her award of temporary total disability benefits to her decision to award the disputed surgeries, we conclude employer is not obligated to provide temporary total disability benefits.

Permanent partial disability

We have determined that employee's work did not cause her to develop carpal tunnel syndrome or cubital tunnel syndrome. We note that the parties stipulated that employee did sustain "an injury" by accident on March 28, 2003. The question presently before us is the nature and extent of any permanent disability suffered by employee as a result of that injury.

The Commission may consider all the evidence, including the testimony of the employee, and draw all reasonable inferences in arriving at the percentage of disability. This is a determination within the special province of the Commission. The Commission is also not bound by the percentage estimates of the medical experts and is free to find a disability rating higher or lower than that expressed in medical testimony. This is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.

Elliott v. Kan. City School Dist., 71 S.W.3d 652, 657 (Mo. App. 2002) (citations omitted).

We find employee's testimony credible to the extent she describes some lingering pain in her hand from when it was crushed between two tables on Mach 28, 2003. We find that employee suffered some permanent partial disability referable to the injury the parties stipulate that she sustained on that date. We find that employee suffered a 10% permanent partial disability at the 175-week level as a result of the work injury.

Accordingly, we modify the award of the administrative law judge. Employee is entitled to permanent partial disability benefits from the employer for 17.5 weeks.

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Award

We modify the award of the administrative law judge. Employee is entitled to permanent partial disability benefits from the employer for 17.5 weeks, not 52.5 weeks as awarded by the administrative law judge. Employee is not entitled to future medical care from the employer or temporary total disability benefits in connection with the disputed surgeries.

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.

The award and decision of Administrative Law Judge Vicky Ruth, issued October 20, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 19th day of June 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Dawn Callahan

Injury No. 03-143411

Dependents: N/A

Employer: Booksource, Inc.

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

Additional Party: None

Insurer: Employer's Fire and Insurance Co.

Hearing Date: July 20, 2011

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: March 28, 2003.
5. State location where accident occurred or occupational disease was contracted: Rolla, 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 sustained an injury to her left hand/arm when the hand was smashed between two tables at work.
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: Left arm.
14. Nature and extent of any permanent disability: 25% of the left upper extremity at the level of the elbow.
15. Compensation paid to-date for temporary disability: \$2,843.25.
16. Value necessary medical aid paid to date by employer/insurer? \$7,201.23.
17. Value necessary medical aid not furnished by employer/insurer? N/A.

18. Employee's average weekly wages: N/A.
19. Weekly compensation rate: \$188.75.
20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable from employer:

PPD (52.5 weeks x \$188.75):	\$9,909.38
Future TTD:	Indeterminate
22. Second Injury Fund liability: N/A.
23. Future medical awarded: Yes.

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Thomas Burke.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Dawn Callahan

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Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Booksource, Inc.

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

Additional Party: N/A

Insurer: Employer's Fire and Insurance Company

On July 20, 2011, Dawn Callahan, Booksource, Inc., and Employer's Fire and Casualty Company appeared for a final award hearing. Dawn Callahan, the claimant, was represented by attorney Thomas Burke. Attorney Mark Cero represented Booksource, Inc. and Employer's Fire and Insurance Company, the employer/insurer. Claimant testified in person at the hearing. Dr. Bruce Schlafly and Dr. William Strecker testified by deposition. The parties submitted briefs/proposed awards on August 10, 2011, and the record closed at that time.

STIPULATIONS

The parties stipulated to the following:

1. On March 28, 2003, Dawn Callahan, the claimant, was an employee of Booksource, Inc. (the employer).
2. On March 28, 2003, claimant sustained an accident at work.
3. The parties were operating subject to the provisions of Missouri Workers' Compensation Law.
4. The employer's liability for workers' compensation was fully insured by Employer's Fire and Insurance Company (the insurer).
5. The Missouri Division of Workers' Compensation has jurisdiction, and venue in Phelps County is proper.
6. A Claim for Compensation was timely filed.
7. Notice is not an issue.
8. The compensation rate is \$188.75/week for temporary total disability benefits and permanent partial disability benefits.
9. Temporary total disability benefits have been paid to claimant in the amount of \$2,843.25.
10. The employer/insurer provided medical care in the amount of \$7,201.23.

ISSUES

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

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1. Medical causation.
2. Nature and extent of permanent partial disability.
3. Future medical care.
4. Future temporary total disability benefits.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence¹:

- | | |
|-----------|---|
| Exhibit A | Report of Injury form. |
| Exhibit B | Claim for Compensation. |
| Exhibit C | Medical records (various providers). |
| Exhibit D | Medical records from Missouri Baptist Hospital (Sullivan) with a letter from Dr. Peeples. |
| Exhibit E | Deposition and report of Dr. Bruce Schlafly. |

On behalf of the employer/insurer, the following exhibit was admitted into the record:

- | | |
|-----------|-------------------------------------|
| Exhibit 1 | Deposition of Dr. William Strecker. |
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Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence.

FINDINGS OF FACT

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

1. Claimant was born on October 12, 1968; at the time of the hearing she was 42 years old. She has a 10th grade education. She resides in Cherryville, Missouri.
2. Claimant worked at the Booksource, Inc. (the employer) from early 2002 through some time in 2004. She worked on the line assembling books.
3. On March 28, 2003, claimant sustained an injury to her hand when she was moving two tables on rollers and her left hand was smashed between the two tables. Claimant testified that she had immediate pain in her thumb and wrist. Claimant reported the injury to her supervisor and then finished working her shift. That evening, claimant's hand hurt badly. She also developed a lump on the dorsum of her left hand.
4. As her complaints did not resolve, claimant saw her personal physician, Nurse Practitioner "Dr. Lisa" in Steelville, Missouri. Because of her continuing complaints, the employer/insurer referred claimant to Dr. Richard Johnston, whom she first saw on

¹ All depositions were received subject to the objections contained therein.

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April 28, 2003. Dr. Johnson's examination revealed tenderness in the base of the left thumb and tenderness into the volar aspect of the thenar musculature. Claimant also had a positive Tinel's and a positive Phalen's. Dr. Johnston diagnosed claimant as having a left hand crush injury with deep contusion, possible secondary carpal tunnel syndrome. He ordered a nerve conduction study.

5. The nerve conduction study was performed by Dr. Peeples on May 1, 2003, and was interpreted as "normal." The records indicate "there was no electrodiagnostic evidence for a neuropathy affecting the left hand." Dr. Johnston ordered physical therapy and he directed that claimant have no repetitive use of the left arm and no lifting over five pounds.

Dr. Strecker

6. Claimant continued to have hand complaints. The employer/insurer referred claimant to Dr. William Strecker, whom she first saw on July 22, 2003. Dr. Strecker is an orthopedist surgeon who focuses on the hand and upper extremity. Dr. Strecker felt that claimant most likely had an ulnar neuropathy but he could not exclude a subacute carpal tunnel. Dr. Strecker prescribed a home exercise program as well as anti-inflammatory medication (Celebrex).
7. On August 19, 2003, claimant continued to complain of persistent numbness over the ring and small fingers. She had full range of motion to the elbow. She had a positive Tinel's over the ulnar and the cubital tunnel.
8. On September 30, 2003, Dr. Strecker noted that claimant still had complaints of paresthesias to her hand. On physical exam, she was tender over the ulnar nerve and had a positive Tinel's of the elbow. Dr. Strecker recommended an MRI to rule out cervical radiculopathy.

On November 19, 2003, Dr. Strecker noted that the MRI of the cervical spine was read to find no abnormalities. The doctor noted that claimant continued to have a symptomatic cubital tunnel syndrome with a normal electrophysiologic study. Dr. Strecker's diagnosis was ulnar neuropathy and symptomatic cubital tunnel syndrome with a normal electrophysiological study. He indicated that due to her non-responsiveness to conservative care and due to her persistent symptoms, he felt that she was a surgical candidate for a decompression of the ulnar nerve as well as subcutaneous anterior transposition.

9. On December 9, 2003, Dr. Strecker wrote a letter to the claims adjuster handling the claim. In that letter, Dr. Strecker opined "other than the history being that she was not having any problems with her elbow until her work injury of 4/9/03, I am unable to relate her current diagnosis or symptom complex with her described injury." The employer/insurer subsequently terminated authorized treatment and claimant was released from Dr. Strecker's care.
10. On August 16, 2005, claimant was sent by the employer/insurer back to Dr. Strecker for an updated evaluation. Dr. Strecker concluded that claimant continues to have symptoms

and physical finding of a cubital tunnel syndrome, but he was unable to relate her current diagnosis or symptom complex with the injury as she described it. Dr. Strecker explained his basis for determining that claimant's work injury was not the cause of her need for surgery. He indicated that his opinion was based on two things: one was the mechanism of injury where claimant claimed that she got her hand caught between two tables; two, her complaints of ulnar neuropathy seemed to evolve over the course of time. Claimant never told him "that she had any kind of direct injury to her ulnar nerve, so both from a temporal standpoint, as well as a direct standpoint, I was unable to relate it to that specific injury."² Dr. Strecker opined that claimant has a 7% permanent partial disability at the level of the elbow.

11. On cross examination, Dr. Strecker agreed that he initially felt that claimant had findings consistent with some aspect of carpal tunnel, but that those seemed to resolve.³ He acknowledged that at the time he made that diagnosis, he felt that the most likely cause of her condition was the work-related injury in April 2003.⁴ He also clarified that as of the last time he saw her, he felt that she was not in need of carpal tunnel surgery as she had no complaints of carpal tunnel nor any physical findings of carpal tunnel and she had a normal nerve conduction study.⁵ Nevertheless, he did feel that at the last time he saw claimant, she was a candidate for ulnar nerve transposition. Dr. Strecker acknowledged that one of the known causes of carpal tunnel syndrome was a crush injury.⁶ He indicated, however, that a crush injury would have to involve the elbow in order to be a recognized cause of the type of symptom complex that she exhibits. Dr. Strecker opined that a crush injury of the hand does not give you a cubital tunnel, which is an ulnar nerve deficit at the elbow, although such an injury could give you the carpal tunnel syndrome symptoms.⁷ Dr. Strecker agreed that he does not relate her elbow symptom complex to any specific finding as the cause of her condition.⁸

Dr. Schlafly

12. On December 15, 2004, Dr. Bruce Schlafly examined claimant at the request of her attorney. Dr. Schlafly is board-certified in hand surgery and orthopedic surgery. Dr. Schlafly found that claimant has some complaints and findings typical of carpal tunnel syndrome (median nerve compression at the wrist) and some that are typical of cubital tunnel syndrome (ulnar nerve compression at the elbow). She also has a small nodular swelling on the dorsoulnar aspect of her left hand, of uncertain significance. Dr. Schlafly noted that in view of claimant's persistent symptoms, she is in need of surgical treatment. He felt that claimant might require both a left carpal tunnel release and ulnar nerve transposition at the left elbow, but he thought that the most likely cause of the majority of her complaints is left carpal tunnel syndrome. Thus, he recommended that treatment begin with left carpal tunnel release alone.

² ER/INS Exh. 1, p. 15.

³ ER/INS Exh. 1, pp. 17-18.

⁴ *Id.*

⁵ *Id.* at p. 19.

⁶ *Id.*

⁷ *Id.* at p. 19.

⁸ *Id.* at p. 20.

13. Dr. Schlafly explained that the negative electrical studies, which were done one and one-half years ago, do not preclude a diagnosis of carpal tunnel syndrome or cubital tunnel syndrome, as such studies are not always accurate.
14. Dr. Schlafly opined that the crush injury to the left hand at work was the substantial factor in the cause of the left carpal tunnel syndrome and the need for the left carpal tunnel release. He also thinks that there is a component of left cubital tunnel syndrome present, which may or may not require surgical treatment, depending on how claimant responds to the left carpal tunnel release. He noted that it has been his experience that some crush injuries to the hand end up causing more proximal nerve entrapment problems, such as cubital tunnel syndrome, probably from altered and decreased use of the hand and wrist such that abnormal stresses are placed on the arm and elbow. He further opined that the March 2003 work injury is the substantial factor in the cause of claimant's left cubital tunnel syndrome and that she may require ulnar nerve transposition, depending on how she responds to the left carpal tunnel release. Dr. Schlafly limited claimant to one-handed duty with her normal right hand. He noted that claimant has significant disability to her left hand, but that he hopes she can be helped with surgery. During his deposition, Dr. Schlafly was asked to clarify his position on disability; he then opined that at the time of claimant's exam in December 2004, claimant had a permanent partial disability of 25% of the left wrist and 25% of the left elbow.⁹
15. In his deposition, Dr. Schlafly testified that blunt trauma causing carpal tunnel syndrome is not unusual.¹⁰

Current complaints

16. Claimant testified that she has continuing complaints of daily pain in her left hand, specifically in the thumb thenar eminence area. Her range of motion is full, but she has pain at the extremes. She testified that she has significant decreased strength in her left hand and wrist. She does not have any swelling. She has tingling and numbness mainly in the long and index fingers on the top of her left hand. She has numbness in her thumb. Her left hand fatigues more easily. She also has some pain in her left elbow.
17. Claimant is no longer able to bowl because of the hand problems. She testified that she has to be careful when doing chores around the house because she cannot lift. She stated that holding objects is difficult. She stated that sleeping increases her pain. Driving increases complaints of numbness in her hand and forearm. She stated that her complaints are located in her hand as well as her wrist with radiating pain to the elbow. Pressure on the elbow is painful.
18. Claimant testified that she takes four or five 200 mg. ibuprofen tablets three times per day. She ices her wrist/forearm/elbow two times per week and applies a heating pad two

⁹ Claimant's Exh. E, pp. 16-18.

¹⁰ Claimant's Exh. E, p. 25.

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times per week.

19. Claimant wishes to receive additional medical treatment such as what has been recommended by Dr. Schlafly.

CONCLUSIONS OF LAW

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

This is a 2003 case; 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.”¹¹

Issue 1: Medical causation

Issue 2: Nature and extent of permanent partial disability

Issue 3: Future medical care

Under Missouri Workers’ Compensation law, the claimant bears the burden of proving all essential elements of his or her workers’ compensation claim.¹² Proof is made only by competent and substantial evidence, and may not rest on speculation.¹³ Medical causation not within lay understanding or experience requires expert medical evidence.¹⁴ When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.¹⁵

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.¹⁶ 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.¹⁷

The fact finder is encumbered with determining the credibility of witnesses.¹⁸ It is free to disregard that testimony which it does not hold credible.¹⁹

The word “accident” as used by the Missouri workers’ compensation law means “an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single

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

¹² *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).

¹³ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

¹⁴ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

¹⁵ *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

¹⁶ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

¹⁷ *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).

¹⁸ *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo.App. E.D. 2008).

¹⁹ *Id.* at 908.

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work shift. An injury is not compensable because work was a triggering or precipitating factor.”²⁰

An “injury” is defined to be “an injury which has arisen out of an in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The “prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.”²¹ An injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.²²

The determination of the specific amount or percentage of disability to be awarded to an injured employee is a finding of fact within the unique province of the ALJ.²³ The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated.²⁴ A determination of the percentage of disability arising from a work-related injury is to be made from the evidence as a whole.²⁵ It is the duty of the ALJ to weigh the medical evidence, as well as all other testimony and evidence, in reaching his or her own conclusion as to the percentage of disability sustained.²⁶

Medical care is addressed in subsection 1 of RSMo Section 287.140, which states, in pertinent part, as follows:

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

As for future medical case, 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

²⁰ Section 287.020.3(1), RSMo. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005, unless otherwise noted.

²¹ Section 287.020.3(1).

²² Section 287.020.3(c).

²³ *Hawthorne v. Lester E. Cox Medical Center*, 165 S.W.2d 587, 594-595 (Mo.App. S.D. 2005); *Sifferman v. Sears & Robuck*, 906 S.W.2d 823, 826 (Mo.App. S.D. 1999).

²⁴ *Rana v. Land Star TLC*, 46 S.W.3d 614 626 (Mo.App. W.D. 2001).

²⁵ *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo.App. E.D. 1998).

²⁶ *Rana* at 626.

²⁷ *Sullivan v. Masters and Jackson Paving*, 35 S.W.2d 879, 888 (Mo.App. 2001).

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care.²⁸ "Probable" means founded on reason and experience that inclines the mind to believe but leaves room for doubt.²⁹ Claimant need not show evidence of the specific nature of the treatment required, but only that treatment is going to be required.³⁰

Claimant testified credibly that on March 28, 2003, she injured her left hand in an accident at work when she was moving two tables. As a result of that accident, she has also developed hand and elbow problems. Claimant continues to have significant symptoms and pain in her left hand and elbow. Claimant wishes to receive additional medical treatment such as recommended by Dr. Schlafly. Dr. Schlafly testified credibly and convincingly that work was the substantial factor in causing claimant's left hand and elbow injury and in the need for future medical treatment. Dr. Schlafly's opinion is thorough and well-reasoned.

I find that claimant has proven by substantial and competent evidence that her left hand and elbow injury arose out of and in the course and scope of employment with the employer. I also find that work was the substantial factor causing claimant's left hand and elbow injury. I find that claimant sustained a permanent partial disability of 25% of the left arm at the level of the elbow (encompassing both the injury to the elbow and to the hand). In addition, claimant has met her burden of proof regarding her need for additional medical treatment; the employer/insurer is ordered to provide additional medical care such as what is recommended by Dr. Schlafly.

Issue 4: Temporary Total Disability

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.³¹ Temporary total disability benefits are owed until the employee can find employment or the condition has reached the point of "maximum medical progress."³² Thus, TTD benefits are not intended to encompass disability after the condition has reached the point where further progress is not expected.³³ This is reflected in the language that TTD benefits last only "during the continuance of such disability."³⁴

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).

³⁰ *Aldredge v. Southern Missouri Gas*, 131 S.W. 3rd 786 at 833 (Mo. App. D. D. 2004).

³¹ *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo. App. W.D. 1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d at 226 (Mo. Banc 2003). See also *Birdsong v. Waste Management*, 147 S.W.3d, 132, 140 (Mo.App. S.D. 2004).

³² *Cooper* at 575.

³³ *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.

³⁴ Section 287.170.1, RSMo.

Employee: Dawn Callahan

Injury No. 03-143411

Additional medical care has been ordered in this Award. I find that it is appropriate to order that temporary total disability benefits be provided to claimant in conjunction with that future medical treatment pursuant to statute.

Any pending objections not expressly ruled on in this award are overruled.

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

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation