

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

Injury Nos.: 02-055584 & 03-008884

Employee: Shelly Martin

Employer: Mark Twain Caring Center

Insurer: Missouri Nursing Home Insurance Trust

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence and briefs, heard the parties' oral arguments and we have considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated July 1, 2009.

Preliminaries

The administrative law judge heard this matter to consider: 1) whether employee suffered accidents that arose out of and in the course of her employment on June 11, 2002, and January 14, 2003; and 2) whether the alleged accidents were the medical cause of employee's back pain complaints and alleged need for further medical aid.

The administrative law judge found that employee suffered injuries that arose out of and in the course of her employment on both June 11, 2002, and January 14, 2003. The administrative law judge further found that employee's back pain complaints had their structural onset from the two work-related accidents. The administrative law judge went on to find that employee is in need of additional medical treatment to cure and relieve her from the effects of her work related injuries. Lastly, the administrative law judge found that employer failed or neglected to provide necessary medical aid to employee and, therefore, waived its right to select the treating physician. As such, employer was ordered to furnish additional medical treatment under the direction and control of Dr. Gornet.

The award was issued as a temporary or partial award and subject to further order, and the proceedings were continued and the case kept open until a final award could be made.

Employer appealed to the Commission alleging the administrative law judge erred in failing to designate the June 11, 2002, accident as a final award in that the administrative law judge found employee's condition was "not disabling" and that employer is not liable for medical treatment as a result of that accident. Employer also alleged that the administrative law judge erred in finding employee's medical condition and need for treatment to be medically causally related to the January 14, 2003, accident because employee's testimony regarding the accident is inconsistent and lacks corroborating evidentiary support. In addition, employee's proof on the issue of medical causation lacks a sufficient probative foundation. Lastly, employer alleged that the administrative

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law judge exceeded his statutory authority by mandating employer provide medical treatment “under the direction and control of Dr. Gornet” without a finding that employee’s health and recovery is endangered.

Employee filed a motion to dismiss employer’s Application for Review under 8 CSR 20-3.040. Employee claims that employer’s Application for Review must be dismissed because employer has failed to allege it is not liable for the payment of *any* compensation, as required by 8 CSR 20-3.040 to appeal a temporary or partial award.

Therefore, the primary issues currently before the Commission include whether employer’s Application for Review must be dismissed under 8 CSR 20-3.040, whether employee suffered injuries that arose out of and in the course of her employment on June 11, 2002, and January 14, 2003, whether employee’s current back pain complaints and alleged need for further medical treatment are medically causally related to the aforementioned injuries, and if so, whether employer failed or neglected to provide employee with said necessary medical treatment, consequently waiving its right to select the employee’s treating physician.

In addition, employer also requested an award for permanent partial disability if we ruled in favor of employer on the issue of additional medical. Therefore, in the event of said finding, the nature and extent of permanent partial disability for both the aforementioned injuries shall also be included as a primary issue before the Commission.

Findings of Fact

The stipulations of the parties were recounted in the award of the administrative law judge and are hereby adopted and incorporated in this award by the Commission.

Employee began working for employer in May 2002. As part of employee’s job, she helped take care of the residents, including showering and bathing, helping with food and drink, reporting any physical or mental changes, answering their call lights, and making beds.

Employee testified that on June 11, 2002, around 7:15 a.m., she was in a room working with a resident named Charley. She dressed him and put a gait belt on to transfer him from his bed to a Geri-chair when, while trying to pivot, she twisted the lower half of her back and felt “pressure” to the right lower back which “wasn’t real intense.” Employee reported the injury to her supervisor, Crystal, who arranged an appointment with Dr. Smith that day. Crystal told employee to go home and that they would call her with information regarding a doctor’s appointment.

Later that same day employee saw Dr. Smith and his note indicates that she had complaints of low back pain related to the transfer of a resident from a bed to a chair that morning. The exam showed mild tenderness was present in the SI joint with palpable muscle spasms in the upper buttock. Dr. Smith diagnosed employee with a lumbar back strain and prescribed her pain medication. Employee was released to work with no lifting over 20 pounds and no repetitive bending.

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On June 24, 2002, employee returned to Dr. Smith for a follow-up. Dr. Smith noted mild tenderness above the right sacroiliac joint, but no muscle spasms were present. Dr. Smith discontinued employee's pain medication. Dr. Smith increased her lifting restrictions to no lifting over 30 pounds.

On July 10, 2002, employee returned to Dr. Smith for another follow-up. Dr. Smith noted the spine was "non tender with a full range of motion." Dr. Smith discharged employee from care and released her to work without restrictions.

Employee testified that when she returned to working without restrictions she still had pressure, but that the pain had lessened. She stated that the pain was localized to the right side of her low back and she had no radiating pain down her right leg. Employee did not seek medical treatment for any continuing complaints of low back pain leading up to the January 14, 2003, accident claim.¹

Between September 10, 2002, and January 3, 2003, employee visited Dr. Schisler on four separate office visits and did not mention any continued back problems. Employee testified she was working mandatory twelve hour work shifts, some 36-48 hours per week, due to work schedule changes made by employer in late 2002.

On January 14, 2003, employee testified she was using a gait belt to transfer a female resident, Ada, from her bed to a Geri-chair. During the transfer, Ada started "twitching" and employee lost her balance. While lifting Ada back up into bed, employee felt sharp pain in her low back followed by a grinding noise, heard popping, and she dropped to her knees. Employee testified that the pain was totally different in intensity than her June 11, 2002, injury. She stated that it felt like someone took a knife and stabbed her. She grabbed the handrail and pulled herself up and used the rail all the way to the nurse's station where she mentioned her injury to some LPNs and a med tech. They told her to fill out an injury report and to return to work. Employee filled out the injury report and returned to work. Employee could not recall if she had requested medical treatment at that time.

Employee's injury report was undated, but was signed by employee and states: "I re-injured my low back on Ada Shalk" during the "p.m." on January 14, 2003. The Form 1/Report of Injury prepared and signed by Chris Taylor on January 23, 2003 shows that the injury was not reported until January 23, 2003. The report shows employee "was allegedly transferring a resident from shower chair to wheelchair." It also indicates employee was sent to Dr. Smith on January 23, 2003. Lastly, it indicates employee returned to work without disability on January 23, 2003.

Dr. Schisler's January 17, 2003, office note does not contain any history of an injury occurring on January 14, 2003, nor does it contain any complaints of low back pain.

¹ Employee originally listed the date of accident on this claim as January 23, 2003, but filed an amended claim on the day of the hearing, which changed the date of the alleged 2003 accident to January 14, 2003.

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On January 23, 2003, employee saw Dr. Smith and complained of low back pain that had come on in the past two weeks, but she reported no recent injury. Dr. Smith's exam showed mild low back tenderness and decreased range of motion without any neurological deficits. Dr. Smith diagnosed employee with a low back strain and put employee on restrictions of no lifting over 30 pounds and no repeated stooping.

Employee testified that her problems progressed to her right leg within a couple of months after the injury. Employee last worked for employer on February 7, 2003. She was discharged because there were not any light duty jobs and they could not find any job that she could do.

On February 13, 2003, employee returned to Dr. Smith. Dr. Smith identified tenderness in the right SI joint with the ability to bend 80 degrees from a vertical position. Dr. Smith continued employee's pain medication and ordered physical therapy, two times per week for three weeks.

On February 14, 2003, employee saw Dr. Schisler for increasing right lower back pain and spasms, which she claimed had been coming on gradually. Dr. Schisler's note indicated that employee hurt her back at work on the left side a couple of weeks ago and then she was carrying some water at work and began having incremental pain in her right side. Employee also noticed a lump in the PSIS area. Dr. Schisler's exam identified palpable muscle spasms in the PSIS area of the right hip, for which pain medication was prescribed.

Employee testified that she told Dr. Schisler about hurting her back at work, but did not remember telling Dr. Schisler that she hurt her back at work carrying water or that the right low back pain came on gradually.

On March 7, 2003, employee attended her physical therapy evaluation and muscle spasms along the right paraspinal in the right thoracic region were identified. The evaluation also showed a complaint of sharp pain that shoots at times down the right leg to the middle of the hamstring. Employee had four physical therapy visits between March 7, 2003, and March 25, 2003, for a right back strain.

On March 31, 2003, employee saw Dr. Smith. Employee informed Dr. Smith that she had quit working for employer and was working for a home health agency. She indicated the work was less strenuous and her back was feeling better. Employee had no tenderness over the SI joint. Dr. Smith assessed employee with a low back strain that had resolved and released her from care with no restrictions.

Dr. Schisler's records show three office visits by employee between March 31, 2003, and July 21, 2003, which contain no evidence of any continuing low back pain problems.

Employee does not know exactly when she began having constant shooting pain down the low back into the right leg. When confronted with the first diagnosis of "sciatica" referred to in the medical records, employee acknowledged "it could be" that her

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complaints of constant shooting pain down her right leg had not begun until ten months after she last worked for employer, although she was not sure.

Employee returned to Dr. Schisler on August 8, 2003, complaining of low back pain and radiculopathy. Dr. Schisler's note indicated that employee hurt her back at work a year ago "apparently got better but now symptoms worse ... right sided lower thoracic pain all the way down to hip with 'occasional sensation' in anterior thigh." Dr. Schisler's exam revealed muscle spasms in employee's right side of her back. Medication and physical therapy were prescribed for employee's "back pain."

On August 22, 2003, Dr. Schisler noted that employee was having tenderness in the lumbar area and spasms. Dr. Schisler continued the physical therapy, but discontinued the pain medication.

On October 22, 2003, employee was sent by employer to Dr. Carter, an orthopedic surgeon, for an evaluation following a recent mediation conference. Dr. Carter noted in his evaluation that there was some confusion on employee's part about when she got hurt and what happened. Dr. Carter noted complaints of low back pain with some pain in the "center part of the thigh" basically constant.

Dr. Carter's exam revealed tenderness over the sacral spinous process, in the right buttock (most significant) and right posterior thigh. He noted that no muscle spasms or atrophy were present. Dr. Carter indicated that Dr. Smith's records show employee to have been asymptomatic to full range of motion of the back at about one month after her first injury, and that there were similar findings by Dr. Smith on March 31, 2003, after her second injury.

Dr. Carter concluded that employee did not need further medical treatment as a result of the two injury episodes she described. He noted she "may have had a mild lumbar strain" from the episodes described, from which she now demonstrated "no definite evidence of significant residual," and that she may work without restrictions. Dr. Carter estimated a 1% permanent partial disability allocated ½% to each reported episode. Further, Dr. Carter suggested employee's "obesity" was a cause of her back pain and recommended massive loss of weight.

Following Dr. Carter's evaluation, employee was treated by Drs. Wilkerson, Schisler, Evans, and Greenberg between December 23, 2003 and July 13, 2005. During this period, employee would occasionally complain of low back pain and numbness to her right lower extremity. However, employee would also go to multiple visits with Dr. Schisler, and not mention any back pain. Also, on April 6, 2005, employee was seen in the Moberly Regional Medical Center emergency room for her low back pain complaints, which began the day before when she injured her back house cleaning. Employee was prescribed physical therapy, but was discharged for non-compliance after one visit.

On November 21, 2005, at the request of her attorney, employee was seen by Dr. Gornet for an Independent Medical Evaluation. Dr. Gornet noted employee's chief complaint as

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low back pain into the right buttock and down the right leg to the foot with tingling in her right foot which “began on June 11, 2002, while she was lifting and transferring a patient” and then had a similar injury which was more severe on January 21, 2003”

Dr. Gornet noted that employee should continue working, but ordered tests. After reviewing the test results, Dr. Gornet noted that employee was “an excellent candidate” for a disc replacement at L4-5. It was Dr. Gornet’s opinion that employee’s current symptoms were causally connected to her work-related injuries.

Dr. Gornet continued to see employee through 2006 and was deposed on October 29, 2007. Dr. Gornet testified that it was his opinion that the best treatment option would be a disc replacement for the L4-5 disc injury, and that it would be reasonable and necessary as a result of either of the work-related injuries. Dr. Gornet stated that the June 11, 2002, accident is responsible for 30-40% of the need for surgery, but that the January 2003 accident was responsible for 60-70% of the need for surgery. It was Dr. Gornet’s opinion that employee’s symptoms on November 21, 2005, had their structural onset from those two injuries. However, he could not identify or separate out the exact nature of the structural problem that occurred at the time of either injury.

Emergency room records from December 23, 2006, show employee was admitted to Moberly Regional Medical Center on a backboard following a motor vehicle accident. She complained of neck, middle back, and left rib injuries. Her discharge diagnosis was sprain/strain injuries to the neck and upper back.

Employee’s medical records show that she continued to complain of low back problems through 2008 and had more emergency room visits. Employee testified, at her hearing, that due to her back pain she has trouble standing and sitting, and struggles completing daily household duties.

Employee has requested the disc replacement surgery recommended by Dr. Gornet to help with her life, to get relief, and to be able to return to work. Employee claims that she has not injured her low back since January 2003.

Conclusions of Law

First and foremost, employee has filed a motion to dismiss employer’s Application for Review under 8 CSR 20-3.040. Employee claims that review of the temporary or partial award in this case is not appropriate because employer previously paid medical benefits on behalf of employee in both claims. Therefore, employee claims that employer is essentially estopped from alleging that it is not liable for *any* compensation because employer has already stipulated to the payment of those past medical benefits.

The Commission rejects employee’s motion to dismiss employer’s Application for Review. As stated in *Trammel v. S&K Industries, Inc.*, 784 S.W.2d 209, 212 (Mo. App. 1989):

The furnishing of medical treatment does not constitute an admission that the condition for which treatment was provided resulted from a compensable accident, and is not inconsistent with a later denial of

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worker's compensation liability. A. Larson, 2B Larson's Workmen's Compensation Law § 79.43 (1989). To hold that the furnishing of medical services estops the employer-insurer would discourage employer-insurer's prompt voluntary furnishing of medical services in doubtful cases. The employer-insurer should be encouraged in this and not penalized for it.”

As stated in *Trammel*, employer's previously paid medical benefits on behalf of employee in both claims do not estop employer from denying liability in this appeal. Therefore, we accept employer's Application for Review and reject employee's motion to dismiss because we find that employer has properly appealed the administrative law judge's award by alleging it is not liable for any compensation.

The next issue to address concerns whether employee's alleged injuries arose out of and in the course of her employment.

Under Missouri Workers' Compensation Law, in order for an injury to be compensable, it must “arise out of” and “in the course of” the employment. Section 287.120.1 RSMo states, in pertinent part:

“Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment....”

Section 287.020 RSMo provides further guidance as to what constitutes “arising out of” and “in the course of” employment. Section 287.020.2 RSMo states, in pertinent part:

“An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability....”

With regard to both injuries, there is not a question that the injuries occurred at work while employee was performing her job duties and that her job duties were a substantial factor in the cause of those injuries. All of the testimony suggests that employee was injured while lifting patients and employee filled out injury reports immediately after each injury occurred. The only real issue concerning whether either of the injuries arose out of and in the course of employee's employment relate to inconsistencies regarding the date of the January 2003 injury. There is some evidence suggesting that this injury occurred on January 14, 2003, and other evidence suggesting that the injury occurred on January 23, 2003. We find the most credible evidence to be the undated injury report in which employee stated that the injury occurred on January 14, 2003. We find this to be the most credible because it was the document filled out most contemporaneously with the accident itself. Although employee only signed the injury report and left the date blank, she credibly testified that she filled it out right after the injury occurred.

For the foregoing reasons, we find that employee suffered two injuries arising out of and in the course of her employment, on June 11, 2002, and January 14, 2003, respectively.

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The next issue to resolve with regard to this case involves whether employee's current back pain complaints and alleged need for further medical treatment are medically causally related to the aforementioned injuries.

Based on a review of all of the medical evidence, we find, as Dr. Carter concluded in his evaluation, that employee reached maximum medical improvement with regard to her first injury on July 10, 2002, and she reached maximum medical improvement with regard to her second injury on March 31, 2003. Dr. Smith's records show that employee was asymptomatic and cleared to work without restrictions on July 10, 2002, following the June 11, 2002, injury. Likewise, Dr. Smith's records also show that employee was asymptomatic and cleared to work without restrictions on March 31, 2003, following the January 14, 2003, injury.

In addition to Dr. Smith's releases of employee to go back to work without restrictions following both injuries, Dr. Schisler's records also show several of employee's office visits that occurred after the releases by Dr. Smith in which employee did not make any complaints of back pain. This further supports our finding that employee achieved maximum medical improvement shortly after each incident.

Although Dr. Gornet is of the opinion that employee is in need of a disc replacement surgery due to the aforementioned injuries, he is basing his opinion off of diagnostic tests that were conducted more than 3 years after employee's January 14, 2003, injury. Also, Dr. Gornet's evaluation does not discuss employee's subsequent emergency room visits or other doctor's appointments concerning her back pain complaints. For the foregoing reasons, we find Dr. Carter's evaluation more credible than Dr. Gornet's. Therefore, we find that employee's two injuries resulted in separate lumbar strains for which employee has since achieved maximum medical improvement. Any need for further medical treatment is not medically causally related to the June 11, 2002, or January 14, 2003, injuries.

Dr. Carter opined that employee suffered a 1% permanent partial disability to the body as a whole as a result of both injuries, or ½% permanent partial disability allocated to each accident. However, in light of all of the evidence, including, but not limited to, employee's testimony regarding her restrictions and struggles relative to her back, we find that employee suffered 2½% permanent partial disability to the body as a whole as a result of the June 11, 2002, accident, and 2½% permanent partial disability to the body as a whole as a result of the January 14, 2003, accident. Therefore, employer is obligated to pay employee \$1,480.00 (10 weeks x \$148.00 wage rate) for the June 11, 2002, accident and \$2,712.40 (10 weeks x \$271.24 wage rate) for the January 14, 2003, accident, or \$4,192.40 total (\$1480.00 + \$2,712.40).

The award and decision of Administrative Law Judge Lawrence Kasten, issued July 1, 2009, is attached hereto for reference.

Sheila Blaylock, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 19th day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Shelly Martin

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Worker's Compensation Law, I believe the decision of the administrative law judge should be affirmed. Therefore, I adopt the decision of the administrative law judge as my decision in this matter.

Because the Commission majority has decided otherwise, I respectfully dissent.

John J. Hickey, Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

TEMPORARY OR PARTIAL AWARD

Employee: Shelley Martin

Injury No. 02-055584 & 03-008884

Employer: Martin Twain Caring Center

Additional Party: Second Injury Fund (left open)

Insurer: Missouri Nursing Home Insurance Trust

Appearances: Sheila Blaylock for the employee
Paul Huck for the employer

Hearing Date: Commenced on February 2, 2009
Completed on February 13, 2009

Checked by: LCK/sm

SUMMARY OF FINDINGS

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? On or about June 11, 2002 and on or about January 14, 2003.
5. State location where accident occurred or occupational disease contracted: Butler County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: In Injury Number 02-055584, the employee injured her low back transferring a patient into a wheelchair. In Injury Number 03-008884, the employee injured her low back attempting to transfer a patient into a Geri Chair.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Low back and body as a whole.
14. Compensation paid-to date for temporary total disability: None.
15. Value necessary medical aid paid to date by employer-insurer? \$226.96 in Injury Number 02-055584 and \$327.19 in Injury Number 03-008884.
16. Value necessary medical aid not furnished by employer-insurer? None.
17. Employee's average weekly wage: \$220.00 in Injury Number 02-055584 and \$406.86 in Injury Number 03-008884.
18. Weekly compensation rate: \$148.00 in Injury Number 02-055584 and \$271.24 in Injury Number 03-008884.
19. Method wages computation: By agreement.
20. Amount of compensation payable:

Additional Medical Aid: See Rulings of Law.

This award is only temporary and 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.

FINDINGS OF FACT AND RULINGS OF LAW

On February 2, 2009, the employee, Shelley Martin, appeared in person and by her attorney, Sheila Blaylock, for a temporary or partial award. The employer was represented at the hearing by their attorney, Paul Huck. The employee's claim against the Second Injury Fund was left open. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Mark Twain Caring Center was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was duly qualified as a self-insured employer through the Missouri Nursing Home Insurance Trust.
2. On or about June 11, 2002 and January 14, 2003, Shelley Martin was an employee of Mark Twain Caring Center and was working under the Workers' Compensation Act.
3. The employer had notice of the employee's alleged accidents.
4. The employee's claims were filed within the time allowed by law.
5. In Injury Number 02-055584, the employee's average weekly wage was \$222.00. The employee's rate of compensation is \$148.00 per week.
6. The employee's average weekly wage and rate of compensation in Injury Number 03-008884 was to be agreed upon after the hearing and the record was left open. On February 13, the parties agreed that the average weekly wage was \$406.86 and the compensation rate is \$271.24 per week.
7. The employer paid \$226.96 in medical aid in Injury Number 02-055584 and \$327.19 in medical aid in Injury Number 03-008884.
8. The employer did not pay temporary disability in either case.

ISSUES:

1. Accident in Injury Number 02-055584.
2. Accident in Injury Number 03-008884.
3. Medical causation in Injury Number 02-055584.
4. Medical causation Injury Number 03-008884.
5. Claim for additional medical aid in Injury Number 02-055584.
6. Claim for additional or future medical aid in Injury Number 03-008884.

The employer requested an award for permanent partial disability if the Court ruled in favor of the employer on the issue of additional medical. If the employer's request was granted, Issue 7 would be the nature and extent of permanent partial disability in Injury Number 02-055584 and Issue 8 would be the nature and extent of permanent partial disability in Injury Number 03-008884.

On the day of the hearing, the employee filed an amended claim in Injury Number 03-008884, which changed the date of the alleged 2003 accident from January 23, 2003 to January

14, 2003. The record was left open for the employer to file an amended answer which was filed on February 5, 2009.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical records and deposition of Dr. Gornet
- B. Medical records of Dr. Smith
- C. Medical records of Moberly Regional Medical Center
- D. Medical records of Dr. Schisler
- E. Medical records of Dr. Wilkerson
- F. Medical records of Barnes Jewish Hospital
- G. Medical records of Dr. Bush
- H. Medical records of Poplar Bluff Regional Medical Center
- I. Medical records of Physical Assessment and Rehabilitation Center
- J. Medical records of Barnes Jewish West County
- K. Medical records of Nurse Practitioner Rasmussen
- L. Physical therapy records from Ozark Physical Therapy
- M. Medical records of University Hospital and Clinic/University Physicians
- N. Correspondence enclosing Mark Twain Caring Center records
- O. Correspondence requesting treatment
- P. Withdrawn prior to going on the record
- Q. Attorney contract

Employer Exhibits

- 1. Records of the employer for 2002 case
- 2. Medical records of Dr. Smith
- 3. Medical records of Dr. Schisler
- 4. Records of the employer for the 2003 case
- 5. Original claim for compensation in Injury Number 03-008884
- 6. Medical records of Dr. Smith
- 7. Medical records of Dr. Schisler
- 8. Medical records of Dr. Wilkerson
- 9. Missouri Division of Employment Security records
- 10. CV and medical report of Dr. Carter
- 11. Medical records of University Hospital and Clinics
- 12. Medical records of Barnes Jewish Hospital

Judicial notice of the contents of the Division's files was taken.

WITNESS: Shelley Martin, the employee

BRIEFS: The employee and the employer both filed briefs on February 2, 2009.

FINDINGS OF FACT:

The employee testified that she is 37 years old, is 5'1'' tall and weighs a little more than 200 pounds. Prior to working at Mark Twain she had no limitations and her weight never affected her work. In May of 2002 she started working for Mark Twain. She helped take care of residents including showering and bathing; helping with food and drink; reporting any physical or mental changes; answering their call lights; and making beds. The employee testified that before working at Mark Twain she had no problems with her back and had no treatment with a doctor or chiropractor for her back.

The employee testified that around 7:15 a.m. on June 11, 2002, she was in a room working with a resident named Charley. She dressed him and put a gait belt on. She stood him up, his leg slipped but she was able to get him transferred into a wheelchair. When he slipped, she lost her balance, twisted and hurt her lower back. The employee pushed him down to the nurse's station and told Crystal, her supervisor that she had twisted her back. Crystal told her to go home. They scheduled an appointment with Dr. Smith.

The June 11 report by the injured employee showed a date of injury of June 11, 2002 at 7:15 a.m. How the injury happened was left blank. The Missouri Nursing Home Insurance Trust supervisor's accident investigation report showed the employee was injured at 7:15 a.m. on June 11, and the injury was to the lower back. The location of the accident was in room 512 while dressing and transferring Charlie. The employee picked him up and put him in his chair and twisted her back.

On June 11 the employee saw Dr. Smith for a Mark Twain workers' compensation case. The employee had low back pain since that morning as she was transferring a patient from a bed to a chair. There were no prior or previous back problems. The employee had mild to moderate tenderness of the right sacroiliac joint and there were palpable spasms in the upper buttocks in the same area. Dr. Smith diagnosed a low back strain, prescribed Naprosyn and Skelaxin and gave work restrictions of no lifting over 20 pounds and no repeated stooping.

The employer's report of injury for the June 11, 2002 alleged accident was that the time of occurrence was 7:15 a.m. on June 11, 2002. The injury was a back strain and the accident occurred when the employee was transferring a resident. The employee was dressing a resident, picked him up and put him in the chair and twisted her back. The employee was sent to Dr. Smith. The report was prepared on June 13, 2002.

On June 24 the employee was rechecked for low back pain by Dr. Smith and was diagnosed with a low back strain. The employee was to discontinue medications with no lifting over 20 pounds.

On July 10, the employee saw Dr. Smith for a Mark Twain workers' compensation case. The employee was diagnosed with a low back strain and was released to work with no restrictions.

The employee testified that she worked with the restrictions. When Dr. Smith released her, she still had pressure and less pain, but she learned how to deal with the pain. Dr. Smith released her with no restrictions and she went back to work. She returned to full duty and did

not miss any time from work. The pain was just in her low back and she had no radiating pain down the right leg. She had no more medical treatment for her low back after being released by Dr. Smith until her injury in January of 2003.

The employee saw Dr. Schisler several times after that during the fall and winter of 2002 and 2003, with no mention of low back pain.

2003:

The employee testified that on January 14, 2003, she hurt her back again. She was in a room with Ada, a patient. She put Ada in a gait belt, and was attempting to get her up off the bed and into a Geri Chair. The patient twisted and the employee lost her balance but was able to get her back onto the bed. During that process the employee strained and felt a sharp pain in her low back. She was able to put the side rail up and get it latched. The pain was sharp and stabbing and was totally different pain than she had in June of 2002. She dropped to the ground and crawled on her knees to a handrail that she used to pull herself up. She went to the nurse's station and reported the incident to a med tech. She then reported the incident to the RN supervisor at the nurse's station and filled out an injury form. She cannot remember if she asked to go to a doctor. The employee returned to work but her low back really hurt.

The undated report by injured employee stated that the employee and Cindy were the only CNAs, and the employee re-injured her lower back while working with Ada on January 14, 2003. The report was signed by the employee.

The Missouri Nursing Home Insurance Trust supervisor's accident investigation report dated January 14, 2003 showed that the injury was a strained low back and happened in the shower room while a transferring a resident. The accident was on January 14, 2003 at approximately 10:30 a.m. and the employee was sent to Dr. Smith.

On January 23, 2003 Dr. Smith noted that he was seeing the employee for a Mark Twain workers' compensation case. The employee had low back pain for two weeks with no recent injury and the employee was on ibuprofen. Dr. Smith diagnosed a low back strain; and put the employee on restrictions of no lifting over 20 pounds and no repeated stooping. Dr. Smith prescribed Naprosyn and Skelaxin.

The employee testified that she told Dr. Smith on January 23, 2003, that she was injured transferring a patient but did not know if she told him that it was on January 14.

The report of injury filed by the employer showed that the date of injury was January 23, 2003 and that it occurred in the afternoon. The employer was notified on January 23. The type of injury was a strained lower back which happened in the shower room while transferring a resident from a shower chair to a wheelchair.

The employee testified that on January 14, 2003, she was helping a female patient in a residence room and the injury occurred when she was transferring the patient from a bed to a Geri Chair. It did not occur transferring the patient from a shower chair to a wheelchair. The

original claim filed by her former attorney listed the injury date as January 23, 2003, and stated it was a male patient. The employee signed the claim but did not read it.

The employee testified that while working at Mark Twain, she was having problems in her buttocks but not down her leg to her toes. The problems progressed to her right leg within a couple of months after the injury. She did not have another accident or slip and fall prior to the pain going down her right leg. The employee last worked at Mark Twain on February 7, 2003. She was let go because there was not any light duty jobs and they could not find any job that she could do. The employment security records show that the employee was discharged on February 7, 2003.

On February 13, the employee saw Dr. Smith who noted that it was a Mark Twain workers' compensation case. The employee was having tenderness on the right SI joint and tingling in the right anterior thigh. Dr. Smith diagnosed a low back strain. He continued the same restrictions and ordered physical therapy.

On February 14, 2003 the employee saw Dr. Schisler for increasing right lower back pain and spasms which had been coming on gradually. She hurt her back at work a couple of weeks ago while carrying some water and began having increasing pain in her right side. She noticed a lump in the PSIS area of the hip. Dr. Schisler noted that she was having musculoskeletal back problems and increasing muscle spasms in the PSIS area of the right hip. Dr. Schisler assessed low back pain and muscle spasms; and prescribed Naprosyn and Skelaxin.

The employee testified that she told Dr. Schisler about hurting her back at work, but did not remember telling Dr. Schisler that she hurt her back at work carrying water.

The employee testified that she got a job in mid-February at Colonial Home Health. She sat with a client to make sure that he took his medications and that nothing happened to him. She did not cook or clean or lift things. She worked there for about two to two-and-a-half months and continued to have back pain. The work at Colonial was not as heavy and was not extensive. She lost her job at Colonial because she did not want to work on Sunday. She then drew unemployment. The employment security records show that the employee received unemployment from May 31 through September 20, 2003.

The employee testified that after the January 14, 2003 injury she had pain in the lower back and buttocks area. There was also a tingling feeling running down the right side of her back and down the right leg and into the toe. The employee learned to adapt and tolerate the pain.

In a March 7, 2003 treatment plan for therapy at Mark Twain, it was noted that the onset date was January 23, 2003, and that the injury occurred while lifting a resident. The physical therapist noted that the employee had sharp pain that shot down the right lower extremity in the middle of the hamstring with increased pain with standing, ambulating and twisting.

The employee saw Dr. Smith on March 31, 2003 for a Mark Twain workers' compensation case. The employee had since quit working for Mark Twain and was working for a home health agency. The work was less strenuous and her back was feeling better. The

employee had no tenderness over the SI joint. The assessment was low back strain resolved and Dr. Smith released her from care with no restrictions.

The employee testified that when Dr. Smith returned her to work she still had problems with sharp lower back pain and muscle tightness.

The June 11, 2002 claim stated that the employee was transferring a patient when the patient's weight shifted causing the employee injury by abruptly supporting the patient's weight. The claim was filed on April 16, 2003.

The original claim in the 2003 case was also filed on April 16, 2003. The claim noted a January 23, 2003, date of injury. The description of the injury stated that the employee was transferring a resident from his bed to his wheelchair when the patient became uncooperative and the employee injured her back while supporting the resident's weight. In the amended claim filed on the day of the hearing, the injury date was changed to January 14, 2003 and the description of the injury was the claimant was moving a patient and the lifting and turning injured her back.

On August 8, 2003 the employee saw Dr. Schisler for low back pain and radiculopathy. The employee hurt her back at work a year ago which was now in dispute. The employee had apparently gotten better but now was worse. The employee had increased right-sided lower thoracic pain all the way down to the hip with an occasional sensation in the anterior thigh. X-rays and physical therapy were ordered. Naprosyn and Skelaxin were prescribed.

The employee was sent to physical therapy at Ozark Physical Therapy by Dr. Schisler. The initial evaluation and therapy was done on August 20, 2003. The employee reported she injured her back while working at Mark Twain Caring Center at the first of the year. The employee stated that she felt her back "go out" while lifting patients.

On August 22, 2003 Dr. Schisler noted that the employee was having tenderness in the lumbar area and spasms. Dr. Schisler continued the physical therapy, discontinued Skelaxin and prescribed Zanaflex. The employee had physical therapy on August 25, September 10 and October 6.

A mediation was held by Judge Robbins on September 29, 2003. The minute entry reflects that the employee was requesting additional medical treatment.

On October 22, 2003, the employer sent the employee to Dr. Edwin Carter, an orthopedic surgeon. Dr. Carter stated there was some confusion on the employee's part about when she got hurt and what happened. It seemed at first she tried to tell him about her second alleged injury. Dr. Carter noted that the best he could tell in October of 2002, the employee was pulled forward by a patient who had slipped as she tried to get the patient back into a chair. The accident happened about 7:15 a.m. and she had immediate pain in the paralumbar area and perhaps the right buttock. She saw Dr. Smith, was put on light duty and then was released to regular work. The employee continued to work with back pain. In January of 2003 she was having some back pain and she was pulled forward by a patient falling backwards. She got the patient in bed but

again had low back pain and a new complaint of right leg pain from the posterior thigh to the knee. She again saw Dr. Smith and her last day at work was February 7, 2003. During the examination, the employee stated that she had low back pain in the right side and the central part of the thigh all the time. Sometimes there was a sharp pull with certain movements. Several times her great toe had become numb. Dr. Carter asked the employee about her bed and she told him it was a firm two to three year old mattress but she was not comfortable in bed which Dr. Carter suggested that the bed was bad.

Dr. Carter reviewed Dr. Smith's records which showed the employee to be asymptomatic and a full range of motion of the back about one month after the alleged first injury. Dr. Carter stated it is obvious that the employee had the date for the first alleged injury wrong. Dr. Carter stated that on January 23, 2003 the employee again had mild lumbar tenderness and then about March 31, 2003 she was asymptomatic. It was Dr. Carter's impression that the employee may have had a mild lumbar strain from the described episodes. Dr. Carter stated that obviously the employee's massive obesity was also a cause of back pain. It was his opinion that the employee has reached maximum improvement from the two episodes with no evidence of any significant residual problems. He assigned an approximate one percent permanent partial disability of the body as whole related to the alleged back injuries. Dr. Carter stated it was difficult to know if one or the other or both were responsible for the disability, he assigned a one-half percent permanent partial disability of the body for each episode.

The employee testified that Dr. Carter told her that she needed to lose weight and needed a new bed. At that time her bed was only a couple of years old, and she never had any trouble sleeping on the bed before the injuries.

The employee saw Dr. Wilkerson on December 23, 2003 due to a back injury that occurred eight months ago in April. The employee's symptoms were better until approximately one week ago but there was no recent injury. The employee had a workers' compensation case for low back pain. She had positive radicular symptoms into the right leg. The employee had palpable spasms in the right paraspinal at L1. Dr. Wilkerson diagnosed low back pain and spasms, and prescribed Robaxin and Lodine.

The employee testified that she did not have an injury in April of 2003, and that the only two injuries she had was January of 2003 and June of 2002.

On December 30, 2003, Dr. Schisler noted that the employee had increased low back pain at the right hip down to right great toe and it was a "shooting pain", and had pain down the back of the leg. The employee had low back spasms and numbness; and was tender in the right PSIS. Dr. Schisler diagnosed sciatica and low back pain and prescribed a Medrol dose pack and Robaxin.

2004:

On January 9, 2004 the employee had low back pain, right hip pain and leg pain. Dr. Schisler diagnosed sciatica, ordered physical therapy and prescribed Zanaflex in lieu of Robaxin.

In January of 2004, the employee had three physical therapy visits for sciatica in the right lower extremity. The initial evaluation on January 15 noted that the employee injured her low back lifting a resident at Mark Twain on two different occasions which were in June 2002 and January of 2003. The employee was seeking medical care on her own. At the last therapy visit the employee had numbness in the right big toe and decreased pain symptoms in the right hip/thigh.

On June 28 the employee saw Dr. Schisler for middle back pain with an onset of three to four days ago. The employee had increased low back pain with no known injury recently and no radiation of pain. On November 30 the employee was seen by Dr. Schisler for low back pain.

On December 13 the employee saw Dr. Schisler for low back pain that radiated down the right leg into the foot and toes. The employee had increased low back pain with radiation that started after an extended car ride to Columbia. There was no recent injury and the pain started two to three days ago. The diagnosis was low back pain with radiculopathy. Dr. Schisler prescribed Lorcet and ordered a CT scan.

The employee testified that when she told Dr. Schisler that the pain started several days ago she meant that the pain was more intense but was in the same location, and that extended car rides for over 5 hours intensified the pain.

In a December 13 letter, the employee's attorney requested the employer to send the employee to a specialist due to low back pain that radiated down her right leg.

On December 20, Dr. Schisler diagnosed low back pain with radiculopathy. The December 20 CT scan showed no abnormalities at L1-2, L2-3, L3-4 or L5-S1. At L4-5 there was a very mild central protrusion either mild bulging or very small herniated nucleus pulposus.

2005:

The employee went to Moberly Regional Medical Center on April 6, 2005 for back pain and sciatica. Checked yes was a recent injury from lifting and turning/bending house cleaning at home. The employee had pain and numbness in the right buttocks down the back of the right leg to the knee. The pain was similar to prior back pains. The employee had a prior back injury and chronic back pain and sciatica. The employee reported reoccurring low back pain and numbness to the right lower extremity that started two days ago. The mechanism of injury was pulled lower back and felt pain upon injury. There was a history of a back injury two years ago while working at a nursing home. There was tenderness in the right lower back, right buttocks and down the back of the right leg. The diagnosis was acute and chronic low back pain and acute sciatica. The employee was given Demerol and Vistaril and a Medrol dose pack.

The employee testified when she reported that she had been cleaning her house and had a sharp pain in the back it was nothing different because when she would sweep or vacuum her pain intensified.

The employee was seen at the Moberly Regional Medical Center emergency room on May 13, 2005 for chronic low back pain that ran down the back of the right leg with radiation. No recent injury was noted. The doctor performed a bilateral facet injection at L4-5.

The employee had an x-ray at Moberly Regional Medical Center on May 16 ordered by Nurse Practitioner Rasmussen. History was lower back pain radiating down the right leg. The impression was spondylitic defect on the right at L5.

On June 8, 2005 the employee went to the emergency room for chronic moderate low back pain that had been occurring for months. There was no recent injury; the pain was located in the low back and buttocks which was similar to prior back pains. The history showed a prior back injury with a notation of herniated discs. The chief complaint was back pain with a history of a L4-5 disc herniation over the past three years. The employee's pain has been worsening since last December. The employee had been doing normal house work today and the low back pain became worse with leg pain but no recent injury.

The employee testified that when she told the emergency room that her pain was worsening she might have meant the burning sensation in her legs which happened in stages, and not all the time.

The employee saw Dr. Greenberg on July 13 for low back pain. The employee had a three year history of low back pain. She initially was hurt transferring a patient. Since that time she had occasional numbness and some low back pain with extension down to her buttocks. The employee had tenderness in the buttocks region and the sciatic nerve distribution. Dr. Greenberg stated the employee had low back pain and sciatica. He recommended physical therapy and anti-inflammatory medications.

The employee went to Moberly Regional Medical Center on July 25 for low back pain and sciatica. On August 1, the employee was at Moberly Regional Medical Center for a physical therapy evaluation with an onset of approximately three years ago. The employee reported an injury at work when she was transferring a patient. The employee had low back pain and occasional tingling in both lower extremities but mainly in the right anterior thigh and posterior calf. The employee had decreased sensation to light touch throughout the right lower extremity and positive right sided straight leg raise. Therapy was ordered for four weeks.

The employee was seen by Dr. Gornet on November 21, 2005 after being referred by her attorney. The employee had low back pain to the right buttock and down the right leg to the foot with tingling in her right toe. She stated her problem began approximately June 11, 2002 while lifting and transferring a patient and felt increasing back pain. She had a similar injury that was more severe on January 21, 2003 in which she was struggling to help a patient to prevent them from falling. She twisted and developed severe pain. Straight leg raising was productive for low back pain at about 45 degrees on the right. Dr. Gornet reviewed the December 2004 CT scan and stated it appeared there was a central disc lesion at L4-5 as well as a PARS fracture bilaterally at L5. Dr. Gornet thought the employee may have suffered a structural spine injury and recommended a new MRI and a CT scan. It was Dr. Gornet's opinion the employee's

current symptoms were causally connected to her work-related injuries. He related it more to the January 2003 injury because that is when she had more symptoms including disabling pain.

2006:

The April 3, 2006 MRI ordered by Dr. Gornet showed a central disc protrusion superimposed on a mild disc bulge at L4-5 associated with a small annular tear. There were bilateral pars defects at L5 and 1mm of anterior lythesis of L5 on S1. There was a mild disc bulge at L5-S1 not causing any central canal stenosis or neural foraminal narrowing. On April 3 Dr. Gornet stated that the CT scan clearly showed spondylolysis at L5. Her MRI scan clearly revealed a disc-related annular tear and central disc protrusion consistent with the disc injury at L4-5. Dr. Gornet recommended a discography to determine whether the L4-5 and/or L5-S1 disc played a role in her current pain. Dr. Gornet believed that her current symptoms were causally connected to her work-related injury but thought that her spondylosis was a pre-existing condition.

On April 28, 2006 Dr. Gornet performed a discogram at L4-5 and L5-S1 for discogenic low back pain. The L5-S1 level was completely non-provocative for pain. At L4-5 the swelling of the disc revealed an obvious posterior annular tear which was provocative and typical for her back pain. The diagnosis was provocative disc at L4-5 and non-provocative disc at L5-S1.

On June 5 Dr. Gornet stated the employee's discogram was positive at L4-5 and thought she would be an excellent candidate for disc replacement at L4-5. Dr. Gornet stated that the discogram reproduced her pain and clearly revealed an annular tear and he thought he could help with her symptoms.

On November 2, 2006 the employee saw Dr. Gornet with continued back pain that affected her life. Dr. Gornet's diagnosis was discogenic low back pain at L4-5 with PARS fracture at L5-S1. Dr. Gornet thought she would be a great candidate for disc replacement at L4-5 and the results would be far superior to a spinal fusion.

On December 2 the employee was seen at Moberly Regional Medical Center emergency room for chronic back pain that started yesterday morning. The possibly of a recent injury was noted. The clinical impression was acute lumbar myofascial sprain, acute and chronic low back pain and spondylolysis. She had a rest home injury in 2002.

The employee testified even though the emergency room stated there was a possible recent injury, the only injuries she had were the two work injuries in June of 2002 and January of 2003. Since working at Colonial in 2005, she attempted to work at Wal-Mart doing light duty and the work did not involve much lifting. She last worked at Wal-Mart in 2006.

2008:

The employee went to the emergency room at Poplar Bluff Regional Medical Center on January 25, 2008 with a diagnosis of acute low back pain and chronic low back pain.

On April 17, 2008 the employee was seen at Barnes Jewish Hospital for chronic back pain and numbness from a previous injury. The employee had a workers' compensation injury in 2002 and 2003. The employee had been having worsening pain and spasms the last two days. The pain radiates over the gluteal region and into the knee on the right side only. The employee had a positive straight leg raise, pain on gluteal palpitation on the right, and spasms. Oxycodone, Ibuprofen and Diazepam were prescribed for a diagnosis of low back pain, sciatica and muscle spasms.

The employee went to Barnes Jewish Hospital on May 20, 2008 for chronic low back pain with numbness down both legs. The employee's chronic low back pain worsened last night. The employee had difficulty walking and changing positions due to pain. She denied a recent injury or activity that exacerbated the pain. The pain radiated down the right gluteal region to the front of the right great toe with numbness to the lateral right thigh. A MRI performed that day showed a minimal left posterior lateral disc protrusion at L4-5 and mild bilateral facet arthropathy without compromise of the central canal or neural foraminal.

The employee went to the emergency room at Poplar Bluff Regional Medical Center on September 29, 2008 for chronic lower back pain. Toradol and Norflex injections were given. She had a history of a back injury in 2003.

The deposition of Dr. Gornet was taken on October 29, 2007. Dr. Gornet is an orthopedic surgeon who practices spine surgery both on the low back and neck. Dr. Gornet stated that disc replacement is a procedure that has evolved over the past 20 years worldwide and he has been performing disc replacements in the low back for over five years. Disc replacement is done by an anterior approach in which the disc is taken away and any structures that are injured are debrided. That segment of the spine is stabilized by placing a prosthesis into position and the prosthesis fills the gap to provide motion. He has been involved in multiple FDA mandated clinical trials. He participated in the largest spinal implant trial run by the FDA which was on the Maverick device which has not been FDA approved. Dr. Gornet uses the PRODISC device which is FDA approved. Dr. Gornet stated that results have shown significant improvement in both the PRODISC and the Maverick and both showed superiority over a fusion. Dr. Gornet stated that with a fusion there is a risk of a failure to fuse with the bone but with a disc replacement the prosthesis growing to the bone is fairly universal and the patient's motion is allowed to occur.

Dr. Gornet stated it was not always appropriate to do a disc replacement. Dr. Gornet stated that the employee has spondylolisthesis/PARS fracture below the L4-5 level and that performing a fusion would cause significant increased load on the spondylolisthesis. If a fusion was done, she would probably require a two level fusion due to the concern about stress on the adjacent level due to the spondylolisthesis. The condition that requires a disc replacement or a fusion is symptomatic discogenic low back pain. In this case the employee also has an annular tear, which in his opinion is a classic indication for disc replacement.

Dr. Gornet stated that the PARS fracture/spondylolisthesis is a preexisting condition and the fracture itself was not caused by the injury. It is possible that the PARS fracture/spondylolisthesis is causing some of the symptoms and it's possible that her injury made

that symptomatic. During the discogram the employee's pain was reproduced at L4-5 and there was definite pathology at L4-5. Dr. Gornet believed that the majority of her back pain that is disabling to her and that required treatment is directly at the L4-5 level and not at the L5-S1 level where the PARS fracture/spondylolisthesis is located. It was Dr. Gornet's opinion that if the employee was having pain from the PARS fracture/ spondylolisthesis, the January 21, 2003 injury was a substantial factor in causing that pain.

Dr. Gornet stated that the employee's pain complaints were consistent with what he would expect from an annular tear at the L4-5 level. It was his opinion that the best treatment option would be a disc replacement for the L4-5 disc injury, and that it would be reasonable and necessary as a result of either of the injuries. It was Dr. Gornet's opinion and recommendation that only the annular tear be treated and not to treat the PARS fracture/ spondylolisthesis.

When asked which injury that he would attribute the need for surgery, Dr. Gornet stated that he believed a portion of it can be tied to her June 11, 2002 accident, but the majority would be related to the January of 2003 accident. He testified that 60 to 70 percent of the need for surgery would be from the 2003 accident and 30 to 40 percent would be from the 2002 accident. It was Dr. Gornet's opinion that both of the accidents are a substantial factor in causing the need for the disc replacement. Dr. Gornet testified that the employee's problems are based on a combination between the two injuries. Dr. Gornet assessed the percentages based on the assumption that her symptoms began in June of 2002 and were made worse after the January of 2003 incident. Dr. Gornet believes she may have suffered some structural injury to her disc mechanism in 2002 but while it was problematic, it was much more tolerable. It was his opinion that the second event produced further injury and now caused more disabling symptoms.

With regard to the history, the employee never provided him with any history of any subsequent injuries after January of 2003. Dr. Gornet did not mention the April 6, 2005 emergency records from Moberly Regional Hospital which indicated that she injured her back 24 hours before while lifting and turning in connection with cleaning at home. Dr. Gornet stated that the employee was overweight, but did not know if she met the classification of obese. Dr. Gornet stated that he did not believe that it's ever been shown that obesity can cause back pain but it can significantly alter a doctor's ability to treat patients. Dr. Gornet did not feel her weight or size was a contraindication for disc replacement surgery.

With regard to the 2002 injury, Dr. Gornet stated he believed the possibility existed that she may have had some subtle structural injury. He stated that the history for a continued problem is fairly scant. He cannot accurately tell whether or not there was a significant structural problem that occurred which could have made her more susceptible to her second injury of January of 2003. It was Dr. Gornet's opinion that the employee's symptoms on November 21, 2005 had their structural onset from those two injuries.

The employee testified that on the average day she does a lot of nothing. She has trouble standing and sitting; and has to rotate sitting, standing and laying. The inner side of her right leg burns and her big toe is numb. She has trouble cleaning her house and if she does much such as sweeping, then she is in bed for a couple of days. She does not do any yard work or laundry, does not do much lifting, has trouble bending, and has trouble sleeping. She has to sleep with

pillows between her knees. Prescription pain pills and muscle relaxers help but she cannot afford them. She takes over-the-counter ibuprofen and tries to tough it out. She is requesting the disc replacement surgery recommended by Dr. Gornet to help with her life, to get relief, and to be able to return to work. She has not injured her low back since January of 2003.

RULINGS OF LAW:

Issue 1. Accident in Injury Number 02-055584 and Issue 2. Medical causation in Injury Number 02-055584

The employer is disputing that on or about June 11, 2002 the employee sustained an accident arising out of and in the course of her employment and that the employee's injury is medically causally related to the alleged accident.

The credible testimony of the employee, the supervisor's accident investigative report, the employer's report of injury and the medical records from Dr. Smith clearly establish that on June 11, 2002, the employee sustained a work-related accident to her low back while transferring a patient into a wheelchair. I find that on or about June 11, 2002, the employee sustained an accident that arose out of and in the course of her employment.

The employee's credible and uncontradicted testimony was that prior to June 11, 2002, she did not have any low back symptoms and never had any treatment for her low back. On June 11, 2002, Dr. Smith found tenderness of the right sacroiliac joint and spasms in the same area of the upper buttocks, and diagnosed a low back strain. Dr. Smith continued to diagnose the employee with a low back strain and released the employee from treatment on July 10, 2002. The employee testified that after being released she continued to have low back pain but did not have radiating pain down the right leg. It was Dr. Carter's opinion that as a result of the June 2002 accident that the employee sustained a lumbar strain.

Dr. Gornet believed that that the employee may have suffered some subtle structural injury to her L4-5 disc on June 11, 2002. It was Dr. Gornet's opinion that a portion of the employee's symptoms are causally connected to the June 11, 2002 accident.

Based upon a review of the evidence, I find that the employee's work related accident on or about June 11, 2002, was a substantial factor in causing the injuries to her low back and resulting medical condition including the lumbar strain, her need for treatment through July 10, 2002, and her continued symptoms through January 13, 2003. I further find that the injury to her low back and resulting medical condition including the lumbar strain, her need for medical treatment through July 10, 2002, and her continued symptoms through January 13, 2003 were medically causally related to the employee's work accident on or about June 11, 2002.

Issue 2. Accident in Injury Number 03-008884 and Issue 4. Medical causation Injury Number 03-008884

The employer is disputing that on or about January 14, 2003 the employee sustained an accident arising out of and in the course of her employment and that the employee's injury is medically causally related to the alleged January 14, 2003 accident.

The employee started having low back problems on June 11, 2002 as a result of her work-related accident. Her credible testimony was that after being released by Dr. Smith on July 10, 2002, the employee continued to have low back pain but did not have pain radiating down the right leg. She went back to work on full duty and learned to deal with the pain. She received no further treatment for her low back until after the alleged reinjury to her low back on or about January 14, 2003.

Under Missouri law, the employer can be held responsible for accidents that aggravate preexisting conditions which were asymptomatic prior the date of the accident. See Indelicio v. Missouri Baptist Hospital, 690 S.W.2d 183 (Mo. App. 1983). A preexisting but non-disabling condition does not bar recovery under the Workers' Compensation Act if a work-related accident causes a preexisting condition to escalate to the level of disability. See Miller v. Wefemeyer, 890 S.W.2d 372 (Mo. App. 1994). The worsening of a preexisting condition is a change in pathology needed to show a compensable injury. See Windsor v. Lee Johnson Const. Co., 950 S.W. 2d 504,509 (Mo. App. 1997).

The aggravation of a preexisting symptomatic condition is also compensable. See Rector v. City of Springfield, 820 S.W.2d 639 (Mo. App. 1991) and Parker v. Mueller Pipeline, 807 S.W. 2d 518 (Mo. App. 1991). In Kelly v. Banta and Stude Construction Company, Inc., 1 S.W.3d 43 (Mo. App. 1999), the Court of Appeals held that the employer-insurer was liable for hip replacements based on a finding that the employee's work activity aggravated the employee's preexisting osteoarthritis.

It is sufficient that causation be supported only by reasonable probability. See Davis v. Brezner, 380 S.W.2d 523 (Mo. App. 1964) and Downing v. Willamette Industries, Inc., 895 S.W.2d 658 (Mo. App. 1995). In Landers v. Chrysler Corporation, 963 S.W.2d 275 (Mo. App. 1997), the Court held that it is sufficient to award medical benefits if the employee shows by "reasonable probability" that she is in need of additional medical treatment by reason of her work-related accident.

The Court of Appeals in Bloss v. Plastic Enterprises, 32 S.W.3d 666 (Mo. App. 2000), held that if work is a substantial factor in the cause of the injury, it can be compensable even if the injuries were triggered or precipitated by the work. The Court of Appeals in Cahall v. Cahall, 963 S.W.2d 368 (Mo. App. 1998), held that a work-related accident can be both a triggering event and a substantial factor. There is no bright line test or minimum percentage defining a substantial factor. A causative factor may be substantial even if it is not the primary or most significant factor. The Court held that one-third of a cause is sufficient to be a substantial factor.

Prior to January 14, 2003, any preexisting condition in the employee's lumbar spine was not disabling. The employee's credible testimony was that on January 14, 2003, as she was attempting to transfer Ada from her bed into a Geri Chair; the patient twisted; the employee lost

her balance and strained; and the employee felt a sharp pain in her low back. The stabbing pain was totally different than the pain from June 11, 2002. The employee went to the floor, crawled on her knees, and used a handrail to pull herself up and go to the nurse's station. She testified that she reported the injury to her supervisor and filled out an injury report on the day of the accident.

The employer is alleging that the employee's testimony regarding the accident is inconsistent with the other evidence and fails to support a finding of accident. The report by injured employee that was signed by the employee shows the date of injury as January 14, 2003, and that her low back was reinjured while working with Ada. The accident report by the employer's supervisor confirms that injury happened on January 14 while transferring a resident around 10:30 a.m. and the employee notified her supervisor on January 14. The only difference in the supervisor's report was that the incident was in the shower room and not the resident's room. The report of injury that was filled out for the employer by Chris Taylor in the personnel department stated that the employee had the accident in the afternoon of January 23 and the employee notified the employer on January 23. The time and date in the employer's report of injury contradicts the supervisor's report. On January 23, the employer sent the employee to Dr. Smith for a workers' compensation injury. Dr. Smith's report stated that employee had been having low back pain for two weeks with no recent injury. January 23 is 10 days after January 14, and therefore is approximately 2 weeks after the employee was having pain. The employee's credible testimony was that on January 23, she told Dr. Smith that she was injured transferring a patient. The next visit to Dr. Smith was on February 13, who again noted it was for a workers' compensation case. On March 7, the therapist at Mark Twain noted that the injury occurred while lifting a resident. I find that the employee's testimony with the other evidence is more consistent than inconsistent. Any inconsistencies are minor and inconsequential. I find that the employee's testimony is credible and persuasive.

Based on a thorough review of the evidence, I find that on January 14, 2003, the employee sustained a work-related accident to her low back attempting to transfer a patient into a chair when the employee strained and felt a sharp pain in her low back. I find that on or about January 14, 2003, the employee sustained an accident that arose out of and in the course of her employment.

The employer is alleging that since the employee was able to continue working after the accident without disability supports a conclusion that the employee sustained just a mild strain. It is important to note that Dr. Smith had the employee on restricted duty from January of 2003 through March 31, 2003 when he released her with no restrictions. On March 31, he noted that the employee was working for a different employer where the work was less strenuous. The employee's credible and uncontradicted evidence was that she was terminated by Mark Twain on February 7, 2003 because the employer did not have any light duty jobs for her. She went to work for Colonial. The employee watched a patient and gave him medications which in essence was a light duty job. She worked there until late May when she was fired because she did not want to work on Sundays. Since May of 2003, the only other employment the employee has had was an attempt to work at Wal-Mart on light duty.

With regard to the issue of medical causation, it important to note when the medical records indicate the employee started developing right lower extremity symptoms. In the second visit to Dr. Smith on February 13, the employee was having tingling in the right anterior thigh. When the employee saw Dr. Schisler on February 14, she had right hip problems. On March 7, the therapist noted that the employee had sharp pain that shot down the right lower extremity into the middle of the hamstring. On August 8, the employee saw Dr. Schisler for low back pain, radiculopathy, right hip pain, and problems in the right thigh. At the end of September the employee requested more treatment from the employer at a mediation. When the employee was sent to Dr. Carter on October 22, the employee had pain in the right low back, the central part of the thigh, and had numbness in her right great toe. At the end of December of 2003, the employee saw Dr. Wilkerson and had positive radicular symptoms; and saw Dr. Schisler for shooting pain down the right leg and into the great toe. Starting with the second visit to Dr. Smith, the employee consistently had right lower extremity symptoms which continued throughout 2003 and 2004. The December 20, 2004 CT scan confirmed that the employee had a L4-5 disc problem. The employee's credible testimony was that the only two injuries that she sustained to her low back were on June 11, 2002 and on January 14, 2003.

Dr. Smith diagnosed the employee with a low back strain. On March 31, 2003, he stated that it had resolved, and released the employee from care. It was Dr. Carter's opinion that as a result of the January 2003 accident that the employee sustained a lumbar strain.

It was Dr. Gornet's opinion that the December 2004 CT scan showed a central disc lesion at L4-5. Dr. Gornet ordered a MRI that clearly showed a disc-related annular tear and central disc protrusion consistent with a disc injury at L4-5. Dr. Gornet performed a discogram to determine if the L4-5 level caused her pain. The swelling of the disc revealed an obvious posterior annular tear at L4-5 which was provocative and typical for her back pain. Dr. Gornet diagnosed discogenic low back pain at L4-5. It was his opinion that the majority of her back pain that is disabling and requires treatment is at L4-5. Dr. Gornet stated that the employee's pain complaints were consistent with an annular tear at L4-5 and recommended disc replacement surgery at L4-5.

It was Dr. Gornet's opinion that the surgery is reasonable and necessary as a result of the injuries, and that the employee's symptoms had their structural onset from the two work related accidents. Dr. Gornet stated that the employee's symptoms began in June of 2002 and the January of 2003 accident caused further injury and more disabling symptoms. It was his opinion that the majority of the need for the surgery (60-70%) is related to the January of 2003 accident and injury. It is Dr. Gornet's opinion that the January of 2003 accident was a substantial factor in causing the need for the disc replacement, and that the employee's current symptoms are causally connected to her January of 2003 work injury. I find that the opinions of Dr. Gornet are credible and persuasive.

Based on a review of all the evidence, I find that the opinion of Dr. Gornet is more credible than the opinions of Dr. Smith and Dr. Carter on the issue of medical causation and whether the January 14, 2003 accident was a substantial factor in causing the injury and need for treatment including the L4-5 disc replacement surgery.

Based on a review of the evidence including the credible testimony of Dr. Gornet, I find that the work accident on or about January 14, 2003, either caused a new injury and/or aggravated a preexisting condition in the lumbar spine at the L4-5 level which caused the employee's low back to become more symptomatic and disabling. I find that the January 14, 2003 accident was a substantial factor in causing the employee's low back injury, resulting medical conditions, disability, and the need for treatment at L4-5. I find that the January 14, 2003 accident caused the need for the employee's medical treatment for the low back. I find that the employee's low back condition at L4-5 and the need for medical treatment are medically causally related to the January 14, 2003 work accident.

Issue 5. Claim for additional medical aid in Injury Number 02-055584 and Issue 6. Claim for additional medical aid in Injury Number 03-008884

The employee is requesting additional medical aid in the form of a disc replacement surgery by Dr. Gornet. The employee offered credible and persuasive testimony concerning her physical problems. In addition, the employee was observed at the hearing and exhibited behavior and physical patterns including shifting in her seat, standing up and sitting down which support a finding that the employee is suffering from a significant level of pain and discomfort.

Under Section 287.140 RSMo the employee is entitled to receive all medical treatment that is reasonably required to cure and relieve her from the effects of the injury. Section 287.140 RSMo gives the employer the right to select the treating physician. The employer may waive the right to select the treating physician by failing or neglecting to provide necessary medical aid. See Herring v. Yellow Freight System, 914 S.W.2d 816 (Mo. App. 1995) and Banks v. Springfield Park Care Center, 981 S.W.2d 161 (Mo. App. 1998). Denial of compensability is tantamount to a denial of liability for medical treatment. Beatty v. Chandeysson Elec. Co., 190 S.W.2d 648 (Mo. App. 1945). I Mo. Workers' Compensation Law Section 7.2 (Mo. Bar 3rd ed. 2004).

On March 31, 2003, Dr. Smith released the employee from care. On October 22, 2003, Dr. Carter stated that the employee had reached maximum improvement from her two lumbar strains. It was Dr. Gornet's opinion that the employee would be an excellent candidate for disc replacement at L4-5, and that was the best treatment option. Dr. Gornet stated that the surgery was reasonable and necessary as a result of the injuries.

I find that the opinion of Dr. Gornet is more credible than the opinions of Dr. Smith and Dr. Carter on the issue of additional medical aid for the employee.

I find that the employee is in need of additional medical treatment to cure and relieve her from the effects of her work related injuries. The employer is therefore directed to provide the employee with all of the medical care that is reasonable and necessary to cure and relieve her from the effects of the work related injuries pursuant to Section 287.140 RSMo. This obligation includes but is not limited to the treatment recommended by Dr. Gornet at L4-5 including the disc replacement surgery. Based on the evidence, I find that the furnishing of additional medical aid by the employer is under the January 14, 2003 accident and injury.

I find that the employer did not provide any medical treatment after October 22, 2003, when Dr. Carter opined that the employee was at maximum medical improvement. On December 13, 2004, the employee's attorney requested the employer send the employee to a specialist due to low back and right leg pain. The employer did not offer any additional medical treatment and therefore failed or neglected to provide necessary medical aid. At the hearing, the employee denied the compensability of the cases by denying that the employee sustained accidents arising out of and in the course of her employment and denying that the employee's injuries were medically causally related to those alleged accidents.

Based upon the case law and a review of the evidence, I find that the employer waived its right to select the treating physician by denying the compensability of the case and by failing or neglecting to provide necessary medical aid. The employer is therefore ordered to furnish additional medical treatment under the direction and control of Dr. Gornet.

As previously indicated this is a temporary or partial award. The award is therefore subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

Date: _____

Made by:

Lawrence C. Kasten
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation