

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

Injury No.: 98-119070

Employee: Merlyn Mabins-Griffin  
Employer: Federal Express Corporation  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)

Date of Accident: October 1, 1998

Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 19, 2006. The award and decision of Administrative Law Judge Linda J. Wenman, issued June 19, 2006, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 5<sup>th</sup> day of March 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

SEPARATE OPINION FILED

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

SEPARATE OPINION  
CONCURRING IN PART AND DISSENTING IN PART

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers'

Compensation Law, I believe the decision of the administrative law judge should be modified. I agree with the majority's conclusion that employee's neck and lumbar conditions are compensable. I disagree with the nature and extent of permanent disability awarded, as well as, the denial of certain medical expenses, future medical care, and temporary total disability benefits for periods of recovery.

#### Medical Causation

The administrative law judge erred in failing to find that employee's cervical and lumbar surgeries were necessitated by the October 1, 1998, work-related motor vehicle accident. The administrative law judge ignores the report of Dr. Eyerman dated September 15, 1999. As regards the cervical spine, Dr. Eyerman reviewed an MRI performed October 27, 1998 (27 days after the motor vehicle accident). Dr. Eyerman reports: "When I reviewed these films with the patient and their [sic] clearly at C6/7, the disc herniation does indent into the spinal cord, slightly...The patient also had on this film a bright spot in the annulus which represents an annular tear..." Dr. Eyerman believed E.M.G. testing revealed a C7 radiculopathy in the arm. Based upon his review of the results of a discogram and CT, Dr. Gornet also believed employee had an annular tear, as well as, disc herniations at C5/6 and C6/7. The accuracy of the radiological impressions of Dr. Eyerman and Gornet were confirmed by Dr. Gornet when he viewed the annular tear and herniations while performing a cervical fusion on September 7, 2004.

As regards the lumbar spine, Dr. Eyerman reviewed an MRI performed February 22, 1999 (4½ months after the motor vehicle accident). Dr. Eyerman reports: "The patient brought these films with her and these showed a definite disc herniation at L5/S1 with almost complete loss of water signal in that disc when all the other ones are bright on the T2 examination. This was a small disc herniation but it certainly also had an annular tear..." Dr. Eyerman believed E.M.G. testing revealed a L5-S1 radiculopathy in the left leg. Dr. Gornet also believed employee had an annular tear based upon his review of the results of a discogram and CT. The accuracy of the radiological impressions of Drs. Eyerman and Gornet were confirmed by Dr. Gornet when he viewed the annular tear while performing lumbar fusion on December 19, 2001.

Drs. Musich and Gornet are of the opinion that the October 1, 1998, motor vehicle accident was a substantial factor in causing employee's neck and lumbar disc conditions. They also believe the accident was a substantial factor in causing employee's need for the surgeries performed by Dr. Gornet. I find the testimony of these physicians persuasive.

The administrative law judge relied upon the opinion of Dr. Kennedy that the accident caused only lumbar and surgical sprains and was not a substantial factor in causing employee's disc conditions and need for the surgeries performed by Dr. Gornet. The administrative law judge erred in relying on Dr. Kennedy's medical causation opinion.

The linchpin of Dr. Kennedy's causation opinion is his erroneous belief that no diagnostic imaging show disc herniations until a discogram and CT scan were performed in October 2001 and November 2001, respectively. Dr. Kennedy's testimony undercuts the persuasiveness of his causation opinion because it reveals that his linchpin belief is unfounded.

Dr. Kennedy testified that he is qualified to interpret MRI films. Dr. Kennedy admitted that different individuals may interpret what an MRI shows differently. Dr. Kennedy admitted he had the report of Dr. Eyerman expressing Dr. Eyerman's opinion that the October 1998 cervical MRI and the February 1999 lumbar MRI showed disc herniations. Notwithstanding the above information, Dr. Kennedy did not review the October 1998 cervical MRI or the February 1999 lumbar MRI. Instead, he relied on the impressions of others as recorded in the MRI reports.

Dr. Kennedy's causation opinions are explicitly founded upon the absence of films showing disc herniations in the days, weeks, and months immediately after the motor vehicle accident. Dr. Kennedy's opinion is simply not persuasive because he failed to personally review the most important objective evidence underpinning his opinions, the MRIs performed shortly after the motor vehicle accident.

Employee has sustained her burden of proving her lumbar and cervical disc conditions were caused by the October 1998 motor vehicle accident.

#### Permanent Disability

The administrative law judge erred in failing to find that employee was rendered permanently and totally disabled by the October 1, 1998, motor vehicle accident. I find the testimony of Mr. James Israel to be the most credible on the issue of employee's employability. Mr. Israel established that employee has no transferable skills and he properly considered her job potential. He concluded that employee was at an "insurmountable substantial disadvantage" and that her overall limitations including her age, pain, educational background, work background factors, and required work site accommodations have rendered employee unable to compete in the open labor market.

I would award permanent total disability benefits against the employer/insurer, as well as, past medical expenses, future medical care, and temporary total disability benefits. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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John J. Hickey, Member

## AWARD

Employee:	Merlyn Mabins-Griffin	Injury No.:	98-119070
Dependents:	N/A	Before the	
Employer:	Federal Express Corporation	<b>Division of Workers'</b>	
Additional Party:	Second Injury Fund (open)	<b>Compensation</b>	
Insurer:	Self-insured	Department of Labor and Industrial	
Hearing Date:	April 28, 2006	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	LJW:tr

## 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: October 1, 1998
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
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 performing work duties, when her delivery van was struck from behind by an automobile.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Cervical and lumbar spine.
14. Nature and extent of any permanent disability: 12.5% BAW referable to the cervical spine, and 12.5% BAW referable to the lumbar spine.

15. Compensation paid to-date for temporary disability: \$5,656.55  
16. Value necessary medical aid paid to date by employer/insurer? \$12,339.81

Employee: Merlyn Mabins-Griffin Injury No.: 98-119070

17. Value necessary medical aid not furnished by employer/insurer? None  
18. Employee's average weekly wages: \$386.40  
19. Weekly compensation rate: \$257.60 / \$267.40  
20. Method wages computation: Stipulated

**COMPENSATION PAYABLE**

21. Amount of compensation payable:
- |   |               |
|---|---------------|
| 100 weeks of permanent partial disability from Employer | \$26,740.00   |
| Credit for permanent partial disability advance         | (\$10,696.00) |
22. Second Injury Fund liability: Open
- |        |             |
|--------|-------------|
| TOTAL: | \$16,044.00 |
|--------|-------------|
23. Future requirements awarded: None

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

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

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Merlyn Mabins-Griffin Injury No.: 98-119070  
Dependents: N/A Before the  
Division of Workers'

Employer: Federal Express Corporation

**Compensation**

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

Additional Party: Second Injury Fund (open)

Insurer: Self-insured

Checked by: LJW:tr

**PRELIMINARIES**

A hearing was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on April 28, 2006. Attorney Randall S. Parker represented Merlyn Mabins-Griffin (Claimant). Federal Express Corporation (Employer) is self-insured, and was represented by Robert Amsler. Briefs were filed and the case was formally submitted on May 30, 2006.

Prior to the start of the hearing the parties identified the following issues for disposition in this case: medical causation; liability for past medical expenses; past temporary total disability (TTD); future medical care; and liability of Employer for permanent partial (PPD) or permanent total disability (PTD). Second Injury Fund (SIF) is to remain open for consideration of secondary wage loss. Claimant stipulated to Employer's credit of \$10,696.00, for prior advancement of PPD.

Claimant offered Exhibits A-AA, and CC1-HH4. Employer offered Exhibits 1-6. Administrative Judicial Notice was taken of Exhibit KK. Objections to Exhibits S & HH1-HH4 were sustained. The exhibits were admitted into the record. Any objections not expressly ruled on in this award are overruled.

**SUMMARY OF EVIDENCE**

Numerous exhibits were admitted. All evidence presented has been reviewed. Only testimony necessary to support this award will be summarized. Any highlighted sections contained within the exhibits were present when the exhibit was admitted in evidence.

**Exhibit Review**

Due to the volume of exhibits and the timeframe involved, the applicable medical exhibits will be summarized in chronological order. On October 1, 1998 while in the course and scope of her employment duties, Claimant's delivery van was at a stop when a car rear-ended her van. Following the collision, Claimant received the following medical care:

10/1/98 Barnes Hospital Emergency Room – Claimant complained of neck pain and pain across her hips due to her seatbelt. Cervical x-rays revealed mild straightening of her lordotic curve.

10/5/98 Dr. Kramer – Employer authorized Claimant to be treated by Dr. Kramer, an orthopedist. Dr. Kramer diagnosed Claimant with cervical and lumbar sprains due to the motor vehicle accident (MVA). Claimant was placed on medications, taken off work, and provided physical therapy.

10/12/98 Dr. Friesenhahn – Dr. Kramer referred Claimant to Dr. Friesenhahn, a neurologist, after Claimant complained of dizziness and headaches. Claimant's neurological examination was normal. A cervical MRI was ordered that demonstrated small disc protrusions at C6-7 and C7-T1, lateralizing slightly to the right. Treatment resumed with Dr. Kramer.

11/9/98 Dr. Kramer – Claimant was found to be gradually improving, and was returned to work with restrictions.

11/23/98 Dr. Kramer – Claimant continued to complain of discomfort in her neck, shoulders, low back, and hips. Due to her persistent complaints, Claimant was referred to Dr. Samson, Dr. Kramer's partner.

11/25/98 Dr. Samson – Claimant was diagnosed with cervical syndrome, provided medication, and continued in therapy. Claimant remained on restricted work duties.

1/28/99 Dr. Samson – Claimant complained of low back pain, neck and shoulder pain. Her physical examination was normal, she was found to be at maximum medical improvement (MMI), and returned to work without restrictions.

2/18/99 Dr. Samson – Claimant complained of stabbing and shooting pain in her upper and lower back and hips. A lumbar MRI was obtained that demonstrated disc desiccation at L5-S1 with a mild bulge at L5-S1. After the lumbar MRI was reviewed with Claimant, blood tests were ordered to rule out an inflammatory process.

3/5/99 – 3/22/99 Lockwood Chiropractic – Claimant sought chiropractic care on own. She was diagnosed with thoracic and lumbar sprain/strains.

3/23/99 Dr. Samson – Claimant’s blood tests are normal, and Dr. Samson informed Claimant her MRI did not explain her symptoms. Claimant requested a second opinion.

3/29/99 Dr. Randolph – Claimant was referred to Dr. Randolph for a second opinion. Claimant’s examination was normal except for small trigger points identified in her shoulder girdle muscles. Dr. Randolph recommended trigger point injections, and Claimant was placed on lifting restrictions.

5/13/99 Dr. Randolph – Claimant complained of diffuse muscle tenderness. Claimant’s diagnosis remained unchanged, and she was placed in therapy.

6/3/99 Dr. Randolph – Claimant’s symptoms were noted to be somewhat out of proportion to any objective abnormalities. Dr. Randolph ordered a functional capacity examination (FCE).

8/6/99 Dr. Randolph – Claimant was examined after returning to full duty for the past ten days. Claimant’s physical examination was normal, but she voiced soreness across her low back. Dr. Randolph found her to be at MMI.

9/8/99 Dr. Riggs – Claimant saw her private medical doctor. Dr. Riggs noted Claimant “never had an orthopedist working for her”, and wanted Claimant to see Dr. Chabot.

9/15/99 Dr. Eyerman – Claimant saw neurologist (now deceased) who believed both MRIs showed annular tears. EMG/NCV testing was completed and interpreted as demonstrating a C7 and L5-S1 radiculopathy. Dr. Eyerman suggested traction. Claimant referred to Dr. Ibrahim.

9/21/99 Dr. Ibrahim – Dr. Ibrahim reviewed Claimant’s cervical and lumbar MRIs. Dr. Ibrahim determined Claimant’s lumbar MRI showed degenerative disc disease at L5-S1 with no herniation, and her cervical MRI showed a very mild herniated disc at C6-7 that did not impinge on a nerve root. Dr. Ibrahim recommended conservative treatment.

10/6/99 Dr. Randolph – FCE demonstrated Claimant was able to lift fifty pounds, and capable of working in the moderate to medium work classification. Dr. Randolph again placed Claimant at MMI.

10/13/99 Dr. Ibrahim – Claimant was informed surgery was a last resort.

11/15/99 Dr. Riggs – Recommended epidural injections. Prescriptions included Percocet and OxyContin.

12/99 – 8/00 – Claimant received lumbar epidural injections. Relief provided for 1-2 weeks per injection.

8/29/00 Dr. Riggs – Referred Claimant to Dr. Chabot.

11/27/00 Dr. Riggs – Claimant did not see Dr. Chabot, rather saw a doctor her attorney sent her to, and was told she had soft tissue problem. Dr. Riggs ordered new cervical and lumbar MRIs, and re-referred Claimant to Dr. Chabot.

12/1/00 Cervical and lumbar MRIs – Cervical MRI demonstrated moderate size central and right herniated disc at C6-7 with dural sac compression, but without cord or nerve root compression, a tiny left disc protrusion at C5-6, and a tiny right disc protrusion at C7-T1. Claimant’s lumbar MRI demonstrated mild disc bulging at L4-S1, but without herniation.

1/4/01 Dr. Chabot – Dr. Chabot reviewed Claimant’s 12/1/00 MRIs, and determined no disc herniations were present. Dr. Chabot had no medical treatment to offer Claimant. Dr. Chabot referred Claimant to a physiatrist, Dr. Wayne.

1/11/01-2/22/01 Dr. Wayne – Dr. Wayne diagnosed cervical and lumbosacral myofascial pain with some component of fibromyalgia. Medication and therapy were provided.

2/28/01 Dr. Poepsel – Claimant complained of left arm pain, and was referred to Dr. Sherrod for repeat EMG/NCV testing.

3/9/01 Dr. Sherrod – Dr. Sherrod conducted EMG/NCV testing of Claimant’s upper and lower extremities. The testing was interpreted to be normal.

4/23/01 Dr. Bailey – Dr. Bailey, a neurosurgeon, examined Claimant, diagnosed facetitis, and ordered medication with aqua therapy. Dr. Bailey reviewed Claimant’s lumbar MRI and found no disc extrusion.

7/30/01 Dr. Bridwell – Dr. Bridwell, an orthopedic surgeon, examined Claimant and found her most obvious finding to be degeneration at L5-S1. Dr. Bridwell found Claimant had no surgical pathology, and provided Claimant Dr Gornet’s telephone number.

9/6/01 Dr. Gornet – Examined Claimant and identified between her neck and lumbar complaints, Claimant’s most significant complaint was her lumbar spine. A lumbar discogram was ordered.

10/24/01 Dr. Gornet – Lumbar discogram demonstrated an annular tear and symptomatic disc at L5-S1. A lumbar CT was ordered.

11/26/01 Dr. Gornet – Claimant’s lumbar CT demonstrated advanced degenerative changes at L5-S1 with diffuse disc bulge, left central disc protrusion, and annular tear with contact of left S1 nerve root.

12/12/01 Dr. Kennedy – Employer requested Claimant be examined by Dr. Kennedy, a neurosurgeon. Dr. Kennedy reviewed Claimant’s MRIs, found Claimant had a normal neurological examination, and diagnosed a mild residual lumbar sprain. Dr. Kennedy found no surgical pathology, and Claimant voiced no cervical complaints.

12/19/01 Dr. Gornet – Claimant underwent an anterior decompression with fusion at L5-S1.

7/21/03 Dr. Gornet – Claimant complained of increasing neck pain, and pain into her left shoulder. Dr. Gornet ordered cervical epidural injections.

5/27/04 Dr. Gornet – Claimant complained of neck and bilateral arm pain. A new cervical MRI was obtained, and Claimant was informed “this is the same process that has been plaguing her since last July, although her symptoms have become increasingly severe.” Claimant elected to undergo surgery.

9/7/2004 Dr. Gornet – Claimant underwent anterior cervical fusion C5-6 and C6-7.

**Claimant:** In addition to the preceding information, Claimant testified while working for Employer she also worked for Neiman Marcus in the shipping department. On the date of accident, although she was restrained, Claimant testified she was thrown into the steering wheel, her head hit the headrest and her back hit the seat. The car that hit her came to rest under her van, and the driver was trapped in the car and incoherent. Claimant testified the driver was cut from his car by the fire department using the “jaws of life.”

As of hearing, Claimant continues to complain of back and neck pain. She experiences difficulty with all aspects of activities of daily living. Her neck swells, she has headaches, has difficulty driving due to trouble turning her head, and reading causes her neck to hurt. Claimant acknowledged surgery helped to a degree, but did not totally alleviate her pain. She continues to take OxyContin, Tylenol #3, and Advil. She finds the need to lie down 4-5 hours a day, because she does not sleep well. She is able to lift 10-15 pounds, but not on a repetitive basis due to pain. She no longer works for Employer or Neiman Marcus, and does not believe she could perform clerical work. Claimant testified Dr. Gornet has offered more surgery, but she does not want additional surgery.

Upon cross-examination, Claimant acknowledged the Barnes emergency room record indicated she told emergency room personnel she had been hit at a low speed impact. Claimant also acknowledged she sought chiropractic care on her own, while she was being provided medical care through Employer. Claimant verified she last worked for Employer in September 1999. Claimant also confirmed she worked for Neiman Marcus for six years after the accident, eventually attaining full-time status. Claimant confirmed that after the accident and until surgery, her neck and low back symptoms worsened. Finally, Claimant acknowledged Dr. Gornet had informed her she could return to “some kind of work.”

### **Medical Deposition Testimony**

**Dr. Musich:** Dr. Musich is board certified in family practice medicine, and evaluated Claimant on five occasions. The first evaluation occurred on September 13, 2000, and Dr. Musich diagnosed Claimant with chronic cervical myofascial pain, degenerative disc disease at L5-S1 with left sacroiliac dysfunction and left piriformis syndrome. On March 25, 2002, Dr. Musich noted Claimant’s symptoms had deteriorated significantly. On April 5, 2002, Dr. Musich opined the MVA was a substantial factor in Claimant’s neck and low back symptoms. On June 27, 2003, Dr. Musich found Claimant to be at MMI regarding her lumbar injury, but not at MMI regarding her cervical injury. On May 10, 2005, Dr. Musich found Claimant to be at MMI for both injuries.

Dr. Musich opined Claimant suffered acute neck and low back trauma due to the MVA of October 1, 1998. As such, work was a substantial factor in the development of acute symptoms and the need for treatment between 1998 and the present. Dr. Musich rated Claimant’s injuries at 45% BAW PPD referable to the lumbar spine, and 55% BAW PPD referable to Claimant’s cervical spine. Dr. Musich concluded Claimant is PTD due to her lumbar and cervical injuries.

Upon cross-examination, Dr. Musich acknowledged it is possible to have degenerative changes that require medical attention, and when examined in 2000 Claimant voiced no complaints regarding her neck. Dr. Musich confirmed Claimant had described the speed of the car hitting her as traveling 60-70 mph upon impact, but the emergency room had recorded Claimant reported the collision impact as low speed.

**Dr. Gornet:** Dr. Gornet is a board certified orthopedic spine surgeon. Dr. Gornet’s practice is dedicated exclusively to disorders of the spine. Dr. Gornet opined Claimant’s annular tear at L5-S1, and her need for cervical fusion were related to the MVA of October 1, 1998. Dr. Gornet opined Claimant’s annular tear was present on her 1998 lumbar MRI, and was consistent with her symptoms at that time.

Upon cross-examination, Dr. Gornet acknowledged he did not examine Claimant until three years after the MVA, and he only reviewed records from Dr. Bridwell. Dr. Gornet acknowledged most strain injuries resolve after three months, but most degenerative conditions become symptomatic after an event. Dr. Gornet confirmed Claimant's initial treatment focused on her low back, but he had noted her neck complaints in his initial examination report.

**Dr. Kennedy:** Dr. Kennedy is a board certified neurosurgeon. Dr. Kennedy described a protruding or herniated disc that does not deform or displace a nerve root as a benign finding, and not representative of a pathologic condition. Dr. Kennedy described a disc bulge that doesn't deform a thecal sac or nerve root as also a benign finding. Dr. Kennedy reviewed Claimant's MRIs and CT films. According to Dr. Kennedy, Claimant's CT scan and discogram were the first diagnostic tests to demonstrate a herniated lumbar disc.

Dr. Kennedy first examined Claimant on December 12, 2001 to assess her low back prior to her scheduled surgery. The examination revealed normal range of motion, no spasm or tenderness, negative straight leg raising, and normal motor and sensory examination. After reviewing Claimant's diagnostic films, Dr. Kennedy opined Claimant's MRI demonstrated the mildest degree of abnormality without root or cord impingement. Dr. Kennedy found Claimant's discogram results difficult to reconcile in light of a negative physical examination and benign MRI findings. Dr. Kennedy questioned if Claimant would have a successful response to surgery in light of the isolated discogram result. Dr. Kennedy opined Claimant had some mild residual lumbar sprain symptoms due to the MVA, but he did not believe the MVA was the source of disc pathology, or that the disc needed surgery. Dr. Kennedy felt in the face of a normal physical examination and essentially normal MRI, it is difficult to rely solely on the discogram. Dr. Kennedy also felt Claimant had no structural changes in her lumbar disc due to the MVA, and her 2001 CT scan pathology was the result of ongoing degeneration.

Dr. Kennedy next examined Claimant on September 21, 2004, after she had undergone lumbar and cervical surgeries. Dr. Kennedy opined Claimant had developed an operative lesion in her cervical spine after December 2001, and the MVA was not the reason Claimant required cervical surgery. Dr. Kennedy opined Claimant's need for cervical surgery was related to degeneration. Dr. Kennedy rated Claimant's cervical injury at 5% BAW PPD and her lumbar injury at 10% BAW PPD both referable to the MVA of October 1, 1998.

Upon cross-examination, Dr. Kennedy acknowledged he was not one of Claimant's treating doctors. Dr. Kennedy confirmed he did not examine Claimant's cervical spine during the 2001 examination because Claimant voiced no complaints concerning her neck. Dr. Kennedy testified he would not perform surgery based solely on a patient's complaints. Finally, Dr. Kennedy did agree annular tears can be painful, and preexisting degenerative disc disease can be asymptomatic, yet later aggravated by trauma.

### **FINDINGS OF FACT & RULINGS OF LAW**

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

#### **Issues relating to medical causation**

Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds). There is no dispute Claimant sustained a work related accident that required medical treatment. The dispute in this case involves the amount of treatment for which Employer is liable, and the key question to be answered involves when Claimant reached MMI.

The total medical treatment rendered to Claimant has previously been summarized. Employer provided Claimant medical treatment from October 1, 1998 until October 6, 1999. Over the ensuing five years Claimant sought treatment with nine different physicians who after further diagnostic testing either, had no medical treatment to offer, or counseled conservative treatment. Although Dr. Eyerman recorded positive EMG/NCV testing in September 1999, by March 2001, Dr. Sherrod reported negative EMG/NCV testing in Claimant's upper and lower extremities. Only after seeking treatment from a tenth physician, Dr. Gornet, did Claimant find a physician willing to perform surgical procedures. Dr. Gornet based his lumbar surgical decision on positive discogram and CT scan findings at L5-S1 performed three years after the MVA. Only two of the ultimately eleven physicians who reviewed Claimant's 1998 radiographs, saw evidence of an annular tear at L5-S1. Likewise, while Claimant may have had very small cervical disc protrusions at C6-7 and C7-T1 in 1998, there was no protrusion present at C5-6, and Dr Gornet eventually performed surgery at that level attributing the C5-6 level to the MVA.

Dr. Kennedy opined Claimant's lumbar findings in 2001, and cervical findings in 2003-2004 were the result of an ongoing degenerative process that was unrelated to the MVA of October 1, 1998. I find the opinion of Dr. Kennedy to be persuasive, and find Claimant sustained sprains to her lumbar and cervical spine due to the MVA of October 1, 1998. I further find Claimant reached MMI from the October 1, 1998 injury when released from care by Dr. Randolph on October 6, 1999. Employer's liability for ongoing medical care ended on that date.

### Issues relating to permanent partial disability

A permanent partial disability award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App. 1991) (overruled in part). With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled in part). Claimant's injuries are limited to sprains of her lumbar and cervical spine. Based on the evidence presented, I find Claimant has sustained 12.5% BAW PPD referable to her lumbar spine, and 12.5% BAW PPD referable to her cervical spine or \$26,740.00. Pursuant to the stipulation presented by the parties, Employer is entitled to an advancement credit of \$10,696.00.

### Remaining Issues

Based on the finding of Claimant's MMI on October 6, 1999, the remaining issues regarding past medical expenses, future medical care, unpaid TTD, and Employer's liability for PTD are moot. Medical expenses incurred after Claimant reached MMI were unauthorized, and Claimant's chiropractic bill incurred prior to reaching MMI is at her own expense as Employer had not waived its right to direct treatment. Any need of Claimant for future medical care now relate to the surgical procedures she has undergone due to her degenerative disc disease. Regarding unpaid TTD, Dr. Randolph indicated in an August 6, 1999 progress note Claimant had been returned to full duty ten days prior. Employer paid TTD benefits until July 28, 1999. Claimant was not placed back on restricted duty prior to the final MMI date of October 6, 1999. Once Claimant was found to be at MMI, Employer's obligation to provide work within her permanent restrictions no longer applied. Claimant left her employment with Employer during September 1999 after she could no longer meet the job requirements. Based on the date of MMI, Employer owes no additional TTD benefits. Finally, Claimant is not entitled to PTD benefits when after the date of MMI she continued to work at Neiman Marcus until she underwent her cervical fusion in 2004.

### CONCLUSION

In summary, Claimant sustained an injury on October 1, 1998, that arose out of and in the course of her employment with Employer. Claimant is awarded \$26,740.00 in permanent partial disability referable to Claimant's lumbar and cervical spine. Employer is entitled to an advancement credit of \$10,696.00. SIF is to remain open. Claimant's attorney is entitled to a 25% lien of any payments made to Claimant.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

LINDA J. WENMAN  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secrest  
Director  
Division of Workers' Compensation