

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

Injury No.: 05-003115

Employee: Terrie L. Kobolt
Employer: Lowe's Home Center
Insurer: Self-Insured c/o Specialty Risk Services

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 29, 2010. The award and decision of Administrative Law Judge Vicky Ruth, issued December 29, 2010, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 6th day of May 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

NOT SITTING

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Terrie L. Kobalt

Injury No. 05-003115

Dependents: N/A

Employer: Lowe's Home Center

Additional Party: N/A

Insurer: Self-Insured c/o Specialty Risk Services

Hearing Date: September 28, 2010

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

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: January 6, 2005.
5. State location where accident occurred or occupational disease was contracted: Eldon, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee, while working in the return department at Lowe's Home Center, attempted to lift a grill into a dumpster.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Low back, right and left legs, headaches, and body as a whole.
14. Nature and extent of any permanent disability: Permanent and total disability.
15. Compensation paid to-date for temporary disability: \$31,965.09.
16. Value necessary medical aid paid to date by employer/insurer? \$104,447.55.
17. Value necessary medical aid not furnished by employer/insurer? N/A.

- 18. Employee's average weekly wages: \$408.17.
- 19. Weekly compensation rate: \$272.11.
- 20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

- 21. Amount of compensation payable from employer:

TTD benefits for 7/16/09 through 2/26/10:	\$8,707.52
Past -due Mileage (\$2,842.8 miles @ \$0.50/mile:	\$1,421.40
<u>PTD benefits beginning 2/27/10:</u>	<u>Indeterminate</u>

Total Award: \$10,128.92 plus an indeterminate amount for PTD benefits.

- 22. Second Injury Fund liability: N/A.
- 23. Future medical awarded: Yes.

Said payments to begin immediately and to be payable and 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: The Van Camp Law Firm.

Employee: Terrie L. Kobalt

Injury No. 05-003115

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Terrie L. Kobalt

Injury No: 05-003115

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Lowe's Home Center

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: N/A

Insurer: Self-insured c/o Specialty Risk Services

On September 28, 2010, Terrie L. Kobalt and Lowe's Home Center/Specialty Risk Services appeared for a final award hearing. Terrie L. Kobalt was represented by attorneys Christine M. Kiefer and Douglas L. Van Camp. Lowe's Home Center and Specialty Risk Services were represented by attorney Benjamin Shelledy. Claimant testified in person at the trial. Dr. David T. Volarich, Mr. James M. England, and Ms. June M. Blaine testified by deposition. The parties filed briefs or proposed awards on October 19, 2010.

STIPULATIONS

The parties stipulated to the following:

1. On or about January 6, 2005, Lowe's Home Center (the employer) was an employer operating subject to the Missouri Workers' Compensation law.
2. The employer's liability for workers' compensation was self-insured and Specialty Risk Services was the third-party administrator.
3. Terrie L. Kobalt (the claimant) was an employee of Lowe's Home Center and sustained an injury by accident that arose out of and in the course and scope of employment.
4. Notice is not an issue.
5. Claimant filed a Claim for Compensation within the time prescribed by law.
6. The Missouri Division of Workers' Compensation has jurisdiction and venue in Eldon is proper.
7. The agreed-upon rate of compensation is \$272/week for temporary total disability benefits, permanent partial disability benefits, and permanent total disability benefits.
8. The employer has provided medical benefits in the amount of \$104,447.55.
9. The employer has provided temporary total disability benefits in the amount of \$31,965.09.

ISSUES

At the hearing, the parties agreed that the issues to be resolved in this proceeding are as follows:

1. Nature and extent of permanent partial disability or permanent total disability.

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2. Whether claimant is entitled to temporary total disability benefits from July 16, 2009 through February 26, 2010.
3. Whether the employer/insurer is responsible for future medical treatment.
4. Whether the employer/insurer is responsible for mileage reimbursement as outlined in Exhibit S.
5. Whether the employer/insurer is responsible for future mileage.
6. Whether the employer/insurer is responsible for a portion of the claimant's attorney's fees and costs as outlined in Exhibits Q and R.

EXHIBITS¹

On behalf of the claimant, the following exhibits were entered into evidence:

Exhibit A	Medical records of Southwest Spine and Sports.
Exhibit B	Medical records of Springfield Neurological Institute, LLC.
Exhibit C	Medical records of Osage Family Clinic.
Exhibit D	Medical records of Lake Regional Health System.
Exhibit E	Medical records of American Physical Therapy.
Exhibit F	Medical records of Lake Regional Medical Management.
Exhibit G	Medical records of Boone Orthopedic Associates.
Exhibit H	Medical records of OnSite Rehabilitation.
Exhibit I	Medical records of Columbia Orthopedic Group.
Exhibit J	Medical records of Dr. H.M. Crabtree.
Exhibit K	Medical records of Springfield Neurological & Spine Institute.
Exhibit L	Medical records of Lake Regional Health System.
Exhibit M	Deposition of Dr. David T. Volarich., taken 6/26/08.
Exhibit N	Deposition of Dr. Volarich, taken 12/04/09.
Exhibit O	Deposition of James M. England, Jr.
Exhibit P	Deposition of June M. Blaine.
Exhibit Q	Attorney fees and expenses.
Exhibit R	Letters to/from opposing counsel.
Exhibit S	Mileage list.

The employer did not offer any exhibits.

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. At the time of the hearing, claimant was 61 years old. She lives with her husband.

¹ All depositions were received subject to the objections contained therein.

2. Claimant began employment with Lowe's Home Center, the employer, in approximately June 2003. She was hired as a clerk in the home décor department, and she later transferred to work on the register. When she was hired, she weighed between 255 to 270 pounds and was 5'6" tall. At the time of the accident, claimant was working as a Return to Manufacturer (RTM) clerk. Her duties involved disposing of returned merchandise by sending it back to the manufacturer, sending it off for repair, or destroying it on site at the direction of the manufacturer. This position required claimant to physically handle the products, some of which were very heavy; she also had to interact with manufacturers by phone and by computer.
3. On January 6, 2005, a large, barbeque grill was returned to the employer. The manufacturer instructed the employer to destroy the grill instead of returning it. The grill weighed between 200 and 300 pounds. Claimant requested the help of the department manager in lifting the grill into the compression dumpster. The department manager and claimant tried to jointly lift the grill. When they lifted, the grill did not move and claimant felt pain in her low back and down both legs. She reported the injury to her employer a few days later. In the days before she reported the injury, she stayed in bed as the symptoms increased.
4. The employer authorized treatment, and sent claimant to Dr. Brayfield on January 11, 2005. Claimant complained of acute pain in her lower lumbar area going into her left buttock. Dr. Brayfield initially assessed musculoligamentous strain of the lumbar sacral area and lumbar radiculopathy. The doctor prescribed Vicodin and Flexeril, and ordered x-rays; the x-rays showed mild degenerative change of the lower lumbar spine.
5. When the claimant saw Dr. Brayfield again on January 17, 2005, she had been working 4-hour days at the employer's business. She indicated that she was continuing to have problems, including a burning sensation on the bottom of her left foot. The doctor's assessment was lumbar radiculopathy. Dr. Brayfield refilled her medications and ordered an MRI of the lumbar spine. The MRI of January 26, 2005, showed degenerative disc disease and hypertrophic facet changes most prominently at L4-5. On January 31, 2005, Dr. Brayfield diagnosed degenerative disc disease of the lumbar spine with recent exacerbation. He referred her to physical therapy.²
6. Claimant attended physical therapy at American Physical Therapy from February 2, 2005, until March 30, 2005.³ On February 28, 2005, during the period of her physical therapy, claimant saw Dr. Brayfield and he increased her work hours from four to six hours per day. On March 14, 2005, Dr. Brayfield saw claimant again and noted that she had not done well when her hours increased to six hours per day. He noted that claimant's gait was not nearly as antalgic as it had been. Dr. Brayfield lowered her restriction to four

² Claimant's Exh. C.

³ Claimant's Exh. E.

hours per day, and suggested that she see a spine rehabilitation specialist.⁴ He also discussed the possibility of doing an epidural steroid injection.

7. Claimant saw Dr. William Harris on April 7, 2005. His impression was chronic ligamentous strain/sprain of the lumbar spine. Dr. Harris referred the claimant to a work hardening program and continued her on light duty. On May 9, 2005, claimant requested a second opinion and Dr. Harris agreed. Claimant was referred to Dr. Jeffrey Parker, who saw her on June 30, 2005. At that time, Dr. Parker noted that according to claimant, the work hardening program made her symptoms worse. Dr. Parker also noted that claimant had stopped working. Claimant had pain in her left hip and into the lateral calf; the pain was exacerbated by vigorous activity. Dr. Parker's impression was that she had grade one spondylolisthesis at L4-5 with marked facet arthritis at that level and spinal stenosis laterally. He indicated that the work injury had exacerbated her preexisting degenerative condition.⁵ He noted that claimant would probably benefit from an epidural steroid injection at L4-5. He also indicated that although the injury did not cause her degenerative spondylolisthesis, it did exacerbate this condition to the point where it is now a real problem for her.
8. On April 10, 2006, claimant returned to Dr. Parker. She told him that she could not walk for more than 15 minutes because of back pain and that she was also having pain with prolonged sitting. She had trouble sleeping at night. Dr. Parker did not think she was a surgical candidate at that time, but he did recommend an epidural steroid injection. The injection was given to her on or about April 26, 2006.
9. Following the injection, claimant was seen at Lake Regional Health Systems on May 12, 2006, with back pain and left leg pain. She stated that she had nausea and diarrhea after the injection. Claimant was prescribed Celebrex, and she had another MRI on May 23, 2006. That MRI showed mild degenerative disc disease with slight bulging at L4-5 and L5-S1, and degenerative facet changes, especially at L4-5, resulting in mild central canal stenosis. Thereafter, claimant was seen at OnSite Rehabilitation from May 2006 through July 2006 for therapeutic exercises, traction and joint mobilization, hot/cold packs, and electrical stimulation.
10. On June 28, 2006, claimant returned to Dr. Parker. He indicated that the injections by Dr. Mead had made claimant somewhat sick, and that she had tried Celebrex, which helped somewhat. He noted that her MRI scan of the lumbar spine showed severe facet disease at L4-5 as well as L5-S1, and moderate spinal stenosis at L4-5. Dr. Parker's impression was that claimant had a grade one spondylolisthesis at L4-5 with moderate spinal stenosis. Dr. Parker continued claimant on therapy and Celebrex, and refilled her Vicodin prescription.
11. On December 11, 2006, claimant visited Dr. Parker and told him that the workers' compensation provider had taken away her TENS unit and stopped physical therapy. She

⁴ Claimant's Exh. C.

⁵ Claimant's Exh. I.

told him that she was using the Vicodin primarily to help her sleep, and that most of her pain was in the lumbar spine. Dr. Parker again diagnosed her with grade one degenerative L4-5 spondylolisthesis with moderate stenosis. He also indicated that she was not a surgical candidate at that time, and he released her as being at maximum medical improvement. He also noted that if her symptoms persist, she may need a referral to the chronic pain center. In a letter following up on this visit, Dr. Parker stated that he did not feel that any preexisting condition played a role in her pain. As a result of the work-related injury, he gave claimant a permanent partial disability rating of 3% of the body as a whole.

12. On September 10, 2007, claimant returned to Dr. Parker. His records reflect that he did not think that there was an easy operative solution, and he noted that she was an extremely high risk for surgery. If surgery was required, it would be an interbody fusion at L4-5; however, the claimant was too obese to undergo that procedure safely. He discussed the possibility of bariatric surgery, but claimant did not believe she could afford it as she did not have insurance. Dr. Parker again noted that claimant could benefit from a referral to the chronic pain center.
13. Claimant was evaluated by Dr. David Volarich on April 29, 2008. He concluded that claimant was not at maximum medical improvement. He opined that she would benefit from treatments at a pain clinic utilizing epidural steroid injections, foraminal nerve root blocks, trigger point injections, and similar treatments to treat her lumbar radicular syndrome. He also recommended a myelogram CT to assess the severity of any nerve root impingement as well as an EMG of the lower extremities. He noted that she may be a surgical candidate in the future. This would be based upon her wishes, progression of her symptoms, and the opinion of expert surgical analysis.
14. In his deposition, Dr. Volarich indicated that he thought that claimant would be a surgical candidate if she got down to about 200 pounds. At the time Dr. Volarich saw her, the claimant weighed about 256 pounds. Although Dr. Volarich did not find the claimant to be at MMI, he did impose various restrictions. The restrictions include, but are not limited to, the following: avoid bending, twisting, lifting, pushing; not handle weights greater than 15 to 20 pounds; not handle weight over her head; and avoid remaining in a fixed position for more than 30 minutes.
15. A hardship hearing was held in July 2008. Additional treatment and temporary total disability was ordered.
16. Claimant was evaluated by Dr. Woodward in September 2008. He noted left lower extremity tenderness and ongoing back pain. Dr. Woodward ordered an EMG of the lower extremity and a CT/myelogram of the spine. He diagnosed lumbar radiculopathy related to spondylosis with stenosis at L4-5, and found that the work injury was the prevailing factor in her need for surgery.

17. On December 19, 2008, Dr. Woodward performed a posterior lumbar interior fusion at L4-5.⁶ Claimant returned to Dr. Woodward through June 2009, when it was noted that she had pain in her shoulder, and had low back muscle tightness and pain. She was given a TENS unit, prescribed medication, and referred to physical and aqua therapy. In addition, she was referred to Dr. Crabtree, to whom she reported left-sided low back pain going into the left lower extremity with tingling in both thighs. Dr. Woodward released claimant in June 2009, with ongoing medications.
18. In early 2010, claimant was referred back to Dr. Woodward and then to Dr. Crabtree and Dr. Crockett for the purposes of ongoing medication and pain management. She underwent additional epidural steroid injections, aqua therapy, and acupuncture. Dr. Crabtree recommended the option of a spinal cord stimulator and at the time of the final award hearing in 2010, claimant was awaiting an upcoming appointment with Dr. Brooks for further evaluation. On May 17, 2010, Dr. Crockett had recommended no repetitive lifting, pushing, pulling of weights over 15 pounds, and on limited occasion 25 pounds. He also stated that the claimant “requires frequent position changes.”⁷
19. In October 2009, claimant was again evaluated by Dr. Volarich. He gave a diagnosis of disc bulge at L4-5 with aggravation of underlying spondylolisthesis at L4-5 causing instability and left leg radiculopathy and S/P posterior fusion with instrumentation at L4-5. He also diagnosed post laminectomy syndrome. He concluded that at the time she was MMI, but that she would need ongoing pain management, including medications, physical therapy, injections, or nerve root blocks, or a spinal cord stimulator. Dr. Volarich gave a rating of 60% of the body as a whole referable to the lumbar spine and deferred to a vocational expert for purposes of determining employability. Dr. Volarich also outlined restrictions similar to those at the time of his first evaluation. However, he restricted her lifting further to 15 pounds and indicated that she could remain in a position for only 15 – 20 minutes.⁸
20. At the request of her attorney, claimant was evaluated by Mr. James England in May 2008. Mr. England prepared a report, along with a supplemental report in November 2009. In 2008, Mr. England opined that he did not think that claimant could sustain work on a regular consistent basis. He further determined in 2009 that claimant was “likely to remain totally disabled from a vocational standpoint.”⁹ Mr. England concluded that claimant’s inability to work was based on the restrictions that put her at a less than sedentary exertion level, along with her pain complaints and need to lie down periodically.¹⁰
21. Claimant was also evaluated, at the request of the employer, by Ms. June Baine. Ms. Blaine evaluated claimant on February 26, 2010; she concluded that claimant was

⁶ Claimant’s Exh. A.

⁷ Claimant’s Exh. 1.

⁸ Claimant’s Exh. N, depo exhibit B.

⁹ Claimant’s Exh. O.

¹⁰ Claimant’s Exh. O, depo p. 20.

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unemployable in the open labor market. She did not make any vocational recommendation for the claimant.¹¹

22. Claimant testified that she has been unemployed since she left the employer's in May 2005. She was employed by employer for three years. Prior to this job, she worked as a manager of a pool and recreation center, an executive director for a crisis pregnancy center, in advertising at a radio station, a secretary, and was briefly self-employed in marketing. She has associate's degree in business and no other formal certifications or degrees.
23. Claimant stated that after the October 2008 surgery, she had no change or relief from her symptoms. After months of recovery from surgery, physical therapy, medications, and the use of A TENS unit, she still had ongoing pain in her back and left leg. She reported no real change in her symptoms through the rest of 2008 and 2009, or through the date of the final hearing.
24. When claimant was released by Dr. Woodward, she continued use of medications, including Cymbalta, Ambien, and Hydrocodone. She has continued taking these medications to date, and she reports ongoing sleep disturbances since the date of the injury.
25. In recent months, claimant has undergone additional injections, acupuncture, and aqua therapy, which she reports has "helped her general well-being," but have not decreased her pain. Outside of moments in the water during aqua therapy, she feels worse when she gets home from therapy. She has to go to bed once she gets home after the therapy, and is completely inactive on days that she goes for treatments.
26. Claimant reported that neither of the two recent injections offered any real relief, nor did the acupuncture. Claimant testified that she is looking into, and is willing to investigate the pros and cons, of the recent recommendation for a spinal cord stimulator.
27. When discussing her current condition, claimant testified that she has days when she is in bed all day, "curled up in a ball," sweating and experiencing a "bone on bone" pain that feels like a steamroller is going across her back. She testified that the pain makes it difficult to concentrate, and that it has taken control of her life.
28. Claimant reported that she typically wakes very early and moves around the house, hoping that stretching will alleviate some pain. She has coffee and breakfast with her husband, and tries to participate in small activities in the morning. She will do a minimal amount of cleaning, like wiping down the counters or putting very small loads of laundry in the washing machine; the machine is at waist to chest level. She occasionally dusts and will prepare herself a small lunch, and occasionally dinner. Claimant stated that her "life has narrowed" and that she does very little. She lies down several times throughout

¹¹ Claimant's Exh. P.

the day, and she goes to bed around 10:00 p.m., but is up again by 1:30 or 2:30 a.m. She tries to go back to bed, but is up again by 5:30 a.m.

29. Claimant reported that she does not experience any pain-free movements, and that a 'good day' is still one with constant pain. She reports that her best days allow her to be more active, but only in the morning. Claimant occasionally attends church; she sits in the back so that she can get up and down frequently to alleviate her pain.
30. Claimant does not do any yard work; she no longer goes hunting with her husband; and she had minimized her computer usage due to the inability to sit for long periods. Claimant reported that she can sit for a maximum of 20 minutes, can drive for 30 minutes at the most, and that she can no longer take any long distance trips.
31. When asked about returning to work, claimant testified credibly that she could not return to her job at Lowe's because she could not move or lift items as was necessary. She felt that the most she could lift was eight pounds. When asked about other possible jobs, including ones that she has held in the past, claimant stated that any other job "would expect her to actually be there." She felt that it was not possible for her to report to work daily and be a reliable employee due to her need to lie down or take days off when her pain is unbearable. Claimant felt that this inability to actually be engaged and concentrating on work on a daily basis would negate the possibility of her working in any capacity, including at a self-owned business.
32. Claimant clarified that she did not receive TTD benefits from July 16, 2009 through February 26, 2010, and that during this time period she was unable to work due to the ongoing pain and complaints. She reiterated that at no time has she been pain-free, and that surgery did not result in any real decrease in her pain and symptoms.

CONCLUSIONS OF LAW

Based upon the findings of fact and the applicable law, I find the following:

The injury in this case occurred on January 6, 2005. Therefore, the 2005 Amendments do not apply to the substantive law controlling the legal issues in this case. In *Thomas v. Hollister, Inc.*, the court held that "[a]ll the provisions of the workers' compensation law shall be liberally construed with a view to the public welfare."¹²

Section 287.020.2, RSMo., requires that the injury be "clearly work related" for it to be compensable. The employee must establish a causal connection between the accident and the claimed injuries.¹³ An injury is clearly work-related "if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely

¹² 17 S.W.3d 124, 126 (Mo.App.W.D. 1999).

¹³ *Thorsen v. Saches Electric Company*, 52 S.W.3d 611, 618 (Mo.App. 2001), overruled in part on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. 2003).

because work was a triggering or precipitating factor.”¹⁴ In this case, the employer has accepted the January 2005 injury as compensable and has agreed that work was the substantial factor in leading to the injury.

Issues 1 and 2: Nature and extent of PPD or PTD

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.¹⁵ Proof is made only by competent and substantial evidence, and may not rest on speculation.¹⁶ Medical causation not within lay understanding or experience requires expert medical evidence.¹⁷ When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.¹⁸

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.¹⁹ Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.²⁰

Section 287.020.7, RSMo, provides that “total disability” is the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident.²¹ The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired.²² The test for permanent and total disability is whether the claimant would be able to compete in the open labor market.²³

There is no dispute among the parties that claimant has suffered serious permanent disability associated with the work injury. In fact, there appears to be no dispute as to whether she is permanently and totally disabled. Both the vocational expert hired by the employee and the one hired by the employer agree that claimant is unable to compete in the open labor market. The restrictions outlined by Dr. Volarich, and the testimony and presentation of the claimant, clearly and convincingly outline an inability to work at even less than a sedentary demand level. The need to lie down throughout the day, the inability to stay in a seated position for more than 15–30 minutes, the ongoing use of pain medication, and the inability to concentrate or focus due to severe ongoing pain all represent an individual who is unable to perform work. I find that the

¹⁴ *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. 1999).

¹⁵ *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

¹⁶ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

¹⁷ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

¹⁸ *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

¹⁹ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

²⁰ *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

²¹ See also *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 178 (Mo.App. S.D. 2004).

²² *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

²³ *Id.*

evidence clearly shows that claimant is permanently and totally disabled. I also find that claimant has been unable to work since January 2005, when she became permanently and totally disabled, and I find that she continues to be permanently and totally disabled and unable to compete in the open labor market.

Issue 2: Temporary Total Disability Benefits

Temporary total disability is provided for in Section 287.170, RSMo. This section provides, in pertinent part, that “the employer shall pay compensation for not more than four hundred weeks during the continuance of such disability at the weekly rate of compensation in effect under this section on the date of the injury for which compensation is being made.” The term “total disability” is defined in Section 287.020.6, as the “inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident.” The purpose of temporary total disability is to cover the employee’s healing period, so the award should cover only the time before the employee can return to work.²⁴ Temporary total disability benefits are owed until the employee can find employment or the condition has reached the point of “maximum medical progress.”²⁵ Thus, TTD benefits are not intended to encompass disability after the condition has reached the point where further progress is not expected.²⁶ This is reflected in the language that TTD benefits last only “during the continuance of such disability.”²⁷

Claimant received temporary total disability benefits through July 15, 2009. Although she was found to be at maximum medical improvement at that time, there is no evidence to suggest that she was able to return to the open labor market at that time. In fact, her permanent and total disability began in January 2005, and has continued to date. While she did have additional treatment, there is no evidence to suggest that she was able to work from July 16, 2009, through February 26, 2010. In fact, the credible evidence shows otherwise. I find that claimant is entitled to temporary and total disability benefits dating back to July 16, 2009, until February 26, 2010, when Ms. Blaine found her to be permanently and totally disabled and the employer/insurer began providing the benefits again. Because the amounts of her temporary total disability benefits and her permanent total disability benefits are the same, I find that claimant is owed temporary total disability benefits for the period she was not compensated – July 16, 2009 through February 26, 2010, and that thereafter, she is awarded permanent and total disability benefits.

Issue 3: Future Medical Treatment

Section 287.140.1, RSMo. (1994), provides that “the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment...as may reasonably be required after the injury or disability, to cure and relieve from the effects of the

²⁴ *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo. App. W.D. 1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d at 226 (Mo. Banc 2003).

²⁵ *Cooper* at 575.

²⁶ *Cooper* at 575; *Smith v. Tiger Coaches, Inc.*, 73 S.W.3d 756, 764 (Mo. App. E.D. 2002), *overruled on other grounds by Hampton*, 121 S.W.3d at 225.

²⁷ Section 287.170.1, RSMo.

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injury.” The employee need only show that he is likely to need additional treatment “as may reasonably be required . . . to cure and relieve . . . the effects of the injury . . . that flow from the accident [or disease].”²⁸ This has been interpreted to mean that an employee is entitled to compensation for care and treatment that gives comfort, i.e., relieves the employee’s work-related injury, even though a cure or restoration to soundness is not possible, if the employee establishes a reasonable probability that he or she needs additional future medical care.²⁹ “Probable” means founded on reason and experience that inclines the mind to believe but leaves room for doubt.³⁰

The evidence clearly shows that additional medical treatment is required to continue to cure and relieve the effects of this injury. Dr. Crabtree, Dr. Woodward, and Dr. Crockett – all doctors authorized by the employer- have recommended further treatment. Dr. Volarich, the claimant’s rating physician, agreed with these recommendations. While it is unfortunate that the treatment provided to date has resulted in little or no relief for the claimant, treating physicians that have recently treated claimant have recommended further treatment for pain management.

I find that claimant’s testimony of continued severe back pain is credible. I also find that the claimant has sustained her burden of establishing that she is in need of additional treatment as set forth by the treating and evaluating physicians in this case. There is no evidence to suggest that the ongoing treatment options will render the claimant pain-free or “cured” of her current diagnosis and symptoms. However, they may alleviate or relieve her of some of the effects of the injury. The employer is ordered to continue to authorize treatment, including but not limited to medication, physical or aqua therapy, spinal cord stimulators, or other pain management strategies as recommended by authorized treating physicians and as desired by claimant.

Issues 4 and 5: Past and Future Mileage Reimbursement

Section 287.140.1, RSMo., states that “when an employee is required to submit to medical treatment at a place outside the local metropolitan area from the employer’s place of employment, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses.”

I find that claimant is entitled to mileage for the dates and visits outlined in Exhibit S, which is 2,842.8 miles. In addition, I find that it reasonable that claimant be reimbursed for the mileage at the rate of \$0.50 per mile, for a total of \$1,421.40 (2,842.8 x \$0.50). Claimant is also awarded ongoing mileage reimbursement for visits necessary for future medical treatment.

Issue 6: Attorneys’ Fees and Costs

Claimant requests that attorney’s fees and costs, from the date of the vocational opinion of Ms. Blaine, be assessed against the employer/insurer.

²⁸ *Sullivan v. Masters and Jackson Paving*, 35 S.W.2d 879, 888 (Mo.App. 2001).

²⁹ *Rana v. Landstar TLC*, 46 S.W.3d 614 (Mo.App. W.D. 2001); *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418 (Mo.App. W.D. 2000).

³⁰ *Rana* at 622, citing *Sifferman v. Sears, Roebuck & Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995).

Section 287.560, RSMo., addresses attorney's fees and costs, as follows (in relevant part):

All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

In *Landman v. Ice Cream Specialties, Inc.*, the Missouri Supreme Court established that the "whole cost" referred to in the statute included attorney's fees.³¹ The statute, however, should only be invoked where the issue is clear and the behavior is egregious.

In this case, the employer/insurer has been providing multiple types of treatment to claimant, including but not limited to surgical intervention, aqua therapy, land-based physical therapy, epidural steroid injections, acupuncture, and various appointments with authorized treating physicians. In fact, within a couple weeks of the hearing, claimant was to have an appointment with a physician who performs dorsal column stimulators, to review whether this treatment would be appropriate for her.

Claimant has also been receiving her weekly benefit check since Ms. Blaine prepared a report that indicated that claimant was permanently and totally disabled.

Upon review, I find that the facts of this case do *not* rise to the level where the employer/insurer should be ordered to pay attorney's fees and costs.

Summary

In conclusion, the issues and their resolutions are as follows:

1. What is the nature and extent of permanent partial disability or permanent total disability? Claimant is permanently and totally disabled.
2. Whether claimant is entitled to temporary total disability benefits from July 15, 2009 through February 26, 2010? Yes.
3. Whether the employer/insurer is responsible for future medical treatment? Yes.
4. Whether the employer/insurer is responsible for mileage reimbursement as outlined in Exhibit S? Yes.
5. Whether the employer/insurer is responsible for future mileage? Yes.
6. Whether the employer/insurer is responsible for a portion of the claimant's attorney's fees and costs as outlined in Exhibits Q and R? No.

³¹ 107 S.W.3d 240 (Mo. banc 2003).

Employee: Terrie L. Kobalt

Injury No. 05-003115

Any pending objections not expressly ruled on in this award are overruled. Interest is applicable as provided by law.

This Award is subject to a lien in the amount of 25% of the payments hereunder in favor of the Van Camp Law Firm, for necessary legal services rendered to the claimant.

Date: _____

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation