

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

Injury No.: 02-156872

Employee: Janet K. Carter
Employer: Harrah's North Kansas City LLC
Insurer: Old Republic Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 22, 2010. The award and decision of Administrative Law Judge Robert B. Miner, issued February 22, 2010, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 13th day of January 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Janet K. Carter

Injury No.: 02-156872

Employer: Harrah's North Kansas City LLC

Insurer: Old Republic Insurance Company

Hearing Date: November 20, 2009

Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: January 20, 2002.
5. State location where accident occurred or occupational disease was contracted: North Kansas City, Clay County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee slipped and fell causing injury to her thoracic spine.
12. Did accident or occupational disease cause death? No.

- 13. Part(s) of body injured by accident or occupational disease: thoracic spine.
- 14. Nature and extent of any permanent disability: 5% of the body as a whole (400 week level).
- 15. Compensation paid to-date for temporary disability: None.
- 16. Value necessary medical aid paid to date by employer/insurer? \$2,167.00.
- 17. Value necessary medical aid not furnished by employer/insurer? None.
- 18. Employee's average weekly wages: \$721.96.
- 19. Weekly compensation rate: \$481.30 for temporary total disability and permanent total disability, and \$329.42 for permanent partial disability.
- 20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None

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

20 weeks of permanent partial disability from Employer (20 x \$329.42=\$6,588.40.)

No weeks of disfigurement from Employer

TOTAL FROM EMPLOYER: \$6,588.40

22. Second Injury Fund liability: N/A. The Second Injury Fund is not a party to this case.

23. Future requirements awarded: None.

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Janet K. Carter

Injury No's: 02-156872
03-060420
03-138347

Employer: Harrah's North Kansas City LLC

Insurer: Old Republic Insurance Company

Hearing Date: November 20, 2009

Checked by: RBM

PRELIMINARIES

A final hearing was held in Injury Numbers: 02-156872, 03-060420, and 03-138347 on November 20, 2009 in Gladstone, Missouri. Employee, Janet K. Carter, appeared in person and by her attorney, William G. Manson. Employer, Harrah's North Kansas City LLC, and Insurer, Old Republic Insurance Company, appeared by their attorney, John R. Fox. The Second Injury Fund appeared by its attorney, Laura Van Fleet. Scott Bradshaw appeared as a representative of Harrah's North Kansas City LLC. The Second Injury Fund is a party in Injury Numbers 03-060420 and 03-138347, but not in Injury Number 02-156872. William G. Manson requested an attorney's fee of 25% from all amounts awarded. It was agreed that briefs would be due on December 31, 2009.

Attorneys William G. Manson and John R. Fox agreed that Employer/Insurer had made an advance to Janet K. Carter in the amount of \$20,000.00 on June 21, 2006. They further agreed that Employer/Insurer shall be entitled to take a credit of \$20,000.00 for this advance against any benefits awarded to Janet K. Carter against Employer/Insurer in any of her three cases.

STIPULATIONS

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

1. On or about January 29, 2002, May 12, 2003, and June 16, 2003, Janet K. Carter ("Claimant") was an employee of Harrah's North Kansas City LLC ("Employer"), and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about January 29, 2002, May 12, 2003, and June 16, 2003, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by Old Republic Insurance Company ("Insurer").

3. On or about January 29, 2002, May 12, 2003, and June 16, 2003, Claimant sustained injuries by accident or occupational disease in North Kansas City, Clay County, Missouri, arising out of and in the course of her employment.

4. Employer had notice of Claimant's injuries.

5. Claimant's Claims for Compensation were filed within the time allowed by law.

6. In Injury No. 02-156872, the average weekly wage was \$721.95 and the rate of compensation for temporary total disability and permanent total disability is \$481.30 per week, and the rate of compensation for permanent partial disability is \$329.42 per week.

7. No compensation has been paid by Employer/Insurer for temporary disability in Injury No. 02-156872.

8. Employer/Insurer has paid \$2,167.00 in medical aid in Injury No. 02-156872.

9. In Injury No's 03-060420 and 03-138347, the average weekly wage was \$741.17 and the rate of compensation for temporary total disability and permanent total disability is \$494.11 per week, and the rate of compensation for permanent partial disability is \$340.12 per week.

10. Employer/Insurer has paid \$5,420.05 in temporary disability benefits at the rate of \$494.11 per week in Injury No. 03-060420.

11. Employer/Insurer has paid \$54,231.82 in medical aid in Injury No. 03-060420.

12. Employer/Insurer has paid \$14,721.34 in temporary total disability at the rate of \$494.11 per week in Injury No. 03-138347 (the June 16, 2003 case). Temporary total disability benefits were paid by Employer/Insurer through March 10, 2005, which is the agreed date that Employee reached maximum medical improvement in her left shoulder case. Employee is not seeking any temporary total disability benefits for any time prior to March 10, 2005.

13. Employer/Insurer has paid \$25,242.76 in medical aid in Injury No. 03-138347.

14. Employer/Insurer shall be entitled to take a credit of \$20,000.00 for an advance it made to Claimant in that amount on June 21, 2006 against any benefits awarded to Janet K. Carter against Employer/Insurer in any of her three cases.

ISSUES

The parties agreed that there is a dispute on the following issue in Injury No. 02-156872: the nature and extent of permanent disability.

The parties agreed that there are disputes on the following issues in Injury No. 03-060420:

1. Employer's liability for permanent disability benefits, including permanent partial disability and permanent total disability.
2. Employer's liability for past temporary total disability benefits from March 11, 2005.
3. Employer's liability for future medical aid.
4. Liability of the Second Injury Fund for permanent disability benefits, including permanent partial disability and permanent total disability.

The parties agreed that there are disputes on the following issues in Injury No. 03-138347:

1. Employer's liability for permanent disability benefits, including permanent partial disability and permanent total disability.
2. Liability of the Second Injury Fund for permanent disability benefits, including permanent partial disability and permanent total disability.
3. Employer's liability for future medical aid.

Claimant testified in person.

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

- A—January 29, 2002 Claim for Compensation
- B—May 12, 2003 Claim for Compensation
- C—June 16, 2003 Claim for Compensation

D—August 31, 2009 deposition of Dr. James Stuckmeyer with deposition exhibits (admitted subject to objections contained in the deposition)

E—September 14, 2009 deposition of Terry Cordray with deposition exhibits (admitted subject to objections contained in the deposition)

F—Medical records of Dr. Blake Donaldson

G—Medical records of Dr. Robert M. Orr

H—Medical records of Intracorp

I—Medical records of Concentra Medical Center

J— Medical records of Northland Imaging

K— Medical records of Dr. Robert M. Drisko

L— Medical records of Dr. Patrick Griffith

M— Medical records of Dr. Geoffrey Blatt

N— Medical records of Research Medical Center

O— Medical records of Dr. Leslie D. Thomas

P—Medical records of Dr. Jeffrey Bredemann

Employer/Insurer offered the following Exhibits that were admitted in evidence without objection:

1—November 9, 2009 deposition of Dr. David Clymer with deposition exhibits (admitted subject to objections contained in the deposition)

2—60 day – Dr. Thomas report, Curriculum Vitae, and records

3—60 day – Dr. Clymer report, Curriculum Vitae, and records

The Second Injury Fund did not offer any exhibits.

Any objections contained in any of the depositions are overruled unless otherwise noted. The Administrative Law Judge did not place any highlighting or other markings on any of the exhibits. The briefs of the attorneys have been considered.

Findings of Fact

Summary of the Evidence

Claimant testified that she was born on February 26, 1946 and is 63 years old.

Claimant started working at Employer in 1993. She worked in 2002 and 2003 as a card dealer for Employer. She stood and dealt cards repetitively eight hours a day, forty hours a week. She usually worked an eight-hour shift, and usually worked five days per week. Claimant was always a card dealer at Employer except when she worked light duty

folding towels from June 2003 to February 2004. She last worked for Employer in February 2004.

Claimant stood in one spot when she worked at Employer dealing cards. She alternated dealing for an hour and taking a twenty minute break throughout the eight hour day. She did not work overtime. She always stood and did not bend or lift. She walked from the tables to the break room.

Claimant pulled cards from a sleeve with her left hand, put the cards into her right hand, and then delivered the cards to the players with her right hand. She was also trained to deal roulette. She would spin a wheel when she worked roulette. Two employees worked together at the roulette table. One was a dealer and one was a reacher. The reacher brought in and stacked the chips. Claimant also occasionally dealt poker.

Claimant testified that she had not had any injuries or accidents before January 29, 2002.

Claimant testified that on January 29, 2002, she had been released from work at Employer and was walking to the parking lot on a snowy, icy day. Her feet went out from under her and she fell, landing flat on her face. She said she hurt the middle of her back around her thoracic spine rib cage area. She had pain around her right side.

A supervisor was there at the time she fell. An EMT was called. Claimant was examined and she thought that she would be all right. She was helped to her car and she went home. She felt pain the next day that was like a hatchet from her right side into her spine, rib cage, and mid back. Her spine itself did not hurt, just the right side of the spine. She developed a dull aching pain later. Walking and moving her arms made her pain worse.

Claimant did not ask Employer for any medical treatment at that time. She went to her own doctor, Dr. Donaldson, who sent her to pain management. She saw Dr. Orr three to four months after the accident. Dr. Orr did three epidural injections which helped. She may have also taken Advil. Claimant did not receive treatment from anyone else. She finished her treatment in the late summer or early fall of 2002. She continued to work at Employer. She said her coworkers sometimes switched with her to give her an easier job.

Dr. Orr prescribed Oxycontin pain medication. She took that for several months, and took it periodically through the time that she had her second accident in May 2003.

Claimant said that she was significantly better in January 2003. She was functioning pretty well, could drive, and could go to work. She went on a vacation to Hawaii in January 2003 and did a lot of walking.

Claimant testified her left shoulder began to ache in late winter or early spring of 2003. She attributed the pain to repetitive dealing cards. Employer had changed the sleeve and it was hard to get the cards out. The pain went from her shoulder down her left arm. She described the pain as a constant throbbing pain that was agonizing at times. She also said she had a dull aching pain most of the time.

Claimant testified that in May 2003, her left shoulder pain was getting pretty bad. It was not twenty-four hours a day, seven days a week at that time, but it eventually got to that point.

On May 12, 2003, Claimant was walking down a walkway between Employer's lunchroom and the casino, coming back from break, when she tripped and turned her ankle. She did not fall. She jerked and felt a searing pain in her right side. She limped over to the pit and told a supervisor that she had hurt herself. She went back to the lunchroom and an EMT was called. The EMT examined her and offered that she go to the hospital. She declined the offer. She thought she would get better.

On May 13, 2003, Claimant had a dull pain, but it was not excruciating. She returned to work. She did not ask for or receive accommodations at work.

Claimant was working forty hours per week just prior to the May 12, 2003 accident. She said she was doing pretty well. She had some pain, but it was not debilitating. The pain was in the right side of her body on her rib. She was not being treated then. Her left shoulder was getting worse.

Claimant testified she progressively got worse. The pain felt like a jab and became intense when she moved around. She had pain for a couple of months before she sought treatment. Her shoulder was getting worse during this time.

On June 6, 2003 or June 16, 2003, Claimant told a supervisor that she could not work anymore. She said she needed to go to HR. She had a constant throbbing pain in her left shoulder. The right side was getting worse.

Employer sent Claimant to Concentra where she was given oral medication and then physical therapy. She had an injection in her shoulder that helped for several weeks. The pain in her side did not get better.

Concentra sent her to Dr. Drisko. He examined her left shoulder and right rib cage and gave her a back brace that did not help. She went to Dr. Leslie Thomas who did an MRI and x-rays, and then did shoulder surgery in early 2004.

Claimant also went to Dr. Dwayne Jones, a pain management doctor, who started giving her Fentanyl in August 2003. Claimant also saw Dr. Jeffrey Blatt, a neurosurgeon, who evaluated her thoracic spine. He told her that they did not like to do surgery in the thoracic spine area. She received pain management for her thoracic spine from Dr. Jones.

Claimant last dealt cards at Employer either on June 6, 2003 or June 16, 2003. Claimant worked light duty for Employer from June 2003 until she was released in February 2004. She worked forty hours per week folding towels during that time. She has not worked for anyone since February 2004.

Claimant testified that her left shoulder pain was always at least a five just prior to her left shoulder surgery. A lot of time it was a nine on a scale of zero to ten. Her rib cage pain was always at least a two to three and, with activity, it could get up to a ten. The Fentanyl lollipops took her pain from a ten to a three or a four.

Claimant testified that the left shoulder surgery helped her left shoulder. She said it took the pain away. She testified that she does not have problems with her left shoulder anymore.

Claimant has received some temporary total disability benefits. She testified that her temporary total disability benefits stopped on March 10, 2005 when Dr. Thomas said she was at maximum medical improvement regarding her shoulder. She also received unemployment benefits for about six months after that. She applied for numerous jobs. She said she applied at several hundred places. She looked for work in sales, secretarial, and administrative. She said she got no call backs and no interviews.

Claimant saw Dr. Griffith for her hips in 2007. He stopped her oral medication except for breakthrough pain. Dr. Griffith prescribed Oxycodone for her in early 2008 and 2009.

Claimant said that a discogram was done by Dr. Griffith in 2007 or 2008. It revealed some cracked disks. Dr. Griffith performed a percutaneous discectomy in 2008. Needles were inserted, but an incision was not made. She saw Dr. Griffith until the summer of 2009. She has been seeing Dr. Griffith for pain in her hips and then her legs.

He has provided epidurals for that pain. The pain in her hips and legs is not related to her fall.

Claimant said that her rib cage still gives her problems. She is still receiving treatment on the right side of her rib cage. She is getting epidurals, is using a TENS unit, and is taking oral medication. She still takes Fentanyl lollipops. She uses Fentanyl patches at times.

Claimant said the Fentanyl causes dry mouth, drowsiness, and makes her feel a little off center. She said that in the spring of 2005, and at the present time, she can do almost anything for a short period of time. She said that she does things in spurts. She said she needs to take medication to keep going. Medication makes her sleepy. She testified that after she takes a shower, she lies down. It takes her until noon to clean the house. Some days are better than others. Some activities are more difficult, like vacuuming. Chopping a salad makes her tired. She will lie down after she does that. She said it is rare for her to be able to work around the house more than two to three hours at a time.

Claimant has not had surgery on her thoracic spine. No one has recommended surgery for her thoracic spine.

Claimant said that her right side is always about a two on the pain scale. The more she does the more it hurts. If she keeps doing things, the pain goes to a nine or ten. If she lies down, the pain goes back to a two. Pills make her drowsy. She drove to the November 20, 2009 hearing in Gladstone. She did not take any Oxycodone the day of the hearing.

Claimant testified that she has constant right rib pain that is one or two when she uses her Fentanyl patch. The pain is a dull ache. She said she is 90 to 95% mentally alert and pretty competent when she uses the patch. She has been off the patch for a short time. She can drive when she uses the Fentanyl. She does not drive when she takes the pill. If she takes very much medication in a day, she will sleep during the day and then have insomnia at night.

Claimant said the only two medications she takes for her ribs are a Fentanyl patch and Oxycodone. She takes medications three days out of a week on average. The medication can cause her to have problems focusing and keeping track. Sometimes it is difficult to read.

Claimant described an average day. She wakes up about 6:30 or 7:00 in the morning and makes coffee. She fixes breakfast in a microwave or makes cereal. She does a little cooking. She takes a shower and usually lies down for about thirty minutes. She gets dressed, straightens up, makes the beds, and puts the dishes away. She and her husband, who retired recently, take walks together. Claimant tries to walk a little each day. Walking increases her pain. She walks part of the way with him. She then lies down if there is nothing that she needs to do. She has a cold lunch and, by 2:00, she generally takes a little nap.

Claimant and her husband have a hot meal at dinner. She straightens the kitchen and then watches TV. She goes to sleep in a recliner a lot of the time. She goes to bed at 10:00 and then is up and down. She returns to the recliner and watches TV.

Claimant goes to the grocery store once a week. She and her husband moved recently. Before they moved, she went more often to a grocery store that was closer. Before her move, she also used to visit her mother in a nursing home once or twice each week.

Claimant is able to take care of her hygiene needs. She can do most things around the house, but she cannot use a push mower. She can use the zero-turn mower for about thirty minutes, but then needs to lie down. She said she was not able to think of any job that she could do where she could work for two hours and then lie down for an hour.

Claimant testified on cross-examination that she had been seated during the hearing the entire time except for the break. She said that she uses a computer at home for emails. The first time she saw a doctor for her January 29, 2002 accident was in May 2002 when she saw Dr. Donaldson. She was on a pain patch in 2002. She took oral pain medications, including Oxycontin, in 2002 because of continued pain in her mid-back. She continued to work at Employer while she took pain medication.

Claimant testified on May 12, 2003, she tripped or lost her balance and tweaked her ankle and back. She caught herself to prevent herself from falling. She jerked and had some searing pain in the right side of her back. She worked her regular shift at Employer for the next few weeks after that. She told Employer in June 2003 that she did not think that she could do her job because of shoulder pain and mid-back pain. She stopped doing light duty work for Employer in February 2004 because the light duty work ran out. She received unemployment benefits from March 2004 until September 2004. The left shoulder surgery performed by Dr. Thomas was done because of a buildup of calcium deposits. She agreed that Dr. Thomas did not find any tears in her shoulder. She

agreed that Dr. Thomas released her with no restrictions. She said she now has no pain in her shoulder, but has some restriction in motion.

Claimant said that since she left Employer, she has had problems with her low back and both of her hips. She presently has no low back pain. She is not contending that her low back or hip pain is related to her work at Employer. She had an injection in her low back about one month before the hearing.

Claimant did not recall any of her treating doctors saying that she was physically incapable of working. She testified she can drive for one hour. She walks between one-half of a mile and one mile. She helps with house repairs. She helped paint trim.

Claimant said her pain was much more severe for a longer period after her second accident. She was not on any work restrictions before her second accident. She worked full time from her first accident to her second accident without taking any early outs. She was taking medication during that time. After her second accident, she would sometimes lie down when she was on a break. She did not do that after her first accident. She said that she did not feel that her shoulder was keeping her from going back to work.

Claimant received a Bachelor of Science in Education degree from Central Missouri State University in 1967. Claimant took computer classes but did not take the certification examinations. Claimant engaged in self-study to permit her to sell insurance and investment products in 1981. Her license to sell health insurance, life insurance and investment products lapsed in the early 1990s.

Claimant was a homemaker for more than three years beginning in 1976, before she went to D&J. She taught school before that. She taught junior high school history for nine to ten years. She raised one son. She was active in her community and was on a school board and medical board.

Claimant worked at D&J Enterprises, a pipeline construction company, as office manager from 1981 to 1983. She answered the phone, kept the books, worked with crews and did payroll. That job was primarily a sit-down job.

Claimant worked at Northwest Mutual Life for ten years from 1983 until 1993. She sold life insurance and health insurance as a sales representative and made appointments and did sales. She also worked as Director of Education and supervised new agents. She lifted books and class materials. She drove to clients' houses. She lifted boxes that weighed between twenty and forty pounds. She did a little squatting and

kneeling and worked a lot of jobs. She had no other jobs while she worked at Northwest Mutual Life.

Claimant worked at Arrow Forklift as a sales representative for one year before she worked for Employer. She sat at a desk at Arrow and called wholesalers and users selling forklift parts. She took calls and researched parts. The job was sedentary and did not involve lifting. She worked during the week at Arrow, and for a time that she worked at Arrow, she also worked weekends for Employer. She left the Arrow Forklift job in January 1994.

I find this testimony of Claimant to be credible unless noted otherwise later in this award.

The Court notes that throughout the hearing, which began at 1:00 p.m. and concluded at 4:30 p.m., Claimant did not appear to be in pain. The only time that Claimant stood during the hearing was when a short recess was taken.

Medical Treatment Records

Exhibit F contains records of Clay-Platte Family Medicine Clinic pertaining to Claimant. The records of Dr. Blake Donaldson in the Clay-Platte records contain a note dated June 6, 2002 referencing thoracic and lumbar strain, and Anaprox and Darvocet for pain. A June 25, 2002 note references tenderness over the right flank. Claimant was placed on Lortab. A July 8, 2002 note references "R flank pain, questionable etiology, chronic." An MRI of the thoracic spine was ordered.

Exhibit F includes a copy of a MRI report dated July 10, 2002 pertaining to Claimant's thoracic spine. The report notes the following conclusion: "1) Small disc osteophyte complexes are noted at several levels which is most pronounced at T10-11 and slightly eccentric towards the left. Some minimal compression of the spinal cord is suggested although there is no significant mass effect. No extruded disc herniations are identified; 2) Mild degenerative spondylosis producing no significant central or foraminal spinal stenosis at this time; 3) Mild degenerative disc disease, especially at T10-11; 4) Probable small bilateral arachnoid diverticula are of no clinical significance."

A July 15, 2002 note in Exhibit F references a MRI that shows small disc osteophyte complex at several levels, worse at T10, T11 which corresponds with the level of Claimant's pain. She continued to have right sided pain. The assessment was "DJD." A July 30, 2002 note of Dr. Donaldson references chronic back pain, mainly thoracic. Claimant had been to pain management and was started on Relafen. Dr. Donaldson's

August 26, 2002 note states Claimant said the epidurals were not helping. She had had her third one.

Exhibit F also includes a Pain Clinic Note dated July 22, 2002 of Dr. Margaret Yoakum-Pyle pertaining to Claimant. Dr. Yoakum-Pyle took a history and performed a physical examination. Her impression then was "thoracic spondylosis with some radicular pain." She prescribed Relafen. The records in Exhibit F include a report of Dr. Robert Orr dated August 12, 2002 documenting a second thoracic epidural steroid injection. Dr. Orr encouraged Claimant to stay off Darvocet and cut out on her smoking.

Exhibit 3 includes the medical report of Dr. Robert Orr dated August 19, 2002. He examined Claimant that day for thoracic radiculopathy. He administered a third thoracic epidural injection. Claimant was to return to Dr. Donaldson. He encouraged her to stay off Darvocet.

A November 1, 2002 note of Dr. Donaldson assesses thoracic strain, chronic and notes "continue pain meds."

The Concentra records in Exhibit 3 document physical therapy for Claimant's left shoulder on May 12, 2003. Dr. Donaldson's note dated June 2, 2003 (Exhibit F) references "back pain T-spine area fell in hole at work. Moves around to front."

Exhibit 3 includes a June 27, 2003 MRI report of the thoracic spine pertaining to Claimant. The impression noted is: "Mild degenerative disc disease at T8-9 and T10-11 with desiccation. No posterior disc bulges or protrusions."

Exhibit A contains records of Concentra documenting Claimant's treatment for thoracic pain and shoulder in 2003. Some records note an injury on May 12, 2003 from "repetitive motion of dealing." The assessment of the left shoulder was adhesive capsulitis of shoulder, bicipital tenosynovitis, shoulder strain, and shoulder impingement.

Exhibit 3 also contains records of Concentra Medical Center's documenting Claimant's visits to Dr. Neal Mikel in July 2003 for left shoulder pain. On July 11, 2003, Dr. Mikel assessed adhesive capsulitis of the shoulder, bicipital tenosynovitis, shoulder strain, and shoulder impingement.

Exhibit K contains records of Dr. Robert Drisko. These include an office note dated July 16, 2003 documenting Claimant's complaint of pain in her left shoulder and right lower thoracic area. Dr. Drisko thought Claimant had a shoulder strain without evidence of any impingement or frozen shoulder. He thought she had a rib injury with

her torquing injury and might have an element of thoracic stenosis. He thought she would benefit from pain management. He did not think she needed any operative intervention or further diagnostic tests.

Exhibit 3 includes records of Dr. Dwayne Jones pertaining to Claimant. Dr. Jones' July 17, 2003 note shows that he examined her that day. Her chief complaint was right sided rib pain and shoulder pain. His assessment was disc osteophyte complex at the thoracic region with radiculitis and history of shoulder strain and history of adhesive capsulitis of the shoulder and bicipital tenosynovitis with short term improvement with previous shoulder joint injection. He recommended a third epidural steroid injection for her radicular pain coming from thoracic radiculitis, and to continue with Celebrex. Claimant underwent a third epidural injection.

Dr. Jones' July 28, 2003 report in Exhibit 3 documents a repeat intralaminar epidural steroid injection at T10-T11. Exhibit 3 includes Dr. Jones' August 12, 2003 report documenting Claimant's continued complaints of pain in the mid back radiating across the right chest wall. They discussed Fentanyl (Actiq) as needed for severe pain and proceeded with a repeat thoracic intralaminar steroid injection.

Dr. Drisko's August 19, 2003 office note (Exhibit K) states he thought Claimant's main problem was thoracic stenosis. He thought she needed a neurosurgery consultation. Her shoulder was better.

Exhibit L contains records of North Kansas City Hospital pertaining to Claimant. The records include notes of Dr. Dwayne Jones pertaining to his thoracic epidural steroid injections in July, August, and September 2003.

Exhibit 3 includes Dr. Jones' September 15, 2003 report. It notes the steroid injections had not given Claimant sustained improvement. She was having some improvement with Actiq. He recommended consideration of a sympathetic block. He indicated a neurosurgical evaluation could be a benefit. Dr. Jones' September 22, 2003 report notes that Claimant continued to work at Employer. She was taking Fentanyl that allowed her to get through the day. The report notes they were going to proceed with thoracic sympathetic block. Dr. Jones' October 7, 2003 report notes that they proceeded with the block.

Exhibit M includes a report of Dr. Geoffrey Blatt dated October 10, 2003 pertaining to Claimant. He saw her that day for thoracic pain following incidents in February 2002 and May 12, 2003. Her treatment was noted. He performed a physical examination. He believed Claimant had some symptoms of thoracic radiculopathy. He

noted it was possible she was “just dealing with a muscular strain or soft tissue injury.” He recommended a better MRI scan.

Dr. Donaldson's October 16, 2003 note (Exhibit F) references she was there for medication refill. Claimant did not think Celebrex was working very well. The note states: “She has severe chronic thoracic strain. She was doing fine until she tripped at work.” Nexium was refilled and Claimant was placed on Vextra.

Exhibit 3 and Exhibit N include an MRI thoracic spine report from Research Medical Center dated October 27, 2003. The impression noted is: “1. Herniation T10/11 disc posteriorly to the left midline. 2. Small posterior herniation T8/9 disc to the left of the midline.” The report also notes that degenerative changes are present in the remaining thoracic discs.

Exhibit F includes a report from Dr. Geoffrey Blatt dated October 31, 2003 pertaining to Claimant. His report notes he saw Claimant that day. She had undergone an MRI scan of her thoracic spine. Studies showed some bulging discs at T8-9 and T10-11, both of which tended to be greater on the left. The report notes Claimant's symptoms were on the right. He noted it should not be caused by any disc on the left-hand side. He noted Claimant had been on Actiq for the last three months. He strongly recommended she work away from long acting narcotics. He recommended she see a physiatrist and have a functional capacity evaluation. He recommended no new restrictions. His report concludes: “Ultimately, I believe it is safe for her to work, although it might be uncomfortable.”

Exhibit 3 includes Dr. Terrence Pratt's December 29, 2003 medical report pertaining to Claimant. The report describes the history of her work injuries in 2002 and 2003. It notes her present symptoms of continuous dull pain to the right of the mid back, intermittently radiating to under the right breast. Her symptoms are noted to be exacerbated with any activities involving the right upper extremity.

Dr. Pratt performed a physical examination and reviewed records. His impression was: “Thoracic syndrome with disc bulging/protrusion.” Dr. Pratt's report notes the abnormalities on the MRI of the thoracic region were primarily to the left and Claimant complained of right sided symptoms. His report notes it is difficult to relate those findings to her symptoms. The report notes that conservative treatment options are limited at this stage. He states that she has reached maximum medical improvement in relationship to the event of May 12, 2003. The report also states: “This event did not result in the onset of her symptoms, but did cause aggravation of underlying involvement.”

Dr. Pratt's report notes that Claimant is "significantly limited subjectively and even reports symptoms with just repetitive movements of her fingers on the right." She also reported some limitations in relationship to the left shoulder. The report notes that he would not recommend that Claimant perform any lifting in excess of twenty pounds and also avoid activities, which involve thoracic rotation, other than occasionally. The report notes that in direct relationship to the reported event on May 12, 2003, "This event was an aggravation of underlying involvement of the region and results in a five percent (5%) permanent partial disability to the body as a whole at 400 weeks."

Dr. Drisko's January 14, 2004 report states Claimant had reached maximum medical improvement. He provided a permanent partial disability rating of 0% of the body as a whole but stated, "Treatment not completed by me so I cannot do a proper rating."

Dr. Donaldson's January 26, 2004 note references chronic pain in Claimant's back. She was placed on Celebrex and a Duragesic patch. Dr. Donaldson notes on February 13, 2004: "Chronic thoracic strain". References are made to Duragesic.

Exhibit 3 and Exhibit F contain a report of Dr. James Scowcroft dated February 26, 2004 pertaining to Claimant. Dr. Scowcroft's report notes he saw Claimant that day for mid-back and flank pain. The chief complaint was noted to be mid-back and flank pain. The record notes Claimant was at work when she was walking and tripped and was able to catch herself before entirely falling, but did strain her back and her side. She had undergone injections. He performed a physical examination. Claimant had mild tenderness in her back and specific point tenderness over the seventh and eighth ribs. His impression was probable intercostal neuralgia. He started Claimant on Neurontin and reinitiated Lidoderm patch. He noted she had a prescription for Duragesic.

Dr. Donaldson's March 23, 2004 note references shoulder strain and chronic thoracic strain. Duragesic was refilled. An ortho referral was made.

Exhibit O and Exhibit F contain records of Dr. Leslie Thomas. These include Dr. Thomas' April 19, 2004 note documenting Claimant presented that day with persistent left shoulder discomfort. His note states that x-rays show clear cut calcific deposit at the rotator cuff tendon near the insertion of a tuberosity humerus. He recommended surgical excision of the calcific deposit. He notes Claimant had clavicular acromial arthritis and would benefit from subacromial decompression. Exhibit 2 includes Dr. Thomas' Curriculum Vitae. It notes Dr. Thomas is a Board Certified orthopedic surgeon licensed

to practice medicine in Missouri, and has staff privileges at North Kansas City Hospital and St. Lukes Northland Hospital.

Dr. Thomas' August 23, 2004 note states he saw Claimant that day. The note states in part that there was a direct causal relationship between Claimant's left shoulder discomfort and her work activity as a dealer. The note also states that Claimant was not complaining about a back injury at present. The note states that Claimant had sustained a slip on the ice and sustained a back injury.

Dr. James Scowcroft's report dated September 8, 2004 in Exhibit 3 notes Claimant's chronic right-sided thoracic pain. His report said there was really no further treatment except for a trial of spinal cord stimulator which Claimant did not want to pursue at that time. She was to follow up with Dr. Donaldson.

The records in Exhibit L include a copy of Dr. Leslie Thomas' November 12, 2004 Operative Report that documents "left shoulder acromioplasty with lateral clavicle resection and rotator cuff repair with excision of calcific deposits of the rotator cuff tendon."

Exhibit 3 includes records of HealthSouth documenting physical therapy treatments Claimant received in 2003, 2004 and 2005.

Dr. Thomas' records in Exhibit O include notes of Claimant's office visits there on November 22, 2004, December 6, 2004, January 25, 2005, March 4, 2005 and April 15, 2005. Dr. Thomas' March 4, 2005 office note states that Claimant has improved in terms of range of motion and was independent on home exercises with near full range of motion. The March 4, 2005 note also states, "We will have her resume full activities and continue with home exercises."

Dr. Thomas' April 15, 2005 note states Claimant still had some "slight weakness about the left shoulder as well as some limitation of motion. She was independent on home strengthening and range of motion exercises." The note states, "I feel she has reached the maximum medical benefit. We will have her pursue activities as tolerated. She is to return to see us on a p.r.n. basis."

Exhibit 3 includes Dr. Leslie Thomas' May 22, 2005 report. It states that Claimant had reached the maximum medical benefit regarding her left upper extremity. He placed Claimant's disability rating "based on mild limitation of motion and resection of distal clavicle at 10% loss of physical function to the involved upper extremity."

Exhibit P contains records of Dr. Jeffrey Bredemann pertaining to Claimant. His June 6, 2006 note states that Claimant presented for evaluation of right chest wall pain that had been going on since January 2002. The note describes the history of Claimant's illness and treatment. The note states in part: "She reports that, if the pain has its onset at home while doing housework, then she can rest and diminish the pain. Reclining or lying down seems to reliably improve her symptoms. However, she reports that when she is out at a store or in public with some other daily activity, that her pain can overtake her and make it difficult for her to complete whatever she is doing." The note states that Claimant said that she was not bothered with left shoulder pain and that "her only pain problem is this right torso and flank thoracic pain." The report notes that Claimant expressed "an openness to any further treatments that might be beneficial for her pain syndrome, and that might allow her to taper off the narcotics she is using to treat the pain." Medications, including Duragesic patch and Actiq lozenges, are noted. The results of the physical examination are noted.

Dr. Bredemann's report notes, "Right thoracic pain of uncertain etiology." He notes possibilities include "an intercostal neuralgia, or some other chronic neuropathic condition, that may be associated with mechanical disruption or injury of the muscles or soft tissues in the posterior spine area." He notes Claimant's pain is reported at 2-9 out of ten that is fairly consistent over time and associated with almost any activity. Claimant is noted to be frustrated with her apparent inability to work or do other basic activities. He notes Claimant is able to drive.

Dr. Bredemann's June 6, 2006 report sets forth certain recommendations. He agreed with Dr. Stuckmeyer that long term use of narcotics was not a good choice for pain syndrome that is of unclear etiology in a young person such as Claimant. He notes tolerance and physical dependence will become issues. He recommended tapering Duragesic patches over three weeks and using Actiq for activity. Claimant was concerned about Actiq causing her to become excessively drowsy. He thought she could adjust the medication.

Dr. Bredemann's June 6, 2006 report recommended a neurology consult. He noted that smoking cessation and weight loss can improve pain syndromes and should be pursued. He recommended consistent follow-up with a single physician to manage her pain symptoms. His report also states:

7. It is not my opinion that the Fentanyl patch or other narcotics would preclude Ms. Carter from working, since she is able to drive and perform other basic activities. She should certainly avoid any substantial decision making issues or safety equipment handling, but

basic clerical duties or other activity of that sort would not in my opinion be contra-indicated by the use of narcotics. We have many patients who take narcotics so that they may in fact return to work successfully. Rather, Ms. Carter's complaints of pain seem to be more the limiting issue. She reports pain with any trivial use of her arms for any extended period of time and it is difficult to conceive of the work that she would do that would not cause her to report this kind of pain. This is where a diagnosis could be most helpful to both her return to more full function and more effective and precise treatment of her pain syndrome.

Dr. Bredemann thought that Claimant's use of Fentanyl currently was reasonable and necessary. He also thought "It would be most beneficial if she could refrain from daily or at least constant use of opioids, which are likely to give unacceptable results over the course of the long term."

Exhibit 3 includes the medical report of Dr. Michael Ryan dated October 24, 2006 addressed to John Fox pertaining to Claimant. Dr. Ryan evaluated Claimant that day. His report notes the history of Claimant's injuries, a records' review, Claimant's current medications, past medical history, and social history. The results of his physical examination are described. The report notes an area of point tenderness in Claimant's thoracic region but no sensory loss was identified in any dermatomal pattern.

Dr. Ryan's assessment/recommendations notes in part:

Chronic right chest wall and back pain, questionable etiology. Some of the features suggest neuropathic pain, but she has tried a number of agents for neuropathic pain without much benefit. There are no objective benefits on clinical exam to corroborate any of her symptoms. The problems are mainly subjective in origin. She does have MRI imaging of her spine done which shows small disc herniations at T8-9 and T11-12, but those are on the left side. Her current symptoms are more around right T6 and I showed her a dermatomal pattern that is chart and she agreed that it appeared to be in the T6 dermatome.

Dr. Ryan's report notes that further evaluation possibly could include thoracic myelogram.

The records in Exhibit L include Dr. Dwayne Jones' July 11, 2006 report that notes he did not think Claimant was a candidate for surgery. He thought she was a candidate

for a trial of epidural spinal cord stimulation. He noted the history of her treatment including Duragesic and Actiq. He thought non-narcotic treatment options would be a better option.

The North Kansas City (NKC) records (Exhibit L) include Dr. Patrick Griffith's March 5, 2007 report. His impression was right thoracic radiculitis. He recommended a new MRI of the thoracic spine and a thoracic epidural steroid injection. The records include a report of Dr. Griffith documenting the administration of a thoracic epidural steroid injection on February 27, 2007. The records include Dr. Griffith's March 14, 2007 report documenting his administration of right T8 and right T10 paravertebral nerve root blocks. The records include his April 9, 2007 report documenting his thoracic epidural steroid injection.

The NKC records include August 17, 2007 MRI reports of the left hip and lumbar spine for left hip pain and back pain with left lower extremity radiculopathy. The MRI conclusion notes, "borderline mild spinal stenosis at the L3-4 and L4-5 levels related to spurring and mild disc bulging. At the L4-5 level there is borderline mild narrowing of the left lateral recess." The NKC records include Dr. Patrick Griffith's report pertaining to provocative discography for multi-level thoracic disc protrusions on August 21, 2007. The records include a CT report of the thoracic spine dated August 21, 2007 which notes "mild extravasated contrast at T10-T11."

The NKC records include a report dated August 31, 2007 documenting left hip joint injection for left hip pain. The records include Dr. Griffith's report dated August 30, 2007 documenting another left hip injection.

The NKC records include Dr. Patrick Griffith's September 17, 2007 report noting he reviewed the CT discography that showed a grade IV right posterior central annular tear and evidence of a disc protrusion at T10-11. He noted pain was non-concordant at that level and the disc was degenerative. The T9-10 disc was also degenerative. His impression was "left thoracic radiculitis with CT discography evidence of a T6-7 disc protrusion with grade IV annular tear with subsequent concordant pain response." He recommended percutaneous disc compression of the T7 disc using coablative therapy.

The NKC records include Dr. Patrick Griffith's report dated February 7, 2008 documenting T6-7 and T8-9 percutaneous disc decompressions. Dr. Griffith's February 28, 2008 report states that Claimant returned that day having had "no pain relief with the thoracic disc decompression." She continued to have pain about the right side of her thoracic spine that wrapped around her chest. He wanted to try another TENS unit. Dr. Griffith saw Claimant on March 27, 2008. He noted that "she is miserable." He had her

off opioid analgesics since November or December. She had continued right-sided thoracic radicular pain. He started her back on the Fentanyl patch with Roxicodone for breakthrough pain.

The records in Exhibit F include a report of Dr. Patrick Griffith dated April 25, 2008. Claimant continued to have pain in her mid-thoracic back that radiated to the right and affected her sleep adversely. Her pain was noted to be six on a scale of ten. He wanted to try her on Ultram and Tramadol and follow up in two weeks for thoracic epidural steroid injection. Dr. Griffith was going to refer Claimant for a functional capacity evaluation.

Dr. Griffith's April 25, 2008 report states in part: "My feelings are that Mrs. Carter has reached maximum medical improvement. I think it would be reasonable to assume that she is going to need ongoing medical therapy and may from time to time, require a thoracic epidural steroid injection; perhaps 3x per year. Consideration could be given to the trial of spinal cord stimulation. However, I have no strong feeling that that would be helpful, nor that we would be able to capture her areas of pain."

The records in Exhibit F document that Dr. Griffith saw Claimant again on June 12, 2008 for a lumbar epidural steroid injection regarding her low back. His impression was lumbar spinal canal stenosis. He administered a second lumbar epidural steroid injection on July 14, 2008.

Dr. Griffith wrote a July 30, 2008 report to Employer's attorney pertaining to Claimant. He noted that Claimant's percutaneous disc decompression procedure was not helpful "primarily because the discs were markedly degenerative." Dr. Griffith noted that he attempted to manage Claimant "without opioid analgesics, but unfortunately her pain was functionally limiting and her quality of life was markedly reduced." His report notes that medication issues for Claimant's work-related thoracic injury were Fentanyl patch, Roxicodone and Cymbalta. He did not think Claimant was a candidate for spinal cord stimulation. He believed a surgical spine consultation in the past was not viewed as a viable option. His report concludes: "I would see her requiring medical management for this problem indefinitely."

Dr. Griffith's August 18, 2008 report notes that he recommended another epidural steroid injection for her lower back pain as part of her "non-work related injury." Dr. Griffith's September 29, 2008 report documents bilateral lumbar medial branch injections. His October 27, 2008 report documents radio frequency neuroablation at L2-L5 for low back pain. Dr. Griffith's November 24, 2008 report notes Claimant's low back pain secondary to lumbar degenerative disc disease and disc bulging which has

improved, but not completely gone, borderline spinal canal stenosis at L3-4 and L4-5, and chronic pain secondary to thoracic disc protrusions. Claimant was continuing to use Fentanyl patches, Roxicodone and Cymbalta.

Exhibit F contains records dated August 21, 2008 documenting physical therapy and hip and lower back pain that started about one year before. Physical therapy records dated September 18, 2008 in Exhibit F document throbbing pain in Claimant's left foot.

The NKC records document another lumbar steroid injection on March 23, 2009. Dr. Griffith saw Claimant on April 20, 2009. He noted her low back and bilateral leg pain were markedly improved. She still had pain in the right side of her lower back with radiation in the right groin. She continued on Fentanyl patches and Roxicodone and was started on Neurontin, but had not continued that on a regular basis. He recommended lumbar medial branch nerve blocks on the right. His report notes, "For the thoracic pain and thoracic disc protrusion, the medication seems to be helpful with that." The report notes Claimant exhibited some tolerance with the Roxicodone. They discussed the possibility of weaning her off temporarily. He felt uncomfortable about increasing her dose. He refilled her Fentanyl patch and Oxycodone.

The NKC records contain a report of lumbar medial branch radio frequency on June 3, 2009. Dr. Griffith's records note Claimant and her husband recently moved to their new home and Claimant "has been doing everything associated with moving, which would be packing boxes and now unpacking the boxes." The report notes that activity increased her pain. Dr. Griffith changed her medication from Roxicodone to Percocet.

Evaluation Physicians

Dr. James Stuckmeyer

Exhibit D contains the deposition of Dr. James Stuckmeyer taken on August 31, 2009, with Stuckmeyer Deposition Exhibit 1, his Curriculum Vitae, Stuckmeyer Deposition Exhibit 2, his medical report dated July 9, 2005 addressed to Claimant's attorney pertaining to Claimant, Stuckmeyer Deposition Exhibit 3, his January 21, 2009 report addressed to Claimant's attorney pertaining to Claimant, and Stuckmeyer Deposition Exhibit 4, his June 5, 2009 report addressed to Claimant's attorney pertaining to Claimant. Dr. Stuckmeyer was Board Certified by the American Board of Orthopedic Surgeons in 1989. Past hospital affiliations are noted. No hospital affiliation is noted since 1995.

Dr. Stuckmeyer's July 9, 2005 report notes he evaluated Claimant on June 30, 2005. His report identifies the medical records he reviewed. Claimant reported she sustained three separate work-related injuries at Harrah's, the first on January 29, 2002, the second on May 12, 2003, and the third on June 16, 2003. His report notes her complaints and treatment relating to those injuries. He summarizes her treatment records in detail. The report discusses Claimant's current complaints and conditions and the results of his physical examination of her.

Dr. Stuckmeyer set forth several conclusions within reasonable medical certainty. He stated that on or about January 29, 2002, Claimant sustained an injury to her thoracolumbar spine following a fall on ice that necessitated treatment. She was capable of continuing to work, but had ongoing symptoms of right-sided chest wall type pain. His report notes her injury on or about May 12, 2003 when she tripped on uneven pavement and again sustained an injury to the thoracolumbar spine that needed further treatment. His report notes that he felt her diagnosis was consistent with degenerative disk disease at multiple levels of the thoracic spine is outlined in various MRIs. He did not feel that she would benefit from intervention.

Dr. Stuckmeyer's report states that Claimant sustained a 10% permanent partial disability to the thoracic spine as a direct result of the January 29, 2002 accident, and an additional 15% disability to the thoracic spine causally related to the May 12, 2003 accident.

Dr. Stuckmeyer's report states that the repetitive nature of Claimant's occupation necessitated the surgical treatment performed by Dr. Thomas regarding the left shoulder. Dr. Stuckmeyer felt Claimant had reached maximum medical improvement regarding the shoulder, and afforded a 25% permanent partial disability to the left shoulder.

Dr. Stuckmeyer recommended ongoing treatment for the chronic thoracic pain with radicular symptoms into the right-sided chest wall. He agreed with Dr. Blatt that every attempt should be made to wean Claimant off narcotics.

Dr. Stuckmeyer's report also states that he did not feel Claimant was employable because she was under Fentanyl dosages on a daily basis. His report notes Fentanyl is approximately ten times the narcotic strength of morphine and impedes an individual's sensory capabilities. His report further states:

Unless Ms. Carter can be appropriately weaned from these medications it would be the opinion of this examiner that as a result of the accident of May 12, 2003, and a subsequent repetitive injury of

June 16, 2003, that the patient is permanently and totally disabled. It is my opinion that the back condition is a hindrance or obstacle for employment or reemployment.

Dr. Stuckmeyer's report states that his opinions are rendered within a reasonable degree of medical certainty.

Dr. Stuckmeyer's January 21, 2009 report, Stuckmeyer Deposition Exhibit 3, notes that he reevaluated Claimant on January 14, 2009. His report identifies medical records he reviewed. The report notes the history of her injuries and his permanent partial disability assessments he made in his earlier report.

Dr. Stuckmeyer's January 21, 2009 report discusses portions of the medical records that he reviewed, including records of Dr. Bredemann, North Kansas City Hospital, Dr. Michael Ryan and Dr. Patrick Griffith. Those records describe treatment Claimant received between June 6, 2006 and September 29, 2008, including examinations, MRIs, thoracic epidural injections, and the percutaneous disk compression performed at T6-T7 in February 2008. He notes Claimant has continued pain medication, including Fentanyl patches and Roxicodone, and lumbar injections.

Dr. Stuckmeyer's January 21, 2009 report notes Claimant reported persistent symptoms of pain in the right thoracolumbar region. Dr. Stuckmeyer performed a physical examination.

Dr. Stuckmeyer's January 21, 2009 report sets forth the following conclusions that are stated within a reasonable degree of medical certainty:

It is my opinion that the accident of January 29, 2002, was the substantial contributing factor to the injury to Ms. Carter's thoracic spine, need for medical treatment, and subsequent disability. I would render a 10% disability to the body as a whole as a result of that accident.

It is my opinion that the accident of May 12, 2003, was the substantial contributing factor to the exacerbation and acceleration of the injury to Ms. Carter's thoracic spine, need for medical treatment, and subsequent disability. I would render a 25% disability to the body as a whole as a result of that accident.

It is my opinion that the repetitive nature of the employment culmination in an accident date of June 16, 2003, was the substantial contributing factor to the injury to Ms. Carter's left shoulder, need for medical treatment, and subsequent disability. I would render a 25% disability to the left shoulder as a result of the repetitive occupational duties.

From an orthopedic standpoint, I do not feel that Ms. Carter is capable of returning to gainful employment. I would restrict her to no prolonged standing, no prolonged walking, and no repetitive lifting, bending, stooping, or squatting. I would also limit her to no repetitive stair climbing and no lifting to exceed 10 pounds on an occasional basis. In addition, based on the heavy narcotic utilization, I do not feel this patient should be driving a vehicle nor should she be around hazardous equipment or hazardous machinery.

Specific to the left shoulder, I would recommend no repetitive lifting, no repetitive pushing or pulling, and no lifting over shoulder height greater than 10 pounds on an occasional basis. I would recommend proceeding with a vocational assessment to determine Ms. Carter's employability. That being stated, this patient has not worked since 2003, and based on the chronicity of her thoracolumbar complaints, left shoulder complaints, and heavy narcotic utilization, it is doubtful that she would be reasonably employable by any employer and it is my opinion that she is permanently and totally disabled as a result of the cumulative effect of the accidents.

In regard to future treatment recommendations, I do feel the patient is going to require long-term utilization of the Fentanyl patches and Oxycodone for breakthrough pain. I would also recommend continuation of her treatment with Dr. Patrick Griffith. These requirements will be a lifelong situation.

Stuckmeyer Deposition Exhibit 4 is Dr. Stuckmeyer's June 5, 2009 report addressed to Claimant's attorney. It notes that Dr. Stuckmeyer reviewed reports of Terry Cordray. Dr. Stuckmeyer's June 5, 2009 report states in part that Claimant was not permanently and totally disabled from the open labor market due to the January 29, 2002 back injury taken in isolation. The report notes Claimant returned to the workforce until May 12, 2003. His report further states:

I think it is fair to state that it is due to a combination of the January 29, 2002 injury in combination with the more significant injury of May 12, 2003 that has rendered Ms. Carter permanently and totally disabled.

When one considers the injury to the left shoulder, taken in isolation, it would be the opinion of this examiner that Ms. Carter would be able to return to the workforce. I would concur with Mr. Cordray that the thoracic injuries in isolation, in conjunction with the narcotic medication, would be enough to render Ms. Carter permanently and totally disabled. That being stated, as outlined in prior commentary, she does have significant disability to the left shoulder as a result of repetitive use.

Dr. Stuckmeyer testified by deposition (Exhibit D) on August 31, 2009. He testified he had treated thoracic spines and shoulders in the past and had done surgery to the thoracic spine and shoulders in the past. He testified he had reviewed the records identified in his reports. He testified regarding portions of his reports, and his testimony was generally consistent with his reports.

Dr. Stuckmeyer thought it was fair to state that after Claimant's first accident she "definitely sustained an injury to her thoracic spine." He noted an MRI scan of July 10, 2002 revealed a disk osteophyte complex at T10-T11 with minimal cord compression. He testified that the osteophyte complex was not caused by the fall and was a preexisting problem. She has persistent symptoms that were waxing and waning between the January 2002 accident and May 2003 accident.

Dr. Stuckmeyer testified that thoracic disk injuries are very difficult to treat, have bizarre symptoms, and MRI scans are not 100% accurate. He thought Claimant had significant injury the first time, and an aggravation and more injury to the thoracic spine the second time. He said it was hard to tell whether Claimant was at maximum medical improvement because Dr. Griffith stated in July 2008 that medial branch blocks might be warranted. He was aware that Dr. Griffith had stated that Claimant was at maximum medical improvement in April 2008.

Dr. Stuckmeyer testified that the likelihood of getting Claimant off Fentanyl and narcotic medications "is probably nil at this stage of the game no matter what they do to her." He testified that Claimant has chronic thoracic back pain with radicular symptoms with multi-level disk involvement and failure to respond to extensive treatment and chronic narcotic medication. He thought Claimant would never be able to get off the

narcotic medications. He put her on restrictions and felt that “essentially she was permanently and totally disabled.”

Dr. Stuckmeyer was asked whether Claimant should remain on the Fentanyl and Roxicodone in the future. He said it would be unlikely that she will ever be able to get off those medications. He testified that Fentanyl is ten times stronger than morphine and is the strongest narcotic commercially available. He noted Claimant is on them daily.

Dr. Stuckmeyer understood Claimant is “pretty much in constant pain regarding the thoracic spine and chest wall pain and it’s exacerbated by activities.” He thought that Claimant represented a relatively typical individual with thoracic spine trauma.

Dr. Stuckmeyer testified regarding Claimant’s restrictions and percentage of disability, and his testimony was consistent with his reports. He noted that he had increased Claimant’s disability from 15% to 25% related to the second accident, after she had undergone additional treatment and he obtained additional information.

Dr. Stuckmeyer also testified (page 37):

And I think as I opined throughout these letters when you take the two thoracic injuries and the fact that she’s on chronic narcotic use and there’s really nothing of a surgical standpoint to offer her any relief, I felt that she was permanently and totally disabled.

Dr. Stuckmeyer said that was despite his 10% rating from the 2002 injury and the 25% rating from the 2003 injury.

Dr. Stuckmeyer testified Claimant was not having any thoracic complaints before 2002 and he saw no suggestion in any of the records that she had preexisting thoracic complaints by January 2002. He said that both the January 2002 and the May 2003 injuries were substantial contributing factors to the thoracic spine problems that he diagnosed. He thought that Claimant “is basically incapable of engaging in the open labor market in some capacity.” He believed that Claimant was legitimately hurting. That was demonstrated by her willingness to undergo thoracic discography where they stick a five inch needle in your thoracic spine.

Dr. Stuckmeyer testified regarding Claimant’s left shoulder. He testified she had undergone a left shoulder acromioplasty with lateral clavicle resection and rotator cuff repair with excision of clavic deposits from the rotator cuff. He rendered a 25% disability to the left shoulder. He reiterated his restrictions specific to the left shoulder that were

consistent with his 2009 report, including no lifting over shoulder height greater than ten pounds on an occasional basis. He noted Dr. Thomas, the treating doctor, had released Claimant on April 15, 2005 as to her shoulder.

Dr. Stuckmeyer testified that if you consider Claimant's left shoulder in isolation, she would be employable. He also testified that if you considered the thoracic spine in isolation and negated the left shoulder, Claimant would not be employable. He testified that Claimant's 2002 injury in isolation did not cause her to be totally disabled because she returned to work.

Dr. Stuckmeyer was asked the following question and gave the following answer (page 51):

Q. Do you believe that the January 2002 and May 2003 accidents in combination have left this lady permanently and totally disabled from a medical standpoint or do you think it's the May 2003 accident taken in isolation that's left her permanently and totally disabled from a medical standpoint?

A. I commented on page 4 of my June 5th, 2009 commentary, first paragraph, I think it is fair to state that it is due to a combination of the January 29, 2002 injury in combination with the more significant injury of May 12th, 2003, that has rendered Ms. Carter permanently and totally disabled.

Dr. Stuckmeyer testified his opinions had been within a reasonable degree of medical certainty.

Dr. Stuckmeyer testified that Claimant is taking Fentanyl and other medications as the result of a combination of the two injuries to her thoracic spine. He testified that her symptoms exploded on May 12, 2003 necessitating further treatment of the thoracic spine. When he said her symptoms exploded, he meant that things got a whole lot worse—her thoracic spine significantly deteriorated.

Dr. Stuckmeyer agreed that Claimant's MRI of her low back showed borderline mild spinal stenosis at L3-4 and that she had degenerative changes in her lumbar spine, specifically calcification or osteophyte complex. She was having lumbar spinal canal stenosis and left leg pain for which she received a series of epidural injections and medial branch blocks. He testified if Claimant had no lumbar complaints, his restrictions would

be the same. Claimant was not really complaining of lower back pain when he evaluated her in 2009.

Dr. Stuckmeyer was aware that Claimant returned to work between January 2002 and May 2003. He was aware that she did not receive any treatment between August 2002 and May 2003. He understood she returned to regular duty status. It was his understanding she was not on any chronic narcotic pain medications immediately prior to her May 2003 work injury. He understood she had taken a family vacation in Hawaii between January 2002 and May 2003. He knew she was not prescribed a chronic narcotic pain medication until after the May 2003 injury. Claimant was not taking Fentanyl prior to the May 2003 accident.

Dr. Stuckmeyer was asked the following question and gave the following answer (pages 82-84):

Q. But we've already got medical records that would indicate she wasn't having those narcotics prior to this work-related injury, so explain to me how it could have been related to the combination of the two when it wasn't until after the May of '03 injury that she was prescribed them.

A. My global perception of this case is that this woman sustained an injury – and I'll go over this again – in January '02. She's evaluated with an MRI scan which was equivocal, had persistent symptoms well documented not only in commentary by me but by other examining physicians and, I believe, even by her deposition. She did undergo a series of epidural injections ending in August '02, which did offer her some relief. In August '02 she has some relief, she returns to work, and then in May '03 she sustains this injury. And as I've testified to, she's subsequently reevaluated with an MRI scan following the '03 accident. It wasn't until 2008 that they ultimately did the provocative discography.

My experience with thoracic spine is as follows. She had persistent thoracic back pain with radicular symptoms into the chest wall indicating she probably had a disc herniation that was never picked up in the '02 and the '03 MRI scan. Based on the patient's history, in '03 she had an explosion of her symptoms, which means that she probably caused yet another disc herniation at yet another level in the thoracic spine. I think it's fair to state and it's my

commentary she had an injury in '02, she had ongoing problems, she was not on narcotics, but she had ongoing chest wall pain. My suspicion is she had an undiagnosed thoracic disc herniation is why she was having the radiating symptoms in the chest wall. '03 things exploded, things got worse, but five years subsequent to the '03 injury she was ultimately diagnosed with having these disc herniations.

Dr. Stuckmeyer testified he did not recommend any additional future medical treatment to the left shoulder. He thought she would need long term management from a pain management group for her narcotics with regard to the thoracic spine. He said she would need to stay on the Fentanyl for her lifetime as a result of the thoracic spine problems.

Dr. Stuckmeyer's opinions were expressed within a reasonable degree of medical certainty.

Dr. David Clymer

The deposition of Dr. David J. Clymer taken on November 9, 2009 was admitted as Exhibit 1 along with Clymer Deposition Exhibit 1, his Curriculum Vitae, Deposition Exhibit 2, his July 13, 2009 medical report addressed to John Fox pertaining to Claimant, Deposition Exhibit 3, WebMD document pertaining to Fentanyl, Deposition Exhibit 4, document titled "Fentanyl Side Effects", Deposition Exhibit 5, document entitled "Fentanyl", and Deposition Exhibit 6, letter from John Fox to Dr. David Clymer dated July 7, 2009. Objections to Clymer Deposition Exhibits 3, 4, and 5 are sustained.

Dr. Clymer's Curriculum Vitae notes that he is a Diplomat of the American Academy of Orthopedic Surgeons and is Board Certified by the American Board of Orthopedic Surgeons. He is licensed to practice medicine in Missouri and Kansas. His hospital affiliations and education are noted.

Dr. Clymer's July 13, 2009 medical report notes medical records that he reviewed. They include records of Dr. Ryan, Dr. Thomas, Dr. Drisko, Dr. Stuckmeyer, Dr. Pratt, Dr. Blatt, Dr. Griffith, Research Medical Center, St. Luke's, Northland Hospital, North Kansas City Hospital, Concentra Medical Center, Clay Family Medicine Clinic and HealthSouth Physical Therapy. He also reviewed Claimant's deposition testimony dated June 30, 2009. His report notes Claimant is 63 years old and is currently unemployed. The report notes that Claimant alleges injuries at Harrah's that "resulted in rather chronic ongoing right sided back and chest wall pain as well as some less severe ongoing left shoulder pain." His report discusses the history of Claimant's slip and fall on ice on

January 29, 2002, and her subsequent conservative treatment. The report notes she continued to work in her regular duties but with some discomfort.

Dr. Clymer's report discusses Claimant's second injury when she stumbled over uneven concrete on a sidewalk. The report notes she stated she had recurrent pain that was very similar to the pain after the first fall with primarily right-sided chest wall searing discomfort. She also complained of increasing discomfort in the upper extremities. The report notes her left shoulder symptoms apparently became much worse in June 2003. The report notes that her shoulder injury sounded more of a culmination of repetitive use over time rather than an isolated accident or injury. Her treatment at Concentra and MRI study was noted.

Dr. Clymer's report notes her study at Northland Imaging revealed some hypertrophic degenerative changes at the AC joint and some calcification in the distal supraspinatus tendon consistent with calcific tendinitis and impingement. The report notes there was not evidence of a significant rotator cuff tear. The report notes Claimant's referral to Dr. Drisko, and the MRI thoracic spine done on October 27, 2003. The report notes Claimant's evaluation by Dr. Blatt in October 2003. The report notes Claimant's evaluation by Dr. Pratt, and his suggested limitations and permanent partial disability at 5% as a result of the workplace accidents.

Dr. Clymer's report also notes Claimant's referral to another doctor that resulted in surgical debridement of the left shoulder in November 2004, a later release at MMI, and the treating doctor's 10% disability rating involving left shoulder. The report notes that Dr. Blatt suggested Claimant try to limit or avoid narcotic medications, and notes the doctor who operated on her left shoulder also suggested a pain management program in hopes that she could wean down on her medications.

Dr. Clymer's report notes that Claimant was seen by Dr. Bredemann to assist in managing her pain medications, and that she was then seen by Dr. Griffith, who performed a CT scan and discogram. The report notes that Dr. Griffith performed a percutaneous disk decompression in February 2008 that resulted in very limited change in subjective symptoms.

Dr. Clymer notes that Claimant continues to use Fentanyl patch with occasional Oxycodone for occasional breakthrough pain. His report states that Claimant notes her left shoulder symptoms have actually improved with only mild remaining crepitus and discomfort with repetitive movement.

Dr. Clymer's report notes that Claimant has "rather significant ongoing right chest-wall pain which is her primary complaint." She reports that her symptoms are more aggravated by repetitive activities such as standing at the kitchen sink to prepare meals or use her hands and arms in a repetitive fashion. The report notes that at times, Claimant's symptoms are rather severe and almost incapacitating, and at other times, they are moderate. She reports that she never feels her symptoms resolve completely. Her primary complaint is noted to be right-sided chest wall pain at about the T-7 or T-8 distribution.

Dr. Clymer's July 13, 2009 report notes the results of his physical examination of Claimant. He notes some generalized vague discomfort in the right thoracic region about on the line of T-7 extending out toward the lateral side of just beneath the right breast anterior. He notes symptoms are somewhat aggravated by compression of the rib cage, but there is no crepitus or any signs of rib instability. He notes mild subacromial crepitus with movement and mild discomfort with impingement maneuvers involving the left upper shoulder.

New x-rays of the left shoulder and thoracic spine were obtained on July 13, 2009. Dr. Clymer's report notes the thoracic spine study shows "minor degenerative changes with some endplate spurring and mild disk space narrowing at several levels. There is no evidence of fracture nor significant deformity. No other abnormalities are noted." X-rays of the left shoulder reveal mild degenerative change at the acromioclavicular joint.

Dr. Clymer's report sets forth the following opinions:

In summary, Ms. Carter's history and current clinical findings suggest some mild thoracic degenerative disk disease and spondylosis with some ongoing irritation or nerve root damage in the region of the right T-7 level. It is possible that the 2 falls at work may have aggravated this process; however, there is no evidence of a significant disk herniation nor significant ongoing radiculopathy or myelopathy. Her ongoing problems are primarily a pain management issue with subjective discomfort in this region much greater than I would expect given the objective findings. With regard to the left shoulder, her history and findings were consistent with a shoulder contusion and sprain with some associated rotator cuff tendinitis and calcific tendon damage. This has been treated quite nicely with surgical decompression with only mild remaining symptoms. I suspect her repetitive activities at work and the 2 falls described may have contributed to this rotator cuff tendinitis process as well.

I feel Ms. Carter has clearly reached maximum medical improvement with regard to these issues. With regard to the left shoulder, she has only mild ongoing discomfort but some limitation with regard to movement and strength. I would encourage an ongoing general fitness and exercise program and would expect her shoulder symptoms will actually improve somewhat with time. At this point, based on her history, operative findings and current complaints, I would estimate a permanent partial disability at 7% of the left upper extremity at the level of the shoulder related to this process.

With regard to her more significant complaints of thoracic and chest wall pain, the issue is much more complex and unclear. All of her clinical and radiographic studies have revealed only mild degenerative disk change but her subjective symptoms have been more consistent with radiculopathy in the mid thoracic region. I think her treatment has been appropriate and reasonable. Unfortunately, it has not resulted in clear resolution of her symptoms. She probably does have some nerve root irritation and simply much more significant subjective complaints with this than an average person. Consequently, I feel she has also reached maximum medical improvement with regard to this process. I do not think there is much else to do at this point aside from a reasonable pain management program. I agree with the other physicians who have stated that a decrease in her use of narcotics would be helpful and appropriate; however, she seems to be reasonable and is using her current medications in an effort to be more active and functional and does not seem to be having any major side effects or problems. Consequently, although I would suggest she continue to try to taper down her use of narcotic medications, I believe it would be reasonable to continue with a Fentanyl patch at 50 mcg daily so long as this results in clear symptomatic improvement and a more functional and active lifestyle. If the medication caused any side effects or problems or resulted in diminished activity, then I think she would be better off to taper down to a lower dose or off completely. At this point, however, it seems that she is functioning well and the current dose of Fentanyl is acceptable. I would suggest she avoid use of any other additional narcotics. She might find that occasional use of a muscle relaxer or an over-the-counter anti-inflammatory would be helpful. I would not anticipate that any other medical or surgical treatment would be necessary.

At this time, based upon her current findings, I feel Ms. Carter does have some ongoing permanent disability with regard to this chronic thoracic pain. Most of her disability is based upon her subjective level of discomfort as opposed to objective findings, however. This makes assessment of true disability difficult. I feel Ms. Carter is reasonable and cooperative in my evaluation and believes she probably does have ongoing discomfort, however, I would not anticipate this level of discomfort should prevent her from most moderate level activity. In fact, I would encourage an ongoing stretching, strengthening and exercise program and feel she probably could also work provided this did not involve very heavy lifting or very highly repetitive activities. A periodic change in position would be appropriate. Use of her arms and shoulders would be acceptable but I would avoid highly repetitive overhead activity or activities which cause excessive strain in the thoracic region. I would suggest a lifting limit in the range of 20 to 25 pounds.

Based upon her current findings and ongoing complaints, I feel she has evidence of permanent partial disability equal to 10% of the body as a whole as a result of the thoracic spine process with disk injury and subsequent surgery as described above.

Finally, with regard to your specific question about working while using Fentanyl patch, I believe an appropriate dose of Fentanyl would not preclude Ms. Carter from activity and work and therefore would not feel that there is any need for restriction from work activities in the past or the future while she is on Fentanyl beyond those physical restrictions which I have just outlined.

Dr. Clymer testified on November 9, 2009 (Exhibit 1) that he is an orthopedic surgeon and has been Board Certified in orthopedic surgery since 1987. He has provided direct treatment for patients with shoulder complaints and thoracic spine complaints. He has performed surgeries on patients with shoulder complaints. He has performed surgeries on backs, including thoracic spines.

Dr. Clymer testified regarding Claimant's history. His testimony was consistent with his report. He testified that the initial MRI revealed degenerative disk and osteophyte changes in the mid-thoracic region, and that condition caused some canal encroachment. He noted osteophyte changes are bony spurring that are caused by age and

degenerative change. He stated the MRI of the thoracic spine did not show up as disk herniation. He testified that the MRI study of the thoracic spine did not demonstrate what could be identified or characterized as a traumatic or acute condition of the thoracic spine.

Dr. Clymer noted that the MRI of the left shoulder showed some hypertrophic degenerative changes at the AC joint in calcification in the distal supraspinatus tendon. He said those degenerative changes were consistent with age and activity. He testified the MRI of the left shoulder did not demonstrate any acute injury to the structure of the left shoulder. He noted that Claimant was seen by Dr. Blatt, Dr. Pratt, and then by Dr. Leslie Thomas. He said his report had a typographical error when it referred to Dr. Carter. He understood that Claimant had surgery of the left shoulder that consisted of an acromioplasty with lateral clavicle resection and excision of calcified deposits. That was done to decrease arthritic change at the acromioclavicular joint and decrease the bony impingement on the rotator cuff. Based on his review of the operative report from Dr. Thomas, he did not believe there was any evidence of traumatic or acute injury in that shoulder joint.

Dr. Clymer noted that Dr. Thomas eventually found Claimant at maximum medical improvement and rated her at 10% of the left shoulder, and suggested she might consider weaning herself off some of the narcotics. He noted she was then seen by Dr. Jeff Bredemann, a pain management doctor. She was then next seen by Dr. Patrick Griffith, who did a percutaneous disk decompression in February 2008. That procedure is “an attempt to remove some of the disk material from within disk space in hopes that it might decompress the amount of disks and diminish the amount of bulging and possibly thereby decrease back pain.”

Dr. Clymer testified regarding Claimant's medications and complaints, the results of his physical examination, regarding the results of his x-rays, and the diagnosis of Claimant's spine condition. His testimony was consistent with his report. He testified that Claimant was consistent in describing her symptoms in terms of location and severity, but the subjective complaints always seem to be much greater than the objective findings would suggest.

Dr. Clymer also testified with a reasonable degree of medical certainty as to the diagnosis of Claimant's left shoulder condition. He stated that he felt “the shoulder was consistent with a shoulder contusion and sprain with some associated chronic rotator cuff tendinitis and calcific tendon change.” He stated it did not appear that Claimant's work-related falls resulted in a significant acute damage to the shoulder. It was basically gradual progressive degenerative change. He felt the work activities probably resulted in

some aggravation of the degenerative calcific tendinitis. He felt Claimant was at maximum medical improvement with respect to the left shoulder and the thoracic spine.

Dr. Clymer's opinion with a reasonable medical certainty regarding the extent of permanent partial disability of Claimant's left shoulder was 7% disability of the left upper extremity at the level of the shoulder. He encouraged some decrease in narcotics, if possible, with respect to treatment of Claimant's thoracic spine.

Dr. Clymer did not believe that there was any objective medical reason why Claimant could not return to some kind of gainful employment. He did not personally feel individuals who are taking pain medications are unable to work. He has many patients who are on pain medications who are working. Dr. Clymer felt that Claimant had a 10% disability of the thoracic spine with a reasonable degree of medical certainty. He felt that Claimant should probably avoid very heavy lifting or very highly repetitive activities and suggested a lifting limit in the range of twenty to twenty-five pounds. Dr. Clymer said he did not have the sense that Claimant was actively malingering.

Dr. Clymer said that Fentanyl is stronger than morphine. It is used for any pain, including back pain. He stated people who are appropriately managed on Fentanyl can drive. He agreed that Claimant is definitely a chronic pain management case at this point.

Dr. Clymer testified that Claimant's two falls were a substantial contributing factor to making her thoracic spine/nerve root irritation problems symptomatic. He testified that Claimant's dealing of cards would be a substantial contributing factor to a least aggravating a degenerative problem with the left shoulder necessitating the surgery that she had with Dr. Thomas. He felt that could have been a substantial contributing factor.

Dr. Clymer stated that he would not anticipate from his review that it would be necessary for Claimant to have to lie down to control the pain through the course of a day. He thought it was more likely that Claimant's symptoms will improve gradually rather than worsen with the treatment parameters that he described. He expected there will be some gradual improvement over the course of one to three years. He did not have any feel as to how the 10% he assigned to the thoracic spine ought to be divided between the two falls. He agreed that Claimant's use of the Fentanyl patch would not preclude her from doing basic clerical duties and activities of that sort, and would not preclude her from working since she is able to drive and perform other basic activities though she should avoid substantial decision making issues in terms of operating equipment.

Vocational Evidence—Terry Cordray

The deposition of Terry Cordray taken on September 14, 2009 was admitted as Exhibit E along with Cordray Deposition Exhibits 1, his Curriculum Vitae, Cordray Deposition Exhibit 2, his March 9, 2009 report pertaining to Claimant addressed to her attorney, Cordray Deposition Exhibit 3, his May 7, 2009 report pertaining to Claimant addressed to Claimant's attorney, and Cordray Deposition Exhibit 4, his September 1, 2009 report pertaining to Claimant addressed to her attorney.

Cordray Deposition Exhibit 1 notes that Mr. Cordray has an M.S. in Rehabilitation Counseling, and that he is a Certified Rehabilitation Counselor, Certified Case Manager, and Licensed Professional Counselor. He is a Diplomat of the American Board of Vocational Experts.

Cordray Deposition Exhibit 2 notes that he performed a vocational assessment of Claimant and met with her on January 13, 2009. His report identifies the medical records and reports that he reviewed. It identifies functional limitations set forth by Dr. Stuckmeyer, Dr. Leslie Thomas, Dr. Blake Donaldson, Dr. Jeffrey Blatt, and Dr. Neil Mikel. His report discusses Claimant's educational background, social background, previous medical conditions, work background, wages, Claimant's perspective of injury including physical limitations Claimant believed she had, and activities of daily living. The report also sets forth the results of vocational tests administered to Claimant.

Mr. Cordray's March 9, 2009 report sets forth the following conclusions:

Given Ms. Carter's current vocational profile as a 62 year old woman who is limited to sedentary work, who has further limitation to the left shoulder with no lifting over shoulder height, who is taking heavy narcotic medication including Oxycodone and Fentanyl patch, it is my opinion that she is totally disabled.

I do not believe it is realistic to expect that an employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to hire an individual who is a 62 year old woman, who has performed as a dealer at a casino for her past ten years of employment, who is limited to alternating to sit/stand jobs with limitations on reaching and who is also required to take heavy narcotic medications which limit her abilities to drive. Therefore given her current presentation as well as reliance upon the medical records reviewed, it is my opinion that Ms. Carter is totally disabled.

It is my opinion that her back injury, in isolation, places her at sedentary occupations, which do exist in the labor market. However, when one considers her upper extremity impairments in combination with her previous back injury, she is totally disabled.

At age 62, even though she has good cognitive skills and is an intelligent woman, I do not believe it is realistic for an individual of her age to attempt any vocational rehabilitation retraining.

Therefore it is my opinion that Ms. Carter is totally disabled and no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to hire Ms. Janet Carter for any job given her current presentation and that she is totally disabled.

Mr. Cordray's May 7, 2009 report, Cordray Deposition Exhibit 3, states in part on page 2:

In my report of March 9, 2009 I noted that following her first injury in January 2002, Ms. Carter did attempt to return to work. After she had returned to work, Ms. Carter sustained a second injury in which she further injured her back. Following this injury, Ms. Carter returned to her usual occupation as a dealer at Harrah's Casino until June 16, 2003 at which time she was no longer able to perform her job.

A review of the medical records indicates that Ms. Carter is taking significant narcotic pain medications including Fentanyl patch and Oxycodone. These medications have a side effect of an inability to be alert and attentive. Based upon these two injuries, Ms. Carter is currently restricted to no prolonged standing, no prolonged walking and no repetitive lifting, bending, stooping or squatting. She is also limited to no repetitive stair climbing and no lifting to exceed ten pounds on an occasional basis.

Based upon these restrictions alone, given Ms. Carter's need to use narcotic pain medications, including Fentanyl patch and Oxycodone which have a significant effect of an inability to be alert and attentive, Ms. Carter was totally disabled following the second injury of May 12, 2003.

It was this injury that Dr. Stuckmeyer noted resulted in the use of heavy narcotic medication usage which has rendered Ms. Carter totally disabled.

The upper extremity disability resultant from cumulative trauma from dealing cards by itself or in combination with the previous two injuries did not result in Ms. Carter's total disability.

Although it is impairment, Ms. Carter's total disability is a result following her second injury of May 12, 2003 which limited her to sedentary occupations with the additional need of use of heavy narcotic medications.

Therefore it is my opinion that Ms. Carter's total disability is a result of the second injury of May 12, 2003.

I hope this clarifies the matter of Ms. Carter's permanent and total disability.

Mr. Cordray's report notes his opinions are based upon a reasonable degree of vocational rehabilitation certainty.

Mr. Cordray's September 1, 2009 report, Cordray Deposition Exhibit 4, states in part:

As you would note in my previous reports, my primary concern regarding Ms. Carter's ability to work in the labor market is her need to use narcotic pain medications including the Fentanyl patch and Oxycodone which have a significant effect on her ability to be alert and attentive.

Ms. Carter's need to take narcotic medication, either from the first injury in January 2002, the second injury in May 2003 or the combination of those two injuries, prevents Ms. Carter from performing sedentary types of jobs.

It is my opinion that following the second injury, Ms. Carter was totally disabled based upon her significant limitations in combination with the effects of her medications.

Certainly the lack of good use of the upper extremities which is an essential ability in performing sedentary work would have been limited by her shoulder injury.

Following her shoulder injury, Ms. Carter was indeed totally disabled; however I believe her total disability was a result of the previous injuries that resulted in her need to use the significant amounts of narcotic pain medication which cause her to be unable to be alert and attentive.

If the injury in January 2002 resulted in her need to take pain medication prior to the May 2003 injury, which resulted in the restrictions to sedentary activities, it would be my opinion that her total disability is a result of the combination of the two injuries.

It remains my opinion that it is the result of Ms. Carter's physical limitations and resultant use of pain medication prior to the shoulder injury that resulted in total disability.

Mr. Cordray stated his opinions are based upon a reasonable degree of vocational rehabilitation certainty.

Mr. Cordray testified on September 14, 2009. He stated he has been giving vocational testimony in Missouri Workers' Compensation for ten years. He said of those, 65% are referred from defense attorneys or insurance companies, and 35% are plaintiff's attorneys. He testified that if he were asked questions about his report contained in Exhibit 2, his thoughts and opinions would be contained in that report.

Mr. Cordray testified that he prepared his supplemental reports to clarify Dr. Stuckmeyer's additional comments, and to sort out when Claimant became totally disabled. He testified regarding portions of his reports, and his testimony was generally consistent with his reports.

Mr. Cordray testified at page 19:

When you combine the fact that she has these physical restrictions that place her at doing sedentary types of activities and combine that with the fact that she's taking strong narcotics including Oxycodone and she eats Fentanyl lollipops, she's unable to work. The

narcotics alone for a 62-year-old lady cause her to be so inattentive and not alert that she wouldn't be able to sustain an eight-hour work day, day-in and day-out and be alert and attentive.

Mr. Cordray thought that the combination of her physical restrictions based on her two back injuries, in combination with the effects of taking Oxycodone and Fentanyl, made her totally disabled. He testified that no employer would hire Claimant.

Mr. Cordray testified the June 2003 accident in isolation did not totally disable Claimant or leave her incapable of work in the open labor market in some capacity. He also testified that if Claimant did not need the Fentanyl, or if she could take the Fentanyl and still work, no employer would hire her when you add the shoulder injury that keeps her from doing repetitive use of the upper extremities. He testified it was not reasonable for an employer to hire Claimant after her last day of work on March 10, 2005.

The parties stipulated that on or about January 29, 2002, May 12, 2003, and June 16, 2003, Claimant was an employee of Employer and was working under the provisions of the Missouri Workers' Compensation Law. The parties also stipulated that on or about January 29, 2002, May 12, 2003, and June 16, 2003, she sustained injuries by accident or occupational disease in North Kansas City, Clay County, Missouri, arising out of and in the course of her employment.

Rulings of Law

Based on a comprehensive review of the substantial and competent evidence, including the testimony of Claimant, the medical reports and records, the depositions, the vocational evidence, the stipulations of the parties, and my personal observations of Claimant at the hearing, I make the following Rulings of Law:

1. Liability for permanent partial disability and permanent total disability benefits.

Section 287.190, RSMo¹ provides for permanent partial disability benefits. The determination of the degree of disability sustained by an injured employee is not strictly a

¹ All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted. See *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007) where the Eastern District Court of Appeals held that the 2005 amendments to Sections 287.020, RSMo and 287.067, RSMo do not apply retroactively. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau*

medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 230 (Mo. banc 2003)². While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros., Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Fogelson v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

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

v. Netco Construction, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000).

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

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

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

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

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992), 29; *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693,

701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004). The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993), 29; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993).

The claimant in a workers' compensation proceeding has the burden of proving all elements of the claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 912 (Mo.App. 2008); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Cardwell*, 249 S.W.3d at 908; *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989). While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros.*, 595 S.W.2d 441, 443 (Mo.App. 1980); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Cardwell*, 249 S.W.3d at 908; *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Cardwell*, 249 S.W.3d at 908; *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

The finding of disability may exceed the percentage testified to by the medical experts. *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289. The Commission “is free to find a disability rating higher or lower than that expressed in medical testimony.” *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490 (Mo.App. 1990); *Sellers*, 776 S.W.2d at 505. The Court in *Sellers* noted that “[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, ‘the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.’” *Sellers*, 776 S.W.2d at 505. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. 1995); *Jones*, 801 S.W.2d at 490.

Section 287.220. 1, RSMo provides in part:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative

law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the 'Second Injury Fund' hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141.

In deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003); *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. 2000). Accordingly, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself renders the employee permanently and totally disabled, then the fund has no liability and the employer is responsible for the entire amount of compensation. *Landman*, 107 S.W.3d at 248; *Hughey*, 34 S.W.3d at 847.

The court in *Knisley v. Charleswood Corp.*, 211 S.W.3d 629 (Mo. App. 2007) states at 634-35:

To prevail against the SIF on a claim for permanent total disability, a claimant must establish that: (1) she had a permanent

partial disability at the time she sustained the work-related injury and (2) the pre-existing permanent partial disability was of such seriousness as to constitute a hindrance or obstacle to her employment. Section 287.220.1 RSMo 2000; *Motton v. Outsource Intern.*, 77 S.W.3d 669, 673 (Mo.App. E.D.2002). "The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment." *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo.App. E.D.2000) (overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)); *Garrone v. Treasurer of State of Missouri*, 157 S.W.3d 237, 244 (Mo.App. E.D.2004). The primary determination is whether an employer can reasonably be expected to hire the employee, given his or her present physical condition, and reasonably expect the employee to successfully perform the work. 157 S.W.3d at 244.

Section 287.020.7, RSMo provides: "The term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident." The phrase "inability to return to any employment" has been interpreted as "the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Knisley*, 211 S.W.3d at 635; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo.App. 2001); *Reiner v. Treasurer of the State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.1992); *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 792 (Mo.App. 1992).

Total disability means the "inability to return to any reasonable or normal employment." *Lawrence*, 834 S.W.2d at 792; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990); *Kowalski*, 631 S.W.2d at 992. An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849, 853 (Mo.App. 1995); *Brown*, 795 S.W.2d at 483. The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Knisley*, 211 S.W.3d at 635; *Brown*, 795 S.W.2d at 483; *Reiner*, 837 S.W.2d at 367; *Kowalski*, 631 S.W.2d at 922. See also *Thornton v. Hass Bakery*, 858 S.W. 2d 831, 834 (Mo.App. 1993).

The court in *Knisley*, 211 S.W.3d states at 635:

Section 287.200.1 does not require a claimant to distinguish each disability and assign a separate percentage for each of several pre-existing disabilities to prevail on a claim for permanent total disability. Section 287.200.1; *See Vaught v. Vaughts, Inc.*, 938 S.W.2d 931, 942 (Mo.App. S.D.1997) (overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)). Rather, a claimant must establish the extent, or percentage, of the permanent partial disability resulting from the last injury only, and prove that the combination of the last injury and the pre-existing disabilities resulted in permanent total disability. *Id.*

The court in *Vaught*, 938 S.W.2d 931, states at 939:

As explained in *Stewart, id.* at 854, § 287.220.1 contemplates that where a partially disabled employee is injured anew and sustains additional disability, the liability of the employer for the new injury “may be at least equal to that provided for permanent total disability.” Consequently, teaches *Stewart*, where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Id.* The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). *Id.* If the compensation to which the employee is entitled for the new injury is *less* than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. § 287.220.1

“For Second Injury Fund liability, a preexisting disability must combine with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have resulted from the new injury alone and of itself; or (2) the preexisting disability combined with the disability from the subsequent injury to create permanent total disability.” *Uhlir v. Farmer*, 94 S.W.3d 441, 444 (Mo.App. 2003)

Based on the competent and substantial evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational expert, the stipulations of the parties, as well as based on my personal observations of Claimant at the hearing, and based on the application of the Workers' Compensation Law, I find that Claimant is not permanently and totally disabled. I find that none of Claimant's injuries sustained in the course of her employment for Employer caused her to be permanently and totally disabled in isolation considered alone. I also find that the combination of Claimant's June 16, 2003 injury and her preexisting disabilities from her May 12, 2003 injury and her January 29, 2002 injury did not result in Claimant's permanent and total disability. I also find that the combination of Claimant's May 12, 2003 injury and her preexisting disability from her January 29, 2002 injury did not result in Claimant's permanent and total disability. This is supported by the following.

Claimant's rib cage still gives her problems. She is still receiving treatment on her right rib side. She takes medication to keep going. She is getting epidurals, is using a TENS unit, and is taking oral medication. She still takes Fentanyl lollipops and uses Fentanyl patches at times. She takes medication three days a week on average.

Claimant can do almost anything for a short period of time, but does things in spurts. She is able to work around the house two to three hours at a time. Claimant has constant right rib dull ache pain that is one or two when she uses her Fentanyl patch. She is 90 to 95% mentally alert and pretty competent when she uses the patch. Claimant now has no pain in her left shoulder, but she has some restriction in motion. She did not feel that her shoulder was keeping her from going back to work. Claimant did not recall any of her treating doctors saying that she was physically incapable of working.

Claimant is able to take care of her hygiene needs and can do most things around the house. She uses a computer at home for emails. She can drive for one hour. She walks between one-half of a mile and one mile. She helps with house repairs and has helped paint trim.

Claimant treated with her own doctors after her first accident. She took pain medication after her first accident. She continued to have mid-back pain after her first accident until her second accident. Some of her coworkers switched with her to give her easier jobs after her first accident. She was not on any work restrictions before her second accident. She worked full-time from her first accident to her second accident.

Claimant's pain was much more severe for a longer period after her second accident. She continued to work for Employer after her second injury until February

2004 when she received treatment for her left shoulder condition. She was released by Dr. Thomas at MMI on April 15, 2005, and received unemployment benefits for six months after that time. She applied for numerous jobs during that period for sales, secretarial, and administrative positions, but she did not receive call-backs.

Claimant has a Bachelor of Science in Education degree from Central Missouri State University. Claimant has taken computer classes. Claimant has worked several jobs in the past with sedentary and light duties.

Claimant did not appear to be in pain during the three and one-half hour hearing. Claimant stood only once during the hearing when a short recess was taken.

The parties stipulated that on or about January 29, 2002, May 12, 2003, and June 16, 2003, Claimant was an employee of Employer and was working under the provisions of the Missouri Workers' Compensation Law. The parties also stipulated that on or about January 29, 2002, May 12, 2003, and June 16, 2003, she sustained injuries by accident or occupational disease in North Kansas City, Clay County, Missouri, arising out of and in the course of her employment.

Dr. Pratt notes in his December 29, 2003 report that in direct relationship to the reported event on May 12, 2003, "This event was an aggravation of underlying involvement of the region and results in a five percent (5%) permanent partial disability to the body as a whole at 400 weeks." The report notes that he would not recommend that Claimant perform any lifting in excess of twenty pounds and also avoid activities, which involve thoracic rotation, other than occasionally.

Dr. Clymer, a Board Certified treating orthopedic surgeon, rated Claimant in his July 13, 2009 report. He estimated a permanent partial disability at 7% of Claimant's left upper extremity at the level of the shoulder. He felt Claimant had evidence of permanent partial disability equal to 10% of the body as a whole as a result of the thoracic spine process with disk injury and subsequent surgery. He did not have any feel as to how the 10% he assigned to the thoracic spine ought to be divided between the two falls. Dr. Clymer stated most of Claimant's disability is based upon her subjective level of discomfort as opposed to objective findings. Dr. Clymer noted Claimant's of her arms and shoulders would be acceptable, but she should avoid highly repetitive overhead activity or activities which cause excessive strain in the thoracic region. He suggested a lifting limit in the range of 20 to 25 pounds. I find Dr. Clymer's restrictions to be credible.

Dr. Clymer testified that the initial MRI revealed degenerative disk and osteophyte changes in the mid-thoracic region that are caused by age and degenerative change. He stated the MRI of the thoracic spine did not show up as disk herniation.

Dr. Stuckmeyer's July 9, 2005 report states that Claimant sustained a 10% permanent partial disability to the thoracic spine as a direct result of the January 29, 2002 accident, and an additional 15% disability to the thoracic spine causally related to the May 12, 2003 accident. That report also assigned a 25% permanent partial disability to the left shoulder as a result of the repetitive nature of Claimant's occupation that necessitated the surgical treatment performed by Dr. Thomas.

Dr. Stuckmeyer's January 21, 2009 report assigned a 10% permanent partial disability to the thoracic spine as a direct result of the January 29, 2002 accident, and an additional 25% disability to the thoracic spine causally related to the May 12, 2003 accident. That report rendered a 25% disability to the left shoulder as a result of the repetitive occupational duties culminating in an accident date of June 16, 2003.

Dr. Thomas assigned a disability rating of 10% Claimant's left shoulder on May 22, 2005.

No treating doctor ever told Claimant she was incapable of gainful employment. Dr Blatt stated on October 31, 2003 that he believed it was safe for Claimant to work, although it might be uncomfortable.

Dr. Bredemann stated on June 6, 2006 that it was not his opinion that the Fentanyl patch or other narcotics would preclude Claimant from working, since she is able to drive and perform other basic activities. He noted she should avoid any substantial decision making issues or safety equipment handling, but basic clerical duties or other activity of that sort would not be contra-indicated by the use of narcotics. He noted they have many patients who take narcotics so that they may in fact return to work successfully. I find these opinions to be credible.

Dr. Griffith wrote on July 30, 2008 that Claimant's pain was "functionally limiting and her quality of life was markedly reduced." However, he did not state that Claimant was unable to work. Dr. Griffith also treated Claimant for low back, hip and bilateral leg pain in 2008 and 2009. She has continued on pain medication and steroid injections. He noted on April 20, 2009 that the medication seems to be helpful with her thoracic pain and thoracic disc protrusion.

Dr. Clymer felt Claimant probably could work provided it did not involve very heavy lifting or very highly repetitive activities. He noted a periodic change in position would be appropriate. He suggested a lifting limit in the range of 20 to 25 pounds. He believed "an appropriate dose of Fentanyl would not preclude Ms. Carter from activity and work and therefore would not feel that there is any need for restriction from work activities in the past or the future while she is on Fentanyl beyond those physical restrictions which I have just outlined." I find these opinions of Dr. Clymer to be credible.

Dr. Clymer testified he did not believe that there was any objective medical reason why Claimant could not return to some kind of gainful employment. He did not personally feel individuals who are taking pain medications are unable to work. He has many patients who are on pain medications who are working. He did not anticipate it would be necessary for Claimant to have to lie down to control the pain through the course of a day. He said Claimant's use of the Fentanyl patch would not preclude her from doing basic clerical duties and activities of that sort, and would not preclude her from working since she is able to drive and perform other basic activities. I find these opinions of Dr. Clymer to be credible.

Dr. Stuckmeyer stated on June 5, 2009 that it is "due to a combination of the January 29, 2002 injury in combination with the more significant injury of May 12, 2003 that has rendered Ms. Carter permanently and totally disabled." He put her on restrictions and felt that "essentially she was permanently and totally disabled." He testified: "the two thoracic injuries and the fact that she's on chronic narcotic use and there's really nothing of a surgical standpoint to offer her any relief, I felt that she was permanently and totally disabled." He thought that Claimant "is basically incapable of engaging in the open labor market in some capacity." I do not find these opinions to be credible.

Dr. Stuckmeyer testified that if you consider Claimant's left shoulder in isolation, she would be employable. I find this opinion to be credible.

Dr. Stuckmeyer assigned the following restrictions:

From an orthopedic standpoint, I do not feel that Ms. Carter is capable of returning to gainful employment. I would restrict her to no prolonged standing, no prolonged walking, and no repetitive lifting, bending, stooping, or squatting. I would also limit her to no repetitive stair climbing and no lifting to exceed 10 pounds on an occasional basis.

Specific to the left shoulder, I would recommend no repetitive lifting, no repetitive pushing or pulling, and no lifting over shoulder height greater than 10 pounds on an occasional basis.

I do not find these restrictions of Dr. Stuckmeyer to be credible. I find his restrictions to be excessive. Dr. Thomas did not place Claimant on any permanent work restrictions when he released her after her left shoulder surgery. Claimant testified she did not have left shoulder pain. Claimant's activities after her release from Dr. Thomas demonstrate she is able to exceed Dr. Stuckmeyer's restrictions. I find Dr. Clymer's opinions are more persuasive than Dr. Stuckmeyer's opinions regarding Claimant's restrictions and ability to work.

Terry Cordray, the only vocational expert expressing opinions in this case, stated Claimant is totally disabled. He did not believe it is realistic to expect that an employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to hire Claimant.

Mr. Cordray testified that the combination of Claimant's physical restrictions based on her two back injuries, in combination with the effects of taking Oxycodone and Fentanyl, made her totally disabled. He also testified that the June 2003 accident in isolation did not totally disable Claimant or leave her incapable of work in the open labor market in some capacity. He also testified that if Claimant did not need the Fentanyl, or if she could take the Fentanyl and still work, no employer would hire her when you add the shoulder injury that keeps her from doing repetitive use of the upper extremities. I do not find these opinions of Mr. Cordray to be credible. Mr. Cordray based his opinion that Claimant is totally disabled on Dr. Stuckmeyer's restrictions, which I have found are excessive and not credible. I find that Claimant can take Fentanyl and still work, and that her left shoulder condition in combination with her mid-back condition does not prevent her from working.

I do not believe Claimant needs to lie down during the day as a result of her work injuries. I believe that an employer in the usual course of business would be reasonably expected to hire Claimant in her present physical condition, reasonably expecting Claimant to perform the work for which she is hired. I believe Claimant is able to work in the open labor market. No doctors restricted Claimant to lie down during the day. Claimant has not had a laminectomy, discectomy or fusion operation. She had a good result following her shoulder surgery and was released without restrictions. I believe that Claimant should be able to work within restrictions imposed by Dr. Clymer.

I find that Claimant's last injury, her June 16, 2003 left shoulder injury, did not render her permanently and totally disabled. I find that Claimant sustained permanent partial disability of 15% of the left upper extremity at the shoulder (232-week level), or 34.8 weeks of permanent disability as a result of her June 16, 2003 left shoulder injury (injury number 03-138347). The parties stipulated that Claimant's weekly compensation rate for permanent partial disability in injury number 03-138347 is \$340.12 per week. Claimant is therefore entitled to an award of \$11,836.18 from Employer for permanent partial disability in injury number 03-138347.

I find that Claimant's May 12, 2003 injury did not render her permanently and totally disabled in isolation considered alone. I find that Claimant sustained permanent partial disability of 20% of the body as a whole (400-week level) as a result of her May 12, 2003 thoracic spine injury (injury number 03-060420). The parties stipulated that Claimant's weekly compensation rate for permanent partial disability in injury number 03-060420 is \$340.00 per week. Claimant is therefore entitled to an award from Employer of \$27,209.60 for permanent partial disability in injury number 03-060420. Employer and Employee stipulated at the hearing that Employer/Insurer shall be entitled to take a credit of \$20,000.00 for an advance it made to Claimant in that amount on June 21, 2006 against any benefits awarded to Janet K. Carter against Employer/Insurer in any of her three cases. The \$20,000.00 credit due Employer/Insurer is applied in this case and deducted from the amount awarded for permanent partial disability, leaving a net balance due Employee from Employer in this case of \$7,209.60.

I find that Claimant's January 29, 2002 injury did not render Claimant permanently and totally disabled in isolation considered alone. I find that Claimant sustained permanent partial disability of 5% of the body as a whole (400-week level) as a result of her January 29, 2002 thoracic spine injury (injury number 02-156872). The parties stipulated that Claimant's weekly compensation rate for permanent partial disability in injury number 02-156872 is \$329.42 per week. Claimant is therefore entitled to an award from Employer of \$6,588.40 for permanent partial disability in injury number 02-156872.

Employer's liability for future medical aid.

Claimant is requesting an award of future medical aid. Section 287.140, RSMo requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Bowers*, 132 S.W.3d at 266. Medical aid is a component of the compensation due an injured worker under section 287.140.1, RSMo. *Bowers*, 132

S.W.3d at 266; *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo.App. 1984). Conclusive evidence is not required. *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997). It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment. *Bowers*, 132 S.W.3d at 270; *Mathia*, 929 S.W.2d at 277; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Sifferman* at 828. Section 287.140.1, RSMo does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992); *Bradshaw v. Brown Shoe Co.*, 660 S.W.2d 390, 394 (Mo.App. 1983).

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

Dr. Leslie Thomas' May 22, 2005 report states Claimant had reached maximum medical benefit regarding her left upper extremity. Dr. Stuckmeyer notes in his July 9, 2005 report that Claimant had reached maximum medical improvement regarding the shoulder. Dr. Stuckmeyer testified he did not recommend any additional future medical treatment to the left shoulder. Dr. Griffith's April 25, 2008 report states in part: "My feelings are that Mrs. Carter has reached maximum medical improvement. No doctor has recommended additional medical aid to treat Claimant's left shoulder. I find that

Claimant is not entitled to an award of future medical aid for her left shoulder in Injury No. 03-138347.

Dr. Stuckmeyer testified on August 31, 2009 that it was hard to tell whether Claimant was at maximum medical improvement because Dr. Griffith stated in July 2008 that medial branch blocks might be warranted. Dr. Clymer felt on July 13, 2009 that Claimant "has clearly reached maximum medical improvement with regard to these issues."

Dr. Griffith treated Claimant's thoracic back condition extensively. He stated on April 25, 2008: "I think it would be reasonable to assume that she is going to need ongoing medical therapy and may from time to time, require a thoracic epidural steroid injection; perhaps 3x per year. Consideration could be given to the trial of spinal cord stimulation. However, I have no strong feeling that that would be helpful, nor than we would be able to capture her areas of pain." Dr. Griffith stated on July 30, 2008: "I would see her requiring medical management for this problem indefinitely."

Dr. Stuckmeyer testified that Claimant is taking Fentanyl and other medications as the result of a combination of the two injuries to her thoracic spine. Dr. Stuckmeyer was asked whether Claimant should remain on the Fentanyl and Roxicodone in the future. He said it would be unlikely that she will ever be able to get off those medications. He thought she would need long term management from a pain management group for her narcotics with regard to the thoracic spine. He said she would need to stay on the Fentanyl for her lifetime as a result of the thoracic spine problems.

Dr. Clymer's July 13, 2009 report states:

I do not think there is much else to do at this point aside from a reasonable pain management program. I agree with the other physicians who have stated that a decrease in her use of narcotics would be helpful and appropriate; however, she seems to be reasonable and is using her current medications in an effort to be more active and functional and does not seem to be having any major side effects or problems. Consequently, although I would suggest she continue to try to taper down her use of narcotic medications, I believe it would be reasonable to continue with a Fentanyl patch at 50 mcg daily so long as this results in clear symptomatic improvement and a more functional and active lifestyle. If the medication caused any side effects or problems or resulted in diminished activity, then I think she would be better off to taper down to a lower dose or off completely.

At this point, however, it seems that she is functioning well and the current dose of Fentanyl is acceptable. I would suggest she avoid use of any other additional narcotics. She might find that occasional use of a muscle relaxer on an over-the-counter anti-inflammatory would be helpful. I would not anticipate that any other medical or surgical treatment would be necessary.

I find that her 2002 back injury did not result in a chronic need for pain medication, and that future medical aid should not be left open for Claimant in the 2002 case. I find that Claimant needs continued medication and medication monitoring to treat the mid-back pain that was caused by the May 12, 2003 work injury. I find that Claimant second back injury has resulted in her need for additional medical care, and that future medical aid should be left open for Claimant in the May 12, 2003 case. Employer/Insurer is directed to authorize and furnish additional medical care and treatment reasonably required to cure and relieve Employee from the effects of her May 12, 2003 injury (Injury No. 03-060420) in accordance with Section 287.140, RSMO.

Employer/Insurer's liability for past temporary total disability.

The burden of proving entitlement to temporary total disability benefits is on the Employee. *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418, 426 (Mo.App. 2000); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997). Section 287.170.1, RSMo provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7, RSMo as the "inability to return to any employment and not merely . . . [the] inability to return to the employment in which the employee was engaged at the time of the accident." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 910 (Mo.App. 2008); *Cooper*, 955 S.W.2d at 575; *Vinson v. Curators of Un. of Missouri*, 822 S.W.2d 504, 508 (Mo.App. 1991); *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641, 645 (Mo.App. 1991); *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo.App. 1985).

Temporary total disability benefits should be awarded only for the period before the employee can return to work. *Cardwell*, 249 S.W.3d at 909; *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Phelps*, 803 S.W.2d at 645; *Williams*, 649 S.W.2d at 489. With respect to possible employment, the test is "whether any employer, in the usual course of business, would reasonably be expected to employ Claimant in his present physical condition." *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Brookman v.*

Henry Transp., 924 S.W.2d 286, 290 (Mo.App. 1996). A nonexclusive list of other factors relevant to a claimant's employability on the open market includes the anticipated length of time until claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that claimant will return to his or her former employment. *Cooper*, 955 S.W.2d at 576. A significant factor in judging the reasonableness of the inference that a claimant would not be hired is the anticipated length of time until claimant's condition has reached the point of maximum medical progress. If the period is very short, then it would always be reasonable to infer that a claimant could not compete on the open market. If the period is quite long, then it would never be reasonable to make such an inference. *Boyles*, 26 S.W.3d at 425; *Cooper*, 955 S.W.2d at 575-76.

Claimant has requested temporary total disability benefits after she reached maximum medical improvement for her left shoulder injury. The parties agreed that date was March 10, 2005. Dr. Thomas had Claimant her resume full activities on March 4, 2005. He noted on April 15, 2005 that he felt she had reached maximum medical benefit.

I find that Claimant did not prove that she was temporarily and totally disabled after March 10, 2005. I find an employer, in the usual course of business, would reasonably be expected to employ Claimant in her present physical condition after March 10, 2005. I find Claimant was capable of competing in the open labor market and was not temporarily totally disabled after March 10, 2005 even though she continued to take pain medication and receive epidurals after that date, and even though Dr. Griffith stated she reached maximum medical improvement on April 25, 2008. Claimant worked after her May 12, 2003 injury until February 2004. She received unemployment benefits for six months after her release by Dr. Thomas and applied for numerous jobs. Claimant is well educated and has extensive job experience. Her treating doctors did not conclude she was incapable of working. She was not on restrictions that prevented her from working. I have discussed in detail my finding that Claimant is not permanently and totally disabled (pp. 51-56), and that discussion will not be restated, but is incorporated by reference.

Claimant's request for past temporary total disability benefits is denied.

Liability of the Second Injury Fund

The Second Injury Fund is not a party in Claimant's January 29, 2002 case. I have assessed 5% permanent partial disability of the body as a whole against Employer in that case. I have found that Claimant is not permanently and totally disabled either as a result of any of the injuries considered alone and in isolation, or in combination with each other. 5% of the body is twenty weeks of compensation, which is below the fifty-week threshold

required for Second Injury Fund liability in permanent partial disability cases. Section 287.220, RSMo. Claimant did not prove that she had the minimum threshold amount of preexisting disability before her May 12, 2003 case to combine with the disability in that case. Claimant's claim against the Second Injury Fund in her May 12, 2003 case (Injury No. 03-060420) is denied.

I find that prior to her June 16, 2003 injury, Claimant had preexisting permanent partial disability that was of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if she became unemployed. I have assessed 20% of the body as a whole (400 week level) permanent partial disability in the May 12, 2003 case, 5% permanent partial disability of the body as a whole in the January 29, 2002 case, and 15% permanent partial disability of the left upper extremity (232 week level) in the June 16, 2003 case. I find that Claimant had 25% permanent partial disability of the body as a whole that pre-existed her June 16, 2003 case. 25% of the body as a whole, or 100 weeks of compensation, and 15% of the left shoulder at the 232 week level, or 34.8 weeks of compensation, meet the minimum thresholds of Section 287.220, RSMo.

I find Claimant's preexistent disability combines with her June 16, 2003 injury to produce a synergistic effect to result in a greater degree of overall disability than the simple sum of those disabilities considered separately. Further, I find that the work injury of June 16, 2003 does not merely supplement the preexisting condition. I find that the synergistic effect of Claimant's disabilities is 10% above the simple sum of the combined disabilities, or 13.48 weeks of compensation. I find Claimant is entitled to an award against the Second Injury Fund for permanent partial disability in her June 16, 2003 case (Injury No. 03-138347) of \$4,584.82 based on 13.48 weeks times the agreed permanent partial disability rate in that case of \$340.12 per week.

Attorney's fees.

Claimant's attorney is entitled to a fair and reasonable fee in accordance with Section 287.260, RSMo. An attorney's fee may be based on all parts of an award. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). During the hearing, and in Claimant's presence, Claimant's attorney requested a fee of 25% of all benefits to be awarded. I find Claimant's attorney, William G. Manson, is entitled to and is awarded an attorney's fee of 25% of all amounts awarded for necessary legal services rendered to Claimant.

Made by: /s/ Robert B. Miner
Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 22nd day of February, 2010.

/s/ Naomi Pearson

Naomi Pearson
Division of Workers' Compensation

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

Injury No.: 03-060420

Employee: Janet K. Carter
Employer: Harrah's North Kansas City LLC
Insurer: Old Republic Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 22, 2010. The award and decision of Administrative Law Judge Robert B. Miner, issued February 22, 2010, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 13th day of January 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Janet K. Carter

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge with regard to Injury Number 03-060420 is in error and that the decision should be modified to award permanent total disability benefits from the Second Injury Fund.

Employee sustained three separate injuries working for employer as a casino dealer. Employee's claim for Injury Number 03-060420 arose from an incident that occurred on May 12, 2003, when employee tripped on uneven concrete and hurt her back. Employee had previously injured her back in January 2002. At the time of the May 12, 2003, incident, employee was taking prescription pain medicine for back pain related to the January 2002 incident and had to ask her coworkers to help her with job tasks when she experienced back pain at work. Employee had also developed an injury of her left shoulder related to repetitive card dealing, for which she ultimately underwent surgery in November 2004 to remove calcific deposits.

Following the May 12, 2003, incident, employee suffered significant pain in her thoracic spine that radiated around to the front of her chest. An MRI in October 2003 revealed herniations at T10-11 and T8-T9. Employee underwent years of pain management treatment before undergoing a percutaneous disk decompression of T6-T7 and T8-T9 on February 8, 2008. Employee did not experience any significant relief from surgery or any of the pain management treatment. Ultimately, employee's doctors placed her on strong narcotic medications such as Fentanyl and Roxicodone, and recommended employee receive thoracic epidural injections three times a year, or consider a spinal cord stimulator. Employee's doctors also placed her on Cymbalta. None of the surgeons who saw employee considered her to be a surgical candidate.

At the hearing, employee identified a constant searing pain in her right side chest wall that she compared to being hit with a machete knife. Employee testified that she has to take Fentanyl and Oxycodone to deal with the chronic pain. These medications make her sleepy and groggy and interfere with or prevent certain activities, such as driving. Activities requiring fine motor skills make the pain more intense. When the pain is too intense, employee has to lie down. On a typical day, employee has to lie down after making breakfast due to pain. Employee then takes a shower, after which she again lies down due to pain. Employee gets dressed, straightens the house, and goes for a walk, after which she again lies down. If employee has any tasks or chores to complete, she relies on medications to get her through the pain. After finishing her tasks or chores, employee again lies down. Employee's sleep is interrupted by pain. Employee acknowledged that she is able to do most things, but made clear that she is only able to remain active for short periods of time, and that she experiences constant pain throughout.

In her appeal to this Commission, employee seeks permanent total disability benefits from the Second Injury Fund, arguing that she is permanently and totally disabled due to a combination of the last work injury and her preexisting disabling conditions.

Employee: Janet K. Carter

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Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent, total disability benefits, employee must establish that: (1) she suffered from a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

Dr. Stuckmeyer evaluated employee and opined that she is permanently and totally disabled due to a combination of the January 2002 and May 2003 back injuries. Dr. Stuckmeyer believed employee will likely have to remain on Fentanyl for life, and that she is not a surgical candidate. Dr. Stuckmeyer pointed out that employee was on narcotic medications before the May 2003 incident, and that it was both the January 2002 and May 2003 back injuries (rather than one or the other considered in isolation) that caused the ongoing need for narcotic pain medications. Terry Cordray, the only vocational expert to testify in this case, agreed with Dr. Stuckmeyer that employee is permanently and totally disabled due to a combination of the January 2002 and May 2003 injuries. Mr. Cordray indicated that the narcotic pain medications alone caused employee to be so inattentive that she wouldn't be able to sustain an eight-hour work day. Specifically, Mr. Cordray opined: "She's out of the labor market because of that combination of those two injuries creating the need to use Fentanyl lollipops and Oxycodone."

Contrary to the opinions of Dr. Stuckmeyer and Mr. Cordray, the administrative law judge found that employee is not permanently and totally disabled, and that she suffered only enhanced permanent partial disability following the May 2003 back injury. The administrative law judge found the opinion of Dr. Thomas that employee is able to work without restrictions to be more persuasive than that of Dr. Stuckmeyer and the unopposed vocational opinion of Mr. Cordray. The administrative law judge based his conclusion that employee is not permanently disabled, in part, on the evidence that employee is able to do most things "in spurts." The administrative law judge's award fails to explain how an individual who is only able to be active in spurts will be able to compete for jobs requiring her to maintain a constant level of activity for eight hours or more at a time. The administrative law judge also discounted the evidence regarding employee's need to use heavy narcotics to control her chronic pain, crediting Dr. Clymer's testimony that, although employee should "avoid substantial decision making issues or safety equipment handling," her narcotic use would not interfere with her ability to compete for gainful employment.

I disagree with the administrative law judge's credibility determinations and ultimate conclusion on the issue of permanent total disability. I find Mr. Cordray's testimony persuasive because it presents the only realistic picture of employee's ability to compete for gainful employment following her back injuries:

[M]y opinion is that no employer would hire her. First of all if you tried to use her previous sales knowledge of securities and insurance sales, those narcotics take her out of that. She's not going to be able to analyze policies and procedures and securities to do that kind of work. I don't want her handling my Merrill Lynch account. ... And again, even the

Employee: Janet K. Carter

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unskilled work on a daily basis, I don't think she'd be expected to—an employer would not hire her for some type of unskilled sedentary job when they've got other people that are not taking narcotics that are certainly available to apply for those jobs and do those jobs.

I would credit the testimony of Dr. Stuckmeyer and the unopposed opinion of Mr. Cordray, and find that employee met her burden under § 287.220 RSMo, of establishing that she is permanently and totally disabled due to a combination of the January 2002 and May 2003 back injuries. Accordingly, I would modify the decision of the administrative law judge with regard to Injury Number 03-060420, to award permanent total disability benefits from the Second Injury Fund.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee: Janet K. Carter

Injury No.: 03-060420

Employer: Harrah's North Kansas City LLC

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

Insurer: Old Republic Insurance Company

Hearing Date: November 20, 2009

Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: May 12, 2003.
North Kansas City, Clay County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was walking when she tripped and jerked, injuring her thoracic spine.

12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: thoracic spine.
14. Nature and extent of any permanent disability: 20% of the body as a whole (400 week level.)
15. Compensation paid to-date for temporary disability: \$5,420.05.
16. Value necessary medical aid paid to date by employer/insurer? \$54,231.82.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$741.17.
19. Weekly compensation rate: \$494.11 for temporary total disability and permanent total disability, and \$340.12 for permanent partial disability.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None.

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

80 weeks of permanent partial disability from Employer—(80 x \$340.12=\$27,209.60). Employer and Employee stipulated at the hearing that Employer/Insurer shall be entitled to take a credit of \$20,000.00 for an advance it made to Claimant in that amount on June 21, 2006 against any benefits awarded to Janet K. Carter against Employer/Insurer in any of her three cases. The \$20,000.00 credit due Employer/Insurer is applied in this case and deducted from the amount awarded for permanent partial disability, leaving a net balance due Employee from Employer in this case of \$7,209.60.

No weeks of disfigurement from Employer.

TOTAL FROM EMPLOYER: \$7,209.60

22. Second Injury Fund liability: None.

No weeks of permanent partial disability from Second Injury Fund. Employee's claim against the Second Injury Fund in this case is denied.

TOTAL FROM SECOND INJURY FUND: NONE

23. Future requirements awarded: Employer/Insurer is directed to authorize and furnish additional medical care and treatment reasonably required to cure and relieve Employee from the effects of her May 12, 2003 injury (Injury No. 03-060420) in accordance with Section 287.140, RSMO.

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Janet K. Carter

Injury No's: 02-156872
03-060420
03-138347

Employer: Harrah's North Kansas City LLC

Insurer: Old Republic Insurance Company

Hearing Date: November 20, 2009

Checked by: RBM

PRELIMINARIES

A final hearing was held in Injury Numbers: 02-156872, 03-060420, and 03-138347 on November 20, 2009 in Gladstone, Missouri. Employee, Janet K. Carter, appeared in person and by her attorney, William G. Manson. Employer, Harrah's North Kansas City LLC, and Insurer, Old Republic Insurance Company, appeared by their attorney, John R. Fox. The Second Injury Fund appeared by its attorney, Laura Van Fleet. Scott Bradshaw appeared as a representative of Harrah's North Kansas City LLC. The Second Injury Fund is a party in Injury Numbers 03-060420 and 03-138347, but not in Injury Number 02-156872. William G. Manson requested an attorney's fee of 25% from all amounts awarded. It was agreed that briefs would be due on December 31, 2009.

Attorneys William G. Manson and John R. Fox agreed that Employer/Insurer had made an advance to Janet K. Carter in the amount of \$20,000.00 on June 21, 2006. They further agreed that Employer/Insurer shall be entitled to take a credit of \$20,000.00 for this advance against any benefits awarded to Janet K. Carter against Employer/Insurer in any of her three cases.

STIPULATIONS

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

1. On or about January 29, 2002, May 12, 2003, and June 16, 2003, Janet K. Carter ("Claimant") was an employee of Harrah's North Kansas City LLC ("Employer"), and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about January 29, 2002, May 12, 2003, and June 16, 2003, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by Old Republic Insurance Company ("Insurer").

3. On or about January 29, 2002, May 12, 2003, and June 16, 2003, Claimant sustained injuries by accident or occupational disease in North Kansas City, Clay County, Missouri, arising out of and in the course of her employment.

4. Employer had notice of Claimant's injuries.

5. Claimant's Claims for Compensation were filed within the time allowed by law.

6. In Injury No. 02-156872, the average weekly wage was \$721.95 and the rate of compensation for temporary total disability and permanent total disability is \$481.30 per week, and the rate of compensation for permanent partial disability is \$329.42 per week.

7. No compensation has been paid by Employer/Insurer for temporary disability in Injury No. 02-156872.

8. Employer/Insurer has paid \$2,167.00 in medical aid in Injury No. 02-156872.

9. In Injury No's 03-060420 and 03-138347, the average weekly wage was \$741.17 and the rate of compensation for temporary total disability and permanent total disability is \$494.11 per week, and the rate of compensation for permanent partial disability is \$340.12 per week.

10. Employer/Insurer has paid \$5,420.05 in temporary disability benefits at the rate of \$494.11 per week in Injury No. 03-060420.

11. Employer/Insurer has paid \$54,231.82 in medical aid in Injury No. 03-060420.

12. Employer/Insurer has paid \$14,721.34 in temporary total disability at the rate of \$494.11 per week in Injury No. 03-138347 (the June 16, 2003 case). Temporary total disability benefits were paid by Employer/Insurer through March 10, 2005, which is the agreed date that Employee reached maximum medical improvement in her left shoulder case. Employee is not seeking any temporary total disability benefits for any time prior to March 10, 2005.

13. Employer/Insurer has paid \$25,242.76 in medical aid in Injury No. 03-138347.

14. Employer/Insurer shall be entitled to take a credit of \$20,000.00 for an advance it made to Claimant in that amount on June 21, 2006 against any benefits awarded to Janet K. Carter against Employer/Insurer in any of her three cases.

ISSUES

The parties agreed that there is a dispute on the following issue in Injury No. 02-156872: the nature and extent of permanent disability.

The parties agreed that there are disputes on the following issues in Injury No. 03-060420:

1. Employer's liability for permanent disability benefits, including permanent partial disability and permanent total disability.
2. Employer's liability for past temporary total disability benefits from March 11, 2005.
3. Employer's liability for future medical aid.
4. Liability of the Second Injury Fund for permanent disability benefits, including permanent partial disability and permanent total disability.

The parties agreed that there are disputes on the following issues in Injury No. 03-138347:

1. Employer's liability for permanent disability benefits, including permanent partial disability and permanent total disability.
2. Liability of the Second Injury Fund for permanent disability benefits, including permanent partial disability and permanent total disability.
3. Employer's liability for future medical aid.

Claimant testified in person.

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

- A—January 29, 2002 Claim for Compensation
- B—May 12, 2003 Claim for Compensation
- C—June 16, 2003 Claim for Compensation

D—August 31, 2009 deposition of Dr. James Stuckmeyer with deposition exhibits (admitted subject to objections contained in the deposition)

E—September 14, 2009 deposition of Terry Cordray with deposition exhibits (admitted subject to objections contained in the deposition)

F—Medical records of Dr. Blake Donaldson

G—Medical records of Dr. Robert M. Orr

H—Medical records of Intracorp

I—Medical records of Concentra Medical Center

J— Medical records of Northland Imaging

K— Medical records of Dr. Robert M. Drisko

L— Medical records of Dr. Patrick Griffith

M— Medical records of Dr. Geoffrey Blatt

N— Medical records of Research Medical Center

O— Medical records of Dr. Leslie D. Thomas

P—Medical records of Dr. Jeffrey Bredemann

Employer/Insurer offered the following Exhibits that were admitted in evidence without objection:

1—November 9, 2009 deposition of Dr. David Clymer with deposition exhibits (admitted subject to objections contained in the deposition)

2—60 day – Dr. Thomas report, Curriculum Vitae, and records

3—60 day – Dr. Clymer report, Curriculum Vitae, and records

The Second Injury Fund did not offer any exhibits.

Any objections contained in any of the depositions are overruled unless otherwise noted. The Administrative Law Judge did not place any highlighting or other markings on any of the exhibits. The briefs of the attorneys have been considered.

Findings of Fact

Summary of the Evidence

Claimant testified that she was born on February 26, 1946 and is 63 years old.

Claimant started working at Employer in 1993. She worked in 2002 and 2003 as a card dealer for Employer. She stood and dealt cards repetitively eight hours a day, forty hours a week. She usually worked an eight-hour shift, and usually worked five days per week. Claimant was always a card dealer at Employer except when she worked light duty

folding towels from June 2003 to February 2004. She last worked for Employer in February 2004.

Claimant stood in one spot when she worked at Employer dealing cards. She alternated dealing for an hour and taking a twenty minute break throughout the eight hour day. She did not work overtime. She always stood and did not bend or lift. She walked from the tables to the break room.

Claimant pulled cards from a sleeve with her left hand, put the cards into her right hand, and then delivered the cards to the players with her right hand. She was also trained to deal roulette. She would spin a wheel when she worked roulette. Two employees worked together at the roulette table. One was a dealer and one was a reacher. The reacher brought in and stacked the chips. Claimant also occasionally dealt poker.

Claimant testified that she had not had any injuries or accidents before January 29, 2002.

Claimant testified that on January 29, 2002, she had been released from work at Employer and was walking to the parking lot on a snowy, icy day. Her feet went out from under her and she fell, landing flat on her face. She said she hurt the middle of her back around her thoracic spine rib cage area. She had pain around her right side.

A supervisor was there at the time she fell. An EMT was called. Claimant was examined and she thought that she would be all right. She was helped to her car and she went home. She felt pain the next day that was like a hatchet from her right side into her spine, rib cage, and mid back. Her spine itself did not hurt, just the right side of the spine. She developed a dull aching pain later. Walking and moving her arms made her pain worse.

Claimant did not ask Employer for any medical treatment at that time. She went to her own doctor, Dr. Donaldson, who sent her to pain management. She saw Dr. Orr three to four months after the accident. Dr. Orr did three epidural injections which helped. She may have also taken Advil. Claimant did not receive treatment from anyone else. She finished her treatment in the late summer or early fall of 2002. She continued to work at Employer. She said her coworkers sometimes switched with her to give her an easier job.

Dr. Orr prescribed Oxycontin pain medication. She took that for several months, and took it periodically through the time that she had her second accident in May 2003.

Claimant said that she was significantly better in January 2003. She was functioning pretty well, could drive, and could go to work. She went on a vacation to Hawaii in January 2003 and did a lot of walking.

Claimant testified her left shoulder began to ache in late winter or early spring of 2003. She attributed the pain to repetitive dealing cards. Employer had changed the sleeve and it was hard to get the cards out. The pain went from her shoulder down her left arm. She described the pain as a constant throbbing pain that was agonizing at times. She also said she had a dull aching pain most of the time.

Claimant testified that in May 2003, her left shoulder pain was getting pretty bad. It was not twenty-four hours a day, seven days a week at that time, but it eventually got to that point.

On May 12, 2003, Claimant was walking down a walkway between Employer's lunchroom and the casino, coming back from break, when she tripped and turned her ankle. She did not fall. She jerked and felt a searing pain in her right side. She limped over to the pit and told a supervisor that she had hurt herself. She went back to the lunchroom and an EMT was called. The EMT examined her and offered that she go to the hospital. She declined the offer. She thought she would get better.

On May 13, 2003, Claimant had a dull pain, but it was not excruciating. She returned to work. She did not ask for or receive accommodations at work.

Claimant was working forty hours per week just prior to the May 12, 2003 accident. She said she was doing pretty well. She had some pain, but it was not debilitating. The pain was in the right side of her body on her rib. She was not being treated then. Her left shoulder was getting worse.

Claimant testified she progressively got worse. The pain felt like a jab and became intense when she moved around. She had pain for a couple of months before she sought treatment. Her shoulder was getting worse during this time.

On June 6, 2003 or June 16, 2003, Claimant told a supervisor that she could not work anymore. She said she needed to go to HR. She had a constant throbbing pain in her left shoulder. The right side was getting worse.

Employer sent Claimant to Concentra where she was given oral medication and then physical therapy. She had an injection in her shoulder that helped for several weeks. The pain in her side did not get better.

Concentra sent her to Dr. Drisko. He examined her left shoulder and right rib cage and gave her a back brace that did not help. She went to Dr. Leslie Thomas who did an MRI and x-rays, and then did shoulder surgery in early 2004.

Claimant also went to Dr. Dwayne Jones, a pain management doctor, who started giving her Fentanyl in August 2003. Claimant also saw Dr. Jeffrey Blatt, a neurosurgeon, who evaluated her thoracic spine. He told her that they did not like to do surgery in the thoracic spine area. She received pain management for her thoracic spine from Dr. Jones.

Claimant last dealt cards at Employer either on June 6, 2003 or June 16, 2003. Claimant worked light duty for Employer from June 2003 until she was released in February 2004. She worked forty hours per week folding towels during that time. She has not worked for anyone since February 2004.

Claimant testified that her left shoulder pain was always at least a five just prior to her left shoulder surgery. A lot of time it was a nine on a scale of zero to ten. Her rib cage pain was always at least a two to three and, with activity, it could get up to a ten. The Fentanyl lollipops took her pain from a ten to a three or a four.

Claimant testified that the left shoulder surgery helped her left shoulder. She said it took the pain away. She testified that she does not have problems with her left shoulder anymore.

Claimant has received some temporary total disability benefits. She testified that her temporary total disability benefits stopped on March 10, 2005 when Dr. Thomas said she was at maximum medical improvement regarding her shoulder. She also received unemployment benefits for about six months after that. She applied for numerous jobs. She said she applied at several hundred places. She looked for work in sales, secretarial, and administrative. She said she got no call backs and no interviews.

Claimant saw Dr. Griffith for her hips in 2007. He stopped her oral medication except for breakthrough pain. Dr. Griffith prescribed Oxycodone for her in early 2008 and 2009.

Claimant said that a discogram was done by Dr. Griffith in 2007 or 2008. It revealed some cracked disks. Dr. Griffith performed a percutaneous discectomy in 2008. Needles were inserted, but an incision was not made. She saw Dr. Griffith until the summer of 2009. She has been seeing Dr. Griffith for pain in her hips and then her legs.

He has provided epidurals for that pain. The pain in her hips and legs is not related to her fall.

Claimant said that her rib cage still gives her problems. She is still receiving treatment on the right side of her rib cage. She is getting epidurals, is using a TENS unit, and is taking oral medication. She still takes Fentanyl lollipops. She uses Fentanyl patches at times.

Claimant said the Fentanyl causes dry mouth, drowsiness, and makes her feel a little off center. She said that in the spring of 2005, and at the present time, she can do almost anything for a short period of time. She said that she does things in spurts. She said she needs to take medication to keep going. Medication makes her sleepy. She testified that after she takes a shower, she lies down. It takes her until noon to clean the house. Some days are better than others. Some activities are more difficult, like vacuuming. Chopping a salad makes her tired. She will lie down after she does that. She said it is rare for her to be able to work around the house more than two to three hours at a time.

Claimant has not had surgery on her thoracic spine. No one has recommended surgery for her thoracic spine.

Claimant said that her right side is always about a two on the pain scale. The more she does the more it hurts. If she keeps doing things, the pain goes to a nine or ten. If she lies down, the pain goes back to a two. Pills make her drowsy. She drove to the November 20, 2009 hearing in Gladstone. She did not take any Oxycodone the day of the hearing.

Claimant testified that she has constant right rib pain that is one or two when she uses her Fentanyl patch. The pain is a dull ache. She said she is 90 to 95% mentally alert and pretty competent when she uses the patch. She has been off the patch for a short time. She can drive when she uses the Fentanyl. She does not drive when she takes the pill. If she takes very much medication in a day, she will sleep during the day and then have insomnia at night.

Claimant said the only two medications she takes for her ribs are a Fentanyl patch and Oxycodone. She takes medications three days out of a week on average. The medication can cause her to have problems focusing and keeping track. Sometimes it is difficult to read.

Claimant described an average day. She wakes up about 6:30 or 7:00 in the morning and makes coffee. She fixes breakfast in a microwave or makes cereal. She does a little cooking. She takes a shower and usually lies down for about thirty minutes. She gets dressed, straightens up, makes the beds, and puts the dishes away. She and her husband, who retired recently, take walks together. Claimant tries to walk a little each day. Walking increases her pain. She walks part of the way with him. She then lies down if there is nothing that she needs to do. She has a cold lunch and, by 2:00, she generally takes a little nap.

Claimant and her husband have a hot meal at dinner. She straightens the kitchen and then watches TV. She goes to sleep in a recliner a lot of the time. She goes to bed at 10:00 and then is up and down. She returns to the recliner and watches TV.

Claimant goes to the grocery store once a week. She and her husband moved recently. Before they moved, she went more often to a grocery store that was closer. Before her move, she also used to visit her mother in a nursing home once or twice each week.

Claimant is able to take care of her hygiene needs. She can do most things around the house, but she cannot use a push mower. She can use the zero-turn mower for about thirty minutes, but then needs to lie down. She said she was not able to think of any job that she could do where she could work for two hours and then lie down for an hour.

Claimant testified on cross-examination that she had been seated during the hearing the entire time except for the break. She said that she uses a computer at home for emails. The first time she saw a doctor for her January 29, 2002 accident was in May 2002 when she saw Dr. Donaldson. She was on a pain patch in 2002. She took oral pain medications, including Oxycontin, in 2002 because of continued pain in her mid-back. She continued to work at Employer while she took pain medication.

Claimant testified on May 12, 2003, she tripped or lost her balance and tweaked her ankle and back. She caught herself to prevent herself from falling. She jerked and had some searing pain in the right side of her back. She worked her regular shift at Employer for the next few weeks after that. She told Employer in June 2003 that she did not think that she could do her job because of shoulder pain and mid-back pain. She stopped doing light duty work for Employer in February 2004 because the light duty work ran out. She received unemployment benefits from March 2004 until September 2004. The left shoulder surgery performed by Dr. Thomas was done because of a buildup of calcium deposits. She agreed that Dr. Thomas did not find any tears in her shoulder. She

agreed that Dr. Thomas released her with no restrictions. She said she now has no pain in her shoulder, but has some restriction in motion.

Claimant said that since she left Employer, she has had problems with her low back and both of her hips. She presently has no low back pain. She is not contending that her low back or hip pain is related to her work at Employer. She had an injection in her low back about one month before the hearing.

Claimant did not recall any of her treating doctors saying that she was physically incapable of working. She testified she can drive for one hour. She walks between one-half of a mile and one mile. She helps with house repairs. She helped paint trim.

Claimant said her pain was much more severe for a longer period after her second accident. She was not on any work restrictions before her second accident. She worked full time from her first accident to her second accident without taking any early outs. She was taking medication during that time. After her second accident, she would sometimes lie down when she was on a break. She did not do that after her first accident. She said that she did not feel that her shoulder was keeping her from going back to work.

Claimant received a Bachelor of Science in Education degree from Central Missouri State University in 1967. Claimant took computer classes but did not take the certification examinations. Claimant engaged in self-study to permit her to sell insurance and investment products in 1981. Her license to sell health insurance, life insurance and investment products lapsed in the early 1990s.

Claimant was a homemaker for more than three years beginning in 1976, before she went to D&J. She taught school before that. She taught junior high school history for nine to ten years. She raised one son. She was active in her community and was on a school board and medical board.

Claimant worked at D&J Enterprises, a pipeline construction company, as office manager from 1981 to 1983. She answered the phone, kept the books, worked with crews and did payroll. That job was primarily a sit-down job.

Claimant worked at Northwest Mutual Life for ten years from 1983 until 1993. She sold life insurance and health insurance as a sales representative and made appointments and did sales. She also worked as Director of Education and supervised new agents. She lifted books and class materials. She drove to clients' houses. She lifted boxes that weighed between twenty and forty pounds. She did a little squatting and

kneeling and worked a lot of jobs. She had no other jobs while she worked at Northwest Mutual Life.

Claimant worked at Arrow Forklift as a sales representative for one year before she worked for Employer. She sat at a desk at Arrow and called wholesalers and users selling forklift parts. She took calls and researched parts. The job was sedentary and did not involve lifting. She worked during the week at Arrow, and for a time that she worked at Arrow, she also worked weekends for Employer. She left the Arrow Forklift job in January 1994.

I find this testimony of Claimant to be credible unless noted otherwise later in this award.

The Court notes that throughout the hearing, which began at 1:00 p.m. and concluded at 4:30 p.m., Claimant did not appear to be in pain. The only time that Claimant stood during the hearing was when a short recess was taken.

Medical Treatment Records

Exhibit F contains records of Clay-Platte Family Medicine Clinic pertaining to Claimant. The records of Dr. Blake Donaldson in the Clay-Platte records contain a note dated June 6, 2002 referencing thoracic and lumbar strain, and Anaprox and Darvocet for pain. A June 25, 2002 note references tenderness over the right flank. Claimant was placed on Lortab. A July 8, 2002 note references "R flank pain, questionable etiology, chronic." An MRI of the thoracic spine was ordered.

Exhibit F includes a copy of a MRI report dated July 10, 2002 pertaining to Claimant's thoracic spine. The report notes the following conclusion: "1) Small disc osteophyte complexes are noted at several levels which is most pronounced at T10-11 and slightly eccentric towards the left. Some minimal compression of the spinal cord is suggested although there is no significant mass effect. No extruded disc herniations are identified; 2) Mild degenerative spondylosis producing no significant central or foraminal spinal stenosis at this time; 3) Mild degenerative disc disease, especially at T10-11; 4) Probable small bilateral arachnoid diverticula are of no clinical significance."

A July 15, 2002 note in Exhibit F references a MRI that shows small disc osteophyte complex at several levels, worse at T10, T11 which corresponds with the level of Claimant's pain. She continued to have right sided pain. The assessment was "DJD." A July 30, 2002 note of Dr. Donaldson references chronic back pain, mainly thoracic. Claimant had been to pain management and was started on Relafen. Dr. Donaldson's

August 26, 2002 note states Claimant said the epidurals were not helping. She had had her third one.

Exhibit F also includes a Pain Clinic Note dated July 22, 2002 of Dr. Margaret Yoakum-Pyle pertaining to Claimant. Dr. Yoakum-Pyle took a history and performed a physical examination. Her impression then was "thoracic spondylosis with some radicular pain." She prescribed Relafen. The records in Exhibit F include a report of Dr. Robert Orr dated August 12, 2002 documenting a second thoracic epidural steroid injection. Dr. Orr encouraged Claimant to stay off Darvocet and cut out on her smoking.

Exhibit 3 includes the medical report of Dr. Robert Orr dated August 19, 2002. He examined Claimant that day for thoracic radiculopathy. He administered a third thoracic epidural injection. Claimant was to return to Dr. Donaldson. He encouraged her to stay off Darvocet.

A November 1, 2002 note of Dr. Donaldson assesses thoracic strain, chronic and notes "continue pain meds."

The Concentra records in Exhibit 3 document physical therapy for Claimant's left shoulder on May 12, 2003. Dr. Donaldson's note dated June 2, 2003 (Exhibit F) references "back pain T-spine area fell in hole at work. Moves around to front."

Exhibit 3 includes a June 27, 2003 MRI report of the thoracic spine pertaining to Claimant. The impression noted is: "Mild degenerative disc disease at T8-9 and T10-11 with desiccation. No posterior disc bulges or protrusions."

Exhibit A contains records of Concentra documenting Claimant's treatment for thoracic pain and shoulder in 2003. Some records note an injury on May 12, 2003 from "repetitive motion of dealing." The assessment of the left shoulder was adhesive capsulitis of shoulder, bicipital tenosynovitis, shoulder strain, and shoulder impingement.

Exhibit 3 also contains records of Concentra Medical Center's documenting Claimant's visits to Dr. Neal Mikel in July 2003 for left shoulder pain. On July 11, 2003, Dr. Mikel assessed adhesive capsulitis of the shoulder, bicipital tenosynovitis, shoulder strain, and shoulder impingement.

Exhibit K contains records of Dr. Robert Drisko. These include an office note dated July 16, 2003 documenting Claimant's complaint of pain in her left shoulder and right lower thoracic area. Dr. Drisko thought Claimant had a shoulder strain without evidence of any impingement or frozen shoulder. He thought she had a rib injury with

her torquing injury and might have an element of thoracic stenosis. He thought she would benefit from pain management. He did not think she needed any operative intervention or further diagnostic tests.

Exhibit 3 includes records of Dr. Dwayne Jones pertaining to Claimant. Dr. Jones' July 17, 2003 note shows that he examined her that day. Her chief complaint was right sided rib pain and shoulder pain. His assessment was disc osteophyte complex at the thoracic region with radiculitis and history of shoulder strain and history of adhesive capsulitis of the shoulder and bicipital tenosynovitis with short term improvement with previous shoulder joint injection. He recommended a third epidural steroid injection for her radicular pain coming from thoracic radiculitis, and to continue with Celebrex. Claimant underwent a third epidural injection.

Dr. Jones' July 28, 2003 report in Exhibit 3 documents a repeat intralaminar epidural steroid injection at T10-T11. Exhibit 3 includes Dr. Jones' August 12, 2003 report documenting Claimant's continued complaints of pain in the mid back radiating across the right chest wall. They discussed Fentanyl (Actiq) as needed for severe pain and proceeded with a repeat thoracic intralaminar steroid injection.

Dr. Drisko's August 19, 2003 office note (Exhibit K) states he thought Claimant's main problem was thoracic stenosis. He thought she needed a neurosurgery consultation. Her shoulder was better.

Exhibit L contains records of North Kansas City Hospital pertaining to Claimant. The records include notes of Dr. Dwayne Jones pertaining to his thoracic epidural steroid injections in July, August, and September 2003.

Exhibit 3 includes Dr. Jones' September 15, 2003 report. It notes the steroid injections had not given Claimant sustained improvement. She was having some improvement with Actiq. He recommended consideration of a sympathetic block. He indicated a neurosurgical evaluation could be a benefit. Dr. Jones' September 22, 2003 report notes that Claimant continued to work at Employer. She was taking Fentanyl that allowed her to get through the day. The report notes they were going to proceed with thoracic sympathetic block. Dr. Jones' October 7, 2003 report notes that they proceeded with the block.

Exhibit M includes a report of Dr. Geoffrey Blatt dated October 10, 2003 pertaining to Claimant. He saw her that day for thoracic pain following incidents in February 2002 and May 12, 2003. Her treatment was noted. He performed a physical examination. He believed Claimant had some symptoms of thoracic radiculopathy. He

noted it was possible she was “just dealing with a muscular strain or soft tissue injury.” He recommended a better MRI scan.

Dr. Donaldson's October 16, 2003 note (Exhibit F) references she was there for medication refill. Claimant did not think Celebrex was working very well. The note states: “She has severe chronic thoracic strain. She was doing fine until she tripped at work.” Nexium was refilled and Claimant was placed on Vextra.

Exhibit 3 and Exhibit N include an MRI thoracic spine report from Research Medical Center dated October 27, 2003. The impression noted is: “1. Herniation T10/11 disc posteriorly to the left midline. 2. Small posterior herniation T8/9 disc to the left of the midline.” The report also notes that degenerative changes are present in the remaining thoracic discs.

Exhibit F includes a report from Dr. Geoffrey Blatt dated October 31, 2003 pertaining to Claimant. His report notes he saw Claimant that day. She had undergone an MRI scan of her thoracic spine. Studies showed some bulging discs at T8-9 and T10-11, both of which tended to be greater on the left. The report notes Claimant's symptoms were on the right. He noted it should not be caused by any disc on the left-hand side. He noted Claimant had been on Actiq for the last three months. He strongly recommended she work away from long acting narcotics. He recommended she see a physiatrist and have a functional capacity evaluation. He recommended no new restrictions. His report concludes: “Ultimately, I believe it is safe for her to work, although it might be uncomfortable.”

Exhibit 3 includes Dr. Terrence Pratt's December 29, 2003 medical report pertaining to Claimant. The report describes the history of her work injuries in 2002 and 2003. It notes her present symptoms of continuous dull pain to the right of the mid back, intermittently radiating to under the right breast. Her symptoms are noted to be exacerbated with any activities involving the right upper extremity.

Dr. Pratt performed a physical examination and reviewed records. His impression was: “Thoracic syndrome with disc bulging/protrusion.” Dr. Pratt's report notes the abnormalities on the MRI of the thoracic region were primarily to the left and Claimant complained of right sided symptoms. His report notes it is difficult to relate those findings to her symptoms. The report notes that conservative treatment options are limited at this stage. He states that she has reached maximum medical improvement in relationship to the event of May 12, 2003. The report also states: “This event did not result in the onset of her symptoms, but did cause aggravation of underlying involvement.”

Dr. Pratt's report notes that Claimant is "significantly limited subjectively and even reports symptoms with just repetitive movements of her fingers on the right." She also reported some limitations in relationship to the left shoulder. The report notes that he would not recommend that Claimant perform any lifting in excess of twenty pounds and also avoid activities, which involve thoracic rotation, other than occasionally. The report notes that in direct relationship to the reported event on May 12, 2003, "This event was an aggravation of underlying involvement of the region and results in a five percent (5%) permanent partial disability to the body as a whole at 400 weeks."

Dr. Drisko's January 14, 2004 report states Claimant had reached maximum medical improvement. He provided a permanent partial disability rating of 0% of the body as a whole but stated, "Treatment not completed by me so I cannot do a proper rating."

Dr. Donaldson's January 26, 2004 note references chronic pain in Claimant's back. She was placed on Celebrex and a Duragesic patch. Dr. Donaldson notes on February 13, 2004: "Chronic thoracic strain". References are made to Duragesic.

Exhibit 3 and Exhibit F contain a report of Dr. James Scowcroft dated February 26, 2004 pertaining to Claimant. Dr. Scowcroft's report notes he saw Claimant that day for mid-back and flank pain. The chief complaint was noted to be mid-back and flank pain. The record notes Claimant was at work when she was walking and tripped and was able to catch herself before entirely falling, but did strain her back and her side. She had undergone injections. He performed a physical examination. Claimant had mild tenderness in her back and specific point tenderness over the seventh and eighth ribs. His impression was probable intercostal neuralgia. He started Claimant on Neurontin and reinitiated Lidoderm patch. He noted she had a prescription for Duragesic.

Dr. Donaldson's March 23, 2004 note references shoulder strain and chronic thoracic strain. Duragesic was refilled. An ortho referral was made.

Exhibit O and Exhibit F contain records of Dr. Leslie Thomas. These include Dr. Thomas' April 19, 2004 note documenting Claimant presented that day with persistent left shoulder discomfort. His note states that x-rays show clear cut calcific deposit at the rotator cuff tendon near the insertion of a tuberosity humerus. He recommended surgical excision of the calcific deposit. He notes Claimant had clavicular acromial arthritis and would benefit from subacromial decompression. Exhibit 2 includes Dr. Thomas' Curriculum Vitae. It notes Dr. Thomas is a Board Certified orthopedic surgeon licensed

to practice medicine in Missouri, and has staff privileges at North Kansas City Hospital and St. Lukes Northland Hospital.

Dr. Thomas' August 23, 2004 note states he saw Claimant that day. The note states in part that there was a direct causal relationship between Claimant's left shoulder discomfort and her work activity as a dealer. The note also states that Claimant was not complaining about a back injury at present. The note states that Claimant had sustained a slip on the ice and sustained a back injury.

Dr. James Scowcroft's report dated September 8, 2004 in Exhibit 3 notes Claimant's chronic right-sided thoracic pain. His report said there was really no further treatment except for a trial of spinal cord stimulator which Claimant did not want to pursue at that time. She was to follow up with Dr. Donaldson.

The records in Exhibit L include a copy of Dr. Leslie Thomas' November 12, 2004 Operative Report that documents "left shoulder acromioplasty with lateral clavicle resection and rotator cuff repair with excision of calcific deposits of the rotator cuff tendon."

Exhibit 3 includes records of HealthSouth documenting physical therapy treatments Claimant received in 2003, 2004 and 2005.

Dr. Thomas' records in Exhibit O include notes of Claimant's office visits there on November 22, 2004, December 6, 2004, January 25, 2005, March 4, 2005 and April 15, 2005. Dr. Thomas' March 4, 2005 office note states that Claimant has improved in terms of range of motion and was independent on home exercises with near full range of motion. The March 4, 2005 note also states, "We will have her resume full activities and continue with home exercises."

Dr. Thomas' April 15, 2005 note states Claimant still had some "slight weakness about the left shoulder as well as some limitation of motion. She was independent on home strengthening and range of motion exercises." The note states, "I feel she has reached the maximum medical benefit. We will have her pursue activities as tolerated. She is to return to see us on a p.r.n. basis."

Exhibit 3 includes Dr. Leslie Thomas' May 22, 2005 report. It states that Claimant had reached the maximum medical benefit regarding her left upper extremity. He placed Claimant's disability rating "based on mild limitation of motion and resection of distal clavicle at 10% loss of physical function to the involved upper extremity."

Exhibit P contains records of Dr. Jeffrey Bredemann pertaining to Claimant. His June 6, 2006 note states that Claimant presented for evaluation of right chest wall pain that had been going on since January 2002. The note describes the history of Claimant's illness and treatment. The note states in part: "She reports that, if the pain has its onset at home while doing housework, then she can rest and diminish the pain. Reclining or lying down seems to reliably improve her symptoms. However, she reports that when she is out at a store or in public with some other daily activity, that her pain can overtake her and make it difficult for her to complete whatever she is doing." The note states that Claimant said that she was not bothered with left shoulder pain and that "her only pain problem is this right torso and flank thoracic pain." The report notes that Claimant expressed "an openness to any further treatments that might be beneficial for her pain syndrome, and that might allow her to taper off the narcotics she is using to treat the pain." Medications, including Duragesic patch and Actiq lozenges, are noted. The results of the physical examination are noted.

Dr. Bredemann's report notes, "Right thoracic pain of uncertain etiology." He notes possibilities include "an intercostal neuralgia, or some other chronic neuropathic condition, that may be associated with mechanical disruption or injury of the muscles or soft tissues in the posterior spine area." He notes Claimant's pain is reported at 2-9 out of ten that is fairly consistent over time and associated with almost any activity. Claimant is noted to be frustrated with her apparent inability to work or do other basic activities. He notes Claimant is able to drive.

Dr. Bredemann's June 6, 2006 report sets forth certain recommendations. He agreed with Dr. Stuckmeyer that long term use of narcotics was not a good choice for pain syndrome that is of unclear etiology in a young person such as Claimant. He notes tolerance and physical dependence will become issues. He recommended tapering Duragesic patches over three weeks and using Actiq for activity. Claimant was concerned about Actiq causing her to become excessively drowsy. He thought she could adjust the medication.

Dr. Bredemann's June 6, 2006 report recommended a neurology consult. He noted that smoking cessation and weight loss can improve pain syndromes and should be pursued. He recommended consistent follow-up with a single physician to manage her pain symptoms. His report also states:

7. It is not my opinion that the Fentanyl patch or other narcotics would preclude Ms. Carter from working, since she is able to drive and perform other basic activities. She should certainly avoid any substantial decision making issues or safety equipment handling, but

basic clerical duties or other activity of that sort would not in my opinion be contra-indicated by the use of narcotics. We have many patients who take narcotics so that they may in fact return to work successfully. Rather, Ms. Carter's complaints of pain seem to be more the limiting issue. She reports pain with any trivial use of her arms for any extended period of time and it is difficult to conceive of the work that she would do that would not cause her to report this kind of pain. This is where a diagnosis could be most helpful to both her return to more full function and more effective and precise treatment of her pain syndrome.

Dr. Bredemann thought that Claimant's use of Fentanyl currently was reasonable and necessary. He also thought "It would be most beneficial if she could refrain from daily or at least constant use of opioids, which are likely to give unacceptable results over the course of the long term."

Exhibit 3 includes the medical report of Dr. Michael Ryan dated October 24, 2006 addressed to John Fox pertaining to Claimant. Dr. Ryan evaluated Claimant that day. His report notes the history of Claimant's injuries, a records' review, Claimant's current medications, past medical history, and social history. The results of his physical examination are described. The report notes an area of point tenderness in Claimant's thoracic region but no sensory loss was identified in any dermatomal pattern.

Dr. Ryan's assessment/recommendations notes in part:

Chronic right chest wall and back pain, questionable etiology. Some of the features suggest neuropathic pain, but she has tried a number of agents for neuropathic pain without much benefit. There are no objective benefits on clinical exam to corroborate any of her symptoms. The problems are mainly subjective in origin. She does have MRI imaging of her spine done which shows small disc herniations at T8-9 and T11-12, but those are on the left side. Her current symptoms are more around right T6 and I showed her a dermatomal pattern that is chart and she agreed that it appeared to be in the T6 dermatome.

Dr. Ryan's report notes that further evaluation possibly could include thoracic myelogram.

The records in Exhibit L include Dr. Dwayne Jones' July 11, 2006 report that notes he did not think Claimant was a candidate for surgery. He thought she was a candidate

for a trial of epidural spinal cord stimulation. He noted the history of her treatment including Duragesic and Actiq. He thought non-narcotic treatment options would be a better option.

The North Kansas City (NKC) records (Exhibit L) include Dr. Patrick Griffith's March 5, 2007 report. His impression was right thoracic radiculitis. He recommended a new MRI of the thoracic spine and a thoracic epidural steroid injection. The records include a report of Dr. Griffith documenting the administration of a thoracic epidural steroid injection on February 27, 2007. The records include Dr. Griffith's March 14, 2007 report documenting his administration of right T8 and right T10 paravertebral nerve root blocks. The records include his April 9, 2007 report documenting his thoracic epidural steroid injection.

The NKC records include August 17, 2007 MRI reports of the left hip and lumbar spine for left hip pain and back pain with left lower extremity radiculopathy. The MRI conclusion notes, "borderline mild spinal stenosis at the L3-4 and L4-5 levels related to spurring and mild disc bulging. At the L4-5 level there is borderline mild narrowing of the left lateral recess." The NKC records include Dr. Patrick Griffith's report pertaining to provocative discography for multi-level thoracic disc protrusions on August 21, 2007. The records include a CT report of the thoracic spine dated August 21, 2007 which notes "mild extravasated contrast at T10-T11."

The NKC records include a report dated August 31, 2007 documenting left hip joint injection for left hip pain. The records include Dr. Griffith's report dated August 30, 2007 documenting another left hip injection.

The NKC records include Dr. Patrick Griffith's September 17, 2007 report noting he reviewed the CT discography that showed a grade IV right posterior central annular tear and evidence of a disc protrusion at T10-11. He noted pain was non-concordant at that level and the disc was degenerative. The T9-10 disc was also degenerative. His impression was "left thoracic radiculitis with CT discography evidence of a T6-7 disc protrusion with grade IV annular tear with subsequent concordant pain response." He recommended percutaneous disc compression of the T7 disc using coablative therapy.

The NKC records include Dr. Patrick Griffith's report dated February 7, 2008 documenting T6-7 and T8-9 percutaneous disc decompressions. Dr. Griffith's February 28, 2008 report states that Claimant returned that day having had "no pain relief with the thoracic disc decompression." She continued to have pain about the right side of her thoracic spine that wrapped around her chest. He wanted to try another TENS unit. Dr. Griffith saw Claimant on March 27, 2008. He noted that "she is miserable." He had her

off opioid analgesics since November or December. She had continued right-sided thoracic radicular pain. He started her back on the Fentanyl patch with Roxicodone for breakthrough pain.

The records in Exhibit F include a report of Dr. Patrick Griffith dated April 25, 2008. Claimant continued to have pain in her mid-thoracic back that radiated to the right and affected her sleep adversely. Her pain was noted to be six on a scale of ten. He wanted to try her on Ultram and Tramadol and follow up in two weeks for thoracic epidural steroid injection. Dr. Griffith was going to refer Claimant for a functional capacity evaluation.

Dr. Griffith's April 25, 2008 report states in part: "My feelings are that Mrs. Carter has reached maximum medical improvement. I think it would be reasonable to assume that she is going to need ongoing medical therapy and may from time to time, require a thoracic epidural steroid injection; perhaps 3x per year. Consideration could be given to the trial of spinal cord stimulation. However, I have no strong feeling that that would be helpful, nor that we would be able to capture her areas of pain."

The records in Exhibit F document that Dr. Griffith saw Claimant again on June 12, 2008 for a lumbar epidural steroid injection regarding her low back. His impression was lumbar spinal canal stenosis. He administered a second lumbar epidural steroid injection on July 14, 2008.

Dr. Griffith wrote a July 30, 2008 report to Employer's attorney pertaining to Claimant. He noted that Claimant's percutaneous disc decompression procedure was not helpful "primarily because the discs were markedly degenerative." Dr. Griffith noted that he attempted to manage Claimant "without opioid analgesics, but unfortunately her pain was functionally limiting and her quality of life was markedly reduced." His report notes that medication issues for Claimant's work-related thoracic injury were Fentanyl patch, Roxicodone and Cymbalta. He did not think Claimant was a candidate for spinal cord stimulation. He believed a surgical spine consultation in the past was not viewed as a viable option. His report concludes: "I would see her requiring medical management for this problem indefinitely."

Dr. Griffith's August 18, 2008 report notes that he recommended another epidural steroid injection for her lower back pain as part of her "non-work related injury." Dr. Griffith's September 29, 2008 report documents bilateral lumbar medial branch injections. His October 27, 2008 report documents radio frequency neuroablation at L2-L5 for low back pain. Dr. Griffith's November 24, 2008 report notes Claimant's low back pain secondary to lumbar degenerative disc disease and disc bulging which has

improved, but not completely gone, borderline spinal canal stenosis at L3-4 and L4-5, and chronic pain secondary to thoracic disc protrusions. Claimant was continuing to use Fentanyl patches, Roxicodone and Cymbalta.

Exhibit F contains records dated August 21, 2008 documenting physical therapy and hip and lower back pain that started about one year before. Physical therapy records dated September 18, 2008 in Exhibit F document throbbing pain in Claimant's left foot.

The NKC records document another lumbar steroid injection on March 23, 2009. Dr. Griffith saw Claimant on April 20, 2009. He noted her low back and bilateral leg pain were markedly improved. She still had pain in the right side of her lower back with radiation in the right groin. She continued on Fentanyl patches and Roxicodone and was started on Neurontin, but had not continued that on a regular basis. He recommended lumbar medial branch nerve blocks on the right. His report notes, "For the thoracic pain and thoracic disc protrusion, the medication seems to be helpful with that." The report notes Claimant exhibited some tolerance with the Roxicodone. They discussed the possibility of weaning her off temporarily. He felt uncomfortable about increasing her dose. He refilled her Fentanyl patch and Oxycodone.

The NKC records contain a report of lumbar medial branch radio frequency on June 3, 2009. Dr. Griffith's records note Claimant and her husband recently moved to their new home and Claimant "has been doing everything associated with moving, which would be packing boxes and now unpacking the boxes." The report notes that activity increased her pain. Dr. Griffith changed her medication from Roxicodone to Percocet.

Evaluation Physicians

Dr. James Stuckmeyer

Exhibit D contains the deposition of Dr. James Stuckmeyer taken on August 31, 2009, with Stuckmeyer Deposition Exhibit 1, his Curriculum Vitae, Stuckmeyer Deposition Exhibit 2, his medical report dated July 9, 2005 addressed to Claimant's attorney pertaining to Claimant, Stuckmeyer Deposition Exhibit 3, his January 21, 2009 report addressed to Claimant's attorney pertaining to Claimant, and Stuckmeyer Deposition Exhibit 4, his June 5, 2009 report addressed to Claimant's attorney pertaining to Claimant. Dr. Stuckmeyer was Board Certified by the American Board of Orthopedic Surgeons in 1989. Past hospital affiliations are noted. No hospital affiliation is noted since 1995.

Dr. Stuckmeyer's July 9, 2005 report notes he evaluated Claimant on June 30, 2005. His report identifies the medical records he reviewed. Claimant reported she sustained three separate work-related injuries at Harrah's, the first on January 29, 2002, the second on May 12, 2003, and the third on June 16, 2003. His report notes her complaints and treatment relating to those injuries. He summarizes her treatment records in detail. The report discusses Claimant's current complaints and conditions and the results of his physical examination of her.

Dr. Stuckmeyer set forth several conclusions within reasonable medical certainty. He stated that on or about January 29, 2002, Claimant sustained an injury to her thoracolumbar spine following a fall on ice that necessitated treatment. She was capable of continuing to work, but had ongoing symptoms of right-sided chest wall type pain. His report notes her injury on or about May 12, 2003 when she tripped on uneven pavement and again sustained an injury to the thoracolumbar spine that needed further treatment. His report notes that he felt her diagnosis was consistent with degenerative disk disease at multiple levels of the thoracic spine is outlined in various MRIs. He did not feel that she would benefit from intervention.

Dr. Stuckmeyer's report states that Claimant sustained a 10% permanent partial disability to the thoracic spine as a direct result of the January 29, 2002 accident, and an additional 15% disability to the thoracic spine causally related to the May 12, 2003 accident.

Dr. Stuckmeyer's report states that the repetitive nature of Claimant's occupation necessitated the surgical treatment performed by Dr. Thomas regarding the left shoulder. Dr. Stuckmeyer felt Claimant had reached maximum medical improvement regarding the shoulder, and afforded a 25% permanent partial disability to the left shoulder.

Dr. Stuckmeyer recommended ongoing treatment for the chronic thoracic pain with radicular symptoms into the right-sided chest wall. He agreed with Dr. Blatt that every attempt should be made to wean Claimant off narcotics.

Dr. Stuckmeyer's report also states that he did not feel Claimant was employable because she was under Fentanyl dosages on a daily basis. His report notes Fentanyl is approximately ten times the narcotic strength of morphine and impedes an individual's sensory capabilities. His report further states:

Unless Ms. Carter can be appropriately weaned from these medications it would be the opinion of this examiner that as a result of the accident of May 12, 2003, and a subsequent repetitive injury of

June 16, 2003, that the patient is permanently and totally disabled. It is my opinion that the back condition is a hindrance or obstacle for employment or reemployment.

Dr. Stuckmeyer's report states that his opinions are rendered within a reasonable degree of medical certainty.

Dr. Stuckmeyer's January 21, 2009 report, Stuckmeyer Deposition Exhibit 3, notes that he reevaluated Claimant on January 14, 2009. His report identifies medical records he reviewed. The report notes the history of her injuries and his permanent partial disability assessments he made in his earlier report.

Dr. Stuckmeyer's January 21, 2009 report discusses portions of the medical records that he reviewed, including records of Dr. Bredemann, North Kansas City Hospital, Dr. Michael Ryan and Dr. Patrick Griffith. Those records describe treatment Claimant received between June 6, 2006 and September 29, 2008, including examinations, MRIs, thoracic epidural injections, and the percutaneous disk compression performed at T6-T7 in February 2008. He notes Claimant has continued pain medication, including Fentanyl patches and Roxicodone, and lumbar injections.

Dr. Stuckmeyer's January 21, 2009 report notes Claimant reported persistent symptoms of pain in the right thoracolumbar region. Dr. Stuckmeyer performed a physical examination.

Dr. Stuckmeyer's January 21, 2009 report sets forth the following conclusions that are stated within a reasonable degree of medical certainty:

It is my opinion that the accident of January 29, 2002, was the substantial contributing factor to the injury to Ms. Carter's thoracic spine, need for medical treatment, and subsequent disability. I would render a 10% disability to the body as a whole as a result of that accident.

It is my opinion that the accident of May 12, 2003, was the substantial contributing factor to the exacerbation and acceleration of the injury to Ms. Carter's thoracic spine, need for medical treatment, and subsequent disability. I would render a 25% disability to the body as a whole as a result of that accident.

It is my opinion that the repetitive nature of the employment culmination in an accident date of June 16, 2003, was the substantial contributing factor to the injury to Ms. Carter's left shoulder, need for medical treatment, and subsequent disability. I would render a 25% disability to the left shoulder as a result of the repetitive occupational duties.

From an orthopedic standpoint, I do not feel that Ms. Carter is capable of returning to gainful employment. I would restrict her to no prolonged standing, no prolonged walking, and no repetitive lifting, bending, stooping, or squatting. I would also limit her to no repetitive stair climbing and no lifting to exceed 10 pounds on an occasional basis. In addition, based on the heavy narcotic utilization, I do not feel this patient should be driving a vehicle nor should she be around hazardous equipment or hazardous machinery.

Specific to the left shoulder, I would recommend no repetitive lifting, no repetitive pushing or pulling, and no lifting over shoulder height greater than 10 pounds on an occasional basis. I would recommend proceeding with a vocational assessment to determine Ms. Carter's employability. That being stated, this patient has not worked since 2003, and based on the chronicity of her thoracolumbar complaints, left shoulder complaints, and heavy narcotic utilization, it is doubtful that she would be reasonably employable by any employer and it is my opinion that she is permanently and totally disabled as a result of the cumulative effect of the accidents.

In regard to future treatment recommendations, I do feel the patient is going to require long-term utilization of the Fentanyl patches and Oxycodone for breakthrough pain. I would also recommend continuation of her treatment with Dr. Patrick Griffith. These requirements will be a lifelong situation.

Stuckmeyer Deposition Exhibit 4 is Dr. Stuckmeyer's June 5, 2009 report addressed to Claimant's attorney. It notes that Dr. Stuckmeyer reviewed reports of Terry Cordray. Dr. Stuckmeyer's June 5, 2009 report states in part that Claimant was not permanently and totally disabled from the open labor market due to the January 29, 2002 back injury taken in isolation. The report notes Claimant returned to the workforce until May 12, 2003. His report further states:

I think it is fair to state that it is due to a combination of the January 29, 2002 injury in combination with the more significant injury of May 12, 2003 that has rendered Ms. Carter permanently and totally disabled.

When one considers the injury to the left shoulder, taken in isolation, it would be the opinion of this examiner that Ms. Carter would be able to return to the workforce. I would concur with Mr. Cordray that the thoracic injuries in isolation, in conjunction with the narcotic medication, would be enough to render Ms. Carter permanently and totally disabled. That being stated, as outlined in prior commentary, she does have significant disability to the left shoulder as a result of repetitive use.

Dr. Stuckmeyer testified by deposition (Exhibit D) on August 31, 2009. He testified he had treated thoracic spines and shoulders in the past and had done surgery to the thoracic spine and shoulders in the past. He testified he had reviewed the records identified in his reports. He testified regarding portions of his reports, and his testimony was generally consistent with his reports.

Dr. Stuckmeyer thought it was fair to state that after Claimant's first accident she "definitely sustained an injury to her thoracic spine." He noted an MRI scan of July 10, 2002 revealed a disk osteophyte complex at T10-T11 with minimal cord compression. He testified that the osteophyte complex was not caused by the fall and was a preexisting problem. She has persistent symptoms that were waxing and waning between the January 2002 accident and May 2003 accident.

Dr. Stuckmeyer testified that thoracic disk injuries are very difficult to treat, have bizarre symptoms, and MRI scans are not 100% accurate. He thought Claimant had significant injury the first time, and an aggravation and more injury to the thoracic spine the second time. He said it was hard to tell whether Claimant was at maximum medical improvement because Dr. Griffith stated in July 2008 that medial branch blocks might be warranted. He was aware that Dr. Griffith had stated that Claimant was at maximum medical improvement in April 2008.

Dr. Stuckmeyer testified that the likelihood of getting Claimant off Fentanyl and narcotic medications "is probably nil at this stage of the game no matter what they do to her." He testified that Claimant has chronic thoracic back pain with radicular symptoms with multi-level disk involvement and failure to respond to extensive treatment and chronic narcotic medication. He thought Claimant would never be able to get off the

narcotic medications. He put her on restrictions and felt that “essentially she was permanently and totally disabled.”

Dr. Stuckmeyer was asked whether Claimant should remain on the Fentanyl and Roxicodone in the future. He said it would be unlikely that she will ever be able to get off those medications. He testified that Fentanyl is ten times stronger than morphine and is the strongest narcotic commercially available. He noted Claimant is on them daily.

Dr. Stuckmeyer understood Claimant is “pretty much in constant pain regarding the thoracic spine and chest wall pain and it’s exacerbated by activities.” He thought that Claimant represented a relatively typical individual with thoracic spine trauma.

Dr. Stuckmeyer testified regarding Claimant’s restrictions and percentage of disability, and his testimony was consistent with his reports. He noted that he had increased Claimant’s disability from 15% to 25% related to the second accident, after she had undergone additional treatment and he obtained additional information.

Dr. Stuckmeyer also testified (page 37):

And I think as I opined throughout these letters when you take the two thoracic injuries and the fact that she’s on chronic narcotic use and there’s really nothing of a surgical standpoint to offer her any relief, I felt that she was permanently and totally disabled.

Dr. Stuckmeyer said that was despite his 10% rating from the 2002 injury and the 25% rating from the 2003 injury.

Dr. Stuckmeyer testified Claimant was not having any thoracic complaints before 2002 and he saw no suggestion in any of the records that she had preexisting thoracic complaints by January 2002. He said that both the January 2002 and the May 2003 injuries were substantial contributing factors to the thoracic spine problems that he diagnosed. He thought that Claimant “is basically incapable of engaging in the open labor market in some capacity.” He believed that Claimant was legitimately hurting. That was demonstrated by her willingness to undergo thoracic discography where they stick a five inch needle in your thoracic spine.

Dr. Stuckmeyer testified regarding Claimant’s left shoulder. He testified she had undergone a left shoulder acromioplasty with lateral clavicle resection and rotator cuff repair with excision of clavic deposits from the rotator cuff. He rendered a 25% disability to the left shoulder. He reiterated his restrictions specific to the left shoulder that were

consistent with his 2009 report, including no lifting over shoulder height greater than ten pounds on an occasional basis. He noted Dr. Thomas, the treating doctor, had released Claimant on April 15, 2005 as to her shoulder.

Dr. Stuckmeyer testified that if you consider Claimant's left shoulder in isolation, she would be employable. He also testified that if you considered the thoracic spine in isolation and negated the left shoulder, Claimant would not be employable. He testified that Claimant's 2002 injury in isolation did not cause her to be totally disabled because she returned to work.

Dr. Stuckmeyer was asked the following question and gave the following answer (page 51):

Q. Do you believe that the January 2002 and May 2003 accidents in combination have left this lady permanently and totally disabled from a medical standpoint or do you think it's the May 2003 accident taken in isolation that's left her permanently and totally disabled from a medical standpoint?

A. I commented on page 4 of my June 5th, 2009 commentary, first paragraph, I think it is fair to state that it is due to a combination of the January 29, 2002 injury in combination with the more significant injury of May 12th, 2003, that has rendered Ms. Carter permanently and totally disabled.

Dr. Stuckmeyer testified his opinions had been within a reasonable degree of medical certainty.

Dr. Stuckmeyer testified that Claimant is taking Fentanyl and other medications as the result of a combination of the two injuries to her thoracic spine. He testified that her symptoms exploded on May 12, 2003 necessitating further treatment of the thoracic spine. When he said her symptoms exploded, he meant that things got a whole lot worse—her thoracic spine significantly deteriorated.

Dr. Stuckmeyer agreed that Claimant's MRI of her low back showed borderline mild spinal stenosis at L3-4 and that she had degenerative changes in her lumbar spine, specifically calcification or osteophyte complex. She was having lumbar spinal canal stenosis and left leg pain for which she received a series of epidural injections and medial branch blocks. He testified if Claimant had no lumbar complaints, his restrictions would

be the same. Claimant was not really complaining of lower back pain when he evaluated her in 2009.

Dr. Stuckmeyer was aware that Claimant returned to work between January 2002 and May 2003. He was aware that she did not receive any treatment between August 2002 and May 2003. He understood she returned to regular duty status. It was his understanding she was not on any chronic narcotic pain medications immediately prior to her May 2003 work injury. He understood she had taken a family vacation in Hawaii between January 2002 and May 2003. He knew she was not prescribed a chronic narcotic pain medication until after the May 2003 injury. Claimant was not taking Fentanyl prior to the May 2003 accident.

Dr. Stuckmeyer was asked the following question and gave the following answer (pages 82-84):

Q. But we've already got medical records that would indicate she wasn't having those narcotics prior to this work-related injury, so explain to me how it could have been related to the combination of the two when it wasn't until after the May of '03 injury that she was prescribed them.

A. My global perception of this case is that this woman sustained an injury – and I'll go over this again – in January '02. She's evaluated with an MRI scan which was equivocal, had persistent symptoms well documented not only in commentary by me but by other examining physicians and, I believe, even by her deposition. She did undergo a series of epidural injections ending in August '02, which did offer her some relief. In August '02 she has some relief, she returns to work, and then in May '03 she sustains this injury. And as I've testified to, she's subsequently reevaluated with an MRI scan following the '03 accident. It wasn't until 2008 that they ultimately did the provocative discography.

My experience with thoracic spine is as follows. She had persistent thoracic back pain with radicular symptoms into the chest wall indicating she probably had a disc herniation that was never picked up in the '02 and the '03 MRI scan. Based on the patient's history, in '03 she had an explosion of her symptoms, which means that she probably caused yet another disc herniation at yet another level in the thoracic spine. I think it's fair to state and it's my

commentary she had an injury in '02, she had ongoing problems, she was not on narcotics, but she had ongoing chest wall pain. My suspicion is she had an undiagnosed thoracic disc herniation is why she was having the radiating symptoms in the chest wall. '03 things exploded, things got worse, but five years subsequent to the '03 injury she was ultimately diagnosed with having these disc herniations.

Dr. Stuckmeyer testified he did not recommend any additional future medical treatment to the left shoulder. He thought she would need long term management from a pain management group for her narcotics with regard to the thoracic spine. He said she would need to stay on the Fentanyl for her lifetime as a result of the thoracic spine problems.

Dr. Stuckmeyer's opinions were expressed within a reasonable degree of medical certainty.

Dr. David Clymer

The deposition of Dr. David J. Clymer taken on November 9, 2009 was admitted as Exhibit 1 along with Clymer Deposition Exhibit 1, his Curriculum Vitae, Deposition Exhibit 2, his July 13, 2009 medical report addressed to John Fox pertaining to Claimant, Deposition Exhibit 3, WebMD document pertaining to Fentanyl, Deposition Exhibit 4, document titled "Fentanyl Side Effects", Deposition Exhibit 5, document entitled "Fentanyl", and Deposition Exhibit 6, letter from John Fox to Dr. David Clymer dated July 7, 2009. Objections to Clymer Deposition Exhibits 3, 4, and 5 are sustained.

Dr. Clymer's Curriculum Vitae notes that he is a Diplomat of the American Academy of Orthopedic Surgeons and is Board Certified by the American Board of Orthopedic Surgeons. He is licensed to practice medicine in Missouri and Kansas. His hospital affiliations and education are noted.

Dr. Clymer's July 13, 2009 medical report notes medical records that he reviewed. They include records of Dr. Ryan, Dr. Thomas, Dr. Drisko, Dr. Stuckmeyer, Dr. Pratt, Dr. Blatt, Dr. Griffith, Research Medical Center, St. Luke's, Northland Hospital, North Kansas City Hospital, Concentra Medical Center, Clay Family Medicine Clinic and HealthSouth Physical Therapy. He also reviewed Claimant's deposition testimony dated June 30, 2009. His report notes Claimant is 63 years old and is currently unemployed. The report notes that Claimant alleges injuries at Harrah's that "resulted in rather chronic ongoing right sided back and chest wall pain as well as some less severe ongoing left shoulder pain." His report discusses the history of Claimant's slip and fall on ice on

January 29, 2002, and her subsequent conservative treatment. The report notes she continued to work in her regular duties but with some discomfort.

Dr. Clymer's report discusses Claimant's second injury when she stumbled over uneven concrete on a sidewalk. The report notes she stated she had recurrent pain that was very similar to the pain after the first fall with primarily right-sided chest wall searing discomfort. She also complained of increasing discomfort in the upper extremities. The report notes her left shoulder symptoms apparently became much worse in June 2003. The report notes that her shoulder injury sounded more of a culmination of repetitive use over time rather than an isolated accident or injury. Her treatment at Concentra and MRI study was noted.

Dr. Clymer's report notes her study at Northland Imaging revealed some hypertrophic degenerative changes at the AC joint and some calcification in the distal supraspinatus tendon consistent with calcific tendinitis and impingement. The report notes there was not evidence of a significant rotator cuff tear. The report notes Claimant's referral to Dr. Drisko, and the MRI thoracic spine done on October 27, 2003. The report notes Claimant's evaluation by Dr. Blatt in October 2003. The report notes Claimant's evaluation by Dr. Pratt, and his suggested limitations and permanent partial disability at 5% as a result of the workplace accidents.

Dr. Clymer's report also notes Claimant's referral to another doctor that resulted in surgical debridement of the left shoulder in November 2004, a later release at MMI, and the treating doctor's 10% disability rating involving left shoulder. The report notes that Dr. Blatt suggested Claimant try to limit or avoid narcotic medications, and notes the doctor who operated on her left shoulder also suggested a pain management program in hopes that she could wean down on her medications.

Dr. Clymer's report notes that Claimant was seen by Dr. Bredemann to assist in managing her pain medications, and that she was then seen by Dr. Griffith, who performed a CT scan and discogram. The report notes that Dr. Griffith performed a percutaneous disk decompression in February 2008 that resulted in very limited change in subjective symptoms.

Dr. Clymer notes that Claimant continues to use Fentanyl patch with occasional Oxycodone for occasional breakthrough pain. His report states that Claimant notes her left shoulder symptoms have actually improved with only mild remaining crepitus and discomfort with repetitive movement.

Dr. Clymer's report notes that Claimant has "rather significant ongoing right chest-wall pain which is her primary complaint." She reports that her symptoms are more aggravated by repetitive activities such as standing at the kitchen sink to prepare meals or use her hands and arms in a repetitive fashion. The report notes that at times, Claimant's symptoms are rather severe and almost incapacitating, and at other times, they are moderate. She reports that she never feels her symptoms resolve completely. Her primary complaint is noted to be right-sided chest wall pain at about the T-7 or T-8 distribution.

Dr. Clymer's July 13, 2009 report notes the results of his physical examination of Claimant. He notes some generalized vague discomfort in the right thoracic region about on the line of T-7 extending out toward the lateral side of just beneath the right breast anterior. He notes symptoms are somewhat aggravated by compression of the rib cage, but there is no crepitus or any signs of rib instability. He notes mild subacromial crepitus with movement and mild discomfort with impingement maneuvers involving the left upper shoulder.

New x-rays of the left shoulder and thoracic spine were obtained on July 13, 2009. Dr. Clymer's report notes the thoracic spine study shows "minor degenerative changes with some endplate spurring and mild disk space narrowing at several levels. There is no evidence of fracture nor significant deformity. No other abnormalities are noted." X-rays of the left shoulder reveal mild degenerative change at the acromioclavicular joint.

Dr. Clymer's report sets forth the following opinions:

In summary, Ms. Carter's history and current clinical findings suggest some mild thoracic degenerative disk disease and spondylosis with some ongoing irritation or nerve root damage in the region of the right T-7 level. It is possible that the 2 falls at work may have aggravated this process; however, there is no evidence of a significant disk herniation nor significant ongoing radiculopathy or myelopathy. Her ongoing problems are primarily a pain management issue with subjective discomfort in this region much greater than I would expect given the objective findings. With regard to the left shoulder, her history and findings were consistent with a shoulder contusion and sprain with some associated rotator cuff tendinitis and calcific tendon damage. This has been treated quite nicely with surgical decompression with only mild remaining symptoms. I suspect her repetitive activities at work and the 2 falls described may have contributed to this rotator cuff tendinitis process as well.

I feel Ms. Carter has clearly reached maximum medical improvement with regard to these issues. With regard to the left shoulder, she has only mild ongoing discomfort but some limitation with regard to movement and strength. I would encourage an ongoing general fitness and exercise program and would expect her shoulder symptoms will actually improve somewhat with time. At this point, based on her history, operative findings and current complaints, I would estimate a permanent partial disability at 7% of the left upper extremity at the level of the shoulder related to this process.

With regard to her more significant complaints of thoracic and chest wall pain, the issue is much more complex and unclear. All of her clinical and radiographic studies have revealed only mild degenerative disk change but her subjective symptoms have been more consistent with radiculopathy in the mid thoracic region. I think her treatment has been appropriate and reasonable. Unfortunately, it has not resulted in clear resolution of her symptoms. She probably does have some nerve root irritation and simply much more significant subjective complaints with this than an average person. Consequently, I feel she has also reached maximum medical improvement with regard to this process. I do not think there is much else to do at this point aside from a reasonable pain management program. I agree with the other physicians who have stated that a decrease in her use of narcotics would be helpful and appropriate; however, she seems to be reasonable and is using her current medications in an effort to be more active and functional and does not seem to be having any major side effects or problems. Consequently, although I would suggest she continue to try to taper down her use of narcotic medications, I believe it would be reasonable to continue with a Fentanyl patch at 50 mcg daily so long as this results in clear symptomatic improvement and a more functional and active lifestyle. If the medication caused any side effects or problems or resulted in diminished activity, then I think she would be better off to taper down to a lower dose or off completely. At this point, however, it seems that she is functioning well and the current dose of Fentanyl is acceptable. I would suggest she avoid use of any other additional narcotics. She might find that occasional use of a muscle relaxer or an over-the-counter anti-inflammatory would be helpful. I would not anticipate that any other medical or surgical treatment would be necessary.

At this time, based upon her current findings, I feel Ms. Carter does have some ongoing permanent disability with regard to this chronic thoracic pain. Most of her disability is based upon her subjective level of discomfort as opposed to objective findings, however. This makes assessment of true disability difficult. I feel Ms. Carter is reasonable and cooperative in my evaluation and believes she probably does have ongoing discomfort, however, I would not anticipate this level of discomfort should prevent her from most moderate level activity. In fact, I would encourage an ongoing stretching, strengthening and exercise program and feel she probably could also work provided this did not involve very heavy lifting or very highly repetitive activities. A periodic change in position would be appropriate. Use of her arms and shoulders would be acceptable but I would avoid highly repetitive overhead activity or activities which cause excessive strain in the thoracic region. I would suggest a lifting limit in the range of 20 to 25 pounds.

Based upon her current findings and ongoing complaints, I feel she has evidence of permanent partial disability equal to 10% of the body as a whole as a result of the thoracic spine process with disk injury and subsequent surgery as described above.

Finally, with regard to your specific question about working while using Fentanyl patch, I believe an appropriate dose of Fentanyl would not preclude Ms. Carter from activity and work and therefore would not feel that there is any need for restriction from work activities in the past or the future while she is on Fentanyl beyond those physical restrictions which I have just outlined.

Dr. Clymer testified on November 9, 2009 (Exhibit 1) that he is an orthopedic surgeon and has been Board Certified in orthopedic surgery since 1987. He has provided direct treatment for patients with shoulder complaints and thoracic spine complaints. He has performed surgeries on patients with shoulder complaints. He has performed surgeries on backs, including thoracic spines.

Dr. Clymer testified regarding Claimant's history. His testimony was consistent with his report. He testified that the initial MRI revealed degenerative disk and osteophyte changes in the mid-thoracic region, and that condition caused some canal encroachment. He noted osteophyte changes are bony spurring that are caused by age and

degenerative change. He stated the MRI of the thoracic spine did not show up as disk herniation. He testified that the MRI study of the thoracic spine did not demonstrate what could be identified or characterized as a traumatic or acute condition of the thoracic spine.

Dr. Clymer noted that the MRI of the left shoulder showed some hypertrophic degenerative changes at the AC joint in calcification in the distal supraspinatus tendon. He said those degenerative changes were consistent with age and activity. He testified the MRI of the left shoulder did not demonstrate any acute injury to the structure of the left shoulder. He noted that Claimant was seen by Dr. Blatt, Dr. Pratt, and then by Dr. Leslie Thomas. He said his report had a typographical error when it referred to Dr. Carter. He understood that Claimant had surgery of the left shoulder that consisted of an acromioplasty with lateral clavicle resection and excision of calcified deposits. That was done to decrease arthritic change at the acromioclavicular joint and decrease the bony impingement on the rotator cuff. Based on his review of the operative report from Dr. Thomas, he did not believe there was any evidence of traumatic or acute injury in that shoulder joint.

Dr. Clymer noted that Dr. Thomas eventually found Claimant at maximum medical improvement and rated her at 10% of the left shoulder, and suggested she might consider weaning herself off some of the narcotics. He noted she was then seen by Dr. Jeff Bredemann, a pain management doctor. She was then next seen by Dr. Patrick Griffith, who did a percutaneous disk decompression in February 2008. That procedure is “an attempt to remove some of the disk material from within disk space in hopes that it might decompress the amount of disks and diminish the amount of bulging and possibly thereby decrease back pain.”

Dr. Clymer testified regarding Claimant's medications and complaints, the results of his physical examination, regarding the results of his x-rays, and the diagnosis of Claimant's spine condition. His testimony was consistent with his report. He testified that Claimant was consistent in describing her symptoms in terms of location and severity, but the subjective complaints always seem to be much greater than the objective findings would suggest.

Dr. Clymer also testified with a reasonable degree of medical certainty as to the diagnosis of Claimant's left shoulder condition. He stated that he felt “the shoulder was consistent with a shoulder contusion and sprain with some associated chronic rotator cuff tendinitis and calcific tendon change.” He stated it did not appear that Claimant's work-related falls resulted in a significant acute damage to the shoulder. It was basically gradual progressive degenerative change. He felt the work activities probably resulted in

some aggravation of the degenerative calcific tendinitis. He felt Claimant was at maximum medical improvement with respect to the left shoulder and the thoracic spine.

Dr. Clymer's opinion with a reasonable medical certainty regarding the extent of permanent partial disability of Claimant's left shoulder was 7% disability of the left upper extremity at the level of the shoulder. He encouraged some decrease in narcotics, if possible, with respect to treatment of Claimant's thoracic spine.

Dr. Clymer did not believe that there was any objective medical reason why Claimant could not return to some kind of gainful employment. He did not personally feel individuals who are taking pain medications are unable to work. He has many patients who are on pain medications who are working. Dr. Clymer felt that Claimant had a 10% disability of the thoracic spine with a reasonable degree of medical certainty. He felt that Claimant should probably avoid very heavy lifting or very highly repetitive activities and suggested a lifting limit in the range of twenty to twenty-five pounds. Dr. Clymer said he did not have the sense that Claimant was actively malingering.

Dr. Clymer said that Fentanyl is stronger than morphine. It is used for any pain, including back pain. He stated people who are appropriately managed on Fentanyl can drive. He agreed that Claimant is definitely a chronic pain management case at this point.

Dr. Clymer testified that Claimant's two falls were a substantial contributing factor to making her thoracic spine/nerve root irritation problems symptomatic. He testified that Claimant's dealing of cards would be a substantial contributing factor to a least aggravating a degenerative problem with the left shoulder necessitating the surgery that she had with Dr. Thomas. He felt that could have been a substantial contributing factor.

Dr. Clymer stated that he would not anticipate from his review that it would be necessary for Claimant to have to lie down to control the pain through the course of a day. He thought it was more likely that Claimant's symptoms will improve gradually rather than worsen with the treatment parameters that he described. He expected there will be some gradual improvement over the course of one to three years. He did not have any feel as to how the 10% he assigned to the thoracic spine ought to be divided between the two falls. He agreed that Claimant's use of the Fentanyl patch would not preclude her from doing basic clerical duties and activities of that sort, and would not preclude her from working since she is able to drive and perform other basic activities though she should avoid substantial decision making issues in terms of operating equipment.

Vocational Evidence—Terry Cordray

The deposition of Terry Cordray taken on September 14, 2009 was admitted as Exhibit E along with Cordray Deposition Exhibits 1, his Curriculum Vitae, Cordray Deposition Exhibit 2, his March 9, 2009 report pertaining to Claimant addressed to her attorney, Cordray Deposition Exhibit 3, his May 7, 2009 report pertaining to Claimant addressed to Claimant's attorney, and Cordray Deposition Exhibit 4, his September 1, 2009 report pertaining to Claimant addressed to her attorney.

Cordray Deposition Exhibit 1 notes that Mr. Cordray has an M.S. in Rehabilitation Counseling, and that he is a Certified Rehabilitation Counselor, Certified Case Manager, and Licensed Professional Counselor. He is a Diplomat of the American Board of Vocational Experts.

Cordray Deposition Exhibit 2 notes that he performed a vocational assessment of Claimant and met with her on January 13, 2009. His report identifies the medical records and reports that he reviewed. It identifies functional limitations set forth by Dr. Stuckmeyer, Dr. Leslie Thomas, Dr. Blake Donaldson, Dr. Jeffrey Blatt, and Dr. Neil Mikel. His report discusses Claimant's educational background, social background, previous medical conditions, work background, wages, Claimant's perspective of injury including physical limitations Claimant believed she had, and activities of daily living. The report also sets forth the results of vocational tests administered to Claimant.

Mr. Cordray's March 9, 2009 report sets forth the following conclusions:

Given Ms. Carter's current vocational profile as a 62 year old woman who is limited to sedentary work, who has further limitation to the left shoulder with no lifting over shoulder height, who is taking heavy narcotic medication including Oxycodone and Fentanyl patch, it is my opinion that she is totally disabled.

I do not believe it is realistic to expect that an employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to hire an individual who is a 62 year old woman, who has performed as a dealer at a casino for her past ten years of employment, who is limited to alternating to sit/stand jobs with limitations on reaching and who is also required to take heavy narcotic medications which limit her abilities to drive. Therefore given her current presentation as well as reliance upon the medical records reviewed, it is my opinion that Ms. Carter is totally disabled.

It is my opinion that her back injury, in isolation, places her at sedentary occupations, which do exist in the labor market. However, when one considers her upper extremity impairments in combination with her previous back injury, she is totally disabled.

At age 62, even though she has good cognitive skills and is an intelligent woman, I do not believe it is realistic for an individual of her age to attempt any vocational rehabilitation retraining.

Therefore it is my opinion that Ms. Carter is totally disabled and no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to hire Ms. Janet Carter for any job given her current presentation and that she is totally disabled.

Mr. Cordray's May 7, 2009 report, Cordray Deposition Exhibit 3, states in part on page 2:

In my report of March 9, 2009 I noted that following her first injury in January 2002, Ms. Carter did attempt to return to work. After she had returned to work, Ms. Carter sustained a second injury in which she further injured her back. Following this injury, Ms. Carter returned to her usual occupation as a dealer at Harrah's Casino until June 16, 2003 at which time she was no longer able to perform her job.

A review of the medical records indicates that Ms. Carter is taking significant narcotic pain medications including Fentanyl patch and Oxycodone. These medications have a side effect of an inability to be alert and attentive. Based upon these two injuries, Ms. Carter is currently restricted to no prolonged standing, no prolonged walking and no repetitive lifting, bending, stooping or squatting. She is also limited to no repetitive stair climbing and no lifting to exceed ten pounds on an occasional basis.

Based upon these restrictions alone, given Ms. Carter's need to use narcotic pain medications, including Fentanyl patch and Oxycodone which have a significant effect of an inability to be alert and attentive, Ms. Carter was totally disabled following the second injury of May 12, 2003.

It was this injury that Dr. Stuckmeyer noted resulted in the use of heavy narcotic medication usage which has rendered Ms. Carter totally disabled.

The upper extremity disability resultant from cumulative trauma from dealing cards by itself or in combination with the previous two injuries did not result in Ms. Carter's total disability.

Although it is impairment, Ms. Carter's total disability is a result following her second injury of May 12, 2003 which limited her to sedentary occupations with the additional need of use of heavy narcotic medications.

Therefore it is my opinion that Ms. Carter's total disability is a result of the second injury of May 12, 2003.

I hope this clarifies the matter of Ms. Carter's permanent and total disability.

Mr. Cordray's report notes his opinions are based upon a reasonable degree of vocational rehabilitation certainty.

Mr. Cordray's September 1, 2009 report, Cordray Deposition Exhibit 4, states in part:

As you would note in my previous reports, my primary concern regarding Ms. Carter's ability to work in the labor market is her need to use narcotic pain medications including the Fentanyl patch and Oxycodone which have a significant effect on her ability to be alert and attentive.

Ms. Carter's need to take narcotic medication, either from the first injury in January 2002, the second injury in May 2003 or the combination of those two injuries, prevents Ms. Carter from performing sedentary types of jobs.

It is my opinion that following the second injury, Ms. Carter was totally disabled based upon her significant limitations in combination with the effects of her medications.

Certainly the lack of good use of the upper extremities which is an essential ability in performing sedentary work would have been limited by her shoulder injury.

Following her shoulder injury, Ms. Carter was indeed totally disabled; however I believe her total disability was a result of the previous injuries that resulted in her need to use the significant amounts of narcotic pain medication which cause her to be unable to be alert and attentive.

If the injury in January 2002 resulted in her need to take pain medication prior to the May 2003 injury, which resulted in the restrictions to sedentary activities, it would be my opinion that her total disability is a result of the combination of the two injuries.

It remains my opinion that it is the result of Ms. Carter's physical limitations and resultant use of pain medication prior to the shoulder injury that resulted in total disability.

Mr. Cordray stated his opinions are based upon a reasonable degree of vocational rehabilitation certainty.

Mr. Cordray testified on September 14, 2009. He stated he has been giving vocational testimony in Missouri Workers' Compensation for ten years. He said of those, 65% are referred from defense attorneys or insurance companies, and 35% are plaintiff's attorneys. He testified that if he were asked questions about his report contained in Exhibit 2, his thoughts and opinions would be contained in that report.

Mr. Cordray testified that he prepared his supplemental reports to clarify Dr. Stuckmeyer's additional comments, and to sort out when Claimant became totally disabled. He testified regarding portions of his reports, and his testimony was generally consistent with his reports.

Mr. Cordray testified at page 19:

When you combine the fact that she has these physical restrictions that place her at doing sedentary types of activities and combine that with the fact that she's taking strong narcotics including Oxycodone and she eats Fentanyl lollipops, she's unable to work. The

narcotics alone for a 62-year-old lady cause her to be so inattentive and not alert that she wouldn't be able to sustain an eight-hour work day, day-in and day-out and be alert and attentive.

Mr. Cordray thought that the combination of her physical restrictions based on her two back injuries, in combination with the effects of taking Oxycodone and Fentanyl, made her totally disabled. He testified that no employer would hire Claimant.

Mr. Cordray testified the June 2003 accident in isolation did not totally disable Claimant or leave her incapable of work in the open labor market in some capacity. He also testified that if Claimant did not need the Fentanyl, or if she could take the Fentanyl and still work, no employer would hire her when you add the shoulder injury that keeps her from doing repetitive use of the upper extremities. He testified it was not reasonable for an employer to hire Claimant after her last day of work on March 10, 2005.

The parties stipulated that on or about January 29, 2002, May 12, 2003, and June 16, 2003, Claimant was an employee of Employer and was working under the provisions of the Missouri Workers' Compensation Law. The parties also stipulated that on or about January 29, 2002, May 12, 2003, and June 16, 2003, she sustained injuries by accident or occupational disease in North Kansas City, Clay County, Missouri, arising out of and in the course of her employment.

Rulings of Law

Based on a comprehensive review of the substantial and competent evidence, including the testimony of Claimant, the medical reports and records, the depositions, the vocational evidence, the stipulations of the parties, and my personal observations of Claimant at the hearing, I make the following Rulings of Law:

1. Liability for permanent partial disability and permanent total disability benefits.

Section 287.190, RSMo¹ provides for permanent partial disability benefits. The determination of the degree of disability sustained by an injured employee is not strictly a

¹ All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted. See *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007) where the Eastern District Court of Appeals held that the 2005 amendments to Sections 287.020, RSMo and 287.067, RSMo do not apply retroactively. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau*

medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 230 (Mo. banc 2003)². While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros., Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

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

v. Netco Construction, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000).

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

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

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

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

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992), 29; *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693,

701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004). The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993), 29; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993).

The claimant in a workers' compensation proceeding has the burden of proving all elements of the claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 912 (Mo.App. 2008); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Cardwell*, 249 S.W.3d at 908; *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989). While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros.*, 595 S.W.2d 441, 443 (Mo.App. 1980); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Cardwell*, 249 S.W.3d at 908; *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Cardwell*, 249 S.W.3d at 908; *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

The finding of disability may exceed the percentage testified to by the medical experts. *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289. The Commission “is free to find a disability rating higher or lower than that expressed in medical testimony.” *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490 (Mo.App. 1990); *Sellers*, 776 S.W.2d at 505. The Court in *Sellers* noted that “[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, ‘the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.’” *Sellers*, 776 S.W.2d at 505. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. 1995); *Jones*, 801 S.W.2d at 490.

Section 287.220. 1, RSMo provides in part:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative

law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the 'Second Injury Fund' hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141.

In deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003); *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. 2000). Accordingly, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself renders the employee permanently and totally disabled, then the fund has no liability and the employer is responsible for the entire amount of compensation. *Landman*, 107 S.W.3d at 248; *Hughey*, 34 S.W.3d at 847.

The court in *Knisley v. Charleswood Corp.*, 211 S.W.3d 629 (Mo. App. 2007) states at 634-35:

To prevail against the SIF on a claim for permanent total disability, a claimant must establish that: (1) she had a permanent

partial disability at the time she sustained the work-related injury and (2) the pre-existing permanent partial disability was of such seriousness as to constitute a hindrance or obstacle to her employment. Section 287.220.1 RSMo 2000; *Motton v. Outsource Intern.*, 77 S.W.3d 669, 673 (Mo.App. E.D.2002). "The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment." *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo.App. E.D.2000) (overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)); *Garrone v. Treasurer of State of Missouri*, 157 S.W.3d 237, 244 (Mo.App. E.D.2004). The primary determination is whether an employer can reasonably be expected to hire the employee, given his or her present physical condition, and reasonably expect the employee to successfully perform the work. 157 S.W.3d at 244.

Section 287.020.7, RSMo provides: "The term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident." The phrase "inability to return to any employment" has been interpreted as "the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Knisley*, 211 S.W.3d at 635; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo.App. 2001); *Reiner v. Treasurer of the State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.1992); *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 792 (Mo.App. 1992).

Total disability means the "inability to return to any reasonable or normal employment." *Lawrence*, 834 S.W.2d at 792; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990); *Kowalski*, 631 S.W.2d at 992. An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849, 853 (Mo.App. 1995); *Brown*, 795 S.W.2d at 483. The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Knisley*, 211 S.W.3d at 635; *Brown*, 795 S.W.2d at 483; *Reiner*, 837 S.W.2d at 367; *Kowalski*, 631 S.W.2d at 922. See also *Thornton v. Hass Bakery*, 858 S.W. 2d 831, 834 (Mo.App. 1993).

The court in *Knisley*, 211 S.W.3d states at 635:

Section 287.200.1 does not require a claimant to distinguish each disability and assign a separate percentage for each of several pre-existing disabilities to prevail on a claim for permanent total disability. Section 287.200.1; *See Vaught v. Vaughts, Inc.*, 938 S.W.2d 931, 942 (Mo.App. S.D.1997) (overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)). Rather, a claimant must establish the extent, or percentage, of the permanent partial disability resulting from the last injury only, and prove that the combination of the last injury and the pre-existing disabilities resulted in permanent total disability. *Id.*

The court in *Vaught*, 938 S.W.2d 931, states at 939:

As explained in *Stewart, id.* at 854, § 287.220.1 contemplates that where a partially disabled employee is injured anew and sustains additional disability, the liability of the employer for the new injury “may be at least equal to that provided for permanent total disability.” Consequently, teaches *Stewart*, where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Id.* The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). *Id.* If the compensation to which the employee is entitled for the new injury is *less* than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. § 287.220.1

“For Second Injury Fund liability, a preexisting disability must combine with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have resulted from the new injury alone and of itself; or (2) the preexisting disability combined with the disability from the subsequent injury to create permanent total disability.” *Uhlir v. Farmer*, 94 S.W.3d 441, 444 (Mo.App. 2003)

Based on the competent and substantial evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational expert, the stipulations of the parties, as well as based on my personal observations of Claimant at the hearing, and based on the application of the Workers' Compensation Law, I find that Claimant is not permanently and totally disabled. I find that none of Claimant's injuries sustained in the course of her employment for Employer caused her to be permanently and totally disabled in isolation considered alone. I also find that the combination of Claimant's June 16, 2003 injury and her preexisting disabilities from her May 12, 2003 injury and her January 29, 2002 injury did not result in Claimant's permanent and total disability. I also find that the combination of Claimant's May 12, 2003 injury and her preexisting disability from her January 29, 2002 injury did not result in Claimant's permanent and total disability. This is supported by the following.

Claimant's rib cage still gives her problems. She is still receiving treatment on her right rib side. She takes medication to keep going. She is getting epidurals, is using a TENS unit, and is taking oral medication. She still takes Fentanyl lollipops and uses Fentanyl patches at times. She takes medication three days a week on average.

Claimant can do almost anything for a short period of time, but does things in spurts. She is able to work around the house two to three hours at a time. Claimant has constant right rib dull ache pain that is one or two when she uses her Fentanyl patch. She is 90 to 95% mentally alert and pretty competent when she uses the patch. Claimant now has no pain in her left shoulder, but she has some restriction in motion. She did not feel that her shoulder was keeping her from going back to work. Claimant did not recall any of her treating doctors saying that she was physically incapable of working.

Claimant is able to take care of her hygiene needs and can do most things around the house. She uses a computer at home for emails. She can drive for one hour. She walks between one-half of a mile and one mile. She helps with house repairs and has helped paint trim.

Claimant treated with her own doctors after her first accident. She took pain medication after her first accident. She continued to have mid-back pain after her first accident until her second accident. Some of her coworkers switched with her to give her easier jobs after her first accident. She was not on any work restrictions before her second accident. She worked full-time from her first accident to her second accident.

Claimant's pain was much more severe for a longer period after her second accident. She continued to work for Employer after her second injury until February

2004 when she received treatment for her left shoulder condition. She was released by Dr. Thomas at MMI on April 15, 2005, and received unemployment benefits for six months after that time. She applied for numerous jobs during that period for sales, secretarial, and administrative positions, but she did not receive call-backs.

Claimant has a Bachelor of Science in Education degree from Central Missouri State University. Claimant has taken computer classes. Claimant has worked several jobs in the past with sedentary and light duties.

Claimant did not appear to be in pain during the three and one-half hour hearing. Claimant stood only once during the hearing when a short recess was taken.

The parties stipulated that on or about January 29, 2002, May 12, 2003, and June 16, 2003, Claimant was an employee of Employer and was working under the provisions of the Missouri Workers' Compensation Law. The parties also stipulated that on or about January 29, 2002, May 12, 2003, and June 16, 2003, she sustained injuries by accident or occupational disease in North Kansas City, Clay County, Missouri, arising out of and in the course of her employment.

Dr. Pratt notes in his December 29, 2003 report that in direct relationship to the reported event on May 12, 2003, "This event was an aggravation of underlying involvement of the region and results in a five percent (5%) permanent partial disability to the body as a whole at 400 weeks." The report notes that he would not recommend that Claimant perform any lifting in excess of twenty pounds and also avoid activities, which involve thoracic rotation, other than occasionally.

Dr. Clymer, a Board Certified treating orthopedic surgeon, rated Claimant in his July 13, 2009 report. He estimated a permanent partial disability at 7% of Claimant's left upper extremity at the level of the shoulder. He felt Claimant had evidence of permanent partial disability equal to 10% of the body as a whole as a result of the thoracic spine process with disk injury and subsequent surgery. He did not have any feel as to how the 10% he assigned to the thoracic spine ought to be divided between the two falls. Dr. Clymer stated most of Claimant's disability is based upon her subjective level of discomfort as opposed to objective findings. Dr. Clymer noted Claimant's of her arms and shoulders would be acceptable, but she should avoid highly repetitive overhead activity or activities which cause excessive strain in the thoracic region. He suggested a lifting limit in the range of 20 to 25 pounds. I find Dr. Clymer's restrictions to be credible.

Dr. Clymer testified that the initial MRI revealed degenerative disk and osteophyte changes in the mid-thoracic region that are caused by age and degenerative change. He stated the MRI of the thoracic spine did not show up as disk herniation.

Dr. Stuckmeyer's July 9, 2005 report states that Claimant sustained a 10% permanent partial disability to the thoracic spine as a direct result of the January 29, 2002 accident, and an additional 15% disability to the thoracic spine causally related to the May 12, 2003 accident. That report also assigned a 25% permanent partial disability to the left shoulder as a result of the repetitive nature of Claimant's occupation that necessitated the surgical treatment performed by Dr. Thomas.

Dr. Stuckmeyer's January 21, 2009 report assigned a 10% permanent partial disability to the thoracic spine as a direct result of the January 29, 2002 accident, and an additional 25% disability to the thoracic spine causally related to the May 12, 2003 accident. That report rendered a 25% disability to the left shoulder as a result of the repetitive occupational duties culminating in an accident date of June 16, 2003.

Dr. Thomas assigned a disability rating of 10% Claimant's left shoulder on May 22, 2005.

No treating doctor ever told Claimant she was incapable of gainful employment. Dr Blatt stated on October 31, 2003 that he believed it was safe for Claimant to work, although it might be uncomfortable.

Dr. Bredemann stated on June 6, 2006 that it was not his opinion that the Fentanyl patch or other narcotics would preclude Claimant from working, since she is able to drive and perform other basic activities. He noted she should avoid any substantial decision making issues or safety equipment handling, but basic clerical duties or other activity of that sort would not be contra-indicated by the use of narcotics. He noted they have many patients who take narcotics so that they may in fact return to work successfully. I find these opinions to be credible.

Dr. Griffith wrote on July 30, 2008 that Claimant's pain was "functionally limiting and her quality of life was markedly reduced." However, he did not state that Claimant was unable to work. Dr. Griffith also treated Claimant for low back, hip and bilateral leg pain in 2008 and 2009. She has continued on pain medication and steroid injections. He noted on April 20, 2009 that the medication seems to be helpful with her thoracic pain and thoracic disc protrusion.

Dr. Clymer felt Claimant probably could work provided it did not involve very heavy lifting or very highly repetitive activities. He noted a periodic change in position would be appropriate. He suggested a lifting limit in the range of 20 to 25 pounds. He believed "an appropriate dose of Fentanyl would not preclude Ms. Carter from activity and work and therefore would not feel that there is any need for restriction from work activities in the past or the future while she is on Fentanyl beyond those physical restrictions which I have just outlined." I find these opinions of Dr. Clymer to be credible.

Dr. Clymer testified he did not believe that there was any objective medical reason why Claimant could not return to some kind of gainful employment. He did not personally feel individuals who are taking pain medications are unable to work. He has many patients who are on pain medications who are working. He did not anticipate it would be necessary for Claimant to have to lie down to control the pain through the course of a day. He said Claimant's use of the Fentanyl patch would not preclude her from doing basic clerical duties and activities of that sort, and would not preclude her from working since she is able to drive and perform other basic activities. I find these opinions of Dr. Clymer to be credible.

Dr. Stuckmeyer stated on June 5, 2009 that it is "due to a combination of the January 29, 2002 injury in combination with the more significant injury of May 12, 2003 that has rendered Ms. Carter permanently and totally disabled." He put her on restrictions and felt that "essentially she was permanently and totally disabled." He testified: "the two thoracic injuries and the fact that she's on chronic narcotic use and there's really nothing of a surgical standpoint to offer her any relief, I felt that she was permanently and totally disabled." He thought that Claimant "is basically incapable of engaging in the open labor market in some capacity." I do not find these opinions to be credible.

Dr. Stuckmeyer testified that if you consider Claimant's left shoulder in isolation, she would be employable. I find this opinion to be credible.

Dr. Stuckmeyer assigned the following restrictions:

From an orthopedic standpoint, I do not feel that Ms. Carter is capable of returning to gainful employment. I would restrict her to no prolonged standing, no prolonged walking, and no repetitive lifting, bending, stooping, or squatting. I would also limit her to no repetitive stair climbing and no lifting to exceed 10 pounds on an occasional basis.

Specific to the left shoulder, I would recommend no repetitive lifting, no repetitive pushing or pulling, and no lifting over shoulder height greater than 10 pounds on an occasional basis.

I do not find these restrictions of Dr. Stuckmeyer to be credible. I find his restrictions to be excessive. Dr. Thomas did not place Claimant on any permanent work restrictions when he released her after her left shoulder surgery. Claimant testified she did not have left shoulder pain. Claimant's activities after her release from Dr. Thomas demonstrate she is able to exceed Dr. Stuckmeyer's restrictions. I find Dr. Clymer's opinions are more persuasive than Dr. Stuckmeyer's opinions regarding Claimant's restrictions and ability to work.

Terry Cordray, the only vocational expert expressing opinions in this case, stated Claimant is totally disabled. He did not believe it is realistic to expect that an employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to hire Claimant.

Mr. Cordray testified that the combination of Claimant's physical restrictions based on her two back injuries, in combination with the effects of taking Oxycodone and Fentanyl, made her totally disabled. He also testified that the June 2003 accident in isolation did not totally disable Claimant or leave her incapable of work in the open labor market in some capacity. He also testified that if Claimant did not need the Fentanyl, or if she could take the Fentanyl and still work, no employer would hire her when you add the shoulder injury that keeps her from doing repetitive use of the upper extremities. I do not find these opinions of Mr. Cordray to be credible. Mr. Cordray based his opinion that Claimant is totally disabled on Dr. Stuckmeyer's restrictions, which I have found are excessive and not credible. I find that Claimant can take Fentanyl and still work, and that her left shoulder condition in combination with her mid-back condition does not prevent her from working.

I do not believe Claimant needs to lie down during the day as a result of her work injuries. I believe that an employer in the usual course of business would be reasonably expected to hire Claimant in her present physical condition, reasonably expecting Claimant to perform the work for which she is hired. I believe Claimant is able to work in the open labor market. No doctors restricted Claimant to lie down during the day. Claimant has not had a laminectomy, discectomy or fusion operation. She had a good result following her shoulder surgery and was released without restrictions. I believe that Claimant should be able to work within restrictions imposed by Dr. Clymer.

I find that Claimant's last injury, her June 16, 2003 left shoulder injury, did not render her permanently and totally disabled. I find that Claimant sustained permanent partial disability of 15% of the left upper extremity at the shoulder (232-week level), or 34.8 weeks of permanent disability as a result of her June 16, 2003 left shoulder injury (injury number 03-138347). The parties stipulated that Claimant's weekly compensation rate for permanent partial disability in injury number 03-138347 is \$340.12 per week. Claimant is therefore entitled to an award of \$11,836.18 from Employer for permanent partial disability in injury number 03-138347.

I find that Claimant's May 12, 2003 injury did not render her permanently and totally disabled in isolation considered alone. I find that Claimant sustained permanent partial disability of 20% of the body as a whole (400-week level) as a result of her May 12, 2003 thoracic spine injury (injury number 03-060420). The parties stipulated that Claimant's weekly compensation rate for permanent partial disability in injury number 03-060420 is \$340.00 per week. Claimant is therefore entitled to an award from Employer of \$27,209.60 for permanent partial disability in injury number 03-060420. Employer and Employee stipulated at the hearing that Employer/Insurer shall be entitled to take a credit of \$20,000.00 for an advance it made to Claimant in that amount on June 21, 2006 against any benefits awarded to Janet K. Carter against Employer/Insurer in any of her three cases. The \$20,000.00 credit due Employer/Insurer is applied in this case and deducted from the amount awarded for permanent partial disability, leaving a net balance due Employee from Employer in this case of \$7,209.60.

I find that Claimant's January 29, 2002 injury did not render Claimant permanently and totally disabled in isolation considered alone. I find that Claimant sustained permanent partial disability of 5% of the body as a whole (400-week level) as a result of her January 29, 2002 thoracic spine injury (injury number 02-156872). The parties stipulated that Claimant's weekly compensation rate for permanent partial disability in injury number 02-156872 is \$329.42 per week. Claimant is therefore entitled to an award from Employer of \$6,588.40 for permanent partial disability in injury number 02-156872.

Employer's liability for future medical aid.

Claimant is requesting an award of future medical aid. Section 287.140, RSMo requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Bowers*, 132 S.W.3d at 266. Medical aid is a component of the compensation due an injured worker under section 287.140.1, RSMo. *Bowers*, 132

S.W.3d at 266; *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo.App. 1984). Conclusive evidence is not required. *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997). It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment. *Bowers*, 132 S.W.3d at 270; *Mathia*, 929 S.W.2d at 277; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Sifferman* at 828. Section 287.140.1, RSMo does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992); *Bradshaw v. Brown Shoe Co.*, 660 S.W.2d 390, 394 (Mo.App. 1983).

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

Dr. Leslie Thomas' May 22, 2005 report states Claimant had reached maximum medical benefit regarding her left upper extremity. Dr. Stuckmeyer notes in his July 9, 2005 report that Claimant had reached maximum medical improvement regarding the shoulder. Dr. Stuckmeyer testified he did not recommend any additional future medical treatment to the left shoulder. Dr. Griffith's April 25, 2008 report states in part: "My feelings are that Mrs. Carter has reached maximum medical improvement. No doctor has recommended additional medical aid to treat Claimant's left shoulder. I find that

Claimant is not entitled to an award of future medical aid for her left shoulder in Injury No. 03-138347.

Dr. Stuckmeyer testified on August 31, 2009 that it was hard to tell whether Claimant was at maximum medical improvement because Dr. Griffith stated in July 2008 that medial branch blocks might be warranted. Dr. Clymer felt on July 13, 2009 that Claimant "has clearly reached maximum medical improvement with regard to these issues."

Dr. Griffith treated Claimant's thoracic back condition extensively. He stated on April 25, 2008: "I think it would be reasonable to assume that she is going to need ongoing medical therapy and may from time to time, require a thoracic epidural steroid injection; perhaps 3x per year. Consideration could be given to the trial of spinal cord stimulation. However, I have no strong feeling that that would be helpful, nor than we would be able to capture her areas of pain." Dr. Griffith stated on July 30, 2008: "I would see her requiring medical management for this problem indefinitely."

Dr. Stuckmeyer testified that Claimant is taking Fentanyl and other medications as the result of a combination of the two injuries to her thoracic spine. Dr. Stuckmeyer was asked whether Claimant should remain on the Fentanyl and Roxicodone in the future. He said it would be unlikely that she will ever be able to get off those medications. He thought she would need long term management from a pain management group for her narcotics with regard to the thoracic spine. He said she would need to stay on the Fentanyl for her lifetime as a result of the thoracic spine problems.

Dr. Clymer's July 13, 2009 report states:

I do not think there is much else to do at this point aside from a reasonable pain management program. I agree with the other physicians who have stated that a decrease in her use of narcotics would be helpful and appropriate; however, she seems to be reasonable and is using her current medications in an effort to be more active and functional and does not seem to be having any major side effects or problems. Consequently, although I would suggest she continue to try to taper down her use of narcotic medications, I believe it would be reasonable to continue with a Fentanyl patch at 50 mcg daily so long as this results in clear symptomatic improvement and a more functional and active lifestyle. If the medication caused any side effects or problems or resulted in diminished activity, then I think she would be better off to taper down to a lower dose or off completely.

At this point, however, it seems that she is functioning well and the current dose of Fentanyl is acceptable. I would suggest she avoid use of any other additional narcotics. She might find that occasional use of a muscle relaxer on an over-the-counter anti-inflammatory would be helpful. I would not anticipate that any other medical or surgical treatment would be necessary.

I find that her 2002 back injury did not result in a chronic need for pain medication, and that future medical aid should not be left open for Claimant in the 2002 case. I find that Claimant needs continued medication and medication monitoring to treat the mid-back pain that was caused by the May 12, 2003 work injury. I find that Claimant second back injury has resulted in her need for additional medical care, and that future medical aid should be left open for Claimant in the May 12, 2003 case. Employer/Insurer is directed to authorize and furnish additional medical care and treatment reasonably required to cure and relieve Employee from the effects of her May 12, 2003 injury (Injury No. 03-060420) in accordance with Section 287.140, RSMO.

Employer/Insurer's liability for past temporary total disability.

The burden of proving entitlement to temporary total disability benefits is on the Employee. *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418, 426 (Mo.App. 2000); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997). Section 287.170.1, RSMo provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7, RSMo as the "inability to return to any employment and not merely . . . [the] inability to return to the employment in which the employee was engaged at the time of the accident." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 910 (Mo.App. 2008); *Cooper*, 955 S.W.2d at 575; *Vinson v. Curators of Un. of Missouri*, 822 S.W.2d 504, 508 (Mo.App. 1991); *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641, 645 (Mo.App. 1991); *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo.App. 1985).

Temporary total disability benefits should be awarded only for the period before the employee can return to work. *Cardwell*, 249 S.W.3d at 909; *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Phelps*, 803 S.W.2d at 645; *Williams*, 649 S.W.2d at 489. With respect to possible employment, the test is "whether any employer, in the usual course of business, would reasonably be expected to employ Claimant in his present physical condition." *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Brookman v.*

Henry Transp., 924 S.W.2d 286, 290 (Mo.App. 1996). A nonexclusive list of other factors relevant to a claimant's employability on the open market includes the anticipated length of time until claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that claimant will return to his or her former employment. *Cooper*, 955 S.W.2d at 576. A significant factor in judging the reasonableness of the inference that a claimant would not be hired is the anticipated length of time until claimant's condition has reached the point of maximum medical progress. If the period is very short, then it would always be reasonable to infer that a claimant could not compete on the open market. If the period is quite long, then it would never be reasonable to make such an inference. *Boyles*, 26 S.W.3d at 425; *Cooper*, 955 S.W.2d at 575-76.

Claimant has requested temporary total disability benefits after she reached maximum medical improvement for her left shoulder injury. The parties agreed that date was March 10, 2005. Dr. Thomas had Claimant her resume full activities on March 4, 2005. He noted on April 15, 2005 that he felt she had reached maximum medical benefit.

I find that Claimant did not prove that she was temporarily and totally disabled after March 10, 2005. I find an employer, in the usual course of business, would reasonably be expected to employ Claimant in her present physical condition after March 10, 2005. I find Claimant was capable of competing in the open labor market and was not temporarily totally disabled after March 10, 2005 even though she continued to take pain medication and receive epidurals after that date, and even though Dr. Griffith stated she reached maximum medical improvement on April 25, 2008. Claimant worked after her May 12, 2003 injury until February 2004. She received unemployment benefits for six months after her release by Dr. Thomas and applied for numerous jobs. Claimant is well educated and has extensive job experience. Her treating doctors did not conclude she was incapable of working. She was not on restrictions that prevented her from working. I have discussed in detail my finding that Claimant is not permanently and totally disabled (pp. 51-56), and that discussion will not be restated, but is incorporated by reference.

Claimant's request for past temporary total disability benefits is denied.

Liability of the Second Injury Fund

The Second Injury Fund is not a party in Claimant's January 29, 2002 case. I have assessed 5% permanent partial disability of the body as a whole against Employer in that case. I have found that Claimant is not permanently and totally disabled either as a result of any of the injuries considered alone and in isolation, or in combination with each other. 5% of the body is twenty weeks of compensation, which is below the fifty-week threshold

required for Second Injury Fund liability in permanent partial disability cases. Section 287.220, RSMo. Claimant did not prove that she had the minimum threshold amount of preexisting disability before her May 12, 2003 case to combine with the disability in that case. Claimant's claim against the Second Injury Fund in her May 12, 2003 case (Injury No. 03-060420) is denied.

I find that prior to her June 16, 2003 injury, Claimant had preexisting permanent partial disability that was of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if she became unemployed. I have assessed 20% of the body as a whole (400 week level) permanent partial disability in the May 12, 2003 case, 5% permanent partial disability of the body as a whole in the January 29, 2002 case, and 15% permanent partial disability of the left upper extremity (232 week level) in the June 16, 2003 case. I find that Claimant had 25% permanent partial disability of the body as a whole that pre-existed her June 16, 2003 case. 25% of the body as a whole, or 100 weeks of compensation, and 15% of the left shoulder at the 232 week level, or 34.8 weeks of compensation, meet the minimum thresholds of Section 287.220, RSMo.

I find Claimant's preexistent disability combines with her June 16, 2003 injury to produce a synergistic effect to result in a greater degree of overall disability than the simple sum of those disabilities considered separately. Further, I find that the work injury of June 16, 2003 does not merely supplement the preexisting condition. I find that the synergistic effect of Claimant's disabilities is 10% above the simple sum of the combined disabilities, or 13.48 weeks of compensation. I find Claimant is entitled to an award against the Second Injury Fund for permanent partial disability in her June 16, 2003 case (Injury No. 03-138347) of \$4,584.82 based on 13.48 weeks times the agreed permanent partial disability rate in that case of \$340.12 per week.

Attorney's fees.

Claimant's attorney is entitled to a fair and reasonable fee in accordance with Section 287.260, RSMo. An attorney's fee may be based on all parts of an award. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). During the hearing, and in Claimant's presence, Claimant's attorney requested a fee of 25% of all benefits to be awarded. I find Claimant's attorney, William G. Manson, is entitled to and is awarded an attorney's fee of 25% of all amounts awarded for necessary legal services rendered to Claimant.

Made by: /s/ Robert B. Miner
Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 22nd day of February, 2010.

/s/ Naomi Pearson

Naomi Pearson
Division of Workers' Compensation

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

Injury No.: 03-138347

Employee: Janet K. Carter
Employer: Harrah's North Kansas City LLC
Insurer: Old Republic Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 22, 2010. The award and decision of Administrative Law Judge Robert B. Miner, issued February 22, 2010, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 13th day of January 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Janet K. Carter

Injury No.: 03-138347

Employer: Harrah's North Kansas City LLC

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

Insurer: Old Republic Insurance Company

Hearing Date: November 20, 2009

Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: June 16, 2003.
5. State location where accident occurred or occupational disease was contracted: North Kansas City, Clay County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee repetitively used her left upper extremity in the course of her employment as a dealer for Employer, which resulted in injury to her left shoulder.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Left upper extremity at the shoulder.
14. Nature and extent of any permanent disability: 15% of the left upper extremity at the shoulder.
15. Compensation paid to-date for temporary disability: \$14, 721.34.
16. Value necessary medical aid paid to date by employer/insurer? \$25,242.76.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$741.17.
19. Weekly compensation rate: \$494.11 for temporary total disability and permanent total disability, and \$340.12 for permanent partial disability.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None.

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

34.8 weeks of permanent partial disability from Employer (34.8 x \$340.12=\$11,836.18.)

No weeks of disfigurement from Employer.

TOTAL FROM EMPLOYER: \$11,836.18

22. Second Injury Fund liability:

13.48 weeks of permanent partial disability from Second Injury Fund (13.48 x
\$340.12=\$4,584.82)

TOTAL FROM SECOND INJURY FUND: \$4,584.82

23. Future requirements awarded: None.

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Janet K. Carter

Injury No's: 02-156872
03-060420
03-138347

Employer: Harrah's North Kansas City LLC

Insurer: Old Republic Insurance Company

Hearing Date: November 20, 2009

Checked by: RBM

PRELIMINARIES

A final hearing was held in Injury Numbers: 02-156872, 03-060420, and 03-138347 on November 20, 2009 in Gladstone, Missouri. Employee, Janet K. Carter, appeared in person and by her attorney, William G. Manson. Employer, Harrah's North Kansas City LLC, and Insurer, Old Republic Insurance Company, appeared by their attorney, John R. Fox. The Second Injury Fund appeared by its attorney, Laura Van Fleet. Scott Bradshaw appeared as a representative of Harrah's North Kansas City LLC. The Second Injury Fund is a party in Injury Numbers 03-060420 and 03-138347, but not in Injury Number 02-156872. William G. Manson requested an attorney's fee of 25% from all amounts awarded. It was agreed that briefs would be due on December 31, 2009.

Attorneys William G. Manson and John R. Fox agreed that Employer/Insurer had made an advance to Janet K. Carter in the amount of \$20,000.00 on June 21, 2006. They further agreed that Employer/Insurer shall be entitled to take a credit of \$20,000.00 for this advance against any benefits awarded to Janet K. Carter against Employer/Insurer in any of her three cases.

STIPULATIONS

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

1. On or about January 29, 2002, May 12, 2003, and June 16, 2003, Janet K. Carter ("Claimant") was an employee of Harrah's North Kansas City LLC ("Employer"), and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about January 29, 2002, May 12, 2003, and June 16, 2003, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by Old Republic Insurance Company ("Insurer").

3. On or about January 29, 2002, May 12, 2003, and June 16, 2003, Claimant sustained injuries by accident or occupational disease in North Kansas City, Clay County, Missouri, arising out of and in the course of her employment.

4. Employer had notice of Claimant's injuries.

5. Claimant's Claims for Compensation were filed within the time allowed by law.

6. In Injury No. 02-156872, the average weekly wage was \$721.95 and the rate of compensation for temporary total disability and permanent total disability is \$481.30 per week, and the rate of compensation for permanent partial disability is \$329.42 per week.

7. No compensation has been paid by Employer/Insurer for temporary disability in Injury No. 02-156872.

8. Employer/Insurer has paid \$2,167.00 in medical aid in Injury No. 02-156872.

9. In Injury No's 03-060420 and 03-138347, the average weekly wage was \$741.17 and the rate of compensation for temporary total disability and permanent total disability is \$494.11 per week, and the rate of compensation for permanent partial disability is \$340.12 per week.

10. Employer/Insurer has paid \$5,420.05 in temporary disability benefits at the rate of \$494.11 per week in Injury No. 03-060420.

11. Employer/Insurer has paid \$54,231.82 in medical aid in Injury No. 03-060420.

12. Employer/Insurer has paid \$14,721.34 in temporary total disability at the rate of \$494.11 per week in Injury No. 03-138347 (the June 16, 2003 case). Temporary total disability benefits were paid by Employer/Insurer through March 10, 2005, which is the agreed date that Employee reached maximum medical improvement in her left shoulder case. Employee is not seeking any temporary total disability benefits for any time prior to March 10, 2005.

13. Employer/Insurer has paid \$25,242.76 in medical aid in Injury No. 03-138347.

14. Employer/Insurer shall be entitled to take a credit of \$20,000.00 for an advance it made to Claimant in that amount on June 21, 2006 against any benefits awarded to Janet K. Carter against Employer/Insurer in any of her three cases.

ISSUES

The parties agreed that there is a dispute on the following issue in Injury No. 02-156872: the nature and extent of permanent disability.

The parties agreed that there are disputes on the following issues in Injury No. 03-060420:

1. Employer's liability for permanent disability benefits, including permanent partial disability and permanent total disability.
2. Employer's liability for past temporary total disability benefits from March 11, 2005.
3. Employer's liability for future medical aid.
4. Liability of the Second Injury Fund for permanent disability benefits, including permanent partial disability and permanent total disability.

The parties agreed that there are disputes on the following issues in Injury No. 03-138347:

1. Employer's liability for permanent disability benefits, including permanent partial disability and permanent total disability.
2. Liability of the Second Injury Fund for permanent disability benefits, including permanent partial disability and permanent total disability.
3. Employer's liability for future medical aid.

Claimant testified in person.

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

- A—January 29, 2002 Claim for Compensation
- B—May 12, 2003 Claim for Compensation
- C—June 16, 2003 Claim for Compensation

D—August 31, 2009 deposition of Dr. James Stuckmeyer with deposition exhibits (admitted subject to objections contained in the deposition)

E—September 14, 2009 deposition of Terry Cordray with deposition exhibits (admitted subject to objections contained in the deposition)

F—Medical records of Dr. Blake Donaldson

G—Medical records of Dr. Robert M. Orr

H—Medical records of Intracorp

I—Medical records of Concentra Medical Center

J— Medical records of Northland Imaging

K— Medical records of Dr. Robert M. Drisko

L— Medical records of Dr. Patrick Griffith

M— Medical records of Dr. Geoffrey Blatt

N— Medical records of Research Medical Center

O— Medical records of Dr. Leslie D. Thomas

P—Medical records of Dr. Jeffrey Bredemann

Employer/Insurer offered the following Exhibits that were admitted in evidence without objection:

1—November 9, 2009 deposition of Dr. David Clymer with deposition exhibits (admitted subject to objections contained in the deposition)

2—60 day – Dr. Thomas report, Curriculum Vitae, and records

3—60 day – Dr. Clymer report, Curriculum Vitae, and records

The Second Injury Fund did not offer any exhibits.

Any objections contained in any of the depositions are overruled unless otherwise noted. The Administrative Law Judge did not place any highlighting or other markings on any of the exhibits. The briefs of the attorneys have been considered.

Findings of Fact

Summary of the Evidence

Claimant testified that she was born on February 26, 1946 and is 63 years old.

Claimant started working at Employer in 1993. She worked in 2002 and 2003 as a card dealer for Employer. She stood and dealt cards repetitively eight hours a day, forty hours a week. She usually worked an eight-hour shift, and usually worked five days per week. Claimant was always a card dealer at Employer except when she worked light duty

folding towels from June 2003 to February 2004. She last worked for Employer in February 2004.

Claimant stood in one spot when she worked at Employer dealing cards. She alternated dealing for an hour and taking a twenty minute break throughout the eight hour day. She did not work overtime. She always stood and did not bend or lift. She walked from the tables to the break room.

Claimant pulled cards from a sleeve with her left hand, put the cards into her right hand, and then delivered the cards to the players with her right hand. She was also trained to deal roulette. She would spin a wheel when she worked roulette. Two employees worked together at the roulette table. One was a dealer and one was a reacher. The reacher brought in and stacked the chips. Claimant also occasionally dealt poker.

Claimant testified that she had not had any injuries or accidents before January 29, 2002.

Claimant testified that on January 29, 2002, she had been released from work at Employer and was walking to the parking lot on a snowy, icy day. Her feet went out from under her and she fell, landing flat on her face. She said she hurt the middle of her back around her thoracic spine rib cage area. She had pain around her right side.

A supervisor was there at the time she fell. An EMT was called. Claimant was examined and she thought that she would be all right. She was helped to her car and she went home. She felt pain the next day that was like a hatchet from her right side into her spine, rib cage, and mid back. Her spine itself did not hurt, just the right side of the spine. She developed a dull aching pain later. Walking and moving her arms made her pain worse.

Claimant did not ask Employer for any medical treatment at that time. She went to her own doctor, Dr. Donaldson, who sent her to pain management. She saw Dr. Orr three to four months after the accident. Dr. Orr did three epidural injections which helped. She may have also taken Advil. Claimant did not receive treatment from anyone else. She finished her treatment in the late summer or early fall of 2002. She continued to work at Employer. She said her coworkers sometimes switched with her to give her an easier job.

Dr. Orr prescribed Oxycontin pain medication. She took that for several months, and took it periodically through the time that she had her second accident in May 2003.

Claimant said that she was significantly better in January 2003. She was functioning pretty well, could drive, and could go to work. She went on a vacation to Hawaii in January 2003 and did a lot of walking.

Claimant testified her left shoulder began to ache in late winter or early spring of 2003. She attributed the pain to repetitive dealing cards. Employer had changed the sleeve and it was hard to get the cards out. The pain went from her shoulder down her left arm. She described the pain as a constant throbbing pain that was agonizing at times. She also said she had a dull aching pain most of the time.

Claimant testified that in May 2003, her left shoulder pain was getting pretty bad. It was not twenty-four hours a day, seven days a week at that time, but it eventually got to that point.

On May 12, 2003, Claimant was walking down a walkway between Employer's lunchroom and the casino, coming back from break, when she tripped and turned her ankle. She did not fall. She jerked and felt a searing pain in her right side. She limped over to the pit and told a supervisor that she had hurt herself. She went back to the lunchroom and an EMT was called. The EMT examined her and offered that she go to the hospital. She declined the offer. She thought she would get better.

On May 13, 2003, Claimant had a dull pain, but it was not excruciating. She returned to work. She did not ask for or receive accommodations at work.

Claimant was working forty hours per week just prior to the May 12, 2003 accident. She said she was doing pretty well. She had some pain, but it was not debilitating. The pain was in the right side of her body on her rib. She was not being treated then. Her left shoulder was getting worse.

Claimant testified she progressively got worse. The pain felt like a jab and became intense when she moved around. She had pain for a couple of months before she sought treatment. Her shoulder was getting worse during this time.

On June 6, 2003 or June 16, 2003, Claimant told a supervisor that she could not work anymore. She said she needed to go to HR. She had a constant throbbing pain in her left shoulder. The right side was getting worse.

Employer sent Claimant to Concentra where she was given oral medication and then physical therapy. She had an injection in her shoulder that helped for several weeks. The pain in her side did not get better.

Concentra sent her to Dr. Drisko. He examined her left shoulder and right rib cage and gave her a back brace that did not help. She went to Dr. Leslie Thomas who did an MRI and x-rays, and then did shoulder surgery in early 2004.

Claimant also went to Dr. Dwayne Jones, a pain management doctor, who started giving her Fentanyl in August 2003. Claimant also saw Dr. Jeffrey Blatt, a neurosurgeon, who evaluated her thoracic spine. He told her that they did not like to do surgery in the thoracic spine area. She received pain management for her thoracic spine from Dr. Jones.

Claimant last dealt cards at Employer either on June 6, 2003 or June 16, 2003. Claimant worked light duty for Employer from June 2003 until she was released in February 2004. She worked forty hours per week folding towels during that time. She has not worked for anyone since February 2004.

Claimant testified that her left shoulder pain was always at least a five just prior to her left shoulder surgery. A lot of time it was a nine on a scale of zero to ten. Her rib cage pain was always at least a two to three and, with activity, it could get up to a ten. The Fentanyl lollipops took her pain from a ten to a three or a four.

Claimant testified that the left shoulder surgery helped her left shoulder. She said it took the pain away. She testified that she does not have problems with her left shoulder anymore.

Claimant has received some temporary total disability benefits. She testified that her temporary total disability benefits stopped on March 10, 2005 when Dr. Thomas said she was at maximum medical improvement regarding her shoulder. She also received unemployment benefits for about six months after that. She applied for numerous jobs. She said she applied at several hundred places. She looked for work in sales, secretarial, and administrative. She said she got no call backs and no interviews.

Claimant saw Dr. Griffith for her hips in 2007. He stopped her oral medication except for breakthrough pain. Dr. Griffith prescribed Oxycodone for her in early 2008 and 2009.

Claimant said that a discogram was done by Dr. Griffith in 2007 or 2008. It revealed some cracked disks. Dr. Griffith performed a percutaneous discectomy in 2008. Needles were inserted, but an incision was not made. She saw Dr. Griffith until the summer of 2009. She has been seeing Dr. Griffith for pain in her hips and then her legs.

He has provided epidurals for that pain. The pain in her hips and legs is not related to her fall.

Claimant said that her rib cage still gives her problems. She is still receiving treatment on the right side of her rib cage. She is getting epidurals, is using a TENS unit, and is taking oral medication. She still takes Fentanyl lollipops. She uses Fentanyl patches at times.

Claimant said the Fentanyl causes dry mouth, drowsiness, and makes her feel a little off center. She said that in the spring of 2005, and at the present time, she can do almost anything for a short period of time. She said that she does things in spurts. She said she needs to take medication to keep going. Medication makes her sleepy. She testified that after she takes a shower, she lies down. It takes her until noon to clean the house. Some days are better than others. Some activities are more difficult, like vacuuming. Chopping a salad makes her tired. She will lie down after she does that. She said it is rare for her to be able to work around the house more than two to three hours at a time.

Claimant has not had surgery on her thoracic spine. No one has recommended surgery for her thoracic spine.

Claimant said that her right side is always about a two on the pain scale. The more she does the more it hurts. If she keeps doing things, the pain goes to a nine or ten. If she lies down, the pain goes back to a two. Pills make her drowsy. She drove to the November 20, 2009 hearing in Gladstone. She did not take any Oxycodone the day of the hearing.

Claimant testified that she has constant right rib pain that is one or two when she uses her Fentanyl patch. The pain is a dull ache. She said she is 90 to 95% mentally alert and pretty competent when she uses the patch. She has been off the patch for a short time. She can drive when she uses the Fentanyl. She does not drive when she takes the pill. If she takes very much medication in a day, she will sleep during the day and then have insomnia at night.

Claimant said the only two medications she takes for her ribs are a Fentanyl patch and Oxycodone. She takes medications three days out of a week on average. The medication can cause her to have problems focusing and keeping track. Sometimes it is difficult to read.

Claimant described an average day. She wakes up about 6:30 or 7:00 in the morning and makes coffee. She fixes breakfast in a microwave or makes cereal. She does a little cooking. She takes a shower and usually lies down for about thirty minutes. She gets dressed, straightens up, makes the beds, and puts the dishes away. She and her husband, who retired recently, take walks together. Claimant tries to walk a little each day. Walking increases her pain. She walks part of the way with him. She then lies down if there is nothing that she needs to do. She has a cold lunch and, by 2:00, she generally takes a little nap.

Claimant and her husband have a hot meal at dinner. She straightens the kitchen and then watches TV. She goes to sleep in a recliner a lot of the time. She goes to bed at 10:00 and then is up and down. She returns to the recliner and watches TV.

Claimant goes to the grocery store once a week. She and her husband moved recently. Before they moved, she went more often to a grocery store that was closer. Before her move, she also used to visit her mother in a nursing home once or twice each week.

Claimant is able to take care of her hygiene needs. She can do most things around the house, but she cannot use a push mower. She can use the zero-turn mower for about thirty minutes, but then needs to lie down. She said she was not able to think of any job that she could do where she could work for two hours and then lie down for an hour.

Claimant testified on cross-examination that she had been seated during the hearing the entire time except for the break. She said that she uses a computer at home for emails. The first time she saw a doctor for her January 29, 2002 accident was in May 2002 when she saw Dr. Donaldson. She was on a pain patch in 2002. She took oral pain medications, including Oxycontin, in 2002 because of continued pain in her mid-back. She continued to work at Employer while she took pain medication.

Claimant testified on May 12, 2003, she tripped or lost her balance and tweaked her ankle and back. She caught herself to prevent herself from falling. She jerked and had some searing pain in the right side of her back. She worked her regular shift at Employer for the next few weeks after that. She told Employer in June 2003 that she did not think that she could do her job because of shoulder pain and mid-back pain. She stopped doing light duty work for Employer in February 2004 because the light duty work ran out. She received unemployment benefits from March 2004 until September 2004. The left shoulder surgery performed by Dr. Thomas was done because of a buildup of calcium deposits. She agreed that Dr. Thomas did not find any tears in her shoulder. She

agreed that Dr. Thomas released her with no restrictions. She said she now has no pain in her shoulder, but has some restriction in motion.

Claimant said that since she left Employer, she has had problems with her low back and both of her hips. She presently has no low back pain. She is not contending that her low back or hip pain is related to her work at Employer. She had an injection in her low back about one month before the hearing.

Claimant did not recall any of her treating doctors saying that she was physically incapable of working. She testified she can drive for one hour. She walks between one-half of a mile and one mile. She helps with house repairs. She helped paint trim.

Claimant said her pain was much more severe for a longer period after her second accident. She was not on any work restrictions before her second accident. She worked full time from her first accident to her second accident without taking any early outs. She was taking medication during that time. After her second accident, she would sometimes lie down when she was on a break. She did not do that after her first accident. She said that she did not feel that her shoulder was keeping her from going back to work.

Claimant received a Bachelor of Science in Education degree from Central Missouri State University in 1967. Claimant took computer classes but did not take the certification examinations. Claimant engaged in self-study to permit her to sell insurance and investment products in 1981. Her license to sell health insurance, life insurance and investment products lapsed in the early 1990s.

Claimant was a homemaker for more than three years beginning in 1976, before she went to D&J. She taught school before that. She taught junior high school history for nine to ten years. She raised one son. She was active in her community and was on a school board and medical board.

Claimant worked at D&J Enterprises, a pipeline construction company, as office manager from 1981 to 1983. She answered the phone, kept the books, worked with crews and did payroll. That job was primarily a sit-down job.

Claimant worked at Northwest Mutual Life for ten years from 1983 until 1993. She sold life insurance and health insurance as a sales representative and made appointments and did sales. She also worked as Director of Education and supervised new agents. She lifted books and class materials. She drove to clients' houses. She lifted boxes that weighed between twenty and forty pounds. She did a little squatting and

kneeling and worked a lot of jobs. She had no other jobs while she worked at Northwest Mutual Life.

Claimant worked at Arrow Forklift as a sales representative for one year before she worked for Employer. She sat at a desk at Arrow and called wholesalers and users selling forklift parts. She took calls and researched parts. The job was sedentary and did not involve lifting. She worked during the week at Arrow, and for a time that she worked at Arrow, she also worked weekends for Employer. She left the Arrow Forklift job in January 1994.

I find this testimony of Claimant to be credible unless noted otherwise later in this award.

The Court notes that throughout the hearing, which began at 1:00 p.m. and concluded at 4:30 p.m., Claimant did not appear to be in pain. The only time that Claimant stood during the hearing was when a short recess was taken.

Medical Treatment Records

Exhibit F contains records of Clay-Platte Family Medicine Clinic pertaining to Claimant. The records of Dr. Blake Donaldson in the Clay-Platte records contain a note dated June 6, 2002 referencing thoracic and lumbar strain, and Anaprox and Darvocet for pain. A June 25, 2002 note references tenderness over the right flank. Claimant was placed on Lortab. A July 8, 2002 note references "R flank pain, questionable etiology, chronic." An MRI of the thoracic spine was ordered.

Exhibit F includes a copy of a MRI report dated July 10, 2002 pertaining to Claimant's thoracic spine. The report notes the following conclusion: "1) Small disc osteophyte complexes are noted at several levels which is most pronounced at T10-11 and slightly eccentric towards the left. Some minimal compression of the spinal cord is suggested although there is no significant mass effect. No extruded disc herniations are identified; 2) Mild degenerative spondylosis producing no significant central or foraminal spinal stenosis at this time; 3) Mild degenerative disc disease, especially at T10-11; 4) Probable small bilateral arachnoid diverticula are of no clinical significance."

A July 15, 2002 note in Exhibit F references a MRI that shows small disc osteophyte complex at several levels, worse at T10, T11 which corresponds with the level of Claimant's pain. She continued to have right sided pain. The assessment was "DJD." A July 30, 2002 note of Dr. Donaldson references chronic back pain, mainly thoracic. Claimant had been to pain management and was started on Relafen. Dr. Donaldson's

August 26, 2002 note states Claimant said the epidurals were not helping. She had had her third one.

Exhibit F also includes a Pain Clinic Note dated July 22, 2002 of Dr. Margaret Yoakum-Pyle pertaining to Claimant. Dr. Yoakum-Pyle took a history and performed a physical examination. Her impression then was "thoracic spondylosis with some radicular pain." She prescribed Relafen. The records in Exhibit F include a report of Dr. Robert Orr dated August 12, 2002 documenting a second thoracic epidural steroid injection. Dr. Orr encouraged Claimant to stay off Darvocet and cut out on her smoking.

Exhibit 3 includes the medical report of Dr. Robert Orr dated August 19, 2002. He examined Claimant that day for thoracic radiculopathy. He administered a third thoracic epidural injection. Claimant was to return to Dr. Donaldson. He encouraged her to stay off Darvocet.

A November 1, 2002 note of Dr. Donaldson assesses thoracic strain, chronic and notes "continue pain meds."

The Concentra records in Exhibit 3 document physical therapy for Claimant's left shoulder on May 12, 2003. Dr. Donaldson's note dated June 2, 2003 (Exhibit F) references "back pain T-spine area fell in hole at work. Moves around to front."

Exhibit 3 includes a June 27, 2003 MRI report of the thoracic spine pertaining to Claimant. The impression noted is: "Mild degenerative disc disease at T8-9 and T10-11 with desiccation. No posterior disc bulges or protrusions."

Exhibit A contains records of Concentra documenting Claimant's treatment for thoracic pain and shoulder in 2003. Some records note an injury on May 12, 2003 from "repetitive motion of dealing." The assessment of the left shoulder was adhesive capsulitis of shoulder, bicipital tenosynovitis, shoulder strain, and shoulder impingement.

Exhibit 3 also contains records of Concentra Medical Center's documenting Claimant's visits to Dr. Neal Mikel in July 2003 for left shoulder pain. On July 11, 2003, Dr. Mikel assessed adhesive capsulitis of the shoulder, bicipital tenosynovitis, shoulder strain, and shoulder impingement.

Exhibit K contains records of Dr. Robert Drisko. These include an office note dated July 16, 2003 documenting Claimant's complaint of pain in her left shoulder and right lower thoracic area. Dr. Drisko thought Claimant had a shoulder strain without evidence of any impingement or frozen shoulder. He thought she had a rib injury with

her torquing injury and might have an element of thoracic stenosis. He thought she would benefit from pain management. He did not think she needed any operative intervention or further diagnostic tests.

Exhibit 3 includes records of Dr. Dwayne Jones pertaining to Claimant. Dr. Jones' July 17, 2003 note shows that he examined her that day. Her chief complaint was right sided rib pain and shoulder pain. His assessment was disc osteophyte complex at the thoracic region with radiculitis and history of shoulder strain and history of adhesive capsulitis of the shoulder and bicipital tenosynovitis with short term improvement with previous shoulder joint injection. He recommended a third epidural steroid injection for her radicular pain coming from thoracic radiculitis, and to continue with Celebrex. Claimant underwent a third epidural injection.

Dr. Jones' July 28, 2003 report in Exhibit 3 documents a repeat intralaminar epidural steroid injection at T10-T11. Exhibit 3 includes Dr. Jones' August 12, 2003 report documenting Claimant's continued complaints of pain in the mid back radiating across the right chest wall. They discussed Fentanyl (Actiq) as needed for severe pain and proceeded with a repeat thoracic intralaminar steroid injection.

Dr. Drisko's August 19, 2003 office note (Exhibit K) states he thought Claimant's main problem was thoracic stenosis. He thought she needed a neurosurgery consultation. Her shoulder was better.

Exhibit L contains records of North Kansas City Hospital pertaining to Claimant. The records include notes of Dr. Dwayne Jones pertaining to his thoracic epidural steroid injections in July, August, and September 2003.

Exhibit 3 includes Dr. Jones' September 15, 2003 report. It notes the steroid injections had not given Claimant sustained improvement. She was having some improvement with Actiq. He recommended consideration of a sympathetic block. He indicated a neurosurgical evaluation could be a benefit. Dr. Jones' September 22, 2003 report notes that Claimant continued to work at Employer. She was taking Fentanyl that allowed her to get through the day. The report notes they were going to proceed with thoracic sympathetic block. Dr. Jones' October 7, 2003 report notes that they proceeded with the block.

Exhibit M includes a report of Dr. Geoffrey Blatt dated October 10, 2003 pertaining to Claimant. He saw her that day for thoracic pain following incidents in February 2002 and May 12, 2003. Her treatment was noted. He performed a physical examination. He believed Claimant had some symptoms of thoracic radiculopathy. He

noted it was possible she was “just dealing with a muscular strain or soft tissue injury.” He recommended a better MRI scan.

Dr. Donaldson's October 16, 2003 note (Exhibit F) references she was there for medication refill. Claimant did not think Celebrex was working very well. The note states: “She has severe chronic thoracic strain. She was doing fine until she tripped at work.” Nexium was refilled and Claimant was placed on Vextra.

Exhibit 3 and Exhibit N include an MRI thoracic spine report from Research Medical Center dated October 27, 2003. The impression noted is: “1. Herniation T10/11 disc posteriorly to the left midline. 2. Small posterior herniation T8/9 disc to the left of the midline.” The report also notes that degenerative changes are present in the remaining thoracic discs.

Exhibit F includes a report from Dr. Geoffrey Blatt dated October 31, 2003 pertaining to Claimant. His report notes he saw Claimant that day. She had undergone an MRI scan of her thoracic spine. Studies showed some bulging discs at T8-9 and T10-11, both of which tended to be greater on the left. The report notes Claimant's symptoms were on the right. He noted it should not be caused by any disc on the left-hand side. He noted Claimant had been on Actiq for the last three months. He strongly recommended she work away from long acting narcotics. He recommended she see a physiatrist and have a functional capacity evaluation. He recommended no new restrictions. His report concludes: “Ultimately, I believe it is safe for her to work, although it might be uncomfortable.”

Exhibit 3 includes Dr. Terrence Pratt's December 29, 2003 medical report pertaining to Claimant. The report describes the history of her work injuries in 2002 and 2003. It notes her present symptoms of continuous dull pain to the right of the mid back, intermittently radiating to under the right breast. Her symptoms are noted to be exacerbated with any activities involving the right upper extremity.

Dr. Pratt performed a physical examination and reviewed records. His impression was: “Thoracic syndrome with disc bulging/protrusion.” Dr. Pratt's report notes the abnormalities on the MRI of the thoracic region were primarily to the left and Claimant complained of right sided symptoms. His report notes it is difficult to relate those findings to her symptoms. The report notes that conservative treatment options are limited at this stage. He states that she has reached maximum medical improvement in relationship to the event of May 12, 2003. The report also states: “This event did not result in the onset of her symptoms, but did cause aggravation of underlying involvement.”

Dr. Pratt's report notes that Claimant is "significantly limited subjectively and even reports symptoms with just repetitive movements of her fingers on the right." She also reported some limitations in relationship to the left shoulder. The report notes that he would not recommend that Claimant perform any lifting in excess of twenty pounds and also avoid activities, which involve thoracic rotation, other than occasionally. The report notes that in direct relationship to the reported event on May 12, 2003, "This event was an aggravation of underlying involvement of the region and results in a five percent (5%) permanent partial disability to the body as a whole at 400 weeks."

Dr. Drisko's January 14, 2004 report states Claimant had reached maximum medical improvement. He provided a permanent partial disability rating of 0% of the body as a whole but stated, "Treatment not completed by me so I cannot do a proper rating."

Dr. Donaldson's January 26, 2004 note references chronic pain in Claimant's back. She was placed on Celebrex and a Duragesic patch. Dr. Donaldson notes on February 13, 2004: "Chronic thoracic strain". References are made to Duragesic.

Exhibit 3 and Exhibit F contain a report of Dr. James Scowcroft dated February 26, 2004 pertaining to Claimant. Dr. Scowcroft's report notes he saw Claimant that day for mid-back and flank pain. The chief complaint was noted to be mid-back and flank pain. The record notes Claimant was at work when she was walking and tripped and was able to catch herself before entirely falling, but did strain her back and her side. She had undergone injections. He performed a physical examination. Claimant had mild tenderness in her back and specific point tenderness over the seventh and eighth ribs. His impression was probable intercostal neuralgia. He started Claimant on Neurontin and reinitiated Lidoderm patch. He noted she had a prescription for Duragesic.

Dr. Donaldson's March 23, 2004 note references shoulder strain and chronic thoracic strain. Duragesic was refilled. An ortho referral was made.

Exhibit O and Exhibit F contain records of Dr. Leslie Thomas. These include Dr. Thomas' April 19, 2004 note documenting Claimant presented that day with persistent left shoulder discomfort. His note states that x-rays show clear cut calcific deposit at the rotator cuff tendon near the insertion of a tuberosity humerus. He recommended surgical excision of the calcific deposit. He notes Claimant had clavicular acromial arthritis and would benefit from subacromial decompression. Exhibit 2 includes Dr. Thomas' Curriculum Vitae. It notes Dr. Thomas is a Board Certified orthopedic surgeon licensed

to practice medicine in Missouri, and has staff privileges at North Kansas City Hospital and St. Lukes Northland Hospital.

Dr. Thomas' August 23, 2004 note states he saw Claimant that day. The note states in part that there was a direct causal relationship between Claimant's left shoulder discomfort and her work activity as a dealer. The note also states that Claimant was not complaining about a back injury at present. The note states that Claimant had sustained a slip on the ice and sustained a back injury.

Dr. James Scowcroft's report dated September 8, 2004 in Exhibit 3 notes Claimant's chronic right-sided thoracic pain. His report said there was really no further treatment except for a trial of spinal cord stimulator which Claimant did not want to pursue at that time. She was to follow up with Dr. Donaldson.

The records in Exhibit L include a copy of Dr. Leslie Thomas' November 12, 2004 Operative Report that documents "left shoulder acromioplasty with lateral clavicle resection and rotator cuff repair with excision of calcific deposits of the rotator cuff tendon."

Exhibit 3 includes records of HealthSouth documenting physical therapy treatments Claimant received in 2003, 2004 and 2005.

Dr. Thomas' records in Exhibit O include notes of Claimant's office visits there on November 22, 2004, December 6, 2004, January 25, 2005, March 4, 2005 and April 15, 2005. Dr. Thomas' March 4, 2005 office note states that Claimant has improved in terms of range of motion and was independent on home exercises with near full range of motion. The March 4, 2005 note also states, "We will have her resume full activities and continue with home exercises."

Dr. Thomas' April 15, 2005 note states Claimant still had some "slight weakness about the left shoulder as well as some limitation of motion. She was independent on home strengthening and range of motion exercises." The note states, "I feel she has reached the maximum medical benefit. We will have her pursue activities as tolerated. She is to return to see us on a p.r.n. basis."

Exhibit 3 includes Dr. Leslie Thomas' May 22, 2005 report. It states that Claimant had reached the maximum medical benefit regarding her left upper extremity. He placed Claimant's disability rating "based on mild limitation of motion and resection of distal clavicle at 10% loss of physical function to the involved upper extremity."

Exhibit P contains records of Dr. Jeffrey Bredemann pertaining to Claimant. His June 6, 2006 note states that Claimant presented for evaluation of right chest wall pain that had been going on since January 2002. The note describes the history of Claimant's illness and treatment. The note states in part: "She reports that, if the pain has its onset at home while doing housework, then she can rest and diminish the pain. Reclining or lying down seems to reliably improve her symptoms. However, she reports that when she is out at a store or in public with some other daily activity, that her pain can overtake her and make it difficult for her to complete whatever she is doing." The note states that Claimant said that she was not bothered with left shoulder pain and that "her only pain problem is this right torso and flank thoracic pain." The report notes that Claimant expressed "an openness to any further treatments that might be beneficial for her pain syndrome, and that might allow her to taper off the narcotics she is using to treat the pain." Medications, including Duragesic patch and Actiq lozenges, are noted. The results of the physical examination are noted.

Dr. Bredemann's report notes, "Right thoracic pain of uncertain etiology." He notes possibilities include "an intercostal neuralgia, or some other chronic neuropathic condition, that may be associated with mechanical disruption or injury of the muscles or soft tissues in the posterior spine area." He notes Claimant's pain is reported at 2-9 out of ten that is fairly consistent over time and associated with almost any activity. Claimant is noted to be frustrated with her apparent inability to work or do other basic activities. He notes Claimant is able to drive.

Dr. Bredemann's June 6, 2006 report sets forth certain recommendations. He agreed with Dr. Stuckmeyer that long term use of narcotics was not a good choice for pain syndrome that is of unclear etiology in a young person such as Claimant. He notes tolerance and physical dependence will become issues. He recommended tapering Duragesic patches over three weeks and using Actiq for activity. Claimant was concerned about Actiq causing her to become excessively drowsy. He thought she could adjust the medication.

Dr. Bredemann's June 6, 2006 report recommended a neurology consult. He noted that smoking cessation and weight loss can improve pain syndromes and should be pursued. He recommended consistent follow-up with a single physician to manage her pain symptoms. His report also states:

7. It is not my opinion that the Fentanyl patch or other narcotics would preclude Ms. Carter from working, since she is able to drive and perform other basic activities. She should certainly avoid any substantial decision making issues or safety equipment handling, but

basic clerical duties or other activity of that sort would not in my opinion be contra-indicated by the use of narcotics. We have many patients who take narcotics so that they may in fact return to work successfully. Rather, Ms. Carter's complaints of pain seem to be more the limiting issue. She reports pain with any trivial use of her arms for any extended period of time and it is difficult to conceive of the work that she would do that would not cause her to report this kind of pain. This is where a diagnosis could be most helpful to both her return to more full function and more effective and precise treatment of her pain syndrome.

Dr. Bredemann thought that Claimant's use of Fentanyl currently was reasonable and necessary. He also thought "It would be most beneficial if she could refrain from daily or at least constant use of opioids, which are likely to give unacceptable results over the course of the long term."

Exhibit 3 includes the medical report of Dr. Michael Ryan dated October 24, 2006 addressed to John Fox pertaining to Claimant. Dr. Ryan evaluated Claimant that day. His report notes the history of Claimant's injuries, a records' review, Claimant's current medications, past medical history, and social history. The results of his physical examination are described. The report notes an area of point tenderness in Claimant's thoracic region but no sensory loss was identified in any dermatomal pattern.

Dr. Ryan's assessment/recommendations notes in part:

Chronic right chest wall and back pain, questionable etiology. Some of the features suggest neuropathic pain, but she has tried a number of agents for neuropathic pain without much benefit. There are no objective benefits on clinical exam to corroborate any of her symptoms. The problems are mainly subjective in origin. She does have MRI imaging of her spine done which shows small disc herniations at T8-9 and T11-12, but those are on the left side. Her current symptoms are more around right T6 and I showed her a dermatomal pattern that is chart and she agreed that it appeared to be in the T6 dermatome.

Dr. Ryan's report notes that further evaluation possibly could include thoracic myelogram.

The records in Exhibit L include Dr. Dwayne Jones' July 11, 2006 report that notes he did not think Claimant was a candidate for surgery. He thought she was a candidate

for a trial of epidural spinal cord stimulation. He noted the history of her treatment including Duragesic and Actiq. He thought non-narcotic treatment options would be a better option.

The North Kansas City (NKC) records (Exhibit L) include Dr. Patrick Griffith's March 5, 2007 report. His impression was right thoracic radiculitis. He recommended a new MRI of the thoracic spine and a thoracic epidural steroid injection. The records include a report of Dr. Griffith documenting the administration of a thoracic epidural steroid injection on February 27, 2007. The records include Dr. Griffith's March 14, 2007 report documenting his administration of right T8 and right T10 paravertebral nerve root blocks. The records include his April 9, 2007 report documenting his thoracic epidural steroid injection.

The NKC records include August 17, 2007 MRI reports of the left hip and lumbar spine for left hip pain and back pain with left lower extremity radiculopathy. The MRI conclusion notes, "borderline mild spinal stenosis at the L3-4 and L4-5 levels related to spurring and mild disc bulging. At the L4-5 level there is borderline mild narrowing of the left lateral recess." The NKC records include Dr. Patrick Griffith's report pertaining to provocative discography for multi-level thoracic disc protrusions on August 21, 2007. The records include a CT report of the thoracic spine dated August 21, 2007 which notes "mild extravasated contrast at T10-T11."

The NKC records include a report dated August 31, 2007 documenting left hip joint injection for left hip pain. The records include Dr. Griffith's report dated August 30, 2007 documenting another left hip injection.

The NKC records include Dr. Patrick Griffith's September 17, 2007 report noting he reviewed the CT discography that showed a grade IV right posterior central annular tear and evidence of a disc protrusion at T10-11. He noted pain was non-concordant at that level and the disc was degenerative. The T9-10 disc was also degenerative. His impression was "left thoracic radiculitis with CT discography evidence of a T6-7 disc protrusion with grade IV annular tear with subsequent concordant pain response." He recommended percutaneous disc compression of the T7 disc using coablative therapy.

The NKC records include Dr. Patrick Griffith's report dated February 7, 2008 documenting T6-7 and T8-9 percutaneous disc decompressions. Dr. Griffith's February 28, 2008 report states that Claimant returned that day having had "no pain relief with the thoracic disc decompression." She continued to have pain about the right side of her thoracic spine that wrapped around her chest. He wanted to try another TENS unit. Dr. Griffith saw Claimant on March 27, 2008. He noted that "she is miserable." He had her

off opioid analgesics since November or December. She had continued right-sided thoracic radicular pain. He started her back on the Fentanyl patch with Roxicodone for breakthrough pain.

The records in Exhibit F include a report of Dr. Patrick Griffith dated April 25, 2008. Claimant continued to have pain in her mid-thoracic back that radiated to the right and affected her sleep adversely. Her pain was noted to be six on a scale of ten. He wanted to try her on Ultram and Tramadol and follow up in two weeks for thoracic epidural steroid injection. Dr. Griffith was going to refer Claimant for a functional capacity evaluation.

Dr. Griffith's April 25, 2008 report states in part: "My feelings are that Mrs. Carter has reached maximum medical improvement. I think it would be reasonable to assume that she is going to need ongoing medical therapy and may from time to time, require a thoracic epidural steroid injection; perhaps 3x per year. Consideration could be given to the trial of spinal cord stimulation. However, I have no strong feeling that that would be helpful, nor that we would be able to capture her areas of pain."

The records in Exhibit F document that Dr. Griffith saw Claimant again on June 12, 2008 for a lumbar epidural steroid injection regarding her low back. His impression was lumbar spinal canal stenosis. He administered a second lumbar epidural steroid injection on July 14, 2008.

Dr. Griffith wrote a July 30, 2008 report to Employer's attorney pertaining to Claimant. He noted that Claimant's percutaneous disc decompression procedure was not helpful "primarily because the discs were markedly degenerative." Dr. Griffith noted that he attempted to manage Claimant "without opioid analgesics, but unfortunately her pain was functionally limiting and her quality of life was markedly reduced." His report notes that medication issues for Claimant's work-related thoracic injury were Fentanyl patch, Roxicodone and Cymbalta. He did not think Claimant was a candidate for spinal cord stimulation. He believed a surgical spine consultation in the past was not viewed as a viable option. His report concludes: "I would see her requiring medical management for this problem indefinitely."

Dr. Griffith's August 18, 2008 report notes that he recommended another epidural steroid injection for her lower back pain as part of her "non-work related injury." Dr. Griffith's September 29, 2008 report documents bilateral lumbar medial branch injections. His October 27, 2008 report documents radio frequency neuroablation at L2-L5 for low back pain. Dr. Griffith's November 24, 2008 report notes Claimant's low back pain secondary to lumbar degenerative disc disease and disc bulging which has

improved, but not completely gone, borderline spinal canal stenosis at L3-4 and L4-5, and chronic pain secondary to thoracic disc protrusions. Claimant was continuing to use Fentanyl patches, Roxicodone and Cymbalta.

Exhibit F contains records dated August 21, 2008 documenting physical therapy and hip and lower back pain that started about one year before. Physical therapy records dated September 18, 2008 in Exhibit F document throbbing pain in Claimant's left foot.

The NKC records document another lumbar steroid injection on March 23, 2009. Dr. Griffith saw Claimant on April 20, 2009. He noted her low back and bilateral leg pain were markedly improved. She still had pain in the right side of her lower back with radiation in the right groin. She continued on Fentanyl patches and Roxicodone and was started on Neurontin, but had not continued that on a regular basis. He recommended lumbar medial branch nerve blocks on the right. His report notes, "For the thoracic pain and thoracic disc protrusion, the medication seems to be helpful with that." The report notes Claimant exhibited some tolerance with the Roxicodone. They discussed the possibility of weaning her off temporarily. He felt uncomfortable about increasing her dose. He refilled her Fentanyl patch and Oxycodone.

The NKC records contain a report of lumbar medial branch radio frequency on June 3, 2009. Dr. Griffith's records note Claimant and her husband recently moved to their new home and Claimant "has been doing everything associated with moving, which would be packing boxes and now unpacking the boxes." The report notes that activity increased her pain. Dr. Griffith changed her medication from Roxicodone to Percocet.

Evaluation Physicians

Dr. James Stuckmeyer

Exhibit D contains the deposition of Dr. James Stuckmeyer taken on August 31, 2009, with Stuckmeyer Deposition Exhibit 1, his Curriculum Vitae, Stuckmeyer Deposition Exhibit 2, his medical report dated July 9, 2005 addressed to Claimant's attorney pertaining to Claimant, Stuckmeyer Deposition Exhibit 3, his January 21, 2009 report addressed to Claimant's attorney pertaining to Claimant, and Stuckmeyer Deposition Exhibit 4, his June 5, 2009 report addressed to Claimant's attorney pertaining to Claimant. Dr. Stuckmeyer was Board Certified by the American Board of Orthopedic Surgeons in 1989. Past hospital affiliations are noted. No hospital affiliation is noted since 1995.

Dr. Stuckmeyer's July 9, 2005 report notes he evaluated Claimant on June 30, 2005. His report identifies the medical records he reviewed. Claimant reported she sustained three separate work-related injuries at Harrah's, the first on January 29, 2002, the second on May 12, 2003, and the third on June 16, 2003. His report notes her complaints and treatment relating to those injuries. He summarizes her treatment records in detail. The report discusses Claimant's current complaints and conditions and the results of his physical examination of her.

Dr. Stuckmeyer set forth several conclusions within reasonable medical certainty. He stated that on or about January 29, 2002, Claimant sustained an injury to her thoracolumbar spine following a fall on ice that necessitated treatment. She was capable of continuing to work, but had ongoing symptoms of right-sided chest wall type pain. His report notes her injury on or about May 12, 2003 when she tripped on uneven pavement and again sustained an injury to the thoracolumbar spine that needed further treatment. His report notes that he felt her diagnosis was consistent with degenerative disk disease at multiple levels of the thoracic spine is outlined in various MRIs. He did not feel that she would benefit from intervention.

Dr. Stuckmeyer's report states that Claimant sustained a 10% permanent partial disability to the thoracic spine as a direct result of the January 29, 2002 accident, and an additional 15% disability to the thoracic spine causally related to the May 12, 2003 accident.

Dr. Stuckmeyer's report states that the repetitive nature of Claimant's occupation necessitated the surgical treatment performed by Dr. Thomas regarding the left shoulder. Dr. Stuckmeyer felt Claimant had reached maximum medical improvement regarding the shoulder, and afforded a 25% permanent partial disability to the left shoulder.

Dr. Stuckmeyer recommended ongoing treatment for the chronic thoracic pain with radicular symptoms into the right-sided chest wall. He agreed with Dr. Blatt that every attempt should be made to wean Claimant off narcotics.

Dr. Stuckmeyer's report also states that he did not feel Claimant was employable because she was under Fentanyl dosages on a daily basis. His report notes Fentanyl is approximately ten times the narcotic strength of morphine and impedes an individual's sensory capabilities. His report further states:

Unless Ms. Carter can be appropriately weaned from these medications it would be the opinion of this examiner that as a result of the accident of May 12, 2003, and a subsequent repetitive injury of

June 16, 2003, that the patient is permanently and totally disabled. It is my opinion that the back condition is a hindrance or obstacle for employment or reemployment.

Dr. Stuckmeyer's report states that his opinions are rendered within a reasonable degree of medical certainty.

Dr. Stuckmeyer's January 21, 2009 report, Stuckmeyer Deposition Exhibit 3, notes that he reevaluated Claimant on January 14, 2009. His report identifies medical records he reviewed. The report notes the history of her injuries and his permanent partial disability assessments he made in his earlier report.

Dr. Stuckmeyer's January 21, 2009 report discusses portions of the medical records that he reviewed, including records of Dr. Bredemann, North Kansas City Hospital, Dr. Michael Ryan and Dr. Patrick Griffith. Those records describe treatment Claimant received between June 6, 2006 and September 29, 2008, including examinations, MRIs, thoracic epidural injections, and the percutaneous disk compression performed at T6-T7 in February 2008. He notes Claimant has continued pain medication, including Fentanyl patches and Roxicodone, and lumbar injections.

Dr. Stuckmeyer's January 21, 2009 report notes Claimant reported persistent symptoms of pain in the right thoracolumbar region. Dr. Stuckmeyer performed a physical examination.

Dr. Stuckmeyer's January 21, 2009 report sets forth the following conclusions that are stated within a reasonable degree of medical certainty:

It is my opinion that the accident of January 29, 2002, was the substantial contributing factor to the injury to Ms. Carter's thoracic spine, need for medical treatment, and subsequent disability. I would render a 10% disability to the body as a whole as a result of that accident.

It is my opinion that the accident of May 12, 2003, was the substantial contributing factor to the exacerbation and acceleration of the injury to Ms. Carter's thoracic spine, need for medical treatment, and subsequent disability. I would render a 25% disability to the body as a whole as a result of that accident.

It is my opinion that the repetitive nature of the employment culmination in an accident date of June 16, 2003, was the substantial contributing factor to the injury to Ms. Carter's left shoulder, need for medical treatment, and subsequent disability. I would render a 25% disability to the left shoulder as a result of the repetitive occupational duties.

From an orthopedic standpoint, I do not feel that Ms. Carter is capable of returning to gainful employment. I would restrict her to no prolonged standing, no prolonged walking, and no repetitive lifting, bending, stooping, or squatting. I would also limit her to no repetitive stair climbing and no lifting to exceed 10 pounds on an occasional basis. In addition, based on the heavy narcotic utilization, I do not feel this patient should be driving a vehicle nor should she be around hazardous equipment or hazardous machinery.

Specific to the left shoulder, I would recommend no repetitive lifting, no repetitive pushing or pulling, and no lifting over shoulder height greater than 10 pounds on an occasional basis. I would recommend proceeding with a vocational assessment to determine Ms. Carter's employability. That being stated, this patient has not worked since 2003, and based on the chronicity of her thoracolumbar complaints, left shoulder complaints, and heavy narcotic utilization, it is doubtful that she would be reasonably employable by any employer and it is my opinion that she is permanently and totally disabled as a result of the cumulative effect of the accidents.

In regard to future treatment recommendations, I do feel the patient is going to require long-term utilization of the Fentanyl patches and Oxycodone for breakthrough pain. I would also recommend continuation of her treatment with Dr. Patrick Griffith. These requirements will be a lifelong situation.

Stuckmeyer Deposition Exhibit 4 is Dr. Stuckmeyer's June 5, 2009 report addressed to Claimant's attorney. It notes that Dr. Stuckmeyer reviewed reports of Terry Cordray. Dr. Stuckmeyer's June 5, 2009 report states in part that Claimant was not permanently and totally disabled from the open labor market due to the January 29, 2002 back injury taken in isolation. The report notes Claimant returned to the workforce until May 12, 2003. His report further states:

I think it is fair to state that it is due to a combination of the January 29, 2002 injury in combination with the more significant injury of May 12, 2003 that has rendered Ms. Carter permanently and totally disabled.

When one considers the injury to the left shoulder, taken in isolation, it would be the opinion of this examiner that Ms. Carter would be able to return to the workforce. I would concur with Mr. Cordray that the thoracic injuries in isolation, in conjunction with the narcotic medication, would be enough to render Ms. Carter permanently and totally disabled. That being stated, as outlined in prior commentary, she does have significant disability to the left shoulder as a result of repetitive use.

Dr. Stuckmeyer testified by deposition (Exhibit D) on August 31, 2009. He testified he had treated thoracic spines and shoulders in the past and had done surgery to the thoracic spine and shoulders in the past. He testified he had reviewed the records identified in his reports. He testified regarding portions of his reports, and his testimony was generally consistent with his reports.

Dr. Stuckmeyer thought it was fair to state that after Claimant's first accident she "definitely sustained an injury to her thoracic spine." He noted an MRI scan of July 10, 2002 revealed a disk osteophyte complex at T10-T11 with minimal cord compression. He testified that the osteophyte complex was not caused by the fall and was a preexisting problem. She has persistent symptoms that were waxing and waning between the January 2002 accident and May 2003 accident.

Dr. Stuckmeyer testified that thoracic disk injuries are very difficult to treat, have bizarre symptoms, and MRI scans are not 100% accurate. He thought Claimant had significant injury the first time, and an aggravation and more injury to the thoracic spine the second time. He said it was hard to tell whether Claimant was at maximum medical improvement because Dr. Griffith stated in July 2008 that medial branch blocks might be warranted. He was aware that Dr. Griffith had stated that Claimant was at maximum medical improvement in April 2008.

Dr. Stuckmeyer testified that the likelihood of getting Claimant off Fentanyl and narcotic medications "is probably nil at this stage of the game no matter what they do to her." He testified that Claimant has chronic thoracic back pain with radicular symptoms with multi-level disk involvement and failure to respond to extensive treatment and chronic narcotic medication. He thought Claimant would never be able to get off the

narcotic medications. He put her on restrictions and felt that “essentially she was permanently and totally disabled.”

Dr. Stuckmeyer was asked whether Claimant should remain on the Fentanyl and Roxicodone in the future. He said it would be unlikely that she will ever be able to get off those medications. He testified that Fentanyl is ten times stronger than morphine and is the strongest narcotic commercially available. He noted Claimant is on them daily.

Dr. Stuckmeyer understood Claimant is “pretty much in constant pain regarding the thoracic spine and chest wall pain and it’s exacerbated by activities.” He thought that Claimant represented a relatively typical individual with thoracic spine trauma.

Dr. Stuckmeyer testified regarding Claimant’s restrictions and percentage of disability, and his testimony was consistent with his reports. He noted that he had increased Claimant’s disability from 15% to 25% related to the second accident, after she had undergone additional treatment and he obtained additional information.

Dr. Stuckmeyer also testified (page 37):

And I think as I opined throughout these letters when you take the two thoracic injuries and the fact that she’s on chronic narcotic use and there’s really nothing of a surgical standpoint to offer her any relief, I felt that she was permanently and totally disabled.

Dr. Stuckmeyer said that was despite his 10% rating from the 2002 injury and the 25% rating from the 2003 injury.

Dr. Stuckmeyer testified Claimant was not having any thoracic complaints before 2002 and he saw no suggestion in any of the records that she had preexisting thoracic complaints by January 2002. He said that both the January 2002 and the May 2003 injuries were substantial contributing factors to the thoracic spine problems that he diagnosed. He thought that Claimant “is basically incapable of engaging in the open labor market in some capacity.” He believed that Claimant was legitimately hurting. That was demonstrated by her willingness to undergo thoracic discography where they stick a five inch needle in your thoracic spine.

Dr. Stuckmeyer testified regarding Claimant’s left shoulder. He testified she had undergone a left shoulder acromioplasty with lateral clavicle resection and rotator cuff repair with excision of clavic deposits from the rotator cuff. He rendered a 25% disability to the left shoulder. He reiterated his restrictions specific to the left shoulder that were

consistent with his 2009 report, including no lifting over shoulder height greater than ten pounds on an occasional basis. He noted Dr. Thomas, the treating doctor, had released Claimant on April 15, 2005 as to her shoulder.

Dr. Stuckmeyer testified that if you consider Claimant's left shoulder in isolation, she would be employable. He also testified that if you considered the thoracic spine in isolation and negated the left shoulder, Claimant would not be employable. He testified that Claimant's 2002 injury in isolation did not cause her to be totally disabled because she returned to work.

Dr. Stuckmeyer was asked the following question and gave the following answer (page 51):

Q. Do you believe that the January 2002 and May 2003 accidents in combination have left this lady permanently and totally disabled from a medical standpoint or do you think it's the May 2003 accident taken in isolation that's left her permanently and totally disabled from a medical standpoint?

A. I commented on page 4 of my June 5th, 2009 commentary, first paragraph, I think it is fair to state that it is due to a combination of the January 29, 2002 injury in combination with the more significant injury of May 12th, 2003, that has rendered Ms. Carter permanently and totally disabled.

Dr. Stuckmeyer testified his opinions had been within a reasonable degree of medical certainty.

Dr. Stuckmeyer testified that Claimant is taking Fentanyl and other medications as the result of a combination of the two injuries to her thoracic spine. He testified that her symptoms exploded on May 12, 2003 necessitating further treatment of the thoracic spine. When he said her symptoms exploded, he meant that things got a whole lot worse—her thoracic spine significantly deteriorated.

Dr. Stuckmeyer agreed that Claimant's MRI of her low back showed borderline mild spinal stenosis at L3-4 and that she had degenerative changes in her lumbar spine, specifically calcification or osteophyte complex. She was having lumbar spinal canal stenosis and left leg pain for which she received a series of epidural injections and medial branch blocks. He testified if Claimant had no lumbar complaints, his restrictions would

be the same. Claimant was not really complaining of lower back pain when he evaluated her in 2009.

Dr. Stuckmeyer was aware that Claimant returned to work between January 2002 and May 2003. He was aware that she did not receive any treatment between August 2002 and May 2003. He understood she returned to regular duty status. It was his understanding she was not on any chronic narcotic pain medications immediately prior to her May 2003 work injury. He understood she had taken a family vacation in Hawaii between January 2002 and May 2003. He knew she was not prescribed a chronic narcotic pain medication until after the May 2003 injury. Claimant was not taking Fentanyl prior to the May 2003 accident.

Dr. Stuckmeyer was asked the following question and gave the following answer (pages 82-84):

Q. But we've already got medical records that would indicate she wasn't having those narcotics prior to this work-related injury, so explain to me how it could have been related to the combination of the two when it wasn't until after the May of '03 injury that she was prescribed them.

A. My global perception of this case is that this woman sustained an injury – and I'll go over this again – in January '02. She's evaluated with an MRI scan which was equivocal, had persistent symptoms well documented not only in commentary by me but by other examining physicians and, I believe, even by her deposition. She did undergo a series of epidural injections ending in August '02, which did offer her some relief. In August '02 she has some relief, she returns to work, and then in May '03 she sustains this injury. And as I've testified to, she's subsequently reevaluated with an MRI scan following the '03 accident. It wasn't until 2008 that they ultimately did the provocative discography.

My experience with thoracic spine is as follows. She had persistent thoracic back pain with radicular symptoms into the chest wall indicating she probably had a disc herniation that was never picked up in the '02 and the '03 MRI scan. Based on the patient's history, in '03 she had an explosion of her symptoms, which means that she probably caused yet another disc herniation at yet another level in the thoracic spine. I think it's fair to state and it's my

commentary she had an injury in '02, she had ongoing problems, she was not on narcotics, but she had ongoing chest wall pain. My suspicion is she had an undiagnosed thoracic disc herniation is why she was having the radiating symptoms in the chest wall. '03 things exploded, things got worse, but five years subsequent to the '03 injury she was ultimately diagnosed with having these disc herniations.

Dr. Stuckmeyer testified he did not recommend any additional future medical treatment to the left shoulder. He thought she would need long term management from a pain management group for her narcotics with regard to the thoracic spine. He said she would need to stay on the Fentanyl for her lifetime as a result of the thoracic spine problems.

Dr. Stuckmeyer's opinions were expressed within a reasonable degree of medical certainty.

Dr. David Clymer

The deposition of Dr. David J. Clymer taken on November 9, 2009 was admitted as Exhibit 1 along with Clymer Deposition Exhibit 1, his Curriculum Vitae, Deposition Exhibit 2, his July 13, 2009 medical report addressed to John Fox pertaining to Claimant, Deposition Exhibit 3, WebMD document pertaining to Fentanyl, Deposition Exhibit 4, document titled "Fentanyl Side Effects", Deposition Exhibit 5, document entitled "Fentanyl", and Deposition Exhibit 6, letter from John Fox to Dr. David Clymer dated July 7, 2009. Objections to Clymer Deposition Exhibits 3, 4, and 5 are sustained.

Dr. Clymer's Curriculum Vitae notes that he is a Diplomat of the American Academy of Orthopedic Surgeons and is Board Certified by the American Board of Orthopedic Surgeons. He is licensed to practice medicine in Missouri and Kansas. His hospital affiliations and education are noted.

Dr. Clymer's July 13, 2009 medical report notes medical records that he reviewed. They include records of Dr. Ryan, Dr. Thomas, Dr. Drisko, Dr. Stuckmeyer, Dr. Pratt, Dr. Blatt, Dr. Griffith, Research Medical Center, St. Luke's, Northland Hospital, North Kansas City Hospital, Concentra Medical Center, Clay Family Medicine Clinic and HealthSouth Physical Therapy. He also reviewed Claimant's deposition testimony dated June 30, 2009. His report notes Claimant is 63 years old and is currently unemployed. The report notes that Claimant alleges injuries at Harrah's that "resulted in rather chronic ongoing right sided back and chest wall pain as well as some less severe ongoing left shoulder pain." His report discusses the history of Claimant's slip and fall on ice on

January 29, 2002, and her subsequent conservative treatment. The report notes she continued to work in her regular duties but with some discomfort.

Dr. Clymer's report discusses Claimant's second injury when she stumbled over uneven concrete on a sidewalk. The report notes she stated she had recurrent pain that was very similar to the pain after the first fall with primarily right-sided chest wall searing discomfort. She also complained of increasing discomfort in the upper extremities. The report notes her left shoulder symptoms apparently became much worse in June 2003. The report notes that her shoulder injury sounded more of a culmination of repetitive use over time rather than an isolated accident or injury. Her treatment at Concentra and MRI study was noted.

Dr. Clymer's report notes her study at Northland Imaging revealed some hypertrophic degenerative changes at the AC joint and some calcification in the distal supraspinatus tendon consistent with calcific tendinitis and impingement. The report notes there was not evidence of a significant rotator cuff tear. The report notes Claimant's referral to Dr. Drisko, and the MRI thoracic spine done on October 27, 2003. The report notes Claimant's evaluation by Dr. Blatt in October 2003. The report notes Claimant's evaluation by Dr. Pratt, and his suggested limitations and permanent partial disability at 5% as a result of the workplace accidents.

Dr. Clymer's report also notes Claimant's referral to another doctor that resulted in surgical debridement of the left shoulder in November 2004, a later release at MMI, and the treating doctor's 10% disability rating involving left shoulder. The report notes that Dr. Blatt suggested Claimant try to limit or avoid narcotic medications, and notes the doctor who operated on her left shoulder also suggested a pain management program in hopes that she could wean down on her medications.

Dr. Clymer's report notes that Claimant was seen by Dr. Bredemann to assist in managing her pain medications, and that she was then seen by Dr. Griffith, who performed a CT scan and discogram. The report notes that Dr. Griffith performed a percutaneous disk decompression in February 2008 that resulted in very limited change in subjective symptoms.

Dr. Clymer notes that Claimant continues to use Fentanyl patch with occasional Oxycodone for occasional breakthrough pain. His report states that Claimant notes her left shoulder symptoms have actually improved with only mild remaining crepitus and discomfort with repetitive movement.

Dr. Clymer's report notes that Claimant has "rather significant ongoing right chest-wall pain which is her primary complaint." She reports that her symptoms are more aggravated by repetitive activities such as standing at the kitchen sink to prepare meals or use her hands and arms in a repetitive fashion. The report notes that at times, Claimant's symptoms are rather severe and almost incapacitating, and at other times, they are moderate. She reports that she never feels her symptoms resolve completely. Her primary complaint is noted to be right-sided chest wall pain at about the T-7 or T-8 distribution.

Dr. Clymer's July 13, 2009 report notes the results of his physical examination of Claimant. He notes some generalized vague discomfort in the right thoracic region about on the line of T-7 extending out toward the lateral side of just beneath the right breast anterior. He notes symptoms are somewhat aggravated by compression of the rib cage, but there is no crepitus or any signs of rib instability. He notes mild subacromial crepitus with movement and mild discomfort with impingement maneuvers involving the left upper shoulder.

New x-rays of the left shoulder and thoracic spine were obtained on July 13, 2009. Dr. Clymer's report notes the thoracic spine study shows "minor degenerative changes with some endplate spurring and mild disk space narrowing at several levels. There is no evidence of fracture nor significant deformity. No other abnormalities are noted." X-rays of the left shoulder reveal mild degenerative change at the acromioclavicular joint.

Dr. Clymer's report sets forth the following opinions:

In summary, Ms. Carter's history and current clinical findings suggest some mild thoracic degenerative disk disease and spondylosis with some ongoing irritation or nerve root damage in the region of the right T-7 level. It is possible that the 2 falls at work may have aggravated this process; however, there is no evidence of a significant disk herniation nor significant ongoing radiculopathy or myelopathy. Her ongoing problems are primarily a pain management issue with subjective discomfort in this region much greater than I would expect given the objective findings. With regard to the left shoulder, her history and findings were consistent with a shoulder contusion and sprain with some associated rotator cuff tendinitis and calcific tendon damage. This has been treated quite nicely with surgical decompression with only mild remaining symptoms. I suspect her repetitive activities at work and the 2 falls described may have contributed to this rotator cuff tendinitis process as well.

I feel Ms. Carter has clearly reached maximum medical improvement with regard to these issues. With regard to the left shoulder, she has only mild ongoing discomfort but some limitation with regard to movement and strength. I would encourage an ongoing general fitness and exercise program and would expect her shoulder symptoms will actually improve somewhat with time. At this point, based on her history, operative findings and current complaints, I would estimate a permanent partial disability at 7% of the left upper extremity at the level of the shoulder related to this process.

With regard to her more significant complaints of thoracic and chest wall pain, the issue is much more complex and unclear. All of her clinical and radiographic studies have revealed only mild degenerative disk change but her subjective symptoms have been more consistent with radiculopathy in the mid thoracic region. I think her treatment has been appropriate and reasonable. Unfortunately, it has not resulted in clear resolution of her symptoms. She probably does have some nerve root irritation and simply much more significant subjective complaints with this than an average person. Consequently, I feel she has also reached maximum medical improvement with regard to this process. I do not think there is much else to do at this point aside from a reasonable pain management program. I agree with the other physicians who have stated that a decrease in her use of narcotics would be helpful and appropriate; however, she seems to be reasonable and is using her current medications in an effort to be more active and functional and does not seem to be having any major side effects or problems. Consequently, although I would suggest she continue to try to taper down her use of narcotic medications, I believe it would be reasonable to continue with a Fentanyl patch at 50 mcg daily so long as this results in clear symptomatic improvement and a more functional and active lifestyle. If the medication caused any side effects or problems or resulted in diminished activity, then I think she would be better off to taper down to a lower dose or off completely. At this point, however, it seems that she is functioning well and the current dose of Fentanyl is acceptable. I would suggest she avoid use of any other additional narcotics. She might find that occasional use of a muscle relaxer or an over-the-counter anti-inflammatory would be helpful. I would not anticipate that any other medical or surgical treatment would be necessary.

At this time, based upon her current findings, I feel Ms. Carter does have some ongoing permanent disability with regard to this chronic thoracic pain. Most of her disability is based upon her subjective level of discomfort as opposed to objective findings, however. This makes assessment of true disability difficult. I feel Ms. Carter is reasonable and cooperative in my evaluation and believes she probably does have ongoing discomfort, however, I would not anticipate this level of discomfort should prevent her from most moderate level activity. In fact, I would encourage an ongoing stretching, strengthening and exercise program and feel she probably could also work provided this did not involve very heavy lifting or very highly repetitive activities. A periodic change in position would be appropriate. Use of her arms and shoulders would be acceptable but I would avoid highly repetitive overhead activity or activities which cause excessive strain in the thoracic region. I would suggest a lifting limit in the range of 20 to 25 pounds.

Based upon her current findings and ongoing complaints, I feel she has evidence of permanent partial disability equal to 10% of the body as a whole as a result of the thoracic spine process with disk injury and subsequent surgery as described above.

Finally, with regard to your specific question about working while using Fentanyl patch, I believe an appropriate dose of Fentanyl would not preclude Ms. Carter from activity and work and therefore would not feel that there is any need for restriction from work activities in the past or the future while she is on Fentanyl beyond those physical restrictions which I have just outlined.

Dr. Clymer testified on November 9, 2009 (Exhibit 1) that he is an orthopedic surgeon and has been Board Certified in orthopedic surgery since 1987. He has provided direct treatment for patients with shoulder complaints and thoracic spine complaints. He has performed surgeries on patients with shoulder complaints. He has performed surgeries on backs, including thoracic spines.

Dr. Clymer testified regarding Claimant's history. His testimony was consistent with his report. He testified that the initial MRI revealed degenerative disk and osteophyte changes in the mid-thoracic region, and that condition caused some canal encroachment. He noted osteophyte changes are bony spurring that are caused by age and

degenerative change. He stated the MRI of the thoracic spine did not show up as disk herniation. He testified that the MRI study of the thoracic spine did not demonstrate what could be identified or characterized as a traumatic or acute condition of the thoracic spine.

Dr. Clymer noted that the MRI of the left shoulder showed some hypertrophic degenerative changes at the AC joint in calcification in the distal supraspinatus tendon. He said those degenerative changes were consistent with age and activity. He testified the MRI of the left shoulder did not demonstrate any acute injury to the structure of the left shoulder. He noted that Claimant was seen by Dr. Blatt, Dr. Pratt, and then by Dr. Leslie Thomas. He said his report had a typographical error when it referred to Dr. Carter. He understood that Claimant had surgery of the left shoulder that consisted of an acromioplasty with lateral clavicle resection and excision of calcified deposits. That was done to decrease arthritic change at the acromioclavicular joint and decrease the bony impingement on the rotator cuff. Based on his review of the operative report from Dr. Thomas, he did not believe there was any evidence of traumatic or acute injury in that shoulder joint.

Dr. Clymer noted that Dr. Thomas eventually found Claimant at maximum medical improvement and rated her at 10% of the left shoulder, and suggested she might consider weaning herself off some of the narcotics. He noted she was then seen by Dr. Jeff Bredemann, a pain management doctor. She was then next seen by Dr. Patrick Griffith, who did a percutaneous disk decompression in February 2008. That procedure is “an attempt to remove some of the disk material from within disk space in hopes that it might decompress the amount of disks and diminish the amount of bulging and possibly thereby decrease back pain.”

Dr. Clymer testified regarding Claimant's medications and complaints, the results of his physical examination, regarding the results of his x-rays, and the diagnosis of Claimant's spine condition. His testimony was consistent with his report. He testified that Claimant was consistent in describing her symptoms in terms of location and severity, but the subjective complaints always seem to be much greater than the objective findings would suggest.

Dr. Clymer also testified with a reasonable degree of medical certainty as to the diagnosis of Claimant's left shoulder condition. He stated that he felt “the shoulder was consistent with a shoulder contusion and sprain with some associated chronic rotator cuff tendinitis and calcific tendon change.” He stated it did not appear that Claimant's work-related falls resulted in a significant acute damage to the shoulder. It was basically gradual progressive degenerative change. He felt the work activities probably resulted in

some aggravation of the degenerative calcific tendinitis. He felt Claimant was at maximum medical improvement with respect to the left shoulder and the thoracic spine.

Dr. Clymer's opinion with a reasonable medical certainty regarding the extent of permanent partial disability of Claimant's left shoulder was 7% disability of the left upper extremity at the level of the shoulder. He encouraged some decrease in narcotics, if possible, with respect to treatment of Claimant's thoracic spine.

Dr. Clymer did not believe that there was any objective medical reason why Claimant could not return to some kind of gainful employment. He did not personally feel individuals who are taking pain medications are unable to work. He has many patients who are on pain medications who are working. Dr. Clymer felt that Claimant had a 10% disability of the thoracic spine with a reasonable degree of medical certainty. He felt that Claimant should probably avoid very heavy lifting or very highly repetitive activities and suggested a lifting limit in the range of twenty to twenty-five pounds. Dr. Clymer said he did not have the sense that Claimant was actively malingering.

Dr. Clymer said that Fentanyl is stronger than morphine. It is used for any pain, including back pain. He stated people who are appropriately managed on Fentanyl can drive. He agreed that Claimant is definitely a chronic pain management case at this point.

Dr. Clymer testified that Claimant's two falls were a substantial contributing factor to making her thoracic spine/nerve root irritation problems symptomatic. He testified that Claimant's dealing of cards would be a substantial contributing factor to a least aggravating a degenerative problem with the left shoulder necessitating the surgery that she had with Dr. Thomas. He felt that could have been a substantial contributing factor.

Dr. Clymer stated that he would not anticipate from his review that it would be necessary for Claimant to have to lie down to control the pain through the course of a day. He thought it was more likely that Claimant's symptoms will improve gradually rather than worsen with the treatment parameters that he described. He expected there will be some gradual improvement over the course of one to three years. He did not have any feel as to how the 10% he assigned to the thoracic spine ought to be divided between the two falls. He agreed that Claimant's use of the Fentanyl patch would not preclude her from doing basic clerical duties and activities of that sort, and would not preclude her from working since she is able to drive and perform other basic activities though she should avoid substantial decision making issues in terms of operating equipment.

Vocational Evidence—Terry Cordray

The deposition of Terry Cordray taken on September 14, 2009 was admitted as Exhibit E along with Cordray Deposition Exhibits 1, his Curriculum Vitae, Cordray Deposition Exhibit 2, his March 9, 2009 report pertaining to Claimant addressed to her attorney, Cordray Deposition Exhibit 3, his May 7, 2009 report pertaining to Claimant addressed to Claimant's attorney, and Cordray Deposition Exhibit 4, his September 1, 2009 report pertaining to Claimant addressed to her attorney.

Cordray Deposition Exhibit 1 notes that Mr. Cordray has an M.S. in Rehabilitation Counseling, and that he is a Certified Rehabilitation Counselor, Certified Case Manager, and Licensed Professional Counselor. He is a Diplomat of the American Board of Vocational Experts.

Cordray Deposition Exhibit 2 notes that he performed a vocational assessment of Claimant and met with her on January 13, 2009. His report identifies the medical records and reports that he reviewed. It identifies functional limitations set forth by Dr. Stuckmeyer, Dr. Leslie Thomas, Dr. Blake Donaldson, Dr. Jeffrey Blatt, and Dr. Neil Mikel. His report discusses Claimant's educational background, social background, previous medical conditions, work background, wages, Claimant's perspective of injury including physical limitations Claimant believed she had, and activities of daily living. The report also sets forth the results of vocational tests administered to Claimant.

Mr. Cordray's March 9, 2009 report sets forth the following conclusions:

Given Ms. Carter's current vocational profile as a 62 year old woman who is limited to sedentary work, who has further limitation to the left shoulder with no lifting over shoulder height, who is taking heavy narcotic medication including Oxycodone and Fentanyl patch, it is my opinion that she is totally disabled.

I do not believe it is realistic to expect that an employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to hire an individual who is a 62 year old woman, who has performed as a dealer at a casino for her past ten years of employment, who is limited to alternating to sit/stand jobs with limitations on reaching and who is also required to take heavy narcotic medications which limit her abilities to drive. Therefore given her current presentation as well as reliance upon the medical records reviewed, it is my opinion that Ms. Carter is totally disabled.

It is my opinion that her back injury, in isolation, places her at sedentary occupations, which do exist in the labor market. However, when one considers her upper extremity impairments in combination with her previous back injury, she is totally disabled.

At age 62, even though she has good cognitive skills and is an intelligent woman, I do not believe it is realistic for an individual of her age to attempt any vocational rehabilitation retraining.

Therefore it is my opinion that Ms. Carter is totally disabled and no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to hire Ms. Janet Carter for any job given her current presentation and that she is totally disabled.

Mr. Cordray's May 7, 2009 report, Cordray Deposition Exhibit 3, states in part on page 2:

In my report of March 9, 2009 I noted that following her first injury in January 2002, Ms. Carter did attempt to return to work. After she had returned to work, Ms. Carter sustained a second injury in which she further injured her back. Following this injury, Ms. Carter returned to her usual occupation as a dealer at Harrah's Casino until June 16, 2003 at which time she was no longer able to perform her job.

A review of the medical records indicates that Ms. Carter is taking significant narcotic pain medications including Fentanyl patch and Oxycodone. These medications have a side effect of an inability to be alert and attentive. Based upon these two injuries, Ms. Carter is currently restricted to no prolonged standing, no prolonged walking and no repetitive lifting, bending, stooping or squatting. She is also limited to no repetitive stair climbing and no lifting to exceed ten pounds on an occasional basis.

Based upon these restrictions alone, given Ms. Carter's need to use narcotic pain medications, including Fentanyl patch and Oxycodone which have a significant effect of an inability to be alert and attentive, Ms. Carter was totally disabled following the second injury of May 12, 2003.

It was this injury that Dr. Stuckmeyer noted resulted in the use of heavy narcotic medication usage which has rendered Ms. Carter totally disabled.

The upper extremity disability resultant from cumulative trauma from dealing cards by itself or in combination with the previous two injuries did not result in Ms. Carter's total disability.

Although it is impairment, Ms. Carter's total disability is a result following her second injury of May 12, 2003 which limited her to sedentary occupations with the additional need of use of heavy narcotic medications.

Therefore it is my opinion that Ms. Carter's total disability is a result of the second injury of May 12, 2003.

I hope this clarifies the matter of Ms. Carter's permanent and total disability.

Mr. Cordray's report notes his opinions are based upon a reasonable degree of vocational rehabilitation certainty.

Mr. Cordray's September 1, 2009 report, Cordray Deposition Exhibit 4, states in part:

As you would note in my previous reports, my primary concern regarding Ms. Carter's ability to work in the labor market is her need to use narcotic pain medications including the Fentanyl patch and Oxycodone which have a significant effect on her ability to be alert and attentive.

Ms. Carter's need to take narcotic medication, either from the first injury in January 2002, the second injury in May 2003 or the combination of those two injuries, prevents Ms. Carter from performing sedentary types of jobs.

It is my opinion that following the second injury, Ms. Carter was totally disabled based upon her significant limitations in combination with the effects of her medications.

Certainly the lack of good use of the upper extremities which is an essential ability in performing sedentary work would have been limited by her shoulder injury.

Following her shoulder injury, Ms. Carter was indeed totally disabled; however I believe her total disability was a result of the previous injuries that resulted in her need to use the significant amounts of narcotic pain medication which cause her to be unable to be alert and attentive.

If the injury in January 2002 resulted in her need to take pain medication prior to the May 2003 injury, which resulted in the restrictions to sedentary activities, it would be my opinion that her total disability is a result of the combination of the two injuries.

It remains my opinion that it is the result of Ms. Carter's physical limitations and resultant use of pain medication prior to the shoulder injury that resulted in total disability.

Mr. Cordray stated his opinions are based upon a reasonable degree of vocational rehabilitation certainty.

Mr. Cordray testified on September 14, 2009. He stated he has been giving vocational testimony in Missouri Workers' Compensation for ten years. He said of those, 65% are referred from defense attorneys or insurance companies, and 35% are plaintiff's attorneys. He testified that if he were asked questions about his report contained in Exhibit 2, his thoughts and opinions would be contained in that report.

Mr. Cordray testified that he prepared his supplemental reports to clarify Dr. Stuckmeyer's additional comments, and to sort out when Claimant became totally disabled. He testified regarding portions of his reports, and his testimony was generally consistent with his reports.

Mr. Cordray testified at page 19:

When you combine the fact that she has these physical restrictions that place her at doing sedentary types of activities and combine that with the fact that she's taking strong narcotics including Oxycodone and she eats Fentanyl lollipops, she's unable to work. The

narcotics alone for a 62-year-old lady cause her to be so inattentive and not alert that she wouldn't be able to sustain an eight-hour work day, day-in and day-out and be alert and attentive.

Mr. Cordray thought that the combination of her physical restrictions based on her two back injuries, in combination with the effects of taking Oxycodone and Fentanyl, made her totally disabled. He testified that no employer would hire Claimant.

Mr. Cordray testified the June 2003 accident in isolation did not totally disable Claimant or leave her incapable of work in the open labor market in some capacity. He also testified that if Claimant did not need the Fentanyl, or if she could take the Fentanyl and still work, no employer would hire her when you add the shoulder injury that keeps her from doing repetitive use of the upper extremities. He testified it was not reasonable for an employer to hire Claimant after her last day of work on March 10, 2005.

The parties stipulated that on or about January 29, 2002, May 12, 2003, and June 16, 2003, Claimant was an employee of Employer and was working under the provisions of the Missouri Workers' Compensation Law. The parties also stipulated that on or about January 29, 2002, May 12, 2003, and June 16, 2003, she sustained injuries by accident or occupational disease in North Kansas City, Clay County, Missouri, arising out of and in the course of her employment.

Rulings of Law

Based on a comprehensive review of the substantial and competent evidence, including the testimony of Claimant, the medical reports and records, the depositions, the vocational evidence, the stipulations of the parties, and my personal observations of Claimant at the hearing, I make the following Rulings of Law:

1. Liability for permanent partial disability and permanent total disability benefits.

Section 287.190, RSMo¹ provides for permanent partial disability benefits. The determination of the degree of disability sustained by an injured employee is not strictly a

¹ All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted. See *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007) where the Eastern District Court of Appeals held that the 2005 amendments to Sections 287.020, RSMo and 287.067, RSMo do not apply retroactively. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau*

medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 230 (Mo. banc 2003)². While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros., Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Fogelson v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

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

v. Netco Construction, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000).

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

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

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

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

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992), 29; *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693,

701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004). The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993), 29; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993).

The claimant in a workers' compensation proceeding has the burden of proving all elements of the claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 912 (Mo.App. 2008); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Cardwell*, 249 S.W.3d at 908; *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989). While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros.*, 595 S.W.2d 441, 443 (Mo.App. 1980); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Cardwell*, 249 S.W.3d at 908; *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Cardwell*, 249 S.W.3d at 908; *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

The finding of disability may exceed the percentage testified to by the medical experts. *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289. The Commission “is free to find a disability rating higher or lower than that expressed in medical testimony.” *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490 (Mo.App. 1990); *Sellers*, 776 S.W.2d at 505. The Court in *Sellers* noted that “[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, ‘the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.’” *Sellers*, 776 S.W.2d at 505. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. 1995); *Jones*, 801 S.W.2d at 490.

Section 287.220. 1, RSMo provides in part:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative

law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the 'Second Injury Fund' hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141.

In deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003); *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. 2000). Accordingly, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself renders the employee permanently and totally disabled, then the fund has no liability and the employer is responsible for the entire amount of compensation. *Landman*, 107 S.W.3d at 248; *Hughey*, 34 S.W.3d at 847.

The court in *Knisley v. Charleswood Corp.*, 211 S.W.3d 629 (Mo. App. 2007) states at 634-35:

To prevail against the SIF on a claim for permanent total disability, a claimant must establish that: (1) she had a permanent

partial disability at the time she sustained the work-related injury and (2) the pre-existing permanent partial disability was of such seriousness as to constitute a hindrance or obstacle to her employment. Section 287.220.1 RSMo 2000; *Motton v. Outsource Intern.*, 77 S.W.3d 669, 673 (Mo.App. E.D.2002). "The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment." *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo.App. E.D.2000) (overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)); *Garrone v. Treasurer of State of Missouri*, 157 S.W.3d 237, 244 (Mo.App. E.D.2004). The primary determination is whether an employer can reasonably be expected to hire the employee, given his or her present physical condition, and reasonably expect the employee to successfully perform the work. 157 S.W.3d at 244.

Section 287.020.7, RSMo provides: "The term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident." The phrase "inability to return to any employment" has been interpreted as "the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Knisley*, 211 S.W.3d at 635; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo.App. 2001); *Reiner v. Treasurer of the State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.1992); *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 792 (Mo.App. 1992).

Total disability means the "inability to return to any reasonable or normal employment." *Lawrence*, 834 S.W.2d at 792; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990); *Kowalski*, 631 S.W.2d at 992. An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849, 853 (Mo.App. 1995); *Brown*, 795 S.W.2d at 483. The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Knisley*, 211 S.W.3d at 635; *Brown*, 795 S.W.2d at 483; *Reiner*, 837 S.W.2d at 367; *Kowalski*, 631 S.W.2d at 922. See also *Thornton v. Hass Bakery*, 858 S.W. 2d 831, 834 (Mo.App. 1993).

The court in *Knisley*, 211 S.W.3d states at 635:

Section 287.200.1 does not require a claimant to distinguish each disability and assign a separate percentage for each of several pre-existing disabilities to prevail on a claim for permanent total disability. Section 287.200.1; *See Vaught v. Vaughts, Inc.*, 938 S.W.2d 931, 942 (Mo.App. S.D.1997) (overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)). Rather, a claimant must establish the extent, or percentage, of the permanent partial disability resulting from the last injury only, and prove that the combination of the last injury and the pre-existing disabilities resulted in permanent total disability. *Id.*

The court in *Vaught*, 938 S.W.2d 931, states at 939:

As explained in *Stewart, id.* at 854, § 287.220.1 contemplates that where a partially disabled employee is injured anew and sustains additional disability, the liability of the employer for the new injury “may be at least equal to that provided for permanent total disability.” Consequently, teaches *Stewart*, where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Id.* The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). *Id.* If the compensation to which the employee is entitled for the new injury is *less* than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. § 287.220.1

“For Second Injury Fund liability, a preexisting disability must combine with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have resulted from the new injury alone and of itself; or (2) the preexisting disability combined with the disability from the subsequent injury to create permanent total disability.” *Uhlir v. Farmer*, 94 S.W.3d 441, 444 (Mo.App. 2003)

Based on the competent and substantial evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational expert, the stipulations of the parties, as well as based on my personal observations of Claimant at the hearing, and based on the application of the Workers' Compensation Law, I find that Claimant is not permanently and totally disabled. I find that none of Claimant's injuries sustained in the course of her employment for Employer caused her to be permanently and totally disabled in isolation considered alone. I also find that the combination of Claimant's June 16, 2003 injury and her preexisting disabilities from her May 12, 2003 injury and her January 29, 2002 injury did not result in Claimant's permanent and total disability. I also find that the combination of Claimant's May 12, 2003 injury and her preexisting disability from her January 29, 2002 injury did not result in Claimant's permanent and total disability. This is supported by the following.

Claimant's rib cage still gives her problems. She is still receiving treatment on her right rib side. She takes medication to keep going. She is getting epidurals, is using a TENS unit, and is taking oral medication. She still takes Fentanyl lollipops and uses Fentanyl patches at times. She takes medication three days a week on average.

Claimant can do almost anything for a short period of time, but does things in spurts. She is able to work around the house two to three hours at a time. Claimant has constant right rib dull ache pain that is one or two when she uses her Fentanyl patch. She is 90 to 95% mentally alert and pretty competent when she uses the patch. Claimant now has no pain in her left shoulder, but she has some restriction in motion. She did not feel that her shoulder was keeping her from going back to work. Claimant did not recall any of her treating doctors saying that she was physically incapable of working.

Claimant is able to take care of her hygiene needs and can do most things around the house. She uses a computer at home for emails. She can drive for one hour. She walks between one-half of a mile and one mile. She helps with house repairs and has helped paint trim.

Claimant treated with her own doctors after her first accident. She took pain medication after her first accident. She continued to have mid-back pain after her first accident until her second accident. Some of her coworkers switched with her to give her easier jobs after her first accident. She was not on any work restrictions before her second accident. She worked full-time from her first accident to her second accident.

Claimant's pain was much more severe for a longer period after her second accident. She continued to work for Employer after her second injury until February

2004 when she received treatment for her left shoulder condition. She was released by Dr. Thomas at MMI on April 15, 2005, and received unemployment benefits for six months after that time. She applied for numerous jobs during that period for sales, secretarial, and administrative positions, but she did not receive call-backs.

Claimant has a Bachelor of Science in Education degree from Central Missouri State University. Claimant has taken computer classes. Claimant has worked several jobs in the past with sedentary and light duties.

Claimant did not appear to be in pain during the three and one-half hour hearing. Claimant stood only once during the hearing when a short recess was taken.

The parties stipulated that on or about January 29, 2002, May 12, 2003, and June 16, 2003, Claimant was an employee of Employer and was working under the provisions of the Missouri Workers' Compensation Law. The parties also stipulated that on or about January 29, 2002, May 12, 2003, and June 16, 2003, she sustained injuries by accident or occupational disease in North Kansas City, Clay County, Missouri, arising out of and in the course of her employment.

Dr. Pratt notes in his December 29, 2003 report that in direct relationship to the reported event on May 12, 2003, "This event was an aggravation of underlying involvement of the region and results in a five percent (5%) permanent partial disability to the body as a whole at 400 weeks." The report notes that he would not recommend that Claimant perform any lifting in excess of twenty pounds and also avoid activities, which involve thoracic rotation, other than occasionally.

Dr. Clymer, a Board Certified treating orthopedic surgeon, rated Claimant in his July 13, 2009 report. He estimated a permanent partial disability at 7% of Claimant's left upper extremity at the level of the shoulder. He felt Claimant had evidence of permanent partial disability equal to 10% of the body as a whole as a result of the thoracic spine process with disk injury and subsequent surgery. He did not have any feel as to how the 10% he assigned to the thoracic spine ought to be divided between the two falls. Dr. Clymer stated most of Claimant's disability is based upon her subjective level of discomfort as opposed to objective findings. Dr. Clymer noted Claimant's of her arms and shoulders would be acceptable, but she should avoid highly repetitive overhead activity or activities which cause excessive strain in the thoracic region. He suggested a lifting limit in the range of 20 to 25 pounds. I find Dr. Clymer's restrictions to be credible.

Dr. Clymer testified that the initial MRI revealed degenerative disk and osteophyte changes in the mid-thoracic region that are caused by age and degenerative change. He stated the MRI of the thoracic spine did not show up as disk herniation.

Dr. Stuckmeyer's July 9, 2005 report states that Claimant sustained a 10% permanent partial disability to the thoracic spine as a direct result of the January 29, 2002 accident, and an additional 15% disability to the thoracic spine causally related to the May 12, 2003 accident. That report also assigned a 25% permanent partial disability to the left shoulder as a result of the repetitive nature of Claimant's occupation that necessitated the surgical treatment performed by Dr. Thomas.

Dr. Stuckmeyer's January 21, 2009 report assigned a 10% permanent partial disability to the thoracic spine as a direct result of the January 29, 2002 accident, and an additional 25% disability to the thoracic spine causally related to the May 12, 2003 accident. That report rendered a 25% disability to the left shoulder as a result of the repetitive occupational duties culminating in an accident date of June 16, 2003.

Dr. Thomas assigned a disability rating of 10% Claimant's left shoulder on May 22, 2005.

No treating doctor ever told Claimant she was incapable of gainful employment. Dr Blatt stated on October 31, 2003 that he believed it was safe for Claimant to work, although it might be uncomfortable.

Dr. Bredemann stated on June 6, 2006 that it was not his opinion that the Fentanyl patch or other narcotics would preclude Claimant from working, since she is able to drive and perform other basic activities. He noted she should avoid any substantial decision making issues or safety equipment handling, but basic clerical duties or other activity of that sort would not be contra-indicated by the use of narcotics. He noted they have many patients who take narcotics so that they may in fact return to work successfully. I find these opinions to be credible.

Dr. Griffith wrote on July 30, 2008 that Claimant's pain was "functionally limiting and her quality of life was markedly reduced." However, he did not state that Claimant was unable to work. Dr. Griffith also treated Claimant for low back, hip and bilateral leg pain in 2008 and 2009. She has continued on pain medication and steroid injections. He noted on April 20, 2009 that the medication seems to be helpful with her thoracic pain and thoracic disc protrusion.

Dr. Clymer felt Claimant probably could work provided it did not involve very heavy lifting or very highly repetitive activities. He noted a periodic change in position would be appropriate. He suggested a lifting limit in the range of 20 to 25 pounds. He believed "an appropriate dose of Fentanyl would not preclude Ms. Carter from activity and work and therefore would not feel that there is any need for restriction from work activities in the past or the future while she is on Fentanyl beyond those physical restrictions which I have just outlined." I find these opinions of Dr. Clymer to be credible.

Dr. Clymer testified he did not believe that there was any objective medical reason why Claimant could not return to some kind of gainful employment. He did not personally feel individuals who are taking pain medications are unable to work. He has many patients who are on pain medications who are working. He did not anticipate it would be necessary for Claimant to have to lie down to control the pain through the course of a day. He said Claimant's use of the Fentanyl patch would not preclude her from doing basic clerical duties and activities of that sort, and would not preclude her from working since she is able to drive and perform other basic activities. I find these opinions of Dr. Clymer to be credible.

Dr. Stuckmeyer stated on June 5, 2009 that it is "due to a combination of the January 29, 2002 injury in combination with the more significant injury of May 12, 2003 that has rendered Ms. Carter permanently and totally disabled." He put her on restrictions and felt that "essentially she was permanently and totally disabled." He testified: "the two thoracic injuries and the fact that she's on chronic narcotic use and there's really nothing of a surgical standpoint to offer her any relief, I felt that she was permanently and totally disabled." He thought that Claimant "is basically incapable of engaging in the open labor market in some capacity." I do not find these opinions to be credible.

Dr. Stuckmeyer testified that if you consider Claimant's left shoulder in isolation, she would be employable. I find this opinion to be credible.

Dr. Stuckmeyer assigned the following restrictions:

From an orthopedic standpoint, I do not feel that Ms. Carter is capable of returning to gainful employment. I would restrict her to no prolonged standing, no prolonged walking, and no repetitive lifting, bending, stooping, or squatting. I would also limit her to no repetitive stair climbing and no lifting to exceed 10 pounds on an occasional basis.

Specific to the left shoulder, I would recommend no repetitive lifting, no repetitive pushing or pulling, and no lifting over shoulder height greater than 10 pounds on an occasional basis.

I do not find these restrictions of Dr. Stuckmeyer to be credible. I find his restrictions to be excessive. Dr. Thomas did not place Claimant on any permanent work restrictions when he released her after her left shoulder surgery. Claimant testified she did not have left shoulder pain. Claimant's activities after her release from Dr. Thomas demonstrate she is able to exceed Dr. Stuckmeyer's restrictions. I find Dr. Clymer's opinions are more persuasive than Dr. Stuckmeyer's opinions regarding Claimant's restrictions and ability to work.

Terry Cordray, the only vocational expert expressing opinions in this case, stated Claimant is totally disabled. He did not believe it is realistic to expect that an employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to hire Claimant.

Mr. Cordray testified that the combination of Claimant's physical restrictions based on her two back injuries, in combination with the effects of taking Oxycodone and Fentanyl, made her totally disabled. He also testified that the June 2003 accident in isolation did not totally disable Claimant or leave her incapable of work in the open labor market in some capacity. He also testified that if Claimant did not need the Fentanyl, or if she could take the Fentanyl and still work, no employer would hire her when you add the shoulder injury that keeps her from doing repetitive use of the upper extremities. I do not find these opinions of Mr. Cordray to be credible. Mr. Cordray based his opinion that Claimant is totally disabled on Dr. Stuckmeyer's restrictions, which I have found are excessive and not credible. I find that Claimant can take Fentanyl and still work, and that her left shoulder condition in combination with her mid-back condition does not prevent her from working.

I do not believe Claimant needs to lie down during the day as a result of her work injuries. I believe that an employer in the usual course of business would be reasonably expected to hire Claimant in her present physical condition, reasonably expecting Claimant to perform the work for which she is hired. I believe Claimant is able to work in the open labor market. No doctors restricted Claimant to lie down during the day. Claimant has not had a laminectomy, discectomy or fusion operation. She had a good result following her shoulder surgery and was released without restrictions. I believe that Claimant should be able to work within restrictions imposed by Dr. Clymer.

I find that Claimant's last injury, her June 16, 2003 left shoulder injury, did not render her permanently and totally disabled. I find that Claimant sustained permanent partial disability of 15% of the left upper extremity at the shoulder (232-week level), or 34.8 weeks of permanent disability as a result of her June 16, 2003 left shoulder injury (injury number 03-138347). The parties stipulated that Claimant's weekly compensation rate for permanent partial disability in injury number 03-138347 is \$340.12 per week. Claimant is therefore entitled to an award of \$11,836.18 from Employer for permanent partial disability in injury number 03-138347.

I find that Claimant's May 12, 2003 injury did not render her permanently and totally disabled in isolation considered alone. I find that Claimant sustained permanent partial disability of 20% of the body as a whole (400-week level) as a result of her May 12, 2003 thoracic spine injury (injury number 03-060420). The parties stipulated that Claimant's weekly compensation rate for permanent partial disability in injury number 03-060420 is \$340.00 per week. Claimant is therefore entitled to an award from Employer of \$27,209.60 for permanent partial disability in injury number 03-060420. Employer and Employee stipulated at the hearing that Employer/Insurer shall be entitled to take a credit of \$20,000.00 for an advance it made to Claimant in that amount on June 21, 2006 against any benefits awarded to Janet K. Carter against Employer/Insurer in any of her three cases. The \$20,000.00 credit due Employer/Insurer is applied in this case and deducted from the amount awarded for permanent partial disability, leaving a net balance due Employee from Employer in this case of \$7,209.60.

I find that Claimant's January 29, 2002 injury did not render Claimant permanently and totally disabled in isolation considered alone. I find that Claimant sustained permanent partial disability of 5% of the body as a whole (400-week level) as a result of her January 29, 2002 thoracic spine injury (injury number 02-156872). The parties stipulated that Claimant's weekly compensation rate for permanent partial disability in injury number 02-156872 is \$329.42 per week. Claimant is therefore entitled to an award from Employer of \$6,588.40 for permanent partial disability in injury number 02-156872.

Employer's liability for future medical aid.

Claimant is requesting an award of future medical aid. Section 287.140, RSMo requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Bowers*, 132 S.W.3d at 266. Medical aid is a component of the compensation due an injured worker under section 287.140.1, RSMo. *Bowers*, 132

S.W.3d at 266; *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo.App. 1984). Conclusive evidence is not required. *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997). It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment. *Bowers*, 132 S.W.3d at 270; *Mathia*, 929 S.W.2d at 277; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Sifferman* at 828. Section 287.140.1, RSMo does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992); *Bradshaw v. Brown Shoe Co.*, 660 S.W.2d 390, 394 (Mo.App. 1983).

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

Dr. Leslie Thomas' May 22, 2005 report states Claimant had reached maximum medical benefit regarding her left upper extremity. Dr. Stuckmeyer notes in his July 9, 2005 report that Claimant had reached maximum medical improvement regarding the shoulder. Dr. Stuckmeyer testified he did not recommend any additional future medical treatment to the left shoulder. Dr. Griffith's April 25, 2008 report states in part: "My feelings are that Mrs. Carter has reached maximum medical improvement. No doctor has recommended additional medical aid to treat Claimant's left shoulder. I find that

Claimant is not entitled to an award of future medical aid for her left shoulder in Injury No. 03-138347.

Dr. Stuckmeyer testified on August 31, 2009 that it was hard to tell whether Claimant was at maximum medical improvement because Dr. Griffith stated in July 2008 that medial branch blocks might be warranted. Dr. Clymer felt on July 13, 2009 that Claimant "has clearly reached maximum medical improvement with regard to these issues."

Dr. Griffith treated Claimant's thoracic back condition extensively. He stated on April 25, 2008: "I think it would be reasonable to assume that she is going to need ongoing medical therapy and may from time to time, require a thoracic epidural steroid injection; perhaps 3x per year. Consideration could be given to the trial of spinal cord stimulation. However, I have no strong feeling that that would be helpful, nor than we would be able to capture her areas of pain." Dr. Griffith stated on July 30, 2008: "I would see her requiring medical management for this problem indefinitely."

Dr. Stuckmeyer testified that Claimant is taking Fentanyl and other medications as the result of a combination of the two injuries to her thoracic spine. Dr. Stuckmeyer was asked whether Claimant should remain on the Fentanyl and Roxicodone in the future. He said it would be unlikely that she will ever be able to get off those medications. He thought she would need long term management from a pain management group for her narcotics with regard to the thoracic spine. He said she would need to stay on the Fentanyl for her lifetime as a result of the thoracic spine problems.

Dr. Clymer's July 13, 2009 report states:

I do not think there is much else to do at this point aside from a reasonable pain management program. I agree with the other physicians who have stated that a decrease in her use of narcotics would be helpful and appropriate; however, she seems to be reasonable and is using her current medications in an effort to be more active and functional and does not seem to be having any major side effects or problems. Consequently, although I would suggest she continue to try to taper down her use of narcotic medications, I believe it would be reasonable to continue with a Fentanyl patch at 50 mcg daily so long as this results in clear symptomatic improvement and a more functional and active lifestyle. If the medication caused any side effects or problems or resulted in diminished activity, then I think she would be better off to taper down to a lower dose or off completely.

At this point, however, it seems that she is functioning well and the current dose of Fentanyl is acceptable. I would suggest she avoid use of any other additional narcotics. She might find that occasional use of a muscle relaxer on an over-the-counter anti-inflammatory would be helpful. I would not anticipate that any other medical or surgical treatment would be necessary.

I find that her 2002 back injury did not result in a chronic need for pain medication, and that future medical aid should not be left open for Claimant in the 2002 case. I find that Claimant needs continued medication and medication monitoring to treat the mid-back pain that was caused by the May 12, 2003 work injury. I find that Claimant second back injury has resulted in her need for additional medical care, and that future medical aid should be left open for Claimant in the May 12, 2003 case. Employer/Insurer is directed to authorize and furnish additional medical care and treatment reasonably required to cure and relieve Employee from the effects of her May 12, 2003 injury (Injury No. 03-060420) in accordance with Section 287.140, RSMO.

Employer/Insurer's liability for past temporary total disability.

The burden of proving entitlement to temporary total disability benefits is on the Employee. *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418, 426 (Mo.App. 2000); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997). Section 287.170.1, RSMo provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7, RSMo as the "inability to return to any employment and not merely . . . [the] inability to return to the employment in which the employee was engaged at the time of the accident." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 910 (Mo.App. 2008); *Cooper*, 955 S.W.2d at 575; *Vinson v. Curators of Un. of Missouri*, 822 S.W.2d 504, 508 (Mo.App. 1991); *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641, 645 (Mo.App. 1991); *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo.App. 1985).

Temporary total disability benefits should be awarded only for the period before the employee can return to work. *Cardwell*, 249 S.W.3d at 909; *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Phelps*, 803 S.W.2d at 645; *Williams*, 649 S.W.2d at 489. With respect to possible employment, the test is "whether any employer, in the usual course of business, would reasonably be expected to employ Claimant in his present physical condition." *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Brookman v.*

Henry Transp., 924 S.W.2d 286, 290 (Mo.App. 1996). A nonexclusive list of other factors relevant to a claimant's employability on the open market includes the anticipated length of time until claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that claimant will return to his or her former employment. *Cooper*, 955 S.W.2d at 576. A significant factor in judging the reasonableness of the inference that a claimant would not be hired is the anticipated length of time until claimant's condition has reached the point of maximum medical progress. If the period is very short, then it would always be reasonable to infer that a claimant could not compete on the open market. If the period is quite long, then it would never be reasonable to make such an inference. *Boyles*, 26 S.W.3d at 425; *Cooper*, 955 S.W.2d at 575-76.

Claimant has requested temporary total disability benefits after she reached maximum medical improvement for her left shoulder injury. The parties agreed that date was March 10, 2005. Dr. Thomas had Claimant her resume full activities on March 4, 2005. He noted on April 15, 2005 that he felt she had reached maximum medical benefit.

I find that Claimant did not prove that she was temporarily and totally disabled after March 10, 2005. I find an employer, in the usual course of business, would reasonably be expected to employ Claimant in her present physical condition after March 10, 2005. I find Claimant was capable of competing in the open labor market and was not temporarily totally disabled after March 10, 2005 even though she continued to take pain medication and receive epidurals after that date, and even though Dr. Griffith stated she reached maximum medical improvement on April 25, 2008. Claimant worked after her May 12, 2003 injury until February 2004. She received unemployment benefits for six months after her release by Dr. Thomas and applied for numerous jobs. Claimant is well educated and has extensive job experience. Her treating doctors did not conclude she was incapable of working. She was not on restrictions that prevented her from working. I have discussed in detail my finding that Claimant is not permanently and totally disabled (pp. 51-56), and that discussion will not be restated, but is incorporated by reference.

Claimant's request for past temporary total disability benefits is denied.

Liability of the Second Injury Fund

The Second Injury Fund is not a party in Claimant's January 29, 2002 case. I have assessed 5% permanent partial disability of the body as a whole against Employer in that case. I have found that Claimant is not permanently and totally disabled either as a result of any of the injuries considered alone and in isolation, or in combination with each other. 5% of the body is twenty weeks of compensation, which is below the fifty-week threshold

required for Second Injury Fund liability in permanent partial disability cases. Section 287.220, RSMo. Claimant did not prove that she had the minimum threshold amount of preexisting disability before her May 12, 2003 case to combine with the disability in that case. Claimant's claim against the Second Injury Fund in her May 12, 2003 case (Injury No. 03-060420) is denied.

I find that prior to her June 16, 2003 injury, Claimant had preexisting permanent partial disability that was of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if she became unemployed. I have assessed 20% of the body as a whole (400 week level) permanent partial disability in the May 12, 2003 case, 5% permanent partial disability of the body as a whole in the January 29, 2002 case, and 15% permanent partial disability of the left upper extremity (232 week level) in the June 16, 2003 case. I find that Claimant had 25% permanent partial disability of the body as a whole that pre-existed her June 16, 2003 case. 25% of the body as a whole, or 100 weeks of compensation, and 15% of the left shoulder at the 232 week level, or 34.8 weeks of compensation, meet the minimum thresholds of Section 287.220, RSMo.

I find Claimant's preexistent disability combines with her June 16, 2003 injury to produce a synergistic effect to result in a greater degree of overall disability than the simple sum of those disabilities considered separately. Further, I find that the work injury of June 16, 2003 does not merely supplement the preexisting condition. I find that the synergistic effect of Claimant's disabilities is 10% above the simple sum of the combined disabilities, or 13.48 weeks of compensation. I find Claimant is entitled to an award against the Second Injury Fund for permanent partial disability in her June 16, 2003 case (Injury No. 03-138347) of \$4,584.82 based on 13.48 weeks times the agreed permanent partial disability rate in that case of \$340.12 per week.

Attorney's fees.

Claimant's attorney is entitled to a fair and reasonable fee in accordance with Section 287.260, RSMo. An attorney's fee may be based on all parts of an award. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). During the hearing, and in Claimant's presence, Claimant's attorney requested a fee of 25% of all benefits to be awarded. I find Claimant's attorney, William G. Manson, is entitled to and is awarded an attorney's fee of 25% of all amounts awarded for necessary legal services rendered to Claimant.

Made by: /s/ Robert B. Miner
Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 22nd day of February, 2010.

/s/ Naomi Pearson

Naomi Pearson
Division of Workers' Compensation