

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

Injury No.: 06-080670

Employee: Tonya Huff

Employer: The Jones Financial Companies LLP

Insurer: Zurich American Insurance Company

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

Discussion

Employer's credit for third-party recovery

Under § 287.150 RSMo, an employer has a subrogation interest to recoup its workers' compensation outlay where the employee makes a recovery against a third party for the work injuries, and there is a well-settled formula for applying the statute in cases (such as this one) where there is both a determination of comparative fault and a post-verdict settlement in the third-party action. See *Kerperien v. Lumberman's Mut. Cas. Co.*, 100 S.W.3d 778 (Mo. 2003). The parties herein do not dispute the administrative law judge's math in calculating the amount of employer's credit pursuant to the *Kerperien* formula, but rather the way in which she applied employer's credit against the past-due compensation that she awarded.

Section 287.150.3 RSMo provides, as follows:

Whenever recovery against the third person is effected by the employee or his dependents, the employer shall pay from his share of the recovery a proportionate share of the expenses of the recovery, including a reasonable attorney fee. After the expenses and attorney fee have been paid, the balance of the recovery shall be apportioned between the employer and the employee or his dependents in the same ratio that the amount due the employer bears to the total amount recovered if there is no finding of comparative fault on the part of the employee, or the total damages determined by the trier of fact if there is a finding of comparative fault on the part of the employee. Notwithstanding the foregoing provision, the balance of the recovery may be divided between the employer and the employee or his dependents as they may otherwise agree. Any part of the recovery found to be due to the employer, the employee or his dependents shall be paid forthwith and any part of the recovery paid to the employee or his dependents under this section shall be treated by them as an advance payment by the employer on account of any future installments of compensation in the following manner:

Employee: Tonya Huff

- 2 -

(1) The total amount paid to the employee or his dependents shall be treated as an advance payment if there is no finding of comparative fault on the part of the employee; or

(2) A percentage of the amount paid to the employee or his dependents equal to the percentage of fault assessed to the third person from whom recovery is made shall be treated as an advance payment if there is a finding of comparative fault on the part of the employee.

On page 26 of her Award, the administrative law judge applied employer's credit to the *past due* medical expenses, mileage, permanent total disability, and disfigurement benefits that she awarded, rather than ordering employee to treat the credit as "an advance payment by the employer on account of any future installments of compensation." § 287.150.3 (emphasis added). Employee argues that this was incorrect, and that employer should be ordered to pay her the past due expenses at this time, and the credit should then apply to *future* payments of permanent total disability benefits and medical expenses. Employer, meanwhile, cites case law that is not on point and responds as if employee is suggesting it should be deemed to have forfeited its credit with respect to past due benefits. But employer will receive the benefit of its credit either way; practically speaking, the only issue is whether § 287.150.3 requires that employer must pay employee a large lump sum now (\$238,471.93) for past due benefits while paying nothing for permanent total disability or future medical expenses until its rather large (\$228,838.87) credit is exhausted, or whether employer must pay employee a smaller lump sum now (\$9,633.06) but also begin immediate payments of permanent total disability benefits and future medical expenses.

As the parties are undoubtedly well aware, § 287.800.1 RSMo requires that we "strictly construe" the provisions of the Missouri Workers' Compensation Law. Where the plain language of § 287.150.3 unequivocally states that employer's credit shall be treated as an advance payment against "future installments of compensation," we conclude that it is inappropriate to apply employer's credit to the past due benefits awarded herein.

We note that the Missouri Court of Appeals, Southern District, issued a decision with respect to this issue in *Demore v. Demore Enters., Inc.*, No. SD32351 & SD32361 (July 15, 2013). At page 3 of the decision, the *Demore* court held that a third-party subrogation credit "offsets future payments, not unpaid past benefits." Although not precedential in light of a subsequent transfer to the Missouri Supreme Court and voluntary dismissal of the appeal, the *Demore* court's reasoning lends some persuasive support to our conclusion herein.

Accordingly, we modify the administrative law judge's award with respect to the issue of employer's credit under § 287.150.3. We order employer to pay employee her past due benefits in the amount of \$238,471.93. Meanwhile, employee shall treat her portion of the third-party recovery as an advance payment by employer of any future installments of compensation.

Corrections

In her award, the administrative law judge thoroughly and commendably handled each of the numerous disputed issues identified by the parties in this factually complex case. Because the award contains some minor errors, however, we provide the following corrections. On page 5 of her award, the administrative law judge states that employee

Employee: Tonya Huff

- 3 -

paid a \$56.00 premium for her insurance through employer. After a thorough review of the record, we were unable to locate any evidence to support this finding. Accordingly, we must disclaim this finding by the administrative law judge. We note, however, that the language of the insurance policy in question declares in multiple provisions that employee had to pay copayments, coinsurance, and meet deductibles in order to participate in the healthcare plan. See *Transcript*, pages 2280-84, 2295-96, and 2305. We find that employee paid copayments, coinsurance, and deductibles for her insurance through employer, and that the insurance policy was not fully-funded by the employer.

On pages 20 and 24 of her award, the administrative law judge states that employee was found to be 25% at fault in the third-party action. This is incorrect. Employee was found to be 32% at fault in the third-party action. Accordingly, we must hereby correct the award on this point.

Conclusion

We modify the award of the administrative law judge as to the issue of how employer's credit should be applied under § 217.150.3 RSMo. Employer is ordered to pay employee \$238,471.93 in past due medical expenses, mileage, permanent total disability and disfigurement benefits, while employee shall treat her \$228,838.87 portion of the third-party recovery as an advance payment by the employer on account of any future installments of compensation.

The award and decision of Administrative Law Judge Margaret Ellis Holden, issued March 14, 2013, is attached and incorporated by this reference to the extent it is not inconsistent with our modifications and supplemental findings and conclusions herein.

We approve and affirm 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 26th day of February 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Tonya Huff Injury No. 06-080670
Dependents: N/A
Employer: The Jones Financial Companies LLP
Additional Party: N/A
Insurer: Zurich American Insurance Company
Hearing Date: 11/15/12 & 12/15/12 Checked by: MEH

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: 8/8/06
5. State location where accident occurred or occupational disease was contracted: WEBSTER COUNTY, MO
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: MOTOR VEHICLE ACCIDENT.
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
14. Nature and extent of any permanent disability: PERMANENT AND TOTAL DISABILITY
15. Compensation paid to-date for temporary disability: \$7,830.31
16. Value necessary medical aid paid to date by employer/insurer? \$15,369.88

Employee: Tonya Huff

Injury No. 06-080670

- 17. Value necessary medical aid not furnished by employer/insurer? \$161,524.38
- 18. Employee's average weekly wages: \$459.38
- 19. Weekly compensation rate: \$306.25
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: \$161,524.38

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

4 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning 11/8/08, for Claimant's lifetime

Travel expenses of \$10,141.30

- 22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:
weekly differential (0) payable by SIF for 0weeks, beginning N/A
and, thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

- 23. Future requirements awarded: FUTURE MEDICAL TREATMENT AND PTD

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:

JAY CUMMINGS

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Tonya Huff Injury No. 06-080670
Dependents: N/A
Employer: The Jones Financial Companies LLP
Additional Party: N/A
Insurer: Zurich American Insurance Company
Hearing Date: 11/15/12 & 12/15/12 Checked by: MEH

The parties appeared before the undersigned administrative law judge on November 15, 2012, for a final hearing. The record was left open for 30 days and closed on December 15, 2012. The claimant appeared in person represented by Jay Cummings. The employer and insurer appeared represented by Josh Mareschal. Memorandums of law were filed by January 14, 2013.

The parties stipulated to the following facts: On or about August 8, 2006, The Jones Financial Companies, LLP was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Zurich American Insurance Company. On the alleged injury date of August 8, 2006, Tonya Huff was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. On or about August 8, 2006, the claimant sustained an accident which arose out of and in the course and scope of employment. The accident occurred in Webster County, Missouri. The claimant notified the employer of her injury as required by Section 287.420 RSMo. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of the alleged accident, the claimant's average weekly wage was \$459.38, which is sufficient to

allow a compensation rate of \$306.25 for temporary total and permanent partial disability compensation. Temporary disability benefits have been paid to the claimant in the amount of \$7,830.31, from May 13, 2008, to November 8, 2008. The employer and insurer have paid medical benefits in the amount of \$15,369.88. The attorney fee being sought is 25%. The claimant settled her third party case for \$580,000 to her and incurred attorney fees of \$235,479.35.

ISSUES:

1. Whether the employer is obligated to pay past medical expenses and including any credit due to the employer because of self-insured health care.
2. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.
3. The nature and extent of permanent disabilities.
4. Any disfigurement to be assessed.
5. Any subrogation due to the employer and insurer from the third party settlement, including whether any future credit will include future medical payments.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Claimant testified at the hearing and was a very credible witness. She is currently 40 years old and lives in Houston, Missouri, with her husband.

Claimant is a high school graduate. After high school she attended college and earned approximately 40 hours of college credit. She described herself as a good student. She worked for Empire Gas and a couple of banks before going to work for the employer. During her employments she has participated in various training, including bank training courses, ATM training courses, theft/robbery training courses, NASDAQ and DOW training courses, and

courses pertaining to the safe use of propane. Claimant can use a laptop computer as well as a tablet PC.

At Empire Gas she worked as an office manager where she prepared yearly budgets, scheduled gas deliveries, prepared propane tank inventories and gas inventories, created delivery rate schedules and performed other general secretarial work.

Claimant went to work for the Jones Financial Companies, the employer, in 2003. She received initial training and was required to complete ongoing training. She held the position of Branch Office Administrator. Her job duties included preparing clients' files and updating their portfolios when securities were exchanged, preparing files before her supervisor met with a client, took items to the post office, made bank deposits, answering the phones and other clerical work.

The employer provided health insurance to their employees through a self-insured health care plan contained in Exhibit 13. Claimant paid premiums for her health insurance. These were automatically deducted from her pay check at the rate of \$56 per pay period for family coverage. She also paid out of pocket deductibles and co-pays.

On August 8, 2006, as part of her duties, Claimant was traveling westbound on Highway 60 in Seymour, Webster County, Missouri, and had her cruise control set around 65 miles per hour. Another vehicle operated by Elizabeth Carter pulled out in front of Claimant's vehicle and Claimant T-boned the Carter vehicle in the rear part of the left front door. Claimant was taken by ambulance to Cox South and complained of pain in her left upper chest area. She was diagnosed with a chest contusion and discharged from Cox South on August 8, 2006.

About two weeks after the accident, claimant returned to work. She continued to work for the employer until May 9, 2008. Her supervisor was very sympathetic to her physical condition and provided extensive accommodations including allowing her to lie down on a pallet

in her office. She testified that she would answer the phone when he had a client and then would lie back down. She was legally required to physically make the deposits so her boss would drive her to the bank as well as the post office. She also had assistants to help her. The employer paid her a full time salary even though she often missed work.

Claimant continued to complain of pain in the upper left shoulder area. On August 31, 2006, the employer and insurer sent her to Dr. Paul Olive, who is affiliated with Orthopedic Specialists of Springfield. During that visit, Claimant complained of neck pain and shoulder pain and described the pain as radiating across her shoulder blade into her left shoulder. She did not have any numbness, tingling or pain radiating past the left shoulder. She did have grip strength that was decreased on the left. Dr. Olive's diagnosis was a contusion to Claimant's anterior chest, cervical strain, and left shoulder strain secondary to the motor vehicle accident at issue. The claimant testified that Dr. Olive told her that if her pain persisted she should see her family doctor. Although Dr. Olive's office notes say that he wants to see her back in two weeks, no return appointment was made.

On September 7, 2006, Claimant presented to Dr. Papaiah Sreepada, a neurologist at Ferrell- Duncan Clinic in Springfield, MO. She was complaining of severe neck pain, shoulder pain, and musculoskeletal pain and spasm. In his exam she had cervical tenderness, left shoulder tenderness, and decreased range of motion in her left arm. X-rays of the left shoulder and an MRI of the cervical spine were performed. An EMG of the left arm showed a winging of the scapula and paralysis of some of the muscles. On October 20, 2006, Dr. Sreepada noted that she was still experiencing a lot of pain. He believed that Claimant had a brachial plexus injury with winging of the scapula that affected the long thoracic nerve with marked weakness of the serratus anterior muscle, suspicious of complex regional pain syndrome and right lower extremity radicular symptoms. His plan was to do an MRI of the brachio plexus on the left side, increase

her Neurontin, Lidoderm patch to apply to the left shoulder area, and extensive physical therapy. None of the treatment performed by Dr. Sreepada was authorized by the employer and insurer and was paid for by claimant's health plan.

On November 30, 2006, Claimant saw Dr. Salim Rahman and Dr. Jeffrey Woodward at Springfield Neurological and Spine Institute. Dr. Rahman saw her for a neurological consultation for her neck pain. He examined her and reviewed the MRI of the cervical spine which showed osteophyte disc complex at C3-4 without spinal canal or foraminal stenosis. He determined that cervical radiculopathy did not exist. Dr. Rahman concluded that the claimant probably had a brachial plexus injury. Dr. Woodward performed repeat EMG/nerve conduction studies that showed severe spinal accessory neuropathy and apparent suprascapular neuropathy consistent with brachial plexus neuropathy. There was no evidence of left cervical radiculopathy. The treatment by Dr. Rahman and Dr. Woodward at Springfield Neurological and Spine Institute on November 30, 2006 was not authorized by the employer and insurer and was paid for by claimant's health plan.

In December 2006 and January 2007, claimant was seen at Barnes-Jewish Hospital/Washington University Orthopedics. On December 13, 2006, Dr. Leesa Galatz, found her injuries consistent with typical long thoracic nerve injury. Her recommendation was electromyogram of her long thoracic nerve as well as suprascapular and a splint for nerve recovery. She suggested if it did not improve her condition, they could perform a pectoralis major transfer. Dr. Susan MacKinnon saw her on December 16, 2006, and noted a marked winging of the scapula. Dr. Heidi Prather examined claimant on December 26, 2006. Her impression was left scapular winging post high velocity injury. Injections were performed. On January 23, 2007, claimant returned for more EMG and nerve conduction studies.

Claimant testified that Dr. Galatz considered a pectoris tendon transfer. Claimant testified she discussed another outside referral with the doctors. Dr. Rahul Nath, a surgeon affiliated with the Texas Nerve and Paralysis Institute was shown in a video that the physicians at Barnes-Jewish Hospital/Washington University Orthopedics showed Claimant. The single visit to Dr. Heidi Prather on December 26, 2006 was authorized by the employer and insurer. The remainder of the unauthorized treatment was paid for by claimant's health plan.

On February 6, 2007, claimant saw Dr. Nath at his office in Texas and on March 1, 2007, he performed surgery consisting of upper trunk of brachial plexus neuroplasty, upper trunk of brachial plexus internal neurolysis, partial anterior scalene muscle resection, long thoracic nerve neuroplasty, long thoracic nerve internal neurolysis and partial middle scalene muscle resection at Hermann Hospital in Texas. The surgery consisted of a brachial plexus neuroplasty and a long thoracic nerve neuroplasty. She followed with Dr. Nath at his office in Chicago. He also recommended water therapy. Claimant initially had improvement from this surgery but it was only for a short time and her pain returned. None of the treatment with Dr. Rahul Nath was authorized. The unauthorized treatment was paid for by claimant's health plan.

Dr. Rahman saw her for on August 7, 2007. MRIs of the lumbar spine and pelvis were performed. These were unremarkable. He recommended referral to a pain clinic.

Claimant started treating with Dr. Glenn Kunkel of Central Missouri Pain Management/Phelps County Regional Medical Center on September 20, 2007. Claimant presented with decreased sensation in her left hand, she was only able to lift her left arm to 35 degrees and it was painful. She also complained of right sided headaches, left arm numbness, cervical pain, and radiating pain in her left arm. His assessment was brachial plexus injury. He ordered cervical epidural steroid injections at C3-4 and refilled Vicodin and Lyrica. Claimant continued to treat with Dr. Kunkel through August 17, 2012. This treatment has included

medications, including Lyrica, OxyContin, Neurontin, MS Contin, and MSIR; EMG/nerve conduction studies; and a series of injections, including C-spine facet joint injections and epidural steroid injections. None of the treatment with Dr. Kunkel was authorized. The unauthorized treatment was paid for by claimant's health plan.

Dr. Christopher Farmer examined her on December 14, 2007. His assessment was left shoulder labral tear, left shoulder subluxation, left scapular winging, cervical spine disease, and probable neuropathy in the left upper extremity. Dr. Victor Wilson saw the claimant on December 17, 2007, for a second opinion. His impression was status post brachial plexopathy with a history of long thoracic nerve repair and significant scapular winging. He noted she was already set up to see Dr. Farmer and Dr. Yamaguchi in St. Louis for additional input from a surgical standpoint. This treatment was unauthorized. The unauthorized treatment was paid for by claimant's health plan.

Claimant saw Dr. Erich Lingenfelter, who is affiliated with North Kansas City Hospital and Northland Bone and Joint, on March 19, 2008. Dr. Lingenfelter's assessment was serratus anterior dysfunction with scapular winging and trapezius palsy from upper trunk strength. He noted two options, a scapulothoracic fusion or a combined pectoralis tendon transfer and levator transfer. Her prognosis was guarded but the latter would probably eliminate the scapular winging and restore some stabilization.

On April 21, 2008, the claimant saw Dr. Christopher Miller, an orthopedic surgeon, for an independent medical examination at the request of the employer and insurer. He also testified by deposition. In his physical exam he found obvious scapular winging, even at rest; hypersensitivity to light touch; and a significant limitation in her range of motion. His impression was "status post motor vehicle accident which has resulted in a brachial plexopathy which appears to be involving both the long thoracic nerve as well as the spinal accessory nerve

based on the inability to shrug her shoulder. The surgery on her long thoracic nerve was only partially successful, and she continues to have significant winging due to serratus anterior palsy, as well as to the trapezial dysfunction.” In his opinion the motor vehicle accident was the prevailing factor resulting in her present condition. He also agreed with her course of treatment, including the surgery by Dr. Nath. He also agreed with the planned tendon transfers by Dr. Lingenfelter. He also felt that trying to fix the torn labrum at that time, before restoring adequate scapular function, was likely to fail.

He testified that he recommended a stellate ganglion block in the neck to try to alleviate symptoms that might be coming from the reflex sympathetic dystrophy. He also recommended no overhead use of the left arm, no lifting greater than five pounds, and no repetitive use of the arm.

On May 13, 2008, Dr. Lingenfelter performed surgery consisting of an Eden-Lange procedure which consisted of muscle and tendon transfers and Achilles tendon graft. The employer and insurer initially authorized this surgery but the morning it was scheduled they changed their mind and unauthorized it after the surgery was already in progress. None of Claimant’s treatment with Dr. Lingenfelter was authorized. The unauthorized treatment was paid for by claimant’s health plan.

Claimant had continued to work for the employer with the accommodations given by her boss. She stopped work shortly after the aforementioned Eden-Lange procedure when her employer in Houston, Missouri completely went out of business at this time. Claimant testified that she did not apply for work anywhere else. She did not apply for unemployment benefits because she did not believe she could consistently work eight hour days. She has not worked since this time.

On July 21, 2008, Dr. Miller states in his notes that it was okay for the claimant to continue treating with Dr. Kunkel who she has seen in the past for pain management. He also testified that he endorsed her continuing pain management with Dr. Kunkel. Claimant saw Dr. Miller again on August 18, 2008. At this time he thought there was “certainly an element of reflex sympathetic dystrophy.” On September 15, 2008, he did not believe that her labral tear should be repaired and opted for non-operative management of that. He felt that she would benefit from seeing a multimodal pain management specialist. He recommended Dr. Tom Brooks and felt she should continue to see him long term after being released by both himself and Dr. Lingenfelter.

On November 7, 2008, Dr. Miller found claimant to be at maximum medical improvement. Other than ongoing pain management he had no other treatment to recommend and released her. He stated again that she should continue with chronic pain management. He assessed 100% disability to Claimant’s left shoulder at the 232-week level, which corresponded to 60% disability to the body as a whole. He also assessed permanent restrictions of no overhead use of the left arm, no lifting greater than one pound, and no repetitive use of the left arm.

On March 31, 2009, Dr. Shane Bennoch performed an independent medical evaluation at the request of the claimant. He also testified by deposition. He diagnosed a motor vehicle accident with injury to the left shoulder, brachial plexus stretching with brachial plexopathy; long thoracic nerve paralysis involving muscle invasion to the scapula resulting in scapular winging; neurolysis and neuroplasty of the upper trunk of the brachial plexus with anterior scalene muscle resection and long thoracic nerve neuroplasty; scapulothoracic fusion with tendon transfers to the shoulder and scapular area; comprehensive regional pain syndrome left upper trunk; and depression. He felt she had reached maximum medical improvement and rated her with a permanent partial disability of 70% to the body as a whole referable to the left upper trunk and

shoulder area and 10% of the body as a whole for depression. He also imposed restrictions consisting of no lifting or carrying with her left arm at all, no pushing or pulling with her left arm, never climb stairs, balance, kneel, crouch, crawl or stoop, as well as manipulative limitations of limited reaching, handling, fingering and feeling with her left arm and hand. He concluded she would be unable to work in any type of gainful employment.

Dr. Bennoch felt that the claimant was having a combination of brachial plexus pain that pre-existed her surgery with Dr. Lingenfelter and following the surgery developed comprehensive regional pain syndrome. He testified that although the medications she was taking caused her pain to be dulled, “certainly not removed, by some fairly strong pain meds which she’s going to need for the foreseeable future. But pretty much any of the medicines that we’d normally think of that would treat nerve pain or just pure unadulterated pain would be appropriate for her at least to try. They may not be successful.” In his opinion, it was worthwhile to try the stimulator, commenting: “The problem is there’s really not much that’s been found to be successful for the complex regional pain syndrome, but you may help with the brachial plexus pain. It’s just hard to sort those out, and the only way to know that is to try it and see.” He recommended a second opinion be obtained on the stimulator because it is such a big step for someone with complex regional pain syndrome, but not an unreasonable approach.

He also said that the dramatic changes in her life had resulted in depression for her “and in my opinion she needed treated for that, again long-term, because there’s really no significant light at the end of this tunnel from the standpoint of pain relief.”

Dr. Terry Winkler, examined the claimant and issued a report, including a life care plan, dated October 7, 2009. Dr. Winkler is board certified as a wound care specialist, in spinal cord injury medicine, and physical medicine and rehabilitation. He testified by deposition taken on February 14, 2012. Dr. Winkler found she had two types of pain, nociceptive pain, a sharp

stabbing pain, and neuropathic pain, which is burning in nature. He said the neuropathic pain has features very similar to complex regional pain syndrome type 1, formerly known as RSD or reflex sympathetic dystrophy. He was convinced she had this condition over her left shoulder.

Dr. Winkler described the four criteria for making a diagnosis of complex regional pain syndrome. First is an initiating noxious event or cause of immobilization. He felt this was met by the motor vehicle accident that clearly caused an injury to claimant's shoulder for which she was put in a sling and immobilized. Second, there must be presence of pain that is ongoing, and can have either allodynia or hyperalgesias with it. This pain also needs to be disproportionate to the original injury. He said she obviously has ongoing pain of this nature. Third, there needs to be evidence of edema or changes in the skin over the area. This must be present at some point, but not necessarily at all times and may change appearance. This indicates an abnormality in the way the blood flows to the area. And the fourth and final criterion is that there is not some other diagnosis that better explains the condition.

He concluded that there was no other condition that explained the claimant's condition better, commenting, "now, you could make an argument for this is not Complex Regional Pain Syndrome; this is neuropathic pain meaning that is caused from a focal nerve injury and that nerve itself continues to cause the problems, and that diagnosis to me, it wouldn't make much difference which one you called it. The outcome or the effect is the same in her life and the type of pain she is experiencing."

Dr. Winkler explained the mechanism of how muscles hold the shoulder blade in place and the effect injuring a nerve has on loss of control of the muscles. He explained that because the brachial plexus that she injured innervates these muscles this caused the muscle to atrophy and the claimant's winged scapula occurred. He further elaborated that "the brachial plexus comes out at C5, 6, 7, 8 and T1 in the neck, and the shoulder girdle itself, the anterior shoulder

muscles, pectoralis muscles and the posterior shoulder muscles and even the deltoid, all those muscles are innervated roughly with C5 and C6 innervations, and so I mean this – and this is exactly the nerve roots that were partially damaged in her.”

Dr. Winkler found she benefits from using compression type of garments that give deep pressure and relieve her of the light touch sensations. He also felt she needed a multi-disciplinary pain management type program in the future as well as a separate occupational therapy program. He further felt that psychological counseling would be necessary for her to deal with the life changes that the chronic pain has caused. Home modifications and vehicle modifications would be helpful for her. In addition, Dr. Winkler felt that she would need future support services to assist her perform the activities of daily living that her family is helping her do at this time.

Dr. Winkler testified that he did not feel she could be competitively employed. He also found the work she performed for the employer was very accommodating and the only reason she was able to return to work was due to her very benevolent boss.

He testified that the treatment the claimant had received and the associated billing was fair and reasonable. Although it did not all cure her injury it did relieve it. On cross-examination, he testified that it is reasonable to try treatments and that if they don't work it doesn't mean it wasn't the right thing to try. Although the outcome wasn't good it doesn't mean the care was not appropriate.

Dr. John Graham performed an independent medical evaluation on the claimant at the employer and insurer's request on April 18, 2011. Dr. Graham also testified by deposition. Dr. Graham testified that his specialty is pain management. He testified that he did not have any publications or fellowships beyond his basic medical school training. After six months in an anesthesia residency he felt he had carried out pain management services for six months so he did

not see anything to be gained from a obtaining the one year pain management fellowship. He is also not board certified in any area.

At the time claimant saw Dr. Graham she had already undergone surgery with both Dr. Nath and Dr. Lingenfelter. Dr. Graham is the only physician the claimant has seen who does not believe she has complex regional pain syndrome. Dr. Graham concluded that Claimant did not have Complex Regional Pain Syndrome because neither his evaluation of Claimant nor his review of medical records prepared by Dr. Kunkel, Dr. Lampert, Dr. Brooks, Dr. Rieth, Dr. Lingenfelter and Dr. Farmer substantiated a finding of Complex Regional Pain Syndrome. According to Dr. Graham, Complex Regional Pain Syndrome can only be diagnosed when there is no other explanation for a patient's complaints. The brachial plexus surgery performed by Dr. Nath and the Eden-Lange surgery performed by Dr. Lingenfelter provided alternative explanations for Claimant's shoulder problems.

Dr. Graham also does not believe that most of the treatment she has received has been reasonable and necessary. He testified that he had never seen the Eden-Lange surgery carried out for a long thoracic nerve injury. Winged scapulas, according to him, are more cosmetic and the real problem would be weakness rather than pain. He testified that typically it will improve with time. He did not find the pain medications effective because she was still having pain. Dr. Graham also recommended claimant stop all the medications she is taking and then he would only prescribe Neurontin.

Dr. Graham saw her before the nerve root stimulator was attempted. He testified that he did not think it was reasonable for several reasons. He did not believe that all medicinal therapies had been exhausted, namely he was suggesting Neurontin, although claimant had previously been found to be unable to use this medication. He also suggested an antidepressant. But he did find all surgical and physical therapy options had been exhausted. Moreover, he

specifically testified that it would not make her condition go away, it would only treat the subjective pain, and “so, if you’re put this in, a stimulator in, you’re putting a stimulator in for the subjective complaints of pain. You’re not going to make her function better. You’re not going to make the long thoracic nerve injury go away. All you’re doing is trying to make the subjective complaint of pain better.”

Claimant went to Dr. Norregaard at the University of Missouri-Columbia between May 27, 2011 and June 16, 2011. Claimant testified that on or about June 7, 2011 Dr. Norregaard implanted a spinal cord stimulator. However, that procedure was a failure as the spinal cord stimulator did not provide any pain relief. When Claimant turned the stimulator up, she suffered from muscle contractions and headaches. Due to the fact that the spinal cord stimulator trial was a failure, Dr. Norregaard removed the stimulator on June 16, 2011. None of Claimant’s treatment with Dr. Norregaard was authorized.

When asked about Dr. Graham’s opinion, Dr. Winkler testified that Dr. Graham was making a common mistake in believing that all the signs and symptoms of complex regional pain syndrome must be present when he saw her for her to have it. He said, “If he would spend five minutes reading the Diagnostic Guide that’s published by the international association of physicians who study pain, he would know that’s not true.” He also disagreed with Dr. Graham’s opinion that the narcotics were not benefiting the claimant and should be stopped. Dr. Winkler said that because the claimant has reported that the medications relieve her pain they should not be stopped. He said, “you know, for me personally, the worst thing in the world you can do to a human being is ignore their pain and suffering and not offer the things that we have available to us that can help a little bit. We can’t get rid of her pain, but we can reduce it 20 percent or 30 percent, and it’s unconscionable to me that a physician would suggest we shouldn’t do that.”

Dr. Kunkel testified by deposition. He explained the stages of complex regional pain syndrome and how he diagnosed the claimant. He said, "Skin color would be an early stage. Hair, nails are late stages. Swelling, atrophy, those are late stages." When diagnosing this condition, he said you first need an injury, which resolves so there is no ongoing injury, such as a fracture that heals. Then you would find allodynia, which is light touch that causes pain. You also need some vasomotor changes, so that the color changes.

Dr. Kunkel explained that initial stage is just allodynia and the vasomotor changes. Later stages you start getting cool extremities, darkened extremities, no sweating, hair loss, nail changes, osteoporosis even if they don't move it. He said if it is caught in the early stage it can perhaps be treated.

Dr. Kunkel also explained that the claimant had two types of pain, nociceptive and neuropathic. Nociceptive pain is very susceptible to narcotics. It is somatic pain that is viscera, which you get from things like broken bones, tendons, etc. Claimant has nociceptive pain from her shoulder injury. Neuropathic pain is pain from nerves. Claimant has this from her nerve injuries. Dr. Kunkel did not feel he was making much headway on the neuropathic pain so he referred her to Dr. Norregaard to attempt a spinal cord stimulator because the literature supports that spinal cord stimulation can help with brachial plexus injuries. He said Dr. Norregaard would try peripheral treatment, the stimulator. If that did not work then try motor cord stimulation. He said "if all that doesn't work, then he alluded to the fact that he could do a cordotomy, which again is a centralized treatment. We have to talk to him about that. Where they actually go into the cord and try to ferret out the nerves that -- basically the spinocortical nerves, the spinocortical tract nerves that would basically control the pathways to the brain." He explained it was a radical treatment and not one done on individuals unless they have a limited life span, such as cancer patients, because it is not permanent and when the pain returns it is much worse.

He recommended continuing to administer drugs to alleviate her pain. He might switch to OxyContin or Thera-Gesic patches. He did state that he was not certain she had RSD or complex regional pain syndrome but she does have neuropathic pain. He testified that he would continue to treat her with the same techniques he has been using as he does not have much else to offer her, saying, "It's just up to Dr. Norregaard and if someone wants to trial Prialt on her."

Claimant went to Dr. Buenger at Piasa Pain Center in Alton, Illinois on October 21, 2011. None of Claimant's treatment with Dr. Buenger was authorized.

Claimant testified that she continues to receive treatment from Dr. Kunkel. She said that his treatment reduces her pain by 20-30%. She is required to see the doctor every 4-6 weeks for an examination and testing to determine if the medications are properly in her system. Prior to the accident she was active and participated in hunting, floating, fishing, riding four wheelers, golfing, caving, and gardening. At present she will go with her son and ride in the golf cart while he plays golf. She will watch her husband garden but does not do any herself. She has problems with household chores and cannot do laundry, vacuum, mop, wash mirrors up high or wash dishes. She cannot ride in a car for more than 15 minutes on a straight flat road before her pain increases. After 25 minutes it becomes almost unbearable. She must stop and get out or take more medication.

Her husband has to help her take a shower to wash her hair. She uses different wash cloths and towels to avoid hurting her skin. She air dries her hair. She needs help dressing with such things as changing her bra and if there are buttons or pulling involved. She can wear her old clothing if she uses compression garments because clothing irritates her skin. She described this as feeling like a grater cutting her skin. She tries to avoid people touching her. Her left arm is shiny and white, without hair, colder, and sensitive from her wrist up. She has a scar on her neck from Dr. Nath's surgery. At the time of the hearing I assessed four weeks of disfigurement.

She has constant burning and stabbing pain which she describes as feeling like a hot knife is being shoved into her chest wall. She does not think she is depressed but understands the doctors have alluded to it. She would attend counseling if she could afford it. Her memory is not as good as it was before and she must write things down. Her concentration is also diminished. Cold weather also increases her pain. She has trouble sleeping. Some days are worse than others. Some days she has to lay in her recliner and the pain will become so bad it will cause her to throw up if she moves too much.

She cannot raise her arm in front of her or over her head. She cannot scratch her back. Rotation of her head to the left is restricted.

Claimant's husband, Stanley Huff, testified as to her activity level before and after the injury. He also testified to receiving a call from the workers' compensation carrier after the claimant had gone into surgery with Dr. Lingenfelter. The surgery was in process when the insurance company called to inform him that the surgery had been unauthorized.

Wilbur Swearingen, a certified vocational rehabilitation counselor, evaluated Claimant on September 2, 2009, and December 21, 2010. He testified by deposition. His is the only vocational opinion offered. Mr. Swearingin interviewed the claimant, reviewed medical records and depositions, and documents. He said she a high school degree and about forty college hours. He noted her chief complaint was constant pain in her left shoulder, left upper back, and left neck. She has some back pain and numbness in her right hand. Also, he found sleep was very problematic for her. She denied being depressed but he found her to seem medicated.

He considered the permanent restrictions of Dr. Miller of no overhead motion of the left arm, no lifting greater than one pound, and no repetitive use of the left arm. Also, Dr. Bennoch's statement that she was unable to lift or carry with her left arm at all and reaching, handling, fingering, feeling she could not do. Mr. Swearingin testified that in addition to not having any

function with her left arm, he said that due to the amount of medication she takes, driving would not be recommended.

Mr. Swearingin concluded, “This lady is just not employable in the competitive labor market. It goes to the issues, number one, of her chronic pain issues; secondly, it goes to the amount of narcotic medication that this lady is using. You know, you lose – pain is something that impacts our attention, concentration and productivity – a negative impact when we have chronic pain...This lady’s amount of medication makes it dangerous for her to drive or commute even to and from work, and we have the issue that she still has a lot of pain and the impact of these medications, and I think those two things would very clearly make this lady incapable of competitive employment.” When asked about the possibility of the claimant performing one hand work, he answered, “If that – if that were as simple in this case, that, given the kind of thing she does, might allow her to work, but I have issues with that, to do that, to accomplish that, I’ve got to do something about the amount of pain this lady experiences and something about the narcotics she takes. Even if she didn’t use the arm very much and functioned – she might function right-handed, but then we have the issues of the level of her pain and the amount of medication that she’s on. So I think it’s really the – it’s not inability to use the arm as much that makes her unemployable as it is the pain and the medication.” He said even if she wasn’t taking the narcotics she would not be employable due to the amount of pain she has, “without resolution of really both of those, she’s not functional.”

Claimant filed a third-party lawsuit in Webster County, Missouri against Elizabeth Carter, the other driver involved in the subject motor vehicle accident. The jury assessed \$1,000,000 in damages in that third party case. After considering comparative fault, Claimant was found to be 25% at fault and Ms. Carter 75% at fault. Claimant entered into a post-judgment settlement with Elizabeth Carter and was paid \$580,000 in settlement of her third party claim. The parties to this

action stipulated that Claimant incurred \$235,479.33 in attorney's fees and expenses in that third party case.

The claimant testified that Dr. Olive told her that if her problems continued she was to see her family doctor, which she did. She also testified that she notified her employer and requested treatment prior to obtaining treatment on her own. This is supported in part by Exhibit G. Claimant testified that she went to providers as directed by her employer but because her pain and discomfort continued she sought treatment on her own after the employer was placed on notice and it was denied by the employer.

Claimant is requesting \$161,524.38 in past due medical bills as set forth in Exhibits A and B. The claimant's health care provider paid some of her medical bills. The employer and insurer are requesting a credit of this amount as they argue that these bills were paid under a self-insured health care plan. Claimant testified that she paid \$56.00 per pay period as premiums for this coverage. The employer and insurer provided no evidence to the contrary. Exhibit 10 tracks healthcare bills submitted under Claimant's healthcare plan through February 3, 2010, which pertained to a visit to Dr. Erich Lingenfelter. The last bill actually paid by the plan pertained to a visit to Dr. Kunkel on October 24, 2008.

Claimant is requesting travel expenses of \$10,141.30 as set forth in Exhibit D. She testified that she used the reimbursement rate for mileage at the lowest rate for the time period. She also testified it was necessary for her to travel by air to Dr. Nath in Houston, Texas, and Chicago, Illinois, because car travel was difficult for her due to increased pain.

As noted in Employer/Insurer's Exhibits 7 and 14, Claimant was paid total TTD benefits of \$7,830.31 and medical of \$15,369.88 (including medical benefits of \$13,671.91 and mileage benefits of \$1,697.97.) Claimant's last TTD payment was made November 7, 2008 in light of Dr. Miller's opinion that Claimant had reached maximum medical improvement on that date.

The last medical payment was on December 18, 2008 for certain prescription medications from Cypress Care. The last date Claimant's mileage was paid for before she reached maximum medical improvement was September 4, 2008.

I find Dr. Winkler, Dr. Miller, and Dr. Bennoch more credible than Dr. Graham. The employer and insurer's reliance on the opinion of Dr. Graham, in light of and in direct opposition with, the numerous other medical opinions in this case is misguided. Dr. Graham's expertise and medical reasoning simply do not hold up when compared to those of the other physicians. I do not find Dr. Graham credible and I give no weight to Dr. Graham's opinions.

Furthermore, the employer and insurer ignore the opinion of their own treating and evaluating physician, Dr. Miller. Dr. Miller is an accomplished orthopedic surgeon who has actively treated the claimant. He is in accord with the diagnosis and treatment claimant has received. Both his qualifications and his medical reasoning are far superior to that offered by Dr. Graham. I find Dr. Miller very credible and Dr. Graham not. Therefore, give I Dr. Miller's opinions significant weight.

After carefully considering all of the evidence, I make the following rulings:

1. Whether the employer is obligated to pay past medical expenses and including any credit due to the employer because of self-insured health care.

I find that the claimant gave the employer notice and opportunity to provide treatment prior to obtaining it on her own. After her initial visit with Dr. Olive he wanted to see her back in two weeks for follow-up but his own records state that no appointment was made. Claimant testified that he told her to see her family doctor if she did not improve, which she did. I find due to her condition, including her substantial pain, that it was reasonable for her to seek treatment for her condition.

Claimant has incurred past due medical expenses of \$161,524.38, as set forth in Exhibits A and B.

I therefore find that the employer is obligated to pay claimant past medical expenses of \$161,524.38. I further find that it was reasonable and necessary for her to incur travel expenses of \$10,141.30 and order she be reimbursed for these amounts.

The employer and insurer are requesting credit for the amounts paid by claimant's health care plan pursuant to *Lenzini v. Columbia Foods*, 829 S.W.2d 482, 485, *overruled on other grounds* (Mo.App.W.D. 1992), which sets forth that the employer and insurer are entitled a credit for payments made through its own self-insured medical plan, which is fully funded by the employer. In this case the claimant was required to pay a premium for her coverage. In order to be "fully funded" it must be precisely that, paid entirely by the employer with no contribution from the claimant. Therefore, this plan does not qualify as fully funded and the employer and insurer are not entitled to a credit.

2. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.

All of the doctors in this case, excluding Dr. Graham, agree that Claimant needs some form of future medical treatment. I find the evidence overwhelming that the claimant will continue to require future medical treatment to cure and relieve her of the effects of her injuries. While this treatment may not necessarily "cure" her condition, it relieves her of the ongoing nociceptive and neuropathic pain resulting from the brachial plexus injury she sustained in the motor vehicle accident on August 8, 2006, and the complex regional pain syndrome that she has subsequently developed as a result.

I further find that it would be detrimental to the claimant to change the course of treatment she is currently receiving or to change the physicians who are currently providing this

treatment. I find that the employer and insurer have waived their right to choose the providers by their past conduct of both failing to provide her with treatment when requested and recommended by both unauthorized physicians and those they authorized for both evaluation and treatment. They further continued to seek yet another opinion from Dr. Graham after they had received the independent medical evaluation from Dr. Miller. Therefore, the employer and insurer shall provide further medical treatment as recommended by Dr. Kunkel or other providers of claimant's choosing to cure and relieve her of the effects of her injuries.

3. The nature and extent of permanent disabilities.

Based on the opinions of Dr. Winkler, Dr. Bennoch and Mr. Swearingin, I find that as a result of the injury of August 8, 2006, the claimant is unable to compete in the open labor market and that no reasonable employer would hire or maintain employment of her. Therefore, I find the claimant is permanently and totally disabled as result of this injury. The claimant reached maximum medical improvement on November 7, 2008, and temporary total disability benefits were terminated. The employer and insurer are to pay her past weekly benefits from November 8, 2008, to the last date of hearing, December 15, 2012, for 214 1/7 weeks totaling \$65,581.25 14 and \$306.25 to the present and into the future according to law.

4. Any disfigurement to be assessed.

At the time of the hearing I examined the claimant's left upper extremity and a scar on her neck and assessed a total of four weeks disfigurement. The employer and insurer are obligated to pay this in addition to permanent disability.

5. Any subrogation due to the employer and insurer from the third party settlement, including whether any future credit will include future medical payments.

A jury awarded the claimant \$1,000,000 and found her to be at 25% fault in the third party lawsuit against Elizabeth Carter. The parties agree that in a post trial settlement, the

claimant received \$580,000 to her and incurred attorney fees of \$235,479.35. Claimant was paid TTD benefits of \$7,830.31 and medical of \$15,369.88 (including medical benefits of \$13,671.91 and mileage benefits of \$1,697.97), for a total amount paid of \$23,200.19.

Section 287.150.1 RSMo. states: “[w]here a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover.” Missouri law further recognizes that “a claimant should not be allowed to keep the entire amount of both his compensation award and his common law damage recovery.” *Ruediger v. Kallmeyer Brothers Service, 501 S.W.2d 56, 58 (Mo. banc. 1973).*

Section 287.150.3 states: “After the expenses and attorney fee have been paid, the balance of the recovery shall be apportioned between the employer and the employee or his dependents in the same ratio that the amount due the employer bears to the total amount recovered if there is no finding of comparative fault on the part of the employee, or the total damages determined by the trier of fact if there is a finding of comparative fault on the part of the employee.”

Kerperien v. Lumberman’s Mutual Casualty Company, 100 S.W.3d 778 (Mo. banc. 2003) dealt with applying the formula set forth in *Ruediger, 501 S.W.2d at 58*, when comparative fault is found against the employee. Accordingly, the amount due to the employer for amounts paid is calculated as follows:

1. \$580,000 [Gross Recovery] - \$235,479.33 [Attorney’s Fees/Expenses] = \$344,520.67 [Net Recovery]
2. \$23,200.19 [Employer’s Payment] / \$1,000,000.00 [Total Damages] = .0232001 [Ratio]
3. \$344,520.67 [Net Recovery] X .0232001 [Ratio] = \$7,992.91 [Amount Owed to Employer]

Section 287.150.3 RSMo. further states: “Any part of the recovery found to be due to the employer, the employee or his dependents shall be paid forthwith and any part of the recovery paid to the employee or his dependents under this section shall be treated by them as an advance payment by the employer on account of any future installments of compensation in the following manner: (1) The total amount paid to the employee or his dependents shall be treated as an advance payment if there is no finding of comparative fault on the part of the employee; or (2) A percentage of the amount paid to the employee or his dependents equal to the percentage of fault assessed to the third person from whom recovery is made shall be treated as an advance payment if there is a finding of comparative fault on the part of the employee.”

The statute is to be strictly construed, so “the amount that is paid to the employee” is relevant in applying subsection (2) regarding advance payments, not the amount of the judgment. Therefore, Employer is owed \$7,992.91 at this time based upon benefits it has paid to date. The remaining \$336,527.76 [\$344,520.67-\$7,992.91] is apportioned to Claimant. However, pursuant to Section 287.150.3(2), RSMo., 68% of that amount shall be treated as an advance payment by the employer of any unpaid past and future compensation benefits, including future medical expenses, it is ordered to pay. As such, Claimant is deemed to have received an advance payment of \$228,838.87. I find that the claimant is owed the following which are an advance on this payment:

Past unpaid medical expenses:	\$161,524.38
Travel expenses:	10,141.30
Past PTD 214 1/7 weeks	65,581.25
4 weeks disfigurement	<u>1,225.00</u>
Total	\$238,471.93

The claimant has received an advance payment of \$228,838.87. This advance is insufficient to cover these past due benefits and a balance of \$9,633.06 remains and is due to the

claimant. *See generally McCormack v. Stewart Enterprises, Inc., 916 S.W.2d. 219, 224-26 (Mo.App. W.D. 1995)*

Attorney for the claimant, Jay Cummings, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Made by: /s/ Margaret Ellis Holden
Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation