

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

Injury No.: 99-138495

Employee: Jerri Jackson
Employer: Krispy Kreme
Insurer: One Beacon Insurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: October 16, 1999
Place and County of Accident: St. Louis 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 19, 2007. The award and decision of Administrative Law Judge Suzette Carlisle, issued November 19, 2007, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 11th day of July 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Jerri Jackson Injury No.: 99-138495
Dependents: N/A Before the
Employer: Krispy Kreme **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Self-Insured Jefferson City, Missouri
Hearing Date: August 16, 2007 Checked by: SC: ms

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - 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
 - Date of accident or onset of occupational disease: October 16, 1999
 - State location where accident occurred or occupational disease was contracted: St. Louis 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
 - 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:
While carrying a 50 pound bag of yeast, Claimant twisted and injured her back.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back, psychiatric

- Nature and extent of any permanent disability: 47.5% referable to the low back, 7.5% psychiatric

15. Compensation paid to-date for temporary disability: \$85,966.38
16. Value necessary medical aid paid to date by employer/insurer? \$128,278.33[11]
17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: \$535.10

19. Weekly compensation rate: \$356.73/\$303.01
20. Method wages computation: Section 287.250 RSMo (2000)/Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

| | | |
|---|---------------------|--------------|
| 122 6/7 weeks of TTD (Employer's overpayment) | (\$ 41,738.26) | |
| Less Claimant's TTD underpayment | <u>-\$ 2,258.53</u> | |
| TTD overpayment | (\$ 39,479.73) | |
| | | |
| 190 weeks of permanent partial disability –physical | | \$57,571.90 |
| | | |
| 30 weeks permanent partial disability - psychiatric | | + \$9,090.30 |

22. Second Injury Fund liability: Yes

| | | |
|---|--|------------|
| 27 weeks of permanent partial disability from the Second Injury Fund: | | \$8,181.27 |
|---|--|------------|

Total: \$35,363.74

23. Future requirements awarded: See the award- page 19

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Randall Parker

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jerri Jackson Injury No.: 99-138495
Dependents: N/A Before the
Employer: Krispy Kreme **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: One Beacon Insurance Company Checked by: SC: ms

PRELIMINARIES

A hearing was held for a final award at the Missouri Division of Workers' Compensation (DWC) St. Louis Office on August 16, 2007, at the request of Jerri Jackson (Claimant) pursuant to Section 287.450 RSMo (2000). Attorney Randall Parker represented Claimant. Attorney David Reynolds represented Krispy Kreme (Employer) and One Beacon Insurance Company (Insurer). Assistant Attorney General Levander Smith represented the Second Injury Fund (SIF). The record closed after presentation of the evidence.

Claimant submitted injury numbers 99-141367 and 99-138495. Although separate awards were issued, the body of each award contains similar issues and facts. Hearing venue is correct and jurisdiction properly lies with the DWC.

STIPULATIONS

The parties stipulate that on or about October 16, 1999;

- Claimant was employed by Employer.
- Claimant sustained an accident which arose out of and during the course of employment in St. Louis County, Missouri.
- Employer and Claimant were operating under provisions of the Missouri Workers' Compensation Law.
- Employer's liability was fully insured by Insurer.
- Employer had notice of the injury.
- A Claim for Compensation was filed within the time prescribed by law.
- Employer paid TTD totaling \$85,966.38 and medical benefits totaling \$128,278.33.
- Claimant's rate for PPD is \$303.01.
- Claimant reached maximum medical improvement (MMI), on October 3, 2002.

ISSUES

The issues for disposition at hearing are;

- Medical Causation
- Future Medical Care

ISSUES (cont)

- Rates for Permanent Total Disability (PTD) and TTD.

Whether a TTD overpayment occurred from October 3, 2002 to February 15, 2005 totaling 122 weeks and 6 days at \$339.73 per week, for a total of \$41,735.83?

- Employer's liability, if any, for PPD or PTD?
- SIF Liability, if any, for PPD or PTD?

EXHIBITS

Claimant's Exhibits A-HH and LL-RR were admitted. Exhibits II-KK were excluded based on relevance. Employer's Exhibits 1, 2, 3, 6, 10, 11, 12, 13, 14, and 16 were admitted, and Exhibits 4, 5, 7, 8, 9 and 15 were withdrawn. The SIF offered no exhibits. Any notations contained in the Exhibits were present when offered for admission.

FINDINGS OF FACT

All evidence was reviewed but only evidence supporting this award is referenced below. Any objections not expressly ruled upon in the award are overruled. Based upon a preponderance of the evidence, I find the following facts:

- Claimant was 27 years old at the time of the October 1999 work injury. A high school graduate with a 3.5 GPA, Claimant has eleven years of supervisory and management experience. She is a licensed cosmetologist, although she has never worked in that field.
- Pre-existing Conditions: Claimant was in fair health prior to February 1999. She took Albuterol for seasonal asthma flare ups. The asthma was diagnosed at age seven. Claimant missed no time from work and was not hospitalized for asthma prior to October 1999.
- At thirteen she was diagnosed with diabetes; and began taking 70/30 injectable insulin at age sixteen. She has medical follow-ups every three months to monitor diabetes. She has not missed work or been hospitalized due to this condition.
- She did not comply with diet, exercise and insulin treatments from 1991 to 1996; however, the diabetes was controlled in 1999.
- February 1999 Accident: On February 9, 1999 Claimant injured her back when she fell out of a chair and rammed her back into the seat of the chair. She reported the injury to Cathy Day, and medical treatment was authorized at Missouri Baptist Hospital.
- X-rays showed minimal spur formation at L5-S1. Claimant was diagnosed with a back sprain and instructed to follow up if she experienced numbness, weakness or tingling in her legs or feet. Her next treatment occurred five months later in the emergency room.
- She returned to work February 9th and continued to work a mandatory 10 hour shift until October 16, 1999, with no restrictions, accommodations or discipline for failure to perform her duties. She also

continued driving and performing daily activities of life.

- She sought unauthorized emergency room treatment several times during the summer of 1999 for pain in her back and shooting pain to her leg. Claimant did not request Employer provide treatment because she did not think the pain was related to the February 1999 work injury.
- She treated at BJC on July 27, 1999, for low back and leg pain and was diagnosed with a kidney infection. Repeat x-rays showed mild scoliosis and degenerative changes of the sacroiliac joints and L5-S1 posterior facets.
- On August 2, 1999, Claimant treated at Christian Northeast (CNE) Hospital Emergency Room for low back and left leg pain, with bilateral numbness on the bottom of her feet for 2-4 weeks. Medical records note "sciatica vs. neuropathy."
- Claimant returned to CNE on September 19, and September 29, 1999, with back pain and bilateral leg pain, left side to the foot and right side shooting pain to the knee. The left leg was reportedly worse with numbness and tingling.
- A CT scan on October 14, 1999, showed disc bulges at L4-5 and L5-S1 but no herniations. Claimant missed no time from work up to October 16, 1999. The L3-4 disc was normal.
- Claimant continued to have back and leg pain up to October 16, 1999 when she reinjured her back.
- Work Experience: Claimant has 11 eleven years of fast food experience. She worked for Rally's eight years as a crew member and later as an assistant manager; before and after graduation from high school. Duties included lifting up to 50 pounds, unloading delivery trucks, operating cash registers, the grill, and food preparation while standing most of the time. She hired, assigned, and fired employees, completed paperwork, and operated the computer during a ten hour shift. Claimant worked sixty hours a week at Sabarro performing similar duties.
- In April 1998, Employer hired Claimant as a crew member, which required lifting 25 pound boxes of milk and juice, 50 pound bags of yeast, and 100 pound packages of dough. In July 1998, she was promoted to manager and received on the job training. She unloaded trucks and lifted 30 pounds of oil and 5 gallons of filling.
- October 16, 1999 Accident: Claimant re-injured her back on October 16, 1999. While carrying a

bag of yeast, she turned to enter a doorway and her legs gave out. She mistakenly told her attorney she was injured on October 19, 1999.

- The same day Claimant was taken by stretcher to CNE where she reported back and left leg pain. She gave a three month history of numbness in both feet. Examination revealed a positive straight leg raise on the left but X-rays were normal.
- Claimant was diagnosed with sciatica and returned to work the next day on light duty. However, light duty was not available, and she continued to lift 50 pound bags and pull 100 pounds of dough through doughnut making equipment.
- Claimant treated at HealthSouth from October 25, 1999 to December 21, 1999. Dr. Meadows prescribed more physical therapy, but she continued to worsen. He planned to refer Claimant to a specialist, however, she returned to CNE emergency room on December 23rd due to increased back and leg pain.
- Claimant has not sought employment since she resigned on December 2, 1999.
- In December 1999 Daniel Scodary ordered an MRI that revealed a medium sized central disc extrusion at L4-5, a small to medium sized disc protrusion at L3-4 central and to the right, and a small to medium sized disc protrusion at L5-S1, central and to the right. Claimant reported a “charley horse” sensation in her low back radiating to the left leg and toes with numbness and tingling, and right leg pain to the knee and calf.
- On December 27, 1999, medical records show Dr. Scodary performed a laminectomy at L4-5, removing multiple disc fragments and decompressing the nerve root on the left side.
- Dr. Stephen Smith, a pain management specialist, provided Claimant with several post operative injections.
- Claimant attended vocational rehabilitation sessions 5 days a week for a month. She was not provided with a certificate of completion or an opinion about her ability to work.
- Dr. Smith evaluated Claimant for pain management from January 2000 to April 2000. He found positive Waddell signs for “exaggeration, but no overreaction during examination,” and possible depression due to pain. Epidural and selected nerve root injections were provided for right and left leg

pain at L3-4 and L4-5. Claimant was released with 75% improvement.

- In April 2000, Dr. Scodary found Claimant “appeared to be doing well; her only problem being a little numbness on the anterior calf.” He returned her to work April 24, 2000, with no restrictions.
- In May 2000, Claimant treated at John C. Murphy Clinic for low back and right leg pain. A repeat MRI on May 18, 2000 revealed spinal stenosis, post surgical changes, L4-5 on the left, and central and right herniation at L3-4 with impingement on the right L4 nerve root, which Dr. Scodary found consistent with Claimant’s right sided symptoms. Dr. Scodary noted “it is questionable whether the L3-4 on the new MRI is clinically relevant,” but Dr. Scodary recommended a second surgery.
- Claimant was referred to Dr. Barry Sampson by Employer for a second surgical opinion. Dr. Sampson examined Claimant on July 19, 2000. He found abnormalities at L3-4 on the right, but did not review the 10-14-99 CT scan or 12/23/99 MRI; and could not determine if the abnormality was present before the May 2000 MRI. He concluded Dr. Scodary’s recommended surgery at L3-4 was reasonable.
- On July 28, 2000, Dr. Scodary performed a right discectomy at L3-4 at CNE based on continued pain, unsuccessful conservative care, and new right thigh weakness, and the absence of knee jerk. Post-operative physical therapy did not help. Claimant began to walk bent over and started using a cane.
- On September 14, 2000, Dr. Scodary continued physical therapy, and discussed the possibility of a third surgery after Claimant complained of continued right leg pain.
- Dr. Bernard Randolph treated Claimant from October to December 2000, at Employer’s request. He referred Claimant to Dr. Scott Jones for physical therapy. Dr. Jones reported Claimant displayed “dramatic head and neck postures, gripping fists, holding forearms tight at rest, yet could freely bend to the left side.” She moved freely when thought to be unobserved. He concluded Claimant’s problem was attitude, posture, and refusal to follow instructions.
- Dr. Randolph found her complaints out of proportion to “objective abnormalities” and her ability to progress after surgery. He opined depression contributed to her complaints. He found she reached MMI in December 2000, and returned her to work full duty. Dr. Randolph rated 9% PPD of the body for the L4-5 injury and 8% for the L3-4 injury. However he opined the L3-4 disc injury was not related to the October 1999 accident.
- Claimant testified she was unable to work, and remained bent over with back and leg pain when Dr. Randolph released her to full duty on December 7, 2000.

- On October 24, 2001, a CT scan of the lower spine revealed disc degeneration at L3-4, L4-5, and L5-S1, slight bulge and possible annular tear at L5-S1 to the right, without encroachment. A discogram revealed pain at L3-4 and L4-5, and degeneration at L3-4 and L4-5 radiating into the right leg. No major protrusion or herniation was found.

Marcaine injections to both discs provided some relief. Claimant was noted to have a very low pain threshold.

- Based on unsuccessful conservative treatment, continued right leg pain, and discogram results which produced pain at L3-4 and L4-5, an anterior fusion with cages was performed on May 13, 2002, at L3-4 and L4-5 by Drs. Scodary and Charles. After the third surgery, Claimant testified she could stand more erect, but continued to have pain.
- On July 3, 2002, an MRI revealed a left sided herniated disc at L5-S1. On August 23, 2002, Dr. Scodary performed the fourth surgery, a left sided discectomy at L5-S1 which revealed overgrown facets and a herniated disc.
- Claimant did not improve after post-operative physical therapy. Dr. Stephen Smith released Claimant from pain management, and found her to be at MMI in November 2002, when he was unable to provide injections due to Claimant's pain level.
- Claimant last saw Dr. Scodary on October 3, 2002 complaining of back pain radiating down her right leg, and diffuse bilateral leg and knee pain, which worsened in cold weather. Dr. Scodary opined diabetes may be a factor in her level of symptoms. He released her with "common sense" restrictions. A functional capacity evaluation was recommended but not obtained.
- Claimant follows up every three months with Dr. Spearman, her primary care physician, to check medication, blood and protein. She takes 16 medications daily for diabetes, anxiety, depression, blood pressure, and pain.
- Claimant's current complaints include back and leg pain to both knees, which impacts her ability to walk or use stairs. Claimant uses a cane for most activities, and sleep is difficult due to pain. Sitting is difficult and causes her to change positions. Cold causes pain. She can no longer socialize with friends due to medication and slow movement. She can drive up to two miles. Bending is painful. She has gained 50 pounds due to inactivity and has decreased energy.
- Claimant can no longer lift 50 pounds of product or pull 100 pounds of product through a doughnut machine. Strong medication prevents her from operating dangerous equipment.

- Claimant fell three times between 2000 and 2005. She injured her legs twice at her mother's house when her legs gave out. In 2001, she fell to her knees when her legs gave out without warning. Claimant fell at home in November 2003 and heard a pop in her back followed by increased pain.
- Dr. Raymond Cohen is a board certified neurologist who testified on behalf of Claimant. He diagnosed a lumbar strain with myalgia as a result of the February 9, 1999 work accident.
- Dr. Cohen diagnosed lumbar radiculopathy, herniated disc, failed lumbar laminectomy syndrome, and depression related to the October 1999 accident. He opined the injuries sustained in February and October 1999 were the substantial factor in causing Claimant's spine disability. Dr. Cohen found the four surgeries were needed as a result of the February 1999 and October 1999 work injuries.
- Dr. Cohen found the treatment provided by Dr. Scodary was reasonable and necessary to cure and relieve Claimant from the effects of the injuries.
- Dr. Cohen set the following permanent restrictions; no repetitive bending, lifting, twisting or stooping, 5 pound weight limit, no prolonged sitting or standing, or climbing or walking on uneven surfaces.
- Dr. Cohen rated 70% PPD of the lumbar spine, 10% due to the February 1999 accident, 60% due to the October 1999 accident, and 20% for depression. Dr. Cohen determined Claimant needed pain management for life for failed back syndrome.
- Dr. Cohen rated 25% of the body as whole for preexisting diabetes and asthma. He found Claimant's pre-existing conditions combined with the October 1999 work injury to create a synergistic effect. He opined the pre-existing conditions were a hindrance or obstacle to employment and Claimant was PTD as a result of the combined injuries.
- On cross examination, Dr. Cohen testified the back injuries alone would have caused Claimant to be PTD. He also acknowledged Claimant may have preexisting degenerative changes of the lumbar spine based on the February 1999 x-rays.
- Dr. Russell Cantrell, a physiatrist, is board certified in physical medicine and rehabilitation, and provided an Independent Medical Examination on March 21, 2005 at Employer's request. Claimant's complaints included low back and bilateral leg pain, right greater than left, bilateral leg weakness with buckling, and numbness below the knee to her feet.

- Dr. Cantrell's examination revealed "stocking glove sensory loss," loss of pin prick sensation in both legs, and decreased ankle reflexes. He concluded these findings were related to diabetic neuropathy, not radicular neuropathy, which is caused by a pinched nerve.
- He noted Claimant initially complained of back and buttock symptoms after the February 1999 injury. Dr. Cantrell testified radicular symptoms usually appear within 72 hours of injury. However, in this case, they did not appear until July, five months after the injury. In addition, a CT scan taken two days before the October 1999 injury showed disc bulges at L4-5 and L5-S1, but no herniation.
- Dr. Cantrell diagnosed a lumbar strain for the February 1999 injury, found Claimant had reached MMI, assigned no restrictions; and rated 5% PPD of the lumbar spine.
- For the October 1999 injury, Dr. Cantrell diagnosed peripheral neuropathy, and opined Claimant's multiple leg problems were caused by insulin dependent diabetes, and not a pinched nerve in her back. Dr. Cantrell found Claimant's pain and numbness was not related to a specific dermatome, and did not follow the distribution of a nerve root.
- Dr. Cantrell concluded the three additional back surgeries were not work related because

Claimant had no radicular symptoms at L3-4 when diagnosed with a disc herniation to the right, no neurologic deficits were found until after the first surgery, the two level fusion addressed pre-existing degenerative changes, and the fourth surgery was based on degenerative changes not related to the 1999 injuries.
- Dr. Cantrell disagreed with Claimant's history of no right leg pain until after the first surgery, and noted medical reports in August and September 1999 where she complained of bilateral foot numbness and leg pain.
- He concluded the second surgery at L3-4, was performed due to pain and the new absence of a right knee reflex, which he did not attribute to the October 1999 injury. He noted three doctors found Claimant's pain complaints were exaggerated or out of proportion; and possibly aggravated by depression. Dr. Cantrell also noted various symptoms with different begin dates.
- Dr. Cantrell diagnosed a herniated disc at L4-5 for the October 1999 work injury, and opined Claimant achieved MMI with 10% PPD of the lumbar spine. Dr. Cantrell imposed sedentary to light work restrictions which he found unrelated to the 1999 work injuries. A functional capacity evaluation was recommended but not obtained.
- Pre-existing conditions included high blood pressure, depression, asthma, and degenerative changes

of the lumbar spine. He rated 15% of the body for the pre-existing degeneration but did not rate other preexisting conditions.

- Dean Rosen, Ph.D., a clinical psychologist, testified on Claimant's behalf. Dr. Rosen interviewed Claimant on May 17, 2004, and administered the MMPI-2 test.
- Based on the interview, test results, and medical records, Dr. Rosen diagnosed depression and pain disorder. He testified two-thirds of her medical condition was caused by the October 1999 injury, and one-third was related to diabetes. Dr. Rosen opined the February 1999 injury contributed in a small way to Claimant's depression.
- Test results show an IQ in the high end of low average, difficulty with concentration, psychopathology, and depression masked by somatizing, focusing on her pain, denial, excessive inhibition, and indecisiveness. Dr. Rosen found excessive inhibition and indecisiveness to be long term personality traits. He diagnosed interpersonal distrust, alienation, disconnection with motives and feelings, inability to deal with anger and resentment, and being easily overwhelmed by minor stress.
- MMPI-2 results reflected overall psychiatric impairment. Dr. Rosen found Claimant's global assessment to be 50 indicating "serious disruptive symptoms and psychological impairment." He rated 20% PPD of the person to the 1999 back injuries and 10% to depression from diabetes. He did not recommend treatment due to the chronic nature of her physical problems, the length of time since the injuries, and Claimant's inability to trust or develop appropriate self-awareness and insight.
- Dr. Wayne Stillings is a board certified psychiatrist, who conducted an IME at Employer's request on July 12, 2005. He performed the MMPI-2 and MCMI-III personality test. Dr. Stillings found Claimant's global assessment to be 55, indicating moderate symptoms.
- Dr. Stillings concluded the February 1999 work accident was not a substantial factor in causing or aggravating Claimant's psychiatric condition, no psychiatric treatment was recommended, Claimant had reached MMI, and she was able to work any job appropriate for her background, training, education, and experience without restrictions. Dr. Stillings found no PPD for the February 1999 injury.
- Dr. Stillings found the October 1999 accident was a substantial factor in aggravating Claimant's personality disorder, however, no medical treatment was recommended. He opined that Claimant had reached MMI and was capable of working any job appropriate for her qualifications. He rated 1-2% PPD of the body for the aggravation of the preexisting psychiatric condition, and 35% PPD for the preexisting personality disorder.

- Dr. Stillings related Claimant's "flat affect" to preexisting schizophrenia, not severe chronic pain. He suggested Claimant's surgical result should have been better; however, she had difficulty coping with multiple surgeries due to transferring her "interpsychic conflict" into physical complaints. Also, Claimant's desire to express long standing resentment conflicts with her fear that such expression would be humiliating. This conflict resulted in chronic tension and the somatic disorders.
- Dr. Stillings found Claimant did not know she had personality problems, which explained the lack of psychiatric treatment before 1999.
- Mr. James Israel is a nationally certified vocational rehabilitation counselor, and he testified on behalf of Claimant on February 18, 2005. Claimant reported ongoing back pain radiating to both legs, right leg "sledgehammer" type pounding pain, decreased energy, weight gain from inactivity, depression, upper and lower extremity limitations, problems stooping, kneeling, squatting, bending, twisting, inability to sit more than 15 minutes, ability to stand up to 30 minutes with cane support, and walk up to 15 minutes.
- **Transferable skills:** Mr. Israel identified sedentary and light job classifications within Claimant's restrictions. Based on Claimant's past management experience, Mr. Israel found she had potentially transferable skills in management, fast food concessions, liquor establishment, fast food services and reservations. However, he concluded the number of potential jobs was "excessively narrow" based on Claimant's work restrictions and inability to transfer managerial skills to unskilled work.
- Mr. Israel concluded Claimant could not return to her former employment, without medical and psychological improvement and retraining. Mr. Israel observed Claimant leaning to one side, crying, and sitting for 30 minutes before requiring a break. Mr. Israel speculated Claimant would have problems keeping any job within the restrictions.
- **Employability:** Mr. Israel found "significant numbers" of unskilled or semi-skilled sedentary or light jobs, including assemblers, order clerks, hand packers, and cashiers. However, he concluded Claimant could not work these jobs because; 1) She has not worked these jobs before, 2) She could not apply her management experience to the work, 3) She has a limited capacity to adjust to unfamiliar work, and 4) Light jobs do not provide for work place accommodations needed for Claimant's physical and mental disabilities.
- Based on Claimant's age, education, physical and mental limitations, injuries, restrictions, pain, and limited job opportunities, Mr. Israel found Claimant to be "insurmountably disadvantaged" and unable to compete in the open labor market.
- Mr. Israel found Claimant's preexisting diabetes and asthma were a hindrance or obstacle to

employment or reemployment.

- Mr. Israel performed no formal testing because Claimant had performed supervisory responsibilities, earned a 3.5 GPA, and obtained a cosmetology license.
- Mr. Israel found Claimant to be a good candidate for vocational training based on “15 years of significant transferable skills.” However he concluded her overall physical and mental condition decreased her chances for successful training.
- Mr. James England, Jr. is a rehabilitation counselor who interviewed Claimant at Employer’s request. Using Dr. Cantrell’s light restrictions he found Claimant employable in most food service management positions, retail sales or as a cashier. Based on Dr. Cohen’s sedentary restrictions, he found Claimant could perform sit-down jobs as an alarm monitor for a security company, night motel clerk, entry level office clerk, parking lot attendant, and customer service representative.
- Mr. England opined Claimant was unable to work based on Dr. Rosen’s psychiatric assessment of 50. He opined Dr. Stillings’ assessment of 55 would permit Claimant to work without psychiatric restrictions and within the restrictions set by Drs. Cohen and Cantrell.
- Mr. England found Claimant eligible for vocational rehabilitation training, career counseling and placement at no charge.

RULINGS of LAW

After careful consideration of the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant is not permanently and totally disabled for the following reasons.

Burden of Proof: In a workers’ compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of [her] claim, including Second Injury fund Liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968).

Medical Causation: Claimant bears the burden of proving an accident occurred and it resulted in injury. *Dolen v. Bandera's Cafe & Bar*, 800 S.W.2d 163, 164 (Mo.App.1990). (Overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121, S.W.3d 220, 223 (Mo. banc 2003)). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 704 (Mo.App.1973) (citations omitted). Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding nor in the absence of expert opinion is the finding of causation within the competency of the administrative tribunal. *Silman v. William Montgomery & Associates*, 891 S.W.2d 173, 175 (Mo.App. 1995) (Overruled on other grounds by *Hampton*, 121 S.W.3d at 223). The subject of a herniated disc, diagnosis, causation, and cure has been held to be “the realm of highly scientific techniques where expert opinion is essential.” *Id* at 176.

Both Drs. Cohen and Cantrell agree on causation regarding the first lumbar surgery. However, they disagree on what caused the need for three additional surgeries. I find Claimant has met her burden to show the October 1999 accident caused the need for three additional surgeries.

Dr. Cohen's opinion is credible that the October 1999 back injury caused the need for three additional surgeries. I find the L3-4, L4-5 and L5-S1 disc injuries were related to the October 1999 accident. A CT scan taken two days before the October 1999 accident revealed no abnormalities at the L3-4 level. However, an MRI taken after the October 1999 accident revealed a small to medium sized disc protrusion, at L3-4, central and to the right. Before the October 1999 accident a CT revealed disc bulges at L4-5 and L5-S1 but no herniations. After October 1999, an MRI revealed an extrusion at L4-5 and a small to medium sized disc protrusion at L5-S1, central and to the right.

Due to continuing right leg and low back pain, another MRI was performed in May 2000, which revealed spinal stenosis, post surgical changes at L4-5, and herniation at L3-4, central and right, with impingement on the right L4 nerve root. Dr. Scodary concluded this finding was consistent with Claimant's complaints. Also, the post surgical changes at L4-5 were consistent with surgery performed eight months earlier at that level.

Dr. Cantrell's opinion is not persuasive that the last three surgeries were not work related. Dr. Cantrell's opinion is not credible that the second surgery was performed due to pain and the absence of a knee jerk reflex; which was a new finding related to diabetic neuropathy, and not lumbar abnormality. Dr. Cantrell also found Claimant's pain, numbness, and tingling did not follow a dermatome pattern, which is consistent with diabetic neuropathy.

Although Dr. Scodary was aware of Claimant's diabetic history, he did not order a nerve conduction or EMG study before performing the second surgery. Dr. Scodary performed the second operation based on Claimant's continued pain, and the development of focal deficit and weakness of the right thigh, not because of diabetic neuropathy.

Also, contrary to Dr. Cantrell's opinion, Claimant experienced right leg pain at the time the L3-4 herniation was diagnosed, and neurologic deficits were discovered within six months of the first surgery. No nerve conduction study was performed, therefore, a determination cannot be made that the leg pain and numbness was caused by diabetic neuropathy and not nerve entrapment.

Dr. Cantrell's opinion that the L3-4 and L4-5 fusions addressed pre-existing degenerative changes is not credible, and on cross-examination he conceded that disc trauma can lead to acceleration of degenerative disc disease.

Dr. Cantrell's opinion that the fourth surgery was performed to correct degenerative changes unrelated to the 1999 injuries is also not persuasive. On cross examination, he acknowledged a two level fusion could "mechanically increase loading" on the disc above and below the fused site, causing additional problems at L5-S1.

It is true Claimant complained of bilateral foot numbness and leg pain two months before the October 1999 accident. However, no nerve conduction tests were performed to rule out diabetic neuropathy. Also, no doctor addressed how multiple falls after October 1999 may have contributed to Claimant's continuing problems from L3-4 to L5-S1. Based on the disc changes discussed above and Dr. Cohen's credible testimony, I find the three surgeries were medically causally related to the October 16, 1999 work accident.

Liability for PTD Benefits: Claimant seeks permanent total disability compensation from either the Employer or SIF beginning February 15, 2005 when Employer terminated TTD payments. To establish SIF liability for PPD or PTD, Section 287.220 RSMo (2000) requires the [fact finder] make three findings regarding disability:

- 1) There must be a determination that the employee has permanent disability resulting from the last injury alone, and
- 2) There was a pre-existing permanent disability that was serious enough to constitute a

hindrance or obstacle to employment or re-employment which combines with the disability from the compensable work related injury to create a greater overall disability to the employee's body as a whole than the simple sum of the disability from the work injury and the pre-existing disability considered separately, and

- 3) There must be a determination that all of the injuries and conditions combined, including the last injury; have resulted in the employee being permanently and totally disabled.

Section 287.020.7 defines "total disability"...as the inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident. Any employment means any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition. ***Kowalski v. M-G Metals and Sales, Inc.*** 631 S.W.2d 919, 922 (Mo. App. 1982) (*Citations omitted*).

The test for permanent total disability in Missouri is a claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in [her] present physical condition. ***Searcy v. McDonnell Douglas Aircraft Co.*** 894 S.W.2d 173, 178 (Mo.App. 1995) (*Overruled on other grounds by Hampton*, 121 S.W.3d at 223).

If a claimant's last injury in and of itself rendered her permanently and totally disabled, then the [SIF] has no liability and the employer is responsible for the entire amount. ***Hughey v. Chrysler Corp.*** 34 S.W.3d 845, 847 (Mo. App. 2000). Therefore, the inquiry begins with the Employer's liability. I find Claimant met her burden on the first and second points; however the claim fails on the third point.

The Last Injury: I find Claimant sustained disability from the last injury alone. Four lumbar disc surgeries were performed, including a two level fusion. Claimant testified she uses a cane to walk, has ongoing pain, limited range of motion, and difficulty walking on stairs. Drs. Cohen and Cantrell set permanent work restrictions. Dr. Cohen rated 60% PPD of the lumbar spine and Dr. Cantrell rated 10% PPD of the spine. I find Claimant sustained 47.5% PPD of the lumbar spine from the October 1999 accident.

Drs. Cohen and Rosen rated 20% PPD of the body as a whole for depression related to the October 1999 injury. Dr. Stillings rated 1-2% PPD of the body as a whole for aggravation of a pre-existing psychiatric condition. Dr. Stillings found Claimant suffered from aggravation of a preexisting personality disorder. Drs. Rosen and Stillings discussed Claimant's preoccupation with pain. I find Claimant sustained 7.5% PPD of the body for psychiatric disability related to the October 1999 injury.

Hindrance or Obstacle to Employment: "To determine whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, the fact finder should focus on the potential that the pre-existing injury may combine with a future work related injury, and result in a greater degree of disability than would have resulted if there was no such prior condition." ***E.W. v. Kansas City, Missouri, School District***, 89 S.W.3d 527, 537 (Mo.App.2002) (*overruled on other grounds, by Hampton*, 121 S.W.3d at 223) (*citations omitted*).

Physical Conditions: Dr. Cohen's opinion is credible that Claimant's pre-existing diabetes constituted a hindrance or obstacle to employment. He rated 25% PPD of the body for the combined effect of diabetes and asthma based on Claimant's testimony. Dr. Cantrell did not rate Claimant's diabetes but he found the pain and numbness Claimant experienced prior to October 1999 did not follow a dermatome pattern. He noted the variable pattern of symptoms extending from Claimant's feet to her legs, was consistent with diabetic neuropathy.

I find Claimant's pre-existing diabetes was serious enough to constitute a hindrance or obstacle to employment. Although Claimant missed no time from work and was not hospitalized for diabetes, she has taken 70/30 injectable insulin since age 16. Claimant has regular doctor's visits to monitor blood work, medication, and protein.

I find the preexisting diabetes had the potential to combine with a later work injury and create overall greater

disability than would have existed without the preexisting disability.

I do not find Claimant's asthma condition constituted a hindrance or obstacle to employment. Although she takes Albuterol for seasonal flare-ups, she did not miss work and was not hospitalized for this condition.

I find Claimant's February 1999 lumbar strain did not constitute a hindrance or obstacle to employment. Dr. Cantrell rated 5% of the body for the February 1999 injury, found Claimant had attained MMI, and required no work restrictions. Dr. Cohen rated 10% PPD of the lumbar spine for the February 1999 injury, although Claimant treated only one time in the emergency room. Claimant missed no time from work and continued to perform her duties without accommodation, discipline, or danger to herself and others.

Dr. Cantrell found 15% PPD of the lumbar spine due to preexisting degenerative changes based on advanced degeneration found during the third and fourth surgeries. Dr. Cohen conceded Claimant may have had lumbar degeneration prior to 1999; however, Claimant performed physical work during ten hour shifts with no restrictions, for a number of years. I find the degenerative lumbar spine condition did not constitute a hindrance or obstacle to Claimant's employment.

Psychiatric Conditions: Dr. Stilling rated 35% PPD of the body for preexisting psychiatric disability, but concluded Claimant was unaware of the personality disorder because she received no medical treatment before 1999. Dr. Rosen found 10% PPD of the body for pre-existing depression from diabetes; but conceded Claimant had no symptoms of depression or treatment prior to October 1999. Dr. Cohen did not find pre-existing psychiatric disability.

Prior to October 1999, the record contains no evidence that psychiatric symptoms affected Claimant's ability to work, caused her to miss work, seek medical treatment, or endangered anyone. In fact, she testified she was responsible for "keeping things going" at work. I find the psychiatric condition was not a hindrance or obstacle to employment.

Permanent Total Disability-Physical: Mr. England's opinion that Claimant can work is more persuasive than Mr. Israel's opinion that she cannot. Mr. England based his opinion on the work restrictions set by Drs. Cohen and Cantrell, and on Dr. Stillings' opinion.

Dr. Cohen's sedentary restrictions permitted sit-down jobs, i.e., alarm monitoring for a security company, night motel clerk, entry level office clerk, parking lot attendant, and customer service representative. Dr. Cantrell's light restrictions permitted work in food service management, retail sales or as a cashier.

After find Claimant possessed "potentially transferable skills" in management, fast food concessions, liquor establishments, and reservations, Mr. Israel discounted Claimant's ability to transfer her experience to these jobs, despite "15 years of significant knowledge or skills." Mr. Israel's conclusion is not credible that Claimant has a narrow range of employment possibilities.

Mr. Israel's opinion is not persuasive because Dr. Cohen limited repetitive activity and the amount of weight to be lifted, but he did not prohibit these activities. It is conceivable Claimant could work within the restrictions set by Drs. Cohen and Cantrell. Neither doctor set time limits on how long she can work while sitting, standing or walking. I find Claimant has developed skills that could transfer to other jobs within the jobs identified by both vocational experts.

Psychiatric: Dr. Stillings' psychiatric opinion is more persuasive than Dr. Rosen's opinion. Dr. Stillings' evaluation included a personality test, and Dr. Rosen's evaluation did not. Dr. Stillings concluded Claimant had reached MMI, and was able to work without psychiatric restriction, in jobs appropriate for her skills.

Despite finding psychiatric impairment, Dr. Rosen did not conclude Claimant was unable to work. However, Mr. England found no potential employment for Claimant based on Dr. Rosen's evaluation. Also, Dr. Rosen did not perform a personality test, despite finding Claimant had long standing personality traits which created "interpersonal distrust, alienation, disconnection with motives and feelings, inability to deal with anger and resentment, which caused

her to be easily overwhelmed by minor stress.” However, he conceded the test may have clarified Claimant’s condition.

Now 35 years old, Claimant is considered a younger worker; with a high school GPA of 3.5, and eleven years of management and fast food experience. Claimant met the requirements to become a licensed cosmetologist. As a food service manager, she hired, fired, and assigned employees and was responsible for keeping the operation running smoothly. She was consistently promoted to management positions throughout her career. She prepared profit and loss reports, and entered shortage totals into the computer. Mr. England and Mr. Israel have identified employment within the restrictions set by Drs. Cohen, Cantrell, and Stillings.

Clearly, Claimant has received significant medical treatment for her low back. However, jobs were identified within the restrictions set by both doctors. Based on Claimant’s relatively young age, education, work experience, training, and the credible testimonies of Drs. Cohen, Stillings, and Mr. England, I find Claimant has not proven she is unable to compete in the open labor market due to either the last injury alone or a combination of preexisting and primary injuries. I find Claimant is not PTD as a result of the October 16, 1999 work accident.

In addition, Mr. England and Mr. Israel found Claimant eligible for vocational rehabilitation training, and Claimant testified she participated in training for one month. However, the record contains no evidence she completed the program or the final outcome of her training. Therefore, vocational retraining remains a viable option.

SIF Liability for PPD: Once a determination is made that a claimant is not PTD, the inquiry turns to what degree, if any, is claimant is permanently partially disabled for purposes of SIF liability. *Leutzinger v. Treasurer of the State of Missouri*, 895 S.W.2d 591, 593 (Mo. App. 1995). Section 287.220.1 RSMo. (2000), states the SIF is triggered in all cases of PPD where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the preexisting disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and the preexisting conditions must produce additional disability greater than the last injury standing alone.

I previously found Claimant’s disability from the primary injury to be 47.5% of the lumbar spine. I also found Claimant’s preexisting diabetes created a hindrance or obstacle to employment or reemployment. I further find the combination of the October 1999 work injury and the diabetes produce additional disability greater than the last injury standing alone. As discussed above, Claimant complained of pain, numbness, and tingling in both feet prior to October 1999, which Dr. Cantrell attributed to diabetic neuropathy. Drs. Scodary and Cohen noted Claimant’s long history of insulin injections. Dr. Cohen rated 25% PPD of the body as a whole for diabetes and asthma conditions. Based on the medical evidence, Claimant’s credible testimony, and Dr. Cohen’s rating, I find the SIF liable for 12.5% PPD of the body for preexisting diabetes.

TTD Rate: The parties placed Claimant’s TTD rate at issue. Claimant contends she earned \$28,000.00 annually and \$26,056.81 through November 1999 when she resigned. Section 287.250 RSMo (2000) states if the wages are fixed by the week, the amount so fixed shall be the average weekly wage.

Exhibit 16 reflects bi-weekly earnings of \$1,019.24 from July 23, 1999 to October 15, 1999; resulting in an average weekly wage of \$535.10 (\$6,421.21 divided by twelve weeks equals \$535.10 per week).

Claimant’s testimony is not credible that she would have earned \$3,848.00 in December if she had worked, for a total of \$28,000.00 for the year; because \$26,056.81 plus \$3,848.00 equals \$29,904.81. Claimant’s 1999 W-2 Earnings show \$24,479.81 earned through November 1999. I find Claimant’s average weekly wage was \$535.10. I find the correct TTD rate should have been \$356.73 (\$535.10 times 2, divided by 3). Claimant was paid TTD at the rate of \$339.73 per week, resulting in a \$17.00 TTD underpayment per week.

TTD Overpayment: Employer contends Claimant received a TTD overpayment totaling \$41,735.83 from October 3, 2002 to February 15, 2005. (122 6/7 weeks at \$339.73 per week).

The test for entitlement to TTD “is not whether an employee is able to do some work, but whether the

employee is able to compete in the open labor market in [her] physical condition.” *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418, 424 (Mo.App. 2000) (*overruled on other grounds, by Hampton*, 121 S.W.3d at 223). TTD benefits are intended to cover the employee's healing period from a work-related accident until she can find employment or her condition has reached a level of maximum medical improvement. *Id.* Once further medical progress is no longer expected, a temporary award is no longer warranted. *Id.*

The parties stipulated Claimant reached MMI on October 3, 2002. I find TTD benefits should have ended October 3, 2002, but Claimant continued to receive benefits until February 15, 2005. I find Claimant was overpaid by \$41,738.26 (\$339.73 times 122 6/7 weeks). I find Employer is entitled a credit for overpayment of TTD totaling \$41,738.26.

TTD Underpayment: I further find Claimant is entitled to receive a TTD underpayment. I previously found Claimant should have received \$356.73 per week, resulting in a \$17.00 underpayment per week for the time she should have received TTD benefits.

The parties stipulated \$85,966.38 was paid in TTD benefits but did not provide the dates or number of weeks TTD should have been paid. I find Claimant should have received \$44,228.12 in TTD benefits (\$85,966.38 minus the \$41,738.26 overpayment). I find this represents 130 1/7 weeks (\$44,228.12 divided by \$339.73).

I find Claimant is entitled to a TTD underpayment totaling \$2,258.53 (\$17.00 per week times 130 1/7 weeks). I find the \$2,258.53 should be applied toward the TTD overpayment of \$41,738.26. I further find the total TTD overpayment to be \$39,479.73 (\$41,738.26 minus \$2,258.53).

Future Medical: Claimant is seeking future medical care for the October 1999 injury including medication and doctor's visits.

Future medical care must flow from the accident before the employer is held responsible. *Modlin v. Sun Mark, Inc.* 699 S.W. 2d 5, 7 (Mo.App. 1985). Future medical care can be awarded in a permanent partial disability case. The employee must prove beyond speculation and by competent and substantial evidence that her work-related injury is in need of treatment. *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo. App. 1984). It is sufficient to show that the need for additional medical treatment by reason of the compensable accident is a "reasonable probability." *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996) (*citations omitted*). 'Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt." *Id.*

Dr. Scodary released Claimant with "common sense" restrictions, without mentioning future medical care. Dr. Cohen opined Claimant needed pain management for life for failed back syndrome totaling \$2,500.00 to \$3,000.00 per year. Dr. Cantrell opined medication may be required following four back surgeries.

I find Claimant's need for future medical care flows from the October 1999 work accident. I find Employer is liable for medical treatment provided by a qualified physician that is related to the October 1999 work accident.

Neither Dr. Stillings nor Dr. Rosen recommended psychiatric treatment. I find Employer is not liable for future psychiatric treatment.

CONCLUSION

Claimant is entitled to permanent partial disability compensation from Employer totaling 47.5% of the lumbar spine, and 7.5% of the body as a whole for psychiatric disability. Claimant is entitled to a TTD underpayment. Employer is entitled to a credit for a TTD overpayment. Future medical care is awarded. Second Injury Fund is liable for 12.5% PPD. Claimant's attorney is entitled to a lien for legal services rendered.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation

The temporary total disability (TTD) and medical benefits apply to both injury numbers 99-138495 and 99-141367. However, the parties were unable to determine how much applied to each case. The majority of the expenses applied to injury number 99-138495.

See the award for injury number 99-141367 for more details about the accident.

A pain diagram dated September 19, 1999 revealed low back pain with an arrow pointing to the right knee and the words "shooting pain" next to it. A second diagram dated December 23, 1999, displayed a similar arrow.

Items unpacked included hamburger patties, French fries, straws, shortening, pickles, and condiments.

Dr. Cohen's restrictions included no repetitive bending, lifting, twisting, or stooping, no lifting over 5 pounds, prolonged sitting or standing, climbing or walking on uneven surfaces.

The TTD paid totaled \$44,213.43 for 130 1/7 weeks, with an additional \$14.69 paid.