

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

Injury No.: 04-103019

Employee: Beverly Fredericks  
Employer: United Parcel Service  
Insurer: Liberty Insurance Corporation  
Additional Parties: 1) Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)  
2) Department of Veterans Affairs

Date of Accident: October 6, 2004

Place and County of Accident: St. Louis County

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 12, 2007. The award and decision of Administrative Law Judge John K. Ottenad, issued January 12, 2007, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 24<sup>th</sup> day of May 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Beverly Fredericks

Injury No.: 04-103019

Dependents: N/A

Employer: United Parcel Service

Additional Party: Second Injury Fund (open)

Additional Party: Department of Veterans Affairs

Insurer: Liberty Insurance Corporation

Hearing Date: September 12, 2006

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

Checked by: JKO

### 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: October 6, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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 was employed as a revenue recovery auditor and was injured when a package fell from overhead striking her on the head and left shoulder, and knocking her to the ground.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Body as a whole—Low back
14. Nature and extent of any permanent disability: 2% of the body as a whole referable to the low back
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$10,069.92

Employee: Beverly Fredericks

Injury No.: 04-103019

17. Value necessary medical aid not furnished by employer/insurer? (allegedly) \$3,132.34
18. Employee's average weekly wages: \$181.45
19. Weekly compensation rate: \$120.97 for TTD/ \$120.97 for PPD
20. Method wages computation: By agreement (stipulation) of the parties

### COMPENSATION PAYABLE

21. Amount of compensation payable:

8 weeks of permanent partial disability from Employer

\$967.76

22. Second Injury Fund liability: open

**TOTAL:**

**\$967.76**

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: Joseph K. Robbins

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

Employee: Beverly Fredericks

Injury No.: 04-103019

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: United Parcel Service

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

Additional Party: Second Injury Fund (open)

Additional Party: Department of Veterans Affairs

Insurer: Liberty Insurance Corporation

Checked by: JKO

On September 12, 2006, the employee, Beverly Fredericks, appeared in person and by her attorney, Mr. Joseph K. Robbins, for a hearing for a final award on her claim against the employer, United Parcel Service, and its insurer, Liberty Insurance Corporation. The employer, United Parcel Service, and its insurer, Liberty Insurance Corporation were represented at the hearing by their attorney, Ms. Maureen Cary. The Second Injury Fund is a party to this case, but was not represented at the hearing because the parties agreed to leave the Second Injury Fund open at this time. The Department of Veterans Affairs was represented at the hearing by Staff Attorney Paul Petraborg regarding his client's lien for medical treatment bills. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of facts and rulings of law, are set forth below as follows:

### **STIPULATIONS:**

- 1) On or about October 6, 2004, Beverly Fredericks (Claimant) sustained an accidental injury arising out of and in the course of employment that resulted in injury to Claimant.
- 2) Claimant was an employee of United Parcel Service (Employer).
- 3) Venue is proper in the City of St Louis.

- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage of \$181.45, resulting in applicable rates of compensation of \$120.97 for total disability benefits and \$120.97 for permanent partial disability (PPD) benefits.
- 7) Employer has paid medical benefits totaling \$10,069.92.
- 8) The Second Injury Fund is being left open.

**ISSUES:**

- 1) Are Claimant's injuries and continuing complaints medically causally connected to her accident at work on or about October 6, 2004?
- 2) What is Employer's liability for past medical expenses for the treatment covered by the lien from the Department of Veterans Affairs?
- 3) Is Claimant entitled to past TTD benefits from December 1, 2004 until May 16, 2006?
- 4) What is the nature and extent of Claimant's permanent partial disability attributable to this accident?

**EXHIBITS:**

The following exhibits were admitted into evidence:

***Employee Exhibits:***

- A. Certified medical treatment records from St. Joseph Health Center
- B. Metro Imaging CT of the brain report dated October 15, 2004
- C. Certified medical treatment records from Dr. Cynthia Byler
- D. Medical treatment records from The Work Center, Inc.
- E. Medical treatment records from the Department of Veterans Affairs
- F. Deposition of Dr. Frank J. Niesen, with attachments, dated September 6, 2006
- G. Certified medical treatment records from Tesson Ferry Spine & Orthopedic Center
- H. Certified medical bills and records from the Department of Veterans Affairs totaling \$3,132.34
- I. Correspondence from Joseph Robbins dated December 16, 2004
- J. Correspondence from Maureen Cary dated December 22, 2004
- K. Correspondence from Joseph Robbins dated December 23, 2004
- L. Correspondence from Joseph Robbins dated March 23, 2005

***Employer/Insurer Exhibits:***

1. Deposition of Dr. R. Peter Mirkin, with attachments, dated June 12, 2006
2. Copy of payroll for Claimant from May 17, 2006 to present
3. Excerpts from Claimant's deposition dated June 14, 2006

**Notes:** 1) Exhibits F and I were admitted subject to the objections contained in the records. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence.  
2) Some of the records submitted at hearing contain handwritten comments or other marks. All of these marks were on these records at the time they were admitted into evidence and no other marks have been added since their admission on September 12, 2006.

**FINDINGS OF FACT:**

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinions and depositions, the medical records and bills, and the testimony of the other witness, as well as my personal observations of Claimant and the other witness at hearing, I find:

- 1) **Claimant** has been an employee of United Parcel Service since January 2002. She is employed in the position of revenue recovery auditor. She checks packages for weight and in doing so, often lifts oversized packages and moves them back and forth from the scale to the conveyer. Often she picks up packages that are mismarked as to weight by the customer. Leading up to October 6, 2004, she denied any problems with, or injuries on, the job.
- 2) Claimant testified she did have problems with her low back before October 6, 2004. She characterized the problems as musculoskeletal pain. She said she had this pain on and off for years. Claimant testified initially she had no prior missed work because of it. She also denied any prior problems with her head, neck or shoulder before October 6, 2004. She testified that she had no treatment for the low back for 2 years prior to her injury on October 6, 2004.
- 3) Medical treatment records from **The Department of Veterans Affairs** (Exhibit E) document treatment Claimant had to multiple body parts for various conditions prior to October 6, 2004. There are numerous hand-written notes going back to 1988 with descriptions of chronic back pain and sciatica for which she is treated and given X-rays. In a typed-written entry dated October 31, 1997 there is a history indicating that in May 1997 Claimant had documented low back pain radiating into the left leg for the last three weeks. She was prescribed medication. She also had complaints of low back pain in September 1997 and shoulder bursitis. Claimant provided a history, at that time, of back pain beginning in 1983 to 1984. She thought it was related to chronic lifting, although she could not recall any specific automobile accident, fall or specific incident related to the injury. She went to the aid-station repeatedly because of the back pain. She saw a chiropractor in the St. Louis area in 1987 and 1988, who she saw several months and had some relief. Most interestingly, on April 28, 1998, there is a social work note indicating Claimant has had to quit jobs because of back problems.
- 4) An MRI of the lumbar spine was taken at the VA Hospital on January 3, 2002. (Exhibit E) The reason for the exam was chronic persisting low back pain for over three months with numbness to both legs. The impression was moderate degenerative disc disease at L4-5 with mild disc bulge and severe degenerative disc disease at L5-S1 with moderate broad-based central disc herniation at L5-S1 with a 5 mm. caudal migration but no direct neural compression or canal stenosis. Claimant had additional visits and treatment at the VA Hospital on September 11, 2002, October 30, 2002, and November 6, 2002 for chronic persistent low back pain and radicular complaints into both lower extremities. Finally, on July 20, 2004, Claimant presented with a complaint of back pain for five days in the mid-back that radiates around to the abdominal area with some radiation down the front of the thighs. She reported some gastrointestinal upset. A Toradal injection was given for back pain and abdominal pain. A low back x-ray was taken on July 20, 2004, due to her low back pain complaints. The July 20, 2004 low back x-ray showed reduced disc space at L5-S1, consistent with a degenerative disc. Further evaluation by CT or MRI was recommended.
- 5) On cross-examination, when Claimant was confronted with the entries in the VA Hospital records, Claimant admitted that she did have a prior extensive history of low back pain and problems going into her legs, as well. She admitted to prior hip pain and also a prior left shoulder X-ray and history of bursitis. Based on the prior MRI from 2002, she also had disc pathology pre-existing her 2004 injury at L5-S1 and L4-L5. She also admitted that she did previously miss some time from work because of low back complaints as documented in the VA records.
- 6) On October 6, 2004, at approximately 7:00 p.m., Claimant was returning to the line from a break. She was suddenly hit on the head and left shoulder by something falling from overhead. She fell to the ground. She stated she lost consciousness because she recalled her supervisor standing over her asking her if she was alright.
- 7) Claimant sought initial treatment at the emergency room at St. Joseph's Hospital in St. Charles where she was driven by her supervisor. She complained initially of a headache and a sore left shoulder, neck and left hip.
- 8) Medical treatment records from **St. Joseph Health Center** (Exhibit A) document the emergency room admission on October 6, 2004. Claimant provided a consistent history of injury and complained of headache, neck pain and left shoulder pain. She denied loss of consciousness. No low back complaints are documented in the emergency room record. She underwent a left shoulder and cervical spine x-ray at the emergency room, both of which were negative. Claimant underwent a head CT. It was also negative. She was diagnosed with a mild head injury and a contusion of the left shoulder. She was directed to follow-up with the company doctor.
- 9) Claimant was then examined the next day by Dr. Cynthia Byler. The medical treatment records from **Dr. Cynthia Byler** (Exhibit C) document treatment Claimant received there from October 7, 2004 to November 24, 2004. Claimant initially provided a consistent history of the injury at work. She denied any loss of consciousness. Upon awakening on October 7, 2004, she had a lot of stiffness and soreness in the low back and

left hip, and presented for follow up. The cervical spine had full range of motion with no spasm. She had tenderness to palpation along the superior margin of the left scapula. Shoulder range of motion was full and impingement testing was negative. She complained of a pulling sensation across the left scapula. Examination of the lumbar spine showed no frank spasm, and no visible swelling. X-rays of the lumbar spine and left hip were negative. Dr. Byler diagnosed a scalp contusion, left shoulder contusion and low back and left hip pain. She prescribed medications and physical therapy. She also released Claimant to work with a 30-pound lifting restriction.

- 10) At the appointments that followed this initial one, Claimant complained of dizziness and seeing spots. To rule out intracranial pathology, Dr. Byler ordered a head CT scan. The **Metro Imaging report of the head CT scan** carried out on October 15, 2004 revealed a negative CT examination of the brain. (Exhibit B) In the examinations that followed, Claimant had pain complaints to various parts of her body. Interestingly, on November 9, 2004, Claimant reported a new injury when a piece of iron hit her right foot the night before at work. She was again complaining of low back, left shoulder and left hip pain. Claimant complained she could not wear the work boots, but she had them in her car. Claimant was able to put her boots on in the office. She walked away slowly and cautiously out of the office. Once outside near her car, Claimant demonstrated no evidence of any gait disturbance. Despite her back pain, Claimant was able to reach down and take off her regular shoes and get her boots on. Dr. Byler felt Claimant was capable of returning to work full-duty on November 9, 2004. She was supposed to follow-up in one week, but instead appeared the next day in the office complaining that she could not handle full duty work. Because of the continued subjective complaints not matching objective findings, Dr. Byler recommended an evaluation with Dr. Mirkin to evaluate scapular complaints and low back complaints. Dr. Byler once again diagnosed a left shoulder contusion, with left hip and low back pain. Dr. Byler then placed a 40-pound lifting restriction on her and sent her back to work, pending her examination with Dr. Mirkin.
- 11) Claimant was sent to **The Work Center, Inc.** for physical therapy and a functional capacity evaluation. (Exhibit D) Claimant admitted that she could not complete all of her physical therapy appointments because her husband is sick and requires hospitalization approximately 2 times per year. There are a number of slips in the records describing reasons she gave for missing therapy appointments, including car trouble, not feeling well, her son's dental appointment, and being involved with a fundraiser. None of them from October 13, 2004 to November 1, 2004 mentioned her husband being ill.
- 12) **Dr. R. Peter Mirkin** (Exhibit G) first examined Claimant on November 12, 2004. Claimant provided a consistent history of injury. She said she developed pain in her neck, left shoulder, left hip and low back. She reported her neck pain had improved, but she had persistent pain in her left shoulder, low back and left hip. On the patient intake sheet, Claimant left blank the question regarding whether she had ever had prior treatment for her complaints to these body parts. She admitted she did not tell Dr. Mirkin about her prior back problems for which she had received treatment at the VA Hospital. On physical examination, Dr. Mirkin found a report of global tenderness to the left shoulder. The cervical spine showed full range of motion with no tenderness to palpation. The lumbar spine showed limited range of motion. Straight leg raising was negative and deep tendon reflexes were intact. The left hip showed full range of motion with no tenderness to palpation. X-rays showed some degenerative changes at L5-S1. X-rays of the left shoulder were normal. Dr. Mirkin's impression was that she had continued complaints of left shoulder pain and low back pain. He recommended an MRI of the left shoulder, hip and back. He recommended she could continue limited work as prescribed by Dr. Byler.
- 13) Claimant returned to Dr. Mirkin on November 24, 2004. He reported her MRI of the shoulder was entirely normal. Her MRI of the back revealed some degenerative disc bulging of the lower lumbar spine. He ordered work hardening and a functional capacity evaluation.
- 14) Although Dr. Mirkin had recommended a functional capacity evaluation in December 2004, Claimant never attended it until October 21, 2005. She said she had problems attending it because of the need to pick up her son and her other commitments, including her sick husband. **Kristin Kershaw**, the occupational health supervisor for Employer, testified that she made special arrangements for The Work Center to stay open until 7:00 p.m. to accommodate Claimant's scheduling difficulties, but Claimant still did not go to therapy. When Claimant finally did have the functional capacity evaluation on October 21, 2005, she was found capable of working at the heavy demand level, but only lifting up to 40 pounds. She had a second functional capacity evaluation on May 12, 2006, and this time was found capable of lifting up to 70 pounds and working at the heavy demand level. (Exhibit D)
- 15) When she was next seen by Dr. Mirkin on December 10, 2004, Claimant had not done either the work hardening or the functional capacity evaluation. She mentioned she had another job and could not do it. Her physical examination was objectively normal, but she still had persistent subjective complaints, so Dr. Mirkin placed a 40-pound lifting restriction on her and opined she was at maximum medical improvement. In a report dated January 12, 2005, Dr. Mirkin confirmed she was at maximum medical improvement and opined she had a permanent partial disability of 2% of the lumbar spine and 0% of the shoulders.
- 16) Claimant testified that since Dr. Mirkin released her with a weight lifting restriction less than 70 pounds, Employer could not accommodate her. Claimant said she asked Dr. Mirkin for more care, but he said he could

not treat her. Dr. Mirkin's records do not contain any such request from Claimant for additional treatment. Claimant admitted that she never asked anyone at Employer for further care before she began to treat on her own at the VA Hospital. She also admitted that she never gave the VA Hospital a history of the injury at Employer as the reason for the need for the treatment. Instead, she gave them the history of her back complaints going back to 1987.

- 17) Although the parties stipulated that Claimant never sought authorization from Employer or requested further treatment from UPS before treating on her own at the VA Hospital, there **are letters exchanged between Claimant's attorney, Joseph Robbins, and Employer's attorney, Maureen Cary**, discussing Claimant's request for additional treatment that have been admitted into the record. (Exhibits I, J, K and L)
- 18) Claimant testified that during this time and following her release from Dr. Mirkin, she worked part-time at Hazelwood West High School in the kitchen/cafeteria. She said she did not have to lift any weight, but she would serve lunch, run the cash register, sweep, wipe counters, stock the soda machine and put trays in the dishwasher. She said she has had these same duties since 2000. This job requires her to stand 4 hours a day. She admitted she continued working the whole time at Hazelwood West after her injury.
- 19) Between December 1, 2004 and May 16, 2006, Claimant admitted that she did not look for additional employment. She also admitted that she could have gone out and gotten a job in the open labor market with no lifting over 40 pounds. She noted that after she failed the first FCE, she filed a union grievance to get a second FCE, which she then passed. Therefore, she was able to get her job at Employer back.
- 20) Medical treatment records and bills from **The Department of Veterans Affairs** (Exhibit H) document additional treatment Claimant had at that facility following her release from Dr. Mirkin. The bills for this period of time total \$3,132.34. In visits dated from January 3, 2005 through October 12, 2005, Claimant was treated for a variety of conditions including upper back and ribcage area pain, epigastric pain, chest pain, low back pain and right hip pain. At a neurology consultation on February 11, 2005, the doctor formed an impression of chronic low back pain with intermittent radiculopathy most likely secondary to degenerative joint disease at L5-S1 with right neural foraminal narrowing and chronic right hip pain. Most interestingly, there is a letter dated October 12, 2005, indicating Claimant reports she had no further back pain since April 2005. She believed she could keep up with the work requirements at UPS. There is no history of the October 6, 2004 injury in any of these records, and therefore, there is no opinion indicating the need for treatment is related to the October 6, 2004 injury. Additionally, there is no opinion that her alleged inability to work is related to the injury on October 6, 2004.
- 21) Claimant testified on cross-examination that between April 13, 2005 and May 8, 2006, she had no treatment for her back, left shoulder, left hip, or headaches and dizziness.
- 22) Regarding her continuing complaints which she relates to the October 6, 2004 injury, Claimant testified that her shoulder hurts, and she has neck pain and headaches every now and then. She said that sometimes with the headaches, she gets dizziness, but she admitted that she did not tell Dr. Mirkin or the VA about any dizziness. She sometimes has low back pain, but does not have it every day. She said lifting a lot causes problems. She said she has missed no time since returning to work, but she does have good and bad days, depending on what she is doing. She admitted there are no permanent restrictions on her ability to work, and she can do all of the job duty requirements at Employer. She admitted she is not hindered in any way at Employer or Hazelwood because of the October 6, 2004 injury.
- 23) The deposition of **Dr. Frank J. Niesen** was taken by Claimant on September 6, 2006 to make his opinions in this case admissible at hearing. (Exhibit F) Dr. Frank Niesen examined Claimant on one occasion, on June 27, 2006, at the request of her attorney for an independent medical evaluation. At one time he was board certified in abdominal surgery, but he quit his surgical practice in 1968 and opened a family practice thereafter when he practiced in internal medicine until 2003 at age 83. Dr. Niesen conducts independent evaluations at the request of Midwest Medical Evaluations.
- 24) Dr. Niesen reviewed some records in conjunction with his evaluation and admitted that he skipped through the VA records and did not do a very thorough examination of them. Claimant reported present complaints of low back pain, frequent headaches accompanied by nausea, dizziness, and pain in the left hip. Although there is no specific history of prior low back problems listed in his report, he does note that she had prior treatment at the VA Hospital, but she was not having any back problems at the time of her injury. Dr. Niesen agreed Claimant told him she received no treatment through workers' compensation. Dr. Niesen further agreed that this was inconsistent with the history of treatment reviewed in Dr. Byler's records, Dr. Mirkin's records and physical therapy. The findings on physical examination are almost non-existent in his report, and in fact, he indicates the range of motion testing is basically non-contributory. He diagnoses a concussion, aggravation of a pre-existing lumbar spine disc problem, and chronic arthritis of the back. He assessed permanent partial disability of 20% of the body as a whole referable to the head for a severe concussion and 15% of the body as a whole for an aggravation of her low back condition. Dr. Niesen then opined the bills from the VA Hospital which amounted to \$2,921.25 were fair, reasonable and necessary as a result of her workers' compensation injury. His sole basis for

this opinion was that the VA records had a designation of “work comp” on them. Finally, he felt it was reasonable for Claimant to be off work from October 7, 2004 through May 17, 2006 because of this injury.

- 25) The deposition of **Dr. R. Peter Mirkin** was taken by Employer on June 12, 2006 to make his opinions in this case admissible at hearing. (Exhibit 1) Dr. Mirkin is a board certified orthopedic surgeon who was an authorized treating physician in this case. He testified consistent with his written reports already submitted into evidence. Based on the patient intake sheet and the verbal history provided to him by Claimant, Dr. Mirkin was under the impression that Claimant had no low back complaints or symptoms prior to the October 6, 2004 incident at UPS. Dr. Mirkin opined Claimant had a small amount of disability in the lumbar spine (2%) due to her subjective complaints of back pain and the fact that she told him she never had problems with her back prior to October 6, 2004. When presented with Claimant’s prior complaints and treatment for the low back, Dr. Mirkin opined that if she had a pattern of pain prior to October 6, 2004, then “her condition very likely could have been present prior to that date.” He did not ultimately change his opinion on the percentage of disability, however, or indicate any difference in what caused the disability.
- 26) Claimant was confronted on cross-examination with her **deposition testimony from June 14, 2006**. (Exhibit 3) In light of the complaints she reported to Dr. Niesen only 13 days after her deposition, as well as in light of the complaints she described at hearing, she was presented with her sworn deposition testimony wherein she indicated she had no complaints related to the injury of October 6, 2004. Claimant then continued in the deposition to specifically deny low back, left shoulder, neck or hip complaints related to the injury that she continued to have.

## **RULINGS OF LAW:**

Based on a comprehensive review of the substantial and competent evidence described above, including Claimant’s testimony and the testimony of the other witness, the expert medical opinions and depositions, the medical records and bills, as well as my personal observations of Claimant and the other witness at hearing, and also based on the applicable statutes of the State of Missouri, I find the following:

Given the nature of this Claim and the evidence submitted, these two issues in this case can be addressed at the same time.

***Issue 1: Are Claimant’s injuries and continuing complaints medically causally connected to her accident at work on or about October 6, 2004?***

***Issue 4: What is the nature and extent of Claimant’s permanent partial disability attributable to this accident?***

Under **Mo. Rev. Stat. § 287.020.2 (2000)**, an injury by accident is compensable if it is clearly work-related, and it is clearly work-related if work was a substantial factor in the cause of the resulting medical condition or disability.

The parties to this case stipulated that an accident arising out of and in the course of employment occurred on October 6, 2004 that resulted in injury to Claimant. Employer raises an issue now as to whether Claimant’s continuing complaints are medically causally related to this accident. While I certainly do have some concern about the credibility of Claimant and Dr. Niesen (as will be discussed below), I do find that Dr. Mirkin’s opinion is credible and persuasive. To the extent that Dr. Mirkin opined Claimant had a small amount of disability in the lumbar spine (2%) due to her subjective complaints of back pain related to this injury, I find that Claimant’s low back complaints and disability are medically causally related to this injury at work.

I should note that I do recognize Claimant was apparently not completely truthful with Dr. Mirkin, since she did not tell him about the prior problems she had with her low back. Claimant’s lack of candor calls into question the foundation of Dr. Mirkin’s opinions. Certainly this is the type of information which could have caused Dr. Mirkin to alter his opinion on disability and medical causation, as he was apparently assuming that she had no prior low back problems. However, Dr. Mirkin was confronted at his deposition with this information, and only opined, “if she had a pattern of pain prior to the 10-6-04 incident, then I would think that her condition very likely could have been present prior to that date.” Ultimately, he had the chance to modify his opinion based on this new information, but I do not read this statement as a change in his opinion, nor did he outright change the percentage of disability he attributed to this accident on October 6, 2004.

Therefore, at least as far as her low back complaints following the October 6, 2004 injury are concerned, I do find that they are medically causally related to the accident, and I also find based on Dr. Mirkin’s opinion that there is some permanent partial disability associated with the low back condition, attributable to the October 6, 2004 accident.

Under **Mo. Rev. Stat. § 287.190.6 (2000)**, “‘permanent partial disability’ means a disability that is permanent in nature and partial in degree...” The claimant bears the burden of proving the nature and extent of any disability by a

reasonable degree of certainty. *Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund*, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697,703 (Mo.App. 1973). Expert testimony may be required when there are complicated medical issues. *Id.* at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the Claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. *Fogelsong v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

Considering the competent and substantial evidence listed above, I find Claimant has 2% permanent partial disability of the body as a whole referable to the low back related to this October 6, 2004 injury.

In arriving at this conclusion, I considered the medical opinions submitted into evidence from Dr. Niesen and Dr. Mirkin. Given the totality of the evidence in this case, I find Dr. Mirkin's opinion on disability more credible and persuasive than that of Dr. Niesen.

In formulating his opinions in this case, Dr. Niesen relied on complaints from Claimant that quite frankly were contradictory to her deposition testimony and her testimony at hearing. She provided a list of complaints for Dr. Niesen, but when her deposition was taken just 13 days prior to his examination, she testified she had no complaints. This inaccuracy with reporting complaints is even more of a concern in this case, when Dr. Niesen's physical examination revealed no objective abnormalities, and he admitted that his opinions were based on those complaints from Claimant. It was also concerning that Dr. Niesen rated disability for a "severe concussion" when no such diagnosis of a concussion had ever been made by any of the treating doctors at or around the time of the injury. All of these factors, combined with his admittedly less than full review of the VA records before issuing his opinion, left me to conclude that his opinion was not credible or persuasive and certainly could not be used as competent evidence to support an award of benefits in this case.

On the other hand, Dr. Mirkin was a treating physician who examined Claimant on more than one occasion, and who actually tried to provide medical treatment for her complaints. He is an orthopedic surgeon with some expertise in this area of medicine. While he certainly took Claimant's complaints into account in his opinions, he seemed to appropriately balance them against the lack of objective abnormalities on her physical examination. While there were some foundational issues with his opinion based on Claimant failing to inform him of her prior history of low back problems, he was presented that information at his deposition and did not outright change his opinion. Based on the totality of the evidence, Dr. Mirkin's opinion was more credible and persuasive than that of Dr. Niesen.

My finding on the nature and extent of permanent partial disability was also impacted though, by the less than fully credible testimony of Claimant. Although Claimant testified to having continued complaints to many more parts of her body than just her low back, which she attributed to this injury on October 6, 2004, I did not find those additional complaints to those additional body parts credible. This finding is not only based on her deposition testimony where she outright denied problems or complaints to any body parts related to this injury, but it is also based on the inconsistent reporting of complaints in the medical treatment records. It is hard to believe that she was having continued headaches, dizziness, or nausea, but she failed to report them to the VA Hospital or Dr. Mirkin.

Claimant's credibility is also called into question for the inconsistencies documented by multiple providers. These include her failure to answer Dr. Mirkin's questions regarding prior medical treatment, Dr. Byler's note from November 9, 2004 that documents a change in the manner of walking when Claimant thought she was not observed, and The Work Center notes documenting an inconsistent gait in the therapy progress note summarizing the visits between October 8, 2004 to November 16, 2004. Additionally there is the discrepancy between the records and her testimony about whether she lost consciousness, and the divergent excuses for why she was unable to attend physical therapy, work hardening and the functional capacity evaluation. Then, of course, there is the conflicted testimony about whether or not she lost time from work prior to October 6, 2004 because of back complaints. Although she initially denied that she had, and although she initially testified she had no low back treatment for the 2 years prior to her injury on October 6, 2004, the records from the VA Hospital certainly did not support her testimony on those facts.

Finally, my finding on the nature and extent of permanent partial disability was impacted by the findings in the medical treatment records themselves. The VA Hospital records contain a fairly consistent history of Claimant's treatment at that facility for low back problems dating back to 1988. Claimant's complaints pre-existing the October 6, 2004 injury included low back pain and sciatica into both legs. Her low back complaints following this injury on October 6, 2004 do not seem markedly different from those pre-existing the accident. Additionally, a comparison of the MRIs before and after this accident did not reveal major changes in the disc involvement or the diagnosis attributable to her low back condition.

Given the totality of the evidence presented at hearing, I find that Claimant has 2% permanent partial disability of the body as a whole referable to the low back which is medically causally related to this October 6, 2004 injury at work. I find she has failed to prove entitlement to any other permanent partial disability to any other parts of the body related to this accident for the reasons described above.

## ***Issue 2: What is Employer's liability for past medical expenses for the treatment covered***

*by the lien from the Department of Veterans Affairs?*

Under **Mo. Rev. Stat. § 287.140.1 (2000)**, “the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment...as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.” **Mo. Rev. Stat. § 287.140.3 (2000)** also states, “All fees and charges under this chapter shall be fair and reasonable...” Claimant bears the burden of proving these elements of the claim.

The Supreme Court addressed the proof necessary for the Claimant to meet her burden of proof on this issue. In *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. 1989), the employee testified that her visits to the hospital and various doctors were the product of her fall. She also testified that the bills she received were the result of those visits. The Court held, “when such testimony accompanies the bills, which the employee identifies as being related to and the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records in evidence, a sufficient factual basis exists for the commission to award compensation.” *Id. at 111-112*. The Court went on to further hold that, “The employer, of course, may challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question.” *Id. at 112*.

Based on the evidence submitted at hearing, I find Claimant has not met her burden of proving that the treatment documented in Exhibit H is reasonable and necessary treatment to cure and relieve Claimant of the effects of this injury at work on October 6, 2004. Accordingly, Claimant’s request for past medical benefits, and the Department of Veterans Affairs lien for repayment of those bills, is denied.

Since Claimant bears the burden of proof, Claimant must provide competent and substantial evidence to show that the medical treatment and bills are medically causally related to this October 6, 2004 injury. Claimant has failed to do that.

Claimant was provided with authorized medical treatment up until she was released at maximum medical improvement by Dr. Mirkin on December 10, 2004. He placed a permanent lifting restriction on her and did not believe any further treatment was necessary. Although Claimant (and/or her attorney) apparently requested more treatment and although Employer was told Claimant was treating at the VA Hospital, there is no competent and persuasive evidence in the record to show the treatment she received there was actually related to this injury on October 6, 2004.

Claimant testified at hearing that she did not know if some of her visits to the VA Hospital between January 3, 2005 and October 12, 2005 were related to this injury at work or not. During this time, she received treatment for a variety of conditions including upper back and ribcage area pain, epigastric pain, and chest pain. There is no medical evidence causally relating any of these complaints to her injury at work on October 6, 2004.

While it is true she did also receive treatment during this time for her low back complaints, she admitted at hearing that she never told the VA Hospital about the October 6, 2004 injury, and instead related her need for low back care to her long-standing, chronic low back problems. Therefore, none of the contemporaneous medical records from the VA Hospital contain any opinions relating this treatment to the October 6, 2004 accident. Instead, they reference a relationship to the pre-existing low back degenerative condition for which she had received treatment for a number of years. After months of leading the VA Hospital to believe her need for treatment was related to her pre-existing degenerative condition, it is disingenuous now for her to claim it was actually on account of her injury on October 6, 2004, which she failed to mention all along. In that respect, I do not find Claimant’s testimony on this point to be credible or persuasive.

Additionally, Claimant relies on the opinion and testimony of Dr. Niesen to causally connect the VA Hospital bills to her injury on October 6, 2004. This reliance is misplaced, since I also do not find Dr. Niesen’s testimony on this issue to be credible or persuasive. While Dr. Niesen does opine that the bills from the VA Hospital which amounted to \$2,921.25 were fair, reasonable and necessary as a result of her workers’ compensation injury, his sole basis for this opinion is that the VA records had a designation of “work comp” on them. He admitted that he skipped through the VA records and did not really review them thoroughly. He also provided no explanation for the discrepancy between his number of \$2,921.25 and the Department of Veterans Affairs number from Exhibit H of \$3,132.34. Finally, he admitted that the treatment Claimant had for her back during this time could be consistent with treatment for a long-standing, degenerative condition, as much as it could be for a specific injury. In short, without reviewing the records, without explaining the discrepancy in the amount owed, and by admitting his opinion was based simply on the billing designation a clerk placed on the VA bills, Dr. Niesen did not provide a competent and persuasive opinion upon which an award of medical bills could be based.

As such, Claimant is not entitled to have Employer repay any of these bills contained in Exhibit H, and The Department of Veterans Affairs is not entitled to collect anything for this treatment they provided to Claimant from January 3, 2005 until October 12, 2005.

***Issue 3: Is Claimant entitled to past TTD benefits from December 1, 2004 until May 16, 2006?***

Employer is responsible under the statute for payment of temporary total disability benefits pursuant to **Mo. Rev. Stat. § 287.170 (2000)** during the continuance of such disability at the appropriate weekly rate of compensation. The statute

also defines "total disability" under **Mo. Rev. Stat. § 287.020.7 (2000)** 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." Claimant bears the burden of proof on this element of her claim just as on any other element.

In this case, Claimant alleges an entitlement to TTD benefits from December 1, 2004 until May 16, 2006. Based on the evidence in the record, it appears that from October 7, 2004 until December 10, 2004 Claimant was under temporary lifting restrictions imposed by Dr. Byler and Dr. Mirkin. Near the end of that time period, it was a 40-pound lifting restriction. On December 10, 2004, Dr. Mirkin placed a permanent 40-pound lifting restriction on her and released her at maximum medical improvement.

During most of that time period (from October 7, 2004 until December 1, 2004) Employer accommodated that lifting restriction and provided light duty work. Therefore, they had no exposure for TTD. While it is unclear how the parties arrived at that date of December 1, 2004, that is the date which they have all agreed begins the period of time when Employer no longer accommodated her lifting restrictions and provided light duty work.

Based on the totality of the evidence in the record, I find Claimant has failed to prove she is entitled to TTD benefits from December 1, 2004 until May 16, 2006.

First, I do not believe Claimant has met her burden of proof to show that she was *temporarily* totally disabled during this period of time. Once Claimant was released by Dr. Mirkin on December 10, 2004, and he made the lifting restrictions permanent, there was no longer a *temporary* condition for which TTD would be properly paid. Certainly, if Claimant received more treatment related to her work injury and was kept out of work by the doctor because of that treatment, then perhaps the TTD would once again be properly owed. However, in this case, none of the records from the VA Hospital addressed her inability to work as a result of her October 6, 2004 injury, because the VA Hospital was never told by Claimant about that injury. As such, there are no contemporaneous medical treatment records during this period of time that take Claimant out of work because of the October 6, 2004 injury.

The only medical opinion Claimant admitted into evidence that dealt with this TTD issue, was Dr. Niesen's opinion from June 27, 2006, after this alleged period of TTD ended. For many of the same reasons discussed above with regard to the other issues, I do not find Dr. Niesen's opinion competent or persuasive. He opined she was entitled to be off work from October 7, 2004 through May 17, 2004 as a result of her injury, because Employer could not accommodate her light duty restrictions. He was apparently unaware that Employer did accommodate those light duty restrictions for a period of time from October 7, 2004 until December 1, 2004. Further, in his deposition, he testified he based this opinion on the premise that Employer would not employ people on a partial basis. When directly asked, however, if Claimant could have worked somewhere during this time with a 40-pound lifting restriction, even if it was not at Employer, Dr. Niesen said that she could have done that. In that respect, his opinion on Claimant's entitlement to TTD is lacking.

Additionally, Claimant even admitted at hearing that she could have gone out and gotten a job with a 40-pound lifting restriction, but she chose not to do that. In fact, she did not look for any work between December 1, 2004 and May 16, 2006. Admittedly though, she was already working her regular job at the Hazelwood school kitchen/cafeteria during this period of time. It is completely inconsistent to allege total disability (an inability to return to *any* employment), but yet to be working a regular position in the kitchen/cafeteria during this same period of time.

Based on her lack of sound medical opinions on the issue of TTD, as well as based on her actual employment during this period of time, Claimant is not entitled to any TTD payments from Employer pursuant to this injury and Claim.

## CONCLUSION:

Claimant has met her burden of proving that she sustained a compensable accident to the low back arising out of and in the course of her employment, and medically causally related to it. Claimant has also met her burden of proof that she is entitled to 8 weeks of permanent partial disability to the body as a whole referable to the low back from Employer on account of this accident. Claimant is not entitled to have Employer repay any of these bills contained in Exhibit H, and The Department of Veterans Affairs is not entitled to collect anything from Employer for this treatment they provided to Claimant from January 3, 2005 until October 12, 2005. Finally, Claimant is not entitled to any TTD payments from Employer pursuant to this injury and Claim. The Second Injury Fund Claim is left open. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Mr. Joseph K. Robbins for necessary legal services.

JOHN K. OTTENAD  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Patricia "Pat" Secrest  
*Director*  
*Division of Workers' Compensation*