

TEMPORARY AND PARTIAL AWARD ALLOWING BENEFITS
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 05-065639

Employee: Jennifer Leavitt
Employer: Borders Group, Inc.
Insurer: Liberty Mutual Insurance Group
Additional Party: Treasurer of Missouri as Custodian
of the Second Injury Fund (Open)
Date of Accident: July 16, 2005
Place and County of Accident: St. Charles County, Missouri

The above-entitled 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 briefs of the parties, heard oral arguments and considered the relevant portions of the record. Pursuant to §286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated May 9, 2008, and issues this temporary award of compensation.

I. Preliminary Matters

The issues in question at the February 4, 2008, hearing before the administrative law judge were medical causation, past medical expenses in the amount of \$527.15 and future medical care. The hearing was scheduled to be for a determination of whether employee needed further treatment. However, employer/insurer made nature and extent of permanent partial disability an issue prior to the hearing.

The administrative law judge denied employee further treatment based on the evidence of employer/insurer's expert medical witness Dr. Chabot. The administrative law judge also denied past medical expenses and future medical treatment. The administrative law judge determined that employee suffered a lumbrosacral strain with sacroiliitis as a result of her July 16, 2005, work injury, and reached maximum medical improvement from that injury in November 2005. Based on these findings, the administrative law judge issued a final award, awarding employee 12.5% permanent partial disability benefits of the body as a whole due to her back injury.

Employee filed an Application for Review with the Commission alleging the administrative law judge erred in the following ways:

- By finding employee's need for further medical treatment was not medically causally related to the July 16, 2005, work injury;
- By finding Dr. Chabot's opinion more credible than that of Dr. Graven's;
- By finding that employee was not entitled to past medical expense; and

- By rendering a final award when the scheduled hearing was only a hardship hearing.

As discussed below, the Commission finds that employee is entitled to further medical treatment as a result of her July 16, 2005, work injury. The Commission also finds that employee is entitled to past medical expenses totaling \$527.15. Consequently, the administrative law judge's award is reversed.

II. Principles of Law

Medical Causation

The claimant in a workers' compensation case has the burden to prove all essential elements of her claim. *Cook v. St. Mary's Hosp.*, 939 S.W.2d 934, 940 (Mo.App. 1997), *overruled on other grounds by Hampton v. Bigboy Steel Erection*, 121 S.W.3d 220, 226 (Mo. 2003). This includes showing "a causal connection between the injury and the job[.]" *Williams v. DePaul Health Ctr.*, 996 S.W.2d 619, 631 (Mo.App. 1999), *overruled on other grounds by Hampton*, 121 S.W.3d at 226.

"An injury is compensable if it is clearly work related." Section 287.020.2 RSMo. 2000. "An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability." *Id.* An injury is not compensable merely because work was a triggering or precipitating factor. *Id.*

"Determinations with regard to causation and work-relatedness are questions of fact to be ruled upon by the Commission" *Bloss v. Plastic Enter.*, 32 S.W.3d 666, 671 (Mo.App. 2000) *overruled on other grounds by Hampton*, 121 S.W.3d at 226. Furthermore, in making such determinations, the Commission is the judge of the credibility of witnesses and has discretion to determine the weight to be given opinions. *Id.* When reviewing an award entered by an administrative law judge the Commission is not bound to yield to his or her findings including those relating to credibility, and is authorized to reach its own conclusions. An administrative law judge is no more qualified than the Commission to weigh expert credibility from a transcript or deposition. *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865 (Mo.App. 2004).

Past Medical Expenses

"Section 287.140.1 clearly provides that 'the employee shall receive and the employer shall provide' medical treatment for his work-related injury. Likewise, §287.140.10 clearly provides that '[t]he employer shall have the right to select' the medical providers for an employee's treatment." *Meyers v. Wildcat, Inc.*, 258 S.W.3d 77, 81 (Mo.App. 2008).

An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is *only* when the employer fails to do so that the employee is free to pick his own provider and assess those costs against his employer. Therefore, the employer is held liable for medical treatment procured by the employee *only* when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81 (Mo.App. 1995)(citing *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 880 (Mo.App. 1984)).

Id. at 80. "[W]here the employee identifies medical bills and testifies that the bills relate to and are a product of her injury, and the bills relate to the services provided as demonstrated by the medical records, there is a sufficient factual basis for the Commission to award compensation for past medical benefits." *Martin v. Mid-Am. Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989).

III. Findings of Fact and Conclusions of Law

Medical Causation

The Commission believes the expert medical evidence provided by Dr. Graven is more persuasive than that of Dr. Chabot. Dr. Graven first saw employee on July 19, 2005, at the request of employer. He initially diagnosed employee with sacroiliac dysfunction and lumbar sprain/strain. He opined at that time that employee's work injury was a substantial factor in causing her injury and need for further treatment. Dr. Graven recommended employee undergo physical therapy.

On August 30, 2005, Dr. Graven recommended that employee have an MRI performed. The MRI was performed on September 16, 2005, and revealed a disc protrusion at L5-S1. Dr. Graven changed his diagnosis at that time to lumbar disc protrusion and lumbar radiculopathy. Employee's condition improved between that time and November 8, 2005, when Dr. Graven found her to be at maximum medical improvement. Dr. Graven testified that as of that date he did not feel employee's condition would drastically improve. His diagnosis as of November 8, 2005, was herniated nucleus pulposus of the lumbar spine and radiculopathy. Dr. Graven gave employee a permanent partial disability rating at that time based on her continued pain, aggravation and decreased activity.

Dr. Graven next saw employee on September 26, 2006. Employee's flexibility had decreased and Dr. Graven felt her condition had worsened. He ordered another MRI to be performed. The MRI was performed on October 26, 2006. It showed that the L5-S1 disc protrusion was larger and protruded farther. Dr. Graven opined that it was within medical probability that the worsening of employee's lumbar injury was a result of the July 16, 2005, work accident. Dr. Graven also testified that he still believed the work accident was a substantial cause of her lumbar injury and need for further treatment. This was because the symptoms in 2006 were not substantially different than those in 2005.

On cross-examination, Dr. Graven was asked whether it was his opinion that the MRI and condition he examined employee for in 2006 was not caused by employee's 2005 injury. He responded that that was not his opinion. Dr. Graven testified that it was medically possible that employee's injury worsened during that time. On redirect, counsel pointed out to Dr. Graven that earlier he had testified that it was medically probable employee's current condition was due to the work accident. Dr. Graven acknowledged as much, and attempted to clarify his opinion by stating that it was his best medical presumption that the worsening of employee's lumbar condition was due to the July 16, 2005, work accident.

Past Medical Expenses

Employee went to the emergency room at Barnes-Jewish St. Peters Hospital on February 5, 2007, due to stabbing low back pain. The hospital records show that employee had been having low back pain and numbness in her right leg for approximately two weeks. The charges for her visit totaled \$527.15.

The evidence in the record demonstrates that employee was not allowed to see Dr. Graven after November 2006 and that employer/insurer told employee she was not allowed to see any other doctors unless prescribed by them. Employee testified that it was still two or three weeks prior to her scheduled appointment with Dr. Chabot. However, the pain in her lower back and right hip was so bad she could not stand it. As such, she made the decision to go to the emergency room on February 5, 2007, to seek treatment. At the hospital, employee filled out a Workers' Compensation Form indicating that the treatment she sought was due to her work injury.

Based on the above, the Commission finds that employee's past medical expense of \$527.15 from her emergency room visit to Barnes-Jewish St. Peters Hospital is a product of and related to her work injury. Therefore, the Commission finds that employer/insurer is liable to employee for \$527.15 in past medical

expenses.

IV. Conclusion

The Commission determines and concludes that employee's July 16, 2005, work accident was a substantial cause of the worsening of employee's L5-S1 disc herniation. As such, employee has not reached maximum medical improvement for her injury and is entitled to further medical treatment to cure and relieve the effects of that injury. The Commission also finds that employee is entitled to past medical expenses of \$527.15. As such, the Commission reverses the administrative law judge's final award dated May 9, 2008, and directs employer to provide further treatment to employee for her injury. Based on the findings above, we need not discuss the remaining issues of nature and extent of disability and future medical care at this time.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of §287.510 RSMo.

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

Given at Jefferson City, State of Missouri, this 1st day of October 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Jennifer Leavitt

Injury No. 05-065639

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: ---

Employer: Borders Group Inc.

Additional Party:
(Open)

State Treasurer, as Custodian of the Second Injury

Insurer: Liberty Mutual Insurance Group

Hearing Date: February 4, 2008

Checked by: LEHB/lsn for ch

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: July 16, 2005
5. State location where accident occurred or occupational disease was contracted: St. Charles County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
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 was working a photo opportunity corner Harry Potter book sale
12. Did accident or occupational disease cause death? No Date of death? ---
13. Part(s) of body injured by accident or occupational disease: low back
 - Nature and extent of any permanent disability: 12.5% PPD BAW re: low back
15. Compensation paid to-date for temporary disability: \$235.33
16. Value necessary medical aid paid to date by employer/insurer? \$7,582.31
17. Value necessary medical aid not furnished by employer/insurer? None (See Award)
18. Employee's average weekly wages: \$131.85

19. Weekly compensation rate: \$87.90/\$87.90

- Method wages computation: by agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:

--- weeks of temporary total disability (or temporary partial disability)

12.5% permanent partial disability from Employer, or \$4,395.00

--- weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning --- for
Claimant's lifetime

22. Second Injury Fund liability: Open

Total: \$4,395.00

23. Future requirements awarded: None

Said payments to begin as of date of this Award and to be payable and be subject to modification and review as provided by law.

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

Colleen Vetter, Attorney for Claimant

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jennifer Leavitt

Injury No: 05-065639

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

Dependents: ---

Employer: Borders Group, Inc.

Additional Party: State Treasurer, as Custodian of the Second Injury Fund (Open)

Insurer: Liberty Mutual Insurance Group

Checked by: LEHB/lsn for ch

This is a hardship hearing in Injury Number 05-065639; the Claimant is seeking a Temporary or Partial award. The claimant, Jennifer Leavitt, appeared in person and by counsel, Attorney Colleen Vetter . The Employer/Insurer, Borders Group Incorporated/ Liberty Insurance Corporation, appeared by and through counsel, Attorney Maureen Cary. There is a claim against the Second Injury Fund, and that claim is to remain open by agreement of the parties.

The parties entered into certain stipulations, and agreements as to the complex issues to be presented in this hearing.

STIPULATIONS:

On or about July 16, 2005: a. the claimant, while in the employment of Borders Group Incorporated, sustained an injury by accident arising out of and in the course of her employment occurring in St. Charles County, Missouri; b. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation law; c. the employer's liability was insured by Liberty Insurance Corporation; d. the employee's average weekly wage was \$131.85, the rate being \$87.90 over \$87.90. e. The employer had notice of the injury. f. A Claim for Compensation was filed within the time prescribed by law. g. Temporary total disability benefits have been paid in the total amount of \$235.33; those payments represent 1 5/7ths weeks of benefits covering a period from July 17, 2005 through July 2, 2005. h. Medical aid has been provided in the total amount of \$7,582.31.

ISSUES:

1. Medical causation of a current condition
2. Liability of past medical expenses in the amount of \$527.15
3. Future medical care
4. Nature and extent of permanent partial disability

EXHIBITS:

The following exhibits were admitted into evidence without objection:

Claimant's Exhibits:

- No. A: Deposition transcript of Dr. Timothy Graven, D.O. taken on behalf of the claimant on December 11, 2007 with attachments (Admitted subject to the objections therein. Claimant: the Court is asked to take particular notice of objections following redirect on Page 41 and 42. Specifically those objections involved in recross examination by Ms. Cary.)
- No. B: Medical records from Barnes-Jewish St. Peters Hospital Emergency Room of July 16, 2005
- No. C: Barnes-Jewish St. Peters Hospital Emergency Room records of February 5, 2007
- No. D: Medical records from Excel Sports Physical Therapy

Employer/insurer's Exhibits:

- No. 1: Deposition transcript of Dr. Michael C. Chabot, M.D. taken on behalf of the employer/insurer on January 18, 2008 with five (5) attached exhibits that are marked 1-5 and A
- No. 2: Certified records of Dr. Hibbard of St. Peters Family Medicine
- No. 3: March 15, 2007 letter from JoAnn Londoff to the Employer/Insurer Attorneys of record and to the Assistant Attorney General which are both parties to this case (Maureen Cary, Employer/Insurer's Attorney: JoAnn Londoff, acting as Trustee on behalf of the Michael T. Londoff Trust, she asserted a letter asking that attorneys keep record of the trust's contractual interest in the outcome of this case; it's my understanding that Colleen Vetter, Claimant's Attorney's firm is agreeable to honoring any sort of lien or recovery that JoAnn Londoff, as Trustee for Michael T. Londoff, asserts in this case; and I'm marking this letter as Exhibit 3 for reference and identification as to the contractual agreement at issue that Colleen's firm is agreeing to protect.)

Court Exhibits:

- Roman Numeral I: A three-page document: First page, Notice of Hearing for today's hearing, February 4th of 2008 which lists all of the parties in the case who received notice of this hearing setting indicated by an asterisk next to their name, and specifically on this sheet, in addition to the Claimant, Jennifer Leavitt, also having asterisks next to their names are the Employee's Attorney, Colleen Vetter; the Insurer, Liberty Insurance Company; the Assistant Attorney General, Attorney General Jeremiah Nixon, the former Employee attorney, Radford Raines with a lien and indicating that he has been withdrawn, and the Employer/Insurer attorney, Maureen Cary. Pages 2 and 3 is the minute sheet from the Division file for this case of Jennifer Leavitt, Injury Number 05-065639, and on this minute sheet it's showing that the case was set for hearing today, February 4, 2008, and also indicates what parties again received notice of this setting. Including on page two of the minute sheet which states that the asterisk indicates who received a docket notice.
- Roman Numeral II: Copy of the actual Withdrawal with Lien filed by Attorney Raines dated August 24th of 2007 and signed by Administrative Law Judge John K. Ottenad.

FINDINGS OF FACTS AND RULLINGS OF LAW

ISSUE: Medical causation of a current condition

It is agreed and stipulated to by the parties that Leavitt, the claimant, on or about July 16, 2005 sustained an injury by accident arising out of and in the course of her employment while in the employment of Borders Group Incorporated. It is found that there is no dispute in the evidence that the July 16, 2005 work related injury was to the claimant's low back; at issue what diagnosis for the low back is causally related to the July 16, 2005 work related accident.

Leavitt testified at the hearing about the July 16, 2005 accident, stating that she was working at a Harry Potter release book party for Number 6 and they had a lot of people in the area of Borders, and the employer had her in a photo opportunity in a corner over by the elevator all by herself. They had a stool, and they had children that parents were picking up and putting on the stool because it was too high for them to get on the stool. And some of the grandparents could not lift them,

and I thought who better to lift the child than myself, Leavitt stated. I had one child in particular that when I lifted her I don't know if she jumped or something happened, I felt a pop in my back and immediate pain in my lower back and down my legs and my right hip, Leavitt testified. I did not end up working any more, the claimant said, I couldn't work anymore. I went ahead and told them to call my roommate who would come and pick me up. Agreeing that that is what he did, Leavitt stated that he had a couple of people, including some supervisors, help me out to the car and he drove me home. Leavitt agreed that when she got home it was still kind of the middle of the night. What I did next was I took some pills to relieve pain which didn't work, Leavitt testified. I tried to sleep some in the morning. It was probably about six hours later, she said. I tried to eat something, she stated. I agreed to go to the hospital but I started throwing up from the pain and it scared my roommate and he called an ambulance, he called 911. Leavitt agreed that's how she ended up at Barnes Jewish.

When I got to the emergency room what I told the workers at the hospital about my pain, Leavitt testified, I told them at the hospital what had happened in the incident of how I lifted the child and felt the pop in my back and my lower back pain and my right hip pain and then my pain down my legs. Leavitt agreed that she was released that day. The next time that I saw a doctor for my back was a couple days later, Leavitt said. She explained that the supervisor at that time at Borders made the appointment with a Dr. Graven. Leavitt stated that she thought the first time she saw Dr. Graven was July 19, 2005. I had never seen Dr. Graven before that, Leavitt said. The claimant stated that she had never had a back injury before this. Discussing the type of treatment Dr. Graven suggested, Leavitt stated that doctor suggested physical therapy and had said that her hip was off. I don't know what off means, Leavitt said, but he showed me with his hands that one hipbone was cockeyed, different than the other one, and it made it so that one leg was longer than the other, and the doctor said that could cause my back pain and my hip pain.

When I next saw Dr. Graven a month later, on August 2, 2005, I had been having physical therapy during this time, and when I saw Dr. Graven I felt like I had improved a little bit, Leavitt testified, my range of mobility was better. It was noted that Dr. Graven's note said - was doing well until this weekend and the pain has returned; Leavitt was asked if she remembered anything in particular happening to cause more pain. No, I don't remember, she answered. Leavitt agreed that she was back to work by then. After the August 2, 2005 appointment I next saw Dr. Graven on August 30, 2005, and I had started up school in August and I had noticed from sitting at school I was having pain with numbness and tingling down my right leg, which were my complaints to Dr. Graven, Leavitt testified. Dr. Graven recommended an MRI, which I believe was the first one, and also more physical therapy, Leavitt further said. Leavitt agreed that, as noted by Dr. Graven on November 8, 2005 after seeing her, she had reported she had some mid-back pain and seemed to be worse in the low back. Explaining the cause of the mid-back pain, Leavitt testified when the doctor had ordered physical therapy for my disc pressing on a nerve, they put me in something called traction where they put you on a table and put straps around your upper back, and then they tilt the table to where you're hanging from the straps, and that hurt my upper back right around where my bra line is. I told him I didn't want to do that anymore and we didn't, she said. Leavitt agreed that she had did have some mid-back pain from that. It was noted that at that time in November of 2005 Dr. Graven had reported that Leavitt was able to flex forward with her hands to her toes; Leavitt was asked if she believes she was able to do that at his office. No, Leavitt answered. I haven't been able to touch my toes since the incident, she explained. I might have been able to go a little bit further like maybe at my calves, she said. It was noted that Dr. Graven wrote in November 2005 that the low back is oftentimes not painful whatsoever; Leavitt was asked if this was an accurate statement. No, she answered. I did have still constant pain in my lower back, she stated. I did have good days to where it wasn't, all the time. She agreed that there were days when she was pain free, but further stated it was not often. Leavitt said she would not agree with the term - oftentimes. She stated that she did not know that at that time that Dr. Graven was releasing her from treatment. My understanding was that it was kind of like a we'll see type of thing, Leavitt stated. When I left the doctor's office in November of 2005 I thought that I was going to receive more treatment, Leavitt said. She stated that she did not know that it was Dr. Graven's opinion, as he had expressed in a November 2005 letter to the insurance company that he felt Leavitt had reached maximum medical improvement. It was noted that Dr. Graven at that time had also rated Leavitt with permanent disability and had said it was based on her continuing pain and aggravation and decreased activity; Leavitt was asked if the doctor's statement regarding continuing pain and aggravation and decreased activity accurate. Yes, Leavitt answered. The claimant testified that she was having aggravation at that time. She explained what she meant by aggravation: From everyday life; just trying to bend over, tie shoes, or put on pants, or getting in and out of the car; that aggravates it and makes the pain worse.

Leavitt testified that she had found out that Dr. Graven had released her from medical care through a letter she received from Liberty Mutual in January 2006. She agreed that it was a letter offering to settle her claim. Discussing her reaction to this, Leavitt stated I had already decided that I still needed more help and that I needed more treatment. Leavitt agreed that following that November 8th visit to Dr. Graven, she didn't have another appointment scheduled. Leavitt agreed that she had tried to contact Dr. Graven again, and this in late November, early December. But someone at Dr. Graven's office told me that I had to go through Liberty Mutual in order to get another appointment, Leavitt said. It was noted that she

had then gotten the letter from the insurance company, and Leavitt was asked what had she done then. I had called the insurance company and because it said on the letter that if you do not dispute, or something, and call us, so I went ahead and called them and told them that I wanted to seek further treatment. Explaining what happened next, Leavitt stated I kind of worked back and forth on what I want to do whether or not to seek counsel. So I went ahead and I did get a lawyer in May of 2006, she testified. Leavitt agreed that this was after she had spoken to somebody at Liberty Mutual asking for more medical treatment and they had not offered her any more medical treatment then. I don't think they told me no, the claimant stated, I think they said that they would get back to me. She agreed that she had then hired a lawyer.

Leavitt agreed that she had next seen Dr. Graven on September 26, 2006, and that she had been sent again by Liberty Mutual. When I saw Dr. Graven again in September of 2006 compared to when I had last seen him on November 8, 2005, my complaints were worse. Just the aggravation, she explained, my mobility had gone down, I was not able to do different things still; I felt that it had proceeded to get worse and not better. The pain was in my lower back, Leavitt stated, and the numbness and tingling with pain down my right leg had gone further than what it was before the previous year. She was asked if the right leg pain with numbness and tingling had gone below her knee before. When I had seen the doctor in 2005 it had receded a bit, Leavitt stated, but it had gone back throughout the course of the next year. Leavitt stated that when she had told Dr. Graven back on August 30, 2005 that she was having pain with numbness and tingling into her right leg and he had ordered the first MRI, the complaints were similar to the ones she had in September of 2006. Leavitt was queried that she had said there was a period when she had gotten better but then the complaints had gone back to the same level. It was back to the same level after not doing physical therapy for a period of time, she explained. But then it progressively got worse over the course of the next year, she stated. Leavitt stated that she had not seen any other doctors about these complaints between the last time she had seen Dr. Graven in 2005 and when she next saw him in September of 2006. She explained this was because I was told through my lawyer and Liberty Mutual that I could not see any other doctors unless it was prescribed through Liberty Mutual.

Leavitt stated that between the last time when she saw Dr. Graven in 2005 and when she next saw him in 2006, she had not had any slips, trips or falls during that time. She stated that there was no time when she remembers doing anything that caused a sharp increase in her pain. She was asked if the increase in pain was just in her low back or both her low back and her right leg. It was both of these, Leavitt answered.

When I saw Dr. Graven in September 2006 he recommended another MRI, Leavitt testified. I returned to see Dr. Graven after that MRI to go over the results and he said that it looked like it had gotten worse, Leavitt stated. It was the same disc, Leavitt said. And he said it looked like there was another area that was poking out, pressing on a nerve, and he recommended at the time that since I had inflammation that would not go down, back injections, and then physical therapy to help with the inflammation to go down, and if that didn't work then he recommended back surgery. I have not had those injections, Leavitt said, because Liberty Mutual did not allow for those to go through, she explained. Leavitt testified that she wanted to have them. Liberty Mutual next wanted a second opinion, and that's when I went to Dr. Chabot, the claimant stated.

It was noted that Leavitt had seen Dr. Chabot on February 28, 2007. It was noted that Dr. Chabot said Leavitt had told him she had persisting numbness in the right leg, and Leavitt testified that she had told Dr. Chabot that she had pain and numbness and tingling down my right leg. It was noted that Dr. Chabot said Leavitt had continued back complaints for the past one and a half years, and Leavitt was asked if she had complaints other than just the back. Yes, my right leg, Leavitt responded, numbness, pain, tingling. Leavitt indicated that she disagreed with Dr. Chabot that she had rated her pain in the severe range, meaning severe all the time. Not all the time, just some of the time, Leavitt answered. She agreed that she had testified earlier good days and bad days. On the good days it's probably rated at about a 4 and on the bad days it's probably about a 7 to an 8, Leavitt stated. She agreed that Dr. Chabot's statements were true that she had reported that she remained cautious when performing certain activities, especially bending and twisting, she has difficulty bending over to tie her shoes and difficulty hiking in the woods and difficulty participating in intercourse because of back pain. Agreeing that in doing those things she is limited by things other than just back pain, Leavitt stated I'm limited by the numbness and the pain and tingling going down my right leg. Leavitt stated Dr. Chabot was inaccurate that she had reported to him that she did some home exercises including walking on an elliptical. I wasn't on the elliptical machine, Leavitt stated, I told him that I avoided it and I walked on the treadmill. The claimant disagreed with Dr. Chabot that she had reported that her busy schedule kept her from performing a regular exercise program. The pain limited me in my exercise program, Leavitt said. It was noted that when she saw Dr. Chabot in February of 2007 she had said she was working full-time as a bank teller. I started working as a bank teller in September of 2006, Leavitt said. I was not limited in any of the activities I was required to perform as a bank teller, Leavitt said. She was queried if she had chosen to limit any of the activities she did as a bank teller. I did with the rolled coins because they're heavy, Leavitt answered. I would have to make more trips back and forth; I do not carry a lot,

she testified. I need to get the rolled coins in the morning whenever we open, she stated, and then at night when I put them away, and whenever you run out of rolled coins for a customer that comes in, then you have to go back to your vault and unlock it and get more out. Leavitt agreed that this was the significant lifting she had to do, and she found ways to go around it. I worked as a bank teller from September of 2006 to March of 2007, Leavitt stated. I had never worked as a bank teller in 2005 or any time up to or before September of 2006, she said. Explaining why she had quit at the bank, Leavitt stated because they wouldn't work around my school schedule. They said that they would, and they did not, and the Borders in Creve Coeur offered a position that worked around my school schedule, Leavitt stated. She agreed this was March of 2007. It was noted that Dr. Chabot reported Leavitt also worked at Borders at the same time she was working at the bank; Leavitt was asked - During the time that you worked as a bank teller how many times did you work at Borders? I believe it was twice in December, Leavitt answered, and then one day in January. Agreeing that it was considered fill-in, Leavitt explained that they called and told me I could come in and alphabetize, so I came in and alphabetized the books. Leavitt agreed that while she was a bank teller full time she really wasn't working a regular schedule at Borders. When I was working every other Sunday at a library, during this time period when I saw Dr. Chabot, I was working 4 hours the every other Sunday. It was noted that Dr. Chabot mentioned that when he saw Leavitt he thought she wasn't in distress, and that at the time that she filled out his chart he found it inconsistent that Leavitt marked a 7 as her pain at that time; Leavitt was asked how would she explain this. I believe my pain at that time, whenever I went in, was a 4; it's at a 7 whenever it's at its worst on the days that I have bad days, she responded. It was noted that it looked like Leavitt might have X'd the 7 saying that's how bad she was; she was asked what is your typical demeanor. I'm a happy person, I'm positive, I'm outgoing, Leavitt answered, I have to be because the pain will drive me crazy. So I have to be the way that I am now so that I don't go crazy from the pain, she said. She was queried - So when Dr. Chabot seems to think it's inconsistent that you don't look like you were hurting at the time that he saw you, were you saying that you were hurting at that time? I was hurting, Leavitt answered. I was told by my parents that it's rude to show that you're in pain and to complain about it, Leavitt stated. It's just the way that I am, she said.

It was noted that three weeks before she saw Dr. Chabot on February 5, 2007 Leavitt had visited Barnes Jewish Emergency Room; she was asked why she had gone then. I went because a couple weeks prior my back had become aggravated along with my right leg and it just got to a point where I couldn't take it anymore and I went ahead and went to the ER, Leavitt answered. It was noted that the report said Leavitt had had pain for two weeks, and she was asked what that meant. It meant that it had been aggravated throughout the two weeks prior to the visit to the ER, Leavitt answered. She was asked what was the last thing that caused her to go to the ER. I was working at the bank during one of my shifts and I had been having pain throughout the day and I had actually woke up in pain that morning, which is unusual, because sleeping at night usually alleviates the pain because laying down helps, Leavitt stated. But that morning it had been bad and when I'd gotten through about half of my day I had gone back and gone to the bathroom and wanted to wash my hands, and just the fact of bending just a little bit to wash my hands, that was the final straw; I hurt too much to wash my hands, so I called my boyfriend and had him drive me to the ER, Leavitt testified. This was not at the end of my work shift, Leavitt said. After this happened I sat on the floor for a while until he could come and pick me up, she stated. Leavitt agreed that he then he took her. It was noted that the ER report says Leavitt had told them her chief complaint was not work related, but she also filled out a Workers' Compensation form stating she was injured at Borders on July 16, 2005; Leavitt was queried what did she mean when she said not work related. It wasn't work related to the bank, she answered. Leavitt explained the notation in the ER note that said - sick to stomach because of the pain: Whenever the pain gets to a high point I do get sick and nauseated, and sometimes I do throw up from the pain, Leavitt explained. She agreed that she was feeling that way that day. Leavitt was asked why did she go to the ER instead of calling the doctor. I was told not to go to a doctor because of Liberty Mutual has to tell me what doctors to go to, Leavitt answered, I felt that the ER was my only choice. She agreed that at that time she was not treating with Dr. Graven.

On cross examination by the employer/insurer, Leavitt agreed that she is currently a part-time student at UMSL. She agreed that back in 2005 she was a full-time student at UMSL, and was also a full-time student in the spring of 2006 and full-time student in the spring of 2007. Leavitt agreed she is a senior currently as of the semester starting January 2008. She agreed that when she refers to a full-time student, this is at least 12 hours. Leavitt agreed this was the number of hours she took in those semesters in 2005 and 2006. Leavitt agreed that she had mentioned that she is pursuing a major in English with a minor in Communications, and agreed that she has to carry books to attend her classes at UMSL. She agreed she had to carry books in as a full-time student in 2005 and in 2006, and presently she carries books as a student. Leavitt agreed that as a full-time student in the fall of 2005 and in the spring of 2006, she had classes Monday through Thursday, and her classes were an hour and a half apiece typically. Leavitt agreed she can read and write, and stated that she believed she was capable of articulating her complaints to the providers whom she treated with for her injury at Borders. She stated she was able to articulate her complaints to Dr. Graven and to Dr. Chabot as well as to the physical therapist and at the Emergency Room visits.

Leavitt agreed that she was an employee of Borders between August 2000 and September 2006, and in September 2006 she started the bank teller job. Leavitt agreed she had said she had gone contingent at Borders, which meant she'd come in when they called her; she was still an employee there but didn't have a regular set schedule. Leavitt agreed that when she worked part time at Borders in July 2005 she was also working 20 hours a week as a librarian in the St. Charles County Library. She agreed that the reason she went part time at Borders was because she wanted to get her foot in the door to a librarian position. Leavitt agreed that the location of her employment in December 2007 at St. Charles County librarian closed in early December. I have not been relocated since then, Leavitt said, and I do not expect to be. It was noted that there was a time period where Leavitt was working 20 hours per week as a St. Charles County librarian, and at some juncture she went to just two Sundays a month, 8 hours per month; she was asked when did that 20 hours per week versus 8 hours per week change. It changed, I believe, when I started at the bank, Leavitt answered, but I was doing the every other Sunday – I don't remember when I started the every other Sunday. I might have been doing it when that accident occurred, she said. But I do know that whenever I started at the bank and went contingent I was doing the Kathryn Linnemann job, which was the 8 hours per month broken down by 4 hours for two Sundays in the month. Leavitt stated that while she was working as a bank teller between September of 2006 through March 2007 she was not also working 20 hours per week at the St. Charles County library system. I quit doing that when I started at the bank, she said. Before the July 16, 2005 injury I lifted anywhere from 20 to 25 pounds in her position at Borders, Leavitt said. She was asked if currently she self limits her lifting to 10 to 15 pounds. I'm not too sure how much it is but it's about a gallon of milk, Leavitt responded, I try not to lift anything more than how much that weighs. She agreed that there is no physician that has placed permanent restrictions upon her, it's a self limitation.

Leavitt agreed, during cross examination, that her working at Borders full-time began most recently in April of 2007 through the present day. She agreed that she works at a different location, and her hours are 6 a.m. to 9 a.m., and she shelves some books in the kids' department. Then from 9 to 10 she has lunch, and from 10 until either 1, 2 or 3 p.m. she's doing her SPO clerk job where she's calling back customers on orders that have come in. Leavitt agreed that she spends half her time at her current full-time position standing, half of it sitting. She agreed that her hours at Borders currently, a full-time position, is about 35 hours per week. With regard to my St. Charles County librarian duties, it was 20 hours, and I was doing this as of the date of my injury in July of 2005 leading up to about September of 2006. She agreed that she had to check out books to patrons, and she had to take incoming books that came in and sort them for shelving. Leavitt agreed that she was able to do this even after her injury. We don't lift books, Leavitt stated, we take books, just a couple in your hand, put them on a cart, roll the cart and then take a couple in your hand and sort them. Leavitt agreed that she was able to also do her librarian duties once Dr. Graven released her to return to work. She agreed that she spent her entire time standing as a St. Charles County librarian. Leavitt agreed that her bank teller employment was at US Bank, and she could sit or stand to perform her bank teller duties. One activity she indicated was that she had to get coins from a coin vault for her work station, and she sometimes had to squat to get those. She was asked if this was difficult for her. It is from getting back up, Leavitt answered. On average my hours as a bank teller were 9 a.m. to 6 p.m., Monday through Friday, but I do work some Saturday, might be until noon, Leavitt stated. It was a full-time position, she agreed.

Leavitt agreed, during cross examination, that it is fair to say that since Dr. Graven placed her at maximum medical improvement on November 8, 2005 there's been no doctor that's excused her from work since that time. There has not been any other doctor who has taken me off work for hip or back or leg complaints, Leavitt stated.

During cross examination, it was noted that on direct examination the claimant had already answered regarding Dr. Graven's note of August 2, 2005 in which he had written Leavitt was doing well until this weekend and the pain returned; Leavitt was asked if she recalled starting school that weekend, or does she have any independent recollection of when she started school. I believe I started school at the end of August, Leavitt answered. It was noted that there was a reference in physical therapy record from Excel PT in a note of 7/25/05 -- her overall hip feels better overall until last night, attributes increased pain level to an increase in bending over; the claimant was asked if she remembered that history. I do not, Leavitt answered. The claimant stated that she did not remember anything that would have caused her to have an increase in bending over on July 24 or July 25, 2005. Leavitt stated that she did not remember, but her return to work on July 26, 2005 sounded right. It was noted that the physical therapy record from 7/25/05, stated that Leavitt had returned to work that day; the claimant was asked if she recalled having any kind of re-injury at Borders of any kind. I don't believe so, no, Leavitt answered. The claimant agreed that her initial round of physical therapy went from approximately July 21, 2005 through August 1, 2005. It was noted that a discharge report stated that goals have been achieved on that date, 8/22/05; Leavitt was asked if she recalled going over with the physical therapist that she had achieved all goals at that juncture. No, I don't remember, Leavitt answered. Leavitt agreed that, as noted in the discharge report which said she was able to return to work without significant difficulty, this sounded correct on August 22, 2005. It was noted in an August 1, 2005 narrative by the physical therapist which said that Leavitt had been seen a total of six visits for complaints of right posterior hip pain; Leavitt

was asked if she disagreed with that statement in that it didn't address leg or back pain. They did address both my back pain and my right leg pain as well as my hip in the initial physical therapies, Leavitt responded. They did a back heating and then cooling and then different things for my leg, Leavitt added. She was asked if it was aimed primarily at her right leg. It was primarily aimed at my hip, the claimant answered. It was cockeyed, off, Leavitt stated. They also did some things where they said that, I guess you called it the sacroiliac, that it was inflamed, Leavitt testified, so they did some like shock things they put on them and then heating and stuff like that, and then they showed me different kinds of things for my leg lifts and to prevent pain from going down my leg.

It was noted that the physical therapy records on September 16, 2005 noted that Leavitt had an increasing low back pain and onset of right lower extremity paresthesia over the past two weeks which seems to be in keeping with the Dr. Graven report that on August 2 Leavitt had had a change; the claimant was asked if this refreshed her recollection at all what might have happened in those two weeks. It doesn't, Leavitt answered.

Leavitt agreed, during cross examination, that the light duty was accommodated by Borders initially when Dr. Graven put her on it. It was noted that Leavitt had said she had then started school in August of 2005; she was asked if she had missed any classes because of her low back or leg complaints. I don't remember; I don't think that I did, Leavitt answered.

The claimant agreed that the second round of physical therapy that began on September 16, 2005 concluded on October 6, 2005. It was noted that on October 6, 2005 the physical therapist wrote that discharge physical therapy goals were achieved; Leavitt was asked if she recalled being in a discussion of whether or not she had achieved her goals. I don't know what their goals were, but no, I don't remember, the claimant answered. She was queried if her right leg complaints had resolved as of her October 6, 2005 visit. No, they had not resolved completely, Leavitt answered, the pain, numbness and tingling had receded to above my knee a little bit. She agreed that it had also lessened in frequency.

The claimant agreed that she had started a second round of physical therapy on September 16, 2005 and she had said that it was at this juncture that the traction took place that caused some mid-back complaints. Leavitt agreed that this was after the MRI was taken on September 13, 2005.

During cross examination, Leavitt agreed that when she returned to Dr. Graven on September 26, 2006 she thought that her low back pain and right hip were progressively feeling worse. She agreed that her low back pain was worse on 9/26/06 than it was at the time of discharge on November 8, 2005 with Dr. Graven. It was worse in terms of frequency and intensity, Leavitt agreed. My right hip and leg complaints were worse when I returned to Dr. Graven on 9/26/06 as compared to when he discharged me on November 8, 2005, Leavitt said, in terms of frequency of my complaints and in degree of severity of complaints. It was noted that when Leavitt saw Dr. Graven on September 26, 2006 the doctor noted a history from her that she has occasional radiation of the right leg with numbness and tingling. I do disagree with this, Leavitt responded, because I also have pain down my right leg.

Leavitt stated, during cross examination, that it sounded correct that she had given the history to Dr. Chabot that she went to the Emergency Room on February 5th, 2007, which was about two or three weeks before she saw Dr. Chabot. It was noted that the Emergency Room record noted in the history that Leavitt had moved wrong and had stabbing low back pain; Leavitt was queried if she had moved wrong during the course of her workday as a bank teller. No, I don't think that it was moving wrong, Leavitt answered, I was trying to wash my hands and I tried to bend at the waist just a little bit and I could not wash my hands because of the pain that I had all day. Leavitt agreed that she had presented to the Emergency Room at about 6:45 p.m., and she had been working as a bank teller all day. She was asked if she had had to reach for coins from the coin vault. I did but I don't reach, Leavitt answered, I squat. She was asked if that had caused her any kind of complaints when she did this as a bank teller. I did have pain doing that but not as often except in the two weeks leading up to that ER visit I was having more frequency in pain, Leavitt answered. She agreed that it was her testimony today at the hearing that moving wrong was that she tried to bend to wash her hands over the sink at work on February --. I think that's what they took -- "bending wrong", but I don't think it was wrong to bend at the waist a little bit to wash my hands, Leavitt added. She was queried - And you reported you had numbness and right leg pain to the low back for two weeks leading up to February 5th, 2007? I did, along with pain down my right leg, Leavitt answered. It was noted that she had said she thought that she had had this aggravation going on for two weeks; Leavitt was queried if it was her testimony at the hearing she has no idea what may have happened in those ensuing two weeks leading up to the ER? I think what it was, it was just aggravation of life, just going through the movements of life and having it be aggravated, Leavitt responded. She was asked if it could it have been bending and stooping at the bank to get her coins. No, Leavitt answered, because I don't bend or stoop. It hurt, she said. She was asked if it hurt to cough or sneeze. At that time, no, Leavitt answered.

Dr. Ann Hibbard is my personal doctor, Leavitt agreed during cross examination. It was noted that in a February 4, 2005 entry the doctor had notation in her records that Leavitt had called in requesting something for a cough. I don't remember, Leavitt responded. I don't recall having a cold, Leavitt said. I do have frequency of sinus infections, so that is possible, she added. I don't remember specifically whether I called in for a cough, Leavitt stated. She was asked if she remembered whether a cough occurred while she was at the bank that day. I don't remember, Leavitt answered. I don't remember if I coughed for the ensuing two weeks leading up to February 5, 2007, Leavitt stated. It was noted that in the records from Dr. Hibbard there is an entry dated 2/4/05 in which it appears that there's a prescription for Tuss BID for PRN cough by Dr. Blair; Leavitt was asked if she is familiar with Dr. Blair? I don't know who Dr. Blair is, she answered, that doesn't sound familiar. It was noted that in the records from Dr. Hibbard, there's an entry March 2, 2005, and then it looks like July 9, 2007; Leavitt was queried - you don't go to the doctor very often? I do for sinus infections, Leavitt responded, I just found out recently I have a deviated septum, so for sinus infections I do go, but more so this past year, 2007, than any other year.

Leavitt agreed, during cross examination, that she recalled telling the physical therapist in the past that coughing or sneezing caused increase in her low back pain or leg pain. In the beginning whenever I first started going to physical therapy, Leavitt added.

Leavitt agreed that when she went to the Emergency Room on 2/5/07 it was worse that day than any other day. She agreed that she had said she awoke with low back pain and right leg pain on the morning of 2/5/07. It was noted that Leavitt had said that previously when she goes to sleep and wakes up in the morning she feels rejuvenated, in other words her pain was lessened typically in her back or her leg. Not every morning, but, yes, that is typical that the pain is usually worsened at night than it was in the morning, Leavitt responded. But not on 2/5/07, Leavitt agreed, I noticed that it was worse in the morning. It was noted that Leavitt had said when she went to the Emergency Room she was given medications; she was asked if she had continue to take medications prescribed by the Emergency Room leading up to her visit to Dr. Chabot on February 28, 2007. I don't remember, Leavitt answered, I believe I did if they prescribed me some. It might have been Darvocet, Leavitt stated. She agreed that she had not listed she was on Darvocet when she was asked about medications at Dr. Chabot's visit. Leavitt was queried -- Between February 5, 2007 when you went to the Emergency Room and the time you saw Dr. Chabot for the first and only time on February 28, 2007, had your low back pain and right leg complaints been relieved somewhat since the Emergency Room presentation? They were not as severe, correct, Leavitt answered. Leavitt agreed that she was the only one providing Dr. Chabot with a history.

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In this case, the claimant testified about the series of testing she underwent subsequent to her July 16, 2005 work related injury and that the testing procedures such as the performance of two MRIs.

“For an injury to be compensable the evidence must establish a causal connection between the accident and the injury. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause and extent of the disability when the facts fall within the realm of lay understanding.

“An injury may be of such a nature [however] that expert opinion is essential to show that it was caused by the accident to which it is ascribed.” (Citations omitted) *Griggs v. A. B. Chance company*, 503 S.W.2d 697, 704 (Mo.App. 1974)

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“Medical causation not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause.” *Selby v. Trans World Airlines, Inc.*, 831 S.W.2d 221, 222 (Mo.App. 1992).

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“...an injury may be of such a nature that expert opinion is essential to show that it was caused by the accident to which it is ascribed. When the condition presented is a sophisticate injury that requires surgical intervention or other highly scientific techniques for diagnosis and particularly where there is a serious question of pre-existing disability and it extent, proof of causation is not within the realm of lay understanding. *Knipp v. Nordyne, Inc.* 969 S.W.2d 236, 240 (Mo.App. 1998).

“A medical expert’s opinion must have in support of it reasons and facts supported by competent evidence which will give the opinion sufficient probative force to be substantial evidence.” (citations omitted) *Pippin v. St. Joe Minerals Corp.*, 799 S.W.2d 898, 904 (Mo.App. 1990).

In this case, the initial treatment record concerning the July 16, 2005 work related injury was from **Barnes Jewish Emergency Room** concerning emergency room treatment on July 16, 2005 (No. B). The ER record began with a report by radiologist Dr. Keith Kastelic, M.D. of an x-ray of the lumbar spine performed on July 16, 2005 which noted the following findings and impression:

...views of the lumbar spine are reviewed and demonstrate the vertebral body heights and intervertebral spaces to be preserved. The skeletal structures are otherwise unremarkable Surgical clips are present within the right upper quadrant consistent with prior cholecystectomy.

IMPRESSION: Unremarkable radiograph of the lumbar spine.

The next document in the emergency room record was a triage form (consisting of two pages) which noted the chief complaint as -- “Painful back: traumatic”. Further noted on the triage form was Leavitt’s quote of her chief complaint: “Pt c/o LBP after picking up a child. Pt states she heard a pop and feels pain shooting down legs. Pt states she vomited her pain pills.” An Emergency Department QualChart form (consisting of two pages) was in the record and was apparently completed by the ER doctor who signed the form; a pain diagram was in the chart and it indicated pain and/or symptoms in the low back at about the belt line. The ER Department QualChart form further indicated constant, dull and throbbing pain upon movement, lifting and bending, and indicated negative straight leg raising tests; the diagnosis written in the chart was -- low back strain. The record indicated that Leavitt was discharged that day (July 16, 2005), and in the discharge instruction sheet, the Primary diagnosis was: Strain – back; the sheet noted that x-rays had been performed, and the reason for exam was -- Lumbar spine pain. A form entitled “Back Pain & Injury” was in the record, and included the statement: “Your exam shows that your back pain is most likely caused by a strain of the muscle or ligaments that support the spine.” This form further included instructions and the following information to the patient:

“You should be examined again, if your back pain is not better in one week. If you have pain that radiates from your back into your legs, any new bowel or bladder control problems, or unusual weakness or numbness, this may be a sign of a herniated lumbar disc. Please call your doctor or the emergency room if you have any of these more serious symptoms.”

The claimant offered the medical expert opinion of the authorized treating doctor, **Dr. Graven, D.O.** who testified by deposition on behalf of the claimant See, Exh. No. A). Dr. Graven stated that his initial diagnosis of Leavitt’s condition was: “Sacroiliac dysfunction, lumbar strain or sprain.” (Graven Dp. pg. 8) The doctor agreed that it was his opinion on July 19, 2005 that Leavitt’s July 16, 2005 work-related injury was the substantial factor in causing her complaints and need for further treatment. Dr. Graven’s medical record was in evidence (marked as Deposition Exhibit 2 and offered into evidence without objection, See Graven Dp. pg. 6), and noted in the initial 07/19/05 entry Leavitt’s complaints were: “Patient here with complaints of low back pain central and in the sacroiliac joints bilaterally”. Dr. Graven wrote in the 07/19/05 entry: “She denies numbness or tingling. Denies bladder or bowel incontinence.” Exam findings on 07/19/05 included: “Positive straight leg raise with low back pain bilaterally. X-rays of the lumbar spine are essentially normal.” In a form entitled Report to Employer completed by Dr. Graven, the doctor wrote a diagnosis of: SI Dysfunction. Dr. Graven agreed at his deposition that although Leavitt had some improvement of pain during August 2005, on August 30, 2005 he had recommended an MRI in a report to the employer. Dr. Graven explained what was significant from the September 13, 2005 MRI: “The most significant finding was a disc protrusion at the last lumbar disc, the L5-S1 disc.” (Graven Dp. pg. 10) When asked if Leavitt’s continuing complaints of pain as he had seen her through August of 2005 consistent with the findings on the MRI, Dr. Graven responded -- “To some degree”. (Graven Dp. pg. 11) The doctor explained: “Well, the MRI for her disc protrusion, of the disc protrusion does not include an examination of the sacroiliac joints, and her initial diagnosis was sacroiliac dysfunction.” (Graven Dp. pg. 8) Dr. Graven stated it would be accurate that Leavitt had heard from him after the MRI that there was some pressing on Leavitt’s spinal cord that might be causing some of her complaints. My diagnosis on September 15, 2005, following the MRI, Dr. Graven stated, was: “Lumbar disc protrusion, lumbar radiculopathy”. (Graven Dp. pg. 11)

Dr. Graven agreed that when he saw Leavitt on October 11, 2005 she had improvement of low back pain but continued to have complaints, and when he saw her on November 8, 2005 Leavitt continued to have some complaints of pain. The doctor

agreed that at the November 8, 2005 exam he found that Leavitt could heel and toe walk, could bend over with her hands to her toes, and her side bend and rotation was normal. Dr. Graven was asked to explain what he had meant when he had said in November 2005 that Leavitt was at maximum medical improvement. "That I did not feel that her condition would drastically improve beyond that point", Dr. Graven answered. (Graven Dp. pg. 12) The doctor read his diagnosis he had written in his November 8, 2005 report to the employer: "Herniated nucleus pulposus of the lumbar spine and radiculopathy". (Graven Dp. pg. 12) Dr. Graven agreed that he still felt this diagnosis was a work-related injury.

Dr. Graven agreed that in a November 10, 2005 letter to the insurance company he had given Leavitt a permanent partial disability rating based on her continued pain and aggravation and decreased activity. The doctor was asked to explain his instructions in the report for Leavitt to follow up PRN: "As needed, if there are further problem". (Graven Dp. pg. 13) Dr. Graven stated that a patient referred to him by a workers' compensation insurance company can come in to see him by just calling in for an appointment, but the doctor added: "It's up to the workers' compensation carrier to approve payment for it or authorize payment for it." (Graven Dp. pg. 13) Dr. Graven stated that he was not aware of whether or not Leavitt had tried to see him again in December, January or February following the November 8, 2005 visit.

The doctor agreed that the next time he saw Leavitt was on September 26, 2006, and stated he believed it was because at that time the workers' compensation insurance company had agreed to pay for more visits. "I rarely get into the details of who's paying for what", Dr. Graven added. (Graven Dp. pg. 14) When I saw Leavitt on September 26, 2006, she did not describe any new or different injuries since the last time she had seen me on November 8, 2005, Dr. Graven said. The doctor was asked to describe how Leavitt's physical examination had changed since the last time he had seen her:

"She had less flexibility in the lumbar spine. As you recall we talked about her being able to flex the lumbar spine, hands to the floor. This time it was only to the knees. Positive straight leg raise was also noted, and I don't believe was present in November of '05." (Graven Dp. pg. 14)

Dr. Graven stated that "(t)here could be a variety of reasons" why Leavitt's physical condition had changed to this extent. (Graven Dp. pg. 15) The doctor was asked his understanding:

"Well, I don't have an answer. I have -- you know, conditions change, conditions can become worse in the lumbar spine. Injuries that start can progress. Degenerative disc disease can take place. There can be additional injuries. There are, like I said, a variety of reasons." (Graven Dp. pg. 15)

The doctor was asked why he had ordered another MRI. "Well, based on her physical exam and her history, it seemed that things were worse than when I had last seen her in November of '06 -- or '05, I'm sorry." (Graven Dp. pg. 15) Dr. Graven testified as to what was significant from the October 26, 2006 MRI: "It appeared the previously mentioned disc protrusion of L5-S1 was larger, more protruding." (Graven Dp. pg. 16) Dr. Graven agreed that his diagnosis following the second MRI was still herniated disc with radiculopathy, the same as it had been following the first MRI. The doctor was asked his opinion regarding what was the substantial factor causing Leavitt's complaints and need for further treatment. "I guess my opinion is the condition requiring further treatment would be that herniated disc", Dr. Graven answered. (Graven Dp. pg. 17) The doctor testified about his opinion as to what caused the herniated disc:

"I did not come to a conclusion. It's certainly within the realm of medical probability that this same disc that had now become worse was related to her initial injury. I had no history that there was additional injury." (Graven Dp. pg. 17)

Dr. Graven agreed that in his report to the employer dated September 26, 2006, an "X" for work-related injury/illness had been marked, and that this mark had been done at his direction.

Dr. Graven was asked what was the medical treatment he had recommended on November 7, 2006. "Lumbar epidural steroid injections", the doctor answered. (Graven Dp. pg. 18) The doctor was asked if he had provided further treatment to Leavitt since November 7, 2006. "No, I don't believe so", Dr. Graven answered. (Graven Dp. pg. 18)

Dr. Graven then gave the following testimony:

1. Okay. You have testified that following the first MRI you believed that Ms. Leavitt's work-related injury was a substantial factor in causing her complaints and need for further treatment. Did you continue to believe that following the second MRI?

1. Yes.

1. Okay. The workers' compensation insurance company rather than providing the treatment you recommended sent Ms. Leavitt to Dr. Chabot for an IME who seems to think the second MRI shows something so different from the first MRI that her complaints when she saw you in September of 2006 cannot be related to the July 2005 injury at work.

Can you please explain to the judge why you believe that her work-related injury from '05 is a substantial factor in causing her need for further treatment that you described, epidural steroid injections, in September of 2006?

- I think that the symptoms in 2006 were not substantially different than they were in 2005. And even though on her initial visit she did not elicit symptoms of a history of leg numbness or tingling. It doesn't reflect in my notes, but it was mentioned.

So while the complaint of numbness and tingling in '06 appeared to be a new finding according to my notes, it certainly wasn't something new for her to complain about. The disc protrusion that was noted in L5-S1 may have led, the natural history of that could lead to regression and improvement. It could also go the other way and become worse with just the normal activities of daily living.

There may have been additional injury that wasn't recorded or elicited to me, so I have no way of saying that there was an additional injury. Something as simple as bending over to tie your shoes or sneezing or coughing could also make that disc worse. Certainly not something that was an additional injury, but just something in everyday life.

So I guess to sum this up, I feel it was related because I had, number one, evidence of numbness and tingling and radicular symptoms in '05, or evidence of her complaints of that; number two, she did have a disc injury in '05; and number three, I have no history or evidence to suggest that there was an additional injury that might be separate. (Graven Dp. pp. 18-20)

In Dr. Graven's treatment records was a report of an MRI performed by a Dr. Paula George, M.D. on 09/13/05 . The clinical history written in the report was: "Low back pain with tingling and numbness down the right leg. Lifting injury." The written impression was: "Small central disc protrusion at L5-S1 but without spinal stenosis or neural foramina narrowing". Next was Dr. Graven's 09/15/05 treatment entry in which was written that Leavitt was being seen for follow up of lumbar spine. The 09/13/05 MRI results were noted, that it "shows small disk protrusion". It was written that Leavitt would be returned to physical therapy, and restrictions were listed; it was written that Leavitt would return for follow up in one month. In the 09/15/05 Report to Employer form, Dr. Graven wrote the diagnosis of: lumbar disc protrusion/lumbar radiculopathy, and that Leavitt was kept on limited work status with restrictions. The next treatment entry of 10/11/05 stated:

Follow up of the low back. Continues to have some pain but rates it as zero to 4 at times, worse after working all day and better on her days off. She has some midback pain as well. I believe this is compensation from the low back problem and muscle fatigue. She will continue with the home exercise program, also working out at the Rec Plex. Will hold from physical therapy at this time. Follow up in four weeks for final check.

Dr. Graven wrote in the 10/11/05 Report to Employer form a diagnosis of: lumbar radiculopathy, and indicated that Leavitt was able to work with no limitations. In the next treatment entry of 11/08/05 Dr. Graven wrote:

Here for final check. Has some midback pain. Seems to be worse in the low back. The low back is oftentimes not painful whatsoever. Was doing her regular job. The midback seems to be as high as 6/10. She feels this is due to her physical therapy treatment because she had no midback pain prior to physical therapy. At the present time she is able to heel and toe walk. Flex lumbar spine hands to the toes. Side bend and rotation is normal. Tender to palpation in the paraspinal and thoracic spine. She will be returned to work full duty with no restrictions. Follow up p.r.n. Has reached maximum medical improvement and final disability will be determined upon request.

In an 11/08/05 Report to Employer form, Dr. Graven's diagnosis was: HNP-lumbar & radiculopathy; it was noted that Leavitt was able to work full-time without restrictions.

Dr. Graven wrote a letter, dated November 10, 2005, in which he stated:

Ms. Jennifer Leavitt has been released from care at this time. As you well know, she sustained a low back injury and was treated conservatively with anti-inflammatory medications and rest. During her physical therapy she did experience some

midback pain and this is ongoing. At her last visit earlier this week she did have some midback pain, but most of the low back pain was quite tolerable. Her range of motion and physical exam were near normal.

At this time she had reached maximum medical improvement. I find her partial permanent disability rating to be approximately 5%; this being based on her continued pain and aggravation and decreased activity.

The next document in Dr. Graven's record was a treatment entry dated 09/26/06, in which Dr. Graven wrote:

Follow-up of her low back. Continues to have pain. States that as she has not really made significant improvement in the last 12 months. Has occasional radiation of the right leg with numbness and tingling. We will repeat her MRI at this time. She has a positive straight leg raise. Patella and Achilles reflexes are +2/4. Light touch sensory exam is normal. She is able to heel and toe walk. Flex lumbar spine only hands to the knees.

After the MRI we will anticipate perhaps epidural steroid injection. May progress to diskography if no relief is noted.

In summary then I believe that she has reached maximum medical improvement but she has not really made any improvement whatsoever. So it is hard to determine what maximum medical improvement if no improvement has been seen in the last year. I think she is unlikely to improve without further treatment. I hope this serves to answer any question. (sic)

In an 09/26/06 Report to Employer form, Dr. Graven's written diagnosis was: DDD, HNP; the doctor continued to indicate that it was a work related injury/illness; Leavitt was maintained at a full time work with no restrictions status; it was noted in the Comments – "pt states she has not been tx (with) another doctor".

A report of an MRI performed by a Dr. Julian Verde, M.D. on 10/26/06 in Dr. Graven's record noted the following clinical history: "Low back pain radiating to her right hip and lower extremity". It was written that this examination was to be compared to the previous exam of 9/13/2005. The written impression was: "1. There is a now a posterolateral herniation of the L5-S1 intervertebral disc to the right with an extruded fragment extending into the anterolateral recess and impinging upon the S-1 nerve root; 2. There has been no other interval change from the previous exam of 9/13/05". A final treatment entry in the record, dated 11/07/06, by Dr. Graven include that Leavitt was "here for follow-up of her MRI showing disc protrusion at L5-S1, especially on the right side". Exam findings were: "Straight leg raise equivocally causes the thigh pain. Light touch sensory exam is normal. Patella and Achilles reflexes are intact." The doctor wrote that epidural steroid injections would be scheduled, and then there would be follow-up. In the Report to Employer form dated 11/07/06 the diagnosis was: HNP L5-S1 (with) radiculopathy; further indicated in the form was that Leavitt could work full time without restrictions; it was indicated that treatment would be epidural steroid injections, and that Leavitt was to return following those injections.

Records of **Barnes-Jewish St. Peters Hospital Emergency Room** concerning treatment of Leavitt on February 5, 2007 (No. C) began with a triage sheet (consisting of two pages) which noted Leavitt's quoted complaints: "Pt moved wrong and she has stabbing low back pain. Pt has had numbness to right leg and pain to lower back x 2 weeks and today sudden onset of severe pain and Pt had a back inj a year and a half ago."; the diagnosis noted on the sheet was: Spasm – muscle, back. The record contained a form entitled Emergency Department QualChart which noted symptoms of constant, dull spasmodic pain with movement and pain with weight bearing, and also noted associated signs and symptoms of -- numbness/tingling; the form included a pain diagram but there were no markings, indicated was negative straight leg raising, but there was paraspinal muscle tenderness; it was indicated that Leavitt was improved; the written diagnosis on the form was: back sprain/strain. A form entitled "Aftercare Instructions for Back Pain" included the following: "The back helps support much of your weight. When it is injured, almost any movement may cause pain. You may also have pain that goes down your leg. This is called sciatica, a condition caused by nerve irritation." The record indicated that Leavitt was discharged that day (February 5, 2007); the Primary diagnosis was: Spasm – muscle, back, and there was a Secondary Diagnosis: Pain – back.

On cross examination by the employer/insurer, a three-page orthopedic history sheet was viewed from Dr. Graven's file, and it was noted that on a diagram Leavitt had indicated that the pain stopped at her knees; it was noted that this diagram was not dated, but Dr. Graven agreed that he had reviewed it with Leavitt on July 19, (2005). The doctor stated that either he or his staff takes a history from the patient, Leavitt; Dr. Graven stated that "(s)ometimes better than others" they document a thorough relevant history from the patient. (Graven Dp. pg. 23) Dr. Graven agreed that he would have documented Leavitt's chief complaints as she came to see him and that also he had read the physical therapy notes between July 19, 2005 and November 8, 2005. It was noted that Leavitt was on medication; the doctor was asked if Leavitt was on any Medrol Dosepak

or anything like that. "I don't believe I prescribed that for her, no", Dr. Graven answered. (Graven Dp. pg. 24) It was noted that Dr. Graven's original diagnosis was low back strain with SI joint dysfunction, and the doctor was asked to explain what was SI joint dysfunction:

"The SI joint stands for sacroiliac. The sacrum is the spin (sic), the ilium is the pelvis. There's a large joint -- there are two joints -- but bilateral SI joints that join the spine to the pelvis. Many times people who suffer or undergo an injury where they have a bending or twisting type injury can have a sacroiliac dysfunction, also causes -- I'm sorry." (Graven Dp. pg. 25)

Dr. Graven was asked how in his practice did the diagnosis of SI joint dysfunction manifest its symptoms: "Low back pain, radiation into the legs, into the thighs, leg length inequality", Dr. Graven responded. (Graven Dp. pg. 25) Dr. Graven agreed that the symptoms he had just stated were consistent with Leavitt's exam when he had first seen her and in keeping with her orthopedic history to him.

During cross examination, Dr. Graven agreed that the first MRI done on September 13, 2005 and the second MRI were both performed at the same location, St. Peters Bone and Joint. It was noted that in the report of the 9/13/05 MRI they called it a protrusion at L5-S1, and in the 10/26/06 MRI it was called a herniation at L5-S1; Dr. Graven was asked his opinion of whether or not there is a difference between these findings -- a protrusion at L5-S1 and a herniation at L5-S1, and the doctor answered: "In my terms, no. I use those equally. But I don't know that you could make a quantitative assessment based on two different radiologist's opinions with those two words." (Graven Dp. pg. 26) Dr. Graven stated that he had looked at the actual films; the doctor was asked if he would agree that there's a difference between the first one on September 13, 2005 and the second one on October 26, 2006. "Without question", Dr. Graven answered. (Graven Dp. pg. 27) In regards to the September 13, 2005 MRI, it talks about small central disc protrusion at L5-S1, and it was noted that Dr. Graven had described it as not going outside its anatomical --. "It is going outside its anatomical boundaries", the doctor explained, but agreed that it was not going outside its anatomical boundaries very much. (Graven Dp. pg. 27) The doctor was asked to explain what it meant when the MRI report said -- "without spinal stenosis and neurofoaminal narrowing". Dr. Graven answered: "Spinal stenosis would indicate a narrowing of the central canal where the nerves run. The foramen are the windows at each level of the spine where a paired set of nerve roots exit." (Graven Dp. pg. 27) The doctor was asked if there was any description in the 09/13/05 MRI that suggested the small central disc protrusion at L5-S1 was impinging on a nerve root. "No", Dr. Graven answered. (Graven Dp. pg. 28) Dr. Graven agreed that when he had conducted the last physical examination on November 8, 2005 he had noted that Leavitt gave a history that the low back is oftentimes not painful whatsoever; Leavitt was more concerned about the mid back, Dr. Graven agreed. The doctor agreed that at the November 8, 2005 exam Leavitt was able to heel/toe walk, and then the following testimony then occurred:

1. What does that indicate to you? What's the significance of that physical exam test?

1. People that have neurologic findings or neurologic impairment from a herniated disc or whatever the cause might be, the L5 nerve controls the ability to walk on your heels or extend your toes or ankle. Being able to walk on the toes is governed by the S1 nerve root.

1. Okay.

1. So there are two findings to elicit weakness secondary to L5 or S1 nerve root problems.

1. And the fact that Ms. Leavitt could walk heel/toe told you what specifically?

1. That she did not have weakness in those muscle groups.

1. Okay. And did that cause you to have an opinion regarding her L5 nerve or the nerves exiting the L5-S1 vertebrae?

1. Did it cause me to have an opinion?

1. Right.

1. Yes, that there wasn't significant motor weakness secondary to a nerve problem. (Graven Dp. pp. 28-29)

Dr. Graven further agreed, during cross examination, that at the November 2005 exam Leavitt could flex her lumbar spine, her hands to her toes, and that this told him the flexibility in Leavitt's lumbar spine was normal. Agreeing that this provided him with information regarding the nature of Leavitt's injury to her L5-S1 disc at this point, Dr. Graven testified: "That currently her nerve roots were not inflamed." (Graven Dp. pg. 29) The doctor stated that he had conducted the physical examination of Leavitt himself. It was noted that Leavitt had stated in her deposition that she was never able to touch her toes; the doctor was asked if this would be a different representation than what he had in his record. "That would be a different representation", Dr. Graven responded. (Graven Dp. pg. 30) Dr. Graven was queried about when he had stated on direct examination Leavitt was at maximum medical improvement, and the doctor agreed that he had thought Leavitt had plateaued.

Dr. Graven agreed, during cross examination, that the complaints Leavitt had made to him on 09/26/06 were different than what she had made to him on 11/08/05 with regard to right leg numbness and tingling. The doctor further agreed that on 09/26/06 Leavitt had a positive straight leg raising test. Dr Graven explained what a positive straight leg raising test was: "That is one of the signs of a nerve root inflammation or impingement." (Graven Dp. pg. 32) It was noted that Dr. Graven had not noted a straight leg raise test administered on November 8, 2005, and the doctor was asked if anything else in the November 8, 2005 exam suggested to him that that was done or that he had the results of it. "Being able to flex the lumbar spine when she's able to touch her toes would recreate some of the same findings you would see with the straight leg raise", Dr. Graven responded. (Graven Dp. pg. 32) The doctor was further queried – if Leavitt was able to flex her spine to touch her toes on November 8, 2005 is that equivalent in your mind to a negative straight leg raise? Dr. Graven eventually answered:

"I guess it depends on what you mean by equivalent. Do I think if someone has a straight leg raise and it causes leg pain that it's indicative of nerve root inflammation or impingement? Yes. Do I think someone who is able to flex their lumbar spine hands to the toes would be able to do that with an inflamed nerve root or impingement, no, I don't think they'd be able to do that." (Graven Dp. pg. 33)

Dr. Graven agreed that he had noted at the September 26, 2006 exam Leavitt was able to heel/toe walk, and could flex the lumbar spine only hands to knees. The doctor agreed that his physical exam on 09/26/06 was different that what he had found on 11/08/05. When further queried -- And it was different in that you found some evidence of nerve inflammation at the L5-S1, is that fair? --Dr. Graven answered: "Yes, that's fair." (Graven Dp. pg. 33) It was noted that the 10/26/06 MRI report said -- there's now a posterolateral herniation at L5-S1; Dr. Graven was queried that the direction of this disc has now changed from central to posterior and to the side. "Yes", Dr. Graven admitted. (Graven Dp. pg. 33) The doctor was queried – Physiologically it changes the location of the disc? "Anatomically", Dr. Graven answered. (Graven Dp. pg. 34) Dr. Graven agreed that on 10/26/06 Leavitt now has a change in her disc that's going posterior into the right at L5-S1. It was noted that the 10/26/06 MRI describes an extruded fragment extending into the anterolateral recess. Dr. Graven was asked to explain what this means:

"Extruded would indicate or describe a disc fragment that is no longer within the normal areas or normal confines of a herniated disc or a disc, period. So the disc has gone beyond the superior and caudad borders of a disc." (Graven Dp. pg. 34)

Dr. Graven agreed that the 10/26/06 MRI indicated that part of the disc had moved. Agreeing that the 10/26/06 MRI report stated a change from the September 13, 2005 report -- that the herniation at L5-S1 as described is impinging on the S1 nerve root -- Dr. Graven added: "The other MRI was more of a central disc...In explanation, the S1 nerve root has branched and it's more lateral than central at that level." (Graven Dp. pp. 35-36) The doctor was queried - So, Dr. Graven, do you have an opinion based on what you've told me about the comparison of the two MRI's between 9/13/05 and 10/26/06 that the 10/256/06 MRI showed a change in pathology at the L5-S1 disc? "It was definitely different", Dr. Graven answered. (Graven Dp. pg. 36) Dr. Graven stated that he had an opinion on whether or not there was a change in pathology in Leavitt's disc condition between November of 2005 and October 26, 2006, based on the histories in 2005 and 2006, his exam findings at the 2005 and the 2006 exams, and the 2005 and the 2006 MRI findings; the doctor explained what the change in pathology was: "I believe that the previous central disc protrusion has become significantly worse", Dr. Graven answered. (Graven Dp. pg. 37) Dr. Graven agreed that he had stated on direct examination that he had no history that there was additional injury; it was noted that the doctor had further said that everyday living could cause the natural progression of a condition to worsen. Dr. Graven further testified:

"I said there are things that occur in everyday life that could; i.e. a sneeze or a cough could make a disc protrusion worse."

“In other words, if we increase our pressure when we strain, for instance, it can increase the intradiscal pressure and thus make an injury we have worse; if you will, squirt more disc out.” (Graven Dp. pp. 37 and 38)

Dr. Graven agreed that when he said strain, it could be even bearing down to have a bowel movement, or coughing, or sneezing, or sexual intercourse. “Anything is possible”, the doctor said. (Graven Dp. pg. 38) Dr. Graven was asked – Considering the difference in the MRIs and the difference between the physical exams done November 8 of 2005 and September 26, 2005, is it possible that the change manifested in the MRI on September 26, 2006 was not caused by the original injury on July 16, 2005? “Yes, it’s possible”, Dr. Graven answered. (Graven Dp. pg. 39) (**RULING:** Claimant’s objection on grounds of leading is overruled. Graven Dp. pg. 38) Dr. Graven indicated it was his opinion the MRI and the condition that he examined for Leavitt in 2006 was caused by Leavitt’s injury in 2005. The doctor was queried – As you sit here today (at your deposition on December 11, 2007), is it fair to say that you really don’t know what caused the change in the pathology between the September 2005 and October 2006 MRIs? Dr. Graven responded:

“I have an opinion as to what happened. Do I absolutely know? I’m not God.”

“I would submit there’s no way of anyone knowing anything that’s for sure. We’re not there to see it happen.”

“If you’re asking me if I’m going to testify that I don’t know, no, I’m not going to testify to that.” (Graven Dp. pg. 39)

Dr. Graven was asked to explain the basis for his opinion that the changes in 2006 are substantially caused by Leavitt’s July 2005 injury:

“I’d say – and I think I testified to this before – that it’s certainly within the realm of medical possibility that that was the case, that you can have an injury and it can become worse with the activities of daily living. Now, I also said that it’s possible that she did something else, I just don’t have a history to that.” (Graven Dp. pg. 40)

Dr. Graven agreed that this is a pretty significant change between the MRI in September 2005 and October 2006. The doctor further agreed that this was evidenced by the fact that he had not ordered epidural steroid injections back in 2005. Dr. Graven was asked – When you put Leavitt at maximum medical improvement on November 8, 2005, did you anticipate a posterolateral herniation with extruded fragment occurring in Leavitt? “No”, Dr. Graven answered. (Graven Dp. pg. 41) The doctor agreed that it is reasonable for him to think Leavitt was going to maintain her condition as he saw her in November 2005. Dr. Graven was further queried – When you say you think it’s within a possibility that the change in pathology noted in the October 2006 MRI was caused by the July 16, 2005 injury, are you able to agree that it’s possible that it wasn’t caused by the July 16, 2005 injury? “Yes”, Dr. Graven answered. (Graven Dp. pg. 41)

On redirect examination, Dr. Graven was reminded that he had testified on direct examination, that it was medically probable. Dr. Graven responded: “Yeah. I think I changed what I said from probable to possible.” (Graven Dp. pp. 41-42) Dr. Graven further testified:

“I guess I could sum it up in saying that she had an injury at L5-S1, it became worse sometime between the MRI, the two MRIs. Have I seen other cases become worse? Yes. Have I seen other cases become better? Yes. I don’t have any history to suggest there was additional injury.

So my best presumption is that it is related because she had an injury to L5-S1 and it became worse. Can I factually say that I was there and know exactly what happened? No. But that is my medical judgement.” (sic) (Graven Dp. pg. 42)

On further cross examination, it was noted that the history in Dr. Graven’s last November 2005 note was lacking in complaints down the leg from Leavitt. “In November of ’05, yes, I did not record any complaints down the legs at that point”, Dr. Graven responded. (Graven Dp. pg. 43) When queried -- had she made them to you would you have written them down? -- Dr. Graven responded: “Yeah, I’d like to think so”. (Graven Dp. pg. 43) The doctor agreed that that is his practice to do so.

On redirect examination, Dr. Graven stated that lumbar radiculopathy indicates “(p)ressure on the nerve root, impingement, effacement... (i)nflammation of the nerve root”. (Graven Dp. pg. 46) The doctor agreed that pain or numbness down into the legs would be acknowledged by a note that says lumbar radiculopathy. It was noted that in his 08/30/05 report to the employer was written -- radiculopathy lumbar. Dr. Graven noted that this was “written by an assistant that works for me”, but further stated that, generally speaking, it is written at his direction. (Graven Dp. pg. 47) Dr. Graven agreed that the MRI he had reviewed on 09/13/05 showed a clinical history of -- low back pain with tingling and numbness down the right

leg; the doctor agreed that he had this MRI report available to him in September 2005. Dr. Graven agreed that in the 09/15/05 report to the employer and the 10/11/05 report to the employer as well as the 11/08/05 report all noted -- lumbar radiculopathy.

Dr. Michael C. Chabot, M.D. testified by deposition on behalf of the employer/insurer (No. 1) An orthopedic spine surgeon, Dr. Chabot agreed that he examined Leavitt on February 28, 2007 at the request of the employer/insurer. The doctor agreed that he was given records to review, including records from Barnes-Jewish St. Peters Hospital emergency room for visit dates of July 16, 2005 and February 25, 2007, records from Excel Physical Therapy for the period of July 21, 2005 to October 6, 2005; and the doctor noted that he was provided with Dr. Graven's records through a follow-up appointment on November 7, 2006. Within Dr. Graven's records, Dr. Chabot agreed, were MRI reports of Leavitt's low back for studies performed on 09/13/05 and 10/26/06; Dr. Chabot further noted that he had reviewed the actual MRI film dated September 13, 2005, and was provided a CD of the October 26, 2006 MRI. Dr. Chabot identified at his deposition his reports of February 28, 2007, December 10, 2007 and December 24, 2007 in which he had set forth his opinions based on his evaluation of Leavitt, and stated that he would testify in a manner consistent with these reports; the reports were marked as Exhibits 2, 3 and 4, respectively, and offered into evidence with no objection (See, Chabot Dp. pp. 10-11 and 30).

It was noted that in his February 28, 2007 report, the doctor wrote that there appeared to be some inconsistency between Leavitt's described pain level and the perceived discomfort or distress she experienced during the course of the exam, and Dr. Chabot explained what he meant:

"During the examination she was pleasant and conversed without any difficulty. She moved about the room without any difficulty. There was no guarding on the examination which would be, you know, significant restrictions in motion or movement. There – her gait was normal. She was able to dress/undress herself without any assistance. The other issue was that she rated her pain as a 7 to 10 on – which is in the severe range which usually would suggest that a person is having pain that would require use of narcotic medication or multiple medications in order to moderate.

She was really only on Aleve which she used only occasionally which was a significant inconsistency.

She also complained of leg pain symptoms on her pain diagram but then when asked specifically was she having leg pain that day, she stated she was not." (Chabot Dp. pp. 12-13)

Dr. Chabot was directed to the pain diagram in his record marked as Exhibit No. 2, and the doctor agreed that it is filled out by the patient when they come to see him. Dr. Chabot agreed that the discrepancy he had just discussed was regarding the pain diagram Leavitt had filled out the day of his exam on February 28, 2007. It was noted that in his February 28, 2007 report Dr. Chabot had taken a history from Leavitt that she was taking one Aleve a day; the doctor was asked to assume that Leavitt had testified that she was taking four Aleve a day at that time and would that be different than what Leavitt had told him. Dr. Chabot answered:

"Yes. Initially, the questionnaire she marked she did not indicate she was on any pain medication. This is actually my handwriting because I asked her specifically, I said, are you taking any prescription or over-the-counter medications, and after she thought about it she informed me she was taking about one Aleve which is an over-the-counter medication and about 220 milligrams of Naproxen Sodium about once a week.

The only reason that was mentioned was because I asked directly whether or not she was using any other medication. She indicated she was using no medications other than Loestrin which is a birth control pill." (Chabot Dp. pg. 14)

Dr. Chabot was asked his understanding as he examined Leavitt on February 28, 2007 of what complaints, if any, she had about her legs. "That she does not have leg pain", Dr. Chabot answered. (Chabot Dp. pg. 15) The doctor was asked his opinion on February 28, 2007 as to whether Leavitt was in need of any additional medical care for her low back condition. "It was my impression that she had reached maximum medical improvement, Dr. Chabot answered. (Chabot Dp. pg. 15) Agreeing that he had addressed the need for epidural steroid injections, Dr. Chabot testified as to what his opinion had been: "It was my opinion that she did not have an active radiculopathy and that they would not be of any benefit." (Chabot Dp. pg. 15) Dr. Chabot was asked to explain what he meant by "active radiculopathy":

"An active radiculopathy means that a person has active nerve root irritation. Usually, symptoms associated with that would be constant buttock and leg pain with numbness and weakness in the leg and/or reflex changes and/or positive tension signs which would include straight leg raise test." (Chabot Dp. pp. 15-16)

Dr. Chabot agreed that he was looking for these signs when he examined Leavitt on February 28, 2007.

Dr. Chabot testified as to what the two MRIs of Leavitt's low back revealed:

"Well, the MRI study from September 13, 2005, after reviewing it, indicated evidence of disc bulging at L5-S1. There was no evidence of nerve root compression. And the MRI study on October 26, 2006, was significantly different. It revealed evidence of a right posterolateral disc herniation at L5-S1." (Chabot Dp. pg. 18)

It was noted that the October 26, 2006 MRI also revealed an extruded fragment, and Dr. Chabot was asked to explain what this meant: "Extrusion usually means a disc fragment which extends through the posterior longitudinal ligament. So they're referring to the position of the disc fragment being that it was more into the spinal canal." (Chabot Dp. pg. 18) Dr. Chabot was asked his opinion of whether or not the MRI on October 26, 2006 was a change from the MRI on September 13, 2005. The doctor answered: "Yes. It's my opinion it was a profound change." (Chabot Dp. pg. 19) Dr. Chabot explained:

"Well, again, the -- when I reviewed the September 13, 2005, study it was my impression that there was evidence of disc bulging, not a frank disc herniation or protrusion.

The study conducted on October 26, 2006, revealed a lesion which was posterolateral in orientation sitting off to the side which is a different location than this disc bulge and one that was also extruded or had passed through the posterior longitudinal ligament and was actually into the spinal canal. Although, again, that -- usually they may refer to it as being extruded, but that's usually confirmed at the time of surgery if it's done.

That is a different position, a different type of lesion than just a central disc bulge.

There was evidence of neurocompression on the October 26, 2006, study and not on the September 13, 2005, study." (Chabot Dp. pp. 19-20)

Dr. Chabot explained what he meant by "evidence of neurocompression": "It means that the material is pushing up against the nerve or nerve tissue" (Chabot Dp. pg. 20) Dr. Chabot was asked if Leavitt had a disc bulge at L5-S1 does that mean she would develop a disc herniation at that level, and the doctor answered:

"No. I mean, she has degeneration at multiple levels as documented on the September 13, 2005, study. She could have been just as likely to develop a disc protrusion or herniation at one of the other levels. I don't know how you could have predicted that the L5-S1 disc bulge would now herniate. I think that's really extrapolating beyond what's probably reasonable." (Chabot Dp. pp. 20-21)

Dr. Chabot was asked -- in conjunction with your review of the MRI films and his knowledge of that, his history from looking at the records, the history he had elicited from Leavitt, and based on his experience, what was his opinion whether the findings on the October 26, 2006 MRI was substantially caused by the July 16, 2005 injury. "It's my opinion it's not", Dr. Chabot answered. (Chabot Dp. pg. 21) Dr. Chabot explained his opinion:

"If you read Dr. Graven's records the patient's primary complaints were that of low back pain and lumbosacral back pain. He diagnosed her primarily with SI dysfunction. There was some documentation a few months after initiation of treatment by the physical therapist, I believe in September 2005, of some symptoms or tingling radiating through the right leg which apparently were intermittent. That could also occur with sacroiliac dysfunction or tissue inflammation and does not necessarily mean that the patient was having radiculopathy.

So it is my opinion that from the records initially there was no documentation of active radiculopathy in this individual, and her MRI would have confirmed that since there was no evidence of a frank herniation or neurocompression. She was treated conservatively. Dr. Graven eventually placed her at maximum medical improvement November 2005.

Then a year later she's seen for more significant complaints, and that is when it's noted that she has a disc herniation at the L5-S1 level. It's my opinion that the disc herniation could have occurred from some other event or could have occurred just based on disc degenerative changes that were noted previously." (Chabot Dp. pp. 21-22)

Dr. Chabot was asked his opinion of what condition did Leavitt have based on his exam of her and his review of the records and MRI from September 2005, what diagnosis did he feel Leavitt had as a result of the July 16, 2005 injury. "I believe she had a lumbosacral strain and sacroiliitis", Dr. Chabot answered. (Chabot Dp. pg. 22) The doctor defined sacroiliitis:

"Well, sacroiliitis is inflammation of the sacroiliac ligaments. Now, these ligaments are the main stabilizing ligaments that hold a pelvis to the sacrum, so sacroiliac. Iliac is another word for pelvis. They are the ligaments that holds everything

above the waist to everything below the waist. There's no physical articulation in the front of the spine that connects those two regions. They're only along the back part of the spine. So it's a relatively high tension or stress area, and when a person turns and twists or strains, they can injure or strain those ligaments that produce pain.

Usually, the pain is localized into the lumbosacral region. In some situations sacroiliac symptoms radiate with tingling and numbness in to the leg. Usually, not below the knee. But they're not a truly radicular complaint as they're primarily tissue inflammation, not nerve irritation." (Chabot Dp. pp. 23-24)

Dr. Chabot was asked how a physician distinguishes between whether it's radiculopathy versus sacroiliitis. Stating that an MRI is not the standard, Dr Chabot further testified:

"The first thing you always depend on is an accurate physical examination.

Does the person have evidence of an active radiculopathy? Is there evidence of neurologic changes and sensation, reflexes or muscle strength or are there changes of tension signs which would be straight leg raise testing with reproduction of leg pain? You could have straight leg raise testing which produces back pain in sacroiliitis but you have to have reproduction of the leg symptoms.

So again, you're looking for evidence that there is active irritation or damage to a nerve root." (Chabot Dp. pg. 24)

The doctor was asked, from his review of Dr. Graven's records in February 2007 and the Excel Physical Therapy records in December 2007, was there anything in those records that caused him to change his position regarding his diagnosis of Leavitt's condition as sacroiliitis as opposed to radiculopathy. Dr. Chabot answered:

"Again, I believe the only neurologic change that was documented by the physical therapist was a diminished right Achilles reflex.

The straight leg raise test he referred to as developing back pain on the right at 45 degrees, I believe, and on the left, I believe, at 75 degrees. That's not a true tension sign. With sacroiliac inflammation usually doing straight leg raise testing will also produce buttock pain, and that's what he elicited.

So aside from that, the single findings of a diminished Achilles reflex, I did not see any evidence of documented active radiculopathy." (Chabot Dp. pp. 25- 26)

It was noted that in a September 16, 2005 physical therapy entry it was written that Leavitt had given a history of some right lower extremity paraesthesia. Dr. Chabot responded:

"Again, like I said, you can have that with irritation of the sacroiliac, irritation of the IT band, irritation of the greater trochanter bursa, any numbers of things -- number of reasons develop paresthesias.

Now, did the paraesthesia extend into the calf or into the foot? There's no mention of that. All right? And usually with those conditions of sacroiliac or greater trochanteric or IT band findings, those usually extend into the thigh and no further." (Chabot Dp. pg. 26)

Dr. Chabot stated that his subsequent review of February 5, 2007 Barnes-Jewish emergency room records did not cause him to change his opinion as expressed in his February 28, 2007 report. Dr. Chabot explained:

"Because they talked about her developing a stabbing -- complaining of stabbing low back pain and numbness in the right leg and leg pain for the last two weeks.

And it was a sudden onset of severe pain is how it was described.

That, again, would support in my opinion that the noted disc protrusion that was documented on her October 26, 2006, MRI did not occur at the time of her original injury." (Chabot Dp. pg. 27)

Dr. Chabot stated that his review of the original Barnes-Jewish emergency room records from July 16, 2005 which he had discussed in his December 24, 2007 report (Employer's Deposition Exhibit 4), those records did not cause him to change his opinions as expressed in his February 28, 2007 report.

Dr. Chabot was asked his opinion of whether or not Leavitt had reached maximum medical improvement as a result of the July 16, 2005 injury. The doctor answered: “Yes. It’s my opinion she had.” (Chabot Dp. pg. 28) Testifying as to when he felt Leavitt had reached maximum medical improvement, Dr. Chabot said: “I believe when she was released by Dr. Graven, I believe, in November of 2005.” (Chabot Dp. pg. 28)

Dr. Chabot testified as to his opinion of whether Leavitt had sustained any permanent partial disability as a result of the July 16, 2005 work related injury: “It was my opinion that the original recommendation of a 5 percent PPD was reasonable.” (Chabot Dp. pg. 29)

On cross examination by the claimant, Dr. Chabot agreed that he knew at the time he agreed to evaluate Leavitt on February 28, 2007 that the insurance company did not authorize him to provide any treatment at the time he saw Leavitt. Dr. Chabot added: “They actually listed the evaluation as IME only.” (Chabot Dp. pg. 33) Dr. Chabot stated it was correct that he had said in his first report of February 28, 2007, top of page 5 – “It’s very well possible that the patient could have herniated a disc or have progression of this pathology at the L5-S1 level not associated with her prior employment at Borders”. The doctor was queried – Would you agree that it’s also possible that the progression of the disc pathology could have been related to Leavitt’s work injury? “It’s my opinion it was not”, Dr. Chabot answered. (Chabot Dp. pg. 34) When further queried if the doctor was saying that there is no possibility that any cause related to Leavitt’s work injury could have caused the herniation that he saw in the 2006 MRI, Dr. Chabot responded:

“It’s my opinion she did not have evidence of a disc herniation on the initial MRI. She had disc bulging at the L5-S1 level with disc desiccation which indicated some evidence of degenerative changes at the L5-S1 level already. I never said that she had a disc injury following that injury in July of 2005.

So you’re assuming she had a disc injury in July of 2005. My opinion is she did not. She had evidence of a lumbosacral strain with sacroiliitis.” (Chabot Dp. pg. 34)

Dr. Chabot was asked if he was saying that the central disc protrusion on the radiologist’s MRI report was not related to Leavitt’s work injury of 2005. “That’s correct”, Dr. Chabot answered. (Chabot Dp. pg. 34)

Dr. Chabot was asked, when you use the terms protrusion and herniation in regard to a disc are you speaking of generally the same thing. Dr. Chabot answered:

“The -- actually, the radiologist referred to the term protrusion. When I describe a herniation, usually I use protrusion and herniation synonymously. Now, whether or not he refers to a protrusion as a disc bulge, that’s up to his context. There is some variation in what people use.

As far as what I use, when I use the word protrusion or herniation, I use them synonymously.” (Chabot Dp. pp. 36 and 37)

Dr. Chabot agreed that the radiologist who read the first MRI did not use the term bulging. Dr. Chabot agreed that a disc protrusion is a disc that extends into the spinal canal beyond its normal anatomic parameters. The doctor was asked if he agreed that lumbar radiculopathy indicates inflammation of the nerve root that causes pain or numbness into one or both legs. “It could”, Dr. Chabot ultimately answered. (Chabot Dp. pg. 37) Dr. Chabot agreed that the records he had reviewed after February 28, 2007 did not cause him to change his opinions from his original report. The doctor was queried if he had testified that he didn’t believe Leavitt had any disc protrusion at the time that she had her first MRI. Dr. Chabot answered:

“I stated that it is my opinion after reviewing the study that it appeared she had disc bulging, not a disc protrusion. Disc bulging is more diffuse. There is no neurocompression, and that is the reason I had that interpretation.” (Chabot Dp. pg. 38)

Dr. Chabot agreed that he had drawn this conclusion based on his review of the study.

Dr. Chabot stated that it was possible for activities of daily living to cause a disc bulge to progress to a disc protrusion, further testifying:

“I’ve had people who leaned over to brush their teeth and suddenly felt back and leg pain and were diagnosed with a disc herniation. People vacuuming their floors. People waking up in bed in the early morning hours with back and leg pain. So I believe that would be correct.” (Chabot Dp. pg. 39)

The doctor was questioned about other specific activities, and the following testimony occurred:

1. Would that include coughing or sneezing?
1. Sure it could. Excessive coughing. I've seen that happen.
1. How about tying your shoes?
1. I've never seen tying your shoes.
1. I'm sorry. Bending over to tie shoes.
1. I've never in my experience seen that. I imagine if a disc is -- the degeneration of a disc is advanced sufficiently that something like that could possibly happen.
1. If somebody had pain with activities like bending over or coughing or sneezing, could those indicate some type of disc protrusion?
1. No. It would indicate that they have probably deconditioning, lack of mobility, inflammation of ligaments and muscle. What you're looking for with a true radiculopathy is intense leg pain symptoms with neurologic changes and tension signs that go along with it.
1. Okay.
1. Usually, with a herniated disc the leg pain symptoms are more pronounced than the back pain symptoms and not vice versa. (Chabot Dp. pp. 39-40)

It was noted in his last two reports, specifically under the discussion section in his December 10, 2007 report, that Dr. Chabot had written – “She subsequently developed an increase in her back pain symptoms that caused her to seek additional medical treatment with Dr. Graven in September 2006”; the doctor was asked if he was saying in these reports that there was no history of any specific inciting events. “That’s correct”, Dr. Chabot answered. (Chabot Dp. pg. 41) Dr. Chabot stated it was also correct in his next report where he again talked about Leavitt going back to Dr. Graven in September 2006, those symptoms were not associated with any specific injury or inciting event.

On redirect examination, Dr. Chabot agreed that when he said there was no specific inciting event, this was based on the history Leavitt had given to him in addition to the fact that he didn't have any medical records describing something.

Dr. Chabot was questioned about his testimony on cross examination about could activities of daily living cause a bulge to change to a protrusion; the doctor gave the following additional testimony at this time –

“Well, actually in the context, if you already have disc bulging, usually there's already disc desiccation. So that's a disc that probably already has degenerative changes.

So my answer is meant to indicate that almost any activity could produce a potential for the disc herniating. In many situations there is no specific inciting events. In some situations an individual can bend over, vacuum, brush his teeth, just about anything, get up out of bed, and suddenly develop back and leg pain.

And in that context those are activities of daily living. The -- aside from a significant traumatic event, in many situations disc herniations arise with very little traumatic -- with very little traumatic, I guess, energy or very little indication of significant stress to the body.” (Chabot Dp. pp. 43-44)

Dr. Chabot agreed that this can happen in conjunction with an already degenerative disc. The doctor was asked if this was Leavitt's condition, if he could answer based upon his review of the MRI. Dr. Chabot responded: “She already had disc

desiccation and disc bulging so which would indicate that she had some changes of degeneration at that level. She also had changes at the adjoining levels.” (Chabot Dp. pg. 44) The doctor was asked if the September 13, 2005 MRI showed some degeneration, did he have an opinion whether this was present before July 16, 2005. Stating that he did have an opinion, Dr. Chabot further answered:

“You don’t develop disc desiccation or change of that sort overnight or even in just a couple of months. That occurs over several years.

I believe there was already mention even in that report of facet degeneration as well, and fact degeneration also is an indication of joint deterioration which again takes years to develop.” (Chabot Dp. pp. 44-45)

Dr. Chabot agreed that he was referring to his December 10, 2007 report on page 2 where he discussed the findings from his review of the MRI. Dr. Chabot agreed that in his discussion about the word protrusion versus bulge, he had mentioned that when he had reviewed the September 13, 2005 MRI of the low back he had called it a bulge.

Dr. Chabot stated that in his practice as an orthopedic spine surgeon part of his practice is to look at MRI films of the low back himself. The doctor agreed that he reviews MRI films in conjunction with the physical examination in making his determination regarding treatment for a patient. Dr. Chabot was asked if he solely relied on the report provided by the radiologist of an MRI of the low back or anywhere on the spine. The doctor answered: “Never. I always require review of the studies.” (Chabot Dp. pg. 46)

The doctor was asked if he distinguished between a finding of right leg pain versus right leg paraesthesia as a neurologic sign, and is there a distinction between the two. Dr Chabot answered:

“Well, there’s a distinction in the distribution of symptoms. If a person is complaining of paraesthesia which don’t extend below the knee, it’s usually very unlikely that will be a lower nerve root involvement. It may involve a third nerve because the third nerve usually extends into the proximal thigh. So you look at that versus the distribution of their complaints; do they have calf pain along with it which is very typical for L5-S1 nerve root injuries or nerve root irritation. Then do they also have sensory changes along that distribution on pinwheel testing, reflex changes that go along with the nerve you think may be involved or muscle strength changes. So the history is part of the information that you’re reviewing in order to sort of close down your differential diagnosis. If a person presents with complaints that are primarily mesodermal which is tissue inflammation distribution into the thigh, non-specifically into the thigh, and they don’t have any type of nerve findings, no tension signs, then one would make the assumption that the likelihood of a disc herniation -- symptomatic disc herniation with radiculopathy is very low.” (Chabot Dp. pp. 46-47)

Dr. Chabot noted that it was Dr. Graven who had described sacroiliac joint dysfunction as a cause of the paraesthesia of the leg. “And she did have minimal tenderness involvement in her right SI region when I examined her on 2/28/07”, Dr. Chabot noted. (Chabot Dp. pg. 48) The doctor was asked if this was consistent with the diagnosis of sacroiliac joint dysfunction, and Dr. Chabot responded – “It could”. (Chabot Dp. pg. 48) Dr. Chabot stated that in “most situations” sacroiliac joint dysfunction or sacroiliitis are probably used synonymously. (Chabot Dp. pg. 48) Dr. Chabot further testified:

“Usually, SI dysfunction would suggest that they have a chronic problem where there’s a tendency for the SI joint to come out of place, and then usually treatment involves realigning it and then focussing on stabilizing it. But sacroiliitis is primarily the inflammation associated with the malalignment.” (sic) (Chabot Dp. pg. 48)

It is found, in a review of the treatment records and the opinions, in particular those of Dr. Graven’s an authorized treating doctor, there is confusion and/or dispute as to what is the proper initial diagnosis for the claimant from the beginning of treatment up through the present; and what diagnosis is causally related to the July 16, 2005 work related injury. It is found that it was noted in an initial treatment record that Leavitt had complaints of low back pain and pain shooting down the legs, and the diagnosis in the 07/16/05 Barnes Jewish emergency room record after examination, including an x-ray, was – low back strain. Dr. Graven noted on 07/19/05 that Leavitt had complaints of low back pain central and in the sacroiliac joints bilaterally, that she denied numbness or tingling and denied bladder or bowel incontinence; exam findings included positive straight leg raise with low back pain bilaterally and essentially normal x-rays. Dr. Graven’s diagnosis on 07/19/05 was - Sacroiliac dysfunction, lumbar strain or sprain. Dr. Graven stated that his diagnosis later began to include -- lumbar radiculopathy, but agreed that the symptoms Leavitt had at that time of low back pain, radiation into the legs, into the thighs and leg length inequality were symptoms consistent with the diagnosis of SI Dysfunction. Dr. Graven started including

lumbar radiculopathy in his list of diagnoses for Leavitt beginning on about 08/30/05; the doctor testified that lumbar radiculopathy indicates pressure on the nerve root and impingement, but admitted the 09/13/05 MRI revealed that there was no disc protrusion on a nerve root at L5-S1 and further admitted that Leavitt's examination on November 8, 2005 did not elicit any weakness secondary to L5 or S1 nerve root problems, or that there was no significant weakness secondary to a nerve root problem. Dr. Graven initially testified that the diagnosis of lumbar disc protrusion and herniated disc pulposus were terms that he used interchangeably, but admitted to a difference in symptoms for the two diagnoses, and admitted that the 2005 MRI that revealed a disc protrusion and the 2006 MRI that revealed a herniated disc, and admitted that these two MRIs revealed different pathologies; Dr. Graven further admitted that the claimant's symptoms in September 2006 were substantially different that they were in 2005, and admitted that the pathology of the disc in 2006 was significantly worse. Dr. Graven admitted that it was possible the changes seen on the 2006 MRI was not caused by the original July 16, 2005 work related injury. On redirect examination, Dr. Graven was reminded that he had testified on direct examination that it was medically probable that the changes seen on the MRI was caused by the 2005 work related injury, and Dr. Graven responded that he was changing what he said, the doctor testified that he changed his opinion from "probable" to "possible" that the changes seen on the 2006 MRI were caused by the 2005 work related injury. Dr. Chabot, who evaluated Leavitt on behalf of the employer/insurer, noted that there was some documentation a few months after initiation of treatment of Leavitt in September 2005 of some symptoms of tingling radiating through the right leg which apparently were intermittent, and this could also occur with sacroiliac dysfunction or tissue inflammation and does not necessarily mean that the patient was having radiculopathy. It is my opinion that from the records initially there was no documentation of active radiculopathy in this individual, and her 2005 MRI would have confirmed that since there was no evidence of a frank herniation or neurocompression, Dr. Chabot stated. Then a year later she's seen for more significant complaints, and that is when it's noted that she has a disc herniation at the L5-S1 level, the doctor noted. Dr. Chabot testified that the MRI study from September 13, 2005 indicated evidence of disc bulging at L5-S1 and there was no evidence of nerve root compression, and the MRI study on October 26, 2006 was significantly different in that it revealed evidence of a right posterolateral disc herniation at L5-S1. Dr. Chabot stated his opinion that the MRI on October 26, 2006 was a profound change from the MRI on September 13, 2005. It's my opinion that the disc herniation could have occurred from some other event or could have occurred just based on disc degenerative changes that were noted previously, Dr. Chabot testified. Dr. Chabot stated that based on his review of the MRI films and his knowledge of that, his history from looking at the records, the history he had elicited from Leavitt, and based on his experience, his opinion was that the findings on the October 26, 2006 MRI was not substantially caused by the July 16, 2005 injury. Dr. Chabot testified that it was his opinion that it was not possible that the progression of the disc pathology seen on the 2006 MRI compared to the 2005 MRI could have been related to Leavitt's July 16, 2005 work injury. The doctor noted that the February 5, 2007 Barnes-Jewish emergency room records talked about Leavitt complaining of stabbing low back pain and numbness in the right leg and leg pain for the last two weeks; Dr. Chabot noted that this was described as a sudden onset of severe pain. Dr. Chabot testified about his opinion of what condition Leavitt had based on his exam of her and his review of the records and MRI from September 2005; the doctor stated that the diagnosis he felt Leavitt had as a result of the July 16, 2005 injury was a lumbosacral strain and sacroiliitis. Dr. Chabot testified that he never said Leavitt had a disc injury following the injury in July of 2005; it was his opinion that Leavitt had evidence of a lumbosacral strain with sacroiliitis.

It is found that Dr. Chabot's opinions are supported by the substantial weight of the competent medical evidence and thus is probative on this issue of medical causation. It is found that Dr. Chabot's opinions with the support of the other competent medical evidence establish that as a result of the July 16, 2005 work related accident at Borders, the claimant sustained the injury of - a lumbosacral strain with sacroiliitis.

ISSUE: Liability of past medical expenses in the amount of \$527.15; and Future medical care

At issue is the compensability of the emergency room treatment the claimant, Leavitt, received at Barnes-Jewish on February 5, 2007.

The records of Barnes-Jewish St. Peters Hospital Emergency Room concerning the treatment of Leavitt on February 5, 2007 (No. C) noted Leavitt's quoted complaints: "Pt moved wrong and she has stabbing low back pain. Pt has had numbness to right leg and pain to lower back x 2 weeks and today sudden onset of severe pain and Pt had a back inj a year and a half ago." The record contained a form entitled Emergency Department QualChart which noted symptoms of constant, dull spasmodic pain with movement and pain with weight bearing, and also noted associated signs and symptoms of -- numbness/tingling. A form entitled "Aftercare Instructions for Back Pain" included the following: "The back helps support much of your weight. When it is injured, almost any movement may cause pain. You may also have pain that goes down your leg. This is called sciatica, a condition caused by nerve irritation."

At the hearing, Leavitt agreed that when she went to the Emergency Room on 2/5/07 it was worse that day than any other day. She agreed that she had relayed to the ER personnel she awoke with low back pain and right leg pain on the morning of 2/5/07. It was noted that Leavitt had said that previously when she goes to sleep and wakes up in the morning she feels rejuvenated, in other words her pain was lessened typically in her back or her leg. Not every morning, but, yes, that is typical that the pain is usually worsened at night than it was in the morning, Leavitt responded. But not on 2/5/07, Leavitt agreed, I noticed that it was worse in the morning.

Leavitt stated, during cross examination, that it sounded correct that she had given this history to Dr. Chabot that she went to the Emergency Room on February 5th, 2007, which was about two or three weeks before she saw Dr. Chabot. It was noted that the Emergency Room record noted in the history that Leavitt had moved wrong and had stabbing low back pain; Leavitt was queried if she had moved wrong during the course of her workday as a bank teller. No, I don't think that it was moving wrong, Leavitt answered, I was trying to wash my hands and I tried to bend at the waist just a little bit and I could not wash my hands because of the pain that I had all day. Leavitt agreed that she had presented to the Emergency Room at about 6:45 p.m., and she had been working as a bank teller all day. She was asked if she had had to reach for coins from the coin vault. I did but I don't reach, Leavitt answered, I squat. She was asked if that had caused her any kind of complaints when she did this as a bank teller. I did have pain doing that but not as often except in the two weeks leading up to that ER visit I was having more frequency in pain, Leavitt answered. She was queried - And you reported you had numbness and right leg pain to the low back for two weeks leading up to February 5th, 2007? I did, along with pain down my right leg, Leavitt answered. It was noted that she had said she thought that she had had this aggravation going on for two weeks; Leavitt was queried if it was her testimony at the hearing she has no idea what may have happened in those ensuing two weeks leading up to the ER? I think what it was, it was just aggravation of life, just going through the movements of life and having it be aggravated, Leavitt responded. She was asked if it could it have been bending and stooping at the bank to get her coins. No, Leavitt answered, because I don't bend or stoop. It hurt, she said. She was asked if it hurt to cough or sneeze. At that time, no, Leavitt answered.

Dr. Chabot testified about his review of February 5, 2007 Barnes-Jewish emergency room records; the doctor included in his testimony that the February 5, 2007 record "...talked about her developing a stabbing -- complaining of stabbing low back pain and numbness in the right leg and leg pain for the last two weeks. And it was a sudden onset of severe pain is how it was described." (Chabot Dp. pg. 27)

Dr. Graven was the authorized treating doctor, and Dr. Graven testified that at the November 8, 2005 exam he found that Leavitt could heel and toe walk, could bend over with her hands to her toes, and her side bend and rotation was normal; the doctor agreed that he felt Leavitt was at maximum medical improvement at that point in regards to the July 16, 2005 work related injury. Dr. Graven was asked to explain what he had meant when he had said in November 2005 that Leavitt was at maximum medical improvement. "That I did not feel that her condition would drastically improve beyond that point", Dr. Graven answered. (Graven Dp. pg. 12) Dr. Graven agreed that in a November 10, 2005 letter to the insurance company he had given Leavitt a permanent partial disability rating based on her continued pain and aggravation and decreased activity.

Dr. Graven agreed that the next time he saw Leavitt was on September 26, 2006. When I saw Leavitt on September 26, 2006, she did not describe any new or different injuries since the last time she had seen me on November 8, 2005, Dr. Graven said. Dr. Graven testified, though, as to how Leavitt's physical examination had changed since the last time he had seen her:

"She had less flexibility in the lumbar spine. As you recall we talked about her being able to flex the lumbar spine, hands to the floor. This time it was only to the knees. Positive straight leg raise was also noted, and I don't believe was present in November of '05." (Graven Dp. pg. 14)

Dr. Graven stated that "(t)here could be a variety of reasons" why Leavitt's physical condition had changed to this extent. (Graven Dp. pg. 15) And further testified that it could be because "conditions change, conditions can become worse in the lumbar spine. Injuries that start can progress. Degenerative disc disease can take place. There can be additional injuries. There are, like I said, a variety of reasons." (Graven Dp. pg. 15) Dr. Graven stated that because of the change in the claimant's symptoms at the 09/26/06 exam he recommended another MRI. An MRI was performed on 10/26/06, and the substantial weight of the medical evidence establishes that this MRI revealed a new finding of a posterolateral herniation of the L5-S1 intervertebral disc to the right with extruded fragment extending into the anterolateral recess and impinging upon the S-1 nerve root. Both Dr. Graven and Dr. Chabot stated that the findings on this 2006 MRI were a substantial change from the MRI performed in September 2005. Dr. Graven stated that the physical findings on 09/26/06 were different that what he had found in November 2005, the point in time when he had determined Leavitt was at maximum medical improvement for the injuries sustained as a result of the July 16, 2005 work related accident and when he had released Leavitt from his care. Dr.

Graven testified as to his opinion of why he felt there was a need for further treatment in September and October 2006: "I guess my opinion is the condition requiring further treatment would be that herniated disc." (Graven Dp. pg. 17)

It has been determined in this Award that the injury caused as a result of the July 16, 2005 work related accident is - a lumbosacral strain with sacroiliitis. It was determined that Dr. Chabot offered a competent opinion on this diagnosis of injury the claimant had sustained as a result of the July 16, 2005 work related accident in that the doctor's opinions were supported by the substantial weight of the competent medical evidence. It is further found that the substantial weight of the medical evidence supports Dr. Chabot's opinion that Leavitt reached maximum medical improvement for the July 16, 2005 injury, the doctor stating: "Yes. It's my opinion she had." (Chabot Dp. pg. 28) Testifying as to when he felt Leavitt had reached maximum medical improvement, Dr. Chabot said: "I believe when she was released by Dr. Graven, I believe, in November of 2005." (Chabot Dp. pg. 28) The doctor was asked if he felt Leavitt was in need of any additional medical care as a result of her July 16, 2005 injury, and Dr. Chabot answered: "It's my opinion she's not." (Chabot Dp. pg. 29) Dr. Chabot further opined that Leavitt was not in need of additional care outside of her July 16, 2005 work related injury, and explained: "Because even with the disc herniation noted on her most recent MRI study she, again, did not have evidence of active radiculopathy." (Chabot Dp. pg. 29)

It is found that the substantial weight of the competent medical evidence establishes that the claimant reached maximum medical improvement for the work related injury in November 2005. Thus, any treatment subsequent to November 2005 is found not to be treatment necessary to cure and relieve the claimant from the effects of her July 16, 2005 work related injuries. It is therefore found that the bills for medical treatment at Barnes-Jewish Hospital emergency room on February 5, 2007 are not compensable.

Additionally, it is further found that the substantial and competent medical evidence establishes that the claimant is at maximum medical improvement for her July 16, 2005 work related injuries, and the substantial weight of the competent medical opinions establish that there is no need for future medical care for the claimant's July 16, 2005 work related injuries. Consequently, future medical care is denied.

See, generally, Bowers v. Hiland Dairy Co., 188 S.W.3d 79, 85 (Mo.App. S.D.,2006) in which the Court stated:

"Evidence must demonstrate that future medical care required flows from the accident in order to hold an employer liable for benefits. *Mickey v. City Wide Maintenance*, 996 S.W.2d 144, 149 (Mo.App.1999), *overruled on other grounds by Hampton*, 121 S.W.3d at 226. An employer is not responsible for compensation for future medical care unless the evidence establishes a reasonable probability that additional medical treatment is needed and, to a reasonable degree of medical certainty, that the need arose from the work injury, even if the treatment will also provide a benefit to a non-compensable condition. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App.1997), *overruled on other grounds by Hampton*, 121 S.W.3d at 226; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 888-89 (Mo.App.2001), *overruled on other grounds by Hampton*, 121 S.W.3d at 225."

ISSUE: Nature and extent of permanent partial disability

It has been determined in this Award that the injury caused as a result of the July 16, 2005 work related accident herein is - a lumbosacral strain with sacroiliitis. It has been found that the substantial weight of the competent medical evidence establishes that the claimant reached maximum medical improvement for the work related injury in November 2005.

Dr. Graven, an authorized treating doctor, testified on behalf of the claimant. Dr. Graven wrote in a treatment entry of 11/08/05 the following:

Here for final check. Has some midback pain. Seems to be worse in the low back. The low back is oftentimes not painful whatsoever. Was doing her regular job. The midback seems to be as high as 6/10. She feels this is due to her physical therapy treatment because she had no midback pain prior to physical therapy. At the present time she is able to heel and toe walk. Flex lumbar spine hands to the toes. Side bend and rotation is normal. Tender to palpation in the paraspinal and thoracic spine. She will be returned to work full duty with no restrictions. Follow up p.r.n. Has reached maximum medical improvement and final disability will be determined upon request.

Dr. Graven wrote a letter to the employer, dated November 10, 2005, in which he stated:

Ms. Jennifer Leavitt has been released from care at this time. As you well know, she sustained a low back injury and was

treated conservatively with anti-inflammatory medications and rest. During her physical therapy she did experience some midback pain and this is ongoing. At her last visit earlier this week she did have some midback pain, but most of the low back pain was quite tolerable. Her range of motion and physical exam were near normal.

At this time she had reached maximum medical improvement. I find her partial permanent disability rating to be approximately 5%; this being based on her continued pain and aggravation and decreased activity.

Dr. Chabot, an orthopedic spine surgeon who evaluated the claimant on behalf of the employer/insurer, stated that he examined Leavitt on February 28, 2007. It was noted that in his February 28, 2007 report, the doctor wrote that there appeared to be some inconsistency between Leavitt's described pain level and the perceived discomfort or distress she experienced during the course of the exam, and Dr. Chabot explained what he meant:

"During the examination she was pleasant and conversed without any difficulty. She moved about the room without any difficulty. There was no guarding on the examination which would be, you know, significant restrictions in motion or movement. There – her gait was normal. She was able to dress/undress herself without any assistance. The other issue was that she rated her pain as a 7 to 10 on – which is in the severe range which usually would suggest that a person is having pain that would require use of narcotic medication or multiple medications in order to moderate.....

She also complained of leg pain symptoms on her pain diagram but then when asked specifically was she having leg pain that day, she stated she was not." (Chabot Dp. pp. 12-13)

Dr. Chabot testified that based on his exam of Leavitt and his review of the records and MRI from September 2005, what diagnosis did he feel Leavitt had as a result of the July 16, 2005 injury. "I believe she had a lumbosacral strain and sacroiliitis", Dr. Chabot answered. (Chabot Dp. pg. 22) Dr. Chabot noted that Dr. Graven had placed Leavitt at maximum medical improvement in November 2005, and that he agreed with this. Dr. Chabot was asked if Leavitt should be on any permanent work restrictions because of the July 16, 2005 injury, and Dr. Chabot responded: "it was my opinion that she did not have to be on work restrictions." (Chabot Dp. pg. 29) Dr. Chabot testified as to his opinion of whether Leavitt had sustained any permanent partial disability as a result of the July 16, 2005 work related injury: "It was my opinion that the original recommendation of a 5 percent PPD was reasonable." (Chabot Dp. pg. 29)

Leavitt, the claimant, gave testimony about her physical conditions and problems at or around the date it has been determined in this Award that she reached maximum medical improvement for the July 16, 2005 work related injury, which it has been determined to be November 2005. During direct examination of the claimant it was noted that Dr. Graven had stated that upon seeing Leavitt on November 8, 2005 Leavitt relayed complaints to him that she had some mid-back pain and seems to be worse in the low back. Leavitt agreed that this was correct. Explaining the cause of the mid-back pain, Leavitt testified when the doctor had ordered physical therapy for my disc pressing on a nerve, they put me in something called traction where they put you on a table and put straps around your upper back, and then they tilt the table to where you're hanging from the straps, and that hurt my upper back right around where my bra line is. I told him I didn't want to do that anymore and we didn't, she said. Leavitt agreed that she did have some mid-back pain from that. It was noted that in a November of 2005 examination, Dr. Graven had reported that Leavitt was able to flex forward with her hands to her toes; Leavitt was asked if she believes she was able to do that at his office. No, Leavitt answered. I haven't been able to touch my toes since the incident, she explained. I might have been able to go a little bit further like maybe at my calves, she said. It was noted that Dr. Graven wrote in November 2005 that Leavitt relayed the low back is oftentimes not painful whatsoever. Leavitt responded that this was not an accurate statement. I did still have constant pain in my lower back, she stated. I did have good days to where it wasn't all the time, she added. Leavitt agreed that there were days when she was pain free, but further stated it was not often. It was noted that Dr. Graven had also rated Leavitt with permanent disability and had said it was based on her continuing pain and aggravation and decreased activity, and Leavitt stated that Dr. Graven's statements regarding her continuing pain and aggravation and decreased activity in November 2005 were accurate. Leavitt testified that she was having aggravation at that time. Explaining what she meant by aggravation, Leavitt said from everyday life; just trying to bend over, tie shoes, or put on pants, or getting in and out of the car; that aggravates it and makes the pain worse. Leavitt agreed that she had next seen Dr. Graven on September 26, 2006. When I saw Dr. Graven again in September of 2006 compared to when I had last seen him on November 8, 2005, my complaints were worse, Leavitt testified. Just the aggravation, she explained, my mobility had gone down, I was not able to do different things still. I felt that it had proceeded to get worse and not better, she said. The pain was in my lower back, Leavitt stated, and the numbness and tingling with pain down my right leg had gone further than what it was before the previous year. She was asked if the right leg pain with numbness and tingling had gone below her knee before. When I had seen the doctor in 2005 it had receded a bit, Leavitt stated, but it had gone back throughout the course of the next year.

It was noted, during direct examination of the claimant, that three weeks before she saw Dr. Chabot on February 5, 2007 Leavitt had visited Barnes Jewish Emergency Room; she was asked why she had gone then. I went because a couple weeks prior my back had become aggravated along with my right leg and it just got to a point where I couldn't take it anymore and I went ahead and went to the ER, Leavitt answered. It was noted that the report said Leavitt had had pain for two weeks, and she was asked what that meant. It meant that it had been aggravated throughout the two weeks prior to the visit to the ER, Leavitt answered. She was asked what caused her to go to the ER. I was working at the bank during one of my shifts and I had been having pain throughout the day and I had actually woke up in pain that morning, which is unusual, because sleeping at night usually alleviates the pain because laying down helps, Leavitt stated. But that morning it had been bad and when I'd gotten through about half of my day I had gone back and gone to the bathroom and wanted to wash my hands, and just the fact of bending just a little bit to wash my hands, that was the final straw; I hurt too much to wash my hands, so I called my boyfriend and had him drive me to the ER, Leavitt testified. This was not at the end of my work shift, Leavitt said. It was noted that the ER report says Leavitt had told them her chief complaint was not work related, but she also filled out a Workers' Compensation form stating she was injured at Borders on July 16, 2005; Leavitt was queried what did she mean when she said not work related. It wasn't work related to the bank, she answered. Leavitt explained the notation in the ER note that said - sick to stomach because of the pain: Whenever the pain gets to a high point I do get sick and nauseated, and sometimes I do throw up from the pain, Leavitt explained. She agreed that she was feeling that way that day. Leavitt was asked why did she go to the ER instead of calling the doctor. I was told not to go to a doctor because of Liberty Mutual has to tell me what doctors to go to, Leavitt answered, I felt that the ER was my only choice. She agreed that at that time she was not treating with Dr. Graven. On cross examination, it was noted that the Emergency Room record noted in the history that Leavitt had moved wrong and had stabbing low back pain; Leavitt was queried if she had moved wrong during the course of her workday as a bank teller. No, I don't think that it was moving wrong, Leavitt answered, I was trying to wash my hands and I tried to bend at the waist just a little bit and I could not wash my hands because of the pain that I had all day. Leavitt agreed that she had presented to the Emergency Room at about 6:45 p.m., and she had been working as a bank teller all day. She was asked if she had had to reach for coins from the coin vault. I did but I don't reach, Leavitt answered, I squat. She was asked if that had caused her any kind of complaints when she did this as a bank teller. I did have pain doing that but not as often except in the two weeks leading up to that ER visit I was having more frequency in pain, Leavitt answered. She agreed that it was her testimony today at the hearing that moving wrong was that she tried to bend to wash her hands over the sink at work on February --. I think that's what they took -- "bending wrong", but I don't think it was wrong to bend at the waist a little bit to wash my hands, Leavitt added. She was queried - And you reported you had numbness and right leg pain to the low back for two weeks leading up to February 5th, 2007? I did, along with pain down my right leg, Leavitt answered. It was noted that she had said she thought that she had had this aggravation going on for two weeks; Leavitt was queried if it was her testimony at the hearing she has no idea what may have happened in those ensuing two weeks leading up to the ER? I think what it was, it was just aggravation of life, just going through the movements of life and having it be aggravated, Leavitt responded. She was asked if it could it have been bending and stooping at the bank to get her coins. No, Leavitt answered, because I don't bend or stoop. It hurt, she said. She was asked if it hurt to cough or sneeze. At that time, no, Leavitt answered. Leavitt agreed, during cross examination, that when she went to the Emergency Room on 2/5/07 it was worse that day than any other day. She agreed that she had said she awoke with low back pain and right leg pain on the morning of 2/5/07. It was noted that Leavitt had said that previously when she goes to sleep and wakes up in the morning she feels rejuvenated, in other words her pain was lessened typically in her back or her leg. Not every morning, but, yes, that is typical that the pain is usually worsened at night than it was in the morning, Leavitt responded. But not on 2/5/07, Leavitt agreed, I noticed that it was worse in the morning.

Leavitt agreed, during cross examination, that it is fair to say that since Dr. Graven placed her at maximum medical improvement on November 8, 2005 there's been no doctor that's excused her from work since that time. There has not been any other doctor who has taken me off work for hip or back or leg complaints, Leavitt stated.

During direct examination, it was noted that Leavitt had seen Dr. Chabot on February 28, 2007, and that Dr. Chabot said Leavitt had told him she had persisting numbness in the right leg; she was asked what did she actually tell Dr. Chabot about the right leg. That I had pain and numbness and tingling down my right leg, Leavitt answered. It was noted that Dr. Chabot said Leavitt had continued back complaints for the past one and a half years, and Leavitt was asked if she had complaints other than just the back. Yes, my right leg, Leavitt responded, numbness, pain, tingling. Leavitt indicated that she disagreed with Dr. Chabot that she had rated her pain in the severe range, meaning severe all the time. Not all the time, just some of the time, Leavitt answered. She agreed that she had testified earlier good days and bad days. On the good days it's probably rated at about a 4 and on the bad days it's probably about a 7 to an 8, Leavitt stated. She agreed that Dr. Chabot's statements were true that she had reported that she remained cautious when performing certain activities, especially bending and twisting, she has difficulty bending over to tie her shoes and difficulty hiking in the woods and difficulty participating in intercourse

because of back pain. Agreeing that in doing those things she is limited by things other than just back pain, Leavitt stated I'm limited by the numbness and the pain and tingling going down my right leg. It was noted that when she saw Dr. Chabot in February of 2007 she had said she was working full-time as a bank teller. I started working as a bank teller in September of 2006, Leavitt said. I was not limited in any of the activities I was required to perform as a bank teller, Leavitt said. She was queried if she had chosen to limit any of the activities she did as a bank teller. I did with the rolled coins because they're heavy, Leavitt answered. I would have to make more trips back and forth; I do not carry a lot, she testified. I need to get the rolled coins in the morning whenever we open, she stated, and then at night when I put them away, and whenever you run out of rolled coins for a customer that comes in, then you have to go back to your vault and unlock it and get more out. Leavitt agreed that this was the significant lifting she had to do, and she found ways to go around it. I worked as a bank teller from September of 2006 to March of 2007, Leavitt stated. Explaining why she had quit at the bank, Leavitt stated because they wouldn't work around my school schedule. They said that they would, and they did not, and the Borders in Creve Coeur offered a position that worked around my school schedule, Leavitt stated. She agreed this was March of 2007. It was noted that Dr. Chabot mentioned that when he saw Leavitt he thought she wasn't in distress, and that at the time that she filled out his chart he found it inconsistent that Leavitt marked a 7 as her pain at that time; Leavitt was asked how would she explain this. I believe my pain at that time, whenever I went in, was a 4; it's at a 7 whenever it's at its worst on the days that I have bad days, she responded. It was noted that it looked like Leavitt might have X'd the 7 saying that's how bad she was; she was asked what is your typical demeanor. I'm a happy person, I'm positive, I'm outgoing, Leavitt answered, I have to be because the pain will drive me crazy. So I have to be the way that I am now so that I don't go crazy from the pain, she said. She was queried - So when Dr. Chabot seems to think it's inconsistent that you don't look like you were hurting at the time that he saw you, were you saying that you were hurting at that time? I was hurting, Leavitt answered. I was told by my parents that it's rude to show that you're in pain and to complain about it, Leavitt stated. It's just the way that I am, she said. During cross examination, Dr. Chabot's records (Employer/Insurer's Exhibit No. 1) were shown to the claimant. Leavitt agreed that there was a 6-page kind of a questionnaire that she was asked to fill out in advance of her employment. That's my handwriting on that first page, Leavitt stated. Leavitt agreed that when she went to see Dr. Chabot on February 28, 2007, which was about two weeks after her emergency room visit, he asked her to fill out a diagram for where she felt her pain was and with little symbols about how to describe sharp pain, numbness and tingling, and she had done this. She was queried if the doctor had asked her to draw it for what she was feeling the date of the exam on February 28, 2007, and what it felt like the date of the injury. I don't remember, Leavitt answered. The claimant was again referred to Employer/Insurer's Exhibit 1 with the enclosed Exhibit 2; it was noted that it said pain level shortly after the injury and there's a little body of a man there, and there was a little key for symbols of what to draw on the man to describe to the doctor what she was feeling, she had drawn horizontal lines across the right leg to the knee on the front of the man. That looks correct, the Leavitt answered. On the back of the man with regard to the leg, it was noted, Leavitt had put again just the horizontal lines down to the knee and maybe a couple inches below. Leavitt agreed. She explained that the key said the horizontal lines meant numbness or tingling. Leavitt agreed that with regard to the low back she had put the symbol for sharp, stabbing pins and needles. She further agreed that she had not put those anywhere on the right leg. The claimant was queried - So to Dr. Chabot, according to the diagram you gave him, you had numbness and tingling but not pain down the right leg; is that correct? According to my little man person, yes, Leavitt answered. She was asked if on February 28, 2007 the doctor had asked her to also draw on a diagram the same kind of things to describe her pain level that day. It was a year ago, but I vaguely recall filling these diagrams out myself, Leavitt said. Leavitt agreed that again for pain level that day, on February 28, 2007, again the only thing she drew on the right leg was a horizontal line. She agreed that she did use the other symbols with reference to the low back, she only drew numbness and tingling on the leg, she didn't note sharp stabbing or burning pain at all down the leg. My pain down my leg was different than that though, Leavitt further noted. .

It is found, considering the evidence, that the claimant's testimony often was inconsistent with the medical records, putting into question the claimant's truthfulness about her continued symptoms and indicating a tendency to exaggerate her continued problems. Thus, the claimant's comments about her continuing problems from the work related injury will be given only some weight. It is found, though, that there is sufficient competent and substantial evidence to support an award for permanent partial disability for the July 16, 2005 work related injury of lumbosacral strain with sacroiliitis. It is found that the evidence supports an award of 12.5% permanent partial disability of the body as a whole at the level of the low back. This would be: $400 \text{ weeks} \times 12.5\% = 50 \text{ weeks}$; $50 \text{ weeks} \times \$87.90/\text{week} = \$4395.00$.

NOTE: It was noted at the beginning of the hearing that this is a hardship hearing and the Claimant is seeking a Temporary or Partial Award. At the point in the beginning of the hearing where issues in dispute to be decided in this hearing are listed, the claimant's listed issues included future medical care, and the employer/insurer put into issue permanent partial disability,. The employer/insurer stated that their position is that the evidence supports a finding for a Final Award in that an

opinion of permanent partial disability has been addressed by their medical expert in this case.

It has been determined in this Award that the substantial weight of the competent evidence establishes that the claimant is at maximum medical improvement for her work related injuries herein. As it turns out, the evidence reveals that the claimant's medical expert also issued a permanent partial disability opinion in his testimony and treatment record at the point that it has been determined in this Award that the claimant was at maximum medical improvement for her work related injury. As the issue of permanent partial disability was raised by the employer/insurer at the beginning of the hearing, it is found that the claimant had notice of this issue at the beginning of the hearing and thus had an opportunity to be heard on the permanent partial disability issue before its resolution. It is found that the record supports a determination for permanent partial disability, and thus an issuing of a Final Award.

See, generally, Bock ex rel. Bock v. Broadway Ford Truck Sales, Inc., 169 S.W.3d 143, 147 (Mo.App. E.D.,2005) which is found to be distinguished from the case herein in that in *Bock* was the parties did not have prior notice of and an opportunity to be heard on the permanent partial disability issue before its resolution:

“The parties have not directed us to, and we have not found, any case addressing the finality of an award issued after a hardship hearing that includes an award of PPD. While, as Employer/Insurer pointed out during argument, there is no statutory prohibition against issuing a final award in resolving issues at a hardship hearing, there is no statutory authority for such an award either. Nor can we condone the transformation of an otherwise non-final award into a final award merely because the award, issued after a hardship hearing, includes a resolution of PPD issues, particularly where, as here, the parties have not either agreed to or had prior notice of and an opportunity to be heard on the PPD issues before their resolution.”

See, also, Boyer v. National Express Co., Inc., 49 S.W.3d 700, 705 -706 (Mo.App. E.D.,2001) which is found to be distinguished from this case herein where the Court held that the Commission acts in excess of its powers in making an award on a ground not in issue:

“Here, the Order of the Commission provides that the “nature and extent of permanent disability” was an issue stipulated for trial. However, the record clearly shows it was not. Pursuant to the stipulation, Boyer did not present any evidence as to his permanent partial disability. In Dr. Samson's deposition, he rendered an opinion as to Boyer's permanent partial disability, but the issue was not discussed by the parties or the ALJ at the hearing.

In its adoption and affirmance of the ALJ's findings and conclusions, Commission's decision to award a percentage of permanent partial disability went beyond the issues stipulated for trial and was in excess of its power. Thus, the award must be reversed and the cause remanded to provide Boyer an opportunity to present evidence as to the percentage of permanent partial disability.”

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The Second Injury Fund claim remains open.

SUMMARY OF THE EVIDENCE

Jennifer Diane Leavitt, the claimant, testified that she lives in St. Ann, Missouri. I was born on June 17, 1980, and I am 27 years old today, Leavitt stated. I am 5 foot 6 and weigh 218 pounds, the claimant said. I am currently working full time at Borders, she said. I am an inventory shelver with SPO also, it is for special orders, Leavitt testified, I call the customers, and I do shelving. Agreeing that she is also a college student, Leavitt testified to the classes she is currently taking. I'm currently part time for the first time in my life, she said, I'm taking 9 hours of classes. I have 2 literature classes that I have to attend Monday through Thursday for one and a half hours, and I also have an internet course that I work on over the weekend, the claimant stated. I am pursuing a Bachelor's in English with a minor in Communications, Leavitt testified, and I am going to go for my Masters in Library Sciences to become a Librarian.

Leavitt agreed that she was at the hearing to discuss a Workers' Compensation claim that she filed stemming from an accident that happened back in 2005 while she was were working at Borders. When I was working at that time in July of 2005 for Borders I worked about 15, 16 hours per week; it was only two days a week, she said. Testifying about other work she was doing then, Leavitt said I was working part time at the library also 20 hours a week; Monday, Tuesday and Thursday 5 to 9, and then 9:30 to 6 on Saturdays. This was the library at the Spencer Road location in St. Charles County, she stated, which is the St. Charles County Library system. Leavitt was asked if she was also a student at that time, and she responded - At the time of the injury it was in the summer, so no. I did start up fall classes in August though, she added. But in July I wasn't going to school, she agreed.

Leavitt testified as to how the July 2005 accident happened. I was at a Harry Potter release book party for Number 6 and they have a lot of people in the area of Borders, and they had me in a photo opportunity in a corner over by the elevator all by myself, the claimant stated. There was someone there previously and I took over her position, she said. They had a stool, and they had children that parents were picking up and putting on the stool because it was too high for them to get on the stool. And some of the grandparents could not lift them, and I thought who better to lift the child than myself, Leavitt stated. I had one child in particular that when I lifted her I don't know if she jumped or something happened, I felt a pop in my back and immediate pain in my lower back and down my legs and my right hip, Leavitt testified. I tried to keep working, Leavitt stated, it didn't happen because I was in too much pain, I was crying. I went ahead and notified my two supervisors, Angie Jackson and Jason Elliott, about what had happened. I went back to the sofa in the break room and laid flat on my back, Leavitt said. And they had to go sell the book which had just been released so they left me alone, she said. Leavitt agreed that this was one of the parties where they don't start selling until midnight. Agreeing that they then kept selling for a couple more hours, Leavitt stated they were open until about 3 or 4:00 in the morning. I'm not sure how long I was in the back room before I left, Leavitt said, I was in a lot of pain and I wasn't watching the clock. I was probably back there an hour or two by myself, she stated. I did not end up working any more, the claimant said, I couldn't work anymore. I went ahead and told them to call my roommate who would come and pick me up. Agreeing that that is what he did, Leavitt stated that he had a couple of people, including some supervisors, help me out to the car and he drove me home. Leavitt agreed that when she got home it was still kind of the middle of the night.

What I did next was I took some pills to relieve pain which didn't work, Leavitt testified. I tried to sleep some in the morning. It was probably about six hours later, she said. I tried to eat something. I agreed to go to the hospital but I started throwing up from the pain and it scared my roommate and he called an ambulance, he called 911. Leavitt agreed that's how she ended up at Barnes Jewish.

When I got to the Emergency Room what I told the workers at the hospital about my pain, Leavitt testified, I told them at the hospital what had happened in the incident of how I lifted the child and felt the pop in my back and my lower back pain and my right hip pain and then my pain down my legs. At the Emergency Room they prescribed me Darvocet for when I left but first they gave me some kind of shot that made me goofy and I remember I was kind of vague on what happened but I think that they did an x-ray of my back, and I remember my parents showing up. Leavitt agreed that she was released that day. She agreed that it was her parents that took her home. The next time that I saw a doctor for my back was a couple days later, Leavitt said, I had an appointment with Dr. Graven. Explaining how this appointment was made, the claimant stated that Jason Elliott, the supervisor at the time at Borders, she had called him the same day she had gone to the hospital. I don't remember if I called him from the hospital or from home, but he had told me about an appointment that was set up for me, Leavitt stated. She stated that she thought the first time she saw Dr. Graven was July 19, 2005. I had never seen Dr. Graven before that, Leavitt said. The claimant stated that she had never had a back injury before this. Discussing the type of treatment Dr. Graven suggested, Leavitt stated that doctor suggested physical therapy and had said that her hip was off. I don't know what off means, Leavitt said, but he showed me with his hands that one hipbone was cockeyed, different than the other one, and it made it so that one leg was longer than the other, and the doctor said that could cause my back pain and my hip pain. Leavitt agreed that she went to the physical therapy Dr. Graven had sent her to. Leavitt stated it was correct what was reflected in the report of the physical therapist, that when she went she said she had back and hip pain, and pain radiating into her posterior knees bilaterally. By posterior knees, I believe it was that the back of my knees, Leavitt

said. I think I next saw Dr. Graven a month later, Leavitt said, and agreed that it sounded correct the next visit was August 2, 2005. During the time I was having physical therapy and seeing Dr. Graven I felt like I had improved a little bit, Leavitt testified, my range of mobility was better. It was noted that Dr. Graven's note said - was doing well until this weekend and the pain has returned; Leavitt was asked if she remembered anything in particular happening to cause more pain. No, I don't remember, she answered. Leavitt agreed that she was back to work by then. It was noted that Dr. Graven's report to the Employer dated August 2, 2005 said - return physical therapy, but then there aren't any physical therapy notes for the month of August; the claimant was queried if she knew why she didn't go to physical therapy that month. I have no idea, Leavitt answered. She agreed it was true that she did not go. It was noted that after the August 2, 2005 appointment Leavitt next saw Dr. Graven on August 30, 2005, and she was asked what were her complaints to Dr. Graven at that time. I had started up school and I had noticed from sitting at school I was having pain with numbness and tingling down my right leg, Leavitt answered. And it happened after sitting for a while and then when I stand up and I'd have to move around some and I was complaining to him about that and my lower back pain, and he recommended an MRI, which I believe was the first one, and also more physical therapy, Leavitt further said. Leavitt agreed that she started back to school in August. She agreed that she was saying she had noticed some complaints in her right leg from sitting in class, and that's when Dr. Graven ordered an MRI. Leavitt agreed that she did go in and see Dr. Graven on August 30th and the doctor ordered her to have an MRI. I did go do that MRI in the same building Dr. Graven is in, she said. Agreeing that following that MRI she had talked to Dr. Graven about what the MRI showed, Leavitt stated the doctor said that my disc was pressing on my nerve in my back which was causing the pain and numbness and tingling down my right leg. And so on top of the physical therapy I had for my hip and my lower back, the doctor wanted special physical therapy for that problem also, Leavitt stated. She agreed that the MRI was performed on September 13, 2005 and she saw Dr. Graven following the MRI on September 16, 2005, and then she returned to physical therapy at the same place she had gone during the month of July. It was noted that the physical therapist had written an initial exam note on September 16, 2005 showing increasing low back pain and right lower extremity paresthesia over the past two weeks; the claimant was asked if this was correct. Yes, Leavitt answered. She was asked what her back pain was like at that time. At that time it was at a constant, she answered. With sitting or standing for greater than an hour, in regards to my back, I was in excruciating pain, Leavitt stated. During that period of time I was not sleeping well at all, Leavitt said, I would wake up every couple hours and move. Leavitt agreed that the physical therapist's reference to this sleep problem was the notation - sleep moderately disturbed due to discomfort. Agreeing that there were activities that increased her back pain, Leavitt testified I couldn't bend over, for example, to tie my shoes, I definitely cannot lift, I could not lift anything more than, let's say, a gallon of milk or something like that. It was noted that the therapist had noticed that coughing or sneezing caused low back pain, and Leavitt was asked if she recalled that happening. I do recall that, the claimant responded, sneezing, coughing, anything like that did cause pain in my lower back. Leavitt stated she remembered the therapist asking her to reach forward as to touch her toes, and she was not able to do that then. Since the injury I haven't been able to touch my toes, Leavitt explained. She agreed that as the physical therapist had reported, at that September 16 visit she was limited by pain down her right leg. And then my lower back, Leavitt added. She was asked how far did the pain go down in her right leg. It went a little bit further past my knee, she answered. Leavitt agreed that she did participate in the physical therapy ordered, and that she had continued to work during that time. The physical therapy brought me a little bit of relief, Leavitt said. I felt that I was improving in my mobility and in level of pain because they gave me breathing exercises to do at home also, and I was continuing the exercises at home. It was noted that the last physical therapy note of October 6, 2005 said that Leavitt had continued to have lumbar discomfort especially at the end of the day. Leavitt responded that this was correct. She agreed that, as also indicated in the note, occasional episodes of right lower leg, or extremity, tingling while sitting at school. She was asked if there was ever a period of time, say a week, in October of 2005, when she was completely pain free. No, never, Leavitt answered, I would have good days and bad days but never an entire week without pain. She was queried - While you continued to work and go to school what types of activities caused you to feel pain in October of 2005? A lot of the same thing with bending over and tying shoes, she stated, or I couldn't lift large amounts of books or anything like that. I would just take a few in my hand, the claimant said. With shelving, I would have to squat in order to get on the lower shelves, Leavitt said, and sitting to get on the lower shelves, so it was difficult to do my job.

Leavitt stated that it was accurate what Dr. Graven had written when she had next seen him on October 11, 2005, that she continued to have some pain with some times having no pain, worse after working all day and better on her days off. Sometimes I had no pain, but still had some, she agreed. Leavitt stated it was not correct what Dr. Graven had said that she was working out at the Rec Plex. I was working out at 24-Hour Fitness; I had paid for a membership in May of 2005, Leavitt stated. She agreed that May was just a couple months before her accident. Leavitt was asked, when she talked to Dr. Graven about this in October 2005, what kinds of exercise was she able to do when she went to the gym. I did walking because I love walking and I did avoid the elliptical machine and I did some swimming, but not often. I did not lift weights, and I was not able to run, Leavitt said. She agreed that Dr. Graven had continued to report to the Employer that she had lumbar radiculopathy, but he did not send her back to physical therapy at that time.

At this pointing the hearing, Leavitt stood. She was asked why, and she responded - My back hurts. She explained that it was at her lower back, about where your belt is.

It was noted that Dr. Graven had noted on November 8, 2005 after seeing Leavitt that she had reported she had some mid-back pain and seems to be worse in the low back, and Leavitt agreed. Explaining the cause of the mid-back pain, Leavitt testified when the doctor had ordered physical therapy for my disc pressing on a nerve, they put me in something called traction where they put you on a table and put straps around your upper back, and then they tilt the table to where you're hanging from the straps, and that hurt my upper back right around where my bra line is. I told him I didn't want to do that anymore and we didn't, she said. Leavitt agreed that she had did have some mid-back pain from that. It was noted that at that time in November of 2005 Dr. Graven had reported that Leavitt was able to flex forward with her hands to her toes; Leavitt was asked if she believes she was able to do that at his office. No, Leavitt answered. I haven't been able to touch my toes since the incident, she explained. I might have been able to go a little bit further like maybe at my calves, she said. It was noted that Dr. Graven wrote in November 2005 that the low back is oftentimes not painful whatsoever; Leavitt was asked if this was an accurate statement. No, she answered. I did have still constant pain in my lower back, she stated. I did have good days to where it wasn't, all the time. She agreed that there were days when she was pain free, but further stated it was not often. Leavitt said she would not agree with the term – oftentimes. She stated that she did not know that at that time that Dr. Graven was releasing her from treatment. She was asked her understanding. My understanding was that it was kind of like a we'll see type of thing, Leavitt stated. She was further queried as to what she had thought when she left the doctor's office in November of 2005. I thought that I was going to receive more treatment, Leavitt said. It was noted that at that time Dr. Graven had written a letter to the insurance company saying that Leavitt had reached maximum medical improvement; she was asked if she had known that was the doctor's opinion at that time. No, Leavitt said. It was noted that Dr. Graven had also rated Leavitt with permanent disability and had said it was based on her continuing pain and aggravation and decreased activity; Leavitt was asked if the doctor's statement regarding continuing pain and aggravation and decreased activity accurate. Yes, Leavitt answered. The claimant stated that she was having aggravation at that time. She explained what she meant by aggravation: From everyday life; just trying to bend over, tie shoes, or put on pants, or getting in and out of the car; that aggravates it and makes the pain worse, Leavitt testified.

Leavitt testified about how she had found out that Dr. Graven had released her from medical care. I found out through a letter I received from Liberty Mutual in January, she said. She agreed that it was a letter offering to settle her claim. Discussing her reaction to this, Leavitt stated I had already decided that I still needed more help and that I needed more treatment. Leavitt agreed that following that November 8th visit to Dr. Graven, she didn't have another appointment scheduled. Leavitt agreed that she had tried to contact Dr. Graven again. But someone at Dr. Graven's office told me that I had to go through Liberty Mutual in order to get another appointment, Leavitt said. Agreeing that she had called Dr. Graven's office, Leavitt stated that she had asked for another appointment or to see what was happening. This was in late November, early December, Leavitt said. It was noted that she had then gotten the letter from the insurance company, and Leavitt was asked what had she done then. I had called the insurance company and because it said on the letter that if you do not dispute, or something, and call us, so I went ahead and called them and told them that I wanted to seek further treatment. She agreed that she had called whoever's name and number was on the letter she had. Explaining what happened next, Leavitt stated I kind of worked back and forth on what I want to do whether or not to seek counsel. So I went ahead and I did get a lawyer in May of 2006. Leavitt agreed that this was after she had spoken to somebody at Liberty Mutual asking for more medical treatment. She was asked if they had offered her any more medical treatment then. No, Leavitt answered. I don't think they told me no, the claimant stated, I think they said that they would get back to me. She agreed that she had then hired a lawyer.

Leavitt agreed that she had next seen Dr. Graven on September 26, 2006, and that she had been sent again by Liberty Mutual. When I saw Dr. Graven again in September of 2006 compared to when I had last seen him on November 8, 2005, my complaints were worse. Just the aggravation,, she explained, my mobility had gone down, I was not able to do different things still, I felt that it had proceeded to get worse and not better. The pain was in my lower back, Leavitt stated, and the numbness and tingling with pain down my right leg had gone further than what it was before the previous year. She was asked if the right leg pain with numbness and tingling had gone below her knee before. When I had seen the doctor in 2005 it had receded a bit, Leavitt stated, but it had gone back throughout the course of the next year. Leavitt stated that when she had told Dr. Graven back on August 30, 2005 that she was having pain with numbness and tingling into her right leg and he had ordered the first MRI, the complaints were similar to the ones she had in September of 2006. Leavitt was queried that she had said there was a period when she had gotten better but then the complaints had gone back to the same level. It was back to the same level after not doing physical therapy for a period of time, she explained. But then it progressively got worse over the course of the next year, she stated. Leavitt stated that she had not seen any other doctors about these complaints between the last time she had seen Dr. Graven in 2005 and when she ext saw him in September of 2006. She

explained this was because I was told through my lawyer and Liberty Mutual that I could not see any other doctors unless it was prescribed through Liberty Mutual.

Leavitt stated that between the last time when she saw Dr. Graven in 2005 and when she next saw him in 2006, she had not had any slips, trips or falls during that time. She stated that there was no time when she remembers doing anything that caused a sharp increase in her pain. She was asked if the increase in pain was just in her low back or both her low back and her right leg. It was both of these, Leavitt answered.

When I saw Dr. Graven in September 2006 he recommended another MRI, Leavitt testified. I returned to see Dr. Graven after that MRI to go over the results and he said that it looked like it had gotten worse, Leavitt stated. It was the same disc, she said. And he said it looked like there was another area that was poking out, pressing on a nerve, and he recommended at the time that since I had inflammation that would not go down, back injections, and then physical therapy to help with the inflammation to go down, and if that didn't work then he recommended back surgery. I have not had those injections, Leavitt said. Because Liberty Mutual did not allow for those to go through, she explained. Leavitt testified that she wanted to have them. Liberty Mutual next wanted a second opinion, and that's when I went to Dr. Chabot, the claimant stated.

It was noted that Leavitt had seen Dr. Chabot on February 28, 2007, and it was noted that Dr. Chabot stated in his February 28, 2007 report that after the initial accident Leavitt had gone home and the next morning she noted an increase in her pain to the point that her roommate called the ambulance. Leavitt was asked if this was why her roommate had called the ambulance, just because she had noted an increase in pain. No, Leavitt answered, the pain was just as bad as it was the night before, but I started throwing up because of the pain and that frightened my roommate into calling 911. It was noted that Dr. Chabot said Leavitt had told him she had persisting numbness in the right leg; she was asked what did she actually tell Dr. Chabot about the right leg. That I had pain and numbness and tingling down my right leg, Leavitt answered. It was noted that Dr. Chabot said Leavitt had continued back complaints for the past one and a half years, and Leavitt was asked if she had complaints other than just the back. Yes, my right leg, Leavitt responded, numbness, pain, tingling. Leavitt indicated that she disagreed with Dr. Chabot that she had rated her pain in the severe range, meaning severe all the time, Not all the time, just some of the time, Leavitt answered. She agreed that she had testified earlier good days and bad days. On the good days it's probably rated at about a 4 and on the bad days it's probably about a 7 to an 8, Leavitt stated. She agreed that Dr. Chabot's statements were true that she had reported that she remained cautious when performing certain activities, especially bending and twisting, she has difficulty bending over to tie her shoes and difficulty hiking in the woods and difficulty participating in intercourse because of back pain. Agreeing that in doing those things she is limited by things other than just back pain, Leavitt stated I'm limited by the numbness and the pain and tingling going down my right leg. Leavitt stated Dr. Chabot was inaccurate that she had reported to him that she did some home exercises including walking on an elliptical. I wasn't on the elliptical machine, Leavitt stated, I told him that I avoided it and I walked on the treadmill. The claimant disagreed with Dr. Chabot that she had reported that her busy schedule kept her from performing a regular exercise program. The pain limited me in my exercise program, Leavitt said. It was noted that when she saw Dr. Chabot in February of 2007 she had said she was working full-time as a bank teller. I started working as a bank teller in September of 2006, Leavitt said. I was not limited in any of the activities I was required to perform as a bank teller, Leavitt said. She was queried if she had chosen to limit any of the activities she did as a bank teller. I did with the rolled coins because they're heavy, Leavitt answered. I would have to make more trips back and forth; I do not carry a lot, she testified. I need to get the rolled coins in the morning whenever we open, she stated, and then at night when I put them away, and whenever you run out of rolled coins for a customer that comes in, then you have to go back to your vault and unlock it and get more out. Leavitt agreed that this was the significant lifting she had to do, and she found ways to go around it. I worked as a bank teller from September of 2006 to March of 2007, Leavitt stated. I had never worked as a bank teller in 2005 or any time up to or before September of 2006, she said. Explaining why she had quit at the bank, Leavitt stated because they wouldn't work around my school schedule. They said that they would, and they did not, and the Borders in Creve Coeur offered a position that worked around my school schedule, Leavitt stated. She agreed this was March of 2007. It was noted that Dr. Chabot reported Leavitt so worked at Borders at the same time she was working at the bank; Leavitt was asked - During the time that you worked as a bank teller how many times did you work at Borders? I believe it was twice in December, Leavitt answered, and then one day in January. She was asked if this was considered fill-in. They called and told me I could come in and alphabetize, so I came in and alphabetized the books, she answered. Leavitt agreed that while she was a bank teller full time she really wasn't working a regular schedule at Borders. They call it contingent, she explained. When I was working every other Sunday at a library, during this time period when I saw Dr. Chabot, I was working 4 hours the every other Sunday. It was noted that Dr. Chabot mentioned that when he saw Leavitt he thought she wasn't in distress, and that at the time that she filled out his chart he found it inconsistent that Leavitt marked a 7 as her pain at that time; Leavitt was asked how would she explain this. I believe my pain at that time, whenever I went in, was a 4; it's at a 7 whenever it's at its worst on the days that I have bad days, she

responded. It was noted that it looked like Leavitt might have X'd the 7 saying that's how bad she was; she was asked what is your typical demeanor. I'm a happy person, I'm positive, I'm outgoing, Leavitt answered, I have to be because the pain will drive me crazy. So I have to be the way that I am now so that I don't go crazy from the pain, she said. She was queried - So when Dr. Chabot seems to think it's inconsistent that you don't look like you were hurting at the time that he saw you, were you saying that you were hurting at that time? I was hurting, Leavitt answered. I was told by my parents that it's rude to show that you're in pain and to complain about it, Leavitt stated. It's just the way that I am, she said.

It was noted that three weeks before she saw Dr. Chabot on February 5, 2007 Leavitt had visited Barnes Jewish Emergency Room; she was asked why she had gone then. I went because a couple weeks prior my back had become aggravated along with my right leg and it just got to a point where I couldn't take it anymore and I went ahead and went to the ER, Leavitt answered. It was noted that the report said Leavitt had had pain for two weeks, and she was asked what that meant. It meant that it had been aggravated throughout the two weeks prior to the visit to the ER, Leavitt answered. She was asked what caused her to go to the ER. I was working at the bank during one of my shifts and I had been having pain throughout the day and I had actually woke up in pain that morning, which is unusual, because sleeping at night usually alleviates the pain because laying down helps, Leavitt stated. But that morning it had been bad and when I'd gotten through about half of my day I had gone back and gone to the bathroom and wanted to wash my hands, and just the fact of bending just a little bit to wash my hands, that was the final straw; I hurt too much to wash my hands, so I called my boyfriend and had him drive me to the ER, Leavitt testified. This was not at the end of my work shift, Leavitt said. After this happened I sat on the floor for a while until he could come and pick me up, she stated. Leavitt agreed that he then he took her. It was not that the ER report says Leavitt had told them her chief complaint was not work related, but she also filled out a Workers' Compensation form stating she was injured at Borders on July 16, 2005; Leavitt was queried what did she mean when she said not work related. It wasn't work related to the bank, she answered. Leavitt explained the notation in the ER note that said - sick to stomach because of the pain: Whenever the pain gets to a high point I do get sick and nauseated, and sometimes I do throw up from the pain, Leavitt explained. She agreed that she was feeling that way that day. Leavitt was asked why did she go to the ER instead of calling the doctor. I was told not to go to a doctor because of Liberty Mutual has to tell me what doctors to go to, Leavitt answered, I felt that the ER was my only choice. She agreed that at that time she was not treating with Dr. Graven.

In regards to Dr. Chabot's report dated February 28, 2007, Leavitt stated it was inaccurate where he had written that she had told him she took 1 Aleve per week for relief of pain. I was taking Aleve at that time, Leavitt said, I was probably taking about 1 to 4 pills a day. Explaining the type of relief she gets from Aleve, Leavitt stated it makes the inflammation in my back go down enough to where it's not as painful, so it makes it easier to go through my day. Leavitt stated that Dr. Chabot's statement in his report of February 28, 2007 that she primarily had back pain symptoms following her injury in 2005 was not accurate. I had my right leg pain with numbness and tingling down my right leg, the claimant said. She was asked to whom had she report the leg pain in 2005. I had reported it to the ER, the physical therapist, Dr. Graven and also to the person who took the MRI, Leavitt answered. Leavitt stated that Dr. Chabot's statement in his February 28, 2007 report that when Leavitt saw him she had different symptoms than she had previously because her present complaints in 2007 at least intermittently involved radiation into the right lower extremity. They were similar complaints from 2005 and 2006, Leavitt said. She agreed that although, like she had said before, she had had some periods where it had gotten better.

Leavitt talked about what activities at home in her daily living right now is she limited in doing. I am not able to do my own laundry, Leavitt stated. I have just recently moved and my boyfriend does my laundry for me because it's down in the basement and I can't carry the loads, she said. He does the grocery shopping for me because I can't lift the bags of groceries, she stated. I'm still having trouble tying my shoes; I have to sit on the floor and I kind of go down slowly and then get up slowly trying to tie my shoes, Leavitt stated. Getting in and out of the car is difficult; intercourse is painful, she said. I have had problems in the past with exercising, and I mean walking, Leavitt testified, and I have quit exercising for a period of 3 to 4 months' time. I love Walking, she said, I have started up in this past month walking again. The limitations I have described today are not different than the limitations that I had from the initial injury in 2005, Leavitt said, but I did have days where it would get better while I was in physical therapy.

I am able to perform my work duties now, she stated. They have made it to where I can stand for half a day and sit for the other half of the day, the claimant explained, so it is a lot better for me to have that type of job. Leavitt agreed that right now she is full-time at Borders. She agreed that she said half the time she does shelving, and then half the time she does what she calls SPOs which are special orders. With my work of calling, I sit at a desk in the back room and I call customers, Leavitt said. It has to do with receiving, and I call them to let them know that their special orders are in, she said. Leavitt was asked how does this condition affect her school classes. It has made it to where I've gone from full time, taking four classes at the

college, to right now I am taking two classes at the college and I'm part time now, she answered. As far as taking breaks during class, she stated, I have to stand up and walk around. I apologize and then I go out in the hallway sometimes, she further stated. Leavitt agreed that this was something she was doing in the fall of 2005 when she was at school, and it was something she had to do in 2006.

Leavitt testified about how this injury affects her plans for the future. I really really want to have children and I'm afraid that if I were to ever get pregnant while I'm in the condition that I'm in I would probably have to be bed-ridden for half of the pregnancy, she stated. Leavitt agreed that this was something that someone told her.

Leavitt reviewed the Emergency Room record from February 5, 2007 (Claimant's Exhibit C) at the hearing, and agreed that it was when she went to the ER for complaints of her back pain. Leavitt agreed that one of the last pages is where she had filled out a Workers' Compensation form, and she had referred to the accident at Borders on July 16, 2005. It was noted that there was a bill for \$527.15 for that date of service. Leavitt stated that she had not had any other treatment or care on that date of service for any other condition. She stated that she has not paid this bill. It is still outstanding, Leavitt said. She was queried if at the time that she went to the Emergency Room on February 5, 2007 she was still a patient of Dr. Graven at that time. No, Leavitt answered. I had not seen Dr. Chabot yet, she said.

Leavitt testified that she is interested in having more medical treatment for her back and right leg complaints. She stated that, if recommended, she is willing to have injections if necessary. She was asked if she is willing to have surgery if necessary. I would if it helped, Leavitt answered. She agreed that that is what she is asking for the Court to award.

On cross examination by the employer/insurer, Leavitt agreed that she is currently a part-time student at UMSL. She agreed that back in 2005 she was a full-time student at UMSL, and was also a full-time student in the spring of 2006 and full-time student in the spring of 2007. Leavitt agreed she is a senior currently as of the semester starting January 2008. She agreed that when she refers to a full-time student, this is at least 12 hours. Leavitt agreed this was the number of hours she took in those semesters in 2005 and 2006. Leavitt agreed that she had mentioned that she is pursuing a major in English with a minor in Communications, and agreed that she has to carry books to attend her classes at UMSL. She agreed she had to carry books in as a full-time student in 2005 and in 2006, and presently she carries books as a student. Leavitt agreed that as a full-time student in the fall of 2005 and in the spring of 2006, she had classes Monday through Thursday, and her classes were an hour and a half apiece typically. Leavitt agreed she can read and write. Leavitt stated she believed she was capable of articulating her complaints to the providers whom she treated with for her injury at Borders. She stated she was able to articulate her complaints to Dr. Graven and to Dr. Chabot as well as to the physical therapist and at the Emergency Room visits.

Leavitt agreed, during cross examination, that on July 16, 2005, the date of the injury, she had a regular set schedule at Borders, which was Wednesdays and Fridays. She agreed her shift was 3 p.m. to midnight. I always worked that shift except for that night, Leavitt said. They wanted us to work later for the Harry Potter release book, she stated.

From 2000 to 2004 I was a full-time employee, and then in 2004 I decided to become part time at Borders in order to work part time at the library, Leavitt stated. She agreed that she was an employee of Borders between August 2000 and September 2006, and in September 2006 she started the bank teller job. Leavitt agreed she had said she had gone contingent at Borders, which meant she'd come in when they called her; she was still an employee there but didn't have a regular set schedule. Leavitt agreed that when she worked part time at Borders in July 2005 she was also working 20 hours a week as a librarian in the St. Charles County Library. She agreed that the reason she went part time at Borders was because she wanted to get her foot in the door to a librarian position. Leavitt agreed that the location of her employment in December 2007 at St. Charles County librarian closed in early December. I have not been relocated since then, Leavitt said, and I do not expect to be. It was noted that there was a time period where Leavitt was working 20 hours per week as a St. Charles County librarian, and at some juncture she went to just two Sundays a month, 8 hours per month; she was asked when did that 20 hours per week versus 8 hours per week change. It changed, I believe, when I started at the bank, Leavitt answered, but I was doing the every other Sunday – I don't remember when I started the every other Sunday. I might have been doing it when that accident occurred, she said. But I do know that whenever I started at the bank and went contingent I was doing the Kathryn Linnemann job, which was the 8 hours per month broken down by 4 hours for two Sundays in the month. Leavitt stated that while she was working as a bank teller between September of 2006 through March 2007 she was not also working 20 hours per week at the St. Charles County library system. I quit doing that when I started at the bank, she said. Leavitt agreed that her duties at Borders in the part-time position she was in on July 16, 2005 was to find books for customers, some register duty, and she had to do shelves, CDs and DVDs. She agreed that she also helped with some administrative book signings, and she was involved in the special promotions like the Harry Potter issue. Before the injury I lifted anywhere from 20 to 25 pounds in that position, Leavitt said. She was asked if currently she self limits her lifting to 10 to 15 pounds. I'm not too

sure how much it is but it's about a gallon of milk, Leavitt responded, I try not to lift anything more than how much that weighs. She agreed that there is no physician that has placed permanent restrictions upon her, it's a self limitation.

Leavitt agreed, during cross examination, that her working at Borders full-time began most recently in April of 2007 through the present day. She agreed that she works at a different location, and her hours are 6 a.m. to 9 a.m., and she shelves some books in the kids' department. Then from 9 to 10 she has lunch, and from 10 until either 1, 2 or 3 p.m. she's doing her SPO clerk job where she's calling back customers on orders that have come in. Leavitt agreed that she spends half her time at her current full-time position standing, half of it sitting. She agreed that her hours at Borders currently, a full-time position, is about 35 hours per week. With regard to my St. Charles County librarian duties, it was 20 hours, and I was doing this as of the date of my injury in July of 2005 leading up to about September of 2006. She agreed that she had to check out books to patrons, and she had to take incoming books that came in and sort them for shelving. Leavitt agreed that she was able to do this even after her injury. We don't lift books, Leavitt stated, we take books, just a couple in your hand, put them on a cart, roll the cart and then take a couple in your hand and sort them. Leavitt agreed that she was able to also do her librarian duties once Dr. Graven released her to return to work. She agreed that she spent her entire time standing as a St. Charles County librarian. Leavitt agreed that her bank teller employment was at US Bank, and she could sit or stand to perform her bank teller duties. One activity she indicated was that she had to get coins from a coin vault for her work station, and she sometimes had to squat to get those. She was asked if this was difficult for her. It is from getting back up, Leavitt answered. On average my hours as a bank teller were 9 a.m. to 6 p.m., Monday through Friday, but I do work some Saturday, might be until noon, Leavitt stated. It was a full-time position, she agreed.

Leavitt agreed, during cross examination, that it is fair to say that since Dr. Graven placed her at maximum medical improvement on November 8, 2005 there's been no doctor that's excused her from work since that time. There has not been any other doctor who has taken me off work for hip or back or leg complaints, Leavitt stated.

During cross examination, Leavitt agreed that, regarding the accident at issue of July 16, 2005, she said that she had felt complaints in her back, right hip and her legs. At the time of the incident the complaints in my legs were down both of my legs and my right hip and it went about to around my knees, Leavitt stated. The complaints in my legs was pain and numbness and tingling, she said. It's fair to say that I did not ask for medical care on July 16, 2005, Leavitt said. I was hoping it would go away, she said. She agreed that when she went to the Emergency Room she was treated and released. She agreed that she followed up with Dr. Graven in a couple of days, and, as his records show, the first visit was July 19, 2005. Leavitt stated that she remembers that Dr. Graven diagnosed her on the first day he saw her with sacroiliac joint dysfunction, but she doesn't really know what it means. I don't remember if he explained this to me, Leavitt said, it was two and a half years ago. Since then, I might have spoken to Dr. Graven about this diagnosis a year and a half ago when I last saw him, Leavitt said. Mostly what they tell me is that the injury had caused a disc pressing on my nerve which is causing the pain, numbness and tingling down my right leg, and my hip hurts because my hip is "off", is the word that they used.

Leavitt agreed that Dr. Graven prescribed physical therapy and some medication when she first saw him. The physical therapy manipulated my leg, she agreed; there was some apparently a leg length discrepancy that was corrected at that time. Leavitt agreed that the physical therapy was helpful to her, and that physical therapy had given her some home exercises.

During cross examination, it was noted that on direct examination the claimant had already answered regarding Dr. Graven's note of August 2, 2005 in which he had written Leavitt was doing well until this weekend and the pain returned; Leavitt was asked if she recalled starting school that weekend, or does she have any independent recollection of when she started school. I believe I started school at the end of August, Leavitt answered. It was noted that there was a reference in physical therapy record from Excel PT in a note of 7/25/05 -- her overall hip feels better overall until last night, attributes increased pain level to an increase in bending over; the claimant was asked if she remembered that history. I do not, Leavitt answered. The claimant stated that she did not remember anything that would have caused her to have an increase in bending over on July 24 or July 25, 2005. Leavitt stated that she did not remember, but her return to work on July 26, 2005 sounded right. It was noted that the physical therapy record from 7/25/05, stated that Leavitt had returned to work that day; the claimant was asked if she recalled having any kind of re-injury at Borders of any kind. I don't believe so, no, Leavitt answered. The claimant agreed that her initial round of physical therapy went from approximately July 21, 2005 through August 1, 2005. It was noted that a discharge report stated that goals have been achieved on that date, 8/22/05; Leavitt was asked if she recalled going over with the physical therapist that she had achieved all goals at that juncture. No, I don't remember, Leavitt answered. Leavitt agreed that, as noted in the discharge report which said she was able to return to work without significant difficulty, this sounded correct on August 22, 2005. It was noted in an August 1, 2005 narrative by the physical therapist which said that Leavitt had been seen a total of six visits for complaints of right posterior hip pain; Leavitt was asked if she disagreed with that statement in that it didn't address leg or back pain. They did address both my back pain

and my right leg pain as well as my hip in the initial physical therapies, Leavitt responded. They did a back heating and then cooling and then different things for my leg, Leavitt added. She was asked if it was aimed primarily at her right leg. It was primarily aimed at my hip, the claimant answered. It was cockeyed, off, Leavitt stated. They also did some things where they said that, I guess you called it the sacroiliac, that it was inflamed, Leavitt testified, so they did some like shock things they put on them and then heating and stuff like that, and then they showed me different kinds of things for my leg lifts and to prevent pain from going down my leg.

It was noted that the physical therapy records on September 16, 2005 noted that Leavitt had an increasing low back pain and onset of right lower extremity paresthesia over the past two weeks which seems to be in keeping with the Dr. Graven report that on August 2 Leavitt had had a change; the claimant was asked if this refreshed her recollection at all what might have happened in those two weeks. It doesn't, Leavitt answered.

Leavitt agreed, during cross examination, that the light duty was accommodated by Borders initially when Dr. Graven put her on it. It was noted that Leavitt had said she had then stated school in August of 2005; she was asked if she had missed any classes because of her low back or leg complaints. I don't remember; I don't think that I did, Leavitt answered.

The claimant agreed that she had started a second round of physical therapy on September 16, 2005. She agreed that she had that it was at this juncture that the traction took place that caused some mid-back complaints. Leavitt agreed that this was after the MRI was taken on September 13, 2005.

Leavitt agreed, during cross examination, that once she felt a numbness or tingling in her right leg that it may take a couple hours to go away.

The claimant agreed that the second round of physical therapy that began on September 16, 2005 concluded on October 6, 2005. It was noted that on October 6, 2005 the physical therapist wrote that discharge physical therapy goals were achieved; Leavitt was asked if she recalled being in a discussion of whether or not she had achieved her goals. I don't know what their goals were, but no, I don't remember, the claimant answered. She was queried if her right leg complaints had resolved as of her October 6, 2005 visit. No, they had not resolved completely, Leavitt answered, the pain, numbness and tingling had receded to above my knee a little bit. She agreed that it had also lessened in frequency.

During cross examination, it was noted that when Dr. Graven examined Leavitt on November 8, 2005 he noted that she was there for final check; Leavitt was asked if she had stated on direct testimony she was not aware that was her last visit with the doctor. I was not, Leavitt responded. She was queried - At any other time when you left Dr. Graven's office, since you started there July 19, 2005 had you left with a date certain appointment? I believe I did, Leavitt answered. She stated that she believed she had left knowing she had upcoming physical therapy visits. The claimant was asked -- But this time, on November 8, 2005, you didn't leave with either; is that fair? I don't remember but I don't think so, Leavitt answered. When further queried, Leavitt stated that she did not remember if she had left that November 8, 2005 appointment with Dr. Graven having no follow-up appointment with Dr. Graven; and she did not remember if she had no upcoming physical therapy visits.

Leavitt agreed, during cross examination, that she was the only one providing any history to Dr. Graven. Agreeing that Dr. Graven performed a physical exam of her on November 8, 2005, Leavitt added but it was incomplete as to what he had done on previous exams of what I could do movement wise. Leavitt agreed she was saying it was a different exam than in times past. She agreed that he had her heel-toe walk across the floor, and agreed that she was able to do that. Leavitt agreed that when she had started with Dr. Graven she wasn't able to do that. It was noted that Dr. Graven had written down that Leavitt could flex lumbar spine hands to toes. Leavitt indicated that she disagreed with this documentation. She agreed that Graven had suggested she continue her home exercises, but further stated that she did not remember if this was as of the last visit of November 8, 2005 though she thought so. Leavitt agreed that she used to do them daily for about 4 or 5 months after last seeing Dr. Graven., noting as pain permitted.

Leavitt agreed during cross examination, that she does her home exercises that physical therapist had instructed her to do only intermittently. I am limited on what I can do with the exercises the physical therapist gave me because of pain, Leavitt added. She agreed that she had told Dr. Graven that she had tried an elliptical and that it was painful to her. Leavitt was queried if it was correct that when she went to see Dr. Chabot in February of 2007 she told him she tried to use an elliptical but it was painful to her. No, Leavitt responded, not after initially trying, after the injury, but a year later, year and a half later after I saw Dr. Chabot I had not tried to get on the elliptical machine again. Leavitt agreed that she had given a history to Dr. Chabot that she had tried an elliptical machine in the past and that it had hurt her.

Leavitt agreed that she had mentioned that in May 2005 she had joined 24-Hour Fitness, a workout gym. She stated that in October 2005 she was going back to that to walk and to swim. It was noted that the physical therapy notes state that she went back to her gym workouts without any increased pain; Leavitt was asked if this was a fair statement, or did she disagree with this. With the swimming and walking I did have small amounts of pain, Leavitt responded, but it did not prevent me from going. Leavitt stated that she would agree if the physical therapists wrote that she had returned to her gym workouts without any significant increase in pain.

Leavitt agreed, during cross examination, that she had no treatment on her own outside of Dr. Graven other than at Excel Physical Therapy. She agreed that she had had an exam by Dr. Chabot at the request of the employer/insurer. It was noted that Leavitt had testified about an Emergency Room visit on February 5, 2007. Leavitt agreed that she didn't go to a physical therapist or anything on her own.

During cross examination, Leavitt agreed that when she returned to Dr. Graven on September 26, 2006 she thought that her low back pain and right hip were progressively feeling worse. She agreed that her low back pain was worse on 9/26/06 than it was at the time of discharge on November 8, 2005 with Dr. Graven. It was worse in terms of frequency and intensity, Leavitt agreed. My right hip and leg complaints were worse when I returned to Dr. Graven on 9/26/06 as compared to when he discharged me on November 8, 2005, Leavitt said, in terms of frequency of my complaints and in degree of severity of complaints. I mentioned that I took Aleve, 4 pills a day in or around February of 2007, Leavitt stated. Leavitt was asked if she recalled that Dr. Chabot had made the note in his February 28, 2007 record that she took Aleve once per week. I do not recall this, she answered. I did have a discussion about Aleve with Dr. Chabot, Leavitt said, but the doctor did not take notes while we were sitting there talking, and I'm wondering if he did the 1 to 4 pills per day and turned it into 1 pill per week, I have no idea. But he was also in a hurry, Leavitt added. Leavitt agreed that she had filled out some kind of a patient intake sheet with Dr. Chabot. Dr. Chabot's records (Employer/Insurer's Exhibit No. 1) were shown to the claimant. Leavitt agreed that there was a 6-page kind of a questionnaire that she was asked to fill out in advance of her employment. That's my handwriting on that first page, Leavitt stated. It was noted that Leavitt had not listed Aleve under medications. This is not in my handwriting, Leavitt responded. She agreed that she didn't list any medications that she was on other than Loestrin, a birth control medication, at the time of her February 28, 2007 exam with Dr. Chabot. She agreed that Dr. Chabot asked her then during the exam about over-the-counter medications she took, and that the doctor had elicited from her that she did take Aleve. Leavitt agreed that it looked like the doctor had written Aleve 1/week. Leavitt agreed that when she went to see Dr. Chabot he asked her to fill out a diagram for where she felt her pain was and with little symbols about how to describe sharp pain, numbness and tingling, and she had done this. She was queried if the doctor had asked her to draw it for what she was feeling the date of the exam on February 28, 2007, and what it felt like the date of the injury. I don't remember, Leavitt answered. The claimant was again referred to Employer/Insurer's Exhibit 1 with the enclosed Exhibit 2; it was noted that it said pain level shortly after the injury and there's a little body of a man there, and there was a little key for symbols of what to draw on the man to describe to the doctor what she was feeling, she had drawn horizontal lines across the right leg to the knee on the front of the man. That looks correct, the Leavitt answered. On the back of the man with regard to the leg, it was noted, Leavitt had put again just the horizontal lines down to the knee and maybe a couple inches below. Leavitt agreed. She explained that the key said the horizontal lines meant numbness or tingling. Leavitt agreed that with regard to the low back she had put the symbol for sharp, stabbing pins and needles. She further agreed that she had not put those anywhere on the right leg. The claimant was queried - So to Dr. Chabot, according to the diagram you gave him, you had numbness and tingling but not pain down the right leg; is that correct? According to my little man person, yes, Leavitt answered. She was asked if on February 28, 2007 the doctor had asked her to also draw on a diagram the same kind of things to describe her pain level that day. It was a year ago, but I vaguely recall filling these diagrams out myself, Leavitt said, and if don't believe Dr. Chabot did it for me. Leavitt agreed that again for pain level that day, on February 28, 2007, again the only thing she drew on the right leg was a horizontal line. She agreed that she did use the other symbols with reference to the low back, she only drew numbness and tingling on the leg, she didn't note sharp stabbing or burning pain at all down the leg. My pain down my leg was different than that though, Leavitt further noted. .

It was noted, during cross examination, that when Leavitt saw Dr. Graven on September 26, 2006 the doctor notes a history from her that she has occasional radiation of the right leg with numbness and tingling. I do disagree with this, Leavitt responded, because I also have pain down my right leg. Leavitt agreed that at the time that Dr. Chabot saw her on February 28, 2007 she was a full-time student and was working as a librarian two Sundays a month. Concerning working on a contingent basis at Borders, I only went one day in January, Leavitt stated. She denied that she was working some kind of library job at UMSL as well. I never have, Leavitt stated.

Leavitt stated that it sounded correct that she had given the history that she went to the Emergency Room on February 5th,

2007, which was about two or three weeks before she saw Dr. Chabot. It was noted that the Emergency Room record noted in the history that Leavitt had moved wrong and had stabbing low back pain; Leavitt was queried if she had moved wrong during the course of her workday as a bank teller. No, I don't think that it was moving wrong, Leavitt answered, I was trying to wash my hands and I tried to bend at the waist just a little bit and I could not wash my hands because of the pain that I had all day. Leavitt agreed that she had presented to the Emergency Room at about 6:45 p.m., and she had been working as a bank teller all day. She was asked if she had had to reach for coins from the coin vault. I did but I don't reach, Leavitt answered, I squat. She was asked if that had caused her any kind of complaints when she did this as a bank teller. I did have pain doing that but not as often except in the two weeks leading up to that ER visit I was having more frequency in pain, Leavitt answered. She agreed that it was her testimony today at the hearing that moving wrong was that she tried to bend to wash her hands over the sink at work on February --. I think that's what they took -- "bending wrong", but I don't think it was wrong to bend at the waist a little bit to wash my hands, Leavitt added. She was queried - And you reported you had numbness and right leg pain to the low back for two weeks leading up to February 5th, 2007? I did, along with pain down my right leg, Leavitt answered. It was noted that she had said she thought that she had had this aggravation going on for two weeks; Leavitt was queried if it was her testimony at the hearing she has no idea what may have happened in those ensuing two weeks leading up to the ER? I think what it was, it was just aggravation of life, just going through the movements of life and having it be aggravated, Leavitt responded. She was asked if it could it have been bending and stooping at the bank to get her coins. No, Leavitt answered, because I don't bend or stoop. It hurt, she said. She was asked if it hurt to cough or sneeze. At that time, no, Leavitt answered.

Dr. Ann Hibbard is my personal doctor, Leavitt agreed, during cross examination. It was noted that in a February 4, 2005 entry the doctor had notation in her records that Leavitt had called in requesting something for a cough, I don't remember, Leavitt responded. I don't recall having a cold, Leavitt said. I do have frequency of sinus infections, so that is possible, she added. I don't remember specifically whether I called in for a cough, Leavitt stated. She was asked if she remembered whether a cough occurred while she was at the bank that day. I don't remember, Leavitt answered. I don't remember if I coughed for the ensuing two weeks leading up to February 5, 2007, Leavitt stated. She was asked how long has Dr. Hibbard been her personal doctor. I had gone to her a couple times, made her my personal doctor up until just this past year, Leavitt answered, so in April or May of 2007, and that's when I went in to have my blood pressure checked and I told her she was my doctor then. It was noted that in the records from Dr. Hibbard there is an entry dated 2/4/05 in which it appears that there's a prescription for Tuss BID for PRN cough by Dr. Blair; Leavitt was asked if she is familiar with Dr. Blair? I don't know who Dr. Blair is, she answered, that doesn't sound familiar. It was noted that in the records from Dr. Hibbard, there's an entry March 2, 2005, and then it looks like July 9, 2007; Leavitt was queried - .you don't go to the doctor very often? I do for sinus infections, Leavitt responded, I just found out recently I have a deviated septum, so for sinus infections I do go, but more so this past year of 2007 than any other year.

Leavitt agreed, during cross examination, that she recalled telling the physical therapist in the past that coughing or sneezing caused increase in her low back pain or leg pain. In the beginning whenever I first started going to physical therapy, Leavitt added.

Leavitt agreed that when she went to the Emergency Room on 2/5/07 it was worse that day than any other day. She agreed that she had said she awoke with low back pain and right leg pain on the morning of 2/5/07. It was noted that Leavitt had said that previously when she goes to sleep and wakes up in the morning she feels rejuvenated, in other words her pain was lessened typically in her back or her leg. Not every morning, but, yes, that is typical that the pain is usually worsened at night than it was in the morning, Leavitt responded. But not on 2/5/07, Leavitt agreed, I noticed that it was worse in the morning. It was noted that Leavitt had said when she went to the Emergency Room she was given medications; she was asked if she had continue to take medications prescribed by the Emergency Room leading up to her visit to Dr. Chabot on February 28, 2007. I don't remember, Leavitt answered, I believe I did if they prescribed me some. It might have been Darvocet, Leavitt stated. She agreed that she had not listed she was on Darvocet when she was asked about medications at Dr. Chabot's visit. Leavitt was queried -- Between February 5, 2007 when you went to the Emergency Room and the time you saw Dr. Chabot for the first and only time on February 28, 2007, had your low back pain and right leg complaints been relieved somewhat since the Emergency Room presentation? They were not as severe, correct, Leavitt answered. Leavitt agreed that she was the only one providing Dr. Chabot with a history.

During cross examination, the claimant was asked, when you do walking now that you say you resumed about in the last five months, is that a treadmill, outside, or what is it? I actually resumed in the past one month, Leavitt responded, it's too cold outside. So I go to the gym, the 24-Hour Fitness, and I walk on the treadmill, Leavitt stated. I do this three times a week for about 20 to 30 minutes of walking, she said. Agreeing that she is able to do this, Leavitt added I cannot go on an incline because of the pain in my back and my right leg. She was asked if she is able to do just a flat walking without significant

increase in her pain. I do have quite a bit of pain in my right hip because I'm not sure, but I think that it's off again, Leavitt answered. I was told by Dr. Graven in the end of 2006 that it was off again, the claimant said, the similar thing, complaint that I had in 2005, but because of that I think that I'm having problems with my walking because of that. Leavitt was asked, at the time you were discharged from Dr. Graven initially on November 8, 2005 do you recall having any problems walking? No, I don't recall any problems I had walking at that time in November of 2005, Leavitt answered.

Leavitt agreed that she had said that she has problems currently when going from a sitting on the floor position to a standing position. I do a crossover with my legs and do one of these numbers and push up, and that causes pain in my lower back and my right leg, Leavitt stated. She agreed that she is pushing up with her left leg. I did not have this complaint on November 8, 2005 when I was discharged from Dr. Graven, Leavitt stated. Then again I don't think I was doing that much at that time, Leavitt added, I am more so at this job that I started last April, doing the shelving. Leavitt agreed that she had testified at her deposition that in June of 2007 she began taking 6 Aleve pills a day as compared to 4 before; she agreed that this was because of an increase in severity of the pain in her low back. She was asked if anything in particular happen in June 2007. No, Leavitt answered. She stated there was no bending over. Agreeing that she sits to tie her shoes, Leavitt further stated I do sit on the floor to tie my shoes so that it prevents me from bending over. Leavitt was queried - Is it fair to say that since Dr. Graven originally discharged you on November 8, 2005 you may have had a cough? Maybe, Leavitt answered. She stated that it would be fair to say that since November 8, 2005 I may have had a sneeze. Leavitt was queried if it is fair to say that since November 8, 2005 she has been caused to bend, whether it be at home, as a bank teller or as a librarian, is it fair to say that she has bent over with bending her back? Doubtful, Leavitt responded, because I try not to do that because it hurts. Leavitt agreed it is fair to say that she has gone from a sitting to a standing position any time, whether at home or at work, since November 8, 2005. She agreed that it is fair to say that she has had intercourse since November 8, 2005. Leavitt agreed that things that cause her pain now she has done in her daily life since November 8, 2005.

It was noted that Dr. Graven doesn't note anything about Leavitt's complaint of pain from sitting to standing, pain from bending over, nor pain with intercourse in any of his notes. I believe I told Dr. Graven in 2006, Leavitt answered. I don't remember if I had said any of that in 2005, Leavitt stated. The claimant was queried - Is it fair to say you may not have told Dr. Graven because you weren't having it at that juncture as of November 8, 2005? I would disagree with that because he did not take notes while we were talking, Leavitt answered, and sometimes he had a different person in there for a while with me. I had to go to a Wentzville location once and saw someone who was with Dr. Graven, Leavitt further testified, I saw him for a little bit and then Dr. Graven came in. Concerning the kind of complaints I was having as of November 8, 2005 in regards to complaints of pain getting up from a standing position, pain in the low back or leg bending over and pain with intercourse, Leavitt testified, leg pain bending over, no. They were more like over the course of time, whenever it starts getting aggravated and worsened then I have more complaints towards that., she said So there is a possibility that I did not complain about that in 2005, Leavitt stated.

During cross examination, Leavitt agreed that both of the MRIs of her low back were taken at the same facility, one on September 13, 2005 and one was on October 26, 2006. There were no other MRIs that I am aware of, Leavitt said.

Concerning her current complaints, Leavitt agreed during cross examination that she has complaints of pain in her low back, but she has good days and bad days. Lately I have pain in my back not about three times per week, rather lately it is constant, Leavitt stated. It's very rare that I have a day that I do not have the back pain, she said. The pain and numbness and tingling down my right leg is more like three to four times a week, Leavitt stated. She was asked if she was equating numbness and tingling with pain in her right leg. They go together, Leavitt answered. Normally whenever I get up, and it takes about an hour for it to go away, she said, normally one will disappear before the other, but they always come together. She agreed that she was talking about the pain, numbness and tingling in the right leg. Agreeing that the constant low back pain is different than it was November 8, 2005, Leavitt agreed that it was fair to say she wasn't having constant low back pain as of November 8, 2005. As for symptoms in the right hip as of November 8, 2005, Leavitt stated, I did have some complaints of pain but it wasn't as often. The physical therapy did help, she stated. I don't remember the frequency in November of 2005, Leavitt said, but it wasn't every day. Leavitt agreed that she currently has complaints to the right knee three to four times per week. She agreed that she recalled her deposition being taken on November 26, 2007. It was noted that during that deposition at Page 21 Line 21 Leavitt was asked the question - "How about when it radiates down your left side usually how far does that go?", and Leavitt's answer - "It doesn't go any further than my right knee."; the question - "How often does that happen?" and the answer on Page 22 Line 1:- "I try not to let it happen. Probably once a week.". Leavitt was queried if she recalled this testimony. It might have been from 2005, whenever I finished up with Dr. Graven that it was once a week, Leavitt responded at the hearing. But at the time of the deposition there's very rarely a day that I don't have the pain and numbness and tingling down my right leg, Leavitt further stated. Leavitt was queried about mid-back pain that she had described came about with traction at physical therapy; there was an agreement that the area in question was

mid-back, at the bra line. Leavitt agreed that when she gets this it lasts for just a couple minutes, and is alleviated with a breathing exercise that physical therapy taught her. She agreed that she is not having any left-sided leg complaints.

Leavitt agreed that regarding any other doctors, she was examined by a Dr. Berkin at the request of her former attorney, and this examination occurred in May of 2007, and was for this Workers' Compensation claim. Leavitt stated that she never saw a report from Dr. Berkin at any Time.

It was noted that Leavitt had said her complaints are better with a "day off"; she was asked what is a day off to her; does it mean no classes, no librarian work, no school work or no work at Borders. That is correct, Leavitt answered, whenever I don't have to, except here recently, it's not true because I have so much homework to do which causes me to sit for prolonged amounts of time which causes pain. Leavitt agreed that when she has to go to school she does not consider that a day off.

During cross examination, Leavitt was asked if she had gotten an opportunity to clarify with Dr. Chabot about the pain diagrams she had filled out that she had discussed during direct examination. I don't remember, Leavitt answered, he was in a hurry and he interrupted me frequently.

Concerning limitation of activities, Leavitt stated during cross examination that she has not done any hiking since November 8, 2005. In this last month I have intermittently resumed my physical therapy home exercises, Leavitt stated. Agreeing that she had resumed them prior to that, Leavitt stated after 2005 she had. But I went 3 or 4 months without doing them because of pain, she said; Leavitt said this was just this last year. It was the longest amount of time I went without doing my exercises, she said. This was not in June of 2007, it was later, Leavitt said, I think September, October, November and December of 2007, that was the longest amount of time I've been without doing exercise. But before then, before that stint of not doing my exercises, I was intermittently doing them when it wasn't causing me too much pain, she said. By intermittent I meant whenever it wasn't painful, Leavitt stated, maybe once a week. But sometimes I would go weeks without doing them because it was too painful, she said. Leavitt was asked if she was saying that the reason she went on a part-time student status is because of her back pain. No, Leavitt answered. She stated it is not because she is full-time now at Borders. It's because I took four English classes, Leavitt stated, I'm an English major and I have previously been through my general education at St. Charles Community College. And this was the first semester, last semester, that I did four English classes all at once and it was too stressful, it was a lot of reading, she said. Leavitt agreed it is because of her academic curriculum that she went part time.

On redirect examination, Leavitt agreed that on cross exam she was showed a page in Dr. Chabot's records and it was a human figure and she had been asked to draw on this. It was noted that it had been stated that Leavitt had not used any of the words that were on that page -- stabbing or whatever -- and she had said the pain down my leg is different than that; Leavitt was asked to explain the pain down her leg with the numbness and tingling. It's kind of -- the pain in my leg is kind of like -- it's numb and tingling and then the pain at the same time, she said. The pain is like it's not sharp or stabbing, it's not dull or anything; it's kind of like, from what I've heard other people describe, I believe it's like when you press on a nerve; it's kind of like that. But I've never had any type of pain like this before in my life, Leavitt stated, never had a pinched nerve or anything like that. Leavitt agreed that she was saying that when she has numbness and tingling she also feels this pain. She was asked how long does the numbness and tingling last. Sometimes it's different, Leavitt answered, usually after I get up and walk around a little bit, it lasts for about an hour. The pain sometimes takes longer, sometimes is shorter, she said, but whenever the numbness and tingling goes away the pain is usually still there for another hour or so. Leavitt was asked her reason for not indicating this on the pain diagram. I didn't know what to put on there, she answered, I saw the numbness and tingling and I just went ahead and marked stuff, but with the pain I just told him about it and it's just wasn't on there, Leavitt testified.

Leavitt stated, on redirect examination, that she did go see Dr. Berkin in May of 2007 and it was her understanding that there was never a report issued. Explaining why, Leavitt stated I believe it was because my lawyer at the time did not send all of the appropriate documentation to the doctor in order to make a report.

Leavitt agreed that despite Dr. Graven's records of August 2, 2005 where he says -- return to physical therapy, follow-up in one month -- there was no physical therapy that took place in August 2005. She agreed that she saw Dr. Graven again on August 30th but they have no dictated report from Dr. Graven. Leavitt agreed that it was at that time that she saw him that the doctor changed her diagnosis from SI dysfunction to radiculopathy, lumbar and ordered an MRI. She agreed that when you saw the physical therapist on September 16th, right after that MRI, the complaints she was having -- the pain is constant and worsens with prolonged standing or sitting greater than one hour, sleep moderately disturbed -- when she did flexion, or bending forward, it was limited by about 30 percent due to complaints of low back pain and lower extremity

symptoms. Leavitt agreed that these symptoms took place after she had not had physical therapy since the end of July. She agreed that these things happened before she last saw Dr. Graven in November of 2005.

The complaints that I had when I saw Dr. Chabot, the difficulties with activities, these were similar to the complaints I was having August 30th at the time when I saw Dr. Graven and he ordered the MRI, Leavitt said during redirect examination. Then after I did physical therapy again, and I saw Dr. Graven in November, I said that I had improved, Leavitt agreed. She was queried - Then from November of 2005 until you saw Dr. Graven in September of 2006 what happened during that time period? Just regular life, I felt like my symptoms were worsened from, I feel, from not going to physical therapy, Leavitt stated.

On further cross examination, Leavitt was asked in regards to this numbness and tingling and pain down your right leg feeling like somebody hit a nerve, is it fair to say that that complaint did not exist on November 8, 2005 when Dr. Graven discharged you originally. When I saw Dr. Graven at that time it did not happen as often, Leavitt responded. The claimant was queried - So your current complaint is different than on November 8, 2005. It is similar in the fact that it still happens and it did happen in 2005, but now it's more often than it was in November of 2005, Leavitt answered. Stating that it is not different now than it was on November 8, 2005, Leavitt agreed that it is different now in frequency and it's difference in intensity as compared to November 8, 2005. Leavitt was queried - Since September 16, 2005, you had had improvement between September 16, 2005 and the last time you saw Dr. Graven which was November 8, 2005; is that fair? I did improve, yes, Leavitt answered.

Medical records offered into evidence included the following:

Medical records from **Barnes Jewish Emergency Room** of July 16, 2005 (No. B) began with a report by radiologist Dr. Keith Kastelic, M.D. of an x-ray of the lumbar spine performed on July 16, 2005 which noted the following findings and impression:

...views of the lumbar spine are reviewed and demonstrate the vertebral body heights and intervertebral spaces to be preserved. The skeletal structures are otherwise unremarkable Surgical clips are present within the right upper quadrant consistent with prior cholecystectomy.

IMPRESSION: Unremarkable radiograph o the lumbar spine.

The next document in the emergency room record was a triage form (consisting of two pages) noted chief complaint as -- "Painful back: traumatic". Further noted on the triage form was Leavitt's quote of her chief complaint: "Pt c/o LBP after picking up a child. Pt states she heard a pop and feels pain shooting down legs. Pt states she vomited her pain pills." An Emergency Department QualChart form (consisting of two pages) was in the record and was apparently completed by the ER doctor who signed the form; a pain diagram was in the chart and it indicated pain and/or symptoms in the low back at about the belt line; the chart further indicated constant, dull and throbbing pain upon movement, lifting and bending, and indicated negative straight leg raising tests; the diagnosis written in the chart was -- low back strain. The record indicated that Leavitt was discharged that day (July 16, 2005), and in the discharge instruction sheet, the Primary diagnosis was -- Strain – back; the sheet noted that x-rays had been performed, and the reason for exam was -- Lumbar spine pain. A form entitled "Back Pain & Injury" was in the record, and included the statement: "Your exam shows that your back pain is most likely caused by a strain of the muscle or ligaments that support the spine." This form further included instructions and the following information to the patient:

"You should be examined again, if your back pain is not better in one week. If you have pain that radiates from your back into your legs, any new bowel or bladder control problems, or unusual weakness or numbness, this may be a sign of a herniated lumbar disc. Please call your doctor or the emergency room if you have any of these more serious symptoms."

Records of **Barnes-Jewish St. Peters Hospital Emergency Room** concerning treatment of Leavitt on February 5, 2007 (No. C) began with a triage sheet (consisting of two pages) which noted Leavitt's quoted complaints: "Pt moved wrong and she has stabbing low back pain. Pt has had numbness to right leg and pain to lower back x 2 weeks and today sudden onset of severe pain and Pt had a back inj a year and a half ago."; the diagnosis noted on the sheet was – Spasm – muscle, back. The record contained a form entitled Emergency Department QualChart noted symptoms of constant, dull spasmodic pain with movement and pain with weight bearing, and also noted associated signs and symptoms of -- numbness/tingling; the form included a pain diagram but there were no markings, indicated was negative straight leg raising, but there was paraspinal muscle tenderness; it was indicated that Leavitt was improved; the written diagnosis on the form was -- back sprain/strain. A

form entitled "Aftercare Instructions for Back Pain" included the following: "The back helps support much of your weight. When it is injured, almost any movement may cause pain. You may also have pain that goes down your leg. This is called sciatica, a condition caused by nerve irritation." The record indicated that Leavitt was discharged that day (February 5, 2007); the Primary diagnosis was -- Spasm -- muscle, back, and there was a Secondary Diagnosis -- Pain -- back.

Medical records from **Excel Sports Physical Therapy** (No. D) included a form entitled Physical Therapy Physician Plan of Care/Referral sheet which indicated the Leavitt was referred to the facility by Dr. Graven on 07/19/05 for a diagnosis of -- SI Dysfunction, and for treatment 2-3 days a week for 4 weeks. A form entitled "Additional Liability Information" noted that an accident had occurred at Borders Bookstore, and noted the following of how the accident had occurred: "I lifted a child (approx 30 lbs) & felt a popping in back & lots of pain". Progress notes were in the record which indicated the initial evaluation was on 07/21/05. An evaluation letter by physical therapist Jennifer Rutkowski, M.P.T. to Dr. Graven, dated July 21, 2005, was in the record, and included the following:

....This 25 year old lady reports lifting a child while a work ad felt a pop in the posterior aspect of her right hip. She complains of an increase in pain with sitting, standing, and walking. She has been unable to work secondary to pain. Her right hip feels best with external rotation or lying supine. She complains of pain radiating into her posterior knees bilaterally. She currently rates her pain level as 4/10.

Lower extremity strength is 5/5. Pain is reproduced with manual muscle test of the right piriformis. In standing, the right iliac crest appear higher compared to left. The right ASIS is lower than the left and right PSIS appears higher than the left.

In the next treatment entry of 07/22/05 was included: "Patient reports awaking today without pain"; in the Assessment section was written -- "Tol well. Lower extremities and pelvic landmarks appears symmetrical in supine and long sitting"; it written that physical therapy was to be continued. In the next entry of 07/25/05 was written: "Pt reports her hip was feeling better overall until last night. Contributes increased pain level to an increase in bending over. States she returned to work today."; the written observations were essentially the same. In the 07/29/05 entry was written the following: "Pt reports working 8 hr shift with little soreness & was able to work out without much difficulty." On 07/29/05 the written observation was -- "Rx per flow sheet. Supine/long sitting leg length appear equal. Sacral sulcus levels appear symmetrical"; the written treatment plan was -- "Re-evaluate next Monday before M.D. appointment on 08/01/05". The physical therapist Brian Manning included the following in an August 1, 2005 letter to Dr. Graven:

Ms. Leavitt has been seen a total of six times in physical therapy for complaints of right posterior hip pain. She has noticed a significant reduction of her overall pain level and has been able to return to work without significant difficulties. Over the past three days she has worked to 8-hour shifts back to back and has been able to return to her gym workouts without an increase in pain level.

.....Lower extremity strength is 5/5. Pelvic landmarks appear symmetrical. Supine an long sitting leg length appear symmetrical.

The physical therapy further noted that only some decrease in range of motion of the lumbar spine with no increase pain, indicating improvement in the range of motion compared to July 27, 2005. In an 08/22/05 treatment entry it was written: "No new orders have been received. Discharge pt for PT." Physical therapist Rutkowski wrote a discharges report, dated 08/22/05 in which she noted the physical therapy treatment given, noted that Leavitt's current functional outcome status compared to the initial status was -- "Patient able to return to work without significant difficulty". It was further written -- "Goals have been achieved".

The Excel Physical Therapy record included a second form entitled Physical Therapy Physician Plan of Care/Referral sheet which indicated the Leavitt was referred to the facility by a Dr. Waller on 09/15/05 for a diagnosis of -- Lumbar Disc Protrusion, Lumbar Radiculopathy, and for treatment 2 days a week for 4 weeks; the treatment goals were noted and were -- increase range of motion and increase strength. In a September 16, 2005 report by physical therapist Julie Kellogg to Dr. Graven, the following was included:

This 25 year- old woman reports increasing lower back pain and onset of right lower extremity paresthesia over the past two weeks. She reported onset of pain on 7-16-05 during a Harry Potter book release when she lifted a child to put him on a stool. She had six physical therapy sessions for SI joint dysfunction in July and August and did well in therapy.

Presently, Jennifer complains of low back pain in the 6/10 pain range on the pain scale. Her pain is constant and worsens with

prolonged standing or sitting greater than one hour. Her sleep is moderately disturbed due to discomfort. Cough and sneezes increase her low back pain.

Lumbar ROM is minimally limited in extension and WNL for side bending. Flexion is limited by about 30% due to complaints of low back pain and lower extremity symptoms. SLR produces increased LBP at 45 (degrees) on the right and is negative to 75 (degrees) on the left....

In the first PT treatment entry of September 20, 2005 was written: "Pt reports 50% less lower extremity symptoms since beginning therapy". In a September 27, 2005 entry was noted: "Reports 4/10 LBP, decreased episodes of tingling in right LE". In the October 4, 2005 entry was written: "0-4 at worst LBP. LE tingling is less frequent. Occurs mostly when sitting at school". Written observations on October 4, 2005 were: "ROM WNL all planes. Lifts 10 pound load multiple times (20) with good body mechanics without difficulty. Doesn't have to lift more than this at work." Written in the treatment plan was - "See x 1 more this week, then return to the physician for follow up". The next and last entry included -- "D/C P.T. goals achieved. 7 visits. Lumbar HNP, radiculopathy. No further P.T...." Physical therapist Kellogg included the following in a letter, dated October 6, 2005, to Dr. Graven:

Miss Leavitt has had seven physical therapy treatment for lumbar radiculopathy since her last visit to your office. She reports significant improvement in her overall pain level and function. She rates her pain 0-4/10 on the pain scale. She reports lumbar discomfort especially at the end of the day. She notes occasional episodes of right lower extremity tingling while she is sitting at school. Overall she feels she is stronger. She is working light duty at Borders part-time.

Lumbar ROM is WNL in all planes. SLR is negative. Gross lower extremity strength sensation to light touch, and DTR appear to be symmetrical and WNL. She is tender with palpation of the lumbar paraspinal muscles, right greater than left, and the L-5/S-1 spinous processes. She is able to lift a 10 pound load multiple times from floor to table in the clinic with good body mechanics.

The therapist further noted that Leavitt was compliant with a home program and had been walking on a regular basis for exercise

Dr. Timothy Graven, D.O. testified by deposition on behalf of the claimant (No. A) Dr. Graven, an orthopedic surgeon, stated that he treated the claimant, Jennifer Leavitt beginning on July 19, 2005. When queried if it was the workers' compensation insurance carrier who had referred Leavitt, Dr. Graven responded -- "I'm not positive of that. I have it recorded her primary care physician. I'm not sure who sent her or who didn't." (Graven Dp. pp. 6-7) [Employer/Insurer stipulated that it, Liberty Mutual, sent Leavitt to Dr Graven. See, Graven Dp. pg. 7]

At the deposition, Dr. Graven was given a certified copy of the emergency room records from Barnes-Jewish St. Peters Hospital from July 16, 2005 (the claimant and the employer/insurer agreed to allow Dr. Graven to review these records at the doctor's deposition; and the emergency room records were marked at the deposition as Employee's Exhibit Number 3. See, Graven Dp. pg. 8) Dr. Graven stated that the history given by Leavitt noted in the July 16, 2005 emergency room records was consistent with the history Leavitt had given to him at the initial visit, as well were the complaints consistent with the type of injury she had described to him with those written in the July 16, 2005 emergency room record. Dr. Graven was asked his initial diagnosis of Leavitt's condition, and the doctor answered: "Sacroiliac dysfunction, lumbar strain or sprain." (Graven Dp. pg. 8) The doctor agreed that it was his opinion on July 19, 2005 that Leavitt's work-related injury was the substantial factor in causing her complaints and need for further treatment. Dr. Graven agreed that he then referred Leavitt for physical therapy.

It was noted that Leavitt first appeared for physical therapy on July 21, 2005, and the physical therapy record of Excel Physical Therapy for that date noted complaints from Leavitt of: an increase in pain with sitting, standing, and walking; right hip feels best with external rotation of lying supine; and complains of pain radiating into her posterior knees bilaterally. Dr. Graven agreed that these complaints were consistent with Leavitt's complaints to him and at the emergency room. Dr. Graven agreed that although Leavitt had some improvement of pain during August 2005, on August 30, 2005 he had recommended an MRI in a report to the employer. Dr. Graven was asked to explain what was significant from the September 13, 2005 MRI: "The most significant finding was a disc protrusion at the last lumbar disc, the L5-S1 disc." (Graven Dp. pg. 10) When asked if Leavitt's continuing complaints of pain as he had seen her through August of 2005 consistent with the findings on the MRI, Dr. Graven responded -- "To some degree". (Graven Dp. pg. 11) The doctor explained: "Well, the MRI for her disc protrusion, of the disc protrusion does not include an examination of the sacroiliac joints, and her initial diagnosis was sacroiliac dysfunction." (Graven Dp. pg. 8) Dr. Graven stated it would be accurate that

Leavitt had heard from him after the MRI that there was some pressing on Leavitt's spinal cord that might be causing some of her complaints. My diagnosis on September 15, 2005, following the MRI, Dr. Graven stated, was: "Lumbar disc protrusion, lumbar radiculopathy". (Graven Dp. pg. 11)

Dr. Graven agreed that when he saw Leavitt on October 11, 2005 she had improvement of low back pain but continued to have complaints, and when he saw her on November 8, 2005 Leavitt continued to have some complaints of pain. The doctor agreed that at the November 8, 2005 exam he found that Leavitt could heel and toe walk, could bend over with her hands to her toes, and her side bend and rotation was normal. Dr. Graven was asked to explain what he had meant when he had said in November 2005 that Leavitt was at maximum medical improvement. "That I did not feel that her condition would drastically improve beyond that point", Dr. Graven answered. (Graven Dp. pg. 12) The doctor was asked to read his diagnosis he had written in his November 8, 2005 report to the employer: "Herniated nucleus pulposus of the lumbar spine and radiculopathy". (Graven Dp. pg. 12) Dr. Graven agreed that he still felt this diagnosis was a work-related injury.

Dr. Graven agreed that in a November 10, 2005 letter to the insurance company he had given Leavitt a permanent partial disability rating based on her continued pain and aggravation and decreased activity. The doctor was asked to explain his instructions in the report for Leavitt to follow up PRN: "As needed, if there are further problem". (Graven Dp. pg. 13) Dr. Graven stated that a patient referred to him by a workers' compensation insurance company can come in to see him by just calling in for an appointment, but the doctor added: "It's up to the workers' compensation carrier to approve payment for it or authorize payment for it." (Graven Dp. pg. 13) Dr. Graven stated that he was not aware of whether or not Leavitt had tried to see him again in December, January or February following the November 8, 2005 visit.

The doctor agreed that the next time he saw Leavitt was on September 26, 2006, and stated he believed it was because at that time the workers' compensation insurance company had agreed to pay for more visits. "I rarely get into the details of who's paying for what", Dr. Graven added. (Graven Dp. pg. 14) When I saw Leavitt on September 26, 2006, she did not describe any new or different injuries since the last time she had seen me on November 8, 2005, Dr. Graven said. The doctor was asked to describe how Leavitt's physical examination had changed since the last time he had seen her:

"She had less flexibility in the lumbar spine. As you recall we talked about her being able to flex the lumbar spine, hands to the floor. This time it was only to the knees. Positive straight leg raise was also noted, and I don't believe was present in November of '05." (Graven Dp. pg. 14)

Dr. Graven stated that "(t)here could be a variety of reasons" why Leavitt's physical condition had changed to this extent. (Graven Dp. pg. 15) The doctor was asked his understanding:

"Well, I don't have an answer. I have -- you know, conditions change, conditions can become worse in the lumbar spine. Injuries that start can progress. Degenerative disc disease can take place. There can be additional injuries. There are, like I said, a variety of reasons." (Graven Dp. pg. 15)

The doctor was asked why he had ordered another MRI. "Well, based on her physical exam and her history, it seemed that things were worse than when I had last seen her in November of '06 -- or '05, I'm sorry." (Graven Dp. pg. 15) Dr. Graven testified as to what was significant from the October 26, 2006 MRI: "It appeared the previously mentioned disc protrusion of L5-S1 was larger, more protruding." (Graven Dp. pg. 16) Dr. Graven agreed that his diagnosis following the second MRI was still herniated disc with radiculopathy, the same as it had been following the first MRI. The doctor was asked his opinion regarding what was the substantial factor causing Leavitt's complaints and need for further treatment. "I guess my opinion is the condition requiring further treatment would be that herniated disc", Dr. Graven answered. (Graven Dp. pg. 17) the doctor was asked his opinion as to what caused the herniated disc:

"I did not come to a conclusion. It's certainly within the realm of medical probability that this same disc that had now become worse was related to her initial injury. I had no history that there was additional injury." (Graven Dp. pg. 17)

Dr. Graven agreed that in his report to the employer dated September 26, 2006, and "X" for work-related injury/illness had been marked, and that this mark had been done at his direction.

Dr. Graven was asked what was the medical treatment he had recommended on November 7, 2006. "Lumbar epidural steroid injections", the doctor answered. (Graven Dp. pg. 18) The doctor was asked if he had provided further treatment to Leavitt since November 7, 2006. "No, I don't believe so", Dr. Graven answered. (Graven Dp. pg. 18)

Dr. Graven then gave the following testimony:

1. Okay. You have testified that following the first MRI you believed that Ms. Leavitt's work-related injury was a substantial factor in causing her complaints and need for further treatment. Did you continue to believe that following the second MRI?

1. Yes.

1. Okay. The workers' compensation insurance company rather than providing the treatment you recommended sent Ms. Leavitt to Dr. Chabot for an IME who seems to think the second MRI shows something so different from the first MRI that her complaints when she saw you in September of 2006 cannot be related to the July 2005 injury at work.

Can you please explain to the judge why you believe that her work-related injury from '05 is a substantial factor in causing her need for further treatment that you described, epidural steroid injections, in September of 2006?

1. I think that the symptoms in 2006 were not substantially different than they were in 2005. And even though on her initial visit she did not elicit symptoms of a history of leg numbness or tingling. It doesn't reflect in my notes, but it was mentioned.

So while the complaint of numbness and tingling in '06 appeared to be a new finding according to my notes, it certainly wasn't something new for her to complain about. The disc protrusion that was noted in L5-S1 may have led, the natural history of that could lead to regression and improvement. It could also go the other way and become worse with just the normal activities of daily living.

There may have been additional injury that wasn't recorded or elicited to me, so I have no way of saying that there was an additional injury. Something as simple as bending over to tie your shoes or sneezing or coughing could also make that disc worse. Certainly not something that was an additional injury, but just something in everyday life.

So I guess to sum this up, I feel it was related because I had, number one, evidence of numbness and tingling and radicular symptoms in '05, or evidence of her complaints of that; number two, she did have a disc injury in '05; and number three, I have no history or evidence to suggest that there was an additional injury that might be separate. (Graven Dp. pp. 18-20)

On cross examination by the employer/insurer, a three-page orthopedic history sheet was viewed from Dr. Graven's file, and it was noted that on a diagram Leavitt had indicated that the pain stopped at her knees; it was noted that this diagram was not dated, but Dr. Graven agreed that he had reviewed it with Leavitt on July 19, (2005). The doctor stated that either he or his staff takes a history from the patient, Leavitt; Dr. Graven stated that "(s)ometimes better than others" they document a thorough relevant history from the patient. (Graven Dp. pg. 23) Dr. Graven agreed that he would have documented Leavitt's chief complaints as she came to see him and that also he had read the physical therapy notes between July 19, 2005 and November 8, 2005, and there were no recommendations from him for epidural steroid injections. It was noted that Leavitt was on medication; the doctor was asked if Leavitt was on any Medrol Dosepak or anything like that. "I don't believe I prescribed that for her, no", Dr. Graven answered. (Graven Dp. pg. 24)

It was noted that Dr. Graven's original diagnosis was low back strain with SI joint dysfunction, and the doctor was asked to explain what was SI joint dysfunction:

"The SI joint stands for sacroiliac. The sacrum is the spin (sic), the ilium is the pelvis. There's a large joint -- there are two joints -- but bilateral SI joints that join the spine to the pelvis. Many times people who suffer or undergo an injury where they have a bending or twisting type injury can have a sacroiliac dysfunction, also causes -- I'm sorry." (Graven Dp. pg. 25)

Dr. Graven was asked how in his practice did the diagnosis of SI joint dysfunction manifest its symptoms: "Low back pain, radiation into the legs, into the thighs, leg length inequality", Dr. Graven responded. (Graven Dp. pg. 25) Dr. Graven agreed that the symptoms he had just stated were consistent with Leavitt's exam when he had first seen her and in keeping with her orthopedic history to him.

During cross examination, Dr. Graven agreed that the first MRI done on September 13, 2005 and the second MRI were both performed at the same location, St. Peters Bone and Joint. It was noted that in the report of the 9/13/05 MRI they called it a protrusion at L5-S1, and in the 10/26/06 MRI it was called a herniation at L5-S1; Dr. Graven was asked his opinion of

whether or not there is a difference between these findings -- a protrusion at L5-S1 and a herniation at L5-S1, and the doctor answered: "In my terms, no. I use those equally. But I don't know that you could make a quantitative assessment based on two different radiologist's opinions with those two words." (Graven Dp. pg. 26) Dr. Graven stated that he had looked at the actual films; the doctor was asked if he would agree that there's a difference between the first one on September 13, 2005 and the second one on October 26, 2006. "Without question", Dr. Graven answered. (Graven Dp. pg. 27) In regards to the September 13, 2005 MRI, it talks about small central disc protrusion at L5-S1, and it was noted that Dr. Graven had described it as not going outside its anatomical --. "It is going outside its anatomical boundaries", the doctor explained, but agreed that it was not going outside its anatomical boundaries very much.. (Graven Dp. pg. 27) Dr. Graven had earlier stated, during cross examination, that the 09/13/05 MRI finding of a small central disc protrusion meant: "A disc that extends into the spinal canal beyond its normal anatomic parameters but not to a large degree." (Graven Dp. pg. 26) The doctor was asked to explain what it meant when the MRI report said -- "without spinal stenosis and neurofoaminal narrowing". Dr. Graven answered: "Spinal stenosis would indicate a narrowing of the central canal where the nerves run. The foramen are the windows at each level of the spine where a paired set of nerve roots exit." (Graven Dp. pg. 27) The doctor was asked if there was any description in the 09/13/05 MRI that suggested the small central disc protrusion at L5-S1 was impinging on a nerve root. "No", Dr. Graven answered. (Graven Dp. pg. 28) Dr. Graven agreed that when he had conducted the last physical examination on November 8, 2005 he had noted that Leavitt gave a history that the low back is oftentimes not painful whatsoever; Leavitt was more concerned about the mid back, Dr. Graven agreed. The doctor agreed that at the November 8, 2005 exam Leavitt was able to heel/toe walk, and then the following testimony then occurred:

1. What does that indicate to you? What's the significance of that physical exam test?
 1. People that have neurologic findings or neurologic impairment from a herniated disc or whatever the cause might be, the L5 nerve controls the ability to walk on your heels or extend your toes or ankle. Being able to walk on the toes is governed by the S1 nerve root.
 1. Okay.
 1. So there are two findings to elicit weakness secondary to L5 or S1 nerve root problems.
 1. And the fact that Ms. Leavitt could walk heel/toe told you what specifically?
 1. That she did not have weakness in those muscle groups.
 1. Okay. And did that cause you to have an opinion regarding her L5 nerve or the nerves exiting the L5-S1 vertebrae?
 1. Did it cause me to have an opinion?
 1. Right.
 1. Yes, that there wasn't significant motor weakness secondary to a nerve problem. (Graven Dp. pp. 28-29)

Dr. Graven further agreed that at the November 2005 exam Leavitt could flex her lumbar spine, her hands to her toes, and that this told him the flexibility in Leavitt's lumbar spine was normal. Agreeing that this provided him with information regarding the nature of Leavitt's injury to her L5-S1 disc at this point, Dr. Graven testified: "That currently her nerve roots were not inflamed." (Graven Dp. pg. 29) The doctor stated that he had conducted the physical examination of Leavitt himself. It was noted that Leavitt had stated in her deposition that she was never able to touch her toes; the doctor was asked if this would be a different representation than what he had in his record. "That would be a different representation", Dr. Graven responded. (Graven Dp. pg. 30) Dr. Graven was queried about when he had stated on direct examination Leavitt was at maximum medical improvement, and the doctor agreed that he had thought Leavitt had plateaued.

Dr. Graven agreed, during cross examination, that the complaints Leavitt had made to him on 09/26/06 were different than what she had made to him on 11/08/05 with regard to right leg numbness and tingling. The doctor further agreed that on 09/26/06 Leavitt had a positive straight leg raising test. Dr Graven explained what a positive straight leg raising test was: "That is one of the signs of a nerve root inflammation or impingement." (Graven Dp. pg. 32) It was noted that Dr. Graven

had not noted a straight leg raise test administered on November 8, 2005, and the doctor was asked if anything else in the November 8, 2005 exam suggested to him that that was done or that he had the results of it. "Being able to flex the lumbar spine when she's able to touch her toes would recreate some of the same findings you would see with the straight leg raise", Dr. Graven responded. (Graven Dp. pg. 32) The doctor was further queried – if Leavitt was able to flex her spine to touch her toes on November 8, 2005 is that equivalent in your mind to a negative straight leg raise? Dr. Graven eventually answered:

"I guess it depends on what you mean by equivalent. Do I think if someone has a straight leg raise and it causes leg pain that it's indicative of nerve root inflammation or impingement? Yes. Do I think someone who is able to flex their lumbar spine hands to the toes would be able to do that with an inflamed nerve root or impingement, no, I don't think they'd be able to do that." (Graven Dp. pg. 33)

Dr. Graven agreed that he had noted at the September 26, 2006 exam Leavitt was able to heel/toe walk, and could flex the lumbar spine only hands to knees. The doctor agreed that his physical exam on 09/26/06 was different that what he had found on 11/08/05. When further queried -- And it was different in that you found some evidence of nerve inflammation at the L5-S1, is that fair? --Dr. Graven answered: "Yes, that's fair." (Graven Dp. pg. 33) It was noted that the 10/26/06 MRI report said there's now a posterolateral herniation at L5-S1; Dr. Graven was queried that the direction of this disc has now changed from central to posterior and to the side. "Yes", Dr. Graven admitted. (Graven Dp. pg. 33) The doctor queried – Physiologically it changes the location of the disc? "Anatomically", Dr. Graven answered. (Graven Dp. pg. 34) Dr. Graven agreed that on 10/26/06 Leavitt now has a change in her disc that's going posterior into the right at L5-S1. It was noted that the 10/26/06 RMI describes an extruded fragment extending into the anterolateral recess. Dr. Graven was asked to explain what this means:

"Extruded would indicate or describe a disc fragment that is no longer within the normal areas or normal confines of a herniated disc or a disc, period. So the disc has gone beyond the superior and caudad borders of a disc." (Graven Dp. pg. 34)

Dr. Graven agreed that the 10/26/06 MRI indicated that part of the disc had moved. Agreeing that the 10/26/06 MRI report stated a change from the September 13, 2005 report -- that the herniation at L5-S1 as described is impinging on the S1 nerve root -- Dr. Graven added: "The other MRI was more of a central disc...In explanation, the S1 nerve root has branched and it's more lateral than central at that level." (Graven Dp. pp. 35-36) The doctor was queried - So, Dr. Graven, do you have an opinion based on what you've told me about the comparison of the two MRI's between 9/13/05 and 10/26/06 that the 10/256/06 MRI showed a change in pathology at the L5-S1 disc? "It was definitely different", Dr. Graven answered. (Graven Dp. pg. 36) Dr. Graven stated that he had an opinion on whether or not there was a change in pathology in Leavitt's disc condition between November of 2005 and October 26, 2006, based on the histories in 2005 and 2006, his exam findings at the 2005 and the 2006 exams, and the 2005 and the 2006 MRI findings; the doctor explained what the change in pathology was: "I believe that the previous central disc protrusion has become significantly worse", Dr. Graven answered. (Graven Dp. pg. 37) Dr. Graven agreed that he had stated on direct examination that he had no history that there was additional injury; it was noted that the doctor had further said that everyday living could cause the natural progression of a condition to worsen. Dr. Graven further testified:

"I said there are things that occur in everyday life that could; i.e. a sneeze or a cough could make a disc protrusion worse."

"In other words, if we increase our pressure when we strain, for instance, it can increase the intradiscal pressure and thus make an injury we have worse; if you will, squirt more disc out." (Graven Dp. pp. 37 and 38)

Dr. Graven agreed that when he said strain, it could be even bearing down to have a bowel movement, or coughing, or sneezing, or sexual intercourse. "Anything is possible", the doctor said. (Graven Dp. pg. 38) Dr. Graven was asked – Considering the difference in the MRIs and the difference between the physical exams done November 8 of 2005 and September 26, 2005, is it possible that the change manifested in the MRI on September 26, 2006 was not caused by the original injury on July 16, 2005? "Yes, it's possible", Dr. Graven answered. (Graven Dp. pg. 39) (**RULING:** Claimant's objection on grounds of leading is overruled. Graven Dp. pg. 38) Dr. Graven indicated it was his opinion the MRI and the condition that he examined for Leavitt in 2006 was caused by Leavitt's injury in 2005. The doctor was queried – As you sit here today (at your deposition on December 11, 2007), is it fair to say that you really don't know what caused the change in the pathology between the September 2005 and October 2006 MRIs? Dr. Graven responded:

"I have an opinion as to what happened. Do I absolutely know? I'm not God."

“I would submit there’s no way of anyone knowing anything that’s for sure. We’re not there to see it happen.”

“If you’re asking me if I’m going to testify that I don’t know, no, I’m not going to testify to that.” (Graven Dp. pg. 39)

Dr. Graven was asked to explain the basis for his opinion that the changes in 2006 are substantially caused by Leavitt’s July 2005 injury:

“I’d say – and I think I testified to this before – that it’s certainly within the realm of medical possibility that that was the case, that you can have an injury and it can become worse with the activities of daily living. Now, I also said that it’s possible that she did something else, I just don’t have a history to that.” (Graven Dp. pg. 40)

Dr. Graven agreed that this is a pretty significant change between the MRI in September 2005 and October 2006. The doctor further agreed that this was evidenced by the fact that he had not ordered epidural steroid injections back in 2005. Dr. Graven was asked – When you put Leavitt at Maximum medical improvement on November 8, 2005, did you anticipate a posterolateral herniation with extruded fragment occurring in Leavitt? “No”, Dr. Graven answered. (Graven Dp. pg. 41) The doctor agreed that it is reasonable for him to think Leavitt was going to maintain her condition as he saw her in November 2005. Dr. Graven was further queried – When you say you think it’s within a possibility that the change in pathology noted in the October 2006 MRI was caused by the July 16, 2005 injury, are you able to agree that it’s possible that it wasn’t caused by the July 16, 2005 injury? “Yes”, Dr. Graven answered. (Graven Dp. pg. 41)

On redirect examination, Dr. Graven was reminded that he had testified on direct examination, that it was medically probable. Dr. Graven responded: “Yeah. I think I changed what I said from probable to possible.” (Graven Dp. pp. 41-42) Dr. Graven further testified:

“I guess I could sum it up in saying that she had an injury at L5-S1, it became worse sometime between the MRI, the two MRIs. Have I seen other cases become worse? Yes. Have I seen other cases become better? Yes. I don’t have any history to suggest there was additional injury.

So my best presumption is that it is related because she had an injury to L5-S1 and it became worse. Can I factually say that I was there and know exactly what happened? No. But that is my medical judgement.” (sic) (Graven Dp. pg. 42)

On further cross examination, it was noted that the history in Dr. Graven’s last November 2005 note was lacking in complaints down the leg from Leavitt. “In November of ’05, yes, I did not record any complaints down the legs at that point”, Dr. Graven responded. (Graven Dp. pg. 43) When queried -- had she made them to you would you have written them down? -- Dr. Graven responded: “Yeah, I’d like to think so”. (Graven Dp. pg. 43) The doctor agreed that that is his practice to do so.

On redirect examination, Dr. Graven stated that lumbar radiculopathy indicates “(p)ressure on the nerve root, impingement, effacement... (i)nflammation of the nerve root”. (Graven Dp. pg. 46) The doctor agreed that pain or numbness down into the legs would be acknowledged by a note that says lumbar radiculopathy. It was noted that in his 08/30/05 report to the employer was written -- radiculopathy lumbar. Dr. Graven noted that this was “written by an assistant that works for me”, but further stated that, generally speaking, it is written at his direction. (Graven Dp. pg. 47) Dr. Graven agreed that the MRI he had reviewed on 09/13/05 showed a clinical history of -- low back pain with tingling and numbness down the right leg; the doctor agreed that he had this MRI report available to him in September 2005. Dr. Graven agreed that in the 09/15/05 report to the employer and the 10/11/05 report to the employer as well as the 11/08/05 report all noted -- lumbar radiculopathy.

Medical treatment records of Dr. Graven (marked as Deposition Exhibit 2 and offered into evidence without objection, See Graven Dp. pg. 6) concerned the treatment of Leavitt beginning on 07/19/05. In this entry, Leavitt’s complaints were notes as: “Patient here with complaints of low back pain central and in the sacroiliac joints bilaterally.” The work related event was next discussed by the doctor. It was further noted: “She denies numbness or tingling. Denies bladder or bowel incontinence.” Exam findings on 07/19/05 included: “Positive straight leg raise with low back pain bilaterally. X-rays of the lumbar spine are essentially normal.” Medication was prescribed. A form entitled Report to Employer completed by Dr. Graven noted a diagnosis of – SI Dysfunction, that Leavitt was unable to work, and that treatment was physical therapy and meds. Excel Physical therapy records were included in Dr. Graven’s record. In the next treatment entry of Dr. Graven, dated 08/02/05, was written: “Follow up of the low back. Was doing well until this weekend and the pain has returned. Has SI dysfunction. Will be returned to physical therapy at this time.” It was written that medication would be increased, and Leavitt was to return in follow up in one month. The Report to Employer form reflected the same diagnosis and treatment

plan as well as indicated that Leavitt could work with limitation with the listed restrictions. Another Report to Employer form in the record dated 08/30/05 now reflected a diagnosis of: SI Dysfunction – Radiculopathy (lumbar); the form reflected that Leavitt was maintained at limited work duty status and would be seen after an MRI.

A report of an MRI performed by a Dr. Paula George, M.D. on 09/13/05 . The clinical history written in the report was: “Low back pain with tingling and numbness down the right leg. Lifting injury.” The written impression was: “Small central disc protrusion at L5-S1 but without spinal stenosis or neural foramina narrowing”.

Next was Dr. Graven’s 09/15/05 treatment entry in which was written that Leavitt was being seen for follow up of lumbar spine. The 09/13/05 MRI results were noted, that it “shows small disk protrusion”. It was written that Leavitt would be returned to physical therapy, and restrictions were listed; it was written that Leavitt would return for follow up in one month. The 09/15/05 Report to Employer form reflected a diagnosis of: lumbar disc protrusion/lumbar radiculopathy, and Leavitt was kept on limited work status with restrictions. The next treatment entry of 10/11/05 stated:

Follow up of the low back. Continues to have some pain but rates it as zero to 4 at times, worse after working all day and better on her days off. She has some midback pain as well. I believe this is compensation from the low back problem and muscle fatigue. She will continue with the home exercise program, also working out at the Rec Plex. Will hold from physical therapy at this time. Follow up in four weeks for final check.

Dr. Graven wrote in the 10/11/05 Report to Employer form a diagnosis of: lumbar radiculopathy, and indicated that Leavitt was able to work with no limitations. In the next treatment entry of 11/08/05 Dr. Graven wrote:

Here for final check. Has some midback pain. Seems to be worse in the low back. The low back is oftentimes not painful whatsoever. Was doing her regular job. The midback seems to be as high as 6/10. She feels this is due to her physical therapy treatment because she had no midback pain prior to physical therapy. At the present time she is able to heel and toe walk. Flex lumbar spine hands to the toes. Side bend and rotation is normal. Tender to palpation in the paraspinal and thoracic spine. She will be returned to work full duty with no restrictions. Follow up p.r.n. Has reached maximum medical improvement and final disability will be determined upon request.

In an 11/08/05 Report to Employer form, Dr. Graven’s diagnosis was: HNP-lumbar & radiculopathy; it was noted that Leavitt was able to work full-time without restrictions.

Dr. Graven wrote a letter, dated November 10, 2005, in which he stated:

Ms. Jennifer Leavitt has been released from care at this time. As you well know, she sustained a low back injury and was treated conservatively with anti-inflammatory medications and rest. During her physical therapy she did experience some midback pain and this is ongoing. At her last visit earlier this week she did have some midback pain, but most of the low back pain was quite tolerable. Her range of motion and physical exam were near normal.

At this time she had reached maximum medial improvement. I find her partial permanent disability rating to be approximately 5%; this being based on her continued pain and aggravation and decreased activity.

The next document in Dr. Graven’s record was a treatment entry dated 09/26/06, in which Dr. Graven wrote:

Follow-up of her low back. Continues to have pain. States that as she has not really made significant improvement in the last 12 months. Has occasional radiation of the right leg with numbness and tingling. We will repeat her MRI at this time. She has a positive straight leg raise. Patella and Achilles reflexes are +2/4. Light touch sensory exam is normal. She is able to heel and toe walk. Flex lumbar spine only hands to the knees.

After the MRI we will anticipate perhaps epidural steroid injection. May progress to diskography if no relief is noted.

In summary then I believe that she has reached maximum medical improvement but she has not really made any improvement whatsoever. So it is hard to determine what maximum medical improvement if no improvement has been seen in the last year. I think she is unlikely to improve without further treatment. I hope this serves to answer any question.

In an 09/26/06 Report to Employer form, Dr. Graven’s written diagnosis was: DDD, HNP; the doctor continued to indicate that it was a work related injury/illness; Leavitt was maintained at a full time work with no restrictions status; it was noted in

the Comments – “pt states she has not been tx (with) another doctor”.

A report of an MRI performed by a Dr. Julian Verde, M.D. on 10/26/06 noted the following clinical history: “Low back pain radiating to her right hip and lower extremity”. It was written that this examination was to be compared to the previous exam of 9/13/2005. The written impression was: “1. There is a now a posterolateral herniation of the L5-S1 intervertebral disc to the right with an extruded fragment extending into the anterolateral recess and impinging upon the S-1 nerve root; 2. There has been no other interval change from the previous exam of 9/13/05”.

A final treatment entry in the record, dated 11/07/06, by Dr. Graven include that Leavitt was “here for follow-up of her MRI showing disc protrusion at L5-S1, especially on the right side”. Exam findings were: “Straight leg raise equivocally causes the thigh pain. Light touch sensory exam is normal. Patella and Achilles reflexes are intact.” The doctor wrote that epidural steroid injections would be scheduled, and then there would be follow-up. In the Report to Employer form dated 11/07/06 the diagnosis was: HNP L5-S1 (with) radiculopathy; further indicated in the form was that Leavitt could work full time without restrictions; it was indicated that treatment would be epidural steroid injections, and that Leavitt was to return following those injections.

Dr. Michael C. Chabot, M.D. testified by deposition on behalf of the employer/insurer (No. 1) Dr. Chabot stated that he is an orthopedic spine surgeon. The doctor agreed that he examined Leavitt on February 28, 2007 at the request of the employer/insurer. The doctor agreed that he was given records to review, including records from Barnes-Jewish St. Peters Hospital emergency room for visit dates of July 16, 2005 and February 25, 2007, records from Excel Physical Therapy for the period of July 21, 2005 to October 6, 2005; and the doctor noted that he was provided with Dr. Graven’s records through a follow-up appointment on November 7, 2006. Within Dr. Graven’s records, Dr. Chabot agreed, were MRI reports of Leavitt’s low back for studies performed on 09/13/05 and 10/26/06; Dr. Chabot further noted that he had reviewed the actual MRI film dated September 13, 2005, and was provided a CD of the October 26, 2006 MRI. Dr. Chabot identified at his deposition his reports of February 28, 2007, December 10, 2007 and December 24, 2007 in which he had set forth his opinions based on his evaluation of Leavitt, and stated that he would testify in a manner consistent with these reports; the reports were marked as Exhibits 2, 3 and 4, respectively, and offered into evidence with no objection (See, Chabot Dp. pp. 10-11 and 30).

It was noted that in his February 28, 2007 report, the doctor wrote that there appeared to be some inconsistency between Leavitt’s described pain level and the perceived discomfort or distress she experienced during the course of the exam, and Dr. Chabot explained what he meant:

“During the examination she was pleasant and conversed without any difficulty. She moved about the room without any difficulty. There was no guarding on the examination which would be, you know, significant restrictions in motion or movement. There – her gait was normal. She was able to dress/undress herself without any assistance. The other issue was that she rated her pain as a 7 to 10 on – which is in the severe range which usually would suggest that a person is having pain that would require use of narcotic medication or multiple medications in order to moderate.

She was really only on Aleve which she used only occasionally which was a significant inconsistency.

She also complained of leg pain symptoms on her pain diagram but then when asked specifically was she having leg pain that day, she stated she was not.” (Chabot Dp. pp. 12-13)

Dr. Chabot was directed to the pain diagram in his record marked as Exhibit No. 2, and the doctor agreed that it is filled out by the patient when they come to see him. Dr. Chabot agreed that the discrepancy he had just discussed was regarding the pain diagram Leavitt had filled out the day of his exam on February 28, 2007. It was noted that in his February 28, 2007 report Dr. Chabot had taken a history from Leavitt that she was taking one Aleve a day; the doctor was asked to assume that Leavitt had testified that she was taking four Aleve a day at that time and would that be different than what Leavitt had told him. Dr. Chabot answered:

“Yes. Initially, the questionnaire she marked she did not indicate she was on any pain medication. This is actually my handwriting because I asked her specifically, I said, are you taking any prescription or over-the-counter medications, and after she thought about it she informed me she was taking about one Aleve which is an over-the-counter medication and about 220 milligrams of Naproxen Sodium about once a week.

The only reason that was mentioned was because I asked directly whether or not she was using any other medication. She indicated she was using no medications other than Loestrin which is a birth control pill.” (Chabot Dp. pg. 14)

Dr. Chabot was asked his understanding as he examined Leavitt on February 28, 2007 of what complaints, if any, she had about her legs. "That she does not have leg pain", Dr. Chabot answered. (Chabot Dp. pg. 15) The doctor was asked his opinion on February 28, 2007 as to whether Leavitt was in need of any additional medical care for her low back condition. "It was my impression that she had reached maximum medical improvement, Dr. Chabot answered. (Chabot Dp. pg. 15) Agreeing that he had addressed the need for epidural steroid injections, Dr. Chabot testified as to what his opinion had been: "It was my opinion that she did not have an active radiculopathy and that they would not be of any benefit." (Chabot Dp. pg. 15) Dr. Chabot was asked to explain what he meant by "active radiculopathy":

"An active radiculopathy means that a person has active nerve root irritation. Usually, symptoms associated with that would be constant buttock and leg pain with numbness and weakness in the leg and/or reflex changes and/or positive tension signs which would include straight leg raise test." (Chabot Dp. pp. 15-16)

Dr. Chabot agreed that he was looking for these signs when he examined Leavitt on February 28, 2007.

Dr. Chabot testified as to what the two MRIs of Leavitt's low back revealed:

"Well, the MRI study from September 13, 2005, after reviewing it, indicated evidence of disc bulging at L5-S1. There was no evidence of nerve root compression. And the MRI study on October 26, 2006, was significantly different. It revealed evidence of a right posterolateral disc herniation at L5-S1." (Chabot Dp. pg. 18)

It was noted that the October 26, 2006 MRI also revealed an extruded fragment, and Dr. Chabot was asked to explain what this meant: "Extrusion usually means a disc fragment which extends through the posterior longitudinal ligament. So they're referring to the position of the disc fragment being that it was more into the spinal canal." (Chabot Dp. pg. 18) Dr. Chabot was asked his opinion of whether or not the MRI on October 26, 2006 was a change from the MRI on September 13, 2005. The doctor answered: "Yes. It's my opinion it was a profound change." (Chabot Dp. pg. 19) Dr. Chabot explained:

"Well, again, the -- when I reviewed the September 13, 2005, study it was my impression that there was evidence of disc bulging, not a frank disc herniation or protrusion.

The study conducted on October 26, 2006, revealed a lesion which was posterolateral in orientation sitting off to the side which is a different location than this disc bulge and one that was also extruded or had passed through the posterior longitudinal ligament and was actually into the spinal canal. Although, again, that -- usually they may refer to it as being extruded, but that's usually confirmed at the time of surgery if it's done.

That is a different position, a different type of lesion than just a central disc bulge.

There was evidence of neurocompression on the October 26, 2006, study and not on the September 13, 2005, study." (Chabot Dp. pp. 19-20)

The doctor was asked to explain what he meant by "evidence of neurocompression", and Dr. Chabot responded: "It means that the material is pushing up against the nerve or nerve tissue" (Chabot Dp. pg. 20) Dr. Chabot was asked if Leavitt had a disc bulge at L5-S1 does that mean she would develop a disc herniation at that level, and the doctor answered:

"No. I mean, she has degeneration at multiple levels as documented on the September 13, 2005, study. She could have been just as likely to develop a disc protrusion or herniation at one of the other levels. I don't know how you could have predicted that the L5-S1 disc bulge would now herniate. I think that's really extrapolating beyond what's probably reasonable." (Chabot Dp. pp. 20-21)

Dr. Chabot was asked -- in conjunction with your review of the MRI films and his knowledge of that, his history from looking at the records, the history he had elicited from Leavitt, and based on his experience, what was his opinion whether the findings on the October 26, 2006 MRI was substantially caused by the July 16, 2005 injury. "It's my opinion it's not", Dr. Chabot answered. (Chabot Dp. pg. 21) Dr. Chabot explained his opinion:

"If you read Dr. Graven's records the patient's primary complaints were that of low back pain and lumbosacral back pain. He diagnosed her primarily with SI dysfunction. There was some documentation a few months after initiation of treatment by the physical therapist, I believe in September 2005, of some symptoms or tingling radiating through the right leg which apparently were intermittent. That could also occur with sacroiliac dysfunction or tissue inflammation and does not necessarily mean that the patient was having radiculopathy.

So it is my opinion that from the records initially there was no documentation of active radiculopathy in this individual, and her MRI would have confirmed that since there was no evidence of a frank herniation or neurocompression. She was treated conservatively. Dr. Graven eventually placed her at maximum medical improvement November 2005. Then a year later she's seen for more significant complaints, and that is when it's noted that she has a disc herniation at the L5-S1 level. It's my opinion that the disc herniation could have occurred from some other event or could have occurred just based on disc degenerative changes that were noted previously." (Chabot Dp. pp. 21-22)

Dr. Chabot was asked his opinion of what condition did Leavitt have based on his exam of her and his review of the records and MRI from September 2005, what diagnosis did he feel Leavitt had as a result of the July 16, 2005 injury. "I believe she had a lumbosacral strain and sacroiliitis", Dr. Chabot answered. (Chabot Dp. pg. 22) The doctor was asked to define sacroiliitis:

"Well, sacroiliitis is inflammation of the sacroiliac ligaments. Now, these ligaments are the main stabilizing ligaments that hold a pelvis to the sacrum, so sacroiliac. Iliac is another word for pelvis. They are the ligaments that holds everything above the waist to everything below the waist. There's no physical articulation in the front of the spine that connects those two regions. They're only along the back part of the spine. So it's a relatively high tension or stress area, and when a person turns and twists or strains, they can injure or strain those ligaments that produce pain.

Usually, the pain is localized into the lumbosacral region. In some situations sacroiliac symptoms radiate with tingling and numbness in to the leg. Usually, not below the knee. But they're not a truly radicular complaint as they're primarily tissue inflammation, not nerve irritation." (Chabot Dp. pp. 23-24)

Dr. Chabot was asked how a physician distinguishes between whether it's radiculopathy versus sacroiliitis. Stating that an MRI is not the standard, Dr Chabot further testified:

"The first thing you always depend on is an accurate physical examination.

Does the person have evidence of an active radiculopathy? Is there evidence of neurologic changes and sensation, reflexes or muscle strength or are there changes of tension signs which would be straight leg raise testing with reproduction of leg pain? You could have straight leg raise testing which produces back pain in sacroiliitis but you have to have reproduction of the leg symptoms.

So again, you're looking for evidence that there is active irritation or damage to a nerve root." (Chabot Dp. pg. 24)

The doctor was asked, from his review of Dr. Graven's records in February 2007 and the Excel Physical Therapy records in December 2007, was there anything in those records that caused him to change his position regarding his diagnosis of Leavitt's condition as sacroiliitis as opposed to radiculopathy. Dr. Chabot answered:

"Again, I believe the only neurologic change that was documented by the physical therapist was a diminished right Achilles reflex.

The straight leg raise test he referred to as developing back pain on the right at 45 degrees, I believe, and on the left, I believe, at 75 degrees. That's not a true tension sign. With sacroiliac inflammation usually doing straight leg raise testing will also produce buttock pain, and that's what he elicited.

So aside from that, the single findings of a diminished Achilles reflex, I did not see any evidence of documented active radiculopathy." (Chabot Dp. pp. 25- 26)

It was noted that in a September 16, 2005 physical therapy entry it was written that Leavitt had given a history of some right lower extremity paraesthesia. Dr. Chabot responded:

"Again, like I said, you can have that with irritation of the sacroiliac, irritation of the IT band, irritation of the greater trochanter bursa, any numbers of things -- number of reasons develop paresthesias.

Now, did the paraesthesia extend into the calf or into the foot? There's no mention of that. All right? And usually with those conditions of sacroiliac or greater trochanteric or IT band findings, those usually extend into the thigh and no further." (Chabot Dp. pg. 26)

Dr. Chabot stated that his subsequent review of February 5, 2007 Barnes-Jewish emergency room records did not

cause him to change his opinion as expressed in his February 28, 2007 report. Dr. Chabot explained:

“Because they talked about her developing a stabbing -- complaining of stabbing low back pain and numbness in the right leg and leg pain for the last two weeks.

And it was a sudden onset of severe pain is how it was described.

That, again, would support in my opinion that the noted disc protrusion that was documented on her October 26, 2006, MRI did not occur at the time of her original injury.” (Chabot Dp. pg. 27)

Dr. Chabot stated that his review of the original Barnes-Jewish emergency room records from July 16, 2005 and discussed in his December 24, 2007 report (Employer’s Deposition Exhibit 4), those records did not cause him to change his opinions as expressed in his February 28, 2007 report.

Dr. Chabot was his opinion of whether or not Leavitt had reached maximum medical improvement as a result of the July 16, 2005 injury. The doctor answered: “Yes. It’s my opinion she had.” (Chabot Dp. pg. 28) Testifying as to when he felt Leavitt had reached maximum medical improvement, Dr. Chabot said: “I believe when she was released by Dr. Graven, I believe, in November of 2005.” (Chabot Dp. pg. 28) The doctor was asked if he felt Leavitt was in need of any additional medical care as a result of her July 16, 2005 injury, and Dr. Chabot answered: “It’s my opinion she’s not.” (Chabot Dp. pg. 29) Dr. Chabot was asked if he felt Leavitt needed some additional care outside of what was caused by her July 16, 2005 injury. The doctor responded: “No. Because even with the disc herniation noted on her most recent MRI study she, again, did not have evidence of active radiculopathy.” (Chabot Dp. pg. 29) The doctor was asked if Leavitt should be on any permanent work restrictions because of the July 16, 2005 injury, and Dr. Chabot responded: “it was my opinion that she did not have to be on work restrictions.” (Chabot Dp. pg. 29)

Dr. Chabot testified as to his opinion of whether Leavitt had sustained any permanent partial disability as a result of the July 16, 2005 work related injury: “It was my opinion that the original recommendation of a 5 percent PPD was reasonable.” (Chabot Dp. pg. 29)

On cross examination by the claimant, in regards to Dr. Chabot’s February 28, 2007 initial IME evaluation report, Dr. Chabot stated that he would agree the records of a 07/19/05 treatment entry by Dr. Graven [marked as Claimant’s Deposition Exh. A at the deposition, See Chabot Dp. pg. 30] “followed a letter from Medical Communications Corporation dated February 20, 2007”. (Chabot Dp. pg. 31) Dr. Chabot noted that another letter came from Medical Communications Corporation dated November 30, 2007 that had Excel Physical Therapy records with it. The doctor stated the other records that also accompanied the November 30, 2007 letter: “There was a copy of the September 13, 2005, MRI; October 26, 2006, MRI on CD; enclosed copy of Excel Physical Therapy records; a copy of Barnes St. Peters emergency room on – 2/5/07”. (Chabot Dp. pg. 32) Dr. Chabot further noted: “The next one is December 13, 2007, and they forwarded Barnes-Jewish St. Peters Hospital emergency room records from July 16, 2005.” (Chabot Dp. pp. 32-33) Agreeing that he knew at the time he agreed to evaluate Leavitt on February 28, 2007 that the insurance company did not authorize him to provide any treatment at the time he saw Leavitt, Dr. Chabot added: “They actually listed the evaluation as IME only.” (Chabot Dp. pg. 33) Dr. Chabot stated it was correct that he had said in his first report of February 28, 2007, top of page 5 – “It’s very well possible that the patient could have herniated a disc or have progression of this pathology at the L5-S1 level not associated with her prior employment at Borders”. The doctor was queried – Would you agree that it’s also possible that the progression of the disc pathology could have been related to Leavitt’s work injury? “It’s my opinion it was not”, Dr. Chabot answered. (Chabot Dp. pg. 34) When further queried if the doctor was saying that there is no possibility that any cause related to Leavitt’s work injury could have caused the herniation that he saw in the 2006 MRI, Dr. Chabot responded:

“It’s my opinion she did not have evidence of a disc herniation on the initial MRI. She had disc bulging at the L5-S1 level with disc desiccation which indicated some evidence of degenerative changes at the L5-S1 level already. I never said that she had a disc injury following that injury in July of 2005.

So you’re assuming she had a disc injury in July of 2005. My opinion is she did not. She had evidence of a lumbosacral strain with sacroiliitis.” (Chabot Dp. pg. 34)

Dr. Chabot was asked if he was saying that the central disc protrusion on the radiologist’s MRI report was not related to Leavitt’s work injury of 2005. “That’s correct”, Dr. Chabot answered. (Chabot Dp. pg. 34)

Dr. Chabot agreed, during cross examination, that when he wrote his second report on December 10 he had not evaluated Leavitt again. The doctor agreed that the paragraph at the top of page 2 of his December 10 report was simply repetition of the paragraph in his first report on page 4.

The doctor was asked, when you use the terms protrusion and herniation in regard to a disc are you speaking of generally the same thing. Dr. Chabot answered:

“The -- actually, the radiologist referred to the term protrusion. When I describe a herniation, usually I use protrusion and herniation synonymously. Now, whether or not he refers to a protrusion as a disc bulge, that’s up to his context. There is some variation in what people use.

As far as what I use, when I use the word protrusion or herniation, I use them synonymously.” (Chabot Dp. pp. 36 and 37)

Dr. Chabot agreed that the radiologist who read the first MRI did not use the term bulging. Dr. Chabot agreed that a disc protrusion is a disc that extends into the spinal canal beyond its normal anatomic parameters. The doctor was asked if he agreed that lumbar radiculopathy indicates inflammation of the nerve root that causes pain or numbness into one or both legs. “It could”, Dr. Chabot ultimately answered. (Chabot Dp. pg. 37) Dr. Chabot agreed that the records he had reviewed after February 28, 2007 did not cause him to change his opinions from his original report. The doctor was queried if he had testified that he didn’t believe Leavitt had any disc protrusion at the time that she had her first MRI. Dr. Chabot answered:

“I stated that it is my opinion after reviewing the study that it appeared she had disc bulging, not a disc protrusion. Disc bulging is more diffuse. There is no neurocompression, and that is the reason I had that interpretation.” (Chabot Dp. pg. 38)

Dr. Chabot agreed that he had drawn this conclusion based on his review of the study.

Dr. Chabot stated that it was possible for activities of daily living to cause a disc bulge to progress to a disc protrusion, further testifying:

“I’ve had people who leaned over to brush their teeth and suddenly felt back and leg pain ad were diagnosed with a disc herniation. People vacuuming their floors. People waking up in bed in the early morning hours with back and leg pain. So I believe that would be correct.” (Chabot Dp. pg. 39)

The doctor was questioned about other specific activities, and the following testimony occurred:

1. Would that include coughing or sneezing?
1. Sure it could. Excessive coughing. I’ve seen that happen.
1. How about tying your shoes?
1. I’ve never seen tying your shoes.
1. I’m sorry. Bending over to tie shoes.
1. I’ve never in my experience seen that. I imagine if a disc is -- the degeneration of a disc is advanced sufficiently that something like that could possibly happen.
1. If somebody had pain with activities like bending over or coughing or sneezing, could those indicate some type of disc protrusion?
1. No. It would indicate that they have probably deconditioning, lack of mobility, inflammation of ligaments and muscle. What you’re looking for with a true radiculopathy is intense leg pain symptoms with neurologic changes and tension signs that go along with it.

1. Okay.

1. Usually, with a herniated disc the leg pain symptoms are more pronounced than the back pain symptoms and not vice versa. (Chabot Dp. pp. 39-40)

It was noted in his last two reports, specifically under the discussion section in his December 10, 2007 report, that Dr. Chabot had written – “She subsequently developed an increase in her back pain symptoms that caused her to seek additional medical treatment with Dr. Graven in September 2006”; the doctor was asked if he was saying in these reports that there was no history of any specific inciting events. “That’s correct”, Dr. Chabot answered. (Chabot Dp. pg. 41) Dr. Chabot stated it was also correct in his next report where he again talked about Leavitt going back to Dr. Graven in September 2006, those symptoms were not associated with any specific injury or inciting event.

On redirect examination, Dr. Chabot agreed that when he said there was no specific inciting event, this was based on the history Leavitt had given to him in addition to the fact that he didn’t have any medical records describing something.

Dr. Chabot was questioned about his testimony on cross examination about could activities of daily living cause a bulge to change to a protrusion; the doctor gave the following additional testimony at this time –

“Well, actually in the context, if you already have disc bulging, usually there’s already disc desiccation. So that’s a disc that probably already has degenerative changes.

So my answer is meant to indicate that almost any activity could produce a potential for the disc herniating. In many situations there is no specific inciting events. In some situations an individual can bend over, vacuum, brush his teeth, just about anything, get up out of bed, and suddenly develop back and leg pain.

And in that context those are activities of daily living. The -- aside from a significant traumatic event, in many situations disc herniations arise with very little traumatic -- with very little traumatic, I guess, energy or very little indication of significant stress to the body.” (Chabot Dp. pp. 43-44)

Dr. Chabot agreed that this can happen in conjunction with an already degenerative disc. The doctor was asked if this was Leavitt’s condition, if he could answer based upon his review of the MRI. Dr. Chabot responded: “She already had disc desiccation and disc bulging so which would indicate that she had some changes of degeneration at that level. She also had changes at the adjoining levels.” (Chabot Dp. pg. 44) The doctor was asked if the September 13, 2005 MRI showed some degeneration, did he have an opinion whether this was present before July 16, 2005. Stating that he did have an opinion, Dr. Chabot further answered:

“You don’t develop disc desiccation or change of that sort overnight or even in just a couple of months. That occurs over several years.

I believe there was already mention even in that report of facet degeneration as well, and facet degeneration also is an indication of joint deterioration which again takes years to develop.” (Chabot Dp. pp. 44-45)

Dr. Chabot agreed that he was referring to his December 10, 2007 report on page 2 where he discussed the findings from his review of the MRI. Dr. Chabot agreed that in his discussion about the word protrusion versus bulge, he had mentioned that when he had reviewed the September 13, 2005 MRI of the low back he had called it a bulge.

Dr. Chabot stated that in his practice as an orthopedic spine surgeon part of his practice is to look at MRI films of the low back himself. The doctor agreed that he reviews MRI films in conjunction with the physical examination in making his determination regarding treatment for a patient. Dr. Chabot was asked if he solely relied on the report provided by the radiologist of an MRI of the low back or anywhere on the spine. The doctor answered: “Never. I always require review of the studies.” (Chabot Dp. pg. 46)

The doctor was asked if he distinguished between a finding of right leg pain versus right leg paraesthesia as a neurologic sign, and is there a distinction between the two. Dr Chabot answered:

“Well, there’s a distinction in the distribution of symptoms. If a person is complaining of paraesthesia which don’t extend

below the knee, it's usually very unlikely that will be a lower nerve root involvement. It may involve a third nerve because the third nerve usually extends into the proximal thigh.

So you look at that versus the distribution of their complaints; do they have calf pain along with it which is very typical for L5-S1 nerve root injuries or nerve root irritation. Then do they also have sensory changes along that distribution on pinwheel testing, reflex changes that go along with the nerve you think may be involved or muscle strength changes. So the history is part of the information that you're reviewing in order to sort of close down your differential diagnosis.

If a person presents with complaints that are primarily mesodermal which is tissue inflammation distribution into the thigh, non-specifically into the thigh, and they don't have any type of nerve findings, no tension signs, then one would make the assumption that the likelihood of a disc herniation -- symptomatic disc herniation with radiculopathy is very low." (Chabot Dp. pp. 46-47)

Dr. Chabot noted that it was Dr. Graven who had described sacroiliac joint dysfunction as a cause of the paraesthesia of the leg. "And she did have minimal tenderness involvement in her right SI region when I examined her on 2/28/07", Dr. Chabot noted. (Chabot Dp. pg. 48) The doctor was asked if this was consistent with the diagnosis of sacroiliac joint dysfunction, and Dr. Chabot responded -- "It could". (Chabot Dp. pg. 48) Dr. Chabot stated that in "most situations" sacroiliac joint dysfunction or sacroiliitis are probably used synonymously. (Chabot Dp. pg. 48) Dr. Chabot further testified:

"Usually, SI dysfunction would suggest that they have a chronic problem where there's a tendency for the SI joint to come out of place, and then usually treatment involves realigning it and then focussing on stabilizing it. But sacroiliitis is primarily the inflammation associated with the malalignment." (sic) (Chabot Dp. pg. 48)

Date: May 9, 2008

Made by:/s/ LESLIE E.H. BROWN
LESLIE E.H. BROWN
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ JEFFREY W. BUKER
JEFFREY W. BUKER
Director
Division of Workers' Compensation

In her award, the administrative law judge incorrectly found that Dr. Graven testified employee's symptoms did substantially change. The record reflects that Dr. Graven actually testified that employee's symptoms did not substantially change. At the hearing, the following was put on record by the Administrative Law Judge about the claimant's former attorney, Radford Raines and his attorney's lien: It should be noted that the hearing in this case started at about 9:45 this morning and it is now 11:45 a.m., and there has been no communication Attorney Raines. **RULING:** In light of: the lack of appearance by the former Attorney for the Claimant, Radford Raines, at this hearing to assert and protect his lien, and in that his lien filed with in this Division of Workers' Compensation file fails to assert the grounds or the amount of any lien he might have for services rendered in this case, and there is evidence indicating that Attorney Raines received notice of this hearing setting per Court Exhibits Nos. I and II, it is found that Attorney Raines has waived any attorney's lien in this case.

At the beginning of the hearing, the claimant objected to Issue Number 4, nature and extent of permanent partial disability, on grounds that the claimant feels it is an inappropriate issue because this is a hardship hearing in which the claimant is seeking a Temporary or Partial Award; and it is inappropriate for the employer/insurer to put in this issue and ask for finality of an award; the claimant does not agree that the Court is in a position to render a final award since the claimant is asking for a Temporary Award only and that is only award that can be appropriately awarded here. Employer/insurer counter argues that the employer-insurer is asking for a final award as it has evidence of nature and extent of permanent partial disability, and I just want it to be noted for the record we are seeking a final award.

ISSUE: Liability of past medical expenses in the amount of \$527.15; and Future medical care begins on page 31.

ISSUE: Nature and extent of permanent partial disability begins on page 34.

SUMMARY OF THE EVIDENCE begins on page 40.

It should be noted that the treatment entries, only, from Dr. Graven's record was offered into evidence by the claimant, marked as Deposition Exhibit A, at Dr. Chabot's deposition with no objection stated. See Chabot Dp. pg. 30.

At the deposition, the question incorrectly referred to a December 24, 2004 report, or Employer's Deposition Exhibit 4. When in actuality Employer's Deposition Exhibit 4 is Dr. Chabot's December 24, 2007 report. (See, Chabot Dp. pg. 28)

It should be noted that the treatment entries, only, from Dr. Graven's record was offered into evidence by the claimant, marked as Deposition Exhibit A, at Dr. Chabot's deposition with no objection stated. See Chabot Dp. pg. 30.

At the deposition, the question incorrectly referred to a December 24, 2004 report, or Employer's Deposition Exhibit 4. When in actuality Employer's Deposition Exhibit 4 is Dr. Chabot's December 24, 2007 report. (See, Chabot Dp. pg. 28)