

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

Injury No.: 05-081844

Employee: Melissa Lane
Employer: Costco Wholesale Corporation
Insurer: Self-Insured

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

Preliminaries

The parties asked the administrative law judge to determine the following issues: (1) nature and extent of permanent partial or permanent total disability; (2) past medical expenses; (3) past temporary total disability; (4) future medical expenses; and (5) whether either party is entitled to costs under § 287.560 RSMo.

The administrative law judge determined as follows: (1) employer is liable to employee for past temporary total disability benefits in the amount of \$39,346.18; (2) employer is liable to employee for unpaid past medical expenses in the amount of \$523,020.75; (3) employee is permanently and totally disabled as a result of the accident on August 11, 2005, and the direct and natural consequence of that injury; (4) employer is liable to provide all additional medical treatment that is reasonable and necessary to cure and relieve employee from the effects of the work injury; and (5) neither of the parties are entitled to costs under § 287.560 RSMo.

Employer filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in concluding employer is liable for permanent total disability benefits; (2) in concluding employer is liable for past medical expenses in the amount of \$523,020.75; (3) in concluding employer is liable for temporary total disability benefits from October 23, 2012, through April 7, 2013; and (4) in concluding employer is liable to provide open medical care to the employee.

Employee also filed a timely application for review with the Commission alleging the administrative law judge erred in declining to award costs to employer under § 287.560 RSMo.

For the reasons stated below, we modify the award of the administrative law judge referable to the issue of past medical expenses.

Discussion

Past medical expenses

The parties asked the administrative law judge to resolve the issue whether employer is liable for employee's past medical expenses for treatment in connection with her work injuries affecting the cervical spine and body as a whole in the form of chronic pain, radiculopathy, and intractable headaches. The administrative law judge awarded employee a total of \$523,020.75 in past medical expenses based on a conclusion that the disputed treatment was reasonably required to cure and relieve the effects of employee's injuries. Employer appeals, arguing

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(in part) that certain of the awarded charges are not shown on the record to correspond to treatment related to the work injury.

Employee, in her brief, fails to respond to employer's argument that certain of the charges are not supported by corresponding treatment records. We have carefully reviewed the transcript, and we agree that certain of the charges awarded by the administrative law judge are not shown to correspond to treatment that was reasonably required to cure and relieve the effects of the work injury. Accordingly, we must modify the award of the administrative law judge as follows.

The administrative law judge awarded \$37,928.41 in charges from St. Luke's Regional Medical Center – Boise. The bills themselves (which, we note, are nearly illegible owing to the poor quality of the copies submitted by employee) suggest to us that employee incurred numerous charges with this provider for dates of service between January 21, 2007, and September 1, 2008. *Transcript*, pages 320-48. The administrative law judge did not provide her calculations or otherwise explain how she reached the awarded amount of \$37,928.41 from St. Luke's Regional Medical Center – Boise; it appears that she may have simply relied on the first page of employee's Exhibit E, which constitutes a mere summary of the *total* charges employee claims from each provider, and which does not include any itemization as to the specific dates of services or treatments claimed. Employee, in her brief, does not provide any itemization or other explanation identifying the particular charges she believes are compensable from St. Luke's Regional Medical Center – Boise.¹

Turning to the medical treatment records from this provider, we find four dates of service for conditions not shown on this record to have resulted from the work injury. Specifically, on May 5, 2007, employee received treatment for a diagnosis of Raynaud's syndrome; on November 11, 2007, employee received treatment for complaints of a sore throat and congestion; on April 16, 2008, employee received treatment for complaints of pelvic pain and a possible urinary tract infection; and on September 1, 2008, employee received treatment for complaints of abdominal pain possibly referable to gallbladder pathology. *Transcript*, pages 1760-62, 1747-51, 1732-42, and 1722-31. The bills suggest that this provider billed employee a total of \$6,937.52 for the treatment she received on these dates. *Transcript*, pages 325, 347, 344, and 320. Because employee has failed to respond to employer's argument these charges are unrelated to the work injury, and because employee's expert, Dr. Koprivica, did not specifically identify any of these treatments as flowing from the work injury, we find that the treatment employee underwent in connection with these conditions was not reasonably required to cure and relieve any effect of the work injury. Accordingly, we must modify the award of charges from St. Luke's Regional Medical Center – Boise from \$37,928.41 to \$30,990.89.

The administrative law judge also awarded \$124,148.93 in charges from Eastern Idaho Regional Medical Center. The bills themselves suggest to us that employee incurred numerous charges with this provider for dates of service between March 15, 2009, and January 2, 2014. *Transcript*, pages 478-583. The administrative law judge did not provide her calculations or otherwise explain how she reached the awarded amount of \$124,148.93 from Eastern Idaho Regional Medical Center; once again, it appears that she may simply have relied on the summary contained in employee's Exhibit E. Nor has employee, in her brief, provided any

¹ If the bills from this provider were any less legible, we would be inclined to view employee's failure to identify the particular charges she claims as a tacit admission that **none** of the charges from this provider are compensable. As it turns out, we were able to parse the bills and treatment records to arrive at what we believe is a fair and reasonable result, but we wish to make clear that it constitutes a rather severe imposition upon the fact-finder whenever the parties fail to itemize disputed expenses in a medically complex case.

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itemization or other explanation identifying the charges she believes are compensable from Eastern Idaho Regional Medical Center.

Turning to the medical treatment records from this provider, it appears that employee has, once again, included bills for treatment that had no relation to the work injury. Specifically, on September 21, 2010, employee received emergency treatment for complaints of abdominal pain of unknown etiology, suspected to have been related to a common bile duct stone. *Transcript*, pages 2797-2835. The bills suggest that this provider billed a total of \$32,442.87 for the treatment employee received for these complaints. *Transcript*, pages 530-35. Because employee has failed to respond to employer's argument that these charges are unrelated to the work injury, and because Dr. Koprivica did not identify abdominal pain as a result of the work injury, we find that the treatment employee underwent in connection with this complaint was not reasonably required to cure and relieve any effect of the work injury. Accordingly, we must modify the award of charges from Eastern Idaho Regional Medical Center from \$124,148.93 to \$91,706.06.

In its brief, employer does not specifically cite any other bills that it argues were incurred in connection with conditions unrelated to the work injury.² Employer does, however, argue in general that any treatment employee received in connection with complaints of headaches should be deemed non-compensable. We are not persuaded. Dr. Koprivica specifically identified intractable headaches as one of the sequelae resulting from the work injury. Employer's expert, Dr. Carabetta, did not rebut this opinion, and thus it appears to us that the uncontested expert medical opinion evidence compels a finding that the numerous treatments employee received for complaints of intractable headaches were reasonably required to cure and relieve the effects of the work injury; we so find.

As a result of the foregoing modifications, we conclude that employee is entitled to, and employer is obligated to pay, a total of \$483,640.36 in past medical expenses, rather than the amount of \$523,020.75 identified by the administrative law judge.

Nature and extent of disability - credibility of the employee

Employer argues, and we agree, that employee's claim for permanent total disability benefits turns, to a considerable degree, upon an evaluation of employee's credibility. In its brief and at oral argument, employer rather persuasively identified evidence to support its contention that employee's testimony should be deemed lacking persuasive force in light of her addiction to prescription pain medications. Having said that, we note that the administrative law judge, who was able to view employee as she testified, ultimately found her to be a credible witness with regard to the nature and extent of her disability.

In light of the opinion from employer's medical expert that employee suffered a compensable injury by accident; given that employer did not dispute, at the hearing before the administrative law judge, the issue of accident; and in the absence of any evidence that employee suffered from a preexisting disabling opiate addiction, we are not persuaded to substitute our own judgment with regard to employee's credibility for that of the administrative law judge. For this reason, we will defer to her findings and we hereby adopt them as our own.

Conclusion

We modify the award of the administrative law judge as to the issue of past medical expenses.

² We acknowledge, of course, employer's global argument that none of employee's past medical expenses should be compensable because employee lacks credibility and thus cannot satisfy her burden of proof with regard to the disputed issues.

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Employer is liable for \$483,640.36 in past medical expenses.

The award and decision of Administrative Law Judge Paula A. McKeon, issued December 18, 2015, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 5TH day of August 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Melissa Lane

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I disagree with the majority's decision to award permanent total disability benefits to this employee.

On August 11, 2005, this membership supervisor working at employer's wholesale department store experienced the onset of a headache after pushing five shopping carts. Half a million dollars in unauthorized medical expenses later, she asks this Commission to find that she is permanently and totally disabled as a result of this work injury. I am not convinced, because the evidence in employee's favor relies wholly upon an acceptance of her own testimony as to the effects of the work injury. And, as the evidence overwhelmingly demonstrates, employee's testimony on the topic is devoid of any credibility owing to her addiction to prescription pain medications.

On August 14, 2005, employee presented to the emergency room for medical treatment with the chief complaint of a migraine. She listed her *current* medications at that time as the following: Morphine, Zofran, Ativan, Toradol, Compazine, Benadryl, and Demerol. She did not provide a history of any work injury. A spinal tap and CT scan of the head came back totally normal. On August 16, 2005, employee presented to Northland Family Care for recurrent headache. She did not provide any history of injury or trauma. On August 17, 2005, employee presented once again to the emergency room with a five day complaint of intractable headaches. She advised of no recent trauma or acute changes or stressors in her life. The E.R. notes confirm that employee had already been to both the E.R. and her primary care physician twice within the past week for these same complaints. She was admitted for treatment.

The intake sheet from North Kansas City Hospital dated August 17, 2005, describes, in employee's own handwriting, her complaints including a "herniated disc." This was before any medical professional had provided a diagnosis of a herniated disc. An MRI of the neck was taken on August 18, 2005; it showed findings compatible with a herniated disc at C5-6. Abnormal reactive changes were noted by the radiologist, who suspected trauma. A CT scan of August 19, 2005, showed a congenital cervicothoracic fusion at C5-6, along with degenerative disc disease.

During employee's hospitalization, she was treated with IV narcotics and Imitrex injections, none of which (according to her) provided significant relief. She also received a Fentanyl PCA pump, which she likewise reported as ineffective. On August 20, 2005, Dr. Flores, a neurosurgeon, saw employee for neck pain. He diagnosed a disc protrusion at C5-6, but was doubtful this was the primary etiology of employee's headaches. The hospital discharged employee on August 21 of 2005, to follow up with her primary care physician.

Later that same day, employee presented to the Liberty Hospital E.R. with complaints of a 10/10 headache. This time, she told emergency personnel that her current medications were Ultram, Trazodone, Valium and Depo. Employee received Dilaudid and a prescription for Ambien. The next day, employee returned to the Liberty Hospital emergency room, now complaining of abdominal pain. She received pain control.

On September 17, 2005, employee returned to the North Kansas City Hospital E.R. complaining of a headache; she received Morphine. Employee returned to the same E.R. on September 25, 2005, now reporting a history of several cervical and one thoracic disc herniations. Employee received pain control.

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On October 3, 2005, employee presented to North Kansas City Hospital for a selective nerve root block. Days later, employee returned to the North Kansas City Hospital E.R. complaining of multiple cervical herniated discs; she received pain control. On October 14 and 20, and on November 10, 11, 18, 20, and 22, 2005, employee went to the Liberty Hospital E.R. and received pain control each time. After being discharged at 1:30 p.m. on November 22, 2005, from Liberty Hospital, employee presented to the North Kansas City Hospital E.R. at 6:55 p.m. the same day. Employee received morphine. Employee returned to the North Kansas City Hospital on December 31, 2005, and again received pain control.

On January 18, 2006, Dr. Rosenberg performed a foraminotomy at C5-6. Employee suffered some post-surgical infections, for which three additional procedures were necessary. On February 23, 2006, employee told Dr. Rosenberg that she was feeling much better and was slowly reducing her use of prescription pain medications. Dr. Rosenberg recommended she see a pain management specialist who specialized in complex narcotic requirements.

From April 30, 2006, through May 9, 2006, employee was admitted to North Kansas City Hospital for intractable headaches and opioid dependence. Employee continued to see Dr. Rosenberg and Dr. Burfeind for prescription pain medications and injections through late 2006. In addition, between May and September 2006, she presented to the North Kansas City Hospital E.R. with pain complaints no less than 11 times.

Employee eventually relocated to Idaho, where she began treating with Dr. Belzer as her primary care physician, so that pharmacists would continue to refill her prescriptions for narcotics. At that time, employee was taking Fentanyl, Topamax, Oxycodone, Tramadol, Nortriptyline, Ambien, Dilaudid, Demerol, Phenergan, and Excedrin migraine. Employee also began seeing Dr. Dubose for additional pain management.

Between January 2007 and September 2008, employee made eight trips to St. Luke's Regional Medical Center seeking pain medications. When employee initially presented on January 21, 2007, complaining of a migraine, she told providers she had a history of six herniated discs in her neck. On June 7, 2007, the emergency room at St. Luke's contacted Dr. Dubose about employee's frequent visits; Dr. Dubose told those providers he wanted them to stop prescribing employee additional pain drugs unless something new and objective were identified on an MRI.

On April 15, 2007, employee reported to Mercy Medical Center seeking pain medications. Employee told one of the nurses that she was living in a shelter and that all of her medications were locked up. During the same visit, she told a different nurse she'd run out of her medications and needed them refilled. The notes indicate that EMS personnel observed employee wearing a Fentanyl patch while also taking Phenergan. Triage notes suggest employee was holding her head dramatically, but when distracted, employee answered all questions and appeared entirely comfortable.

On May 17, 2007, Dr. Dubose called Dr. Belzer to discuss employee's drug seeking behaviors. Dr. Dubose advised he was no longer willing to give employee the same amount of prescriptions, and he referred employee to Dr. Hajjar, a neurosurgeon. Employee reported worsening of her complaints, and Dr. Hajjar performed a fusion at C5-6 and C-7 on July 19, 2007. As of December 7, 2007, employee reported that she was doing very well and overall very happy with the result of the fusion.

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Employee underwent post-operative physical therapy at Intermountain from August 24, 2007, through December 26, 2007. At the time of employee's discharge from therapy, she had been back to work since the end of August 2007, had travelled at least three times to Seattle, and she noted that her neck complaints were fairly stable. Employee's drug seeking behaviors continued, however.

On May 4, 2008, employee visited Harrison Medical Center in Washington seeking drugs for a reported headache. Employee told treating personnel that her current medications included Oxycontin, Oxycodone, and Methadone. Employee received pain control and was discharged. On May 16, 2008, employee presented to the University of Washington Medical Center complaining, once again, of a headache. Employee received Toradol, morphine, and Phenergan. On June 14, 2008, employee once again sought drugs at the Harrison Medical Center complaining of a headache. Employee received pain control and was discharged.

On June 23, 2008, employee returned to Harrison Medical Center, reporting that she was having withdrawals from narcotics, which caused vomiting and diarrhea. Employee reported that she was visiting from Idaho and had run out of medications three days ago, and needed refills for Oxycontin, Hydrocodone, Dilaudid, and Neurontin.

On December 30, 2008, employee established a new primary care physician-patient relationship with Dr. Zoe. Employee denied illegal drug usage or doctor shopping. Notably, employee did not tell Dr. Zoe that she'd had a work injury, but instead reported left sided neck pain beginning in 2003. Employee reported prior relief for this condition from Oxycodone, Lortab, Norco, Morphine, Fentanyl, Dilaudid, and Demerol. Dr. Zoe provided employee with prescriptions for Fentanyl and Oxycodone, but noted a desire to review employee's prior medical records. Employee continued her treatment with Dr. Zoe through July 22, 2010. Employee routinely complained of 10/10 pain to keep the pain medications coming.

Dr. Zoe's notes reveal that on July 14, 2010, employee was 8 weeks pregnant and on high dose narcotic pain medications. Employee reported that her OB/GYN told her to use Fentanyl, but employee wanted to stay on Oxycodone. Dr. Zoe educated employee about the significant risks involved in staying on a Category C medication during pregnancy; employee indicated that she understood and wished to accept that risk. Employee received MS Contin and Morphine sulfate. In her follow-up visit of August 6, 2009, employee noted that she wished to continue to receive narcotics, as they were helping, but she felt she needed higher doses for her pain complaints. Employee revealed, at that time, that she'd been on morphine during a prior pregnancy, which had occurred prior to the 2005 work injury.

On September 21, 2010, employee presented to Eastern Idaho Regional Medical Center complaining of abdominal pain. She was admitted for tests, but these could not be completed owing to employee's adamant refusal to stay off narcotic medications long enough to perform the tests. Employee became upset and demanded that she be discharged.

On September 23, 2010, employee established yet another primary care physician-patient relationship, this time with Dr. Rencher. Employee falsely reported that she'd been receiving her medications from providers in Kansas City, and failed to mention Dr. Zoe. Employee advised she'd been on chronic opioid medications since 2006, including 75mg of Oxycodone, and reported that she felt pretty stable at that dosage. Employee told Dr. Rencher that she didn't want Lyrica or Neurontin, however, as these were not as effective as the Oxycodone.

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On June 24, 2011, employee fell asleep while driving after taking Oxycontin together with Oxycodone. She struck a delineator post, drifted across two lanes of oncoming traffic, and struck a guardrail head-on. Responding law enforcement officers searched employee's car, and found the following: one empty prescription bottle for Oxycodone 15mg, which had been prescribed to Timothy Lane dated May 20, 2011, that originally contained 45 pills; another pill bottle for Oxycodone 15mg prescribed to (employee's husband) Timothy Lane dated June 17, 2011, containing 71 pills, although the bottle listed a quantity of 45; and yet a third pill bottle for Oxycontin 40mg belonging to Timothy Lane dated June 17, 2011, containing 37 pills although the original quantity was listed at 60.

On July 27, 2011, Dr. Rencher added Norco to employee's prescriptions in an attempt to get her to wean off the stronger narcotics. Employee resisted, claiming that she had worsening of her neck complaints, and complaining that she'd previously been stable for years with her favored drugs.

On September 20, 2011, only three months after her last drug-related motor vehicle accident, employee again crashed her car, this time crossing the center lane and striking another motorist and causing a third to swerve to avoid collision. Employee told Dr. Koprivica that her medications referable to the work injury caused her to fall asleep at the wheel; the administrative law judge (and Commission majority) expressly relied on this theory to find that this motor vehicle accident was a product of the work injury. Yet, employee told Dr. Rencher that she merely had been up late the night before dealing with sick children, and that she didn't think her drugs had caused her to fall asleep. Employee made no attempt whatsoever to resolve this inconsistency at trial.

On April 5, 2012, employee saw Dr. Allen for neck pain and headaches. Employee told Dr. Allen she was on Adderall, Hydrocodone, Oxycontin, Flexeril, Lunesta, Oxycodone, Wellbutrin, Cymbalta, Ultram, Neurontin, Demerol, Topamax, and Fentanyl. I pause to allow the reader to contemplate this list—taken directly from employee's own mouth—of the numerous, potent, and mind-altering controlled substances that employee was ingesting (and requesting) as of April 2012. Frankly, I have never seen anything like it in the years that I have been reviewing workers' compensation claims as a member of this Commission.

Mere weeks after listing this truly astonishing pharmaceutical cocktail for Dr. Allen, police pulled employee over on April 23, 2012, upon reports she was driving dangerously. Employee was visibly intoxicated and unable even to stand, and admitted to law enforcement that she'd been taking her own Oxycontin, her husband's Oxycodone, and Vyvanse, which had been prescribed for her son. Employee was charged with a DUI, but pled guilty to the lesser charge of reckless driving.

At the hearing in this matter, employee's behavior outside of the courtroom but within the administrative law judge's line of vision was physically theatrical and inappropriate. The administrative law judge, in fact, was forced to stop the trial so that this could be addressed, and she described employee's behavior, for the record, as follows:

The Court: I need to take a break one moment. Mr. Kelly [employee's counsel], please go ask your client to go back to a conference room or she can sit in here, but I don't want her doing what she's doing outside the door. That can be on the record.

(Mr. Kelly exits the courtroom at this time.)

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Mr. Early [employer's counsel]: What's she doing?

The Court: Some physical theatrics that I don't appreciate. ... She's been down the hall. I have already put on the record that she was doing some physical theatrics that I don't think is appropriate standing in front of my door. ... [D]ramatic things. She was standing up, leaning over, squatting down, holding her body in a very awkward and unusual position, directly in my line of vision.

Transcript, page 25.

In contrast to her presentation at trial, surveillance footage obtained shortly before trial shows employee ambulating freely without a limp, able to collect and carry her young daughter, carry a shoulder bag, and bend and flip her head in a mannerism wholly inconsistent with a painful neck. No explanation was offered for this significant inconsistency between surveillance and trial presentation.

Also at hearing, on both direct and cross-examination, employee denied planning to attend a Royals baseball game on October 28, 2014. Yet, on her personal Facebook page, she specifically stated that she did intend to do so. She also told her own treating physician, Dr. Rencher, that she "was able to go to the World Series game back in Kansas City, which she enjoyed." *Transcript, page 2643.* In the face of allegedly unbearable, chronic, and permanently and totally disabling neck pain and headaches referable to pushing five carts on August 11, 2005, it is truly remarkable that employee felt able to attend a three to four hour baseball game. More importantly, it appears to me that employee was effectively impeached with regard to attending the baseball game, another significant blow to her credibility.

Employee's testimony is not credible

By all accounts, opiate addiction is one of the worst afflictions imaginable, and I have utmost sympathy for employee, as she clearly remains in the throes of this condition. On the other hand, it is my duty to determine, as a member of this Commission, whether employee's testimony (upon which all of the medical and vocational experts relied) is persuasive and believable with respect to the disputed issues. Based on the foregoing, I cannot so conclude. Consequently, the medical and vocational testimony in employee's favor must fail, with the result that employee cannot meet her burden of proof with respect to the disputed issues.

I would reverse the award of the administrative law judge and find that employee is not entitled to permanent total disability benefits, past medical expenses, temporary total disability benefits, or future medical care. Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

FINAL AWARD

Employee: Melissa Lane Injury No. 05-081844
Employer: Costco Wholesale Corporation
Insurer: Helmsman Management Services
Additional Party: N/A
Hearing Date: October 20, 2015 Checked by: PAM/drl

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: August 11, 2005
5. State location where accident occurred or occupational disease was contracted: Kansas City, 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: Lane was pushing and turning shopping carts causing injury to her neck.
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, upper extremity, body as a whole.

14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$0
17. Value necessary medical aid not furnished by employer/insurer? \$523,020.75
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$503.47 / 365.08
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:
 1. 78.15 weeks of temporary total disability or \$39,346.18.
 2. Past medical benefits totaling \$523,020.75.
 3. Permanent total disability benefits beginning July 1, 2013. Employer/Insurer liability of \$503.47 per week.
22. Future requirements awarded: Yes – see finding and rulings.

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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Mark Kelly.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Melissa Lane Injury No. 05-081844
Employer: Costco Wholesale Corporation
Insurer: Helmsman Management Services
Additional Party: N/A
Hearing Date: October 20, 2015 Checked by: PAM/drl

On October 20, 2015, the parties appeared for final hearing. The Division had jurisdiction to hear this case pursuant to Mo. Rev. State §287.110. The Employee, Melissa Lane, appeared in person and with counsel, Mark Kelly. The Employer/Insurer appeared through attorney Maurice Early.

STIPULATIONS

The parties stipulated to the following:

- 1) That on or about August 11, 2005 Costco Wholesale Corporation was an employer operating under and subject to the provisions of the Missouri workers' compensation law;
- 2) That Lane was its employee working subject to the law in Missouri;
- 3) That Lane notified her employer of her injury and filed her claim in the time allowed by law;
- 4) That Lane's weekly compensation rate is \$503.47 / 365.08; and
- 5) That on or about August 11, 2005 Lane sustained an injury arising out of and in the course of her employment which resulted in injury to her neck, body as a whole.

ISSUES

The issues to be determined by this hearing are the following:

- 1) Whether Costco is liable for past medical expenses totaling \$523,020.75;
- 2) Whether Costco is liable for past temporary total disability benefits for 78.15 weeks or \$39,346.18;
- 3) Whether Lane is permanently and totally disabled;
- 4) Whether Lane is in need of future medical care;
- 5) Whether either party is entitled to costs and fees pursuant to §287.560 R.S.Mo.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Lane testified live. Lane is a 41 year old former membership supervisor for Costco Wholesale Corporation. Lane also held numerous other jobs within the Costco organization including food court, membership, front end supervisor and return to vendor clerk.

As membership supervisor, Lane would process refunds, assist with membership, schedule employee work and break/lunch schedules, and assist front end activities when needed.

On August 11, 2005, Lane was assisting the front end by gathering carts. As she was pushing/turning four to five carts from the outside into the vestibule area inside Costco, she felt a pop in her neck and shoulder area on the left side. She had immediate onset of tingling in her left upper extremity and a headache at the base of her skull.

Lane went directly to the administrative manager's office to see if she could answer phone calls while waiting to see if her headache went away. When her headache symptoms did not resolve, the manager suggested she go home.

Lane's headache symptoms continued, so she went to the emergency room at North Kansas City Hospital. She received medications, but the headache did not resolve. Lane was admitted to North Kansas City Hospital on August 17, 2005 due to continued and progressive headaches. MRI taken on August 18, 2005 revealed an acute cervical disk herniation. Lane was referred to Dr. Burfeind for pain management.

A report of injury was filed by Costco on August 26, 2005. No medical treatment was provided by Costco. Costco did pay approximately \$214 in temporary total disability benefits which were discontinued when Costco denied further coverage under workers' compensation.

While Lane continued to treat with Dr. Burfeind, she also consulted with orthopedic surgeon Dr. Jackson who referred her to neurologist Dr. Rosenberg who performed a cervical foraminotomy in January 2006. Following the surgery, Lane continued to have complaints of headaches and nausea. Lane was diagnosed with a staph infection from the cervical surgery. Lane was rehospitalized due to the infection and subsequent surgical repair of her dural defect in February 2006.

Lane had a complicated and significant course of treatment throughout 2006, including extensive pain management, use of TENS unit and multiple medications, including narcotics. Lane obtained treatment through Costco's health insurance.

In December 2006 Lane was relocating to Idaho with her family. She continued to work for Costco in Idaho. It was recommended that she obtain pain management services in Idaho.

At no time during this period did Costco assume control of Lane's care, provide temporary total disability benefits or consultations with any medical care providers.

After relocating to Idaho, Lane continued to have headaches and chronic pain. She was treated at the Idaho Pain Center where medical records reflect among other findings post-laminectomy syndrome of the cervical spine. Also noted are concerns regarding narcotic use and tolerance. Due to continued intractable complaints, Lane was referred to surgeon Dr. Hajjar who performed a cervical fusion in July 2007.

Lane filed a claim for compensation in April 2007 and again requested benefits including medical. Costco did not assume control of Lane's care or provide temporary total disability benefits or medical treatment of any kind.

Lane continued to receive extensive medical care and pain management treatment with Dr. DuBose until December 2008 when she began a course of pain management with Dr. Zoe. Lane continued to receive various prescription medications including high doses of narcotics to control headaches and neck pain. Lane treated with Dr. Zoe until fall of 2010.

Lane's treatment was then followed by Dr. Rencher, family physician, who provided prescriptions, including continuation of narcotics. In May and early June 2011 Dr. Rencher notes Lane's complaints regarding numbness and tingling of the upper extremities, fatigue and chronic neck pain. Lane had access to and was taking large quantities of pain-related medications, including narcotics. She presented at emergency rooms several times seeking narcotics.

Lane was involved in a motor vehicle accident on June 24, 2011. Lane testified she fell asleep while driving and hit a guardrail. Several prescription bottles were found in the vehicle, some prescribed to Lane's husband and son for Oxycodone and OxyContin. Lane testified that she sustained facial injuries, but denies additional trauma to her cervical spine.

Lane was involved in another car accident in September 2011. Lane testified that fatigue and pain medications caused her to fall asleep at the wheel as she returned home from work.

Lane was arrested for driving under the influence in April 2012. She was visibly glassy eyed according to police reports. Lane was unable to stand and was noted to be in possession of narcotic prescriptions, both hers and family members.

Lane was seen at the Idaho Spine Clinic beginning in January 2012 for pain in her neck. She received epidural steroid injections in her cervical spine, but ultimately required an additional cervical fusion. This additional cervical fusion did reduce Lane's complaint of pain and symptoms. She was released from care on April 7, 2013. Lane continues active medical care with Dr. Rencher for pain management.

Dr. Koprivica evaluated Lane on two separate occasions, October 18, 2010, and June 26, 2014, and authored two reports. The first report dated October 18, 2010, noted Lane suffered an accident on August 11, 2005, while pushing five to six shopping carts. He reported Lane indicated this was followed by a nearly immediate headache to which she went inside and reported that she was having a "horrid headache." He notes Lane went to the emergency room at North Kansas City Hospital on August 14, 2005, at which time a CT scan of the head was negative and she was discharged. However, due to the intractable headache, she called in sick to work and saw Dr. Roney on August 17, 2005. Later that day, she also went to the emergency room at North Kansas City Hospital and was admitted with an intractable headache from August 17, 2005, through August 21, 2005. During that time, an MRI scan of the cervical spine revealed a central and left-sided C5-6 cervical disk herniation. Lane underwent nerve root blocks, a lumbar epidural blood patch and, ultimately, a C5-6 foraminotomy on January 18, 2005. She developed significant complications following this neurosurgical procedure and required extensive treatment for a post-operative infection, including a wound debridement on June 29, 2006. A lumbar drain was also placed due to this infection, which was removed on February 9, 2006. Dr. Rosenberg recommended pain management on February 23, 2006, and a TENS unit was prescribed. She was re-hospitalized in North Kansas City Hospital from April 3, 2006, through May 9, 2006, due to ongoing chronic cervical radiculitis with opioid dependence, left lower extremity paresthesias and nausea and vomiting.

Lane underwent an interior cervical discectomy infusion at C5-6 and C6-7 for her post laminectomy syndrome on July 19, 2007. At the time of the examination, Lane was prescribed OxyContin, Neurontin, and Wellbutrin. She also took Zofran as needed for nausea.

At the time of Dr. Koprivica's first evaluation, Lane had tingling and numbness radiating into her left arm, left thumb, index finger, and middle finger to the point she could not use those digits reliably for pinching tasks. She suffered from severe disabling headaches. Lane missed about three days per month of work on average due to headaches. She also noted she was accommodated at work and had a helper. He reported work restrictions of lifting and carrying, including maximum lift of 30 pounds, occasional lifting or carrying of 25 pounds, frequent lifting and carrying of less than 15 pounds and no overhead lifting activities. Lane reported postural limitations including a sitting tolerance of less than an hour and standing or walking tolerance of less than two hours. He noted she had persistent pain in her left lateral lower leg with limp which has persisted since the initial left C5-6 foraminotomy.

Dr. Koprivica concluded Lane's work injury of August 11, 2005, was the direct, proximate, substantial and prevailing factor in her development of an annular injury at the C5-6 level with the development of a left C6 radiculopathy and development of intractable headache. Dr. Koprivica opined Lane had developed profound, disabling conditions, which were the result of complications arising during care and treatment necessitated by the August 11, 2005, injury. He felt Lane's treatment of a left C5-6 foraminotomy and subsequent post-operative infection

along with the post-laminectomy syndrome and dural defect was a direct result of her accident. He noted a secondary complex regional pain syndrome involving the left upper extremity as a complication of the nerve root injury associated with the surgery. Dr. Koprivica opines that Lane required an anterior cervical discectomy and fusion at C5-6 and C6-7. He felt the extent of the medical treatment Lane received was medically reasonable and a direct necessity in an attempt to cure and relieve Lane of the effects of permanent injuries sustained on August 11, 2005.

Dr. Koprivica felt Lane would require chronic pain management. He recommended a pain management specialist to monitor and provide ongoing medications. At the time of his evaluation on October 18, 2010, Dr. Koprivica felt there was a risk of adjacent segment disease, which would require her to have access to an appropriate neurosurgeon as dictated by the clinical course.

Dr. Koprivica opined as a direct result of her injury, she had significant disability. He felt she suffered a 50% permanent partial disability to the body as a whole. Dr. Koprivica specifically noted if Lane were to lose her employment with Costco, there would be an issue as to her ability to access the open labor market in light of the accommodated work currently being provided to her by Costco and her ongoing chronic use of narcotics.

In Dr. Koprivica's updated June 26, 2014, evaluation and report, he noted Lane was seeing Dr. Rencher for ongoing chronic pain management. He also noted the motor vehicle accident in late June 2011, in which Lane stated she fell asleep and hit a guardrail. Lane felt she fell asleep because of the side effects of the medications she had been prescribed along with a sleep disturbance that had been ongoing based on her work injury and residual disability attributable to the August 11, 2005, injury. Dr. Koprivica felt the motor vehicle accident was a direct and natural complication of the August 11, 2005, claim. Dr. Koprivica noted Dr. Farrell saw Lane after an MRI scan on March 19, 2012, which revealed multi-level degenerative disk disease with adjacent segment central spinal stenosis with diskogenic changes at C3-4 and C4-5. Cervical epidural steroid injections were attempted but unsuccessful. Ultimately, Lane underwent an anterior vertebrectomies as C3-4 and C4-5 and the prior instrumentation from C5-7 was removed. An anterior decompression and instrumented fusion was then done from C3 to C5.

At the time of Dr. Koprivica's June 26, 2014, evaluation, Lane continued to suffer left upper extremity radicular symptoms. She was unable to feel her left thumb, index finger or middle finger and had decreased sensation of the left lateral lower leg. Lane continued to have headaches and sleep disruption. Lane reported she is limited in her activities at home. Dr. Koprivica noted Lane had difficulty even lifting her 11-pound daughter and was unable to lift or carry more than 20 pounds. Lane reported she needed to lie down throughout the day.

After reviewing the updated medical records and performing a physical examination, Dr. Koprivica gave additional opinions as to Lane's condition. He continued to believe Lane's work injury of August 11, 2005, was the direct, proximate, substantial and prevailing factor in her development of the annular injury at the C5-6 level with left C6 radiculopathy along with intractable headaches. He believed with the failed laminectomy syndrome, she required an anterior cervical discectomy and fusion at C5-6 and C6-7. He felt as a direct and natural consequence of the injury and subsequent multiple surgeries, adjacent segment disease development occurred. He felt it was medically reasonable and a direct necessity of the further complication that Lane underwent the removal of her prior hardware along with anterior corpectomy at C3, C4 and C5 with interbody and anterior fusion from C3 through C5. He opined she required indefinite treatment needs including ongoing physician monitoring as well as management of the chronic disabling pain attributable to this injury.

Dr. Koprivica gave updated restrictions of captive sitting intervals of less than 1-1/2 to 2 hours. He felt standing should be limited to less than 30 minutes and walking intervals should be limited to less than 30 minutes. He felt she should have the ad lib ability to change between those activities as necessary. Lane should avoid any above shoulder activities bilaterally, even if unweighted, and avoid sustained or awkward postures of the cervical spine. She should avoid whole body vibration or jarring types of activities and no lifting above chest level. Dr. Koprivica felt she should limit lifting and carrying to occasional and less than 20 pounds. She should not perform any climbing type of activities. Dr. Koprivica opined, in looking at the severity of the postural restriction, including the need to lie down unpredictably, which he noted was consistent with her presentation clinically; it was his opinion Lane was, in fact, permanently and totally disabled. Dr. Koprivica felt the permanent and total disability was attributable to the August 11, 2005, injury with the subsequent impairment and resulting disability, in and of itself.

Dr. Carabetta saw Lane on two separate occasions, first on December 8, 2008, and then on January 16, 2015. In his December 8, 2008 report, Dr. Carabetta reviewed medical reports provided to him and outlined her medical treatment. He also performed a physical examination and gave his impression as status post-cervical fusion radiculopathy. Dr. Carabetta noted Lane has some limited improvement in her symptoms although she remained symptomatic requiring active treatment in the form of analgesic medications. He felt this was expected to continue indefinitely. He felt Lane was at maximum medical improvement.

Dr. Carabetta noted Lane was fortunate to be able to continue working for her employer, albeit in a different position that was less physical demanding. Dr. Carabetta felt the work injury of August 11, 2005, was a substantial factor necessitating the need for the four separate surgical procedures Lane had undergone. As a result of her permanent partial disability, he felt she suffered a 25% permanent partial disability to the body as a whole due to her cervical condition.

While he felt 5% of the disability was attributable to underlying factors, he acknowledged that no disability existed prior to August 11, 2005.

In Dr. Carabetta's report dated January 16, 2015, he reviewed additional reports provided to him. He noted Lane felt no particular incident had led to the need for additional surgery in October 2012. He felt she had progressively gotten worse and the need for surgery was because she was tired of being on medication. Dr. Carabetta noted Lane was under the care of Dr. Rencher and numerous medications for pain management were utilized prior to the motor vehicle accident. These included sleeping pills, such as Ambien, Fentanyl patches, and oral dilaudid. He noted Lane reported that due to the extensive use of medications, she fell asleep at the wheel and hit a guardrail. He also noted on October 23, 2012, Lane required an instrumented fusion from C3 through C5. Dr. Carabetta felt the need for her most recent surgery on October 23, 2012, was related to the motor vehicle accident in which she was involved. He noted while Lane was able to continue to work previously, this was in a restricted capacity and she had been lifting about 15 pounds to the best of her recollection. Dr. Carabetta opined Lane stopped working due to her most recent pregnancy and her employer's inability to meet restrictions. Dr. Carabetta opined Lane's permanent partial disability was 40% of the body as a whole.

Lane continues to have significant restrictions and symptoms following her five surgeries. Her mobility is restricted, her sleeping ability limited. The numbness and tingling complaints are reduced, but not eliminated. Lane takes numerous medications, including antidepressants. She no longer drives due to several motor vehicle accidents, at least two of which included citations for driving under the influence.

Lane was taking a substantial amount of pain medications, including narcotics, for a number of years. Medical records support that various medical providers were concerned about Lane's addiction issues which increasingly became a problem for her. Lane testified that as of the date of the hearing she had substantially reduced the quantity of prescribed medications she is taking.

Lane also had many personal stressors which caused stress and aggravated her pain levels, including a severely ill husband who required a liver transplant. She has nine children. Her children were frequently away from her and were cared for by others. She also dealt with her daughter's illness. However, she also undisputedly had significant pain and complications from her long and complex course of medical care which flowed from her August 11, 2005 injury.

Lane's vocational history reflects some college and very limited diesel mechanic training while in the military. Lane had performed entry level clerical services prior to her employment with Costco where she worked from 2000 to 2013. Her work tasks at Costco varied from

department, but included cashier, bagging items, open/close store, update computer information, assist with customer service.

Costco accommodated Lane's physical restrictions by providing assistance, changing work duties. She was accommodated by Costco until her termination in July 2013 due to policy violations; some described as tardiness or failure to follow work schedule. Lane testified these were due to complications from her neck injury.

Terry Cordray, vocational expert, testified that Lane's current medical/physical problems, limited education and lack of transferable skills significantly erode her employment opportunities at a sedentary level.

Based on her vocational profile, Mr. Cordray felt Lane's work background would not have caused her to obtain any skills from her previous employment that would relate to sedentary work with the exception of simple data entry, which she had performed at Costco.

Mr. Cordray performed vocational testing and felt she was of average intelligence and performed at the average range in math and spelling. However, given her current significant medical problems with difficulty in rotating her head up and down, significant pain, limitations, and the ability to concentrate, it is his opinion Lane is not a candidate for any type of vocational rehabilitation training.

Cordray noted Lane was required to take medication, including the Fentanyl patch and OxyContin, which caused significant side effects and an inability to be alert and attentive. Secondary to the side effects of her medication, Lane was having difficulty with the 60-mile commute from her home in Idaho Falls to her job in Pocatello and was, therefore, terminated from her employment by Costco. Given the significant limitations of her injury, pain and inability to be alert and attentive from her medication, Lane has been unable to return to work in any occupation since being terminated by her employer, Costco. He noted Dr. Rencher, in his report of March 25, 2013, gave permanent restrictions of, "Limit repetitive head/neck movements with weight limits of occasionally pushing and pulling 21 to 50 pounds, lifting and carrying occasionally 11 to 20 pounds with the ability to perform simple or repetitive tasks, complex or varied tasks, capable of doing basic work, interacting with others, decision making, and attention to tasks and details, able to do hand and foot movement, and that she could sit for two hours at a time, stand for two hours at a time, and walk for two hours at a time with a 15 minute break after each two hours."

Mr. Cordray felt Lane was only capable of working at her job with accommodations. Additionally, based upon the restrictions of Dr. Koprivica, including the need to lie down unpredictably during the day, Mr. Cordray did not feel Lane was capable of working and was totally vocationally disabled.

Michelle Sprecker, vocational expert evaluated Lane on July 21, 2015. She concluded that, based on the physical restrictions of Dr. Koprivica, Lane would be permanently and totally disabled. No reasonable employer would realistically hire Lane. Sprecker did believe Lane capable of data entry/processor jobs when considering Dr. Carabetta's report. Sprecker testified that if Lane was required to be able to lie down unpredictably, that restriction alone would prohibit her return to work.

Lane testified the workers' compensation carrier had not provided any payment for her medical expenses and she had to use her health insurance for payment of the bills. She received a payment from workers' compensation of approximately \$200.00 soon after her injury, which she understood to be for three days off work. With her health insurance, she had to pay a portion of the premiums for the insurance, which included co-pays and deductibles for all medical expenses she has incurred to the extent they have been paid for by her health insurance. There are a number of medical expenses, which have not been paid at all. Lane was required to sign a financial responsibility agreement with all of her medical providers, which made her responsible for 100% of the bills.

Lane was cross-examined by counsel for Costco regarding attending a Royals baseball game during the playoffs in 2014. Lane testified that although she had hoped to attend the baseball game in conjunction with a hearing scheduled in Kansas City for her workers' compensation claim, she was not able to attend the game because of the pain in her neck and arm due to driving from Idaho to Kansas City. Lane has been unable to work since being released by Costco on July 1, 2013.

Lane had concerns about the effects of the multiple narcotic pain medications, which is why she sought the fusion in October 2013. During her continued employment with Costco following the accident, Lane worked in an accommodated and/or light duty status. She never returned to full-duty following the August 11, 2005, accident. Lane testified she needs to lay down during the day to relieve the pain.

Following Dr. Carabetta's December 8, 2008, examination, he opined her injury was work related and felt she needed further medical treatment. Following receipt of this report, Lane testified her counsel sent a letter to Costco on December 29, 2008, requesting they provide medical treatment consistent with Dr. Carabetta's opinion. Despite the request and report from Dr. Carabetta, Costco continued to refuse to provide medical treatment.

Temporary Total Disability

At the hearing, Melissa Lane requested temporary total disability compensation for the periods of:

August 12, 2005, through October 4, 2005

November 11, 2005, through September 7, 2006, less November 28, 2005

July 19, 2007, through August 30, 2007

October 23, 2012, through April 7, 2013

Costco stipulated they have not paid any temporary total disability benefits.

Section 287.270, RSMo, provides that an injured employee is to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7 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.” Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. Vinson v. Curators of Univ. of Missouri, 822 S.W. 2d 504 (Mo. App. 1991); Phelps v. Jeff Wolk Const. Co., 803 S.W.2d 641, 645 (Mo. App. 1991); and Williams v. Pillsbury Co., 694 S.W.2d 488 (Mo. App. 1985).

The employee has the burden of proving that he or she is unable to return to any employment. Such proof is made only by competent and substantial evidence. It may not rest on speculation. Griggs v. A.B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). The employee’s testimony alone can constitute substantial evidence to support an award of temporary total disability. Evidence of temporary disability given by the employee is not necessarily beyond the realm of understanding by lay persons. Riggs v. Daniel Intern, 771 S.W.2d 850, 851 (Mo. App. 1989).

Costco had Lane evaluated by Dr. Carabetta to address causation as well as the need for further medical treatment. Despite Dr. Carabetta’s opinions expressed in his December 8, 2008, report, Costco refused to provide any medical treatment or temporary total disability benefits to Lane.

I believe Dr. Koprivica’s and Lane’s testimony supports her claim for temporary total disability compensation. Additionally, the corroborating medical records evidence Lane’s inability to work during the claimed dates. Further, Dr. Koprivica testified Lane did not reach maximum medical improvement until April 7, 2013. Lane was then terminated on July 1, 2013. There is no evidence to the contrary.

I find Lane has met her burden of proof in her claim for temporary total disability compensation.

Costco shall pay Lane \$39,346.18, representing 78.15 weeks for the claimed time period in which Lane was temporarily totally disabled.

Past Medical Bills

“Employee had the burden of proving his entitlement to benefits for care and treatment authorized by §287.140.1 i.e., that which is reasonably required to cure and relieve from the effects of the work injury.” Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 266 (Mo.App. 2004); Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App. 2001). Meeting that burden requires that the past bills be causally related to the work injury. Bowers, 132 S.W.3d at 266; Pemberton v. 3M Co., 992 S.W.2d 365, 368-69 (Mo.App. 1999).

The employee must prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury. Chambliss v. Lutheran Medical Center, 822 S.W.2d 926 (Mo.App. 1991), overruled in part on the grounds by Hampton, 121 S.W.3d at 229; Jones v. Jefferson City School District, 801 S.W.2d 486, 490-91 (Mo.App. 1990), overruled in part on other grounds by Hampton, 121 S.W.3d at 230; Roberts v. Consumers Market, 725 S.W.2d 652, 653 (Mo.App. 1987); Brueggemann v. Permaneer Door Corporation, 527 S.W.2d 718, 722 (Mo.App. 1975). The employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence that relate to the services provided. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo.App. 1994), overruled in part on other grounds by Hampton, 121 S.W.3d at 228; Lenzini v. Columbia Foods, 829 S.W.2d 482, 484 (Mo.App. 1992), overruled in part on other grounds by Hampton, 121 S.W.3d at 229; Wood v. Dierbergs Market, 843 S.W.2d 396, 399 (Mo.App. 1992), overruled in part on other grounds by Hampton, 121 S.W.3d at 229. The medical bills in Martin were shown by the medical records in evidence to relate to the professional services rendered for treatment of the product of the employee’s injury. Martin, 769 S.W.2d at 111.

Lane has submitted the medical records and bills reflecting the treatment she received into evidence. The total medical bills were itemized and admitted as Exhibit E. Further, Dr. Koprivica reviewed the medical records and found they were reasonable and necessary to cure and relieve Lane of the symptoms of her injuries dated August 11, 2005.

Dr. Carabetta testified the work injury of August 11, 2005, was a substantial factor necessitating the need for the four separate surgical procedures Lane had undergone.

Dr. Carabetta felt the need for her most recent surgery on October 23, 2012, was related to the motor vehicle accident in which she was involved. He acknowledged an argument could be made that the multiple narcotic medications she had been taking was the cause for her to fall asleep at the wheel, but this “obviously” negates issues of personal responsibility required while operating a motor vehicle.

Despite Dr. Carabetta’s opinions expressed in his December 8, 2008, report, Costco refused to provide any medical treatment or temporary total disability benefits to Lane.

Costco argues the motor vehicle accident caused the need for the last surgery in 2012. The records from Eastern Idaho Regional Medical Center indicate Lane fell asleep at the wheel. When she arrived by ambulance at the hospital, she was in mild pain. The records indicate she reported pain in her neck and upper back, which was chronic and that she was taking narcotics for chronic pain management. CT scans performed at the hospital were interpreted as negative. The records stated the only injuries she had was a complex lip laceration and a pulmonary contusion. She was admitted to the surgical service for deterioration of her pulmonary status and to have her lip laceration repaired. She received no treatment for her neck.

Although Dr. Carabetta believes the motor vehicle accident caused the need for treatment, he did not address whether the effects of the medications Lane was taking due to her August 11, 2005, injury caused her to fall asleep which in turn caused the motor vehicle accident. He did touch on this when he stated an argument could be made that the multiple narcotic medications was the cause for her to fall asleep. He felt however, she had a personal responsibility while operating the motor vehicle.

Dr. Koprivica noted Lane was seeing Dr. Rencher for ongoing chronic pain management in terms of prescribing multiple medications. He also reported there was a motor vehicle accident in late June 2011, in which Lane stated she fell asleep and hit a guardrail. Lane felt she fell asleep because of the side effects of the medications she had been prescribed along with a sleep disturbance that had been ongoing based on her work injury and residual disability attributable to the August 11, 2005, injury. Dr. Koprivica felt the motor vehicle accident was a direct and natural complication of the August 11, 2005, claim.

I find that Lane suffered a motor vehicle accident as a direct result of the side effects of the medications she was taking due to her August 11, 2005, injury. Prior to the motor vehicle accident, Costco sought an evaluation from Dr. Carabetta regarding causation. Despite his opinion relating her neck injury to work and recommending medical treatment, Costco failed to provide Lane any medical treatment forcing her to seek medical care and treatment on her own. Accordingly, I find Lane met her burden of proof regarding the past medical expenses and direct Costco to pay \$523,020.75, representing the unpaid medical expenses.

Nature and Extent of Claimant's Disability

Lane claims she is permanently and totally disabled.

Section 287.020.7, RSMo, provides, "The term "total disability" as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee' was engaged at the time of the accident." The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowaiski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. Sullivan v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 (Mo.App. 2001), overruled in part on other grounds by Hampton, 121 S.W.3d at 225; Reiner v. Treasurer of the State of Mo., 837 S.W.2d 363, 367 (Mo.App. 1992), overruled in part on other grounds by Hampton, 121 S.W.3d at 229; and Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789, 792 (Mo.App. 1992). The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1990); Reiner at 367; and Kowalski at 922. See also Thornton v. Hass Bakery, 858 S.W.2d 831, 834 (Mo.App. 1993).

The evidence demonstrates Lane was injured on August 11, 2005. Following the injury, she underwent continual medical treatment and is still under the medical care of Dr. Rencher. During the lengthy course of Lane's treatment history, no physicians questioned her veracity or her level of pain. As a result of the injury, Lane testified she suffers severe pain and physical restrictions. She takes chronic narcotic medications to help control and decrease her pain, which cause side effects, including drowsiness. Further, she needs to lie down and change positions frequently and unpredictably. Lane testified she has good days and bad days but her condition consistently deteriorates from the beginning of the day through the end of the day.

Although the October 2012, surgery gave her some pain relief and allowed her to reduce the pain medication she takes, she continues to suffer significant pain in her hands, arm and neck. She has significant headaches and very limited range of motion of her neck. She has significant lifting restrictions. She has difficulty sleeping which results in her having to lie down during the day. Lane remains on Flexeril, Oxycodone, Morphine, Formethazine, anti-nausea and uses Tylenol, Excedrin Migraine, Lydoderm patches, Vyvanse for attention deficit, as well as uses a TENS unit for pain relief. She does not believe she is capable of any gainful employment at this point given her severe pain and sleep difficulties.

During her continued employment with Costco following the accident, Lane worked in an accommodated and/or light duty status. She never returned to full-duty following the August 11, 2005, accident.

Dr. Koprivica gave significant permanent restrictions at previously noted. Dr. Koprivica opined Lane was, in fact, permanently and totally disabled. Dr. Koprivica felt the permanent and total disability was attributable to the August 11, 2005, injury with the subsequent impairment and resulting disability, in and of itself.

Dr. Carabetta noted while Lane was able to continue to work previously, this was in a restricted capacity and she had been lifting about 15 pounds to the best of her recollection. Dr. Carabetta opined it appeared Lane's stopping work due to her most recent pregnancy associated with her employer's inability to meet restrictions. Given the additional fusion and restriction of movement that Dr. Carabetta felt was now measurably more substantial, as well as the result of further surgery, he felt Lane's permanent partial disability was 40% of the body as a whole.

Mr. Cordray, vocational expert, felt Lane was totally vocationally disabled and did not feel it was realistic to expect any employer in the normal course of business, hiring individuals to perform work as it is customarily performed, would reasonably hire an individual as she currently presented. He reported Dr. Koprivica felt Lane's total vocational disability was attributable to her injury of August 11, 2005, for which he agreed.

Michelle Sprecker, vocational expert, opined that, based on the restrictions identified by Dr. Koprivica in conjunction with physical demands as reported by Lane, she would not retain the physical ability to return to any type of pre-injury positions. She stated with the need to lie down unpredictably, in her opinion, Lane does not retain the ability to return to the labor market and would be permanently and totally disabled. However, based on the report of Dr. Carabetta of December 9, 2008, and the physical restrictions Lane reported working within her deposition transcript dated January 16, 2015, Sprecker felt Lane would retain the physical ability to perform processor/data entry positions.

I think it is also significant to note in Dr. Koprivica's initial evaluation of October 18, 2010, he specifically stated if Lane were to lose her employment, he believed there would be an issue as to her ability to access the open labor market in light of the accommodated work currently being provided to her by Costco and her ongoing chronic use of narcotics.

"When expert opinions conflict, the Commission decides which to accept." Lytle v. T-Mac, Inc., 931 S.W. 2d 496, 502 (Mo.App. W.D. 1996). Further, the trier of fact is "free to

disregard testimony of a witness **even if** no contradictory or impeaching evidence is introduced.” Cahill v. Cahill, 963 S.W.2d 368, 372 (Mo.App. E.D. 1998) emphasis added.

I find the testimony of Terry Cordray to be more persuasive than that of Michelle Sprecker. I also find the testimony of Dr. Koprivica to be more credible than the testimony of Dr. Carabetta.

Based upon the evidence presented, I find that Lane is permanently and totally disabled. I find that no employer could reasonably be expected to hire Lane in her current condition, particularly when one considers the chronic pain she experiences, the need for narcotic medications and the requirement to lie down unpredictably throughout the day. I further find that the total disability is a result of the accident on August 11, 2005, and the direct and natural consequence of that injury.

The evidence establishes that Lane was terminated from Costco on July 1, 2013. The Employer and Insurer is therefore directed to pay Lane the sum of \$503.47 per week for permanent total disability commencing on July 2, 2013 and continuing for the remainder of Lane's life pursuant to Missouri Workers' Compensation laws.

Future Medical Care and Treatment

Lane seeks an award leaving open future medical care and treatment to relieve and cure her of the work related injuries she has suffered.

Section 287.140, RSMo, requires that the employer/insurer provide “such medical, surgical, chiropractic, and hospital treatment...as may reasonably required...to cure and relieve [the employee] from the effects of the injury.” Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo.App. 1996). The standard of proof for entitlement to an allowance for further medical treatment cannot be met simply by offering testimony that it is “possible” that the claimant will need further medical treatment. Modlin v. Sun Mark, Inc., 699 S.W.2d 5,7 (Mo.App. 1995). Employees are required to show by a reasonable probability that they will need future medical treatment. Sharp v. New Mac Elec. Co-op., 92 S.W.3d 351, 354 (Mo.App. 2003), overruled in part on other grounds by Hampton, 121 S.W.3d at 224; Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo.App. 1997), overruled in part on other grounds by Hampton, 121 S.W.3d at 227.

Dr. Koprivica felt Lane has definite chronic pain management needs. He felt she would need a pain management specialist to monitor her situation and provide ongoing medications indefinitely. At the time of his evaluation on October 18, 2010, Dr. Koprivica felt there was a risk of adjacent segment disease, which would require her to have access to an appropriate

neurosurgeon as dictated by the clinical course. He felt the recommended treatment could be expected to be a lifelong need.

Dr. Carabetta noted Lane would require active treatment in the form of analgesic medications. He felt this was expected to continue indefinitely.

When the standards for awarding future medical aid are applied to the facts of this case, I find Lane has satisfied her burden of proof on this issue. Both Dr. Koprivica and Dr. Carabetta agree Lane needs further medical care and treatment, including but not limited to analgesic medications, which could be expected to continue indefinitely.

Based on this evidence, Costco is directed to provide all additional medical treatment reasonable and necessary to cure and relieve Lane from the effects of her August 11, 2005, injury in accordance with the provisions of Section 287.140, RSMo.

Fees and costs pursuant to §287.560 R.S.Mo.

Both Lane and Costco have requested fees and costs pursuant to §287.560 R.S.Mo. I find the proceedings of this case were brought and defended reasonably and therefore, deny any request for fees and costs pursuant to §287.560 R.S.Mo.

The compensation awarded to Lane shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of Mark Kelly for necessary legal services.

Made by: _____

Paula A. McKeon
Chief Administrative Law Judge
Division of Workers' Compensation