

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

Injury No.: 04-039200

Employee: Lisa Earley  
Employer: Dillard's  
Insurer: United State Fidelity & Guarantee  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Denied)

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 July 12, 2012. The award and decision of Administrative Law Judge Suzette Carlisle, issued July 12, 2012, 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 16<sup>th</sup> day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Lisa Earley

Injury No.: 04-039200

Dependents: N/A

Employer: Dillard's

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional : Second Injury Fund (Denied)

Insurer: United States Fidelity & Guarantee c/o  
ESIS

Hearing Date: April 13, 2012

Checked by:SC

### 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: April 2, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis 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:  
Claimant injured her low back when she pulled a rounder of clothing on wet carpet.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Lumbar spine
14. Nature and extent of any permanent disability: 40% PPD of the lumbar spine, 35% PPD of the left knee
15. Compensation paid to-date for temporary disability: \$8,570.36
16. Value necessary medical aid paid to date by employer/insurer? \$39,038.95

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Lisa Early

Injury No.: 04-039200

- 17. Value necessary medical aid not furnished by employer/insurer? \$235,137.59
- 18. Employee's average weekly wages: \$422.50
- 19. Weekly compensation rate: \$294.99
- 20. Method wages computation: Stipulated

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses:	\$235,137.59
32 weeks of temporary total disability	\$ 9,439.68
216 weeks of permanent partial disability from Employer	\$ 63,717.84 <sup>1</sup>

22. Second Injury Fund liability: No

**TOTAL: \$308,295.11**

23. Future requirements awarded: None

Said payments to begin 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: Daniel Gauthier

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<sup>1</sup> The total number of weeks of permanent partial disability is 216; with 160 weeks assigned to the lumbar spine, and 56 weeks to the left knee.

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Lisa Earley

Injury No.: 04-039200

Dependents: N/A

Employer: Dillard's

Additional : Second Injury Fund (Denied)

Insurer: United States Fidelity & Guarantee c/o  
ESIS

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

### **STATEMENT OF THE CASE**

A hearing was held at the Missouri Division of Workers' Compensation (DWC), St. Louis office at the request of Lisa Earley (Claimant), on April 13, 2012, pursuant to Chapter 287 RSMo (2000).<sup>2</sup> Claimant seeks a final award for permanent partial disability (PPD) or permanent total disability (PTD) benefits against the Employer or Second Injury Fund (SIF). Attorney Daniel Gauthier represented Claimant. Dillard's (Employer) and United States Fidelity & Guarantee (Insurer) appear represented by Attorney Lisa Henderson.<sup>3</sup> SIF is represented by Assistant Attorney General Da-Niel Cunningham. Venue is proper and jurisdiction lies with DWC. The record closed after presentation of the evidence on April 13, 2012. The court reporter was Kathy Rethemeyer.

At the hearing, Claimant tried two injury numbers, 01-129066 and 04-039200. Some evidence will be discussed in both awards, however separate awards were issued.

### **STIPULATIONS**

The parties stipulated to the following, that on or about April 2, 2004:

1. Claimant sustained an accident which arose out of and in the course of employment in St. Louis County;
2. Employer and Claimant operated under the Missouri Workers' Compensation Law;
3. Employer's liability was fully insured;
4. Employer had notice of the injury;
5. A Claim for Compensation was timely filed;
6. Claimant's average weekly wage was \$422.50 resulting in a benefit rate of \$294.99 for temporary total disability (TTD), PPD and PTD; and
7. Employer paid \$8,570.36 in TTD benefits and \$39,038.95 in medical benefits.

<sup>2</sup> All statutory references in this award are to the 2000 Revised Statutes of Missouri unless otherwise stated.

<sup>3</sup> All references in this award to the Employer also include the Insurer.

### EXHIBITS

Claimant's Exhibits A through Q which were admitted into evidence without objection. The exhibits refer to both injury numbers 01-129066 and 04-039200. Employer's Exhibits 1 through 3 were admitted without objection. SIF offered no additional exhibits. The marks and highlights contained in the exhibits were made prior to becoming part of this record and were not placed there by the undersigned administrative law judge.

### ISSUES

1. Whether medical treatment for Claimant's low back after August 5, 2005 was medically causally related to the April 2, 2004 work injury,<sup>4</sup> and was reasonable and necessary to cure and relieve the effects of the April 2, 2004 injury? Yes
2. Whether any medical treatment for Claimant's left knee was medically causally related to the April 2, 2004 injury? If so, was the treatment reasonable and necessary to cure and relieve the effects of the April 2, 2004 work injury? Yes
3. Whether medical expenses for the left knee and medical expenses for the low back after August 5, 2005 totaling \$235,137.59 were reasonable and necessary to cure and relieve the effects of the April 2, 2004 work injury? Yes
4. Is Claimant entitled to future medical treatment for the work injury? No
5. Is the Employer responsible for TTD benefits from January 5, 2009 to August 17, 2009 totaling \$9,439.68? Yes
6. What is the nature and extent of Employer's liability for either PPD or PTD benefits, if any? 40% PPD of the lumbar spine, and 35% PPD of the left knee
7. What is the nature and extent of the SIF liability for either PPD or PTD benefits, if any? None
8. What date did the Claimant reach maximum medical improvement (MMI)? December 24, 2009

### FINDINGS OF FACT

All evidence was reviewed but only evidence which supports this award is discussed below. Any objections not ruled upon in this award are now overruled.

1. **Claimant** testified at the hearing and her testimony was credible. Claimant is a high school graduate. When Dr. Mirkin released Claimant from care in 2009 she was 49 years old. Claimant can operate a computer, type, use email, look up information on the

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<sup>4</sup> The record refers to the date of injury as "September 2004" however the parties stipulated the accident occurred April 2, 2004.

- computer, operate a keyboard, and play cards on the computer. She has maintained books for her business. Also, she has a Facebook account.
2. In the 1970s, Claimant worked as a legal secretary where she typed 85 words per minute, filed, made photocopies, answered the telephone, and operated a Dictaphone. She performed secretarial duties for two law firms and at Forest Park Community College. Claimant left the workforce for a time to care for her family.
  3. Claimant passed two tests to obtain a license to sell real estate. As an agent, she operated a computer, drove clients to view properties, wrote contracts, closed deals, and sold houses. She was co-owner of a real estate business. Claimant worked for RE/MAX from 1986 to 1994. She stopped being an agent for pay but continued to help family and friends with real estate purchases. Claimant renewed her real estate license every two years until it expired in February 2012. She did not renew it because of increased costs and test requirements.
  4. In 1993, Claimant moved to a different state and sold her mother's home. Her real estate licenses were renewed every two years until February 2012 when she allowed them to expire because of increased fees and a required written test. She last worked as a real estate agent in 1994.
  5. Prior to April 2, 2004, Claimant had the following medical conditions or disabilities:
    - a. In 2001, Dr. Cantrell diagnosed a left shoulder strain and recommended trigger point injections, which Claimant refused. After her release, Claimant did not miss time from work for this injury. Complaints include shooting pain with overhead activity, and hand numbness. Claimant avoids overhead activity, and recently aggravated the left shoulder washing windows. Claimant received no additional medical care after the doctor released her.
    - b. On October 2, 2001, Claimant injured her right ankle in a motor vehicle accident when she left a doctor's appointment for her left shoulder. Claimant has problems when she wears high heeled shoes. She did not miss work for her ankle after she was released from medical care. Claimant had no work restrictions for the right ankle after her release. The case settled with the Employer for 10% PPD of the right ankle.
  6. Before April 2004, Claimant worked, swam, walked frequently, exercised up to five days a week, and did not receive medical treatment or take prescription medication. She continued to work after both injuries with no medical restrictions.
  7. Claimant worked for Employer as a salesclerk for eight years. Her job duties included customer service, inventory, cleaning dressing rooms, carrying large quantities of merchandise, bending, pulling, tugging and jerking on various items.

8. On April 2, 2004, a flood occurred in the store. Claimant pulled a fixture which contained merchandise on wet carpet. The fixture weighed 300 to 400 pounds. Claimant began to feel low back pain.
9. Claimant reported the accident to her supervisor, and finished her work for the day however she began to walk with a limp. Before April 2, 2004, Claimant had no low back pain or treatment.
10. Initially, Claimant treated with a chiropractor and later with SSM for left buttock pain which radiated down her left leg and into her ankle. An MRI of the lumbar spine was performed in June 2004. The pain increased and Dr. Gray took Claimant off work, and scheduled her to see a neurosurgeon on July 7, 2004.
11. In June 2004, Claimant requested an earlier appointment with the surgeon after she could not get off the floor. Laura Foster, the adjuster, denied the request, and accused Claimant of exaggerating her symptoms.
12. Claimant sought treatment on her own from **Gregory Bailey, M.D.**, a neurosurgeon, at **St. Mary's Emergency Department**.
13. On June 17, 2004, Dr. Bailey surgically repaired Claimant's low back at L5-S1 but she continued to have leg pain. Claimant testified Dr. Bailey told her she had two herniations but he was only paid to repair one herniation at a time.
14. Dr. Bailey prescribed medication and nine physical therapy sessions. Claimant's request for additional therapy was denied. On September 27, 2004, Claimant reported pain with standing or sitting for long periods. Dr. Bailey prescribed new medication and planned to send her for a facet injection in three weeks if the pain continued.
15. On October 16, 2004, Claimant fell while walking down stairs at her daughter's home. Claimant fell due to left leg weakness, nerve pain, and inability to straighten her left leg. The leg remained in a bent position. She received treatment at Barnes for a torn anterior cruciate ligament (ACL), including surgery in December 2004.
16. In November 2004, the Employer authorized an Independent Medical Evaluation (IME) with Dr. Bernardi, who opined Claimant's leg may have given out due to insufficient physical therapy for her back.
17. After medical treatment for the knee ended, Employer transferred care of Claimant's back to Dr. Bernardi who prescribed more physical therapy. He also treated Claimant for her knee. A second MRI of the lumbar spine was obtained in March 2005.
18. In July 2005, Dr. Bernardi ordered a Functional Capacity Evaluation (FCE) which revealed less than full effort by Claimant, and it was difficult for therapists to assess her limitations. Claimant performed the best she could during that evaluation.

19. Claimant disagrees with Dr. Bernardi's June 2005 report that she was better because she continued to have nerve pain.
20. On August 5, 2005, Dr. Bernardi recommended no additional surgery, placed Claimant at MMI, and released her from care. Claimant did not seek additional treatment for her back until 17 months later.
21. On March 27, 2006, Dr. Poetz evaluated Claimant but did not refer her to a spine specialist.
22. On January 22, 2007, Claimant returned to Dr. Bailey for continuing nerve pain. She had waited over a year to seek treatment because she did not know she had a doctor, her insurance changed, her husband's job changed, and she tried to live with the pain by taking medication. She told Dr. Bailey she was there for a workers' compensation case, but Employer refused to pay. Claimant stopped treatment because she could not pay the bill. She did not seek further back treatment in 2007.
23. She waited over a year to seek treatment with Dr. Mirkin because she did not have a doctor, and did not know she could go to another doctor for a workers' compensation case.
24. Claimant treated with Dr. Mirkin on her own in April 2008 for left buttock pain into her ankle and a limp. A third MRI was performed. Dr. Mirkin recommended physical therapy and injections. She did not return until October 2008 because her husband's insurance required her to pay 50% of each visit after he retired and funds were limited. Claimant completed two months of therapy, which did not help, and refused injections.
25. Claimant's pain increased. A fourth MRI was taken in December 2008. On January 5, 2009, Dr. Mirkin surgically repaired the L5-S1 disc and the L4-5 disc. Dr. Mirkin told Claimant that her back should have been repaired at both levels earlier.
26. After the 2009 surgery, Claimant's leg pain resolved for the first time since the 2004 accident. Current complaints include back pain when she bends, stoops, or squats. Repetitive bending causes her to be "down" the next day. Activity increases her pain. In the morning, Claimant has left leg pain from the knee to the ankle. Her back is stiff all the time. She has left leg pain with a lot of activity. After she sits for a while she has to lie down, which she repeats often during the day. She lies down to watch television. Claimant did not have to lie down during the day before the 2004 work accident.
27. Claimant carries a pillow for support, and used it during the hearing. It is easier to stand but prolonged standing effects her back. She can walk but it affects the knee. Sweeping and vacuuming cause back pain. She can lift up to 30 pounds, but repetitive lifting causes back pain. She cannot lift her grandchildren. Claimant gained 50 pounds, and no longer swims or works out three times a week. She is no longer sexually active, has high blood pressure, and cannot garden. Claimant's husband dusts the lower furniture, and removes clothes from the dryer.

28. Claimant improved after left knee surgery. However, the knee hurts when she walks. Sleeping is difficult because of discomfort and she changes position up to 40 times a night. Sometimes she walks with a limp. She holds onto items to squat. Her knee hyperextends. Kneeling hurts her knee and pain increases when she tries to get up. To get up from the floor she crawls on all fours "like a dog" and holds on to furniture.
29. On a typical day Claimant eats breakfast, works on the computer, lies down, washes dishes and visits her daughter, but she is not very active. She is always trying to become comfortable. Claimant lies down after visiting her daughter and she takes Extra Strength Tylenol. She avoids narcotic medication because she became addicted several years ago. While preparing to sell her house, Claimant takes frequent breaks.
30. Claimant is not currently taking prescription medication for her back or left knee. Claimant has not worked or looked for work since Dr. Bernardi released her in August 2005. She does not believe she can return to work for the Employer because she cannot bend, stand, or twist in a constant manner. She cannot work as a real estate agent because it requires a lot of sitting, and it is hard to get out of the car. During the hearing lunch break, Claimant laid on the floor to ease back pain.
31. Since 2010, she has received \$696.00 per month in Social Security Disability and Medicare. She is also listed on her husband's health insurance policy.
32. After Claimant's release from care in August 2005 she did not look for work or apply for unemployment benefits because she did not feel well enough to work.
33. In 2010, Claimant treated with Dr. Mirkin for cervical and upper spine injuries sustained in three separate motor vehicle accidents in 2010. In 2011, she received medical treatment for the 2010 injuries. She denied any re-injury to her back or left leg from these accidents. However, Dr. Hand, her primary physician, provided minimal back treatment.
34. Claimant requests PTD benefits, medical expenses paid for the 2004 knee surgery by Dr. Milne and back surgery performed by Dr. Mirkin in 2009.
35. Dr. Mirkin submitted medical bills totaling \$87,119.79. Dr. Mirkin's charges were paid by Claimant's insurance company, United Healthcare. Charges covered the period April 4, 2008 to January 26, 2009. Medical records charges total \$61.16<sup>5</sup>. (Exhibit N)
36. DesPeres Hospital charges for the low back total \$122,075.83 during Claimant's hospital stay from January 5, 2009 to January 10, 2009. (Exhibit A-14)
37. DesPeres Hospital medical expenses total \$25,941.97 for left knee surgery on December 27, 2004. Exhibit A-16)<sup>6</sup>

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<sup>5</sup> Medical records were charged as follows: \$36.79 – 1-13-09 and 1-26-09-\$24.37, totaling \$61.16.

<sup>6</sup> Claimant seeks \$235,137.59 in past medical expenses which does not include bills from Signature Health and Select Physical Therapy totaling \$2,337.00.

*Medical Evidence – Low Back*

38. Claimant treated with **Gary Gray, M.D.** at **SSM Health Services** from May 13, 2004 to June 3, 2004 for lumbar pain radiating to her left leg. Dr. Gray examined Claimant, prescribed medication and physical therapy, and returned Claimant to work with restrictions.
39. On June 1, 2004, Dr. Gray ordered an MRI of the lumbar spine which showed: **left disc herniation at L5-S1 and a left asymmetric disc bulge at L4-5.** Dr. Gray diagnosed lumbar pain with left leg sciatica due to a herniated disc at L5-S1, and a left disc bulge at L4-5. Dr. Gray discharged Claimant to follow up with a neurosurgeon.
40. On June 14, 2004, Claimant gave **Gregory J. Bailey, M.D.** at **St. Mary's Emergency Department**, a two-month history of severe and constant lumbar pain that radiated into her pelvis and left leg, along with weakness, numbness along the left thigh, and tingling. Two days earlier, the pain increased while doing floor exercises.
41. Examination revealed restricted but full range of motion, reduced left leg strength, inability to perform straight leg raise, an absent Achilles reflex, and a positive straight leg raise.
42. Dr. Bailey interpreted the June 2004 MRI to show “**severe disc herniation on the left, extruded disc, L5-S1, moderate disc herniation, mild disc herniation, central, L4-5, moderate degenerative changes.**”
43. On June 17, 2004, Dr. Bailey performed a microdiscectomy at L5-S1. In the operative note Dr. Bailey wrote: “The patient had disc protrusion at L4-5 degenerative disease, felt the patient had problem at L5-S1, and believed the problem was at the L5-S1 level.” He did not recommend treatment at L4-5, but during surgery an incision was made at the L4-5 level.
44. On September 27, 2004, Claimant reported back pain with minimal relief from physical therapy. Dr. Bailey changed her medication, kept her off work, and instructed Claimant to call in two weeks with an update. If no improvement occurred, Dr. Bailey planned to refer Claimant for injections with a pain management doctor.
45. In November 2004, **Dr. Bernardi**, a board certified neurosurgeon, provided an Independent Medical Examination (IME) at the Employer's request. He reviewed the June 2004 MRI and found mild degenerative disc disease at L3-4, L4-5, and L5-S1, and L5-S1 herniation. Physical examination of Claimant's left side was deferred as she wore an immobilizer.
46. On March 1, 2005, an MRI with sagittal and axial images showed **disc bulging at L2-3 and L3-4, desiccation and moderate posterior protrusion at L4-5 resulting in moderate impression on the left thecal sac, and tissue surrounding the left thecal sac and left S1 nerve root related to surgery, and mild foraminal narrowing on the left at L5-S1.** On March 3, 2005, an MRI with gadolinium contrast showed moderate

posterior disc protrusion at L4-5 with moderate impression on the left thecal sac and mild asymmetric foraminal narrowing on the left at L4-5, and tissue surrounding the left lateral thecal sac and S1 nerve root on the left at L5-S1.

47. Dr. Bernardi concluded the 2005 MRI showed the pre-surgery herniation at L5-S1 was removed, and a small amount of scar tissue remained. However, the L4-5 herniation with narrowing of the left lateral recess was new, and did not appear on the June 1, 2004 MRI.
48. On September 16, 2005, Dr. Bernardi diagnosed lumbar disc herniation with radiculopathy. Dr. Bernardi opined three factors attributed to Claimant's back condition: 1) Degenerative disease, 2) Soft tissue trauma from back surgery, and 3) An altered gait related to hamstring shortening from back surgery.
49. Dr. Bernardi concluded the L4-5 protrusion was unrelated to the 2004 work accident because it was not seen on the pre-operative MRI report, but a herniation was seen on the 2005 MRI report. Also, in June 2004 the L4-5 disc was not symptomatic, and Claimant had no leg pain, weakness or neurologic findings in the L5 distribution or musculature consistent with L4-5 protrusion. Dr. Bernardi did not recommend treatment and was not concerned about the protrusion.<sup>7</sup>
50. A **Functional Capacity Evaluation** (FCE) dated July 15, 2005, revealed less than full effort by Claimant on four of thirteen validity criteria. Consequently, the therapist could not assess Claimant's limitations, and concluded she could at least work at the sedentary level.
51. Dr. Bernardi restricted Claimant to lifting no more than 25 pounds, no repetitive bending or twisting of the low back, and she should change positions every hour as needed.
52. In August 2005, Dr. Bernardi found Claimant achieved MMI, rated 10% PPD of the low back and released her from care.
53. Dr. Bernardi could not opine whether the back injury caused Claimant's knee to give out resulting in injury. He could not examine her left knee during the initial examination because it was in an immobilizer. He noted hamstring pain is common after discectomy with patients who have severe S1 radiculopathy. He speculated it may be possible Claimant had so much pain she felt like her knee gave out. However, to his knowledge, none of his patients have fallen as a result of pain.
54. On January 22, 2007, Claimant returned to Dr. Bailey with back and leg complaints but no treatment was provided and no subsequent visits were made.

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<sup>7</sup> According to Dr. Chabot, the March 1, 2005 MRI was repeated to include a post gadolinium study to distinguish between disc protrusion and scar tissue. Test results revealed a mild to moderate disc protrusion at L4-5 and scar tissue at L5-S1. However the report did not mention L5-S1 herniation or recurrent herniation.

55. **Dr. R. Peter Mirkin** treated Claimant on April 4, 2008 and April 11, 2008 for “significant” back and leg pain. Claimant gave a history of persistent pain up to the time she saw Dr. Mirkin.
56. Dr. Mirkin interpreted the June 2004 MRI to show **disc herniation at L5-S1 on the left and a bulge at L4-5 on the left**. The March 2005 MRI showed **disc desiccation on the left, and a disc protrusion at L4-5**. **There are also degenerative changes at L5-S1 and postoperative changes at L5/S1**.
57. Examination revealed a “markedly” positive straight leg raise on the left and diminished left Achilles reflex, which indicated nerve compression or impingement. Claimant walked with a limp and had limited range of motion of the low back. X-rays revealed severe degenerative changes at L5-S1.
58. Dr. Mirkin reviewed the April 2008 MRI film which showed **a bulge at L4-5, small bulge at L3-4, and degenerative changes at L4-5 and L5-S1, but no nerve root compression**. Dr. Mirkin could not explain the lack of compression on the April 2008 MRI findings. But he was concerned about the accuracy of the results because they showed no postoperative changes at L5-S1 and no nerve root compression. The lack of compression did not correlate with Dr. Mirkin’s clinical findings in No. 57 above.
59. Dr. Mirkin recommended physical therapy, but Claimant did not have therapy and did not return for six months.
60. On October 3, 2008, Claimant returned with persistent back and leg pain. Dr. Mirkin recommended epidural injections but Claimant refused. He prescribed physical therapy from October 2008 to December 2008, which did not help.
61. On December 24, 2008, Claimant reported excruciating pain down her left leg, and she requested epidural injections. Claimant had difficulty with walking.
62. An MRI dated December 26, 2008 revealed **degenerative changes at L5-S1, at L4-5 degenerative changes and a massive disc herniation with severe compression of cauda equina**.
63. Physical examination on January 5, 2009 revealed marked lumbar spasm, inability to walk without assistance, markedly positive straight leg raise on the left, and weakness in the left foot dorsiflexor.
64. On January 5, 2009, Dr. Mirkin performed a two-level decompression and fusion at Des Peres Hospital. Dr. Mirkin performed a fusion at L5-S1 because he observed “significant collapse of the disc space from the prior surgery,” herniation, and postoperative degeneration at L5-S1. Dr. Mirkin conceded the L5-S1 herniation was not observed on any MRI scans. Dr. Mirkin called the L4-5 disc a recurrent hernia because Claimant had previous surgery in that area, but he could not tell if surgery was actually performed on the L4-5 disc.

65. Dr. Mirkin opined the January 2009 surgery was the result of the 2004 accident because:

- a) Dr. Bailey diagnosed an L4-5 herniation in 2004,
- b) MRI scans revealed pathology at L4-5 and L5-S1, although a discectomy was only performed at L5-S1,
- c) Claimant's back and left leg pain waxed and waned after the 2004 surgery,
- d) The December 2008 MRI showed the L4-5 herniation grew over time, and
- e) The L5-S1 disc space collapsed after the prior surgery, and there was a herniation

66. During deposition testimony the following questioning took place:

*Question:* So is it your position that the reason she needed this 2009 surgery was because of a finding that has been present since the 2004 incident?

*Answer:* (Dr. Mirkin) Well, I think that that's when the condition was first present and had Dr. Bailey— in retrospect I suspect he would have recommended doing surgery on both the discs. He only did it on one."

67. On August 17, 2009, Claimant expressed a desire to return to work. Dr. Mirkin returned her to work with a 45 pound lifting restriction, and concluded she was doing "extremely well" and was neurologically intact. The last time Dr. Mirkin treated Claimant for the back injury was December 24, 2009. H

68. United Healthcare paid for Dr. Mirkin's medical services. Dr. Mirkin opined his charges were reasonable for the type of services he provided. Claimant is still under Dr. Mirkin's care for her low back but cannot afford to see him. She has not seen him in a long time for her back because she does not have the money to pay.

69. Claimant returned to Dr. Mirkin in 2010 for three unrelated motor vehicle accidents. Treatment was paid by other sources and she did not reinjure her back or knee in the subsequent accidents. Dr. Bays treated Claimant's cervical spine for the subsequent car accidents and provided minimal treatment for her back, including a massage for her back. Claimant last saw Dr. Mirkin in 2011 for injuries sustained in the motor vehicle accidents.

### ***Medical Evidence –Left Knee***

70. On October 16, 2004, Claimant fell down stairs and injured her left knee. Claimant gave a history of left knee weakness, catching, giving way, and popping when she bends the leg or walks. Dr. Stahle initially treated Claimant, and later referred her to Dr. Milne.

71. An MRI on October 18, 2004 revealed a full thickness tear of the anterior cruciate ligament, grade II sprain of the medial collateral, a strain of the distal biceps femoris tendon and fibula, and possible medial meniscus tear of the posterior horn.

72. Dr. Milne's examination revealed a positive anterior drawer and Lachman, and soft endpoint. He prescribed a brace and prehabilitation.
73. On December 27, 2004, Dr Milne performed a left ACL reconstruction, partial medial meniscectomy, and chondroplasty. Dr. Milne was paid through Claimant's spouse's insurance, United Healthcare.
74. On June 17, 2005, Claimant reported no knee problems and has no permanent medical restrictions.

***Expert Medical Opinion***

75. In 2006, **Dr. Poetz** rated 40% PPD of the low back and 40% PPD for the 2004 accident.
76. **David Volarich, M.D.**, a board certified medical examiner, evaluated Claimant on May 29, 2009 and February 8, 2010 at her attorney's request. Claimant gave a history of back and left leg complaints but no history of the need to lie down during the day. Dr. Volarich found Claimant had not reached MMI when she was examined in 2009 as she was still under treatment by Dr. Mirkin for her low back.
77. Dr. Volarich interpreted the June 1, 2004 MRI report to show herniations at L5-S1 and L4-5, and asymmetric bulge to the left with narrowing of neural foramen but no impingement.<sup>8</sup> The March 1, 2005 MRI showed a moderate sized, left posterior disc protrusion with desiccation, resulting in moderate impression on the left anterior thecal sac. The December 26, 2008 MRI showed a very large left posterior disc extrusion at L4-5.
78. Dr. Volarich opined the April 2004 accident resulted in a herniation at L5-1. Dr. Volarich opined the need for the 2009 surgery at L4-5 was the result of the April 2004 work accident. However, Dr. Volarich did not believe surgery was recommended at L4-5 in June 2004. Dr. Volarich explained the lack of back treatment between Claimant's fall and March 2005 was due to ongoing treatment for her left knee.
79. Also, Dr. Volarich opined the L4-5 herniation was caused by left leg sciatica, buckling, and the fall. The fall in October was caused by progressive radicular symptoms after surgery which resulted in left knee injury that required surgery. In addition, the fall caused "progression of the L4-5 bulge" to a herniation which required surgery, and a revision at L5-S1. Dr. Volarich did not believe the bulge would have progressed without the fall. Additionally, he disagreed with Dr. Nogalski's suggestion that the ACL damage was chronic.<sup>9</sup> According to Dr. Volarich, medical records do not show a chronic condition, which would have been unstable.

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<sup>8</sup> Dr. Volarich interpreted Dr. Bailey's finding in the operative note as L4-5 disc protrusion and moderate herniation. Dr. Volarich diagnosed eccentric bulge to the left based on medical records and the June 1, 2004 MRI scan. According to Dr. Volarich, Dr. Bailey did not open the L4-5 level and see what was there.

<sup>9</sup> Dr. Nogalski's report is not in evidence.

80. Dr. Volarich concluded the L4-5 disc changed after the fall, as shown in the March 2005 MRI. Prior to the fall, the L4-5 disc was identified as a bulge by various physicians. Also, Claimant's left leg symptoms increased significantly after the fall.
81. Dr. Volarich opined Claimant reached MMI after Dr. Mirkin released Claimant. On February 8, 2010, Dr. Volarich rated 50% PPD of the lumbar spine for the 2004 work accident. For the left knee, Dr. Volarich rated 45% PPD of the left knee for the torn anterior cruciate ligament and partial medial meniscectomy.
82. For the preexisting medical conditions, Dr. Volarich rated 25% PPD of the left shoulder and 15% PPD of the right ankle.
83. Dr. Volarich imposed the following restrictions for the spine, occasional lifting up to 35 pounds; avoid fixed positions for more than 30 minutes including sitting and standing. Dr. Volarich also imposed restrictions for the lower extremities and the left shoulder.
84. Dr. Volarich recommended ongoing medication and conservative treatment to relieve complaints.
85. On June 28, 2010, after a review of Mr. Israel's opinion that no jobs were available for Claimant, Dr. Volarich found Claimant to be PTD from the April 2, 2004 injury alone. Dr. Volarich concluded the medical treatment for Claimant's back "far outweighed" the preexisting disabilities. Also, before April 2004 she worked full duty with no restrictions, although she had some problems.
86. On August 12, 2010, Dr. Volarich reviewed medical bills from Des Peres Hospital (\$122,075.83), Dr. Mirkin (\$87,119.79), and Forest Park Hospital (\$25,941.97), compared them to the medical records, and determined the charges were fair, reasonable, customary, and necessary to cure and relieve the effects of Claimant's work accident. The bills totaled \$235,137.59.<sup>10</sup>
87. **Michael C. Chabot, D.O.**, a board certified orthopedic spine surgeon, examined Claimant on September 17, 2010 and testified on behalf of Employer. Based on a review of medical records, Dr. Chabot found no evidence of active radiculopathy at L5-S1. Examination revealed a negative straight leg raise and no neurologic deficits.
88. Dr. Chabot concluded the treatment provided by Drs. Bailey and Bernardi was reasonable and necessary. Dr. Chabot relied on Dr. Bernardi's opinion that Claimant had achieved MMI for her low back injury.
89. Furthermore, Dr. Chabot concluded the October 2004 fall was not related to Claimant's April 2004 back injury because medical records show no neurologic or functional deficits to the left leg before the fall. Also, there was no record of left leg catching, giving way or instability.

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<sup>10</sup> Dr. Volarich referred to medical charges at Forest Park Hospital totaling \$25,941.97, but the evidence showed charges incurred at DesPeres Hospital for Claimant for the same amount and time period.

90. Dr. Chabot disagreed with Dr. Volarich's opinion that Claimant's left knee injury was caused by the 2004 work accident. Dr. Chabot concluded:

"The patient's mechanism of injury, namely a strain to the low back, was not responsible for her left knee complaints that Dr. Volarich indicated were responsible for her trip and fall down steps in October 2004 requiring surgery. She was noted to have evidence of degeneration involving the L4-5 disc space on ...the MRI dated June 21, 2004. The disc protrusion noted at the L4-5 level on March 1, 2005 was most likely associated with progression of the disease at the L4-5 level. The subsequent MRI study of the lumbar spine from April 8, 2008 revealed bulging at the L4-5 level as well as degenerative changes and disc bulging involving almost all segments of the lumbar spine. **The study did not reveal evidence of a focal disc herniation.** It was not until the patient had an increase in ... complaints later in 2008 that a repeat MRI study of the lumbar spine was performed on December 26, 2008, which revealed evidence of a large disc herniation at the L4-5 level that ultimately required surgical intervention." (Emphasis added)

91. Dr. Chabot further opined the treatment provided by Dr. Mirkin starting in 2008 was not related to the April 2004 accident because records show no neurologic changes in April 2008. Furthermore, the April 2008 MRI report did not mention a herniation at L4-5. However, the December 2008 MRI showed a large disc herniation at L4-5. The changes on the MRI reflect a new event or pathology related to the spine, which is supported by Claimant's history of increased leg pain between October and December 2008.
92. Dr. Chabot further opined the April 2008 MRI identified a bulge, not a herniation at L5-S1. Dr. Chabot opined Claimant had degenerative changes at multiple levels of her back which would have advanced between 2004 and 2008. Furthermore, it is possible for significant changes to occur between April 2008 and December 2008 in the absence of an acute or traumatic accident.
93. Dr. Chabot agreed with Dr. Mirkin's conclusion that Claimant could work with a 45 pound weight restriction because Claimant did not take narcotic medication, and on examination exhibited no significant functional deficits. Dr. Chabot read the radiology report but did not review the actual MRI.
94. Dr. Chabot rated 12% PPD of the lumbar spine for the two-level fusion, and adopted the 45 pound lifting restriction imposed by Dr. Mirkin.

#### *Expert Vocational Opinions*

95. **Mr. James Israel**, a vocational rehabilitation counselor, interviewed Claimant and prepared a report at the request of her attorney on May 13, 2010.

96. The Wide Range Achievement Test administered by Mr. Israel showed Claimant scored in the post high school level in reading, eleventh grade in spelling, and seventh grade in math. Mr. Israel opined Claimant's academic skills do not prevent her from working.
97. Mr. Israel opined Claimant's secretarial work was too remote because technology has changed. The real estate sales were before the past twelve months which is the relevant period, although it demonstrates early experience.
98. Mr. Israel acknowledged Claimant has solid sales and marketing skills in real estate and retail sales. Furthermore, her vocational skills and aptitude produced 12,741 job titles she may potentially perform. He noted alternative jobs include sales clerk, food, group sales representative and security system.
99. He concluded Claimant acquired "significant knowledge or skills over 15 years which were transferable to other types of related work performed in the local or national economy." Within Dr. Volarich's restrictions Mr. Israel opined potential jobs would be limited to the sedentary and light level. But the number of available jobs was significantly reduced because of Dr. Volarich's restrictions. Therefore, he concluded Claimant could not return to work as a salesclerk, or in any past occupation.
100. Mr. Israel concluded Claimant has no transferable skills from her work in retail, real estate sales, or as a secretary. Based on vocational testing, Mr. Israel found Claimant would be a "viable candidate" for alternative vocational or advanced training, apart from her current ability to function. However, Mr. Israel decided Claimant has a poor capacity to adapt to work she has not performed in the past. Furthermore, Mr. Israel concluded the unskilled jobs she could work in the sedentary and light category do not accommodate Dr. Volarich's medical restrictions.
101. Mr. Israel predicted employers would select other candidates over Claimant who are "work ready and able." He predicted it would be a challenge for Claimant to find and apply for jobs, and maintain a work schedule.
102. Based on test results, Claimant's age, education, experience, interview, and access to the labor market in 2010 with the medical restrictions, Mr. Israel concluded Claimant could not return to retail sales, real estate as an agent or secretary, and it was unlikely she could sustain full-time employment as a direct result of the April 2, 2004 work accident. He found Claimant would be disadvantaged if she attempted to compete in the open labor market.
103. Mr. Israel relied solely on Dr. Volarich's opinions and work restrictions to reach his conclusions because they were the most current. However, he included a four year old FCE report but not Dr. Mirkin's restrictions which were reported within the most recent 12 month period. Also, he did not consider Dr. Bernardi's restrictions although they were in his files. Dr. Chabot's evaluation was after Mr. Israel wrote his report, but the evidence is not clear he would have substituted Dr. Volarich's restrictions for Dr.

Chabot's if he had them. Also, Mr. Israel had no records about Claimant's preexisting medical conditions.

104. **Mr. James England**, a rehabilitation counselor, interviewed Claimant on November 7, 2011 at the Employer's request. The interview lasted one hour. Mr. England noted Claimant is a high school graduate whose skills include: typing, keyboarding, and secretarial work. She attended St. Louis Business Institute for secretarial training. Also, she passed two real estate examinations, and obtained retail sales experience.
105. Based on tests administered by Mr. Israel, Mr. England opined the scores were adequate for a "wide variety of work activity," including working with numbers, reading and understanding contracts, writing proposals, handling correspondence, clerical work, and answering telephones.
106. FCE results show Claimant capable of working even though she did not put forth maximal effort during the test.
107. Based on Claimant's past sedentary-to-light work experience and medical restrictions, Mr. England opined Claimant is able to compete in the open labor market in secretarial or clerical positions. Also, Claimant has sufficient computer skills to learn to function in a variety of clerical positions.
108. Mr. England concluded the restrictions imposed by Drs. Mirkin and Chabot do not prohibit Claimant from performing her past work in retail, real estate or as a secretary on a full-time basis. Mr. England opined Claimant would have an advantage over an inexperienced applicant if she applied for a clerical position with a real estate company. However, Claimant could not return to retail sales based on Dr. Volarich's restrictions because of the requirement to change positions every 30 minutes.
109. Based on Dr. Volarich's restrictions, Mr. England opined Claimant could still work in real estate, as a secretary, or in entry-level clerical jobs, i.e. receptionist, customer service, or inside sales. Mr. England observed Mr. Israel only listed Dr. Volarich's restrictions.
110. During the interview, Mr. England observed Claimant to be appropriately and groomed and he opined she would make a "nice impression" in a prospective job interview.
111. The only way Mr. England found Claimant PTD is if she needed to lie down, and there were no medical records to support her need to lie down during the day.

#### **ADDITIONAL FINDINGS OF FACT and RULINGS OF LAW**

After careful consideration of the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I make the following findings:

1. ***Claimant's low back treatment after August 5, 2005 was medically causally related to the April 2, 2004 work injury***

Claimant asserts the need for L4-5 surgery was caused by the 2004 work accident. Employer contends the 2004 work accident did not cause the need for surgery at L4-5.

Under Missouri law, it is well-settled that the claimant bears the burden to prove all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. ***Landers v. Chrysler Corp.***, 963 S.W. 2d 275, 279 (Mo.App. 1997) (overruled on other grounds) (citations omitted).<sup>11</sup> While the claimant is not required to prove the elements of the claim based on "absolute certainty," they must at least establish the existence of those elements by "reasonable probability." ***Sanderson v. Porta-Fab Corp.***, 989 S.W.2d 599, 603 (Mo.App. 1999) (citations omitted).

Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding nor in the absence of expert opinion is the finding of causation within the competency of the administrative tribunal. ***Silman v. William Montgomery & Associates***, 891 S.W.2d 173, 175 (Mo.App. 1995). The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. ***Choate v. Lily Tulip, Inc.***, 809 S.W.2d 102, 105 (Mo.App.1991).

When 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. ***George v. Shop 'N Save Warehouse Foods, Inc.***, 855 S.W.2d 460, 462 (Mo. App. 1993) (citations omitted).

I find Claimant's testimony is generally credible. It is not clear from the record why Claimant's medical care was transferred to Dr. Bernardi. There is no evidence Dr. Bailey released her, and Dr. Bernardi did not review any of Dr. Bailey's records. Dr. Bernardi did not know Dr. Bailey changed Claimant's medication in September 2004, and planned to prescribe facet injections if she did not improve. Dr. Bernardi did not examine Claimant's left lower extremity during the initial visit because she was wearing an immobilizer due to the fall in October 2004.

In fact, low back treatment stopped after the fall in October 2004. Dr. Bernardi deferred treatment of the low back until March 2005. However, Dr. Milne did not recommend Claimant resume low back treatment until August 2005, the same month Dr. Bernardi released her from care.

Drs. Bernardi and Bailey reviewed the same 2004 MRI but made different findings. Dr. Bailey found a "moderate, mild herniation at L4-5 but Dr. Bernardi only found a mild

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<sup>11</sup> Several cases herein were overruled by *overruled on other grounds* by ***Hampton v. Big Boy Steel Erection***, 121 S.W.3d 220 (Mo banc 2003) on grounds other than those for which the cases are cited. No further reference will be made to ***Hampton***.

degenerative disc disease at L4-5. Therefore, I find Dr. Bernardi's opinion is not credible that the L4-5 protrusion found on the March 2005 MRI was not related to the 2004 work accident because it was not present on the June 2004 MRI.

Unlike Dr. Bernardi, Dr. Mirkin reviewed Dr. Bailey's records. Also, Dr. Mirkin is the only physician deposed in the case that saw Claimant's spine and the MRI reports. I find Dr. Mirkin's opinion is credible that the L4-5 disc injury was caused by the 2004 accident because:

- a) Dr. Bailey diagnosed an L4-5 herniation in 2004, and in, in retrospect suspected Dr. Bailey would have recommended surgery for both discs;
- b) MRI scans revealed pathology at L4-5 and L5-S1, although a discectomy was only performed at L5-S1,
- c) Claimant's back and left leg pain waxed and waned after the 2004 surgery,
- d) The December 2008 MRI showed the L4-5 herniation grew over time, and
- e) The L5-S1 disc space collapsed after the prior surgery, and herniated.

Dr. Chabot's opinion is not persuasive that the L4-5 disc problem was caused by progressive degeneration and a lack of neurologic deficits at L5-S1. Drs. Bailey and Mirkin found decreased Achilles reflex and positive a straight leg raise on examination. The record is replete with references to leg pain and weakness. Even Dr. Bernardi said she may have had enough pain to think her leg was giving out. Drs. Mirkin and Volarich opined the L4-5 disc developed over time, and Dr. Chabot testified a disc can change over time, with or without trauma.

It is interesting to note none of Employer's physicians denied causation based on the timing of the 2009 surgery or gaps in treatment over a five year period.

Section 287.140.1 states: [A]n employee shall receive and the employer shall provide such medical, surgical...as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

For the reasons stated above, the opinions of Drs. Chabot and Bernardi are not credible that Claimant had achieved MMI on August 5, 2005. In contrast, Dr. Mirkin's opinion was supported by resolution of left leg pain after surgery in 2009. Dr. Mirkin conceded the April 2008 MRI did not show a herniation, however the results did not correlate with Dr. Mirkin's findings of a markedly positive straight leg raise, and decreased Achilles reflex. Dr. Volarich's opinion is credible that Claimant was not at MMI during the same time period.

Based on credible testimony by Drs. Mirkin and Volarich, and Claimant, medical records and reports, I find Claimant's low back treatment after August 5, 2005 was medically causally related to the April 2004 work injury. I find Claimant's low back treatment after August 5, 2005 was reasonable and necessary to cure and relieve the effects of the April 2, 2004 low back injury.

**2. Claimant's left knee treatment was medically causally related to the April 2, 2004 injury**

Claimant asserts the October 2004 fall is related to the April 2004 low back injury, and Employer contends it is not. Dr. Volarich opined the fall was caused by progressive radicular symptoms and buckling. The record contains numerous reports by Claimant of leg pain between 2004 and 2009. The fall resulted in an ACL reconstruction. Dr. Chabot's opinion is not persuasive that the fall was not related to Claimant's April 2004 back injury because medical records show no neurologic or functional deficits to the left leg before the fall. Also, there was no record of left leg catching, giving way or instability. However, Drs. Bailey and Mirkin found diminished Achilles reflex over a five year period.

Dr. Bernardi declined to opine about why Claimant's knee gave out but noted shortened hamstrings are common after back surgery, and Claimant may have thought her knee gave out due to pain.

Dr. Volarich opined the medical charges were reasonable and necessary to cure and relieve the effects of the knee injury.

Based on credible testimony by Dr. Volarich, less than credible testimony by Drs. Chabot and Bernardi, I find Claimant's left knee injury was medically causally related to the April 2004 work injury. I find the treatment she received was reasonable and necessary to cure and relieve the effects of the knee injury.

**3. Claimant is entitled to medical expenses related to the April 2004 injury**

Claimant seeks medical expenses totaling \$235,137.59 for services rendered in this case. Employer contends the expenses are not work related. A sufficient factual basis exists to award past medical expenses when the employee identifies all of the medical bills as being related to, and the product of, a work-related injury and the medical bills are shown to relate to the professional services rendered by medical records in evidence. *Martin v. Mid-America Farm Lines, Inc.* 769 S.W.2d 105, 111-112 (Mo banc 1989). Once Claimant made such a showing, the burden shifted to Employer to challenge the reasonableness or fairness of the bills or to show that the medical expenses incurred were not related to the injury in question. *Id.*

Claimant testified she received medical treatment provided by Dr. Mirkin and Dr. Milne, which her insurance company paid. Dr. Mirkin bills totaled \$87,119.79; two DesPeres Hospital bills total \$122,075.83 for the low back and left knee. Dr. Volarich compared the bills to the medical records and determined the charges were fair, reasonable, customary, and necessary to cure and relieve the effects of Claimant's work accident. I find Employer's challenge to the bills is not persuasive. Based on credible testimony by Claimant, Dr. Volarich, and medical bills in evidence, I find Claimant is entitled to reimbursement of medical expenses totaling \$235,137.59.

**4. Employer is not liable for future medical treatment**

Claimant contends Employer is liable for future medical treatment for the work injury. Employer denies liability. Where future medical benefits are to be awarded, the medical care

must of necessity flow from the accident, via evidence of a “medical causal relationship” between the injury from the condition and the compensable injury, before the employer is to be responsible. *Modlin v. Sun Mark, Inc.* 699 S.W. 2d 5, 7 (Mo.App. 1985). It is sufficient for the claimant to show his need for additional medical care and treatment by a reasonable probability. *Rana v. Landstar TLC*, 46 S.W. 3d 614, 622 (Mo. App. W.D. 2001). Probable means founded on reason and experience which inclines the mind to believe but leaves room for doubt. *Id.*

I find Employer is not liable for future medical treatment. Both Drs. Mirkin and Milne released Claimant with no recommendation for additional treatment. Dr. Volarich is the only doctor that recommended ongoing medication and physical therapy. In addition, Claimant had three motor vehicle accidents in 2010, after Dr. Mirkin released her. I find Claimant has not met her burden to show a medical-causal relationship between the April 2004 accident and the need for ongoing medical care. For these reasons, I find the Employer is not liable for ongoing medical treatment.

**5. *Employer is liable for TTD benefits***

Claimant seeks TTD benefits from January 5, 2009 to August 17, 2009, and Employer denies liability. The test for entitlement to TTD “is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition.” *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418, 424 (Mo.App. 2000). TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. *Id.* Once further medical progress is no longer expected, a temporary award is no longer warranted. *Id.*

Dr. Mirkin released Claimant to return to work on August 17, 2009. I find Employer is liable for TTD benefits from January 5, 2009 to August 17, 2009 as outlined on page 2 of this award.

**6. *Employer is liable for PPD benefits***

Claimant seeks PTD benefits for the April 2004 work accident. Employer contends they are not liable and SIF contends if Claimant is PTD it is from the last injury.

I find Claimant sustained disability from the last injury alone. For the lumbar spine, Dr. Bernardi rated 10% PPD, Dr. Chabot -12% PPD, and Dr. Volarich - 50% PPD. Also, Dr. Volarich rated 45% PPD of the left knee.

Claimant's leg pain resolved but she now has back pain with prolonged sitting, standing, and movements at the waist. She refers to her pillow as a “staple” to support her back, which she used during the hearing. Also, her knee hyperextends. Kneeling hurts her knee and pain increases when she tries to get up. To get up from the floor she crawls on the floor on all fours “like a dog” and holds on to furniture.

During the hearing I observed Claimant testify with a pillow propped behind her back, and she looked uncomfortable. She stood at 12:05 p.m. and again at 12:24 p.m. After she was excused, I observed her walk slowly out of the room and she appeared to be uncomfortable.

Based on credible testimony regarding disability by Drs. Bernardi, Chabot, and Volarich, and Claimant, I find Claimant sustained 40% PPD of the lumbar spine and 35% PPD of the left knee.

**7. Claimant is not permanently and totally disabled-No SIF liability**

Section 287.020.7 RSMo (2000) defines “total disability”...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. Any employment means any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition. *Kowalski v. M-G Metals and Sales, Inc.* 631 S.W.2d 919, 922 (Mo. App. 1982) (*Citations omitted*).

The test for permanent total disability in Missouri is a claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in her present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo.App. 1995).

The treating physicians did not opine Claimant could not return to work. Drs. Bernardi, Mirkin and Chabot released Claimant with lifting restrictions. Claimant expressed an interest in returning to work.

Dr. Volarich's opinion is not credible that Claimant is PTD. Dr. Volarich did not find Claimant PTD until he reviewed Mr. Israel's conclusion that Claimant was PTD due to the last injury. However, Mr. Israel's opinion is not persuasive. He only considered Dr. Volarich's restrictions in his determination. He justified his decision by saying he used the most current restrictions available in the past twelve months, which happened to be Dr. Volarich's. But when Mr. Israel discovered Dr. Chabot imposed more recent restrictions, he did not say he would substitute the new restrictions, Mr. Israel did not consider records he possessed from Drs. Bernardi and Mirkin, the treating physicians.

Mr. Israel discounted Claimant's experience as a secretary and real estate agent, stating it was too remote. However, Claimant can operate a computer, has a Facebook account, and plays games on the computer. He gave contradictory information about Claimant's ability to learn new skills, despite scoring from seventh grade to post high school in vocational testing.

I find Mr. England's opinion more credible than Mr. Israel's opinion. Based on Claimant's past sedentary-to-light work experience, FCE results, and medical restrictions, Mr. England opined Claimant can compete in the open labor market in secretarial or clerical positions. Also, Claimant has sufficient computer skills to learn to function in a variety of clerical positions.

The restrictions imposed by Drs. Mirkin and Chabot do not prohibit Claimant from performing her past work in retail, real estate or as a secretary on a full-time basis. Mr. England opined Claimant would have an advantage over an inexperienced applicant if she applied for a clerical position with a real estate company. However, Claimant could not return to retail sales based on Dr. Volarich's restrictions because of the requirement to change positions every 30 minutes. Mr. England observed Claimant to be appropriately dressed and opined she would make a "nice impression" in a prospective job interview. The only way Mr. England found Claimant PTD is if she needed to lie down, and there are no medical records to support Claimant's need to lie down during the day.

Claimant testified she has to lie down repeatedly throughout the day. However, the need to lie down is not mentioned in any of the medical records. Claimant drives, visits her daughter, performs household chores, and is preparing her house for sale. In *Keener v. Wilcox Electric, Inc.*, 884 S.W. 2d 744, 747 (Mo. App. 1994), the court found the appellant's ability to shop, walk, perform housework, run errands, drive, go out for dinner, travel, visit the hairdresser and clean her car were indications she was not PTD although she had not returned to work.

Based on credible testimony by Mr. England and Claimant, and less than credible testimony by Mr. Israel and Dr. Volarich, I find Claimant did not meet her burden to prove an employer in the usual course of business would not reasonably be expected to employ her in her present physical condition. I find Claimant did not show she is unable to compete in the open labor market. I find Claimant is not PTD.

Once a determination is made that a claimant is not PTD, the inquiry turns to what degree, if any, is an individual permanently partially disabled for purposes of SIF liability. *Leutzinger v. Treasurer of the State of Missouri*, 895 S.W.2d 591, 593 (Mo. App. 1995). Section 287.220.1 RSMo., provides the SIF is triggered in all cases of PPD where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the preexisting disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and the preexisting conditions must produce additional disability greater than the last injury standing alone.

I find Claimant's preexisting left shoulder and right ankle injuries do not reach the statutory thresholds required to trigger SIF liability. Before the April 2004 accident, Claimant stood at work, swam, walked frequently, exercised up to five days a week, and did not receive medical treatment or take prescription medication for these conditions. Although she avoided overhead work, she continued to perform her work duties after both injuries. I find Claimant failed to prove SIF liability for her preexisting left shoulder and right ankle conditions. The SIF case is denied.

**8. *Claimant reached MMI on December 24, 2009***

Claimant asserts she reached MMI on June 18, 2010 when Mr. Israel opined she could no longer work. Employer contends Claimant reached MMI on August 5, 2005 when Dr. Bernardi released her. Maximum medical improvement is reached when the medical condition has

reached the point where further progress is not expected. *Cardwell v. Treasurer of State of Missouri*, (Mo. App. 2008).

On August 17, 2009, Dr. Mirkin returned Claimant to work with a 45 pound lifting restriction, and concluded Claimant was doing extremely well and was neurologically intact. He continued to monitor her progress until December 24, 2009. I find Claimant reached MMI on December 24, 2009.

### **CONCLUSION**

1. Claimant's medical treatment for the low back after August 5, 2005 was medically causally related to the April 2, 2004 work injury and reasonable and necessary to cure and relieve the effects of the injury.
2. The left knee injury is medically causally related to the April 2004 work injury and treatment was reasonable and necessary to cure and relieve the effects of the injury.
3. Employer is liable for TTD, PPD, and past medical expenses.
4. Employer is not liable for PTD or future medical benefits.
5. The Second Injury Fund is denied.
6. Claimant achieved MMI on December 24, 2009.
7. The award is subject to a 25% lien in favor of Claimant's attorney for legal services rendered.

Made by: \_\_\_\_\_

**Suzette Carlisle**  
*Administrative Law Judge*  
*Division of Workers' Compensation*