

FINAL AWARD ALLOWING COMPENSATION

(Affirming Award and Decision of Administrative Law Judge with Correction)

Injury No.: 03-028306

Employee: Paula L. Johnson

Employer: Wal-Mart Associates, Inc.

Insurer: American Home Assurance, Inc.

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (previously adjudicated)

The above-captioned workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having heard the oral arguments and read the briefs of the parties and having reviewed the evidence and considered the whole record, the Commission affirms (with the correction noted below) the award and decision of the administrative law judge dated October 14, 2009 (award), pursuant to § 286.090 RSMo. This Commission adopts the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the decision set forth below.

The parties are in agreement that the compensation rate that the administrative law judge used to calculate temporary total disability benefits was incorrect. After determining that employee's average weekly wage was \$91.49, the administrative law judge neglected to multiply that number by 66 2/3%, as required under § 287.170.1(4) RSMo. The proper rate is \$61.00 per week.

Consequently, we correct the award by ordering employer and insurer to pay employee the total amount of \$2,143.71 (instead of \$3,215.22) for temporary total disability, which changes the total employer and insurer shall pay to employee to \$69,860.74 (instead of \$70,932.25).

The award and decision of Administrative Law Judge L. Timothy Wilson, as corrected herein, is attached and incorporated by 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 15th day of April 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Paula L. Johnson

Injury No. 03-028306

Dependents: N/A

Employer: Wal-Mart Associates, Inc.

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

Insurer: American Home Assurance, Inc.

Hearing Date: August 18, 2009

Checked by: LTW

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: March 29, 2003
5. State location where accident occurred or occupational disease was contracted: Greene 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:
Claimant was pulling shopping carts apart that were stuck together; in doing so, she suffered an injury.
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: Neck and shoulders
14. Nature and extent of any permanent disability:
14. Compensation paid to-date for temporary disability:
16. Value necessary medical aid paid to date by employer/insurer?

Employee: Paula L. Johnson

Injury No. 03-028306

- 17. Value necessary medical aid not furnished by employer/insurer?
- 18. Employee's average weekly wages: \$91.49
- 19. Weekly compensation rate: \$91.49TTD/\$194.13 PPD
- 20. Method wages computation: Award

COMPENSATION PAYABLE

21. Amount of compensation payable:

| | |
|--|-------------|
| Unpaid medical expenses: | \$23,843.65 |
| 35 1/7 weeks of temporary total disability (or temporary partial disability) | 3,215.22 |
| 218 weeks of permanent partial disability from Employer | 42,320.34 |
| 8 weeks of disfigurement from Employer | 1,553.04 |

22. Second Injury Fund liability: No

TOTAL: \$70,932.25

23. Future requirements awarded: Future medical care is awarded (See Award)

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: Patrick J. Platter, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Paula L. Johnson

Injury No. 03-028306

Dependents: N/A

Employer: Wal-Mart Associates, Inc.

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

Insurer: American Home Assurance, Inc.

Hearing Date: August 18, 2009

Checked by: LTW

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on August 18, 2009. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about September 8, 2009.

The employee appeared personally and through her attorney Patrick Platter, Esq. The employer and insurer appeared through their attorney, Jerry Harmison, Esq. The Treasurer of Missouri, as the Custodian of the Second Injury Fund, is not a party to this hearing.¹

The parties appearing at the evidentiary hearing of August 18, 2009 entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about March 29, 2003, Wal-Mart Associates, Inc., was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by American Home Assurance Inc.
- (2) On the alleged injury date of March 29, 2003, Paula Johnson was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about March 29, 2003, the employee claimant sustained an accident, which arose out of and in the course and scope of her employment with the employer.
- (4) The above-referenced employment and accident occurred in Camden County, Missouri. The parties agree to venue lying in Springfield (Greene County), Missouri. Venue is proper.

¹ The employee and the Second Injury Fund have already adjudicated the claim against the Second Injury Fund.

- (5) The employee notified the employer of her injury as required by Section 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) Temporary disability benefits have not been provided to the employee.
- (8) The employer and insurer have provided medical treatment to the employee, having paid \$13,003.87 in medical expenses.

The sole issues to be resolved by hearing include:

- (1) Whether the claimed accident of March 29, 2003 caused the injuries and disabilities for which benefits are now being claimed?
- (2) Whether the employer and insurer are obligated to pay for certain past medical care and expenses in the amount of \$29,771.84?
- (3) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee of the effects of the injuries?
- (4) What is the applicable compensation rate?
- (5) Whether the employee is entitled to temporary total disability compensation? (The employee seeks payment of temporary total disability compensation, payable for the periods of July 23, 2003 to April 22, 2004, and May 31, 2005 to February 2, 2006, which represents 71 weeks of temporary total disability compensation.)
- (6) Whether the employee sustained any permanent disability as a consequence of the claimed accident; and, if so, what is the nature and extent of the disability?
- (7) Whether the employee is entitled to additional compensation in the nature of disfigurement?

EVIDENCE PRESENTED

The employee testified at the hearing in support of her claim. Also, the employee presented at the hearing of this case the testimony of her husband – Edgar Leroy Johnson. In addition, the employee offered for admission the following exhibits:

- Exhibit 1 Associate Statement (Page 1)
Exhibit 2 Associate Statement (Page 2)

| | |
|-----------------|---|
| Exhibit 3..... | Workers' Compensation Request for Medical Care |
| Exhibit 4..... | Workers' Compensation Tele-reporting Call-In Sheet (Page 1) |
| Exhibit 5..... | Workers' Compensation Tele-reporting Call-In Sheet (Page 2) |
| Exhibit 6..... | Associate Accident Review Form |
| Exhibit 7..... | Associate Accident Review Form |
| Exhibit 8..... | Claim No.C3223374 |
| Exhibit 9..... | Authorization for Medical Records and Reports |
| Exhibit 10..... | New Associate Orientation Checklist |
| Exhibit 11..... | Wal-Mart Stores Matrix of Essential Job Functions |
| Exhibit 12..... | Letter to Associates from Ron Kinnison |
| Exhibit 13..... | Payroll Register |
| Exhibit 14..... | Exit Interview |
| Exhibit 15..... | Performance Documentation Related to Paula Johnson |
| Exhibit 16..... | Bate Stamped Documents from Attorney Harmison (under Letter Dated May 31, 2005) |
| Exhibit 17..... | Bate Stamped Documents from Attorney Harmison (under Letter Dated August 21, 2007) |
| Exhibit 18..... | Chart Notes from Lake Ozark Clinic – Dr. Osborn |
| Exhibit 19.... | Certified Medical Records from Mid-Missouri Orthopedic & Sports Medicine |
| Exhibit 20..... | To Whom It May Concern Letter Dated October 13, 2004 from Dr. Michael Hoeman |
| Exhibit 21... | To Whom It May Concern Letter Dated November 4, 2004 from Dr. Michael Hoeman |
| Exhibit 22..... | Stipulation for Compromise Settlement (Injury No. 90-069780) |
| Exhibit 23..... | Certified Medical Records from Springfield Neurological & Spine Institute |
| Exhibit 24. | Medical Records from Healthsouth – Initial Evaluation Dated April 9, 2003 |
| Exhibit 25..... | Division Docket Entry from Judge Zerrer (Dated Sept. 21, 2004) |
| Exhibit 26..... | Division Docket Entry from Judge Billings (Dated Jan. 20, 2005) |
| Exhibit 27..... | Request for Leave of Absence (Dated May 31, 2005) |
| Exhibit 28..... | Deposition of Judy White (Dated Aug. 27, 2007) |
| Exhibit 29..... | Deposition of Nancy Baez (Dated Aug. 27, 2007) |
| Exhibit 30..... | Deposition of Mary Simpson (Dated Aug. 27, 2007) |
| Exhibit 31..... | Deposition of Staci Martin (Dated Sept. 21, 2007) |
| Exhibit 32..... | Complete Medical Report from Dr. Robert Strang |
| Exhibit 33..... | Complete Medical Report from Dr. Michael Hoeman |
| Exhibit 34..... | Medical Records from Lark of the Ozarks Clinic |
| Exhibit 35..... | Medical Records from St. John's Smith, Glynn, Callaway Clinic |
| Exhibit 36..... | Medical Records from Diagnostic Clinic |
| Exhibit 37..... | Medical Records from St. John's Health Center |
| Exhibit 38..... | Medical Records from Ferrell-Duncan Clinic |
| Exhibit 39..... | Medical Records from University of Missouri Health Care |
| Exhibit 40..... | Medical Records from Putnam Orthopedic Clinic |
| Exhibit 41..... | Medical Records from Healthsouth |
| Exhibit 42..... | Deposition of Shane Bennoch, M.D. |
| Exhibit 43..... | Curriculum Vitae of Philip Eldred |

Exhibit 44..... Vocational Rehabilitation Evaluation Report from Philip Eldred
(Dated April 4, 2007)
Exhibit 45..... Copy of Medical Expenses
Exhibit 46..... Deposition of Philip Eldred (Dated July 27, 2009)
Exhibit 47..... Certified Medical Records from Diagnostic Clinic
Exhibit 48..... Medical Expenses Summary

Exhibits 1 to 45 were initially offered and admitted at the evidentiary hearing of June 11, 2008, which involved the claim against the Second Injury Fund. (The employer and insurer were not parties to the June 11, 2008 hearing.) Without objection, Exhibits 1 through 24, 27 through 39, and 41 through 45 were received and admitted into evidence. Exhibits 25 and 26 were moved to and made part of the Legal File. Exhibit 40 was withdrawn. Exhibits 46 through 48 were received and admitted into evidence at the hearing of August 18, 2009.

The employer and insurer presented one witnesses at the hearing of this case – Nancy Baez. In addition, the employer and insurer offered for admission the following exhibits:

Exhibit A..... Deposition of Paula Johnson (Dated May 7, 2007)
Exhibit B..... Deposition of Thomas Corsolini, M.D. (Dated September 24, 2007)
Exhibit C..... Deposition of Michael Hoeman (Dated May 15, 2008)
Exhibit D..... Complete Medical Report of Jeffrey J. Mutchler, D.O.
Exhibit E..... Complete Medical Report of Thomas B. Corsolini, M.D.
Exhibit F . Correspondence and Documents from Attorney Harmison to Attorney Platter (July 31, 2007 & August 21, 2007 per Judge Holden)
Exhibit G..... Employee's Wage Statement
Exhibit H..... Report of Injury (prepared March 31, 2003)
Exhibit I..... Trial Transcript of Paula Johnson (Dated June 11, 2008)
Exhibit J..... Letter from Michael Hoeman, M.D. (Dated September 5, 2008)
Exhibit K..... Trial Transcript of Philip Eldred (Dated June 11, 2008)
Exhibit L..... Medical Expenses Payment History

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took judicial notice of the documents contained in the Legal File, which include:

- Notice of Hearing
- Request for Hearing-Final Award
- Order Sustaining Change of Administrative Law Judge
- Request for Change of Administrative Law Judge
- Final Award Denying Compensation Issued by Labor & Industrial Relations Commission
(Injury No. 03-028306 – Denial of Second Injury Fund Liability)
- Award Issued by Administrative Law Judge Victorine R. Mahon
- Division Docket Entry from Judge Zerrer (Dated Sept. 21, 2004)
- Division Docket Entry from Judge Billings (Dated Jan. 20, 2005)
- Answer of Employer/Insurer to Claim for Compensation

- Answer of Second Injury Fund to Claim for Compensation
- Claim for Compensation
- Report of Injury

At the evidentiary hearing, the undersigned took judicial notice of Chapter 287, RSMo. Additionally, at the evidentiary hearing the employer and insurer questioned Nancy Baez relative to oral statements made to her by the employee, Paula Johnson. Through her attorney Ms. Johnson objected, asserting that such statements were not previously provided pursuant to Section 287.215, RSMo. The undersigned permitted Ms. Baez to testify as an offer of proof, and reserved ruling on the admissibility of the testimony. The undersigned, having now reviewed Section 287.215, RSMo and having considered arguments of counsel, the objection is overruled. This testimony of Nancy Baez relative to the statements made by the employee, Paula Johnson, is admitted into evidence. Section 287.215, RSMo is not applicable to oral statements made to Nancy Baez by the employee, as the statements were not in writing and were never reduced to writing.

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

PROCEDURAL HISTORY & COMMENT

On June 11, 2008 the employee, the employer and insurer, and the Second Injury Fund, proceeded to an evidentiary hearing for a final adjudication before an administrative law judge other than the undersigned. Prior to commencement of the hearing, the employee and the employer and insurer entered into a tentative settlement agreement, conditioned on the parties securing a Medicare set-aside agreement acceptable to the parties. And, in light of this agreement, the employee proceeded to evidentiary hearing on June 11, 2008 against the Second Injury Fund only.

Thereafter, on or about August 6, 2008, the Administrative Law Judge presiding over the June 11, 2008 hearing issued an Award and Decision denying compensation. Notably, in ruling in favor of the Second Injury Fund, the Administrative Law Judge ruled that the work injury of March 29, 2003, considered alone, renders the employee permanently and totally disabled. On April 8, 2009, the Labor & Industrial Relations Commission affirmed the Award and Decision of the Administrative Law Judge.

In addition, subsequent to the June 11, 2008 hearing, the employee and the employer and insurer were unable to finalize the tentative agreement, resulting in the parties not entering into an approved Stipulation for Compromise Settlement Agreement. As a consequence the employee and the employer and insurer are now proceeding to evidentiary hearing on the claim against the employer and insurer only. And, insofar as the employer and insurer were not parties to the adjudication held on June 11, 2008, the findings and awards issued by the Administrative Law Judge on August 6, 2008, as well as the Final Award Denying Compensation issued by the Labor & Industrial Relations Commission on April 8, 2009, are not binding on the employer and insurer or on this proceeding.

The adjudication of this workers' compensation file, as it involves separate adjudication proceedings against separate parties before different judges, highlights the attendant risks and the potentiality of inconsistent rulings in the employee electing to adjudicate the claim against the employer and insurer and the claim against the Second Injury Fund separately.

DISCUSSION

The employee, Paula Johnson, is 54 years of age, having been born on September 10, 1955. Ms. Johnson is married and resides with her husband in Springfield, Missouri. Ms. Johnson and her husband, Edgar Leroy Johnson, have been married for approximately 21 years. Mr. and Mrs. Johnson do not have any children. Ms. Johnson, however, has an emancipated son from her prior marriage.

Ms. Johnson enjoys limited education, as she attended high school, but did not complete the ninth grade. Ms. Johnson quit school to marry her first husband. While in school Ms. Johnson made Ds and Fs. She did not attain a GED. Additionally, she lacks any formal vocational training.

Ms. Johnson's employment history is varied, and includes labor-oriented work. Notably, this work experience is described by the Dictionary of Occupational Titles to include the following:

- Hostess (People Greeter)
- Fast-Food Worker
- Circuit Board Inspector
- Inventory Clerk
- Cleaner, Housekeeping

Prior Medical Condition / Disabilities

Prior to March 2003, Ms. Johnson suffered several injuries or medical conditions. Notably, in 1994 Ms. Johnson applied for and received social security disability, and became medicare eligible in 1996. (See Transcript of Evidentiary Hearing held on June 11, 2008, page 136.) Ms. Johnson continued to receive social security disability compensation through the date of the evidentiary hearing. Additionally, since obtaining social security disability compensation in 1994 Ms. Johnson has not worked full time.

Several of the injuries or conditions suffered by Ms. Johnson prior to March 2003, together with the treatment received by Ms. Johnson for these conditions, are summarized below.

- Right Hand. In or around 1990 Ms. Johnson suffered carpal tunnel syndrome in her right hand, which resulted in a surgical repair. This injury involved a workers' compensation claim (Injury No. 90-069780), wherein Ms. Johnson and the employer/insurer entered into a Stipulation for Compromise of Lump Sum Settlement on or about December 22, 1993. This settlement agreement does not identify a percentage of disability suffered by Ms. Johnson referable to this injury.

Prior to March 2003, Ms. Johnson presented with numbness and tingling in her right hand. Additionally, she experienced weakness and occasionally would drop things.

- Thoracic Outlet Syndrome. In or around 1992, Ms. Johnson was diagnosed with right thoracic outlet syndrome, which resulted in her undergoing a right transaxillary rib resection. The procedure relieved the swelling she experienced in the arm, but provided no relief for the pain.

Without objection, Philip Eldred, who is a vocational expert secured by the employee, testified that, on November 30, 1992, Dr. Aly Moshen provided a disability rating report, wherein he opined that Ms. Johnson presented with a disability of 30 percent, referable to the right upper extremity; and Ms. Johnson presented with a disability of 10 percent referable to the cervical and shoulder girdle areas. Additionally, Mr. Eldred noted that Dr. Moshen limited Ms. Johnson's employment to sedentary work.

- Neck. In October 1993 Ms. Johnson suffered a motor vehicle accident as an unrestrained driver, which resulted in her sustaining an injury to her head, neck, left ankle, left foot, and left wrist. The accident resulted in Ms. Johnson getting emergency room treatment, wherein the attending physician diagnosed Ms. Johnson with a cervical strain, head contusion without evidence of intracranial pathology, left ankle sprain, left foot contusion, and left wrist sprain. The attending physician released Ms. Johnson from the hospital on the same day, prescribing bed rest for that day, followed by an off work prescription for three days.

Ms. Johnson characterized the injury to her neck as a "whiplash." which continued to cause pain, resulting in her obtaining medical care. The medical records reveal that she presented with a "very complex chronic pain syndrome," resulting in her being treated aggressively with multiple modalities, including physical therapy, local anesthetic infiltrations of trigger points and facet rhizotomies at C4-C5, C5-C6, and C6-C7 bilaterally. Diagnostic studies did not identify this condition to involve a surgical concern.

Eventually, Ms. Johnson was referred to a pain clinic for chronic myofascial neck pain without evidence of radiculopathy. Ms. Johnson did not pursue treatment with this pain clinic, but treated her condition with muscle relaxants and pain medication.

Without objection Mr. Eldred testified that in March 1994 Dr. Palermo provided Ms. Johnson with treatment, and Dr. Palermo indicated that Ms. Johnson had sustained a cervical injury with radiculopathy to the right upper extremity, and he suspected reflex sympathetic dystrophy. Additionally, Mr. Eldred notes that Dr. Palermo had noted that Ms. Johnson suffered mild myofascial pain syndrome.

In addition, in August 1998 Ms. Johnson treated with her family physician for chronic neck pain. Additionally, she sought and obtained an evaluation with Jon Ferguson, M.D., who opined that Ms. Johnson did not present with a surgical condition.

The parties did not identify the injury to involve a workers' compensation claim; nor are there any medical records that reference a degree of disability suffered by Ms. Johnson. However, Ms. Johnson indicates that she obtained a settlement check relative to this accident.

In September 2000, while treating for her low back, Ms. Johnson presented with symptoms of neck pain and stiffness. Similarly, in January 2002, while presenting to Dr. Hoeman for treatment of her low back, Ms. Johnson noted some increased neck pain, particularly involving the left posterior neck area, occasionally causing headaches. Dr. Hoeman, however, did not offer a diagnosis referable to the neck and did not offer any specific treatment referable to the neck.

On March 5, 2003 Ms. Johnson presented to Dr. Hoeman for follow-up treatment referable to her lumbar disc disease and chronic pain syndrome secondary to her lumbar disc disease. At the time of this examination, Ms. Johnson noted that she was developing a sensation of "numbness" involving both arms while lying on either side; and, when she changes position, the numbness tends to resolve. Dr. Hoeman did not offer a specific diagnosis or treatment plan for the upper extremity numbness, and did not refer to the symptoms as a neck condition. Notably, when questioned about this condition in December 2007, Dr. Strang opined that the numbness was "more likely a peripheral etiology and unrelated to the C5-6 process."

During the period of 1999 to 2003, Ms. Johnson primarily presented for treatment with complaints of chronic low back pain, and not neck pain; although, during this period she received pain management treatment that provided relief to her body as a whole, including neck pain.

- Low Back. In 1998, and subsequent to being on social security disability, Ms. Johnson treated with her family physician, Michael D. Hoeman, M.D., and other physicians, for mid and low back pain. In light of diagnostic studies, the attending physicians diagnosed Ms. Johnson with degenerative disc disease of the lumbar spine with significant muscle spasm. The treating physicians opined that Ms. Johnson presented with chronic pain, and recommended that she be managed conservatively for pain management as the condition did not involve a surgical condition.

In 1999 Ms. Johnson continued to treat for significant low back pain and left lower extremity pain. The medical records note that Ms. Johnson was experiencing pain with ambulation, and occasionally dragged her left foot because of weakness. Diagnostic studies, which included an MRI and a CT Myelogram, revealed significant spinal stenosis. The nature of this condition interfered with Ms. Johnson's ability to perform daily activities, and resulted in Ms. Johnson utilizing a cane to assist in walking and ambulating. The condition, however, was not identified as a surgical condition; and the physicians treated Ms. Johnson conservatively with medication and adjustments.

In August 2000 Ms. Johnson presented with a progression of low back pain, with pain and numbness radiating into the buttocks and down both lower extremities. Notably, in August 2000 Ms. Johnson began suffering shooting pain in her right lower extremity, from the back to the ankle. In September 2000 Ms. Johnson noted that the pain interfered with her ability to rest at night. The physicians continued to treat Ms. Johnson with a medication regime, which included Relafen, Soma, Denavir, Baclofen, E-Mycin, Vicodin, and Amitriptylin.

Ms. Johnson continued to receive follow-up treatment for lumbar disc disease and chronic pain syndrome. In March 2001 the attending physician changed Ms. Johnson's prescription for Amitriptyline to Oxycontin. Ms. Johnson continued with this medication regime until March 5, 2003, when she discontinued Oxycontin because of shortness of breath, which she attributed to the Oxycontin. Subsequently, Ms. Johnson experienced a worsening of back pain which caused her to wake up several times each night because of the severity of back pain. And in July 2003 Ms. Johnson began taking Percocet as an addition to her medication regime.

- Depression / Anxiety Disorder. In 1997, Ms. Johnson treated with James R. Blaine, M.D., who is a primary-care physician. Testing performed by Dr. Blaine revealed moderately severe depression, resulting in Dr. Blaine treating Ms. Johnson with Paxil. Other medical records indicate that Ms. Johnson suffered from generalized anxiety disorder, for which she took Paxil.

Employment with Wal-Mart

In July 2001, and although on social security disability and unable to work full-time, Ms. Johnson obtained employment with Wal-Mart, working in a Wal-Mart Super Center facility located in Osage Beach, Missouri. (Philip Eldred, vocational expert, notes that an individual on social security disability is entitled to work a limited number of hours and to continue receiving social security disability compensation.) In her employment with Wal-Mart, Ms. Johnson worked as a "people greeter," which required her to maintain a "zone defense" at the front of the retail facility. The work performed by Ms. Johnson included arranging shopping carts, greeting customers upon their entrance, answering customer questions, handling merchandise, and returning merchandise to locations at the front of the store. This activity involved lifting items (e.g. ledgers, hand tools, etc.) weighing up to 10 pounds upon an occasional basis, basic reading and writing, pushing and pulling items (e.g. shopping carts), and standing and walking.

This employment involved part-time employment. Initially, Ms. Johnson worked three days a week. However, early in this employment and continuing to March 2003, because of low back pain, Ms. Johnson scaled down her work schedule to two 8-hour days a week. Notably, during her employment with Wal-Mart, Ms. Johnson obtained favorable performance evaluations, either meeting or exceeding performance expectations, which assessed her performance in customer service, loss prevention, and safe-work practices. Additionally, during her employment with Wal-Mart, Ms. Johnson was noted for good attendance and punctuality.

Judy White, personnel director for the Wal-Mart Super Center facility located in Osage Beach, testified that, in employing Ms. Johnson, she knew Ms. Johnson was on social security disability for her back and understood that Ms. Johnson wished to restrict her employment to three days. According to Ms. White, Ms. Johnson advised her that she could work three days a

week, but no more than the three days because standing hurt her back. Further, according to Ms. White, Ms. Johnson requested a reduction in her work schedule, from three days to two days a week because she was watching her father, who was ill, and not because of back pain.

Ms. Johnson severed her employment with (or last worked for) the Wal-Mart facility in Osage Beach on May 31, 2005.

Accident

On the morning of March 29, 2003, while engaged in her employment with Wal-Mart as a "people greeter," Ms. Johnson pulled two carts apart, which were stuck together. As she pulled the first or rear cart closer to her with her right hand, she pushed the second or lead cart away from her with her left hand. In doing so, she suffered an injury, which she described as sounding like a tear or rip in her left shoulder. She experienced immediate and excruciating pain, starting in her neck and then running down to her left shoulder and arm.

Reporting of Incident to Employer & Insurer

Ms. Johnson reported the incident and symptoms to her supervisors, approximately one hour after suffering the incident. In accordance with employer policy, Ms. Johnson made a written report, filed on an "Associate Statement-Workers Compensation" form. In explaining why she waited an hour to make the report, Ms. Johnson notes, "I thought I could tuff (sic) it out." This written incident report references injury to her arm and shoulder, and pain in left shoulder and numbness.

Subsequent to completing the Associate Statement, John Fitch, who is an assistant manager, completed the employer's portion of the Workers' Compensation Request for Medical Care form, and authorized Ms. Johnson to seek an evaluation with Lake of the Ozarks Clinic. And the attending physician completed the doctor's portion of the Workers' Compensation Request for Medical Care form, wherein the attending physician noted a strain of the upper back. Additionally, Mr. Fitch completed a Workers' Compensation Telereporting Call-in Sheet form, which referenced only a left-shoulder injury. (These two forms are completed and filed with the employer's insurer in accordance with employer policy and an agreement between the employer and its insurer. This agreement between the employer and its insurer recognize that the employer may suffer a penalty with the insurer if the employer fails to file timely and properly these forms with the insurer. This agreement further recognizes that the insurer is exclusively responsible for investigating a worker's compensation claim; and it is the insurer that is responsible for authorizing or denying medical care.)

Initial Medical Treatment

Subsequent to suffering the work-related incident, and as directed by the employer, on March 29, 2003 Ms. Johnson presented to Lake of the Ozarks Clinic for an evaluation. At the time of this visit, Ms. Johnson presented with complaints of pain in her left upper extremity and neck. The initial chart note includes the following entry,

Work comp @ Wal-Mart.

Pulling carts apart et hurt lt shoulder. Lt hand also c swelling.

c/o pain in shoulder area also down into arm. Pain in neck also;

when turning neck.

Thereafter, Dr. Osborn, who is a physician with Lake of the Ozarks Clinic, intermittently treated Ms. Johnson from March 29, 2003, until May 28, 2003, though his treatment focused upon the left shoulder. This treatment included continuing with the prescriptions of Relafen and Percocet, which Ms. Johnson was taking prior to the injury. Additionally, Ms. Johnson received a prescription for physical therapy.

Notably, while attending physical therapy appointments at Health South, Ms. Johnson reported complaints of pain involving her left shoulder and neck. The medical records of Health South reveal the following complaints:

Chief Complaint:

Pain: Location: Pain L side of neck and upper shoulder, numbness in little, ring and middle finger and ulnar side of hand dorsal surface and extending on ulnar forearm to just above the elbow.

And, while getting physical therapy prescribed by Dr. Osborn, Ms. Johnson received certain treatment for her neck. Believing that her pain related to her shoulder, and uncertain as to why she was getting physical therapy for her neck, Ms. Johnson addressed this concern with Dr. Osborn. Responding to her concerns, Dr. Osborn propounded in his medical note of April 21, 2003 the following comments:

She is here for a follow up on her shoulder. She says it is some better. She said that physical therapy is working on her neck and her problem is in her shoulder. Physical therapy says her problem is in her neck and she probably has disc problems in her neck. She was sent to this clinic as Workman's Comp for her shoulder because of an injury to her shoulder, so, therefore, I do not really think the neck injury could caused (sic) by the problem that she has now. She was pulling two carts apart with her arms when this occurred and so it would only be in her shoulder and not in her neck so, therefore, I think that probably the neck is not a problem.

In light of continuing pain, Dr. Osborn ordered a diagnostic study in the nature of an MRI, and referred Ms. Johnson to Jeffrey Mutchler, D.O., who is an orthopedic surgeon, for an orthopedic surgical consultation.

On or about June 11, 2003, Ms. Johnson presented to Dr. Mutchler for an evaluation. The medical records of Dr. Mutchler note that, at the time of this examination, Ms. Johnson propounded the following complaints,

I have arm numbness & tingling running down in hand left side
I've been diagnosed [sic] with degenerative disc disease
the mid to lower back cause great pain & swelling in my back.

Additionally, at the time of this examination Ms. Johnson identified the various medications she was taking, which included prescriptions she was taking prior to the injury. The medications are as follows:

| Medication | Dosage | Reason for Medication |
|-------------------|------------------------------|------------------------------|
| Paxil | 30mg, 1 time per day | Anxiety |
| Carisoprodol | 350 mg, 4 times per day | Muscle Relaxant |
| Baclofen | 20 mg, 4 times per day | Muscle Relaxant |
| Atenolol | 50 mg, 1 time per day | Heart |
| Hydroco/apaps | 500 mg, 2 every 4-6 hours | Pain |
| Nabumetone | 750 mg, 2 times per day | Inflammation |
| Ery-Tab | 333 mg, 3 times per day | Antibiotic |
| Percocet | 10-325 mg, 1 every 4-6 hours | Pain |

The examination performed by Dr. Mutchler on June 10, 2003 revealed positive impingement sign. Additionally, Dr. Mutchler noted that Ms. Johnson reported radicular type numbness and tingling paraesthesias. And x-rays revealed "a very large anterior inferior acromial spur." In light of the positive findings, Dr. Mutchler scheduled Ms. Johnson for subacromial decompression surgery.

On July 23, 2003 Ms. Johnson proceeded to surgery, which involved an open subacromial decompression with subacromial bursectomy. Post-operatively, Dr. Mutchler diagnosed Ms. Johnson with a severe impingement secondary to a very large anterior inferior subacromial spur and ossification of the coracoacromial ligament with hypertrophic subacromial bursitis.

Dr. Mutchler provided follow-up treatment, which included physical therapy and office visits. Initially, following surgery, Dr. Mutchler placed restrictions on Ms. Johnson, which included no use of her left arm. Eventually, Dr. Mutchler eased the restrictions to fifteen pounds, and then none. (Notably, while treating with Dr. Mutchler, Ms. Johnson treated with her family physician, Micheal Hoeman, M.D., for multiple symptoms, including low back and lower extremity pain. In December 2003, Ms. Johnson obtained a surgical consultation with Robert Strang, M.D., who opined that Ms. Johnson did not present with a surgical condition for her low back. Rather, according to Dr. Strang, Ms. Johnson presented with "other multiple myalgias or

arthralgias... [that] raise the question of a fibromyalgia type syndrome or perhaps other related syndrome.”)

On or about April 22, 2004, Dr. Mutchler determined that Ms. Johnson had reached maximum medical improvement. In releasing Ms. Johnson from his care, Dr. Mutchler noted that Ms. Johnson was continuing to experience problems, which he attributed to bicep tendonitis. In this regard Dr. Mutchler indicated that this pain would probably continue until she regained all of her shoulder strength, which he expected to occur within six months or so. Further, in releasing Ms. Johnson from his care, Dr. Mutchler opined that Ms. Johnson had sustained a permanent partial impairment of 9 percent to the upper extremity which he related to “decreased strength and slight decrease of range of motion with flexion and abduction.”

Medical Treatment for the Neck

Ms. Johnson did not receive treatment for her neck and cervical spine during the period she treated with Dr. Mutchler from April 2003 to April 2004. Subsequent to treating with Dr. Mutchler, and in light of continuing pain and numbness in her upper extremity, Ms. Johnson requested the employer to provide additional treatment. The employer and insurer, however, declined to provide Ms. Johnson with additional medical care. Consequently, Ms. Johnson sought and obtained medical care with her primary care provider, Michael Hoeman, M.D.

In July 2004, Ms. Johnson presented to Dr. Hoeman for examination and evaluation with complaints of “progressive pain in the left shoulder to the point where she had lost feeling in the dorsum of her hand and the 4th and 5th digits of her right hand”, and “sensation of numbness and paresthesias involving the left arm.” In light of these symptoms, Dr. Hoeman referred Ms. Johnson to a neurologist with Ferrell-Duncan Clinic for an EMG and nerve conduction velocity study, which the neurologist identified as negative for a peripheral nerve injury or deficit. In light of this diagnostic study, and based on clinical findings, the neurologist felt that Ms. Johnson likely suffered a lower cervical radiculopathy.

Subsequently, in his reports dated October 13, 2004 and November 4, 2004, Dr. Hoeman offered a working diagnosis to include: (1) neck pain; (2) left shoulder pain; (3) paresthesias involving the left arm; and (4) possible cervical radiculopathy involving the left upper extremity. And Dr. Hoeman initiated a treatment plan to include “use of non-steroidal anti-inflammatory medication, skeletal muscle relaxants and physical modalities such as heat.” Additionally, Dr. Hoeman noted that treatment included “uses of potent narcotic analgesics for control of her chronic pain” and other treatment may include physical therapy. Further, Dr. Hoeman opined that, based on her history, physical findings, and clinical course, this presenting medical condition is causally related to the March 2003 injury at Wal-Mart while pulling carts apart.

Eventually, in light of continuing complaints of pain, Dr. Hoeman referred Ms. Johnson to Robert Strang, who is a neurosurgeon with Springfield Neurological & Spine Institute, and who had previously provided consultation to Ms. Johnson for her low back. Additionally, Ms. Johnson underwent an MRI of the cervical spine.

On May 5, 2005, Ms. Johnson presented to Dr. Strang for complaints of pain to her neck, shoulder, and arm. In his office note of May 5, 2005, Dr. Strang records the following history,

Ms. Johnson returns today with neck, shoulder and arm pain following an incident at work in March of 2003. She has some documentation with her today from other doctor's visits which do document that she sought medical attention following an injury at Wal-Mart that left her with neck and shoulder pain. Now the pain has traveled further down the arm and is more radicular in nature. The left side is more affected than the right and with distribution is approximately at C6 or C7. Her symptoms are aggravated by activity and are relieved somewhat by rest. She has had shoulder surgery, but continues to have shoulder pain. She denies any recent bowel or bladder changes.

In light of his examination and evaluation of Ms. Johnson, and in light of his review of the MRI, Dr. Strang opined that Ms. Johnson presented with a herniated disc of the cervical spine at C5-C6, and recommended that she undergo an anterior cervical discectomy with fusion and fixation at the level of C5-C6, and this condition presented a risk for spinal cord injury if she did not proceed with a surgery. Dr. Strang further opined that this condition was causally related to the work incident at Wal-Mart. In this context Dr. Strang propounded the following comments:

In reviewing her records it does appear that the symptoms are secondary to a work related injury. She initially had neck pain with radiation to the shoulder and in all likelihood this was an early cervical radiculopathy that has now progressed down the entire upper extremity.

Dr. Strang performed an anterior cervical discectomy with anterior cervical arthrodesis on June 17, 2005. This procedure included an anterior cervical arthrodesis at C5-C6 the fixation of an anterior cervical plate, and a tube threaded cervical interbody spacer placement. Dr. Strang provided Ms. Johnson with follow-up treatment, which included office visits, physical therapy, x-rays, and MRI scan. On February 2, 2006 Dr. Strang released Ms. Johnson from his care, with directions to return on a PRN basis.

Notably, in responding to a suggestion that Ms. Johnson presented with an episode of numbness and/or paresthesias while sleeping prior to suffering the March 2003 injury at Wal-Mart, and in responding to the employer/insurer's concerns that Ms. Johnson's presenting medical condition associated with her neck was not causally related to the March 29, 2003 accident, Dr. Strang issued a report dated December 13, 2007. In this report Dr. Strang propounded the following comments:

I am writing this letter in regard to Paula L. Johnson, whom I saw on May 5, 2005 for a neck injury/cervical radiculopathy. She was found to have a C5-6 herniated disc with cervical radiculopathy and significant stenosis at C5-6. She underwent a C5-6 anterior discectomy with fusion on June 17, 2005 due to the work-related injury.

It has come to my attention that several weeks prior to her injury she had an episode of numbness and/or paresthesias while sleeping. It is my opinion that this is unrelated to her C5-6 herniated disc, for which she underwent surgery on June

17, 2005. Indeed she had a similar episode later the same year in November 2005 and this is documented in my note from November 21, 2005. I feel that this is more likely a peripheral etiology and unrelated to the C5-6 process. Furthermore, the fact that it was present both preoperatively and postoperatively, and is related to positioning postoperatively (especially since the patient has had a fusion), would make it unlikely that the positional numbness/paresthesias are related to her herniated disc.

Subsequent to being released from medical treatment by Dr. Strang, Ms. Johnson continued to receive follow-up care from her primary care provider, Dr. Hoeman, and other physicians for multiple medical problems, including conditions predating the March 29, 2003 injury, and new conditions occurring subsequent to being released from medical care by Dr. Strang. Notably, in March 2006 Dr. Putnam diagnosed Ms. Johnson with a tear in the cartilage of her right shoulder. And on March 30, 2006 Ms. Johnson underwent a right shoulder arthroscopic surgery performed by Dr. Putnam. Additionally, in 2006 Ms. Johnson received treatment, including hospitalization, for chest pain and hypertension.

In 2007 and continuing through 2008, Dr. Hoeman provided follow-up treatment primarily for degenerative disc disease involving the lumbar and cervical spine. Additionally, she received treatment or evaluations from Dr. Strang. Dr. Hoeman provided pain management that included maintaining Ms. Johnson "on potent narcotic analgesic agents."

Shane L. Bennoch, M.D., who is a physician certified in disability evaluations through American Academy of Disability Evaluating Physicians, testified by deposition in behalf of the employee. Dr. Bennoch performed an independent medical examination of Ms. Johnson on January 11, 2006. At the time of this examination, Dr. Bennoch took a history from Ms. Johnson, reviewed various medical records, and performed a physical examination of her. In light of his examination and evaluation of Ms. Johnson, Dr. Bennoch opined that in the process of attempting to separate two carts on March 29, 2003, while engaged in her employment at Wal-Mart, Ms. Johnson sustained an injury to her neck and left shoulder which necessitated surgical repair to both her neck and left shoulder.

Notably, in describing the nature of this injury, Dr. Bennoch opined that the injury to the neck involved a herniated disc at the level of C5-C6 "with cervical radiculopathy and cervical myelopathy secondary to delay in diagnosis"; and the injury to the left shoulder involved "impingement syndrome, secondary to a large anterior inferior subacromial spur and ossification of a coracocacromial ligament." The surgery for the neck condition involved a C5-C6 anterior cervical discectomy with anterior cervical arthrodesis and cervical plate fixation. The surgery for the left shoulder involved an open subacromial decompression with a left shoulder subacromial bursectomy. Additionally, Dr. Bennoch opined that the March 29, 2003 injury caused Ms. Johnson to suffer "neuropathic itching secondary to cervical myelopathy, bilateral, severe"; and it caused Ms. Johnson to suffer "depression secondary to her neck and shoulder injuries and subsequent neuropathic itching."

Further, Dr. Bennoch opined that, as a consequence of the March 29, 2003 injury, Ms. Johnson will require medication on a long-term basis for treatment of the neuropathic itching, and physical therapy for treatment of her left shoulder in an attempt to avoid adhesive capsulitis (frozen shoulder). In addressing the question of future medical care, Dr. Bennoch was not of the

opinion that Ms. Johnson will require further surgery for her neck, but should be provided a repeat MRI to make sure there is no other impingement or cord lesion or spinal stenosis that could be causing the bilateral radiculopathy, weakness of the arm, and paraesthesias.

In determining the nature and extent of the disabilities caused by the March 29, 2003 injury, Dr. Bennoch propounded the following opinions:

- Neck. The March 29, 2003 work-related injury caused Ms. Johnson to sustain a permanent partial disability of 35 percent to the body as a whole, referable to the cervical spine. In rendering this opinion, Dr. Bennoch takes into consideration the cervical discectomy and fusion, the residual and significant restriction in range of motion to Ms. Johnson's neck, and the persistent pain she is continuing to suffer, with bilateral cervical radiculopathy involving the ulnar nerves.
- Left Shoulder. The March 29, 2003 work-related injury caused Ms. Johnson to sustain a permanent partial disability of 25 percent to the left shoulder, referable to the surgery for the impingement syndrome. In rendering this opinion, Dr. Bennoch takes into consideration the open subacromial decompression and a subacromial bursectomy, the significant decrease in range of motion and positive impingement signs to her shoulder with pain during those movements and continuing physical therapy in an attempt to retain range of motion.
- Neuropathic Itching. The March 29, 2003 work-related injury caused Ms. Johnson to sustain a permanent partial disability of 20 percent to the body as a whole, referable to neuropathic itching of the skin secondary to a delay in diagnosis of cervical neck disease, associated with nerve damage. In rendering this opinion, Dr. Bennoch takes into consideration Ms. Johnson suffers from severe protracted itching to both arms, severe enough to cause skin lesions secondary to scratching, and has caused Ms. Johnson to take gabapentin in an attempt to help with itching.
- Depression. The March 29, 2003 work-related injury caused Ms. Johnson to sustain a permanent partial disability of 10 percent to the body as a whole, referable to the brain, secondary to depression. In rendering this opinion, Dr. Bennoch takes into consideration Ms. Johnson suffers from persistent depression requiring medication for partial control. (In his deposition, Dr. Bennoch modified this opinion, opining that, prior to March 29, 2003, Ms. Johnson presented with a permanent partial disability of 5 percent to the body as a whole, referable to the brain, secondary to depression; and the accident of March 29, 2003 caused Ms. Johnson to sustain a permanent partial disability of 5 percent to the body as a whole, referable to the brain, secondary to depression.)

In determining the nature and extent of the disabilities predating the March 29, 2003 injury, Dr. Bennoch propounded the following opinions:

- Low Back. Prior to March 29, 2003, Ms. Johnson suffered from a permanent partial disability of 20 percent to the body as a whole, referable to the lumbar spine due to multilevel disk disease and degenerative disk disease. In rendering this opinion, Dr.

Bennoch takes into consideration Ms. Johnson presented with decreased range of motion to the lumbar spine with persistent pain and radiculopathy in both legs.

- Hypertension. Prior to March 29, 2003, Ms. Johnson suffered from a permanent partial disability of 5 percent to the body as a whole, referable to cardiovascular system. In rendering this opinion, Dr. Bennoch takes into consideration Ms. Johnson has been required to take oral medication to control her blood pressure.
- Thoracic Outlet Syndrome. Prior to March 29, 2003, Ms. Johnson suffered from a permanent partial disability of 15 percent to the body as a whole, referable to the chest wall, secondary to obstructive thoracic outlet syndrome and resultant excision of the first rib on the right. In rendering this opinion, Dr. Bennoch takes into consideration Ms. Johnson continues to suffer from intermittent numbness to her right arm.

Dr. Bennoch did not identify any preexisting disability attributable to the neck. In his deposition, Dr. Bennoch acknowledged that, prior to March 29, 2003, Ms. Johnson suffered prior episodes of neck pain and sought treatment for this neck pain. Dr. Bennoch, however, characterized this neck pain as transient pain, and not of a permanent nature. Further, Dr. Bennoch noted that, prior to March 29, 2003, Ms. Johnson had not suffered a herniated disc of the cervical spine; and, prior to March 29, 2003, Ms. Johnson had not been diagnosed with cervical radiculopathy.

Finally, Dr. Bennoch opines that the combination of her impairments creates “a substantially greater impairment than the total of each separate injury and/or illness and a loading factor should be added.” Dr. Bennoch further opines that Ms. Johnson’s existing disabilities, including the restrictions and limitations he imposed upon her, is going to make it quite difficult for her to find a job that she is qualified for and able to perform. Notably, in placing restrictions on Ms. Johnson Dr. Bennoch does not differentiate the restrictions applicable to the March 29, 2003 work-related injury from restrictions applicable to the preexisting disabilities.

Concluding that Ms. Johnson is permanently and totally disabled because of the combination of the injuries and disabilities suffered by her, Dr. Bennoch states,

She has significant disease of both the neck and the lower back along with decreased range of motion to both arms along with paresthesias and radiculopathy both to her arms and legs.

On cross-examination Dr. Bennoch acknowledged that he did not review all of Ms. Johnson’s medical records predating the March 2003 injury. Notably, in this regard, he did not review the actual records of Dr. Hoeman. Rather, he reviewed Dr. Corsolini’s summary of Dr. Hoeman’s medical records. In this context, Dr. Bennoch did not know whether Ms. Johnson’s neck was symptomatic before March 2003, but understood her preexisting condition included degenerative disk disease and she presented with occasional transient neck pain prior to March 29, 2003.

And, in light of Dr. Bennoch having not reviewed the actual medical records of Dr. Hoeman, Dr. Bennoch acknowledged on cross-examination that he was not aware that Ms.

Johnson had been diagnosed with depression prior to March 29, 2003 and was taking Paxil, an anti-depressant, in April 2002 for depression/anxiety. Rather, he relied on Ms. Johnson reporting a history of never having any problems with depression or anxiety before March 29, 2003. In light of this preexisting depression, Dr. Bennoch conceded on cross-examination that his assessment of permanent disability attributable to the depression should be separated or apportioned, and he apportioned the disability to reflect 5 percent disability preexisting the March 29, 2003 injury and 5 percent disability caused by the March 29, 2003 work-related injury.

In addition, in his deposition Dr. Bennoch offered initially his opinions under the assumption that, at the time of Ms. Johnson's injury on March 29, 2003, Ms. Johnson was working 40 hours per week. And on cross-examination Dr. Bennoch acknowledged that he did not know whether Ms. Johnson was working more or less than 20 hours a week at the time of the March 29, 2003 injury.

Further, on cross-examination Dr. Bennoch acknowledged that, prior to March 29, 2003, Ms. Johnson suffered from significant preexisting disability, including disabilities to her low back and right shoulder, which caused her to be governed by restrictions and limitations which rendered her sufficiently symptomatic to cause her to be on social security disability. And in this context Dr. Bennoch opines that Ms. Johnson is now permanently and totally disabled as a result of the combination effect attributable to the preexisting disabilities and the work-related injury of March 29, 2003.

Notably, in examining Dr. Bennoch's opinion of permanent total disability, the employer and insurer, and the Second Injury Fund, proffered certain questions, which resulted in Dr. Bennoch propounding the following testimony:

By Mr. Harmison [Employer/Insurer]

Q. Okay. If Ms. Johnson didn't have any preexisting problems and just had this particular situation you attribute to March of 2003, is it your opinion that she couldn't return back to work at Wal-Mart, but she perhaps could do other more sedentary things?

A. I think if you take just strictly her neck as the way it is now and her shoulders as they are now, she could not do a job on an eight-hour-a-day, several-days-a-week basis. So she can't do repetitive. Could she do something for a few hours? She probably could, but she'd probably pay for it. In other words, any kind of over activity with her neck now causes significantly increasing pain, and she's on a number of medications for that.

Q. She was on the medications before, though, correct?

A. Yes.

Q. In fact, I think we've established her preexisting condition was so symptomatic such that she was receiving social security disability?

A. Yes.

Q. Okay. And if I heard you right, your conclusion about permanent total disability is it's a combination effect?

A. Yes.

By Ms. Colburn [Second Injury Fund]

Q. But to reiterate, you believe that even if she did not have any of the preexisting problems, she could not hold down a job now because of the neck and shoulder problems that we have been discussing from March of 2003?

A. That is correct.

Phillip Eldred, who is a vocational expert secured by the employee, testified by deposition and in person at the evidentiary hearing held on June 11, 2008 (trial between the employee and Second Injury Fund). Mr. Eldred opined that, prior to March 29, 2003, Ms. Johnson presented with disabilities referable to her low back and right arm which caused her to be governed by restrictions and limitations, which rendered her eligible for receipt of social security disability compensation. Mr. Eldred further notes that among the multiple physical problems that qualified Ms. Johnson for social security disability compensation included "chronic myofascial neck pain." Considering the preexisting restrictions imposed by Dr. Moshen, which related to Ms. Johnson's low back and right upper extremity, Mr. Eldred opined that these restrictions were vocationally disabling such as to constitute a hindrance or obstacle to employment.

Further, based on these preexisting disabilities and applicable restrictions and limitations, and taking into consideration Ms. Johnson's employment history and educational background, Mr. Eldred opined that, prior to Ms. Johnson securing employment with Wal-Mart, she presented with a medical condition governed by restrictions and limitations that would support a basis for him concluding that she was permanently and totally disabled. And in this context, Mr. Eldred states that, while she was unemployable, she secured employment solely due to the benevolence of the employer, who offered accommodations to her, as well as accommodations to other individuals working as "people greeters", including a quadriplegic, who could not orally speak to (greet) customers but was given an electronic sign to greet customers. Mr. Edlred specifically noted that Ms. Johnson's employment with Wal-Mart was an "accommodated position" since she was only able to work 24 hours per week because of her existing disabilities.

Thomas Corsolini, M.D., who is a physician practicing in the specialty of physical medicine, testified by deposition in behalf of the employer and insurer. Dr. Corsolini performed an independent medical examination of Ms. Johnson on September 22, 2006. At the time of this examination, Dr. Corsolini took a history from Ms. Johnson, reviewed various medical records, and performed a physical examination of her. In light of his examination and evaluation of Ms. Johnson, Dr. Corsolini opined that, on March 29, 2003, while separating two shopping carts, Ms. Johnson sustained an injury in the nature of an aggravation of a preexisting impingement of the rotator cuff tendon in her left shoulder, which necessitated the eventual surgical repair of the left shoulder.

Dr. Corsolini, however, opines that Ms. Johnson does not need any additional medical care, relative to the accident and injury she sustained on March 29, 2003. Additionally, Dr. Corsolini opines that Ms. Johnson is at maximum medical improvement, and he is in agreement

with Dr. Mutchler in the disability suffered by Ms. Johnson relative to this injury, which he notes to be 9 percent to the upper extremity.

In addition, relative to the cervical spine, Dr. Corsolini opined that the March 29, 2003 incident did not cause Ms. Johnson to sustain any injury to her cervical spine. Rather, Dr. Corsolini notes Ms. Johnson suffered from neck pain prior to the accident, which he attributed to the degenerative process consisting of a bone spur formation causing spinal stenosis.

On cross-examination Dr. Corsolini acknowledged that in 1998 Ms. Johnson saw John Ferguson, M.D., who is a neurosurgeon, for neck pain; and Dr. Ferguson did not identify the condition to merit consideration for surgery. (In rendering this opinion Dr. Corsolini noted that he did not review the medical records of Dr. Ferguson, but rather relied on his review of other medical records, including the medical records of Dr. Hoeman.)

Also, on cross-examination, Dr. Corsolini acknowledged that, in light of the history provided to Dr. Osborn by Ms. Johnson, it was "possible" that Ms. Johnson provided a history consistent with cervical radiculopathy. Similarly, Dr. Corsolini acknowledged that Ms. Johnson made reports to her medical providers consistent with the diagnosis made by Dr. Strang. And Dr. Corsolini acknowledged that he did not have the records from the physical therapy clinic Health South, which were consistent with the history provided by Ms. Johnson to other providers. In this context, and relative to the diagnosis and treatment provided by Dr. Mutchler, Dr. Corsolini acknowledged that it can be difficult to distinguish the source of pain between the neck and the shoulder insofar as the "territories of pain overlap greatly, and it's not always to know for sure which one might be the source."

At the hearing of August 18, 2009, Ms. Johnson testified that she continues to experience considerable discomfort and pain. She notes that she suffers from a restriction of motion, due both to pain and somewhat due to the fusion itself. Additionally, she notes that the neck pain causes her to have headaches approximately every day. In regards to her left arm, Ms. Johnson does not believe that she has much strength in her left arm and she tends to drop things when she holds them in her left hand. She avoids using her left (nondominant) hand due to weakness. She has difficulty reaching overhead with her arms. She has difficulty sleeping because of discomfort from her neck, left shoulder, and low back.

Further, Ms. Johnson testified that, following the shoulder surgery, and with accommodations made by the employer, she returned to work. However, following the neck surgery, she had moved to Springfield and was unable to secure employment with such accommodations. Since the neck surgery, Ms. Johnson has not returned to any employment.

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying workers' compensation case involving an accident date of March 29, 2003, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on March 29, 2003, which is

substantive in nature, and not procedural, governs substantively the adjudication of this case. Accordingly, in this context, several familiar principles bear reprise.

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo. App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo. Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo. App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo. App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Bruflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo. App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo. App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo. App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575,577 (Mo. App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo. App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo. App. W.D. 1993).

In addition, in the context of this case and premised on the understanding that work-related accident must constitute a substantial factor in the cause of the resulting medical condition or disability, several familiar principles bear reprise.

A preexisting but not disabling condition does not bar recovery under The Missouri Workers' Compensation Law if a work-related accident causes the condition to escalate to a level of disability. *Weinbauer v. Grey Eagle Distributors*, 661 S.W.2d 652 (Mo. App. E.D. 1983). If the evidence establishes that an accident caused a disability or aggravated a preexisting condition or infirmity of an employee, which produces a condition that would not have resulted in a normal, healthy individual, an award is authorized. *Fogelson v. Banquet Foods Corp.*, 526 S.W.2d 886 (Mo. App., K.C.D. 1975). An aggravation of an existing infirmity caused by an accident or occupational exposure arising out of and in the course of employment is compensable under Chapter 287, RSMo, even if the particular accident or occupational injury would not have produced such result in a normal and healthy individual. *Mashburn v. Chevrolet-Kansas City Division, General Motors Corp.*, 397 S.W.2d 23 (Mo. App., K.C.D. 1965).

I.
Nature of Injury & Medical Causation

In March 2003 Ms. Johnson engaged in employment with Wal-Mart, working as a “people greeter”. Yet, while working for Wal-Mart, Ms. Johnson was on social security disability, and limited her employment with Wal-Mart to 16 hours per week. For all intents and purposes, Ms. Johnson had secured employment with Wal-Mart and was able to engage in employment with Wal-Mart through accommodations made by Wal-Mart for her, and in light of her personal work ethic and strong desire to work, even if limited to part-time employment.

On March 29, 2003, Ms. Johnson sustained an injury by accident, which arose out of and in the course of her employment with Wal-Mart. At the time of this injury, while engaged in her employment with Wal-Mart as a “people greeter,” Ms. Johnson pulled two carts apart, which were stuck together. As she pulled the first or rear cart closer to her with her right hand, she pushed the second or lead cart away from her with her left hand. In doing so, she suffered an injury, which she described as sounding like a tear or rip in her left shoulder. She experienced immediate and excruciating pain, starting in her neck and then running down to her left shoulder and arm.

The parties readily agree that the March 29, 2003 accident caused Ms. Johnson to sustain an injury to her left shoulder, which involved a severe impingement secondary to a very large anterior inferior subacromial spur and ossification of the coracoacromial ligament with hypertrophic subacromial bursitis. The injury necessitated surgical repair involving an open subacromial decompression with subacromial bursectomy.

The parties, however, offer differing medical opinion relative to whether the injury sustained by Ms. Johnson included an injury to her neck. The employee, relying principally upon the medical records of Dr. Hoeman (primary care provider), and the medical opinions of Drs. Strang (treating physician and surgeon) and Bennoch (examining physician), assert that, while Ms. Johnson previously suffered from neck pain, the March 29, 2003 incident caused Ms. Johnson to suffer a herniated disc to her cervical spine with radiculopathy, which progressed and eventually necessitated surgical repair involving a discectomy and fusion.

However, the employer and insurer, relying upon the medical opinions of Drs. Osborn (treating physician selected by employer and insurer) and Corsolini (examining physician), assert that the March 29, 2003 incident caused only an injury to the left shoulder. The employer and insurer further argue that the treatment for Ms. Johnson’s neck is due to a progressive degenerative condition that is not causally related to the March 29, 2003 injury.

After consideration and review of the evidence, I find and conclude that the March 29, 2003 incident caused Ms. Johnson to sustain an injury to her cervical spine at the level of C5-C6, including a herniated disk of the cervical spine at the level of C5-C6, as well as an aggravation of the preexisting degenerative disc disease. In rendering this determination, I find and conclude that the testimony of Dr. Strang, who is a neurosurgeon, credible, reliable and worthy of belief. I similarly find and conclude that the testimony of Dr. Bennoch credible, reliable and worthy of belief. I further note that the March 29, 2003 incident caused Ms. Johnson to experience cervical

radiculopathy. Dr. Strang described this radiculopathy as an early cervical radiculopathy that started in the shoulder, and then progressed down the entire left arm. Ms. Johnson reported this incident to Wal-Mart within an hour of when it happened. She reported symptoms several times to at least three medical providers, which included symptoms relating to both her left shoulder and her cervical radiculopathy.

Unfortunately, in light of cervical radiculopathy symptoms being closely associated with or confused with a left shoulder injury, the initial treating physician focused his attention exclusively on treatment of the left shoulder. Although Wal-Mart and its insurer could have taken precautions to have more closely documented Ms. Johnson's problem, Wal-Mart's insurer implemented a procedure in which it exclusively investigated the claim; there was never any evidence that the employer investigated Ms. Johnson's original reports to verify that she suffered what Dr. Strang diagnosed as a cervical disc disorder. The employer and insurer simply declined to accept the March 29, 2003 accident to involve a cervical spine injury, relying in part on the incident report forms filed with the insurer.

Further, the incident of pulling the shopping carts apart provides a medical explanation for Ms. Johnson suffering a herniated disc to her cervical spine. Ms. Johnson's primary care physician, who treated Ms. Johnson both before and after the incident, causally linked the incident to the cervical disc disorder. This disorder was cervical radiculopathy and myelopathy, a surgical condition. Both Dr. Strang, who is the neurosurgeon having performed the surgery, and Dr. Bennoch, who is the examining physician, causally linked the cervical disorder to the March 29, 2003 accident. Preeminently, the March 29, 2003, incident aggravated Ms. Johnson's preexisting neck condition, which produced a herniated disc and a surgical concern.

There are only two physicians that did not make the causal connection – Drs. Osborn and Corsolini. Dr. Osborn did not identify the March 29, 2003 incident to cause an injury involving cervical radiculopathy. Dr. Osborn, however, did not accurately assess Ms. Johnson's medical history. And further, he was authorized only to treat the left shoulder. And Dr. Corsolini, who is an examining physician for the employer and insurer, renders an opinion based on reference to prior neck pain. Yet, Dr. Corsolini acknowledges that there are not any medical records or evidence that indicates Ms. Johnson presented with a surgical cervical condition before the work-related injury.

Further, relying upon the medical opinion of Dr. Bennoch, Ms. Johnson asserts that the March 29, 2003 incident caused her to sustain additional injuries in the nature of a dermatological disorder (neuropathic itching) and depression. In context of these injuries, Dr. Bennoch opines that Ms. Johnson suffers from severe protracted itching to both arms, severe enough to cause skin lesions secondary to scratching for which Ms. Johnson takes gabapentin in an attempt to help with the itching; and Ms. Johnson suffers from depression, secondary to chronic pain attributable to the March 29, 2003 accident. The employer and insurer dispute these contentions and note that at the hearing Ms. Johnson did not exhibit any signs of a dermatological disorder; and for several years prior to March 29, 2003, Ms. Johnson suffered from depression and received prescription medication for a diagnosis of depression / generalized anxiety disorder.

After consideration and review of the evidence, I find and conclude that the March 29, 2003 incident caused Ms. Johnson to sustain additional injuries in the nature of a dermatological

disorder (neuropathic itching) and depression. In rendering this determination, I find and conclude that Dr. Bennoch is credible, reliable, and worthy of belief. Dr. Bennoch reasonably explains the nature of the dermatological disorder, which involves neuropathic itching and is a complication associated with the cervical spine disorder, and the delay in treatment resulting in residual nerve damage. Yet, I note that the dermatological condition is under control through use of the prescription medication; and at the hearing Ms. Johnson did not exhibit any skin rash or scratch marks caused by itching. Additionally, prior to March 29, 2003, and at the time of the accident, Ms. Johnson suffered from preexisting depression, which involved an industrially disabling condition and required Ms. Johnson to be under active treatment which included Paxil.

In light of the foregoing, I find and conclude that the March 29, 2003 accident caused Ms. Johnson to sustain injuries to her left shoulder (left labral tear and impingement), cervical spine (herniated disc with residual cervical radiculopathy and myelopathy), a dermatological disorder (neuropathic itching), and depression (psychological overlay secondary to chronic neck pain).

II. Medical Care

The evidence is supportive of a finding that, as a consequence of the March 29, 2003 accident and resulting injury to her cervical spine, Ms. Johnson incurred medical care and expenses in the amounts and as follows:

| Health Care Provider | Treatment | Date(s) of Treatment | Medical Expenses Billed | Medical Expenses Owed |
|----------------------------------|---|----------------------------|-------------------------------|-----------------------------|
| Ozark Anesthesia Assoc., Inc. | Surgery of the cervical spine, with anterior instrumentation | 06-17-05 | \$ 1,560.00 | \$ 1,032.00 |
| | | Sub-total: | \$ 1,560.00 | \$ 1,032.00 |
| Litton & Giddings | MRI – Cervical Spine | 03-23-05 | \$ 309.70 | \$ 126.00 |
| Litton & Giddings | OTH SPCF PREOP EXAM | 07-01-05 | \$ 37.10 | \$ 20.00 |
| Litton & Giddings | Arthrodesis Status | 07-12-05 | \$ 46.00 | \$ 20.00 |
| Litton & Giddings | Cervical Spine LTD | 12-30-05 | \$ 47.30 | \$ 20.00 |
| Litton & Giddings | MRI Upper Extremity Joint | 01-24-06 | \$ 239.80 | \$ 112.00 |
| | | Sub-total: | \$ 679.90 | \$ 298.00 |
| Lester E. Cox Medical Centers | MRI – Cervical Spine | 03-23-05 | \$ 1,213.22 | \$ 970.58 |

| | | | | |
|--|--|----------------------------|--------------------|--------------------|
| Lester E. Cox Medical Centers | Diagnostic & Lab Studies | 06-15-05 | \$ 822.43 | \$ 822.43 |
| Lester E. Cox Medical Centers | Surgery of the cervical spine, with anterior instrumentation | 06-17-05 to 06-18-05 | \$25,458.85 | \$ 7,158.20 |
| Lester E. Cox Medical Centers | PT-OT Outpatient | 12-22-05 to 11-28-05 | \$ 285.99 | \$ 285.99 |
| | | Sub-total: | \$27,780.49 | \$ 9,237.20 |
| Boyd D. Crockett, M.D. | Nerve Conduction Studies; EMG | 01-23-06 | \$ 1,227.00 | \$ 794.30 |
| | | Sub-total: | \$ 1,227.00 | \$ 794.30 |
| Robert D. Strang, M.D.; Mark Brown PAC; Michael J. Workman, M.D. (SNSI) | Evaluation, Treatment & Surgery of the Cervical Spine | 05-05-05 To 06-19-06 | \$21,619.25 | \$10,925.97 |
| | | Sub-total: | \$21,619.25 | \$10,925.97 |
| Michael Hoeman, M.D. | Treatment of the Cervical Spine (Chronic Pain) | 07-03-03 To 03-07-06 | \$ 1,204.00 | \$ 1,204.00 |
| | | Sub-total: | \$ 1,204.00 | \$ 1,204.00 |
| Papaiah Sreepada, M.D. | Nerve Conduction Studies | 07-29-04 | \$ 605.00 | \$ 352.18 |
| | | Sub-total: | \$ 605.00 | \$ 352.18 |
| | | Total: | \$54,675.64 | \$23,843.65 |

The aforementioned medical care was reasonable, necessary, and causally related to the March 29, 2003 accident. Further, the medical expenses were fair and reasonable.

Notably, the total expenses billed are in the amount of \$54,675.64. However, the medical expenses were billed through Medicare and/or Blue Cross-Blue Shield, which resulted in certain adjustments (write-offs) being made and the health care provider accepting payment for lesser amounts. The medical expenses owed represent the amount paid by Blue Cross-Blue Shield, Medicare, and/or Ms. Johnson.

The Missouri Courts have determined that an employee is not entitled to compensation for healthcare provider write-offs. *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818 (Mo. 2003). And, in the context of payments made by Medicaid, the Missouri Courts have “ruled that an employee is not entitled to compensation for Medicaid write-off amounts when the total amount submitted to Medicaid will never be sought from claimant.” *Id.*, citing *Mann v. Varney Construction*, 23 S.W.3d 231, 233 (Mo.App. E.D. 2000).

In light of the foregoing, the employer and insurer are liable to the employee for payment of past medical care and expenses incurred as a consequence of the accident of March 29, 2003, and are ordered to pay to the employee, Paula Johnson, the sum of \$23,843.65 in past medical care and expenses.

Future Medical Care

The employee seeks future medical care in order to cure and relieve the employee from the effects of the March 29, 2003 injury. In seeking future medical care, the employee relies upon the medical opinion of Dr. Bennoch, who opines that the March 29, 2003 accident will cause Ms. Johnson to need future medical care in order to cure and relieve her from the effects of the injury.

After consideration and review of the evidence, and in light of the continuing symptomology presented by Ms. Johnson, I find and conclude that Ms. Johnson is in need of future medical care causally related to the March 29, 2003 accident, in order to cure and relieve her from the effects of the injury. The employee sustained her burden of proof. Accordingly, the employee is awarded future medical treatment, pursuant to *Section 287.140.1* and *287.140.8*, for her left labral tear and impingement and cervical radiculopathy, myelopathy, dermatological disorder, and depression, as identified by Dr. Bennoch.

Therefore, in light of the foregoing, the employer and insurer are ordered to provide such medical care as may be causally related to the accident of March 29, 2003. The medical care shall include pain medication, diagnostic imaging for the cervical spine, physical therapy for the cervical spine, antidepressants causally related to chronic neck pain, and medication for treatment of the dermatological condition.

Admittedly, as argued by the employer and insurer, Ms. Johnson took pain medication, including a pain management regiment that included narcotic medication, for treatment of her prior medical condition. However, this, by itself, is not a defense to a claim for medical treatment that would result had the work-related injury existed alone. See, for example, *Bowers v. Hiland Dairy*, 132 S.W.3d 260 (Mo. App. S.D. 2004) appeal after remand, 188 S.W.3d 79. This award, in providing future medical treatment, is consistent with the Missouri Workers' Compensation Law, as construed by the courts before the 2005 amendments. *Sullivan v. Masters and Jackson Paving Company*, 35 S.W.3d 879 (Mo. App. S.D. 2001); *Kaderly v. Race Brothers Farm Supply*, 993 S.W.2d 512 (Mo. App. S.D. 1999); *Williams v. City of Ava*, 982 S.W.2d 307 (Mo. App. S.D. 1998); *Mathia v. CFI*, 929 S.W.2d 271 (Mo. App. S.D. 1996); *Sifferman v. Sears Roebuck & Co.*, 906 S.W.2d 823 (Mo. App. S.D. 1995).

III.
Compensation Rate

The provisions of Section 287.250, RSMo, govern the determination of the applicable compensation rate. Section 287.250, RSMo, in pertinent part, states:

1. Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly wage earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:

* * *

(3) If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two;

(4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages by the day, hour, or output per day actually worked by the employee that such employee earned in the employ of the employer in the last thirteen consecutive calendar weeks immediately preceding the week in which the employee was injured... For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence of for a calendar week. ...

(5) If the employee has been employed less than the two calendar weeks immediately preceding the injury, the employee's weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury, except if the employer has agreed to a certain hourly wage, then the hourly wage agreed upon multiplied by the number of weekly hours scheduled shall be the employee's average weekly wage;

(6) If the hourly wage has not been fixed or cannot be ascertained, or the employee earned no wage, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees of the employer or any other employer;

* * *

3. If an employee is hired by the employer for less than the number of hours per week needed to be classified as a full-time or regular employee, benefits computed for purposes of this chapter for permanent partial disability, permanent total disability and death benefits shall be based upon the average weekly wage of a full-time or regular employee engaged by the employer to perform work of the same or similar nature and at the number of hours per week required by the employer to classify the employee as a full-time or regular employee, but such computation shall not be based on less than thirty hours per week.

4. If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determined such employee's average weekly wage.

In the present case, Ms. Johnson worked for Wal-Mart as a part-time employee, working only 16 hours per week. And, at the time of the March 29, 2003 accident, Ms. Johnson earned an hourly wage of \$7.49 per hour. Further, the payroll records of Ms. Johnson (Exhibit G) indicate that, during the thirteen-week period prior to March 29, 2003, she worked during four two-week pay periods, and earned the following wages:

| WEEK ENDING | WAGES EARNED BY THE EMPLOYEE |
|---------------------------------|------------------------------|
| 02-07-03 | \$ 65.09 |
| 02-21-03 | \$ 106.62 |
| 03-07-03 | \$ 65.54 |
| 03-07-03 | \$ 276.81 |
| 03-21-03 | <u>\$ 217.89</u> |
| Total Wages Earned by Employee: | \$ 731.95 |

Week ending March 7, 2003 includes income above and beyond the hours worked. In addition, the employee worked during the pay period ending on April 4, 2009, earning \$204.18 for this latter two-week pay period; but this pay period includes a workweek subsequent to the March 29, 2003 accident. There is no indication that the employee worked or earned any wages during the 13-week period, prior to the week-ending pay period of February 7, 2003.

After consideration and review of the evidence, I find and conclude that the “thirteen week rule” under Section 287.250.1(4), RSMo governs the determination of the compensation rate applicable to temporary total disability compensation in the present case. Further, applying this thirteen-week rule to the wages earned between week ending February 7, 2003 and week ending March 21, 2003 (8 weeks), Ms. Johnson earned an average weekly wage of \$91.49. ($\731.95 divided by 8 weeks = \$91.49.)

However, in determining the applicable compensation rate for permanent disability the thirteen-week rule is not applicable. Rather, Sections 287.250.3 and 287.250.4, RSMo apply. In presenting evidence relative to this issue, the employee offered for admission Exhibit 13, which is a payroll register provided by the employer and explained by Judy White during her deposition on Pages 61 and 62. Ms. White testified that all people greeters start out at the same wage rate, but salaries are increased based on the years of employment. Full-time greeters work at least 35 hours per week and make at least \$8.32 per hour.

Accordingly, in the present case, if a full-time employee works 35 hours per week and earns \$8.32 per hour, such earnings yield an average weekly wage of \$291.20 and a workers’ compensation rate of \$194.13. Since it is speculative to assess an hourly rate beyond the minimum, and it is similarly speculative to assume hours worked beyond the minimum for full-time employees, it is reasonable to assume a 35 hour workweek, payable at a rate of \$8.32 per hour. Therefore, applying this rationale to the evidence presented, I find and conclude that the applicable compensation rate for payment of permanent disability compensation is \$194.13. ($\8.32×35 hours = \$291.20 divided by 3 = \$97.066 x 2 = \$194.13.)

Therefore, I find and conclude that the compensation rate for temporary total disability compensation is \$91.49, and the compensation rate for permanent disability compensation is \$194.13.

IV. Temporary Total Disability Compensation

The employee seeks temporary total disability compensation for the periods of July 23, 2003 to April 22, 2004 (39 1/7 weeks) and from May 31, 2005 to February 2, 2006 (35 1/7 weeks).

The evidence indicates that, following the surgery to her left shoulder, Ms. Johnson returned to her employment with Wal-Mart who provided accommodations and allowed her to return to work as a "people greeter," working part-time two days a week, similar to the schedule she enjoyed prior to the March 29, 2003 accident. Ms. Johnson continued to work for Wal-Mart until May 31, 2005, when she voluntarily terminated her employment to move to Springfield, Missouri.

Notably, upon moving to Springfield, Missouri, Ms. Johnson attempted to secure employment within the restrictions governing her medical condition, and within the accommodations she previously enjoyed with Wal-Mart in Osage Beach, Missouri. Unfortunately, she was unable to obtain such employment, nor was she able to secure employment with Wal-Mart in Springfield, Missouri. Further, in or around this time, the cervical radiculopathy continued to progress, resulting in her undergoing an anterior cervical discectomy with anterior cervical arthodesis performed by Dr. Strang on June 17, 2005. Thereafter, Dr. Strang provided Ms. Johnson with follow-up treatment, which included office visits, physical therapy, x-rays, and MRI scan. On February 2, 2006 Ms. Johnson reached maximum medical improvement, as Dr. Strang released Ms. Johnson from his care with directions to return on a PRN basis.

Accordingly, after consideration and review of the evidence, I find and conclude that, as a consequence of the accident of March 29, 2003, the employee was temporarily and totally disabled during the period of May 31, 2005 to February 2, 2006 (35 1/7 weeks). Therefore, the employer and insurer are ordered to pay to the employee the sum of \$3,215.22, which represents 35 and 1/7 weeks of temporary total disability compensation, payable for the period of May 31, 2005 to February 2, 2006, at the applicable compensation rate of \$91.49 per week.

V. Permanent Disability Compensation

The parties offer differing opinion relative to the nature and extent of permanent disability caused by the accident of March 29, 2003. After consideration and review of the evidence, I find and conclude that, as a consequence of the accident and injury of March 29, 2003, Ms. Johnson sustained multiple injuries, which resulted in her sustaining permanent partial disability as follows:

- She sustained a permanent partial disability of 30 percent to the body as a whole, referable to the cervical spine (120 weeks). This decision takes into consideration the

cervical discectomy and fusion, the residual and significant restriction in range of motion to Ms. Johnson's neck, and the persistent pain she is continuing to suffer, with bilateral cervical radiculopathy involving the ulnar nerves.

- She sustained a permanent partial disability of 25 percent to the left shoulder (58 weeks). This decision takes into consideration the surgical procedure involving an open subacromial decompression and a subacromial bursectomy, the significant decrease and loss in range of motion and positive impingement signs to her shoulder with pain during movements with her left shoulder.
- She sustained a permanent partial disability of 5 percent to the body as a whole, referable to the dermatological disorder involving neuropathic itching, secondary to the delay in diagnosis and treatment of the cervical spine and associated nerve damage (20 weeks). This decision takes into consideration that the condition is under control with prescription medication, but requires Ms. Johnson to take prescription medication in order to control the itching and avoid skin lesion caused by scratching.
- She sustained a permanent partial disability of 5 percent to the body as a whole, referable to the brain, secondary to depression and psychological overlay associated with the chronic neck pain resulting from the March 29, 2003 injury (20 weeks).

A question remains whether the aforementioned injuries and disabilities render Ms. Johnson unemployable in the open and competitive labor market as a consequence of the March 29, 2003 accident, considered alone. In resolving this issue, I note that only Dr. Bennoch offers a basis for asserting that the March 29, 2003 injury, considered alone, renders Ms. Johnson permanently and totally disabled. And this basis is premised on his response to questions propounded to him by the Second Injury Fund during cross-examination. In this context, Dr. Bennoch states,

Q. But to reiterate, you believe that even if she did not have any of the preexisting problems, she could not hold down a job now because of the neck and shoulder problems that we have been discussing from March of 2003?

A. That is correct.

Yet, in opining that, "even if [Ms. Johnson] did not have any of the preexisting problems, she could not hold down a job now because of the neck and shoulder problems," Dr. Bennoch premises his opinion on certain assumptions not supported by the evidence and which I do not accept as true. In this regard, Dr. Bennoch assumed that, prior to March 29, 2003, Ms. Johnson had not sustained any prior permanent disability to the Neck. However, the evidence is supportive of a finding, and I find and conclude that, prior to March 29, 2003, Ms. Johnson sustained a prior neck injury and presented with residual and permanent neck pain, which caused her to suffer headaches, although this residual cervical pain was without radiculopathy. I further find and conclude that, prior to March 29, 2003, Ms. Johnson had sustained a permanent partial disability of 5 percent to the body as a whole, referable to the neck pain.

Notably, during the ten-year period prior to March 29, 2003, for approximately a seven to nine year period, Ms. Johnson received treatment for her neck that involved multiple modalities, including physical therapy, local anesthetic infiltrations of trigger points, and facet rhizotomies at C4-C5, C5-C6, and C6-C7 bilaterally. And, in light of diagnostic studies not identifying this condition to involve a surgical concern, prior to March 29, 2003, Ms. Johnson received a referral for treatment with a pain clinic for chronic myofascial neck pain without evidence of radiculopathy. Although she did not pursue treatment with this pain clinic, she treated this condition with muscle relaxants and pain medication.

In the latter years of the 10-year period preceding the March 29, 2003 accident, Ms. Johnson received treatment from her family physician for symptoms of neck pain and stiffness. And in January 2002 Dr. Hoeman noted that Ms. Johnson presented with increased neck pain, particularly involving the left posterior neck area, occasionally causing headaches. Ms. Baez confirmed that, prior to March 29, 2003, Ms. Johnson suffered from headaches. Although Ms. Johnson treated primarily for low-back pain during the three years preceding the March 29, 2003 accident, the treatment involved a pain management regiment that included use of narcotic pain medication and muscle relaxants which treated and provided relief to Ms. Johnson, not only for her low back pain, but her neck pain.

In addition, Dr. Bennoch did not differentiate the permanent work restrictions governing Ms. Johnson's medical condition which were caused by the March 29, 2003 accident from the restrictions caused by the pre-existing injuries and disabilities. And Dr. Bennoch assumed that, prior to March 29, 2003, Ms. Johnson engaged in full-time employment, and worked 40 hours per week at the time of the March 29, 2003 accident. Ms. Johnson, however, was not a full-time employee of Wal-Mart, and specifically limited her employment to 16 hours per week because she needed additional days to rest and obtain relief from chronic pain.

Further, Ms. Johnson's vocational expert, Phillip Eldred, admitted that Dr. Bennoch's restrictions were a combination of Ms. Johnson's preexisting conditions and those applicable to the present work injury. Mr. Eldred specifically stated Ms. Johnson is not permanently and totally disabled as a result of the recent work injury in isolation. Rather, Mr. Eldred opines Ms. Johnson is permanently and totally disabled as a result of a combination of her preexisting disabilities and the disabilities caused by the March 29, 2003 accident. And the severity of the preexisting disabilities is highlighted by Mr. Eldred's testimony, wherein he states that it would not be reasonable for an employer to hire Ms. Johnson in the open labor market based on her preexisting conditions alone. And, in recognizing that Ms. Johnson qualified for social security disability benefits in 1996, and was governed by significant restrictions and limitations caused by these preexisting disabilities, which included chronic myofascial neck pain, Mr. Eldred testified that Ms. Johnson "was disabled from the labor market."

Preeminently, Dr. Bennoch opines that Ms. Johnson is permanently and totally disabled as a consequence of the March 29, 2003 accident, in combination with the preexisting injuries and disabilities. Although he, on cross-examination, indicates that the March 29, 2003 accident, considered in isolation, renders Ms. Johnson permanently and totally disabled; he does not identify specifically the "neck and shoulder problems" caused by the work-related injury. Nor does he identify any specific work restriction that is attributable directly to the March 29, 2003 accident, considered alone. The "neck and shoulder problems" referenced by Dr. Bennoch

include consideration of neck pain, which includes the presenting neck pain experienced by Ms. Johnson prior to March 29, 2003.

Similarly, the “neck and shoulder problems” referenced by Dr. Bennoch include consideration of depression, which he attributed to the neck pain. And consideration of the problems associated with depression includes consideration of the depression experienced by Ms. Johnson prior to March 29, 2003, for which she was under active treatment at the time of the accident. The restrictions assessed by Dr. Bennoch, and which govern Ms. Johnson’s employability, include restrictions attributable to the preexisting injuries and disabilities suffered by Ms. Johnson prior to March 29, 2003.

After consideration and review of the evidence, and in considering the record as a whole, I find and conclude that the injuries caused by the March 23, 2009 accident, considered alone, do not render Ms. Jones permanently and totally disabled. The chronic pain experienced by Ms. Johnson which requires her to take pain medication, including a pain management regiment that includes narcotic medication, and renders her unemployable in the open and competitive labor market, includes consideration of her preexisting injuries and disabilities.

Therefore, in light of the foregoing, the employer and insurer are ordered to pay to the employee, Paula Johnson, the sum of \$42,320.34, which represents payment of 218 weeks of permanent partial disability compensation, payable at the applicable compensation rate of \$194.13 per week.

VI. Disfigurement

The accident of March 29, 2003 caused Ms. Johnson to undergo two surgeries, which resulted in her suffering scarring to the anterior side of her neck, and to the upper part of her left arm. After consideration and review of the evidence, and after having had an opportunity to observe visually the surgical scarring to Ms. Johnson’s neck and left arm, I find and conclude that the accident of March 29, 2003 caused Ms. Johnson to sustain 8 weeks of scarring and disfigurement.

Further, having concluded that the liability of the employer and insurer is for payment of permanent partial disability under Section 287.190, RSMo, and not for payment of permanent total disability under Section 287.200, RSMo, I find and conclude that an additional award for disfigurement under Section 287.190, RSMo is appropriate. Accordingly, the employer and insurer are ordered to pay to the employee, Ms. Johnson, the sum of \$1,553.04, which represents 8 weeks of disfigurement, payable at the applicable compensation rate of \$194.13 per week.

The award is subject to modifications as provided by law.

An attorney’s fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Made by: /s/ L. Timothy Wilson
L. Timothy Wilson
Administrative Law Judge
Division of Workers' Compensation
(signed October 6, 2009)

This award is dated and attested to this 14th day of October, 2009.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation