

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

Injury No.: 00-162891

Employee: Kim M. Hulsey
Employer: Hawthorne Restaurants
Insurer: Argonaut Great Central Insurance Company
Date of Accident: December 1, 2000
Place and County of Accident: Franklin County, Missouri

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 November 2, 2006. The award and decision of Administrative Law Judge Kevin Dinwiddie, issued November 2, 2006, 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 7th day of June 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified. I believe

the administrative law judge erred in concluding that employee failed to meet the burden of proof on the issues of accident and medical causation with regard to her lower back injury.

Employee has the burden of proving all the essential elements of a claim for workers' compensation benefits by reasonable probability, not absolute certainty. *McDermott v. City of Northwoods Police Dep't*, 103 S.W.3d 134, 138 (Mo.App. E.D. 2002). Employee must prove not only that the accident arose out of and in the course of his employment, but that the alleged injury was directly caused by the accident. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 279 (Mo.App. E.D. 1997) (overruled on other grounds).

The administrative law judge found that employee proved that she suffered an accident on December 1, 2000; however, found that her back injury and later fusion were not medically causally related to the alleged accident. Competent and substantial evidence supports a finding that employee did suffer a back injury on December 1, 2000 and that her later fusion was a direct result of that injury.

Employee consistently reported an onset of symptoms that occurred following the injury, including severe back pain as well as a numb sensation that radiated down through her lower extremities, predominantly on the right. Furthermore, employee has established through medical evidence that the work injury sustained on December 1, 2000, was the substantial factor in the cause of employee's back injury.

An MRI taken after the accident on July 23, 2001 showed a dominant disc protrusion at L5-S1 centrally within the canal as well as smaller focal protrusions centrally at L4-5 and L3-4. The MRI of the sacroiliac joints showed no specific sacroiliac pathology. Employee underwent physical therapy as well as trigger point and epidural steroid injections which provided some alleviation of her symptoms temporarily. Employee experienced re-exacerbation of her symptoms when she bent over and experienced a snapping sensation in her back. As a result, employee was taken to the emergency room where x-rays were taken of her spine and an injection was administered.

Employee's surgeon, Dr. Raskas, ordered another MRI performed on August 27, 2003 which revealed multilevel degenerative disc and facet disease; a small focal central protrusion at L5-S1; and a mild protrusion that lateralizes slightly to the right at L2-3. The myelogram CT revealed a bulging disk at the L4-5 level. After reviewing her MRI and CT, Dr. Raskas recommended surgery which was performed on May 14, 2004. Employee underwent a complete discectomy as well as an anterior lumbar interbody fusion at L4-5 and L5-S1.

However, postoperatively employee developed a hematoma of her left groin which caused acute left pelvic deep venous thrombosis of the iliac system. She was placed on medication and treated with anticoagulant and thrombolytic therapy.

Dr. Cohen opined that employee's herniated disc at L5-S1, right lumbosacral myofascial pain disorder, right lumbar radiculitis, and deep venous thrombosis were causally related to her work-related accident. He further opined that her work injury was a substantial factor in her disability and that she was in need of additional treatment. Dr. Cohen acknowledged that employee did suffer from degenerative disc disease; however stated that employee's back surgery was performed as a result of employee's back trauma due to her work accident. Dr. Cohen based his opinion on employee's medical records as well as his examinations of employee and a thorough medical history. Dr. Cohen's testimony was credible as he gave a thorough and reasonable explanation for the expert medical opinion he rendered.

I find the medical opinion offered by Dr. Cohen more persuasive than that of Dr. Lange. Dr. Lange evaluated employee at the request of employer and opined that employee suffered a right sacroiliac joint injury as a result of falling on the side of her pelvis. Dr. Lange acknowledged that his diagnosis of sacroiliac joint injury could prove to be incorrect in the event the fusion resolved employee's pain complaints. Dr. Raskas's notes indicate that after her surgery employee reported significant improvement with regard to her condition including a decrease in her pain levels.

Despite the compelling evidence, the administrative law judge found that employee was not entitled to unpaid or future medical benefits. However, employee was able to show that her back surgery was necessary to cure and relieve her from the effects of her injury and that there is a reasonable probability that she may need additional medical treatment by reason of her work-related accident. Consequently, employee is entitled to reimbursement

for expenses associated with employee's treatment including back surgery and post-operative complications as well as future medical care necessitated by her condition.

Employee has met her burden of proof by establishing that she suffered a work-related injury on December 1, 2000 and that her back condition, as well as subsequent venous thrombosis, is medically causally related to the work-related injury. Accordingly, I would modify the decision of the administrative law judge to award compensation for her back and related conditions as well as unpaid and future medical benefits.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission to deny compensation for her back and subsequent conditions.

John J. Hickey, Member

AWARD

Employee:	Kim M. Hulsey	Injury No. 00-162891
Dependents:	N/A	
Employer:	Hawthorne Restaurants	Before the DIVISION OF WORKERS' COMPENSATION Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	N/A	
Insurer:	Argonaut Great Central Insurance Company	
Hearing Date:	July 26, 2006; finally submitted 8/25/06	Checked by: KD/bb

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: 12/01/00
5. State location where accident occurred or occupational disease was contracted: Franklin County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee suffered body as a whole injury at work after falling off of a chair
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: 20% permanent partial disability of the body as a whole, referable to sacroiliac joint

- 15. Compensation paid to-date for temporary disability: None
- 16. Value necessary medical aid paid to date by employer/insurer? None
- 17. Value necessary medical aid not furnished by employer/insurer? None/See Award
- 18. Employee's average weekly wages: \$300.00 per week
- 19. Weekly compensation rate: \$200.00/\$200.00
- 20. Method wages computation: by application of the law to the facts

COMPENSATION PAYABLE

21. Amount of compensation payable:

The issue as to past medical expense is found in favor of the employer. See Award.

1 and 1/7 weeks of temporary total disability at \$200.00 per week	\$ 228.58
80 weeks of permanent partial disability from Employer at \$200.00 per week	\$16,000.00

TOTAL:	\$16,228.58
--------	-------------

23. Future requirements awarded: Issue as to future medical found in favor of employer. See Award

Said payments to begin as of the date of this Award 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:

Lawrence O. Willbrand

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kim M. Hulsey

Injury No: 00-162891

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Hawthorne Restaurants

Additional Party N/A

Insurer: Argonaut Great Central Insurance Company

Checked by: KD/bb

The claimant, Ms. Kim Hulsey, and the employer and its insurer, Hawthorne Restaurants and Argonaut Great Central Insurance Company, appeared at hearing by and through their counsel and entered into certain agreements and stipulations as to the issues and evidence to be presented at hearing on the matter. The parties agree that the issues to be resolved at hearing are as follows:

Medical causation;
Liability for certain past medical expenses;
Future medical care;
Rate of compensation;
Temporary total disability; and
Permanent disability.

Ms. Hulsey appeared at hearing and testified on her own behalf. The claimant also submitted the testimony of Tina Mohr, Ashley Deutschmann, Lawrence Edward Hulsey, and the deposition testimony Dr. Raymond F. Cohen. The employer and insurer submitted the deposition testimony of David R. Lange, M.D.

EXHIBITS

The following exhibits are in evidence:

Claimant's Exhibits

- A. Certified medical records of Mid County Orthopaedic Surgery and Sports medicine (John E. Tessier, M.D.)
- B. Certified records of ProRehab, P.C.
- C. Certified medical records of HealthSouth Open MRI of West County
- D. Certified medical records of Mid County Orthopaedic Surgery and Sports Medicine (Dr. Daniel G. Sohn).
- E. Certified emergency room records of St. Luke's Hospital
- F. Certified medical records of St. Louis Spine Care Alliance (David S. Raskas, M.D.)
- G. Medical records of St. Louis Spine Care Alliance
- H. Objection sustained, not in evidence.
- I. Letter dated August 28, 2003
- J. Letter dated September 15, 2003
- K. Letter dated October 10, 2003
- L. Medical records of Missouri Baptist Medical Center May 11, 2004 to June 2, 2004
- M. Medical records of Missouri Baptist Medical Center
- N. Medical records of Missouri Baptist Medical Center
- O. Medical records of Missouri Baptist Medical Center
- P. Medical records of Missouri Baptist Medical Center 10/17/05
- Q. Medical records of Missouri Baptist Medical Center 10/29/05
- R. Deposition of Raymond F. Cohen, D.O., taken on 7/17/03
- S. Deposition of Raymond F. Cohen, D.O., taken on 11/29/05
- T. Deposition of James M. England, Jr., taken on 12/20/05

- U. Missouri Baptist Medical Center billing statement
- V. North Jefferson Co. Ambulance District billing statement
- W. Certified statement of services and charges of St. Luke's Hospital for 6/22/02
- X. Midwest Radiological Assoc. billing statement
- Y. Midwest Radiological Assoc. billing statement
- Z. Certified billing statement of Mid County Orthopaedic Surgery and Sports Medicine
- AA. Certified billing statement of ProRehab, PC
- BB. Certified billing statement of HealthSouth
- CC.: Billing statement of Signature Health Services
- DD. Billing statement of Ballas Anesthesia
- EE. Billing statement of Signature Health Services
- FF. St. Luke's Emergency Room record dated 6/22/02
- GG. Objection sustained, not in evidence
- HH. Billing statement of St. Louis Spine Care Alliance
- II: Certified billing statements of Missouri Baptist Medical Center
- JJ. Billing statement of Missouri Baptist Medical Center
- KK. Medical records of The Center for Cancer Care and Research
- LL. List of medications

Employer and Insurer's Exhibits

- 1. Deposition of David R. Lange, M.D., taken on 12/6/05

FINDINGS OF FACT AND RULINGS OF LAW

Ms. Kim Hulsey, 47 years old as of the date of hearing in this matter, has worked as either a waitress or as a bartender since the age of sixteen. Prior to her work injury on 12/01/00, Ms. Hulsey had been working for a year and a half as a waitress at Hawthorne Restaurants. Claimant recalls that while standing on a chair at the restaurant putting up Christmas garland with a staple gun, she attempted to step onto the arm of the chair for leverage, causing the chair to flip, and causing the claimant to fall to the floor. Claimant recalls suffering from a bad burning sensation on her right side to her hip, but continued to work for another hour before going home. Claimant recalls that evening, a Friday, she was unable to lift her right arm to hang up clothing, and that her back and rear end were both hurting bad. Claimant recalls returning to work the following Tuesday while tolerating pain into her back and hip.

Claimant recalls that she had good and bad days thereafter, but was still having complaints of pain around Christmas of 2000, when her request for medical treatment was denied by Kathy, one of the owners of the restaurant.

Claimant was referred by a neighbor to Dr. Tessier, and the first medical evaluation of Ms. Hulsey post her accident on 12/01/00 was performed by Dr. Tessier on 1/11/01 (See Claimant's Exhibit A). Dr. Tessier took a history of injury; had x-rays taken of the lumbar spine; performed a physical examination; and concluded that claimant suffered from "mechanical low back pain with possible lower lumbar disc protrusion". In his notes dated 1/11/01, Dr. Tessier noted among others, that straight leg raise exam was negative bilaterally, and that the tenderness complained of was "in the right sacroiliac region with some mild tenderness at the sciatic notch on the right side only". Claimant was given a trigger point injection to her right sacroiliac joint, was prescribed physical therapy and anti-inflammatory medication, and was to have an MRI in the event of ongoing complaint as to numbness and tingling in her right leg. Ms. Hulsey attended three of six sessions scheduled at ProRehab through 2/02/01(See Claimant's Exhibit B). Claimant was advised by Dr. Tessier to remain off of work from 1/11/01 to 1/22/01. Claimant was subsequently terminated from her employment by the employer once advised she would not be able to come to work for a week.

There is no history of further treatment until 7/16/01, when the claimant returned to Dr. Tessier with ongoing complaints of an aching pain in the back of her pelvis, and of a numb sensation down the right lower extremity into the feet. The medical records indicate that on 7/23/01 the claimant had both an MRI of the lumbar spine and of the pelvis. The MRI states, in part: "Degenerative disk disease predominates at the L5-S1 level. There is a focal disk protrusion or herniation centrally within the canal, which may lateralize slightly to the left of midline". The MRI of the pelvis was interpreted as showing no specific sacroiliac pathology (Claimant's Exhibit C). On 7/26/01 Dr. Tessier reviewed the results of the MRI and suggested epidural steroid injection. The next note, dated 12/31/01, states that the claimant was now ready to proceed with epidural steroid injection. Claimant was referred to Dr. Sohn for further treatment.

Claimant met with Dr. Sohn on 1/08/02. Dr. Sohn took a history of complaint, reviewed the medical history, and prescribed physical therapy, medication, and administered a trigger point injection for what he diagnosed as sacroiliitis and myofascial pain syndrome (See Claimant's Exhibit D).

There is no further medical record in evidence until 6/22/02, when Ms. Hulsey presented to the emergency room at St. Luke's Hospital with complaints of severe right sided low back and right hip pain. Ms. Hulsey acknowledged at hearing that on 6/22/02 she was taken by ambulance to the hospital after her back "went out" and she was unable to straighten up after attempting to bend over with a towel to remove some cat poop from the carpet. X-rays of the lumbar spine showed no fracture or subluxation. Claimant was treated and discharged that same day. On 6/27/02 Dr. Tessier performed a physical examination, and noted that the claimant presented with a positive straight leg raise test at 45 degrees on the right side. He suggested epidural injection for what appeared to be right sided nerve root impingement. Claimant met with Dr. Tessier on 8/11/02, and Dr. Tessier discussed possible surgical intervention in the event epidural injection by Dr. Sohn did not work.

On 8/19/02 Ms. Hulsey returned to Dr. Sohn, and received an epidural steroid injection to her low back. On 9/03/02 Dr. Sohn met with Ms. Hulsey, reviewed the MRI, and recommended further injection to the low back at two levels. On 9/04/02 Dr. Sohn performed the two injections. Claimant returned to Dr. Sohn on 9/18/02, and reported 75 to 100% improvement in her low back.

On 6/22/03, Dr. David R. Lange, board certified in orthopedic surgery, performed an examination of Ms. Hulsey at the request of the employer's insurer. Dr. Lange solicited physical complaints from Ms. Hulsey, reviewed certain medical records, and performed a physical examination. Dr. Lange concluded that the claimant suffered a right sacroiliac joint injury as a consequence of falling on the one side of the pelvis. Dr. Lange concluded that the claimant had reached maximum medical improvement as of the date of his examination (Employer and Insurer's Exhibit No. 1, at p. 11).

Subsequent to his evaluation of Ms. Hulsey on 6/22/03, in November of 2004 Dr. Lange was provided with records relating to a spinal fusion had by the claimant. Dr. Lange also had the opportunity to see Ms. Hulsey on 6/23/05 by referral from Dr. Greco, an oncologist and hematologist in the same building who was treating Ms. Hulsey at the time. Dr. Lange notes that Ms. Hulsey completed a pain drawing that indicated that she still had right low back symptoms and right leg complaints, and similar pain levels to what she had indicated after completing the same form while seeing Dr. Lange in 2003.

As for the finding of disc herniation at L5-S1, Dr. Lange notes that the claimant had a small disc herniation centrally located and extending to the left, asymptomatic side. He notes that such disc herniation was not treated by the fusion surgery had by Ms. Hulsey, inasmuch as the herniation is posterior into the canal, and would require a posterior approach. Dr. Lange, when advised that the surgery involved an anterior retroperitoneal approach, noted that the surgery had by Ms. Hulsey was to remove the inside disc to effect fusion, and was not to treat the herniation, which would not have been seen by this anterior approach (Employer and Insurer's Exhibit 1, at pages 16-17). Dr. Lange goes on to acknowledge that his diagnosis of sacroiliac joint injury could be proved to be incorrect in the event that the fusion surgery performed on Ms. Hulsey had the effect of resolving her pain complaints.

Two months after the evaluation had with Dr. Lange on 6/22/03, Ms. Hulsey met with Dr. David Raskas on 8/25/03. Dr. Raskas took a history of complaint; reviewed certain medical records; had x-rays taken; performed a physical examination; diagnosed the claimant as having discogenic pain at the L5-S1 level; and ordered a current MRI scan. An MRI of the lumbar spine performed on 8/27/03 was interpreted as showing "1. Multilevel degenerative disc and facet disease. Small focal central protrusion L5-S1. Mild protrusion lateralizes slightly to the right at L2-3. 2. Transitional first sacral segment."

On 4/09/04 Dr. Raskas met with Ms. Hulsey to discuss various medical concerns, including as to the lumbar spine. Dr. Raskas notes that he reviewed the old lumbar MRI and states "She has some dehydration of her disks throughout the lumbar spine but the most collapsed significant one is what I would call the L5-S1 segment" (See Claimant's Exhibit F).

On 4/16/04 Ms. Hulsey had a myelogram and post myelogram CT of both the cervical and lumbar spines. The report as to the post myelogram CT of the spine speaks for itself. The only finding noted in the section entitled "Impression" is as to a "very mild stenosis at L3-4 and L4-5."

In his report dated 4/23/04, Dr. Raskas states that he reviewed the CT of the lower spine, and notes, "The L4-5 disk bulges quite a bit. The L5 and what I'll call transitional vertebra does its most collapse and is really degenerative." Dr. Raskas recommended the fusion surgery that he performed with the assistance of Dr. Arenos on 5/14/04.

The operative report, as contained in Claimant's Exhibit F, indicates that Dr. Raskas performed a complete discectomy and anterior lumbar interbody fusion of L5-S1 and L4-5. Subsequent to that operation, Ms. Hulsey suffered groin pain and swelling in her left lower extremity. Doppler ultrasounds indicated a deep venous thrombosis in the proximal, femoral, and iliac vessels.

Studies suggested that the claimant had developed blood clots in her left iliac vein and in the left common femoral artery. Claimant was put on anticoagulants. Claimant further treated for her venous condition by placement of a filter, and a stent in the left common iliac vein (See Claimant's Exhibit L).

Ms. Hulsey testified that she continues to treat with Dr. Greco, who actively monitors her use of blood thinning medication. Claimant recalls seeing Dr. Lange by referral from Dr. Greco concerning complaints she had made as to achiness in her neck and shoulders.

Ms. Hulsey testified as to a constant pain in her left side from below her breast and down her left leg. Ms. Hulsey further reports a right sided lower back ache that comes and goes. Claimant relates that sitting and standing for extended periods of time causes her to suffer pain up and down her left side, and into the left leg and abdomen area. Claimant has

pain when bending to lift from the floor, and uses a gripper to pick things up from the floor. Claimant further notes a general lack of energy, and of loss of bowel control two or three times in a week. Claimant also notes that her sleep is disturbed; that she will get maybe four hours of sleep in a night; and that she awakens exhausted in the mornings. Ms. Hulsey notes that she is unable to walk distances; that she has difficulty walking up inclines; and that her legs are often in pain.

Claimant acknowledged on cross examination that she continued to work until the event at home on 6/22/02 that caused her to seek medical treatment. Claimant further acknowledges that she worked in new home sales in 2003 and into March of 2004, for three months with McBride & Sons, and for 3 or 4 months with American Heritage.

Ms. Hulsey further relates that she has not sought any back treatment since her release from care by Dr. Raskas in March of 2005, and that the only work limitation imposed by Dr. Raskas was a 25 pound lifting restriction.

The claimant's husband, daughter, and a good friend who has known the claimant for over 20 years all testified as to their observations of the claimant both prior to and subsequent to her injury at work on 12/01/00. The witnesses all testified as to the active life led by Ms. Hulsey prior to her work injury, and as to her ongoing complaints to date as to pain, swelling in the leg, incontinence, and as to her irregular sleeping habits.

Dr. Raymond F. Cohen met with Ms. Hulsey on 2/28/02, took a history of injury and complaint, reviewed certain medical records, and performed a physical examination. Dr. Cohen concluded that the claimant suffered from a lumbar disc protrusion at L5-S1, a right lumbosacral myofascial pain disorder and a right lumbar radiculitis, all of which he related to the injury at work on 12/01/00. Dr. Cohen recommended that the claimant have a lumbosacral and pelvic bone scan; a lumbar myelogram CT; and a lower extremity EMG NCD. In the event the testing was negative, he would further recommend treatment by epidural steroid injection, physical therapy, and medication. Dr. Cohen ruled out a surgical option in the absence of any definite radicular findings (Claimant's Exhibit R, at pages 10-12).

Dr. Cohen had the opportunity to meet with Ms. Hulsey again on 10/5/04, some five or so months post her fusion surgery. Dr. Cohen became aware of the development of a deep vein thrombosis in the left leg post the surgery, and of ongoing care provided by Dr. Greco. Dr. Cohen took a further history from Ms. Hulsey as to her complaints, reviewed certain of the medical records, and conducted a physical and neurologic evaluation. Dr. Cohen concludes that the work trauma suffered on 12/01/00 caused the need for the fusion surgery, and was also the cause of the deep vein thrombosis, inasmuch as the DVT was a result of the fusion surgery.

Dr. Cohen acknowledges that one of the findings contained in the operative note of Dr. Raskas is as to the presence of severe degenerative disc disease at L5-S1 and L4-5. When asked as to the significance of such a finding, he notes:

That compared to her initial MRI scan done in July of '01 and the operation several years ago and going along with her history of progression of the severe back pain, that the disc space had progressively lost its space. In other words, it had gone lower or collapsed and would have been consistent with her ongoing complaints of pain, that once that process had started and the disc protruded, it no longer could support that disc space between L5 and S1.(Claimant's Exhibit S, page 8).

Dr. Cohen acknowledges that it is extremely unlikely for a patient the age of Ms. Hulsey to have as much disc space narrowing in the absence of trauma. He further states, "So if a patient has a history of significant back trauma and has an MRI and as time goes by and the back pain gets worse and then shows collapse of that disc space, then more likely than not the trauma is what caused the need for the surgery" (Claimant's Exhibit S, at page 24).

MEDICAL CAUSATION

The employer admits that the claimant suffered a compensable injury by accident on 12/01/00, but submits the expert medical opinion of Dr. Lange to support the conclusion that the claimant suffered a sacroiliac joint injury. Dr. Lange intimates, but does not outright declare, that the failure of the fusion surgery to resolve the low back and right leg complaints supports his conclusion that the injury suffered by Ms. Hulsey was properly diagnosed as a sacroiliac joint injury. To the contrary, Dr. Berkin notes the history of complaint post the injury and the diagnostic findings prior to the fusion surgery, and concludes that the severe degenerative condition found in the low back would most likely not have progressed as rapidly in the absence of a significant trauma to her low back.

The claimant has the burden of proving all the essential elements of the claim for compensation. It is noted that the proof as to medical causation need not be by absolute certainty, but rather by a reasonable probability. "Probable" means founded on reason and experience which inclines the mind to believe but leaves room for doubt. Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo.App. 1986).

"Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause". Brundige v. Boehringer Ingelheim, 812 S.W. 2d 200, 202 (Mo.App. 1991); McGrath v. Satellite Sprinkler Systems, Inc., 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of expert testimony is to be determined from the testimony as a whole

and less than direct statements of reasonable medical certainty will be sufficient. Choate v. Lily Tulip, Inc., 809 S.W. 2d 102, 105 (Mo.App.1991).

“A medical expert’s opinion must have in support of it reasons and facts supported by competent evidence which will give the opinion sufficient probative force to be substantial evidence.” (citations omitted) Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 904 (Mo.App. 1990). The commission may not substitute an administrative law judge’s personal opinion on the question of medical causation for the uncontradicted testimony of a qualified medical expert. Wright v Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo banc 1994), citing Merriman v. Ben Gutman Truck Service, Inc., 392 S.W.2d 292, 297 (Mo. 1965).

Dr. Lange had the opportunity to perform an evaluation of Ms. Hulsey three years after the injury in question, and to provide an expert orthopedic opinion after the benefit of soliciting her complaints of ill being, and concluded that her responses indicated to him a sacroiliac joint injury. Dr. Berkin likewise had the opportunity to evaluate Ms. Hulsey a little over two years post the injury, and at that time acknowledged that in the absence of any definite radicular findings, and a disc herniation that was predominantly central, the claimant was not a surgical candidate.

The testimony of Dr. Lange persuades that the claimant suffered a sacroiliac joint injury as a consequence of her work accident on 12/20/01. The claimant is known to have suffered a sacroiliac joint injury, and to also suffer from a severe degenerative condition in her low back. The more difficult question is whether the degenerative condition of the low back was sufficiently exacerbated by the work injury as to conclude that the progressive worsening of the back condition followed as an incident of the claimant’s employment. After a review of all of the evidence, the testimony of Dr. Cohen fails to persuade, as a matter of a reasonable probability, that the work injury suffered on 12/01/00 was a substantial factor in causing the need for fusion surgery at L5-S1 and L4-L5 of the low back. The issue as to medical causation with respect to the need for a fusion surgery to the low back is found in favor of the employer.

LIABILITY FOR PAST MEDICAL EXPENSES

A finding in favor of the employer as to medical causation with respect to the need for a fusion surgery is also dispositive of the issue as to liability for past medical expenses, to the extent that certain of the medical expense at issue relates to care rendered pursuant to the back fusion, and as to complications from the surgery relating to a deep vein thrombosis. As for the medical or physical therapy provided while under the care of Doctors Tessier and Sohn, there is no medical testimony in evidence to establish that the treatment was necessary to cure and relieve of the effects of the work injury, nor did Ms. Hulsey identify any of the medical bills at hearing as being related to medical treatment that was the product of her work injury. The issue as to past medical expense is found in favor of the employer.

FUTURE MEDICAL CARE

Dr. Lange testified that he believed the claimant to have reached maximum medical improvement following her right sacroiliac joint injury. He made no recommendation as to a need for further medical care for such injury. The issue as to future medical care is found in favor of the employer.

RATE OF COMPENSATION

Ms. Hulsey testified that she worked three days a week and that the restaurant was open six days a week, but offered no testimony as to the number of hours worked in a week to earn the amounts she claims to have earned in a three day period. In the absence of information as to the number of hours worked in a week, any of the calculations allowed for by law, Section 287.250 RSMo, based on the number of hours worked, cannot be used to calculate the rate in this matter.

Ms. Hulsey testified that she earned \$400.00 a week, including tips, but on cross examination by the employer admitted that she could not document that amount, and would also agree that it was likely that any documentation had by the employer would most likely reflect \$300.00 a week earned over the 13 weeks prior to the injury in December of 2000.

The applicable weekly compensation rate for temporary total, permanent partial or permanent total disability, based on a weekly wage of \$300 a week, is two thirds of that amount, or \$200.00 a week.

TEMPORARY TOTAL DISABILITY

Ms. Hulsey submitted the medical records of Dr. Tessier, which included an off work slip while receiving orthopedic

care for her work injury complaints (See Claimant's Exhibit D). The testimony of Ms. Hulsey persuades that she was able to return to work initially post her injury, but suffered from a temporary total disability and was put off of work by Dr. Tessier from 1/11/01 to 1/22/01. Inasmuch as the first three days missed from work is a waiting period that is not compensable under the law, the total due for temporary total disability is 1 and 1/7 weeks, or a total of \$228.58.

-
PERMANENT DISABILITY
-

Ms. Hulsey testified that she attempted to find other work in waitressing and food service post her work injury, but notes that three such attempts at returning to such employment were short lived. In all instances, claimant testified persuasively that due to her work injury she was unable to be on her feet and work regularly.

Claimant testified persuasively that post her work injury she continued to suffer from both right sided lower back ache and right leg numbness that varies from time to time in severity. Dr. Lange persuades that the right sacroiliac injury suffered by Ms. Hulsey has resulted in a permanent and partial disability to the body as a whole. From all of the evidence, the involved work injury is found to have resulted in a permanent partial disability equivalent to 20% of the body as a whole, referable to the right sacroiliac joint. The total due from the employer is for 80 weeks of disability, at the rate of \$200.00 a week, or a total of \$16,000.00.

This award is subject to a lien in favor of Lawrence O. Willbrand, Attorney at Law, in the amount of 25% thereof for necessary legal services rendered.

This award is subject to interest as provided by law.

-
-

Date: November 2, 2006

Made by: /s/ KEVIN DINWIDDIE
KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST
Patricia "Pat" Secrest, *Director*
Division of Workers' Compensation