

FINAL AWARD
(Reversing Temporary Award issued by Administrative Law Judge)

Injury No.: 02-149736

Employee: Robin Mahoney
Employer: Bath & Body Works, Inc.
Insurer: Self-Insured
Specialty Risk Services
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: September 11, 2002
Place and County of Accident: Camden 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. We have reviewed the evidence, read the briefs of the parties and considered the entire record. Pursuant to section 286.090 RSMo, the Commission reverses the temporary award and decision of the administrative law judge dated July 28, 2005, and in lieu thereof, the Commission issues its final award. The temporary award and decision of Administrative Law Judge Robert Dierkes, is attached hereto solely for reference.

I. Stipulations of Parties

The parties stipulated to the following: jurisdiction; employment relationship; injury due to an accident arising out of and in the course of employment; venue; claim for compensation timely filed; employee timely reported injury to employer; both employer and employee were operating pursuant to the provisions of the Missouri Workers' Compensation Act; compensation rate of \$377.55/340.12; date of accident September 11, 2002; and the employer was an authorized self-insured pursuant to the Missouri Workers' Compensation Act.

II. Disputed Issues

The parties placed the following issues in dispute at the evidentiary hearing: whether or not there is a medical causal relationship between the accident occurring September 11, 2002, and the resultant medical condition being alleged by employee, including, but not limited to, the need for back surgery; whether employer is liable to provide employee with additional medical care and treatment deemed reasonable and necessary to cure and relieve employee from the effects of the injuries sustained pursuant to the provisions of section 287.140 RSMo; employer's liability, if any, for temporary total disability benefits; whether employee has achieved maximum medical improvement on account of the injury sustained, and, if so, whether a final award is to be issued in lieu of a temporary award; if a final award is issued, the nature and extent of employee's permanent partial disability attributable to the injury, if any; and, if a final award is issued, the liability, if any, of the Second Injury Fund.

Based on the stipulations of the parties as to the issues in dispute, it was the contention of the employee at the evidentiary hearing that a temporary award should be issued awarding employee medical care and treatment deemed reasonable and necessary to cure and relieve employee from the effects of her injury as well as be awarded temporary total disability. Conversely, it was the contention of the employer that a final award should be issued because employee had achieved maximum medical improvement, no additional improvement was envisaged, and employee's condition had reached a state of permanency, in lieu of a temporary condition, on account of the injury sustained.

III. Facts

The employee, the husband of the employee, and two co-employees, testified at the hearing. The remaining evidence consisted of exhibits from the parties comprised of medical records, medical reports, deposition of Dr. Koprivica and both the transcribed deposition of Dr. Coyle as well as the videotape deposition of Dr. Coyle.

In summary fashion, employee testified she was born September 23, 1954; she admittedly experienced back problems prior to September 11, 2002; she underwent back surgery under the auspices of Dr. Backer on June 21, 1999; due to a disc herniation at the L-5 transitional level on the right side Dr. Backer performed a discectomy directly removing the disc and also performed a medial and lateral facetectomy. Employee followed up postoperatively with Dr. Backer undergoing a postoperative MRI on August 3, 1999; employee's symptoms partially resolved over the next few months and employee's last consultation/visit with Dr. Backer postoperatively was October 26, 1999.

In April 2001, employee experienced recurrent back pain and lower extremity pain for which she consulted her primary physician, Dr. Osborn, with complaints of bi-lateral leg and back pain for the past few weeks which had progressively worsened. These complaints and symptomatology were not associated with any specific accident.

Employee became employed with employer in July 2002 and on September 11, 2002, employee sustained an injury due to an accident arising out of and in the course of her employment; i.e., a cabinet fell forward knocking employee to the floor. Her principal treatment on account of this injury was rendered under the auspices of Dr. Coyle, a board certified orthopedist. Dr. Coyle treated employee between November 13, 2002 and January 8, 2003.

Dr. Coyle rendered the following medical opinions:

To summarize my earlier conclusions, it can be stated with a reasonable degree of medical certainty that Dr. Backer performed reasonable and appropriate surgery in June of 1999 for a foraminal disc herniation. This provided relief at that time, however, Robin Mahoney has experienced progressive degenerative collapse of the L5 transitional segment on the right side, secondary to degenerative problems, prior surgery and scoliosis. There is no evidence that she sustained a recurrent disc herniation or a traumatic injury to the lumbar spine necessitating surgery as a consequence of the 9/11/02 work incident. There is no objective radiographic evidence that Robin Mahoney's work activities of 9/11/02 caused a change in pathology necessitating surgery. I do agree that she does need a lumbar fusion, however, this is directly attributable to her history of scoliosis, degenerative changes and a prior facetectomy at L5 transitional level on the right and progressive collapse at that level.

These medical opinions were expressed by Dr. Coyle in a report authored by him on November 4, 2004.

Dr. Coyle also testified via videotape deposition. Due to the medical complexity of this particular injury and residuals medically causally related to this injury, the Commission sets out verbatim salient videotape testimony of Dr. Coyle as follows:

Q: What is that opinion?

A: No. 1 she has scoliosis with a concavity on the right side of her lumbar spine. There are some other details as to the nature of the scoliosis. No. 2, she had surgery in 1999 to address nerve root impingement at what is referred to as L4 - 5, in some cases L5-S1, it's the same level in both places. She had a radiculopathy at the time of surgery, a protracted course following the surgery with problems sufficient to warrant postoperative evaluation with an MRI. When she saw me she had an MRI showing almost complete absence of the facet at L4-5 on the right side coupled with concavity of the spine at that level. What she did not have was any evidence of an acute injury at that level. We have films from prior to her surgery, within two months of her surgery in 1999, an MRI from 2002, there's no significant difference in pathology on any of those studies. We have a CT myelogram which I obtained in November of 2002 and that shows no evidence of a recurrent disc herniation. It does show postoperative sequela specifically at the site of the facetectomy and

scoliosis. So based on reviewing those studies, I could conclude with a reasonable degree of medical certainty that the proximate cause of her radiculopathy was compression of the nerves on the right side due to scoliosis and instability with a history of prior discectomy and absence of the facet.

Q: Okay. So I'm repeating what you just said, but these conditions that you diagnosed, is that what you attribute the limitations and complaints to?

A: Yes.

Q: And then do you have an opinion based on a reasonable degree of medical certainty whether the incident that Ms. Mahoney described having occurred at Bath & Body Works on September 11th, 2002 was a substantial factor in causing any of the conditions diagnosed and previously discussed?

A: It is my impression within a reasonable degree of medical certainty that that incident did not cause the pathology in the spine which is causing the sciatica in the right lower extremity and back pain and necessitating a lumbar fusion for scoliosis.

Q: Do you have an opinion as to whether the condition that you diagnosed and discussed a minute ago as a source of her complaints and limitations preexisted and was unrelated to the September 11, 2002 accident?

A: Yes.

Q: What is that opinion?

A: My opinion is that it is related to scoliosis and history of prior surgery, progressive degeneration at the affected level.

Q: And do you have an opinion whether her work at Bath & Body Works and specifically this accident of September 11, 2002 caused or could have caused a change in pathology or change in the preexisting condition of her lumbar spine?

A: Yes. My opinion is that if one looks at the radiographic studies, there's no evidence of an acute injury, there's no evidence of a change other than progressive degeneration at that level secondary to scoliosis.

Q: Do you have an opinion as to whether the accident of September 11, 2002 was a substantial factor in causing any kind of a new injury or condition to the lumbar spine?

A: Yes, it's my impression to a reasonable degree of medical certainty that she sustained a lumbar sprain at that time.

Q: Do you have an opinion as to whether any of the conditions that may have preexisted this incident that you previously described, in which you indicated would be unrelated, were such that they would constitute a hindrance or obstacle to employment or re - employment prior to the accident?

A: Are you talking about the conditions of her spine prior to the accident?

Q: Right.

A: Yes, I think they would have.

Q: Okay. Do you have an opinion of whether the medical treatment Ms. Mahoney received following her September 11, 2002 accident with regards to her lumbar spine was reasonably required to cure and relieve her from the effects of a work-related injury?

A: Yes, I do. I think it was reasonably required to relieve her of the effects of the injury. Having said that, she has a very complex spinal disorder and so the work-up that she had, which was reasonable and appropriate, was more extensive than it would need to have been for someone who did not have preexisting scoliosis and prior spine surgery, specifically the CT myelogram would not have been necessary, the diagnostic injections and all that would not have been necessary.

Q: You indicated that she may have suffered a lumbar sprain or strain as a result of this accident?

A: Yes.

Q: Do you have an opinion whether she requires any additional treatment as a result of that?

A: It's my impression that the symptoms that are perpetuated are due to the scoliosis and instability and not to the accident.

Q: Do you have an opinion as to whether she would require future medical treatment with regard to her lumbar spine?

A: Yes.

Q: What is that opinion?

A: Well it's based on when I last examined her, so I can't say as to how she's doing now, but based on when I last examined her, reasonable appropriate treatment would include a lumbar fusion.

Q: Do you have an opinion then whether this treatment would have been necessary even had the accident of September 11, 2002 never occurred?

A: Yes.

Q: What is that opinion?

A: My opinion is that she has a progressive degenerative and congenital problem at her lumbar spine and will require ongoing treatment for that.

Q: And do you have an opinion whether that treatment was necessary even prior to September 11, 2002?

A: Yes, my impression is that she would have needed that treatment regardless of whether or not she had a lumbar sprain in 2002.

Q: Do you have an opinion whether her need for this medical treatment that you just discussed that she may need in the future was accelerated at all as a result of the September 11, 2002 accident?

A: It's my impression that it wasn't accelerated and that's based on a comparison of the pre-injury films of 1999 and post-injury films of 2002.

Q: Do you have an opinion whether Ms. Mahoney suffered a permanent disability as a result of her lumbar spine condition?

A: Her overall lumbar spine condition, yes, she does have a permanent disability referable to the history prior to surgery and scoliosis.

Q: Do you have an opinion as to how much or have you not reached that conclusion?

A: I have not done that.

Q: Do you have an opinion as to whether she has suffered any additional permanent disabilities as a result of the accident of September 11, 2002?

A: No, I don't, I haven't considered that.

Q: Do you have an opinion whether there are any permanent restrictions she should follow as a result of the condition you diagnosed in the lumbar spine?

A: Yes, she should limit her bending, limit her lifting, how much I couldn't say. I couldn't say directly how much but based on looking at her spine, looking at the pathology she has and the symptoms she has, she should limit her bending and lifting.

Q: Are these restrictions, would they be any different now than what they should have been prior to September 11, 2002?

A: No, they wouldn't be.

Q: In other words is she further limited and restricted in her ability to function as a result of the September 11, 2002 accident?

A: Not that I'm aware of. The scoliosis and spine problems predominate.

Q: In one of your reports, I believe it was the first one, you stated in there that the September 11, 2002 accident was merely a triggering and precipitating incident, is that still your opinion?

A: Yes.

Q: I need to ask you some questions about that so I can further understand what you mean by that, and first would be do you have an opinion as to whether the preexisting back condition that you diagnosed and discussed earlier today would have deteriorated with time regardless of the September 11, 2002 accident?

A: Yes. I think most surgeons who practice deformity surgery would look at a curve like that and anticipate that in the face of having had surgery at that level, progressive deterioration was likely.

Q: Ms. Mahoney was working, as I understand it, and maintaining employment obviously prior to September 11, 2002 because she was injured at Bath & Body Works?

A: Yes.

Q: Has the September 11, 2002 accident affected her ability to maintain employment?

A: It has not altered her pathology and so I would conclude that it has not changed her ability to maintain employment.

Q: Did the accident of September 11, 2002 result in any additional limitations or restrictions that might affect her ability to maintain employment above any limitations and restrictions that would have existed prior to September 11, 2002?

A: No.

Q: Was there any change in her diagnosis after the September 11, 2002 accident?

A: No, in terms of the scoliosis and post - laminectomy situation. She obviously had a diagnosis of a lumbar sprain.

Q: Okay, and with regard to that lumbar sprain, do you believe there's any additional treatment necessary to cure or relieve her from the effects of that?

A: No.

Q: Do you believe she's reached maximum medical improvement with regard to any injury she may have suffered as a result of the September 11th, 2002 accident?

A: Yes, I never made that determination but she's now over two years out from that, so from my definition she would have reached maximum medical improvement --

Q: Okay.

A: -- from that specific injury.

Q: And did that injury of September 11, 2002, the lumbar sprain/strain, cause a change in her prior condition such that she would require additional surgery or other treatment that you suggested earlier?

A: No.

Q: Have all of your opinions then been based on a reasonable degree of medical certainty and also based upon the records you reviewed, films you reviewed, history provided, physical examination and the opinions or diagnoses that you reached?

A: Yes.

Transcript 299-308

Q: Doctor, is it possible that the work injury accelerated that degenerative process?

A: That's what I was looking for when I did the CT myelogram. I was looking for a treatable work injury, a piece of disc in there, a fracture of the facet, something acute, a narrowing that wasn't present on the other films, but we have an MRI that was obtained in April of 1999 prior to the first surgery, an MRI that was obtained in August of '99 following the first surgery and an MRI that was obtained in October of 2002. There is no substantial difference between the postoperative MRI in August of 1999 and the MRI post injury in October of 2002. So this is one of those instances where you can look at a pre-injury and a post-injury MRI and see no appreciable difference in pathology.

Q: So this work-related injury has nothing to do with her present condition?

A: It has nothing to do with her necessity for surgery.

Transcript 322-323

Q: (By Mr. Truesdale) Doctor, would it be a fair statement to say that Robin Mahoney had a bad back before this back injury she suffered on 9/11/02?

A: I don't think anybody would dispute that.

Q: Did this back injury make her bad back worse?

A: I don't think it made it worse in a permanent sense. I think she did have an acute transient sprain to her back.

Q: Okay, but you don't think it worsened her collapse or -- at the L - 5 level, or you don't think the back injury at work on 9/11/02 had any effect at all on her other conditions that she carried with her to work that day?

A: I do not think her back injury increased her scoliosis, increased her subluxation at L4-5, caused a disc herniation, necessitated surgery or resulted in any permanent problem in her lumbar spine.

Q: Do you believe that prior to having the drawer fall on her she needed a lumbar fusion but just didn't know it?

A: I think it was a question of time.

Transcript 332-333

Q: Okay. Is it fair to say that as of January 8th, 2003 Ms. Mahoney had exhausted all medical treatment that may have cured or relieved her from the effects of this sprain or strain?

A: Yes.

Q: So would you at that point then believed that she would have reached maximum medical improvement such that no additional treatment would have provided her with any improvement?

A: That's speculating. The only thing I could say within a reasonable degree of medical certainty is

that patients who have lumbar sprain typically have self-limiting condition, and if you look at the textbooks there are numbers as low as four weeks for reaching maximum medical improvement and as far out as 12 weeks.

Q: And then do you have an opinion as to whether the accident of September 11, 2002 caused a period of time in which Ms. Mahoney was unable to work as a result of that accident?

A: Yes.

Q: What is that opinion?

A: If we assume the outside number, it's 12 weeks.

Transcript 347-348

Dr. Koprivica evaluated the employee on January 29, 2004, at the request of the attorney representing the employee. Dr. Koprivica did not treat the injured employee. Dr. Koprivica is board certified in emergency medicine and occupational medicine. He is not a surgeon.

The prominent opinions of Dr. Koprivica contained in his deposition testimony were as follows:

Q. And after doing your evaluation, evaluating the myelogram, did you come to a diagnosis of Ms. Mahoney's back?

A: Yes.

Q. What was that?

A: It was my opinion that Ms. Mahoney suffered from instability in — at the L5 transitional level with a right lumbar radiculopathy,

Q. Can you explain that in somewhat layman's terms?

A: Yes. Prior to the injury that she had September 11th, 2002, she had structural changes in her back. And as far as back as 1989 she had been identified as having scoliosis. She had had a disk herniation with a surgery June 19th, 1999 and that surgery had removed bone, including the medial facet joint and hemilaminectomy at the L5 transitional level. So at the same level she had had some bone removed which would put her at risk for instability, and she had scoliosis.

Now, my basic understanding from what she told me was that functionally she recovered from that and she was able to rebuild her strength over time where she was doing activities that if she was symptomatic from instability you would expect her to have symptoms. She told me that she was climbing deer stands, hiking two to three miles on uneven surfaces and not having problems. The injury that she sustained aggravated that situation and caused her to have symptoms from instability and it was -- that instability was causing pinching of the nerve which was producing the pain and weakness she was having in the right leg. So the bone is slipping. As it slips there had been degeneration of the disk that caused the nerve to get pinched at that level. And there is clear-cut evidence that she would have had changes at that level that would make her at risk but they were not symptomatic or disabling until she had the injury. That's basically what I found.

Q. Is your diagnosis consistent with that of Dr. Coyle?

A: Yes.

Q. And your diagnosis was consistent with the types of complaints she presented to you?

A: That's correct.

Q. And is it your opinion that she's at maximum medical improvement at this time?

A: No. My opinion was she was not at maximum improvement.

Q. And do you believe she requires additional care and treatment?

A: That's my opinion. I felt when I saw her in January of 2004 that she did require surgical intervention.

Q. And the surgical intervention is related to the work-related injury on September 11th, 2002?

A: My opinion is that the September 11th, 2002 event was a substantial factor in the need for surgery. She clearly had structural changes that contributed also. But they were asymptomatic prior to the aggravating injury. And I felt the aggravating injury was a substantial contributor.

Q. And do you have Exhibit 2 in front of you, Doctor?

A: Yes.

Q. Could you identify that?

A: Yes. What's marked as Exhibit 2 is an 11-page report dated January 29th, 2004 that represents a

true and accurate copy of the original report that I authored on that date after evaluating Ms. Mahoney. The only difference from the original report and Exhibit 2 is that this is a file copy, so the first page is not letterhead. But the body of the report is identical. And it would be a true reflection of the report that I authored.

Q. And that report is an accurate reflection of your opinions regarding Ms. Mahoney?

A. Yes.

Q. Have there been any changes to that report?

A. No.

Transcript 273-274

IV. Conclusions of Law

Based on a complete review of the entire record, the Commission finds that employee sustained an injury due to an accident arising out of and in the course of her employment; employee received all medical care and treatment reasonable and necessary to cure and relieve her from the effects of her injury; the injury sustained was a lumbar strain/lumbar sprain for which employee achieved maximum medical improvement after twelve weeks from the date of injury; accordingly, employee is entitled to temporary total disability benefits for twelve weeks; and employee did not sustain any permanent disability attributable to this work related injury.

Employee contends that the final result of her injury could not be determined and that the temporary award of the administrative law judge should be affirmed. Conversely, employer contends that employee had achieved maximum medical recovery with no improvement envisaged, was not in need of additional medical care and treatment deemed reasonable and necessary to cure and relieve her from the effects of her injury, and a final award was appropriate as to whether or not employee sustained any permanent disability on account of this injury.

The Commission finds there is sufficient evidence upon which to find that employee's condition is permanent and that her condition does not require additional treatment on account of this injury.

The issues were clearly delineated at the beginning of the hearing, i.e., whether the administrative law judge should issue a temporary award vis-a-vis a final award based on the evidence presented.

The authority of the Commission to issue a final award in lieu of a temporary award, as requested by the employee, is not a case of first impression. The Commission cites the following four cases: 1) *Toombs v. Deitz Hill Development Co.*, 159 S.W.2d 317 (Mo. App. 1942); 2) *Lindsay v. George F. Schulenburg Barrell & Drum Co.*, 227 S.W.2d 503 (Mo. App. 1950); 3) *Gonzales v. Johnston Foil Manufacturing Company*, 305 S.W.2d 45 (Mo. App. 1957); and 4) *Phelps v. Jeff Wolk Const. Co.*, 803 S.W.2d 641 (Mo. App. 1991).

All four of these cited cases are similar to the case a bar. Employee was seeking a temporary award; and employer was requesting a final award. In each case the employee was principally contending that the Commission committed reversible error in issuing a final award for permanent disability before making an award for temporary total disability. In each case the argument was rejected based on the evidence presented.

The important principles gleaned from these cases are as follows:

1) the *Toombs* case, *supra*, holds as follows at page 318 of the opinion:

"... if the commission feels that it cannot, at the time of any hearing, with reasonable accuracy, determine the period of compensable disability, it is its duty to make partial awards from time to time until it can do so. When the commission does decide the question and make a final award, it will be presumed that it has done its duty under this section and acted properly in making a final award at the time it did so.

This language would clearly indicate that the commission may make partial award, but if, at the hearing, the commission feels it can, with reasonable accuracy, make a final award, then it may do so. The court also says in effect, in that same opinion, that it is a

fundamental principle of law that controversies about matters of fact must be settled somewhere and “as soon as reasonably possible.”

2) In the Lindsay case, supra, the Appellate Court clearly stated that in a compensation proceeding, where an administrative law judge found that injury to employee resulted in temporary total disability and that full extent of injury could not be determined and made an award accordingly, and upon review the Commission found that the employee suffered permanent partial disability, the evidence sustained judgment of the award of the Commission rather than the award of the administrative law judge. The Appellate Court agreed that there was evidence upon which to find that the employee's condition was permanent and that no further treatment was necessitated, and a final award was appropriate.

3) In the Gonzales case, supra, the Appellate Court discussed the fact that the Commission was faced with two sets of medical opinions that were in irreconcilable conflict. The testimony presented two conflicting medical opinions regarding the condition of the employee, i.e., was it temporary in nature, or permanent in nature as to the extent of the injuries sustained.

As noted by the court these are the type of cases which frequently arise where the ultimate question of the right to compensation depends upon the acceptance of one of two conflicting medical or scientific theories regarding the cause of an injury. The issue is to be determined by the Commission based on substantial and competent evidence.

4) In the Phelps case employee challenged the Commission jurisdiction by contending the Commission exceeded its authority by awarding permanent partial disability when the issue was not presented at the hearing and the employee had no opportunity to present evidence concerning permanent disability. The Appellate Court held both contentions to be without merit.

In the instant case, the Commission finds the testimony and medical opinions of Dr. Coyle to be credible, persuasive and worthy of belief. In contrast, the Commission finds both the qualifications and medical opinions of Dr. Koprivica pale in comparison.

The Commission has had an opportunity to review both the videotape deposition testimony of Dr. Coyle as well as his transcribed deposition testimony, and the Commission finds his opinions to be extremely cogent and knowledgeable, concerning any medical causal relationship between employee's present complained of condition, and her injury, any need for additional medical care and treatment, whether or not maximum medical recovery has been achieved, and the nature and extent of disability, both temporary and permanent.

The Commission does not find the medical opinions of Dr. Koprivica concerning medical causation, need for treatment and ability to work on account of this injury to be credible, trustworthy or persuasive. The Commission would be constrained to give his medical opinions an iota of credibility in this case, when compared and contrasted with the medical opinions of Dr. Coyle.

The Commission also finds that the testimony proffered by employee and the lay witnesses carries little if any weight concerning the principal issues of medical causal relationship, maximum medical recovery, ability to work and residual disability. These issues are principally medical-legal issues and the expert medical evidence relied on by the employee is neither persuasive nor worthy of belief.

On the other hand, the expert medical evidence proffered by the employer, by the testimony of Dr. Coyle, is clear, convincing, and unequivocal.

In layman's terms, Dr. Coyle clearly explains that the employee sustained a lumbar strain/lumbar sprain; employee was adequately treated for this injury; and she sustained no permanent disability on account of this injury. She achieved maximum medical recovery after twelve weeks and no additional medical care and treatment was deemed necessary to cure and relieve her from the effects of this injury.

Employee presently needs a lumbar fusion, however, Dr. Coyle unequivocally states that the employee's need for

additional medical care and treatment is not medically causally related to the injury occurring September 11, 2002. The Commission emphasizes the excerpts of his videotape testimony regurgitated in the facts of this case, which the Commission finds determinative of the issues presented. The Commission further emphasizes that cross-examination of Dr. Coyle not only did not neutralize any of his opinions, rather, his medical opinions were clearly buttressed.

In fact, on cross-examination, Dr. Coyle testified that the injury occurring September 11, 2002, did not make employee's back worse in a permanent sense; she sustained an acute transient sprain to her back; the injury did not increase her pre-existing problems concerning scoliosis, nor her subluxation at L4-5; did not cause a disc herniation; did not necessitate the surgery she now needs; and furthermore, did not result in any permanent problem in her lumbar spine.

The Commission finds it rare indeed that a medical expert's testimony is so clear and convincing, unimpeached, and then buttressed on cross-examination as in the instant case.

In conclusion, after reviewing this entire record, the Commission makes the following findings: the employee sustained an injury due to an accident arising out of and in the course of her employment on September 11, 2002; the injury sustained was a lumbar strain/lumbar sprain; the employee received all medical care and treatment deemed reasonable and necessary to cure and relieve her from the effects of her injury; maximum medical recovery was achieved after twelve weeks; the injured employee is due twelve weeks of temporary total disability benefits; and the employee did not sustain any permanent disability on account of this injury. Employee is not in need of any additional medical care and treatment to cure and relieve her from the effects of this injury; employee has achieved maximum medical recovery with no improvement envisaged on account of this injury; and the issuance of a final award is appropriate based on the evidence presented.

Accordingly, the injured employee is awarded twelve weeks of temporary total disability benefits at the stipulated compensation rate of \$377.55 which amounts to a lump sum awarded of \$4,530.60.

The compensation awarded to the employee shall be subject to a lien in the amount of 25% of all payments ordered in favor of attorney Raymond Bozarth for necessary legal services rendered the employee.

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

Given at Jefferson City, State of Missouri, this _____ day of March 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I must respectfully dissent from the award and decision of the majority of this Commission reversing the award and decision of the administrative law judge. I have reviewed and considered all of the competent and substantial evidence on the whole record. The award of the administrative law judge is well written, well reasoned, and well

supported. I believe the award and decision of the administrative law judge should be affirmed.

Missouri case law makes clear that, “[t]he worsening of a preexisting condition is a ‘change in pathology.’” Winsor v. Lee Johnson Constr. Co., 950 S.W.2d 504, 509 (Mo. App. 1997) (citation omitted), overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 224 (Mo. banc 2003).

The administrative law judge’s thorough discussion of how employee’s evidence clearly details the “night and day” change in employee’s condition is consistent with the definition of “pathology,” which extends to a broader class of change than just anatomical change.

1 : the study of abnormality; esp: the study of diseases, their essential nature, causes, and development, and the structural and functional changes produced by them. 2 : something abnormal: a (1): the anatomic and physiological deviations from the normal in the tissues of animals and plants that are manifested as disease...(2) : the complex of signs, symptoms and bodily changes that characterize a particular disease...

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1655 (3d ed. 1971) (emphasis added).

I agree with the conclusion of the administrative law judge that employee has shown that her need for a lumbar fusion was medically caused by the aggravation of her back condition by the work injury.

Because I would affirm the award and decision of the administrative law judge, I must respectfully dissent from the decision of the majority of the Commission to deny further compensation to this injured worker.

John J. Hickey, Member

TEMPORARY OR PARTIAL AWARD

Employee: Robin Mahoney

Injury No. 02-149736

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

Dependents:

Employer: Bath & Body Works, Inc.

Additional Party:

Second Injury Fund

Insurer: Self-insured/Specialty Risk Services

Hearing Date: June 27, 2005.

Checked by: HDF/cs

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: September 11, 2002.
5. State location where accident occurred or occupational disease contracted: Camden 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? Employer was self-insured.
11. Describe work employee was doing and how accident happened or occupational disease contracted:
Employee was squatting while filling a large drawer with product. The drawer came loose and fell on Claimant, injuring her back.
12. Did accident or occupational disease cause death? No. Date of death?
N/a.
13. Parts of body injured by accident or occupational disease: Low back.
14. Compensation paid to-date for temporary disability: Unknown.
15. Value necessary medical aid paid to date by employer/insurer? Unknown.
16. Value necessary medical aid not furnished by employer/insurer? Unknown.

Employee: Robin Mahoney

Injury No. 02-149736

17. Employee's average weekly wages: \$566.33.
18. Weekly compensation rate: \$377.55 ttd/\$340.12 ppd.
19. Method wages computation: By Stipulation.

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses:

133 weeks of temporary total disability (or temporary partial disability) = \$50,214.15

(Employer is also ordered to provide Claimant with medical care as set forth more fully herein.)

TOTAL: \$50,214.15

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

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:

Raymond Bozarth.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robin Mahoney

Injury No: 02-149736

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

Dependents:

Employer: Bath & Body Works, Inc.

Additional Party Second Injury Fund

Insurer: Self-insured/Specialty Risk Services

Checked by: HDF/cs

ISSUES DECIDED

An evidentiary hearing was held in this case in Camdenton on June 27, 2005, on Claimant's request for a temporary or partial award. The parties requested leave to file post-hearing briefs, which leave was granted, and

the case was submitted on July 21, 2005. The evidentiary hearing was held to decide the following issues:

1. Whether Claimant's work-related accident of September 11, 2002 is the medical and legal cause of the injuries and conditions alleged by Claimant, including, but not limited to, the need for back surgery;
2. Whether Employer shall be ordered to provide Claimant with additional medical treatment pursuant to §287.140, RSMo;
3. Whether Employer shall be ordered to provide temporary total disability ("TTD") benefits, and, if so, for what period(s) of time;
4. Whether Claimant has reached maximum medical improvement, and, if so, whether a final award shall be issued;
5. If a final award is issued, the nature and extent of Claimant's permanent partial disability, if any; and
6. If a final award is issued, the liability, if any, of the Second Injury Fund.

STIPULATIONS

The parties stipulated as follows:

1. The Division of Workers' Compensation has jurisdiction over this case;
2. Venue is proper in Camden County;
3. The claim is not barred by Section 287.430 or Section 287.420;
4. Both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. The rates of compensation are \$377.55/\$340.12, based on an average weekly wage of \$566.33;
6. Claimant sustained an accident arising out of and in the course of her employment with Limited Brands, d/b/a Bath & Body Works, Inc. on September 11, 2002; and
7. Employer, Limited Brands, d/b/a Bath & Body Works, Inc., was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, Robin Crane (formerly Robin Mahoney); the testimony of Dee Johnson and Joyce Fulton, Claimant's former co-employees; the testimony of Rex Crane, Claimant's husband; medical records; the narrative report and deposition testimony of Dr. P. Brent Koprivica; and the narrative report and deposition testimony of Dr. James J. Coyle.

FINDINGS OF FACT AND RULINGS OF LAW

I find that Claimant, Robin Crane (formerly Mahoney) was born September 23, 1954, and was employed by Employer in July 2002 as an assistant manager of a new store. Claimant's work for the first few weeks consisted of setting up the new store, which involved unloading trucks, unpacking boxes of product and stocking shelves.

Claimant sustained the work-related accident on September 11, 2002.

Claimant's medical history prior to September 23, 2002 is relevant in the following respects. In 1989, Claimant was diagnosed with scoliosis. In September 1998, Claimant sought treatment for low back pain. In April 1999, she sought treatment for low back pain with right lower extremity complaints. An MRI done on April 23, 1999 revealed a transitional vertebra between L5 and S1, a desiccated disc between L5 and the transitional vertebra, and mild levorotatoscoliosis of the lumbar spine. Claimant had a series of epidural steroid injections at that time, which did not help. Claimant was referred to a St. Louis spine surgeon, Dr. Robert J. Backer, who performed surgery on June 21, 1999 consisting of "far lateral discectomy, second disk from the bottom on the right". A portion of the lamina of L5 was removed in the surgery, as well as most of the L5 facet joint. No fusion was done. Claimant's complaints continued post-surgery, and a repeat MRI was performed on August 3, 1999. The MRI showed the post-operative changes, but no other abnormalities were seen. By early September 1999, Claimant was working six-hour days with ten pound lifting restrictions. Claimant was still having foot drop at that time. By her own account, Claimant was symptom-free as of October 1999.

In April 2001, Claimant called Dr. Backer's office complaining of recurrent low back and leg pain. Dr. Backer recommended an MRI. Claimant testified that this episode of symptom recurrence was due to an excessive amount of driving that she was doing while one of her parents was very ill. Claimant testified that the symptoms remitted after she was no longer driving an excessive amount, and she cancelled the MRI.

The work-related injury occurred on September 11, 2002 when Claimant and her co-employees were stocking shelves. Claimant was in a squatting position (according to Claimant's testimony, a "catcher's position", i.e., similar to a baseball catcher's squat) filling a large drawer. The drawer should have been anchored in the back, but it was not. As Claimant filled the drawer with product, the drawer became "front heavy" and fell forward onto Claimant's legs, causing Claimant to twist and fall. Claimant felt that she had injured her low back. An injury report was completed, and Employer's home office was notified.

Claimant saw her family doctor, Dr. Howard W. Osborn, on September 13, 2002. He advised Claimant to use heat on her back and prescribed Bextra and Darvocet. Dr. Osborn also restricted Claimant's work. Claimant was started on physical therapy three days later, and kept on light duty. The physical therapy did not seem to help, and an MRI was done on October 14, 2002, which showed no evidence of disc herniation. The 10/14/02 MRI was essentially identical to the 8/3/99 MRI. On October 25, 2002, Dr. Osborn stated that he had nothing else to offer Claimant and recommended that Claimant see an orthopedic specialist.

Claimant saw Dr. James Coyle, an orthopedic surgeon, on November 13, 2002. Dr. Coyle's "impression" was: "scoliosis, pre-existing, hidden lumbar sprain secondary to 9/11/02 back injury, L5 transitional level instability secondary to scoliosis and prior surgery at L5 transitional level." Dr. Coyle's recommendation was: "lumbar myelogram to assess for evidence of nerve root impingement, continue on light duty with no lifting greater than ten pounds and no repetitive bending at work." Dr. Coyle's report of that date states further: "Ms. Mahoney has evidence (of) iatrogenic instability at the L5 transitional level secondary to partial facetectomy and scoliosis. Her work incident appears to be a triggering or precipitating incident."

The lumbar CT/myelogram was done on November 20, 2002. The radiologist's report states, in part: "Due to the facet degeneration, rotation and listhesis there is moderate to severe narrowing of the right neural foramen. There is mild narrowing on the left due to facet hypertrophy. ... The facet degeneration at L5-TS1 is much worse compared with the prior exam and the narrowing of the right neural foramen also appears more severe." On December 6, 2002, Dr. John Graham attempted to perform a right L5-S1 nerve root block on Claimant. Dr. Graham reports that he made at least four attempts with a fluoroscopically-guided needle, but due to Claimant's pain complaints, the procedure was aborted. Dr. Graham concluded: "In my opinion, the response the patient was having to the selective nerve root block attempts was symptom magnification behavior and not a true physiological complaint, as by any anatomic standards we were not near any nerve roots when she was complaining of pain going from her back into her leg."

Claimant saw Dr. Coyle again on December 11, 2002. Dr. Coyle's report of that date states: "It appears that there is some degree of L4 nerve compression when Robin is upright and increasing her level of activity, secondary to the scoliosis." Dr. Coyle stated that he "would be reluctant to recommend a lumbar decompression

and fusion”, although “this would be her only surgical option”. Claimant saw Dr. Coyle for a final time on January 8, 2003. His report of that date states:

At this point, I do not think further conservative treatment would be beneficial to her. To receive any definitive improvement, she would require a fusion at the site of her prior surgery. The fusion would be to address the scoliotic compression and concavity. Her work incident was a triggering or precipitating injury. Her scoliosis, pre-existing facet collapse and prior surgery were substantial contributing factors to her symptoms.

Since January 8, 2003, Claimant has seen Dr. P. Brent Koprivica, for an evaluation only, not for treatment. Claimant has not been to the emergency room since that time. Claimant testified that Dr. Karen Hayes in Kansas is “helping” her with pain management for her back, although no records from Dr. Hayes were in evidence. Employee is requesting that surgery be ordered.

Claimant has not worked “since she saw Dr. Coyle”. Claimant testified that she has not sought employment since that time. Claimant does not feel that she can work, and is requesting that TTD benefits be awarded.

Medical causation. Claimant clearly did not have a normal back prior to September 11, 2002. It is clear that Claimant was diagnosed with scoliosis, was diagnosed with a transitional vertebra between L5 and S1, and that in June 1999 Claimant underwent a partial laminectomy, facetectomy and discectomy at the level between L5 and the transitional vertebra. It is clear that Claimant had another flare-up of recurrent back and leg pain in April 2001.

The evidence also strongly suggests that, but for the April 2001 flare-up, Claimant was doing quite well with her back from October 1999 through September 11, 2002. Claimant testified that the April 2001 flare-up was caused by excessive driving due to her father’s illness, and that her back was fine once the driving stopped. Her testimony is corroborated, in part, by the medical records, or rather the absence thereof. Dr. Backer ordered an MRI in April 2001; Claimant testified that no MRI was done because she recovered quickly. The absence of any MRI in the medical records between August 3, 1999 and October 14, 2002 would tend to corroborate Claimant’s testimony in that regard. The absence of any other medical records showing Claimant’s complaints of back or lower extremity pain, or of Claimant seeking treatment therefor between October 1999 and September 11, 2002, also tends to corroborate Claimant’s testimony regarding her well-being during this time. Claimant’s husband, Rex Crane, has known Claimant since March 2001. He testified that Claimant was extremely active before September 11, 2002. Crane testified that Claimant could “keep up with” him hiking through woods and creeks; Crane also testified that Claimant helped him clear his road of trees and brush after a snowstorm in the winter of 2001-2002. Crane testified that Claimant was in “excellent shape”.

Claimant’s former co-workers, Dee Johnson and Joyce Fulton, both testified that they worked alongside Claimant at various times prior to September 11, 2002. They testified that Claimant was lifting and carrying 25-30 lb. boxes of product, and putting in “long days” without any problem. Fulton testified that Claimant unloaded trucks, lifted and carried heavy boxes, climbed, bent, “did everything”. Fulton also testified that prior to September 11, 2002, Claimant “worked as hard as everyone else”. Both Johnson and Fulton testified that Claimant couldn’t walk very well after 9/11/02. Fulton testified that, after 9/11/02, Claimant was “trying hard to work”, but Fulton “could tell she (Claimant) was hurting”.

While the testimony of Claimant and her husband regarding Claimant’s alleged state of well-being prior to 9/11/02 may be self-serving, it is consistent with the medical records, and is corroborated by the testimony of Johnson and Fulton, both of whom impressed me as truthful, and neither of whom had any motive to lie. I find, therefore, that, between October 1999 and September 11, 2002, Claimant had no problems with her back and lower extremities, except for a brief period in April 2001. I also find that Claimant clearly was able to perform her job duties with Employer for the two months prior to her accident, including carrying and lifting boxes of product, unloading trucks and bending, stooping and squatting.

I also find that Claimant had consistent problems with back pain, right gluteal and hip pain and right lower extremity pain from September 11, 2002 through at least January 8, 2003. These problems are documented by Dr. Osborn and by Dr. Coyle. When Dr. Coyle released Claimant on January 8, 2003, he noted that “on exam

today (Claimant) has right paralumbar tenderness, right-sided gluteal pain, lateral thigh pain, anterior calf pain, numbness on the top of her foot, numbness in the great toe and 2nd toe". Claimant testified that her back is still stiff and sore, that her back spasms and "locks up", and that she is very limited in her activities. Although there are no contemporaneous medical records to corroborate Claimant's problems since January 8, 2003, Dr. Coyle's note of that date does state: "to receive any definitive improvement, she would require a fusion at the site of her prior surgery". Since Claimant has not had the fusion surgery, Dr. Coyle's note would suggest that Claimant would not be expected to have experienced "any definitive improvement" in the interim.

Dr. Coyle testified that the 9/11/02 accident caused a lumbar sprain or strain, that he would expect that Claimant reached maximum medical improvement from the lumbar sprain within 12 weeks after it occurred. Dr. Coyle testified that the 9/11/02 accident did not cause a change in the pathology of Claimant's spine. Dr. Coyle believes that the 9/11/02 accident was not a substantial factor in the need for fusion surgery. Dr. Coyle does not believe that Claimant requires any additional treatment related to her 9/11/02 accident. Dr. Coyle testified that he probably would have recommended a fusion surgery for Claimant in June 1999 when the partial laminectomy, facetectomy and discectomy were performed. Dr. Coyle testified that, since Claimant did not undergo fusion in June 1999, that she would have eventually needed a fusion surgery, with or without the 9/11/02 accident.

Dr. Koprivica's pertinent testimony is as follows:

Q. And after doing your evaluation, evaluating the myelogram, did you come to a diagnosis of Ms. Mahoney's back?

A. Yes.

Q. What was that?

A. It was my opinion that Ms. Mahoney suffered from instability in – at the L5 transitional level with a right lumbar radiculopathy.

Q. Can you explain that in somewhat layman's terms?

A. Yes. Prior to the injury that she had September 11th, 2002, she had structural changes in her back. And as far back as 1989 she had been identified as having scoliosis. She had had a disk herniation with a surgery June 19th, 1999 and that surgery had removed bone, including the medial facet joint and hemilaminectomy at the L5 transitional level. So at the same level she had had some bone removed which would put her at risk for instability, and she had scoliosis. Now my basic understanding from what she told me was that functionally she recovered from that and she was able to rebuild her strength over time where she was doing activities that if she was symptomatic from instability you would expect her to have symptoms. She told me that she was climbing deer stands, hiking two to three miles on uneven surfaces and not having problems. The injury that she sustained aggravated that situation and caused her to have symptoms from instability and it was – that instability was causing pinching of the nerve which was producing the pain and weakness she was having in the right leg. So the bone is slipping. As it slips there had been degeneration of the disk that caused the nerve to get pinched at that level. And there is clear-cut evidence that she would have had changes at that level that would make her at risk but they were not symptomatic or disabling until she had the injury. That's basically what I found.

Q. Is your diagnosis consistent with that of Dr. Coyle?

A. Yes.

Q. And your diagnosis was consistent with the types of complaints she presented to you?

A. That's correct.

Q. And is it your opinion that she's at maximum medical improvement at this time?

A. No. My opinion was she was not at maximum medical improvement.

Q. And do you believe she requires additional care and treatment?

A. That's my opinion. I felt when I saw her in January of 2004 that she did require surgical intervention.

Q. And the surgical intervention is related to the work-related injury on September 11th, 2002?

A. My opinion is that the September 11th, 2002 event was a substantial factor in the need for surgery. She clearly had structural changes that contributed also. But they were asymptomatic prior to the aggravating injury. And I felt the aggravating injury was a substantial contributor.

While the testimony of Dr. Coyle and Dr. Koprivica are in agreement in many respects, the crucial difference concerns the role, if any, that the 9/11/02 work accident played in causing Claimant's current and persisting symptoms, and the role, if any, that the 9/11/02 work accident played in causing Claimant's current need for fusion surgery.

Employer asserts in its brief that Dr. Koprivica's opinion regarding causation "is based solely on a temporal proximity between the accident and the escalation of her symptoms" and that Dr. Koprivica's opinion "does not establish a cause and effect relationship between the ... condition and the asserted cause as required by Davis v. General Electric, 991 SW2d 699 (Mo.App.S.D. 1999) but rather assumes one based on the temporal proximity." If Dr. Koprivica's opinion is considered in a vacuum, Employer's assertion may be correct. However, Davis also reiterated that "expert testimony must be analyzed in the context of all of the evidence, so that a less than direct statement of reasonable medical certainty, combined with other corroborating evidence, may be sufficient to establish causation." (Davis at 706-7).

There is "other corroborating evidence" in this case. The evidence shows that the 9/11/02 accident was the type of accident that would cause an injury to Claimant's back. This is shown by Dr. Coyle's testimony that the 9/11/02 accident caused an acute lumbar "sprain or strain", and also in Dr. Coyle's consistent reference to the 9/11/02 accident as a "triggering or precipitating incident" or a "triggering or precipitating injury". *Taber's Cyclopedic Medical Dictionary* defines "trigger" as "an event or impulse that initiates other actions or events". *American Heritage Dictionary* defines "trigger" as "an event that precipitates others" and defines "precipitate" as "to cause to happen before anticipated or required".

What did the 9/11/02 accident "initiate" or "precipitate"? What did the 9/11/02 accident "cause to happen before anticipated or required"? The evidence as a whole, including the testimony of Drs. Coyle and Koprivica, leads to the conclusion that the 9/11/02 accident "precipitated" the onset of Claimant's severe low back pain and lower extremity complaints, "causing" same "to happen before anticipated", i.e., before the progressive course of Claimant's serious preexisting back conditions would have otherwise been expected to cause them to happen.

Employer's brief also states: "(e)ven assuming Dr. Koprivica's testimony rises to the level necessary to meet Ms. Mahoney's burden of proof, the evidence confirms that work was not a substantial factor in causing a change in pathology or a change in the underlying medical condition". Employer's brief further asserts that the work accident was a mere "triggering or precipitating factor". (Section 287.020.2, RSMo, states in part: "An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.") Employer cites Cahall v. Cahall, 963 SW2d 368 (Mo.App. E.D. 1998) for its position on this issue. The Court of Appeals affirmed the Commission's finding of a compensable accident in Cahall. While the evidence of compensability in Cahall appears to be stronger than in the instant case, the Cahall court recognized (at p. 372): "the use of the general article 'a' before 'substantial factor', as opposed to the specific article 'the', indicates a causative factor may be substantial even if it is not the primary or most significant factor. There is no bright-line test or minimum percentage set out in the Workers' Compensation Law defining 'substantial factor'." As applied to the instant case, even though Claimant's underlying back conditions (scoliosis, history of partial laminectomy, facetectomy and discectomy) are clearly **the most** substantial factor in the cause of Claimant's current problems and the need for surgery, the possibility of other "substantial factors" still exists.

The Cahall court also recognized (also at p. 372) that "(t)hese work related accidents may have triggered claimant's current medical condition in that they were the last of multiple causal factors. *However, a work related accident can be both a triggering event and a substantial factor.*" The italicized language is important in the instant case. My reading of Dr. Coyle's testimony is that, because Claimant's underlying back conditions clearly are the most substantial factor in the cause of Claimant's problems, the 9/11/02 "triggering or precipitating incident" can therefore not even be considered as "a" substantial factor in the cause. In other words, I believe Dr. Coyle says "substantial factor" must be "either/or", when the law clearly contemplates the possibility of more than one substantial factor.

I also want to address Employer's point regarding the lack of "change in pathology". It is clear from the evidence that the 10/14/02 MRI and the 11/20/02 myelogram showed no structural changes in Claimant's low back, when compared to the 8/3/99 MRI. Therefore, the only evidence of "change in pathology" is how Claimant feels since the 9/11/02 accident. Claimant has credibly testified that her back pain has been severe and consistent since the 9/11/02 accident, and, as noted above, her testimony in that regard is corroborated by other substantial evidence. In Winsor v. Lee Johnson Construction, 950 SW2d 504 (Mo.App.W.D. 1997), the Court, in a case very similar on its facts to the instant case, found that Mr. Winsor's increased pain complaints after a work-related incident constituted an "exacerbation" of his preexisting back problems and constituted "a change in pathology". I note that the

Winsor court stated in a footnote: "While we find evidence to support the award, we nevertheless acknowledge that this is a close case. Without detailing all the evidence which would justify a contrary result, we can say that had the Commission ruled against Winsor, the application of our standard of review to such decision based on the record before us would likely result in our affirmance thereof." This footnote, I believe, is meant to send a message that not every time an employee with a preexisting condition complains of pain after a work incident should the case be found compensable; that such a finding should be reserved for those cases where the employee's complaints are clear, substantial and convincing. As noted in detail above, I believe this is such a case. Claimant has painted a credible and corroborated picture of a "night and day" change between her pre-9/11/02 condition and her post-9/11/02 condition, and this change is not the result of mere coincidence.

Therefore, on the crucial issue of causation, I find that, although Claimant's preexisting conditions constituted *the most substantial factor* in the cause of Claimant's symptoms and need for fusion surgery, the work accident of 9/11/02 was also a substantial factor in the cause of Claimant's symptoms and need for fusion surgery.

Medical treatment. Employer is therefore ordered to provide Claimant with all such medical, surgical and other treatment, including, but not limited to, the spinal fusion surgery detailed in the evidence, and all care, treatment and diagnostic testing attendant thereto, as required by Section 287.140, RSMo.

TTD benefits. Claimant testified that she has not worked "since seeing Dr. Coyle". It is clear that Claimant has not worked for a substantial period of time, and that she has not sought work during that time.

The question, then, is whether Claimant, in her current physical condition, could compete on the open market for employment. Cooper v. Medical Center of Independence, 955 S.W.2d 570, 575 (Mo.App.W.D. 1997). A claimant can be totally disabled even if able to perform sporadic or light duty work. Cooper at 575.

When Dr. Coyle saw Claimant on December 11, 2002, he stated: "From the standpoint of work, she should do no lifting greater than ten pounds. She should work no more than four hours per day with a twenty minute break during that period of time." When Dr. Coyle saw Claimant on January 8, 2003, he found her condition not to be improved, although he did not make any statement regarding her work status. It is reasonable to assume that, since her condition had not changed, that the same work restrictions would continue to apply. As it is clear from Claimant's testimony that her condition has not significantly improved in the interim, and as Dr. Coyle has opined that Claimant would not be expected to improve without fusion surgery, it is also reasonable to believe that Claimant has not been able to perform anything more than part-time light duty work since January 8, 2003. Claimant has thus been (temporarily) totally disabled since January 8, 2003. Employer is ordered to provide Claimant with TTD benefits, at the rate of \$377.55 per week, from and after January 8, 2003 to the present, and continuing until such time as Claimant has achieved maximum medical improvement, or until Claimant is able to compete on the open market for employment, or until 400 weeks of TTD have been paid, or until Claimant's death, or until otherwise ordered by the Division or the Commission, whichever shall first occur. As of July 26, 2005, 133 weeks of compensation are owed, totaling \$50,214.15.

As Claimant has not reached maximum medical improvement from her work-related injury of 9/11/02, the remaining issues are moot.

Claimant's attorney, Raymond Bozarth, is allowed 25 percent the accrued TTD benefits awarded to Claimant (i.e., \$12,553.54) as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon, until paid.

This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

Date: July 28, 2005

Made by: /s/Robert J. Dierkes
ROBERT J. DIERKES
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Patricia "Pat" Secret

Patricia "Pat" Secret, *Director*
Division of Workers' Compensation