

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

Injury No.: 06-093114

Employee: Wendy L. Fry  
Employer: Tates Facility Services, Inc.  
Insurer: Grinnell Mutual Reinsurance Co.

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 29, 2009. The award and decision of Administrative Law Judge Edwin J. Kohner, issued July 29, 2009, 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 18<sup>th</sup> day of December 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

Attest: \_\_\_\_\_  
John J. Hickey, Member

\_\_\_\_\_  
Secretary

## AWARD

Employee: Wendy L. Fry Injury No.: 06-093114  
Dependents: N/A Before the  
Employer: Tates Facility Services, Inc. **Division of Workers'**  
**Compensation**  
Additional Party: N/A Department of Labor and Industrial  
Relations of Missouri  
Insurer: Grinnell Mutual Reinsurance Co. Jefferson City, Missouri  
Hearing Date: June 18, 2009 Checked by: EJK/ch

### 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 2, 2006
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
The claimant, a custodian, suffered a low back injury while emptying a trash barrel.
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: Low back
14. Nature and extent of any permanent disability: 25% permanent partial disability to the low back
15. Compensation paid to-date for temporary disability: \$4,127.88
16. Value necessary medical aid paid to date by employer/insurer: \$15,257.18

- 17. Value necessary medical aid not furnished by employer/insurer? \$28,087.18
- 18. Employee's average weekly wages: \$292.00
- 19. Weekly compensation rate: \$194.67
- 20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Unpaid medical expenses:	\$28,087.18
25 3/7 weeks of temporary total disability (or temporary partial disability)	4,950.18
100 weeks of permanent partial disability from Employer	\$19,467.00

- 22. Second Injury Fund liability: No

TOTAL: \$52,504.36

- 23. Future requirements awarded: See additional Findings of Fact and Conclusions of Law.

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: Bradley W. Cundiff, Esq.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Wendy L. Fry	Injury No.: 06-093114
Dependents:	N/A	Before the
Employer:	Tates Facility Services, Inc.	<b>Division of Workers'</b>
Additional Party:	N/A	<b>Compensation</b>
Insurer:	Grinnell Mutual Reinsurance Co.	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri Checked by: EJK/ch

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a custodian, suffered a low back injury while emptying a trash barrel. The issues for determination are (1) Liability for Past Medical Expenses, (2) Future medical care, (3) Temporary Disability, and (4) Permanent disability. The evidence compels an award for the claimant for medical expenses, future medical care, and temporary total disability and permanent partial disability benefits.

At the hearing, the claimant testified in person and offered depositions of Raymond F. Cohen, D.O., and Timothy G. Graven, D.O., medical records and bills from St. Joseph Hospital West, SSM Rehab, Open MRI, St. Peters Bone and Joint Surgery, St. Peters Ambulatory Surgery, Dr. David B. Robson, M.D., Professional Imaging, Metro West Anesthesia Group, Inc., Radiologic Imaging Consultants, Stewart's Rexall Drug. The defense offered a deposition of David B. Robson, M.D.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident was alleged to have occurred in Missouri.

### **SUMMARY OF FACTS**

On October 2, 2006, this 44 year old claimant, a custodian, injured her low back while emptying a trash barrel into a dumpster in which she had to reach over her head to dump the trash. She developed immediate low back pain below the beltline, and sat down to see if the pain would subside. When it didn't, she called her employer on his cell phone but received no response. She continued working by doing simple tasks like dusting and wiping out sinks but noticed that any movement hurt her back. She called her employer again and reported that she injured herself and was unable to finish her shift. Her employer directed her to obtain medical care.

The claimant reported to St. Joseph Hospital West on the night of the injury with complaints of a left lower back injury and pain radiating down her left side. She received a Morphine injection and prescription pain medication, and was told to follow up with her primary care physician, Dr. Smith. Shortly after the accident, she began feeling a tingling-like sensation

that went down her left leg and ankle, accompanied by an aching sensation in the same area. Dr. Smith referred her to physical therapy at SSM Rehab, where she completed eight sessions. The claimant testified that the physical therapy did not help her. On October 24, 2006, she went to Dr. Graven, an orthopedic surgeon, and complained of low back pain, numbness and tingling into her left heel, and weakness in the left leg. Dr. Graven prescribed a Medrol Dosepak, Percocet, Lodine and more physical therapy. On November 9, 2006, Dr. Graven sent claimant back to work with limited duty and restrictions of no bending, stooping or squatting more than five to ten times per hour, and no lifting more than ten pounds. Claimant worked two hours a day for Tate Facility Services performing dusting. She continued to work two-hour days through November 28, 2006, when her employment was terminated.

In December 2006, after two rounds of physical therapy with little or no relief, Dr. Graven referred the claimant to Dr. Coleman for a series of three epidural steroid injections on December 19, 2006, January 5, 2007, and February 2, 2007. The claimant testified that these injections resulted in only transient benefits. On February 15, 2007, she reported back to Dr. Graven who opined that she was clinically depressed and gave her a prescription for Oxycontin and Prozac. Dr. Graven made a request for a discography and told her to discontinue working.

The discography was not approved by the defense. Dr. Robson examined the claimant on March 8, 2007, and March 15, 2007, and he ordered a CT exam which came back normal. At the time of this visit, she still complained of low back pain. At this time, Dr. Robson recommended against any further treatment, including the discogram, and released claimant to maximum medical improvement. Dr. Robson opined that the claimant sustained a 3% permanent partial disability to the lumbar spine from a low back strain.

On April 30, 2007, Dr. Cohen examined the claimant and the claimant complained of difficulty bending, lifting, twisting, squatting, and stooping. The claimant told Dr. Cohen that she could do these activities, but only to a minimal degree due to severe low back pain. She complained of radiating pain down into the left buttock and left thigh, and occasionally into the left foot. She had difficulty traveling in a vehicle for long distances, and reported that she had not driven in six months. She reported that she was unable to clean her home, climb stairs, do yard work, or play with her children.

Dr. Cohen found that she had a loss of the lumbar lordotic curve and tenderness to palpation over the sacroiliac area. A pelvic rock test was performed, which was markedly positive on the left. His report states that she was having difficulty sitting on the exam table, and frequently had to change positions. He concluded that she should have a discogram to decide whether she was a surgical candidate. He recommended that she continue with the Oxycontin, and asked her to suggest to Dr. Graven to add Zanaflex as a muscle relaxant. He rated her permanent partial disability at 25% of the lumbar spine.

The claimant returned to Dr. Graven, and had a discogram which was normal at the L3-4 and L4-5 levels but produced pain at L5-S1. The claimant testified that she felt excruciating pain when the doctor placed the needle at the L5-S1, so much so that she rose up from the table and had to be held down. On May 24, 2007, Dr. Graven and claimant discussed treatment options consisting of a plasma disc replacement, fusion, or total disc replacement. On July 9, 2007, Dr. Graven performed a plasma disc replacement.

The claimant testified that prior to surgery her pain level was between seven and seven and a half, and after surgery it was between three and three and a half. The claimant testified that she continues to have constant back pain, and her symptoms have not improved over time. She is currently not working, and believes that she could not work. She has difficulty walking long distances, sitting for more than half an hour, standing for more than an hour. She cannot vacuum, do laundry, sweep, or mop. She does try to dust and fold clothes. She continues to take Tramadol, which is prescribed by Dr. Graven.

Dr. Graven testified that the cost of the surgical procedure for the plasma disc decompression was high, and that the reasonable and customary charge for surgery should be half of what was billed.

### **LIABILITY FOR PAST MEDICAL EXPENSES**

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury. Section 287.140.1, RSMo 1994.

The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App. E.D. 1995).

The method of proving medical bills was set forth in Martin v. Mid-America Farmland, Inc., 769 S.W.2d 105 (Mo. banc 1989). In that case, the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation. The employer, may, of course, 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 111, 112.

At the hearing, the claimant presented medical bills and records relating to her prescription medication, discogram on April 19, 2007, and plasma disc decompression on July 9, 2007:

Dates	Provider	Service	Amount
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3/15/07- 5/27/09	Stewart Drug	Prescription medication Copay Exhibit N	\$ 533.14
4/19/07- 3/26/09	St. Peters Bone & Joint	Office visits, discography, surgery, X-rays Exhibits E, P	\$22,783.00
5/21/07- 7/09/07	St. Joseph Hosp	Discogram, Plasma disc decompression Exhibits A, B	\$14,188.70
5/21/07- 7/09/07	Metro West Anesthesia	Anesthesiology Exhibits K, L	\$ 1,760.00
5/21/07- 7/09/07	Radiologic Imaging	Radiologic interpretation Exhibits A, M	\$ 213.84
Total			\$39,478.68

The charges listed above for St. Peters Bone & Joint Surgery exclude services rendered before April 19, 2007, which appear to have been paid by the employer or its insurer. In addition, Dr. Graven testified that the reasonable charges for his services is reflected at one half of the billed charges. See Dr. Graven deposition, pages 29-30. Thus, the reasonable charge for his services for the discogram and surgery is reduced by \$11,391.50. Dr. Graven testified that the claimant suffered from an annular tear, disc protrusion at L5-S1, that the accident at work was the prevailing cause of the disc injury and that the procedures were necessary and a result of the work related accident. See Dr. Graven deposition, page 25.

On the other hand, Dr. Robson testified that the procedures performed by the above medical providers were not reasonable or necessary to the claimant's health or recovery. See Dr. Robson deposition, page 13. He testified:

If somebody has a normal CT scan, a normal MRI, there's no reason to get a discogram. The only reason to get a discogram is if you're trying to make a surgical decision, if you've already made a decision that the patient is going to need surgery, a discogram is just inherently inaccurate in light of a normal MRI or in a normal CT scan. A discogram would be used in some who has an abnormal MRI and you're trying to decide what levels to involve in your surgery type of a thing, so to – for diagnosing something that's already been deemed relatively normal on a CT scan or MRI, discography has no role, and that would be an even more pervasive argument, don't stick a needle in anybody if there's nothing on their scans. ....

Q. But what if they're still having symptoms?

A. Then you tell them that there's (sic) other things they have to do to deal with their symptoms. This woman had a very unreliable physical examination. She was inappropriate in her movement in the office. I mean, somebody can have the biggest disc rupture in the whole world and move their spine more than 10 degrees, and she moved differently in the sitting and standing position. There

was (sic) contrary-type findings in my physical exam. She had normal scan results. If somebody has normal things, it doesn't always mean that they have to have surgery eventually. Sometimes they need to be told live with your situation, there's a chance that this will improve with time, which is, in my opinion proper advice for this injury. See Dr. Robson deposition, pages 29, 30.

He also opined that the percutaneous plasma disc decompression procedure results had a 79% success rate which is equal to the success rate of the natural history for no treatment whatsoever for back problems. See Exhibit H. "Therefore, they cannot improve the natural history of the disease and in my opinion, recommend against this procedure in general." See Exhibit H.

In reviewing the two different forensic medical opinions, both of the orthopedic surgeons are Board certified with significant experience. However, Dr. Graven's findings appear to be more credible for two reasons. First, Dr. Graven was the treating physician and had more contact with the claimant over a longer time than did Dr. Robson. Second, the claimant testified that the medical procedures reduced her level of pain significantly. This is in concert with Dr. Graven's findings after the surgical procedure. See Exhibit E. While the location of the pain was still in the claimant's low back and buttocks, the claimant reported that the level of pain was significantly reduced. She testified that she improved greatly immediately after the surgery and that the medications consumed were less potent. However, she also testified that she developed increased pain after she returned to everyday life. On the other hand, the pain medications consumed now appear to be less potent. Comparing the claimant's symptoms at any two times is a difficult process, because factoring the level of activity and impact of different pain medications requires professional evaluation. Thus, the two orthopedic surgeons remain as the source of information to consider those variables. Without any objective test for determining the level of pain, Dr. Graven had the opportunity to examine the claimant over an extended period. In contrast, Dr. Robson consulted the claimant twice, but examined the claimant on only one occasion, March 8, 2007. See Exhibit H. His treatment notes do not reflect whether the claimant had consumed Oxycontin prior to his examination.

Based on the entire record, the credible evidence compels an award of \$28,087.18 for past medical expenses in favor of the claimant.

### **FUTURE MEDICAL CARE**

The Workers' Compensation Act requires employers "to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment[.]" § 287.120.1. This compensation often includes an allowance for future medical expenses, which is governed by Section 287.140.1. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App.2001). Section 287.140.1 states:

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

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. Rana, 46 S.W.3d at 622. The claimant satisfies this burden, however, merely by establishing a reasonable probability that he will need future medical treatment. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo.App.2002). Nonetheless, to be awarded future medical benefits, the claimant must show that the medical care “ ‘flow [s] from the accident.’ ” Crowell v. Hawkins, 68 S.W.3d 432, 437 (Mo.App.2001)(quoting Landers v. Chrysler Corp. 963 S.W.2d 275, 283 (Mo.App.1997)).

To receive an award of future medical benefits, a claimant need not show "conclusive evidence" of a need for future medical treatment. ABB Power T & D Co. v. Kempker, 236 S.W.3d 43, 52 (Mo.App. W.D. 2007). Instead, a claimant need only show a "reasonable probability" that, because of her work-related injury, future medical treatment will be necessary. Id. A claimant need not show evidence of the specific nature of the treatment required. Aldridge v. Southern Missouri Gas Co., 131 S.W.3d 876, 883 (Mo.App. S.D. 2004); Stevens v. Citizens Memorial Healthcare Foundation, 244 S.W.3d 234, 237 (Mo.App. S.D. 2008).

On March 31, 2009, Dr. Graven testified:

“Q. Is she continuing to have prescription treatment?”

A. Yes.

Q. And has her prescriptions increased or decreased in strength or frequency or type of medication that she is taking, do you know?

A. From what I understand is that she had to increase the frequency, but her activity level had increased as well.

Q. Now, she is on Ultram 50 milligram tabs two to three times a day, and Naprosyn 500 milligrams twice a day, is that your understanding?

A. Yes.”

.....

“Q. Do you think that Miss Fry is going to need continuing prescription care?”

A. It would seem so, yes.

Q. And would it be reasonable to assume that the prescriptions that she is on now would be the ones that she would stay on?

A. She has been on that way for more than a year, so yes, I would think so.” See Dr. Graven deposition, pages 27, 28.

Dr. Robson testified that the claimant needed no further medical care. “Sometimes they need to be told live with your situation, there’s a chance that this will improve with time, which is, in my opinion, proper advice for this injury.” See Dr. Robson deposition, page 30.

Dr. Graven's recommendation for additional prescription medication to control the claimant's pain seems credible over Dr. Robson's recommendation to live with the pain and hope for change. Dr. Graven has been the treating physician and has had the opportunity to have more contact with the claimant's condition than Dr. Robson. For these reasons, the claimant is awarded additional prescription medication to be regulated by a medical provider selected by the employer.

### **TEMPORARY DISABILITY**

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.020.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." 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." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, 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. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Stevens v. Citizens Memorial Healthcare Foundation, 244 S.W.3d 234, 238 (Mo.App.2008).

The claimant received temporary total disability benefits from October 3, 2006, through November 12, 2006, and once again from March 5, 2007, through March 18, 2007. She received temporary partial disability from November 13, 2006, through March 4, 2007. The claimant has been off work since her termination from employment on November 28, 2006.

The disputed period appears to be from March 19, 2007, (the defense stopped payment of temporary disability benefits) to September 13, 2007 (Dr. Graven authorized the claimant to return to work), 25 3/7 weeks. In order to analyze the issue, a chronological review of the facts is helpful. On March 6, 2007, Dr. Graven opined that the claimant should not be "off work due to the medications that I had prescribed to her and recommended for her to see Dr. Coleman for the consideration of a discography under the guidance of pain management. She is to remain off work until I see her again after her pain management referral." See Exhibit E. On March 15, 2007, Dr. Robson opined that the claimant could return to work and was at maximum medical improvement. See Dr. Robson deposition, pages 14, 15. On April 19, 2007, Dr. Graven examined the claimant and prepared a notation, "Dr. Robinson (sic) ... states that she is to return to work without restrictions and completely better. This is bullshit, but anyway patient give medication in the meantime, will attempt to obtain a diskogram." See Exhibit E. Dr. Graven continued to prescribe pain medication and the claimant had a discogram on May 22, 2007, revealing degenerative disc disease at L4-5 and L5-S1. See Exhibit E. On July 9, 2007, Dr. Graven performed a disk decompression at L5-S1 to repair a herniated nucleus pulposus with lumbar radiculopathy. See Exhibit E. Dr. Graven examined the claimant on July 19, 2007, and noted significant reduction in pain and opined that the claimant should remain off work. See

Exhibit E. On August 18, 2007, Dr. Graven recommended physical therapy and opined that the claimant should remain off work for an additional four weeks. See Exhibit E. On September 13, 2007, Dr. Graven opined that the claimant "has probably reached maximum medical improvement." See Exhibit E.

In reviewing the evidence, Dr. Graven, as the treating physician, appears to have opined that the claimant did not reach maximum medical improvement until September 13, 2007, and strongly disagreed with Dr. Robson's contrary opinion. Dr. Graven opined that the surgical procedures were related to the work related accident and the claimant appears to have significantly improved with the surgical procedures performed by Dr. Graven. Dr. Graven's findings are more credible than those of Dr. Robson with regard to this issue given Dr. Graven's role as the treating physician and his opportunity to examine the claimant on more occasions than Dr. Robson. In addition, the treatment rendered by Dr. Graven successfully reduced the claimant's pain and disability, according to the claimant and Dr. Graven. For these reasons, the claimant is awarded additional temporary total disability benefits from March 19, 2007, to September 13, 2007, 25 3/7 weeks.

### **PERMANENT DISABILITY**

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id. In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629.

On March 8, 2007, Dr. Robson examined the claimant for evaluation and treatment and opined that the claimant suffered a 3% permanent partial disability to her low back due to the work related accident manifesting in a loss of motion and a soft tissue strain of the low back. See Dr. Robson deposition, pages 5, 9.

On April 30, 2007, Dr. Cohen examined the claimant and diagnosed left sacroiliac joint dysfunction, severe aggravation of lower lumbar degenerative disc disease, and intractable back pain secondary to the above. See Exhibit J. He rated the claimant's permanent partial disability at 25% of the lumbar spine. See Exhibit J. On April 3, 2008, Dr. Cohen reexamined the claimant, after her surgery, and diagnosed status post lumbar surgery for L5-S1 disc derangement with compression of the left S1 nerve root, left lumbar radiculopathy, and left

sacroiliac joint dysfunction. See Exhibit J. He opined that the L5-S1 surgery was related to the injury from the October 2, 2006, accident and that the medical treatment was medically necessary and reasonable. See Exhibit J. He rated the employee's permanent partial disability at 35% of the lumbar spine. See Exhibit J. He reported:

The medical reasoning behind the increase as compared to the first time that I had examined her and rated her at 25% whole person disability at the lumbar spine is as follows. At the time that I initially saw her, I had recommended additional treatment. She did have this additional treatment. The discogram was a positive. The L3-4 and L4-5 disc did not reproduce her pain. The L5-S1 disc on the left did reproduce her left leg pain and that was the level that Dr. Graven operated on and she did obtain some relief of her back and left leg pain and some increased function. However, once the disc has been operated on, there will be some significant permanent changes in the disc and there is always the well known medical situation in which the patient can have a recurrent disc herniation or other abnormality at that level. Besides the above, the disability is higher as she has continued significant inability to participate in most of her prior activities and she is severely limited in what she can do. She needs to be permanently restricted from any type of work or activity in which she does any prolonged sitting, standing, walking, stooping, twisting, climbing, or any similar activity. See Exhibit J.

Dr. Graven stated that she could continue to work with restrictions of no bending, stooping, and repetitive lifting with a weight limit of no more than 15-20 pounds. See Dr. Graven deposition, pages 41, 55. Dr. Cohen recommended that the claimant be restricted from prolonged sitting, standing, walking, stooping, twisting, climbing, or any similar activity. See Exhibit J. Dr. Robson recommended that the claimant return to work with no restrictions. See Dr. Robson deposition, pages 8, 9.

The weight of the evidence supports a finding that the 2006 accident was the prevailing factor causing what Dr. Graven termed an "annular tear and disc protrusion at L5-S1". Based on the evidence, claimant has a 25% permanent partial disability of the lumbar spine.

Date: July 29, 2009

Made by: /s/ EDWIN J. JOHNER  
EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ NAOMI L. PEARSON  
*Naomi L. Pearson*  
*Division of Workers' Compensation*