

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

Injury No.: 02-141648

Employee: Suzanne M. Miller  
Employer: Gen X Mex Foods, Inc. d/b/a Taco Bell  
Insurer: Continental Western Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 30, 2008. The award and decision of Administrative Law Judge June Striegel Doughty, issued September 30, 2008, 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 29th day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: Suzanne M. Miller

Injury No. 02-141648

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: N/A

Employer: Gen X Mex Foods, Inc., d/b/a Taco Bell

Additional Party: Second Injury Fund

Insurer: Continental Western Insurance Co.

Hearing Date: July 9, 2008

Checked by: JSD/sb

### 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: April 1, 2002.
5. State location where accident occurred or occupational disease was contracted: Warrenton, 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: Employee slipped on water and fell on her 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: Lower back.
14. Compensation paid to-date for temporary disability: \$4,365.48.

- 15. Value necessary medical aid paid to date by employer/insurer? \$73,331.56.
- 16. Value necessary medical aid not furnished by employer/insurer? \$1,997.54.
- 17. Employee's average weekly wages: \$233.86.
- 18. Weekly compensation rate: \$155.91.
- 19. Method wages computation: Stipulation by the participating parties.
- 20. Nature and extent of disability: 12.5% PPD of the body as a whole.

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: \$ 311.82 in TTD for April 5-6, 2002  
\$7,795.50 in PPD  
  
Total: \$8,107.32

- 22. Future requirements awarded: None.
- 23. Second Injury Fund liability: Left open.

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of attorney E. Thomas Liese for necessary legal services rendered to the Claimant.

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

Employee: Suzanne M. Miller

Injury No: 02-141648

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: N/A

Employer: Gen X Mex Foods, Inc., d/b/a Taco Bell

Additional Party: Second Injury Fund

Insurer: Continental Western Insurance Co.

Checked by: JSD/sb

This workers' compensation claim was heard before the undersigned administrative law judge on July 9,

2008. The claimant, Suzanne M. Miller, appeared in person and with counsel, E. Thomas Liese. Attorney Michael C. Margherio represented the employer and the insurer. The parties agreed that the Second Injury Fund liability would not be determined at this hearing and no one appeared on behalf of the Fund. The claimant and the employer/insurer submitted post-hearing briefs on July 21, 2008.

### **STIPULATIONS**

The parties stipulated that on April 1, 2002:

- Miller was in the employment of Gen X Mex Foods, Inc., d/b/a Taco Bell (“Taco Bell”) and sustained an injury by accident arising out of and in the course of her employment that resulted in injury to her low back;
- Taco Bell and Miller were operating under and subject to the provisions of the Missouri Workers’ Compensation Law;
- Taco Bell’s liability was insured by Continental Western Insurance Co.;
- Miller earned an average weekly wage of \$233.86; and
- The weekly rate of compensation for temporary total and permanent partial disability benefits was \$155.91.

The parties also stipulated that:

- The Missouri Division of Workers’ Compensation has jurisdiction over this case and venue is proper in Warren County;
- Taco Bell had proper notice of the injury and a Claim for Compensation was timely filed;
- Taco Bell paid Miller \$4,365.48 in temporary total disability benefits representing payment for April 7, 2002, and February 12, 2004, through August 25, 2004; and
- Taco Bell provided Miller with medical care costing \$73,331.56.

### **ISSUES**

The parties request that the Division determine:

- Whether Taco Bell is liable for temporary total benefits for the periods of:
  - April 5, 2002 – April 6, 2002;
  - May 13, 2002 to August 25, 2002; and
  - October 29, 2002 to February 12, 2004?
- Whether Miller is entitled to permanent partial disability benefits or permanent total disability benefits and, if so, the extent thereof?
- Whether Taco Bell is liable for past medical expenses for medical treatment Miller sought on her own?
- Whether Taco Bell is liable for future medical expenses for medication?

## **EVIDENCE PRESENTED**

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Miller testified on her own behalf and the following exhibits were entered into evidence by the claimant:

- Medical Records: Dr. Rachel George
- Crossroads Hospital Records
- Medical Records: Jean M. Burle, D.C.
- Medical Records: Russell T. Imboden, D.O.
- Medical Records: J. Al Vellinga, D.O.
- Deposition of Thomas F. Musich, M.D.
- Deposition of Samuel Bernstein, Ph.D., CRC

Carla Boshers testified on behalf of Taco Bell and the following exhibits were entered into evidence by the employer:

- Deposition of Dr. R. Peter Mirkin
- Deposition of Beth Collins
- Deposition of David S. Raskas, M.D.
- Claim for Compensation, Injury No. 99-063800

Any objections not specifically addressed in this award are overruled.

## **FINDINGS OF FACT**

### Chronology of Events

- Suzanne Marie Miller was born on August 17, 1967. Miller has a 10th grade education and no other educational training. Miller's work history includes some factory work but is primarily in food service, including a period of time in 1999 when she worked at Kentucky Fried Chicken in Creve Coeur, Missouri ("KFC") as a shift leader. When she worked at KFC, Miller's last name was Turner.
- Miller began working at Taco Bell in November of 2001. Miller's supervisor was Carla Boshers, Taco Bell's Restaurant General Manager in Warrenton, Missouri. While at work on April 1, 2002, Miller slipped on water on the floor and fell on her back ("the fall"). Miller testified that she felt pain immediately in her low back and by later that evening she was also experiencing pain radiating down both legs.
- Miller reported to work on April 2 but could not stand up straight so Boshers told Miller to go home and scheduled Miller to be seen at Dr. Buckles' office the next day.
- Dr. Rachel George, a physician working in Dr. Buckles' office, first saw Miller on April 3, 2002. Dr. George's impression was that Miller was suffering from lumbar strain and she prescribed Darvocet and instructed Miller to stay home from work on April 4 and use ice packs on her back. Dr. George also sent Miller to Crossroads Regional Hospital ("Crossroads") for an X-ray of Miller's lumbar spine. The X-ray, taken on April 3, 2002, found: "Minimal levoconvex rotary lumbar scoliosis" and "no evidence of spondylolysis, spondylolisthesis, fracture, or focal bone lesion."

Miller returned for a follow up visit with Dr. George on April 5, 2002. Miller reported that she was better but still in pain and not ready to go back to work. Dr. George explained the results of the X-ray to Miller, instructed Miller to continue using ice packs and taking Darvocet as needed, and authorized Miller to return to work on Monday, April 8, 2002, "if better."

- Just after 7:30 p.m. on the evening of April 5, 2002, Miller went to the emergency department at Crossroads because "the pain was still way too bad." While at Crossroads, Miller was given Flexeril and Toradol. This reduced Miller's assessment of her pain from 9 to 6 on a 10-point scale. Miller was discharged from Crossroads at 8:45 p.m. with instructions to: 1) follow up with Dr. George on Monday, April 8, 2002; 2) discontinue taking Darvocet; 3) continue taking Flexeril; and 4) take Ibuprofen for pain, or Percocet if the Ibuprofen did not relieve her pain.
- Miller did not follow up with Dr. George as directed. Instead Miller returned to work at Taco Bell on April 8, 2002, and was able to perform her duties satisfactorily. Miller confirmed that Dr. Buckles' office and Crossroads were the only providers Taco Bell had authorized to treat Miller for injuries from the fall. Miller continued working on a full-time basis at Taco Bell until May 13, 2002.
- Five weeks after Miller had gone back to work at Taco Bell, she sought medical treatment on her own from a chiropractor, Dr. Burle, rather than return to Dr. Buckles' office. Dr. Burle's records from May 13, 2002, indicate that Miller reported constant lower back pain and radiating pain shooting down both legs to the knees, as well as down her right arm to the thumb. Dr. Burle adjusted Miller's back, which according to Miller, provided no relief. Miller received an "off-work slip" from Dr. Burle that she provided to Taco Bell. Miller stopped working at Taco Bell on May 13, 2002.
- Later that day, Miller went to the Emergency Department at Crossroads complaining of pain in her right hip radiating down to the right knee. Miller's right hip was X-rayed on May 13, 2002. The X-ray revealed a normal right hip with no evidence of fracture or dislocation. Crossroads' Emergency Physician Record describes the context of this injury as "no apparent injury; 'chiropractor told her it was probably dislocated today.'" Hospital staff also noted "reportedly has hx of intermittent R hip dislocation over many years." Miller was discharged that same day with instructions to rest, apply moist heat to painful areas as needed for spasms or stiffness, take Naprosyn 2 times daily and Darvocet N-100 every 4-6 hours as needed for pain, and follow up with Dr. Imboden in one week if not better.
- Approximately six weeks later, on June 25, 2002, Miller returned to see Dr. Burle, complaining of low back pain, among other things. Dr. Burle's June 25, 2002, record indicates Miller was "re-injured" when "getting up from sitting, leg went out." Dr. Burle adjusted Miller's back and gave her another off-work slip, which Miller gave to Boshers.
- Miller went back to see Dr. Burle on July 1, 2002, complaining of low back pain. Again, Miller was directed to see Dr. Imboden, which she did for the first time on July 11, 2002.
- Dr. Imboden's records reflect that Miller complained of back pain and told him about her fall at Taco Bell. Dr. Imboden's impression on July 11, 2002, was that Miller suffered from lumbar-sacral contusion and pain secondary to the fall. He recommended a lumbosacral MRI, prescribed Zanaflex, and provided Miller with an off-work slip for the period of July 11, 2002, to July 31, 2002, authorizing Miller to return to work on August 1, 2002, with no restrictions.
- An MRI of Miller's lumbar spine was performed on July 18, 2002, at NYDIC Open MRI. The MRI findings and impression were as follows:

Findings: I do not identify an abnormal signal in the inferior portion of the spinal cord or the conus medullaris.

There are end plate changes at the opposing bony margins of the L5-S1 interspace. The signal is decreased on the T1 weighted images and increased on the T2 weighted images. This is due to vascularized fibrous tissue secondary to degenerative disc disease. I do not see evidence for a marrow replacing process.

There is a bright signal in the intervertebral discs from L1 to L5. There is decreased signal in the intervertebral disc at the L5-S1 level with a loss in height and this change is due to desiccation.

There is no extradural impression upon the thecal sac or alteration of the epidural fat planes in the lumbar

region. I do not see evidence for a protrusion or extrusion of disc content.

- Impression: 1. Modic Type I end plate changes at the L5-S1 level.  
2. Disc desiccation with a loss in height at the L5-S1 level.  
3. No evidence for a protrusion or extrusion of disc content in the lumbar region.

- Miller returned to Dr. Imboden on July 23, 2002. At that time, Dr. Imboden reviewed the MRI results with Miller, prescribed Ultracet, and recommended that Miller consult Dr. Vellinga, with Physicians' Pain Clinic.
- On August 13, 2002, Miller saw Dr. Vellinga for the first time. Miller completed a pain management questionnaire reporting the fall and describing her low back pain as sharp and constant, made better by lying down, ice and pain pills, and made worse by bending forward or backwards and working. Miller rated her pain on a 10-point scale as 3 at the least, 4 on August 13th when she completed the questionnaire, 8 most of the time, and 10 at its worst. Miller reported that she was able to drive and climb stairs but could not do housework, work at a job, or walk one block.
- Dr. Vellinga diagnosed Miller as having: 1) low back pain status post work injury; 2) degenerative disc disease; and 3) bilateral sacralgia secondary to sacroiliitis. Dr. Vellinga noted a marked lower limb length discrepancy and his belief that Miller would benefit from bilateral SI joint injections. He also indicated "[i]t is likely her pain is secondary to exacerbation of pre-existing degenerative disc disease." Dr. Vellinga performed bilateral sacroiliac joint injections on Miller on August 13, 2002, and referred Miller for physical therapy evaluation and treatment at Excel Sports ("Excel"). Dr. Vellinga also gave Miller an off-work slip for the period August 13, 2002, through August 19, 2002.
- Miller was evaluated by David L. Meers, PT, CSCS, on August 15, 2002, and received physical therapy treatment at Excel on the 15th and 22nd of August. Meers released Miller from physical therapy after just two visits.
- Miller returned to work full-time on August 25, 2002, without restrictions. She performed her job satisfactorily, although she did have "symptoms" in her low back and legs while she was working.
- On October 7, 2002, Miller returned to Dr. Vellinga reporting no significant pain relief from the SI joint injections. Dr. Vellinga again noted his belief that Miller was "likely suffering from exacerbation of a pre-existing condition mainly degenerative disk disease." Other than the evaluation and treatment performed on August 13, 2002, Dr. Vellinga's treatment of Miller consisted only of prescribing pain medications as follows:

Prescription Date	Medication Prescribed	Count	Refill	Generic
			Y/N	Y/N
8/15/02	Ultram	60	N	N
8/28/02	Norco 10/325	90	N	N
10/7/02	Kadian 20mg	30	N	N
11/26/02	Norco 10/325	60	N	Y
12/18/02	Kadian 50 mg	14	N	N
1/2/03	Kadian 50 mg	14	N	N

- Miller was a good employee who was promoted one time during her employment with Taco Bell. Except for excused time off work, Miller never missed more than the occasional day here or there for normal illnesses. Miller's employment with Taco Bell was terminated on October 29, 2002, for disciplinary reasons unrelated to the fall, her performance at work after the fall, or any absences from work in connection with or following the

fall.

- After her termination, Miller retained an attorney and on January 15, 2003, filed a claim for compensation. Taco Bell referred Miller to Dr. Sherwyn Wayne for an Independent Medical Evaluation on November 21, 2003. Dr. Wayne reported that Miller had “chronic lumbar pain syndrome which may emanate from chronic L5-S1 degenerative disc disease.” Dr. Wayne recommended a lumbar SPECT bone scan and possibly a lumbar provocative discogram. If the discogram revealed symptoms emanating from the L5-S1 level, Dr. Wayne recommended that Miller undergo a myelogram and post-myelogram CT scan in advance of surgical planning. Dr. Wayne concluded that: “[i]f everything falls into place with strong confirmatory evidence of symptomatology arising from the L5-S1 degenerated level, an anterior or posterior interbody fusion at L5-S1 would be indicated.”
- Dr. Wayne specifically noted in his evaluation that Miller “undoubtedly” “had chronic lumbar degeneration disc disease prior to her fall.” However, because Miller stated she was totally asymptomatic before the fall “[i]f it is confirmed that there is organic pathology as the basis for her complaints emanating from the L5-S1 level, it would then be probable that her fall served as a substantial aggravating factor for her current symptomatology.”
- In February 2004, Miller underwent the recommended diagnostic procedures and, subsequently, was seen by Dr. David Raskas, an orthopedic spine surgeon also affiliated with Orthopedic and Sports Medicine, Inc. Dr. Raskas diagnosed Miller as having discogenic pain and collapsed degenerative disease L5-S1. Dr. Raskas recommended an L5-S1 anterior fusion.
- On March 18, 2004, Dr. Raskas performed surgery on Miller, specifically, an L5-S1 complete discectomy with decompression, along with an anterior lumbar interbody fusion, insertion of a spacer and an anterior instrumentation. Pursuant to Dr. Raskas’ order, Miller underwent physical therapy with Beth Collins through The Work Center beginning July 15, 2004, and ending August 23, 2004. Miller also continued to follow up with Dr. Raskas through October 13, 2004. On that date, Dr. Raskas released Miller at maximum medical improvement with a 50-pound lifting restriction. Dr. Raskas reported in his records that based upon Miller’s post-operative CT scan,

[i]t looks like . . . there is some incorporation of the bone graft into the end plates at L5 and S1. There is no loosening about the hardware. There is no disc herniation. She has minor facet changes at L4-5 and L5-S1. I do not think those are significant. [Miller] rates her back pain at a level of 1-2 on an every-day basis where prior to surgery was a level 7 or 8. She is vastly improved over her preoperative condition.

With respect to future medical care, Dr. Raskas noted: “[Miller] will probably need some Skelaxin periodically for the management of cramping back symptoms that she has periodically.”

- Taco Bell was able to accommodate a 50-pound weight restriction had Miller returned to work at Taco Bell following her surgery and physical therapy in 2004.
- By letter dated December 10, 2004, Dr. Raskas opined that Miller has “a twenty-five percent (25%) permanent partial disability of her spine secondary to her lumbar fusion. Half of this is due to pre-existing degenerative disc disease and half due to her work injury.”
- Miller had good recovery following her surgery and physical therapy at The Work Center.
- Miller was employed on two separate occasions after the surgery. First, she went to work at a truck stop as a cashier in November of either 2005 or 2006. This position required Miller to stand at the register and collect money and give people cigarettes. She had no lifting duties at this job. Miller maintained her position at this job for about two weeks and quit because she claimed the pain was too great to keep working.
- Miller went to work in November of 2006 or 2007 for two and a half or three weeks at Jack-in-the-Box as a cashier. Miller reported that she stopped working at that job because she began to experience “excruciating” pain.
- Miller did not seek additional medical treatment from anyone or attempt to obtain additional medical treatment through Taco Bell following her failed employment attempts at Mr. Fuel and Jack-in-the-Box.
- At the time of the hearing Miller reported continuous pain in her lower back and also leg symptoms when she does too much. Miller reported that it hurts her to bend at the waist and that, while she can squat, it hurts her to get back up from a squat position. Miller testified that on some days she has difficulty lifting a case of soda.

Miller also testified that she has ongoing pain in her back when she sits or walks for long periods of time.

### **Prior Back Trauma and Pain**

- On June 11, 1999, a claim for compensation was filed with the Missouri Division of Workers' Compensation by an attorney on behalf of the injured employee, Suzanne M. Turner, naming KFC as the employer, the injury date as May 31, 1999, and containing the following injury description: "During the course and scope of employment, employee fell, injuring her back and person as a whole." ("the 1999 back claim.")
- Over the years, as well as during her testimony at the hearing, Miller denied ever having sustained any previous injuries to her back or ever having had any symptoms of pain or discomfort in her low back prior to April 1, 2002. Miller specifically denied having sustained any injuries while working at KFC in 1999. When presented with a copy of the 1999 back claim that was signed by Suzanne M. Turner, Miller admitted that her name was Suzanne M. Turner in 1999 and that she worked for KFC at the time of the fall and resulting back injury reported on the 1999 back claim. Miller also admitted at the hearing that the 1999 back claim contained her social security number and accurately listed the address she lived at in June 1999 when the claim was filed with the Division. Nevertheless, Miller denied signing the claim or knowing the attorney who had filed the claim on her behalf, stating initially that she did not believe the first name looked like her signature and that she didn't think it was her signature because the "a" and "z" "kinda look different" as compared to her signature on the date of the hearing. Upon further questioning, Miller testified emphatically that she had nothing to do with the 1999 back claim. Miller's testimony regarding the 1999 back claim was not credible and I find that Miller did sign the claim under her previous name, reporting a previous fall and injury to her back that went otherwise undisclosed to all treating providers referenced in this case.
- Miller voiced general complaints of back pain to Boshers shortly after she began working for Taco Bell and prior to the fall. Boshers remembers this because she also has back problems. Boshers testified that in response to Miller's general complaints, Boshers told Miller she should probably see a doctor and provide Taco Bell with documentation of her back problem. Boshers never followed up with Miller regarding this suggestion.

### **Expert Evidence**

- On January 31, 2008, Dr. Thomas F. Musich conducted an independent medical evaluation on Miller. Dr. Musich's deposition was taken on March 27, 2008. Dr. Musich has been licensed to practice medicine in Missouri since 1977 and has been Board certified in the area of family practice since 1979. At his deposition, Dr. Musich testified that his specialties were in the areas of primary care medicine and industrial medicine.
- Based on his examination of Miller on January 31, 2008, his review of medical records, and the medical history relayed to him by Miller, Dr. Musich concluded that Miller suffered acute trauma adversely affecting her low back as a result of her fall on April 1, 2002, during the course and scope of her employment with Taco Bell. Dr. Musich opined that the trauma from the fall was a substantial factor in Miller's development of acute low back pain and discongenic pain which eventually required surgical intervention. Dr. Musich further opined that because Miller continues to note chronic, constant low back pain, Miller would benefit from "occasional" pain management.
- Dr. Musich opined to a 50-percent (50%) permanent partial disability of the body as a whole referable to her lumbosacral spine. As for restrictions, Dr. Musich stated Miller should refrain from activities that require: repetitive lifting over 30 pounds; prolonged sitting, standing, or walking for any length of time over 90 minutes; or repetitive squatting, kneeling, or climbing, which he clarified in his deposition to mean more than 3 to 8 times during any given 30-minute period. Dr. Musich indicated his belief that Miller would benefit from vocational rehabilitation to determine any job duties allowable within her recommended restrictions.
- Dr. Samuel Bernstein, Miller's vocational expert, conducted a vocational and psychological evaluation of Miller in May 2005. In his report, Dr. Bernstein concluded that, based upon his examination, testing, and study of Miller's records, Miller at the age of 37 was unemployable in the open competitive labor market given her combination of impairments and unskilled background.
- During his deposition, Dr. Bernstein testified that Miller's impairments were her back, her depression and, to a lesser degree, her prior history of lower extremity problems, with the main impairment being Miller's back and

- “how that affects her in terms of any exertional activities on a sustained basis.” Dr. Bernstein’s opinion regarding the degree of Miller’s back impairment was based entirely upon what Miller told him and his review of the medical records that were provided to him in connection with his evaluation.
- With regard to Miller’s depression impairment, Dr. Bernstein references various medical providers in his report, including Dr. Raymond Cohen who, according to Dr. Bernstein, had previously diagnosed Miller as having Major Depression. Dr. Cohen’s records were not offered as evidence in this case.
  - Included in his report under “Psychological Factors and General Observations,” Dr. Bernstein notes that Miller used crystal meth about seven years ago, as well as marijuana. Miller told him she quit using meth but continues to smoke marijuana everyday for pain relief and relaxation. During his deposition, Dr. Bernstein confirmed his understanding that Miller’s marijuana use predated her 2002 back injury and admitted he was not an expert regarding the long term impacts of marijuana use.
  - Physical therapist Beth Collins testified by deposition about Miller’s physical therapy sessions following her back surgery in 2004. Beginning on July 15, 2004, Miller received physical therapy three times per week for six weeks by order of Dr. Raskas. After her initial evaluation, Miller’s therapy sessions focused on pain relief modalities and a series of exercises for stretching, strengthening, and overall conditioning. Miller reported her pain levels, both when she started and when she finished her therapy sessions, to be 1 to 2 a majority of the time on a 10-point scale. Although she did not achieve her goal of decreasing her subjective pain level to 0/10, Collins testified that Miller made excellent progress in therapy, increasing both her strength and flexibility and increasing her ability to bend such that she was functioning at 65% of normal in bending forward, 99% of normal when bending backward, and 123% and 101% of normal when bending to the left and then the right, respectively. Collins testified, and noted in her final report, that on her last visit Miller expressed feeling ready to return to her pre-injury work levels even though her pain levels increased with a lot of activity and with inclement weather.
  - Miller’s orthopedic spine surgeon, Dr. David Raskas, was deposed on June 3, 2008. He testified that he recommended Miller stay off work as of February 25, 2004, prior to her surgery in March. He testified that Miller was released from the hospital two days following her surgery. Four months after the surgery Miller was “doing very well clinically” and Dr. Raskas released her to light duty and referred her for physical therapy. When Dr. Raskas saw Miller on August 25, 2004, Miller was “doing excellently” and “had no complaints.”
  - Thereafter, Dr. Raskas ordered and reviewed the results of a post-surgical CAT scan, confirming that Miller had a solid fusion. Seven months after her surgery, on October 13, 2004, Dr. Raskas discharged Miller at maximum medical improvement with a 50-pound lifting restriction. Dr. Raskas put no bending or other restrictions on Miller because Miller had done so well in therapy. While acknowledging that the post-surgical CAT scan revealed some minor facet changes at L4-5 and L5-S1, Dr. Raskas concluded that those changes were not significant and that Miller was “vastly improved over her preoperative condition.” During that October 13, 2004, office visit, Miller rated her back pain as “1-2 on an every day basis where prior to surgery [it] was a level 7 or 8.” Dr. Raskas noted that “[Miller] will probably need some Skelaxin periodically for the management of cramping back symptoms that she has periodically.” When asked at his deposition by Miller’s attorney whether she might need additional medical treatment for her low back in the future if she lives her life expectancy, Dr. Raskas testified he believed the risk of such a need is less than half and that the type of any future treatment is unknown.
  - On December 4, 2004, Dr. Raskas opined that Miller had a “twenty-five percent (25%) permanent partial disability of her spine secondary to her lumbar fusion. Half of this is due to pre-existing degenerative disc disease and half due to her work injury.”
  - On July 20, 2005, orthopedic surgeon Dr. R. Peter Mirkin conducted a medical evaluation on Miller. Dr. Mirkin obtained Miller’s history from her and reviewed various records relating to Miller’s medical treatment since the fall. Dr. Mirkin also obtained an X-ray of Miller’s lumbar spine, revealing a solid fusion at L5-S1, and conducted a physical examination of Miller before rendering his report. Dr. Mirkin opined that Miller had a permanent partial disability of 20%, with 10% due to pre-existing degenerative disc disease and 10% due to the fact that Miller underwent a lumbar fusion procedure. In his written report and at his deposition, Dr. Mirkin expressed surprise that others had concluded that Miller was unable to work. He did not believe Miller was totally disabled and could see “no physical reason why a 37-year-old woman with a one level lumbar fusion, which has been quite successful, could not return to the work force.” Miller’s attorney cross-examined Dr. Mirkin on this point at his deposition and Dr. Mirkin added that for eight years preceding his deposition he had

performed between 100 and 120 lumbar fusions each year and “[could not] think of a single person with a one-level fusion done who is in this age group who has not returned to the work force.”

### **Past Medical Expenses**

- Miller testified that she has incurred the following expenses:

<b>Date</b>	<b>Service Provided</b>	<b>Payee</b>	<b>Amount</b>
4-3-02	Prescription	?	\$ 10.09
7-11-02	Office visit	Dr. Imboden	\$ 40.00
7-11-02	Prescription-Zanaflex	?	\$ 37.17
7-18-02	M.R.I.	NYDIC Open MRI	\$ 575.00
7-23-02	Office visit	Dr. Imboden	\$ 40.00
7-23-02	Prescription-Zanaflex	?	\$ 37.17
7-23-02	Prescription-Ultracet	?	\$ 22.69
8-15-02	Physical Therapy	Excel	\$ 20.00
8-15-02	Prescription-Tramadol	?	\$ 35.49
8-22-02	Physical Therapy	Excel	\$ 20.00
8-28-02	Prescription-Hydrocodone	?	\$ 52.19
9-5-02	Low-dose morphine	?	\$ 88.19
9-17-02	Treatment	Dr. Vellinga	\$ 803.00
10-7-02	Treatment	Dr. Vellinga	\$ 70.00
10-7-02	Prescription	Wal-Mart	\$ 76.55
12-18-02	Office visit	Dr. Vellinga	\$ 70.00
			Total\$1,997.54

- No invoices or receipts were offered to substantiate these charges.
- Between April 8, 2002, and the time Miller filed a claim for compensation in this case, Miller did not ask Boshers or any other representative of Taco Bell for authorization to see Drs. Burle, Imboden, Vellinga or any other health care provider, nor did she seek reimbursement for any medical costs she incurred as a result of injuries from the fall.

### **CONCLUSIONS OF LAW**

#### **Credibility**

Miller repeatedly denied back trauma of any kind prior to the April 1, 2002, injury. Every opinion offered in this case relies, in part, on this material representation. Unfortunately, this factual claim is discredited by Miller’s incredible refusal to acknowledge her own signature on the 1999 back claim reporting low back trauma from a fall at KFC in May of 1999. Miller’s testimony regarding the 1999 back claim demonstrates, at best, her inability to recall important events in relation to her low back or, at worst, a conscious attempt to withhold material information regarding pre-existing back trauma. In either case, all representations made by Miller to her medical providers and at hearing are suspect. The medical opinions that support Miller’s position are premised on Miller’s truthfulness and the accuracy of all facts presented by Miller. If Miller’s representations to these providers were not complete, accurate and truthful, then the medical opinions that are based on that information are flawed.

In an attempt to bolster her credibility, Miller argues that her denial of a prior low back injury should be believed because the 1999 back claim was dismissed within one year of filing and there is no evidence that Miller received medical treatment or compensation as a result of the injury described in the claim. Had Miller admitted

the 1999 fall, these additional facts regarding the claim might have warranted giving little weight to the prior event. Such is not the case. I have found that Miller sustained and filed a claim relating to low back trauma in 1999 prior to the fall in this case. This finding is supported by the 1999 back claim, Boshers's testimony of Miller's general back complaints when Miller first began working at Taco Bell, and the presence of pre-existing degenerative disc disease noted by Drs. Raskas and Mirkin.

### **Temporary Total Disability Benefits**

When an employee is injured in an accident arising out of and in the course of her employment and is unable to work as a result of her injury, § 287.170 sets forth the temporary total disability ("TTD") benefits an employer must provide to the injured employee. Taco Bell paid Miller TTD benefits for April 7, 2002, and for the period of February 12, 2004, through August 25, 2004. Miller asserts that Taco Bell is also liable for TTD for the periods of April 5 and 6, 2002; May 13, 2002, to August 25, 2002; and October 29, 2002, to February 12, 2004.

#### **April 5 and 6, 2002**

It is undisputed that Miller worked on Monday, April 1; reported to work but did not work on April 2; received off-work slips from Dr. Buckles' office covering the period of April 1 through April 7; and was authorized to and did return to work without restrictions on Monday, April 8, 2002, the seventh day following the fall.

Section 287.160.1 provides that unless a disability lasts longer than fourteen days, an injured worker is not entitled to receive benefit payments for the first three days of the injury. Miller's initial period of temporary total disability encompasses April 2, 2002 (the first day following the fall) through April 7, 2002 (the day before Miller's return to work). As Miller's initial period of disability did not exceed fourteen days, Miller is not entitled to TTD during the three-day waiting period (April 2-4). She is entitled to TTD benefits for the 5th, 6th and 7th of April. She previously received payment for April 7, 2002. Miller is entitled to additional TTD in the amount of \$311.82.

#### **May 13, 2002 to August 25, 2002**

The statutes do not define TTD, but § 287.020.7 defines "total disability" as the "inability to return to any employment and not merely . . . the employment in which the employee was engaged at the time of the accident." TTD benefits are payable only until an employee is able to return to any reasonable or normal employment. An employer is not obligated to pay TTD benefits simply because its employee remains under a doctor's care. Once an employee is able to return to the employee's previous work duties, such benefits are unwarranted. Miller bears the burden of proving her entitlement to TTD benefits by a reasonable probability. She has failed to do so regarding the disputed days between May 13th and August 25th of 2002.

The record contains no attendance records or any documentation regarding Miller's various absences from Taco Bell. Miller testified that she was off work from May 13, 2002, to August 25, 2002, due to back pain. The only off-work slips introduced during this period were one written by Dr. Imboden covering the period of July 11 through July 31, 2002, and one written by Dr. Vellinga for the period August 13 through August 19, 2002. In addition, Miller performed her duties at Taco Bell satisfactorily on a full-time basis for five weeks immediately prior to and nine weeks immediately following this disputed period of time. Miller has failed to carry her burden of proving she was unable to work because of the fall

during the period of May 13, 2002, to August 25, 2002.

### **October 29, 2002 to February 12, 2004**

Miller worked full-time in a satisfactory manner from August 25, 2002, until she was terminated for cause, unrelated in any way to the fall, on October 29, 2002. Miller argues she should receive TTD benefits for this extended period because up until her termination she had been working with a condition which ultimately required a spinal fusion. Since there is no evidence to suggest Miller's medical condition changed after she was terminated but before

Dr. Raskas recommended and then performed surgery, Miller asserts this entitles her to TTD benefits for the entire period of time prior to her surgery. This, however, is not the law. TTD benefits were not warranted once Miller was able to return to work. That Miller eventually underwent surgery for a condition she endured while satisfactorily performing her duties does not establish her right to TTD benefits following her termination for cause. Miller did receive TTD benefits covering the time she prepared for, underwent, and recovered from surgery. No additional TTD benefits are owed to Miller.

### **Permanent Disability**

Miller claims that she is permanently and totally disabled as a result of the fall on April 1, 2002. To support her claim she offers the expert opinions and deposition testimony of Dr. Musich, a family practice specialist who saw Miller on only one occasion, and Dr. Bernstein, who admittedly relied heavily on Miller's representations. Taco Bell argues that Miller suffers from permanent partial disability due to the fall and offers the opinions of Drs. Mirkin and Raskas, both spine surgeon specialists and both of whom concluded that Miller had significant degenerative disc disease of the lumbar spine prior to the fall.

According to § 287.190.6 "permanent partial disability" means a disability that is permanent in nature and partial in degree . . ." Section 287.020.7 defines "total disability" as "inability to return to any employment and not merely ... inability to return to the employment in which the employee was engaged at the time of the accident." The test for permanent total disability is claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ Miller in her present physical condition. Additionally, an employer is liable for permanent total disability compensation under § 287.200 only where there is evidence in the record that the primary accident alone caused employee to be permanently and totally disabled.

The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. Proof is made only by competent substantial evidence and may not rest on surmise or speculation. Expert testimony may be required when there are complicated medical issues. However, the determination of the degree of disability sustained by an injured employee is not strictly a medical question. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors which are both medical and nonmedical. Accordingly, the courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such

testimony. The fact-finding body may reject the uncontradicted opinion of a vocational expert.

Based on the evidence, including the medical treatment records, the expert opinions from the doctors and vocational expert, as well as based on my personal observations of Miller at hearing and her credibility as a witness, I find that Miller is not permanently and totally disabled as a result of the fall. Only Dr. Musich opined that Miller did not suffer from any pre-existing disability referable to her low back before April 1, 2002. However, Miller failed to share with him that she had fallen and injured her low back in 1999 while working at KFC. She also failed to tell him about the back symptoms she experienced and reported to Boshers prior to the fall.

Despite Dr. Bernstein's opinion, Miller has failed to prove by competent and substantial evidence that she is unable to return to any employment. Dr. Bernstein's opinion relies almost entirely on Miller's credibility, which is found lacking. In addition, Dr. Bernstein's opinion is based on conclusions and treatments of other providers that were not offered in evidence.

Miller admitted that she was able to, and did, perform the duties of shift manager on a full-time basis after the fall from April 8, 2002, until May 13, 2002, and then again from August 25, 2002, until her termination for cause on October 29, 2002. Boshers testified that, except for the incident that lead to her termination, Miller was a good employee and her performance was at all times satisfactory. Miller also admitted that her symptoms improved to some extent as a result of the surgery in 2004. This is confirmed by numerous notations in Miller's medical treatment physical therapy records. Finally, her treating surgeon, Dr. Raskas, and Dr. Mirkin, another specialist in lumbar surgery, both opined that Miller is not permanently disabled. I find the opinions of Drs. Raskas and Mirkin more persuasive than those of Dr. Musich and Dr. Bernstein for the reasons stated herein.

Miller has, however, sustained permanent partial disability as a result of the fall. Dr. Raskas imposed a permanent lifting restriction of 50 pounds. He also rated Miller's permanent partial disability as 25% with half due to the April 1, 2002, injury and subsequent lumbar fusion. Dr. Raskas' opinion that Miller's disability is attributable equally to the fall and degenerative disc disease that existed prior to the fall is supported by the July 18, 2002, MRI of Miller's lumbar spine and the assessments of causation noted in the medical records by Drs. Vellinga and Wayne. Taking into account all of the evidence, I find that Miller sustained 12.5% permanent partial disability of the body as a whole referable to the low back as a result of the April 1, 2002, work-related accident. Miller is entitled to recover permanent partial disability benefits from Taco Bell in the amount of \$7,795.50.

### **Past Medical Expenses**

Miller seeks reimbursement in the amount of \$1,997.54 for medical treatment and prescription medication that she sought on her own to relieve her symptoms and to cure her from the effects of her injury. The statutory duty of the employer is to provide such medical, surgical, chiropractic, and hospital treatment as may be reasonably required after a work-related injury. "If the employee desires, he shall have the right to select his physician, surgeon, or other such requirement at his own expense."

The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment.

The method of proving medical bills was set forth in ***Martin v. Mid-America Farmland, Inc.***, where the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were due to her fall and that the bills she received were the result of those visits.

We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation.

In this case, Miller made no written demand on Taco Bell to furnish any medical care other than what was provided by Crossroads and Dr. George. There is no credible evidence to support a finding that Taco Bell was on notice that Miller needed additional medical treatment in connection with the fall before Miller filed the claim for compensation on January 15, 2003. After the claim was filed, Taco Bell did provide additional medical treatment in the amount of \$73,331.56. While medical records in this case show that Miller received treatment from Drs. Burle, Imboden and Vellinga, and that an MRI was conducted and Miller received prescriptions for various medications, there are no bills, invoices or receipts showing what was charged or paid for these services. Miller's entire claim for reimbursement in the amount of \$1,997.54, is supported by her testimony alone.

Miller was entitled to select her own health care providers at her own expense. However, she has failed to carry her burden of proving that she is entitled to be reimbursed for the cost of the services she obtained on her own. Miller's request for past medical expenses is denied.

### **Future Medical Expenses**

Miller seeks future medical treatment in the form of the prescription medication, Skelaxin. To support her request Miller offers the opinion of Dr. Raskas, who reported when he released her at maximum medical improvement that "[Miller] will probably need some Skelaxin periodically for the management of cramping back symptoms that she has periodically." Miller also references Dr. Musich's opinion that she would benefit from occasional pain management.

Future medical benefits may be awarded if an employee proves to a reasonable degree of probability that such benefits are necessary and directly result from a work-related injury. "Probable" means founded on reason and experience that inclines the mind to believe but leaves room for doubt. Dr. Raskas's opinion that Miller will probably need Skelaxin might be enough to satisfy the requirement that Miller prove future benefits in the form of medication are necessary. However, to carry her burden Miller must also show that her need for medication in the future "flows from the accident." Dr. Raskas did not opine that Miller's need for Skelaxin in the future was as a direct result of the fall. In fact, at his deposition, Dr. Raskas testified as follows:

- You note that she would probably need some Skelaxin, if I'm saying that right, periodically for the management of cramping back symptoms that she has; is that correct?
- Yes.
- Did you give her a prescription for that drug?

- I can't recall.
- Well, let me ask you if there's an indication in your file that you gave her a prescription for that drug?
- We probably did at some point, but I don't know if there's a copy of the prescription.
- I saw it somewhere, I think. I thought I saw a script somewhere in here. I did see it, but I can't find it now.

Doctor, is there a note in your file that indicates that she was given a prescription for Skelaxin?

- Yes.
- Okay. When would that drug be taken?
- Occasionally for back spasms. It's a very mild muscle relaxant.
- Back spasms would be related to the injury and surgery at L5-S1?

A. It could be related [sic] that. It could be related to some of the degenerative changes as L4-5 that she has. It could be related to unknown things.

\* \* \*

- Would you anticipate that she might need additional medical treatment in the future if she lives her life expectancy . . . [f]or her low back problems[?]

A. I think the risk is less than half.

Dr. Musich's testimony does not help tip the balance in favor of an award for future benefits because Dr. Musich does not explain what he means by pain management. Also, as previously discussed, Dr. Musich's opinion that Miller's disability is entirely due to the fall is flawed because Miller failed to tell him about her previous back trauma. Miller has failed to carry her burden with respect to future medical aid in the form of medication. Her request is denied.

Employee's attorney requests and is granted a lien in the amount of 25% of all benefits awarded.

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

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

June Striegel Doughty  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
 Jeffrey Buker  
*Director*  
*Division of Workers' Compensation*

Any exhibits containing markings, highlighting, etc., were submitted in that manner. This finding is based upon Miller's testimony at the hearing. However, Miller told Dr. Bernstein that she completed but did not pass 9th grade, leading to his conclusion that she had only an 8th grade education. Miller claims that Dr. George's specialty in April 2002 was OB/GYN. This claim finds no support in the record and Miller offered no explanation as to basis for this claim. No finding has been made regarding Dr. George's specialty as a physician.

Ex. A, at 4.

*Id.* at p. 6.

Miller testified that Dr. George discharged her from treatment on April 5, 2002. No evidence of discharge is reflected in Dr. George's medical records. In fact, Dr. George's final notation on April 5th states Miller "may return to work Monday if better" (emphasis added). This notation suggests that Dr. George did not know on April 5th whether Miller would be able to return to work but authorized her to do so if she felt up to it. The Form 9 completed by Dr. George on April 11, 2008, suggests that Dr. George was under the impression that Miller was able to resume regular work on April 8, 2002, an understandable assumption given that Miller did not seek follow up treatment with Dr. George or anyone else at Dr. Buckles' office in spite of the specific instruction from the Crossroads emergency physician to do so.

This finding is based on Miller's testimony. No off-work slips from Dr. Burle are in the record, nor do Dr. Burle's records reflect this fact. The record contains no evidence as to the period of time covered by Dr. Burle's off-work slips.

See fn. 7.

Ex. D, at 4.

Miller testified that Dr. Imboden imposed a 5-pound lifting restriction and that Dr. Vellinga imposed a restriction of no lifting and never removed that restriction. These assertions find no support in the record. Dr. Imboden authorized Miller to return to work on August 1, 2002, with no restrictions. Ex. D, at 8. Dr. Vellinga provided one off-work slip that stated only: To whom it may concern: Suzanne Miller is to stay off from work from 8-13-02 – 8-19-02. Please call if questions." Ex. E, at 14. No restrictions were imposed by either doctor.

Ex. E, at 18.

Boshers' testimony at hearing.

IME report of Dr. Sherwyn J. Wayne dated November 21, 2003, included in Employer's Exhibit 2 of Ex. 3, Deposition of Dr. David Raskas.

*Id.*

P.2 of Employer's Exhibit 2 of Ex. 3, Deposition of Dr. David Raskas.

*Id.*

P.1 of Employer's Exhibit 2 of Ex. 3, Deposition of Dr. David Raskas.

Miller testified that her back pain improved after the surgery "for a little bit" but that the difficulties she had bending, lifting, and standing were the same after the surgery as they were before the surgery. She later admitted that following her post-operative physical therapy, Miller told the therapist she was ready to return to work at Taco Bell and that with the surgery and physical therapy she did have good recovery.

Ex. 4.

During Dr. Bernstein's deposition, Mr. Margherio objected on the basis of hearsay to the last sentence of the section captioned "Background Information" in Dr. Bernstein's report dated May 19, 2005 contained as Exhibit B to his deposition. At the hearing, Mr. Margherio renewed his objection and the report was received subject to that objection. The objection is sustained.

Ex. G, at 12.

*Id.* at p.31.

Employer's Exhibit 2 of Ex. 3, Deposition of Dr. David Raskas.

Ex. 3, at 8.

Employer's Exhibit 2 of Ex. 3, Deposition of Dr. David Raskas; *see also*, Ex. 3, at 19-20.

The testimony of Miller and Boshers conflict on this point. This finding is based upon the credibility of these two live witnesses, as well by the lack of records or other evidence to corroborate Miller's claims.

*See e.g.*, Ex. B, p.9 (no previous symptoms involving musculoskeletal system); Ex. E, p.10 (denying pre-existing back pain to Dr. Vellinga); Ex. F, p.18, lines 8-19 (regarding Dr. Musich, Miller specifically and totally denied ever having low back complaints or suffering any low back pain or trauma before April, 2002); Dr. Mirkin report dated July 20, 2005, included as an exhibit to Ex. 1, Deposition of Dr. R. Peter Mirkin (denies any prior history of back problems); Dr. Sherwyn J. Wayne report dated November 21, 2003, included as an exhibit to Ex. 3, Deposition of David S. Raskas ("denies any prior injury"); Therapy Baseline Evaluation dated July 15, 2004, included as an exhibit to Ex. 2, Deposition of Beth Collins ("Miller reports no previous injury to the low back before the injury of record which occurred in 2002").

Unless otherwise indicated, all statutory references are to the Revised Statutes of Missouri, 2000.

\$155.91 x 2 = \$311.82.

***Phelps v. Jeff Wolk Const. Co.***, 803 S.W.2d 641, 645 (Mo.App. E.D. 1991) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 229 (Mo. 2003).

***Boyles v. USA Rebar Placement, Inc.***, 26 S.W.3d 418, 424-25 (Mo.App. W.D. 2000) *overruled on other grounds by Hampton*, at 225.

***Thorsen v. Sachs Electric Co.***, 52 S.W.3d 611, 621 (Mo.App. W.D. 2001).

***Searcy v. McDonnell Douglas Aircraft Co.***, 894 S.W.2d 173, 178 (Mo.App. E.D. 1995) *overruled on other grounds by Hampton*, 121 S.W.3d at 228.

***Mathia v. Contract Freighters, Inc.***, 929 S.W.2d 271, 276 (Mo. App. 1996).

*Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund*, 138 S.W.3d 714, 717 (Mo. Banc 2004).

*Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo.App. K.C. 1973).

*Id.* at 704.

*Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. W.D.1989) *overruled on other grounds by Hampton*, 121 S.W.3d at 230; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo. App. E.D. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo. App. E.D. 1983) *overruled on other grounds by Hampton*, 121 S.W.3d at 231.

*Fogelson v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo. App. 1975).

*Searcy*, 894 S.W.2d at 177-78.

We cannot know whether knowledge of an earlier fall at KFC would have impacted Dr. Musich's opinion that Miller did not suffer from any pre-existing disability referable to her low back before April 1, 2002. It is clear that Miller's withholding of this fact, whether by oversight or intent, discredits not only Miller's testimony but the strength of Dr. Musich's opinion on her behalf. This is true even if Miller did not receive medical treatment or compensation following the filing of the 1999 back claim.

For example, Dr. Bernstein's report references and seems to rely on medical treatment provided by

Drs. Cohen and Guerrino. It is unclear whether Dr. Bernstein obtained information regarding the treatments and opinions of these doctors from reviewing medical records that were not introduced as evidence or whether

Dr. Bernstein obtained the information he reported and relied on from Miller herself. In any case, his opinion that "[c]onsistent with the findings of Dr. Cohen, [Miller] is suffering from Major Depression" is not supported by the record and is certainly not attributable on this record to her low back pain.

$(400 \times 12.5\%) \times \$155.91 = \$7,795.50.$

§ 287.140.1

*Id.*

*Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo.App. E.D. 1995).

769 S.W.2d 105 (Mo. Banc 1989).

*Id.* at 111-12.

Dr. Imboden's records for the 7-11-02 and 7-23-02 office visits contain handwritten notations of "40.00" which may mean that is what was charged for Miller's office visit. However, they also contain other hand-written notations reflecting "40.00 – 3864" on one and "40.00 – 3879" on the other suggesting Miller may have paid or been charged something less than \$40.00. No finding regarding the cost of or payments made for these visits can be made on this record.

Ex. 3, Deposition of Dr. Raskas, p.2 of Employer's Exhibit 2.

*Rana v. Landstar TLC*, 46 S.W.3d 614, 622 (Mo.App. W.D. 2001) *overruled on other grounds by Hampton*, 121 S.W.3d at 225; *Landers v Chrysler Corporation*, 963 S.W. 2d 275, (Mo.App. E.D.1997) *overruled on other grounds by Hampton*, 121 S.W.3d at 226.

*Rana* at 622.

*Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692,695 (Mo.App. E.D. 1992) *overruled on other grounds by Hampton*, 121 S.W.3d at 229.

Ex. 3, at 18-20.