

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

Injury No.: 06-135790

Employee: Angela Miller
Employer: Anderson Merchandisers
Insurer: New Hampshire Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 6, 2012. The award and decision of Administrative Law Judge Vicky Ruth, issued November 6, 2012, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 30th day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Angela Miller

DISSENTING OPINION

Based on my review of the evidence and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the majority errs in affirming the administrative law judge's award in favor of the employee.

Dr. Coyle, Dr. Polinsky, and Dr. Woiteshek indicate that employee's condition and disability would improve if she were to have a surgical fusion of her L4-5. Employee previously underwent that surgery at the expense of employer, however the union was unsuccessful. Dr. Coyle and Dr. Polinsky opined that the first surgery was likely unsuccessful because of employee's nicotine use from smoking cigarettes. Dr. Coyle, Dr. Polinsky, and Dr. Bartlett recommend that employee discontinue smoking so that the second surgery will be more successful. Dr. Polinsky states that the success rate for the fusion surgery would only be 10-20% if she continues to smoke, but it would be as good as 70-80% if she quits smoking first. For this reason, Dr. Coyle refuses to perform the second surgery, and Dr. Polinsky would not recommend the second surgery, until employee discontinues her nicotine usage. Based on these medical opinions, employer agrees to pay for the second surgery but only if employee stops smoking first. Given the low chances of success if employee were to continue smoking, I find that employer's position is reasonable.

Employee testified that she wants to quit smoking and she wants to have this second surgery. However, employee contends that she is unable to quit smoking because she is addicted. Employer contends that employee's continuing usage of nicotine constitutes an unreasonable refusal of medical treatment, and therefore it should only be liable for permanent partial disability rather than permanent total disability. Thus, the issue in this case is whether employee's continuing use of nicotine, against the recommendation of all medical experts, thereby rendering herself ineligible for a surgery that could alleviate her condition and lessen her disability, reduces employer's liability for employee's permanent disability benefits.

Section 287.140.5 RSMo¹ states that "No compensation shall be payable for the death or disability of an employee, if and insofar as the death or disability may be caused, continued or aggravated by any unreasonable refusal to submit to any medical or surgical treatment or operation, the risk of which is, in the opinion of the division or the commission, inconsiderable in view of the seriousness of the injury."

Since employee's ongoing use of nicotine is the reason employee is not able to have surgery at this time with any reasonable chance of success, I find that she is continuing and aggravating her own disability. The question then becomes whether employee's continuing use of nicotine is equivalent to an unreasonable refusal to submit to medical or surgical treatment pursuant to § 287.114.5.

I am not persuaded that employee is absolutely unable to overcome her smoking addiction. Although employee listed numerous cessation techniques she has tried,

¹ All statutory references are to Revised Statutes of Missouri (2005) unless otherwise indicated.

Employee: Angela Miller

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there is insufficient testimony and evidence as to when each of the techniques were tried, how long she tried each technique, and whether there were other factors contributing to the attempts being unsuccessful. Further, none of the medical experts opined that employee was unable to quit smoking.

I also do not believe it is unreasonable to require employee to quit smoking for this surgical procedure. There are no risks or negative outcomes to smoking cessation. Instead, not only would employee be able to have this surgery which could greatly improve her disability and condition, but also her health in general would likely improve after becoming a non-smoker. And, employer has offered and continues to offer to pay for smoking cessation treatments.

Importantly, employee has not alleged any concerns about the risks of surgical intervention. Her position is only that she cannot quit smoking to be able to get this surgery. Again, I am not persuaded by that. I find that employer has done everything it can to optimize employee's disability and condition, and at this point it is employee who must take the next step forward. It was employee's smoking which likely caused the failure of the first surgery, and her disability continues and is aggravated now because she has not quit smoking.

Under these circumstances, I find that employer should not be liable for the continued and aggravated disability caused by employee's ongoing smoking. I would reverse the award of permanent total disability and instead award only permanent partial disability pursuant to § 287.114.5. Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

AWARD

Employee: Angela Miller

Injury No. 06-135790

Dependents: N/A

Employer: Anderson Merchandisers

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

Additional Party: None

Insurer: New Hampshire Insurance Company,
c/o Specialty Risk Services

Hearing Date: August 2, 2012

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: June 15, 2006.
5. State location where accident occurred or occupational disease was contracted: In or about Marion 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 occurred or occupational disease contracted: Claimant was lifting a box of books when she sustained an injury to her low back.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Body as a whole/low back.
14. Nature and extent of any permanent disability: Permanent and total disability.
15. Compensation paid to-date for temporary disability: \$41,163.31.
16. Value necessary medical aid paid to date by employer/insurer? \$105,871.03.
17. Value necessary medical aid not furnished by employer/insurer? N/A.

18. Employee's average weekly wages: \$642.46.
19. Weekly compensation rate: \$428.31/\$365.08.
20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable from employer:

Permanent and total disability benefits of \$428.31/week from March 1, 2010, and forward for claimant's lifetime as provided by law.

22. Second Injury Fund liability: N/A.

23. Future medical awarded: Yes, by agreement of the parties future medical care is left open.

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mark Moreland.

Employee: Angela Miller

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Angela Miller

Injury No. 06-135790

Dependents: N/A

Employer: Anderson Merchandisers

Additional Party: None

Insurer: New Hampshire Insurance Company,
c/o Specialty Risk Services

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

On August 2, 2012, Angela Miller, Anderson Merchandisers, and New Hampshire Insurance Co., c/o Specialty Risk Services, appeared for a final award hearing in Hannibal, Missouri. Angela Miller (the claimant) was represented by attorney Mark Moreland. Anderson Merchandisers (the employer) and New Hampshire Insurance Co, c/o Specialty Risk Services (the insurer) were represented by attorney Ben Shelledy. Claimant testified in person at the trial. Dr. Michael Polinsky and Dr. Dwight Woiteshek testified by deposition. The Administrative Law Judge set a deadline of August 27, 2012, for the filing of briefs, which was extended by request to September 5, 2012. The employer/insurer submitted a brief on or about September 5, 2012. After requesting and receiving an extension, claimant submitted her brief on September 14, 2012; the record closed at that time.

STIPULATIONS

At the trial, the parties stipulated to the following:

1. On June 15, 2006, claimant sustained an accident, and that accident that arose out and in the course of her employment with Anderson Merchandisers (the employer).
2. At all relevant times, the employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was insured by New Hampshire Insurance Company, c/o Specialty Risk Services (the insurer).
4. The Missouri Division of Workers' Compensation has jurisdiction, and the parties agree that venue in Marion County is proper.
5. Notice is not an issue.
6. Claimant filed a Claim for Compensation within the time prescribed by law.
7. Claimant's average weekly wage was \$642.46, yielding a weekly compensation rate of \$365.08 for permanent partial disability benefits and \$428.31 for permanent total disability benefits.
8. The employer/insurer paid temporary total disability benefits in the amount of \$41,163.31, for the periods of June 19, 2006 to June 20, 2006, October 24, 2006 to

November 2, 2006, November 7, 2006 to April 27, 2008, and November 1, 2009 to February 28, 2010.

9. The employer/insurer paid medical benefits in the amount of \$105,871.03.
10. The employer/insurer has agreed to leave future medical treatment open for the purpose of providing back surgery; such treatment is to be at the direction of the employer/insurer.
11. Claimant initially underwent some conservative treatment after the injury. On January 9, 2007, she came under the treatment of Dr. James Coyle. Dr. Coyle noted from an MRI that claimant had a foraminal disc herniation at L4-5 on the right with a compensatory shift on L4-5 on the right as well. Dr. Coyle recommends that claimant not undergo surgery at that particular time, and that she should attempt to seek additional conservative care with Dr. Manish Suthar.
12. Although Dr. Suthar provided epidural steroid injections, claimant continued to have complaints.
13. Dr. Coyle ultimately recommended that claimant undergo surgical intervention. He performed a right L4-5 lumbar discectomy and anterior body fusion on May 21, 2007. Claimant was advised prior to surgery that she should discontinue smoking.
14. Approximately six months after surgery, claimant was continuing to have back pain with extension. It was recommended that she continue treatment with Dr. Suthar. It was also noted on x-ray that claimant had some lucency with her fusion posterior and she was again advised to quit smoking.
15. As of June 2008, claimant was having a gradual increase in her low back pain.
16. Dr. Coyle was concerned about the possibility of a nonunion based on the claimant's operative and post-operative smoking history.
17. A CT scan showed lucency at the site of the fusion, which is consistent with a nonunion. Dr. Coyle recommended that the claimant augment her prior surgery with a fusion posteriorly. However, Dr. Coyle indicated that revision surgery would be contraindicated unless claimant was able to completely cease smoking as evidenced by a negative nicotine test for at least four weeks after smoking cessation. The doctor opined that in the absence of this, claimant would be at maximum medical improvement.
18. On January 24, 2008, Dr. Coyle gave claimant a disability rating of 20% of the body as a whole relative to the lumbar spine. The Functional Capacity Evaluation (FCE) showed that claimant could lift 20 pounds floor to knuckle, 25 pounds knuckle to shoulder, and 20 pounds shoulder to overhead. She was able to carry 30 pounds.
19. On November 24, 2009, Dr. Michael Polinsky saw claimant for an Independent Medical Evaluation. Dr. Polinsky concurred with Dr. Coyle that claimant would likely need a re-do of the fusion posteriorly, but that she would need to completely discontinue smoking prior to undergoing any further surgical intervention due to the fact that the risk of a nonunion is significantly higher in patients who smoke than in patients that do not smoke. Dr. Polinsky also felt that if the claimant is unable to discontinue smoking, and therefore unable to undergo surgery, then she is at maximum medical improvement. Dr. Polinsky testified that if claimant were able to quit smoking, her chances of a successful operation would be 70-80%. However, if claimant continued to smoke and had a re-do fusion, her chances of success would be 10-20%.
20. On October 8, 2009, claimant saw Dr. Dwight Woiteshek at the request of her attorney. Dr. Woiteshek did not feel that claimant could engage in employment in the open labor market due to her pain and based on her current nonunion fusion. He did recommend

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that claimant be seen by Dr. Joshua Darling of Washington University for further evaluation about surgical intervention and the insertion of a bone growth stimulator.

21. The parties agree that claimant is currently permanently and totally disabled. They disagree as to whether or not the employer/insurer is liable for this condition.

ISSUES

At trial, the parties indicated that the only issue for resolution is whether the employer/insurer is liable for permanent partial disability benefits or permanent total disability benefits; thus, this is the only issue that will be addressed.¹

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence:

Exhibit A	Report from Dr. Thomas Musich.
Exhibit B	Report of Gary Weimholt.
Exhibit C	Report and records from Midwest Spine Surgeon/Dr. James Coyle.
Exhibit D	Report from Functional Capacity Evaluation.
Exhibit E	Medical records from Pain Prevention & Rehabilitation Center.
Exhibit F	Medical and billing records from the Hannibal Clinic.
Exhibit G	Medical records from Hannibal Regional Hospital.
Exhibit H	Medical records from First Choice Physical Therapy.
Exhibit I	Deposition of Dr. Dwight Woiteshek.

On behalf of the employer/insurer, the following exhibits were admitted into the record:

Exhibit 1	Deposition of Dr. Michael Polinsky.
Exhibit 2	Report from Blaine Rehabilitation Management.
Exhibit 3	Joint Stipulated Set of Facts for Trial.

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence. Depositions were admitted subject to the objections contained in the record. Unless otherwise specifically noted below, the objections are overruled.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

¹ In her brief, claimant indicates that she is also seeking unpaid temporary total disability benefits for the period of April 28, 2008 through October 31, 2009. This, however, was not brought up at trial and is therefore not properly an issue.

1. Claimant was born on November 2, 1972. At the time of the hearing, she was 39 years old; she was about 33 years old on the date of the work injury.
2. On June 15, 2006, claimant was lifting a box of books while in the course and scope of her employment. While lifting the box, she injured her back.
3. She initially underwent some conservative treatment after the injury. On January 9, 2007, she came under the treatment of Dr. James Coyle. Dr. Coyle noted from an MRI that claimant had a foraminal disc herniation at L4-5 on the right with a compensatory shift on L4-5 on the right as well. Dr. Coyle recommended that claimant not undergo surgery at that particular time, and that she seek additional conservative care with Dr. Manish Suthar. Although Dr. Suthar provided epidural steroid injections, claimant continued to have complaints.
4. On January 9, 2008, claimant participated in a Functional Capacity Evaluation (FCE).² According to that evaluation, claimant demonstrated a physical demand level in the light to medium category. She demonstrated lifting floor to knuckle with 20 pounds; knuckle to shoulder with 25 pounds; shoulder to overhead with 20 pounds; carry 30 pounds for 30 feet; pushed and pulled 30 pounds for 30 feet. Claimant demonstrated a cardiovascular fitness status in the light category for the bench step test and the heavy category for the treadmill test. Claimant demonstrated difficulty with the repetitive stepping up and down during the bench step test, which resulted in increased right-sided low back pain.
5. On January 24, 2008, Dr. Coyle gave claimant a disability rating of 20% of the body as a whole relative to the lumbar spine.
6. On October 8, 2009, claimant saw Dr. Dwight Woiteshek at the request of her attorney. Dr. Woiteshek did not feel that claimant could engage in employment in the open labor market due to her pain and based on her current nonunion fusion. He recommended that claimant be seen by Dr. Joshua Darling of Washington University for further evaluation about surgical intervention and the insertion of a bone growth stimulator.
7. Claimant testified that she started smoking at age 22 years; she found smoking to be a stress reliever. She testified that between ages 22 and 33 years (the date of injury), she tried to quit smoking many times. She tried the medication Chantix, but it caused nightmares and made her feel scared. She testified that she tried other medications, electronic cigarettes, aricular therapy, hypnosis, and nicotine patches. She testified that she has been unable to quit smoking; she feels that she is “addicted” to smoking.
8. Claimant testified that she currently has back pain on a daily basis. The pain is often an eight on at ten-point scale. On a good day, and if she is sedentary, the pain might decrease to a three on a ten-point scale.

² Claimant’s Exh. D.

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9. Claimant testified that she wants to have the surgery recommended by Dr. Coyle, but that she is unable to quit smoking.
10. The employer/insurer provided smoking cessation treatment, but claimant was not successful in her efforts to quit.

Independent Medical Evaluations

11. On October 12, 2009, Dr. Dwight Woiteshek evaluated claimant at the request of her attorney. As to the June 2006 work injury, he diagnosed claimant with 1) traumatic herniated nucleus propusius L4-5 s/p surgical microlumbar discectomy and anterior lumbar interbody fusion L4-5, and 2) nonunion L4-5 of the attempted fusion. He opined that the June 2006 work injury was the prevailing factor in the cause of her traumatic herniated nucleus propusius L4-5 status post surgical microlumbar discectomy and anterior lumbar interbody fusion and subsequent nonunion L4-5 of the attempted fusion.³
12. Dr. Woiteshek opined that claimant has not reached maximum medical improvement as she needs additional treatment for her nonunion of the L4-5 attempted fusion. He also indicated that in his opinion, if claimant does not get the nonunion of the L4-5 attempted fusion fixed with surgery, in her present state she is no longer able to obtain gainful employment in the open labor market. Thus, he believes that claimant is permanently and totally disabled unless she gets surgery; if she gets surgery, she can be reevaluated after the appropriate amount of time.
13. On November 24, 2009, Dr. Michael Polinsky saw claimant for an Independent Medical Evaluation on behalf of the employer/insurer. Dr. Polinsky noted that claimant presented with intractable and severe back pain after surgical intervention and that she has a nonunion. He thinks it is likely that her tobacco use contributed to her nonunion. Dr. Polinsky concurred with Dr. Coyle that claimant would likely need a re-do of the fusion posteriorly, but that she would need to completely discontinue smoking prior to undergoing any further surgical intervention due to the fact that the risk of a nonunion is significantly higher in patients who smoke than in patients that do not smoke. Dr. Polinsky felt that if the claimant is unable to discontinue smoking, and therefore unable to undergo surgery, then she is at maximum medical improvement. Dr. Polinsky testified that if claimant were able to quit smoking, her chances of a successful operation would be 70-80%. However, if claimant continued to smoke and had a re-do fusion, her chances of success would be 10-20%.
14. Dr. Polinsky also indicated that in his opinion, if claimant does not get the nonunion of the L4-5 attempted fusion fixed with surgery, in her present state she is no longer able to obtain gainful employment in the open labor market. Thus, he believes that claimant is permanently and totally disabled unless she gets surgery; if she gets surgery, she can be reevaluated after the appropriate amount of time.

³ Employer/insurer Exh. 2.

15. On July 11, 2011, Dr. Thomas Musich performed an Independent Medical Evaluation (IME) of claimant at the request of claimant's attorney. Dr. Musich opined that claimant suffered acute work-related trauma during the course and scope of her employment with the employer in June 2006. He opined that the work-related trauma was the prevailing factor in the development of acute low back pain and bilateral lower extremity radiculopathy, which necessitated the treatment claimant received for her back. In his opinion, the work injury is causally related to claimant's ongoing and persistent debilitating low back pain and bilateral lower extremity radiculopathy that has resulted from discogenic pain, followed by nonunion.
16. Dr. Musich opined that claimant is "not at maximum medical improvement, and would benefit from weight loss, smoking cessation and definite surgical intervention, as a result of her current lumbar pain secondary to discogenic pain and nonunion."⁴ Dr. Musich also indicated that it is his medical opinion that claimant is "unable to obtain and maintain employment in the open job market, given her intractable low back pain, her permanent restrictions from Dr. Coyle, as well as suggested restrictions of no operating commercial vehicles, or power tools, no prolonged positioning of the lumbosacral spine over 15 minutes, no lifting greater than 20 pounds."⁵ He also indicated that he believed that claimant is "currently unsafe in the open job market, given her recommended restrictions and her ongoing need for large amounts of narcotic analgesics and muscle relaxants."⁶ Dr. Musich also believed that if claimant does not received additional treatment for her lumbar condition, that she is totally and permanently disabled as a result of the June 2006 work injury. He also indicated that if claimant receives additional spinal treatment, she would need to be re-evaluated to determine any permanent partial disability referable to the work injury. He also opined that claimant did not suffer any pre-existing permanent partial disability before the 2006 work injury.
17. On or about November 24, 2009, Dr. Michael Polinsky evaluated claimant at the request of the employer/insurer. Dr. Polinsky noted that claimant presented with intractable and severe back pain after surgical intervention. He noted that she has a nonunion. He opined that it is possible that surgical treatment of her lumbar spine would improve her pain condition; he believed that that this would be a "redo" of the fusion posteriorly. However, he believed that claimant would need to completely discontinue all forms of nicotine usage prior to surgery and for six months postoperatively. He noted that he thinks it is likely that her tobacco abuse contributed to her nonunion. He indicated that approximately "10 percent of patients who undergo fusions of this type develop a nonunion, but the risk is much higher in patients who smoke. If [claimant] is unable to discontinue smoking, and therefore [is] unable to undergo surgery, then she is at her maximum medical improvement. I think if she is unable to discontinue her smoking and wishes to proceed with surgery, then she is not yet at her maximum medical improvement."⁷

⁴ Claimant's Exh. A.

⁵ *Id.*

⁶ *Id.*

⁷ Employer/insurer Exh. 1.

Vocational Evaluations

18. At the request of her attorney, claimant was examined by Gary Weimholt, a vocational rehabilitation counselor, on October 28, 2011. Mr. Weimholt opined that claimant has “a total loss of access to the open competitive labor market and is neither employable nor placeable in the open competitive labor market.”⁸ He further notes that he believes that it is “the status of her lumbar spine and severe and incapacitating pain, and also depression, which arose from the injury of June 2006 while she was employed with [the employer], which resulted in her total loss of labor market access.”⁹
19. On November 30, 2011, June Blaine, a rehabilitation counselor, evaluated claimant on behalf of the employer/insurer. Ms. Blaine concluded as follows:

...the most current functional capacities as outlined by Dr. Musich limited her to less than a sedentary level, given the limitations for no prolonged positioning of the lumbar spine over 15 minutes. Therefore, given Ms. Miller's needs for further treatment, her use of narcotics, including Methadone for pain control and her limited level of functioning, we do not believe it is feasible for us to recommend employment for Ms. Miller at this time.¹⁰

CONCLUSIONS OF LAW

Based upon the findings of fact and the applicable law, I find the following:

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.¹¹ Proof is made only by competent and substantial evidence, and may not rest on speculation.¹² Medical causation not within lay understanding or experience requires expert medical evidence.¹³ When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.¹⁴

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.¹⁵ Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.¹⁶ The fact finder is encumbered

⁸ Claimant's Exh. B.

⁹ *Id.*

¹⁰ Employer/insurer Exh. 2.

¹¹ *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

¹² *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

¹³ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

¹⁴ *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

¹⁵ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

¹⁶ *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

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with determining the credibility of witnesses.¹⁷ It is free to disregard that testimony which it does not hold credible.¹⁸

The determination of the specific amount or percentage of disability to be awarded to an injured employee is a finding of fact within the unique province of the ALJ.¹⁹ The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated.²⁰ A determination of the percentage of disability arising from a work-related injury is to be made from the evidence as a whole.²¹ It is the duty of the ALJ to weigh the medical evidence, as well as all other testimony and evidence, in reaching his or her own conclusion as to the percentage of disability sustained.²²

Section 287.020.7, RSMo, provides that “total disability” is the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident.²³ The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired.²⁴ The test for permanent and total disability is whether the claimant would be able to compete in the open labor market.²⁵ When the claimant is disabled by a combination of the work-related event and pre-existing disabilities, the responsibility for benefits lies with the Second Injury Fund.²⁶ If the last injury in and of itself renders a claimant permanently and totally disabled, the Second Injury Fund has no liability and the employer is responsible for the entire compensation.²⁷

Various factors have been considered by courts attempting to determine whether or not an employee is permanently and totally disabled. An employee’s ability or inability to perform simple tasks such as sitting,²⁸ bending,²⁹ and walking³⁰ may prove that the employee is permanently and totally disabled.

Issue: Whether the employer/insurer is liable for permanent partial disability benefits or permanent total disability benefits.

At trial, the parties indicated that the issue to be determined is whether the employer/insurer is liable for permanent partial disability benefits or permanent total disability

¹⁷ *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo. App. E.D. 2008).

¹⁸ *Id.* at 908.

¹⁹ *Hawthorne v. Lester E. Cox Medical Center*, 165 S.W.2d 587, 594-595 (Mo.App. S.D. 2005); *Sifferman v. Sears & Robuck*, 906 S.W.2d 823, 826 (Mo.App. S.D. 1999).

²⁰ *Rana v. Land Star TLC*, 46 S.W.3d 614 626 (Mo.App. W.D. 2001).

²¹ *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo.App. E.D. 1998).

²² *Rana* at 626.

²³ See also *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 178 (Mo.App. S.D. 2004).

²⁴ *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

²⁵ *Id.*

²⁶ Section 287.200.1, RSMo.

²⁷ *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

²⁸ *Brown v. Treasurer of Missouri*, 795 S.W.2d 478 (Mo.App. E.D. 1990).

²⁹ *Sprung v. Interior Const. Service*, 752 S.W.2d 354 (Mo.App. E.D. 1988).

³⁰ *Keener v. Wilcox Elec. Inc.*, 884 S.W.2d 744 (Mo.App. W.D. 1994).

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benefits. The parties agree that in her current state, claimant is permanently and totally disabled. The employer/insurer contends that claimant has unreasonably refused medical aid by not quitting her smoking habit so that she can undergo back surgery. And thus, the employer/insurer believes that it is liable for permanent *partial* disability benefits and not permanent *total* disability benefits. I could find no Missouri case law that is directly applicable to the present situation.³¹ Likewise, based upon their briefs, it appears that neither party found a case directly on point.

The employer/insurer argues that the focus in this case is whether or not it is unreasonable for claimant to not cease smoking so that she may undergo back surgery. The employer/insurer contends that it has done everything it can to provide treatment. Dr. Coyle, the treating physician, indicates that claimant would benefit from a “re-do” of her fusion, but that she must stop smoking before that surgery can be provided. Dr. Polinsky also indicates that claimant would benefit from a fusion “re-do,” but that she must stop smoking first. The employer/insurer has provided smoking cessation treatment.

Claimant contends that she would like to have the “re-do” fusion surgery. She testified that she has tried unsuccessfully to stop smoking, availing herself of medications, the nicotine patch, aricular therapy, and hypnosis. Her testimony regarding her repeated attempts to stop smoking was credible and sincere. In spite of her efforts, she has been unable to overcome her addiction. Claimant testified credibly that she would have the surgery if a doctor would perform it even though she is still smoking. She stated that she has not refused to undergo the medical treatment.

Section 287.140.5 provides, in pertinent part, as follows:

No compensation shall be payable for the death or disability of an employee, if and insofar as the death or disability may be caused, continued, or aggravated by any unreasonable refusal to submit to any medical or surgical treatment or operation, the risk of which is, in the opinion of the division nor the commission, inconsiderable in view of the seriousness of the injury.³²

A claim that an employee has unreasonably refused an employer’s offer of medical aid is an affirmative defense.³³ The burden of proving such a claim rests with the employer.³⁴ Section 287.800 provides that “Administrative Law Judges . . . and any reviewing courts shall construe the provision of the chapter strictly.”³⁵ And in order for the employer/insurer to avail itself of

³¹ In *Boring v. Treasurer of Missouri as Custodian of Second Injury Fund*, 1996 WL 33107619 (Mo.Lab.Ind.Rel.Com), the Administrative Law Judge (ALJ) discussed in *dicta* a scenario somewhat similar to the one at hand. The ALJ’s comments, however, did not pertain to the holding of the case and were not addressed by either the Commission or the Eastern District Court of Appeals. See *Boring v. Treasurer of Missouri, Custodian of the Second Injury Fund*, 947 S.W.2d 483 (Mo.App. E.D. 1997).

³² Section 287.140.5, RSMo.

³³ *Stawizynski v. J. S. Alberici Construction Co.*, 936 S.W.2d 159 (Mo.App. E.D. 1996).

³⁴ *Jacobs v. Ryder Systems /Complete Auto Transit*, 789 S.W.2d 233 (Mo.App. E.D. 1990).

³⁵ Section 287.800, RSMo.

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this defense, the employer/insurer must first tender an offer of treatment to the employee and have it be refused.³⁶

In the present case, the employer/insurer has not made an offer to claimant to provide her with (additional) surgical treatment. While all of the doctors who have examined claimant agree that she would benefit from a “redo” of the failed lumbar fusion, no doctor has offered to provide the treatment at this time. Dr. Coyle and Dr. Polinsky have clearly indicated that they would not offer the surgery until claimant quits smoking. Dr. Woiteshek agreed that claimant needed a “redo” fusion, and he suggested that the surgery might be done using an additive, BMP, which increases the likelihood of bone growth. He recommended that claimant be sent to Dr. Dowling at Washington University, who could examine claimant and who might have been willing to perform the surgery even if claimant continued smoking. The employer/insurer, however, has not sent claimant to Dr. Dowling or any other doctor to discuss that possibility.

I find that claimant has not refused to undergo any medical treatment actually tendered by the employer/insurer. Claimant testified credibly that she wants to undergo a “redo” fusion, and she is willing to have the surgery now. In addition, it should be noted that claimant wants to quit smoking, has tried to quit smoking, but has been unable to do so.

In the alternative, if employer’s offer of surgery with the stipulation that claimant first quit smoking is in fact an offer of treatment, then the question becomes whether the fact that claimant has not quit smoking is actually an unreasonable refusal to submit to medical or surgical treatment or operation. The evidence shows that claimant is addicted to nicotine. She has made numerous efforts to stop smoking, over a period of many years, and all without success. I find that under strict construction, claimant’s addiction and her inability to overcome it are not an unreasonable refusal of medical care. I am mindful that one might reasonably question whether it is good public policy to compensate an individual who chooses to smoke and then finds him or herself suffering the consequences for such behavior; that, however, is a question that should be answered by the legislature. Under the current statutory framework and based on the facts of this case, I find that claimant’s inability to quit smoking is not an unreasonable refusal to submit to medical or surgical treatment or operation.

I find that claimant is permanently and totally disabled and that the employer/insurer is liable for such benefits. As temporary total disability benefits ended February 28, 2010, such benefits shall be paid from March 1, 2010, and shall continue subject to modification and review as provided by law. As agreed to by the parties, future medical treatment shall be left open for the purpose of providing back surgery, and such treatment is to be at the direction of the employer/insurer.

Any pending objections not expressly ruled on in this award are overruled. Interest, if any, is applicable as provided by law.

³⁶ *Boatwright v. ACE Industries*, 463 S.W.2d 549 (Mo.App. 1971).

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This Award is subject to a lien in the amount of 20% of the payments hereunder in favor of the claimant's attorney, Mark Moreland, for necessary legal services rendered to the claimant.

Made by: _____

Vicky Ruth

*Administrative Law Judge
Division of Workers' Compensation*