

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

Injury No.: 08-017535

Employee: Sonya Nebbit

Employer: City of St. Louis

Insurer: Self-Insured

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 14, 2010. The award and decision of Administrative Law Judge John Howard Percy, issued January 14, 2010, 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 5th day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Sonya Nebbitt	Injury No. 08-017535
Dependents:	N/A	Before the
Employer:	City of St. Louis	Division of Workers'
Additional Party:	None	Compensation
Insurer:	Self-insured	Department of Labor and Industrial
Hearing Date:	October 13, 2009	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JHP

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: February 6, 2008
5. State location where accident occurred or occupational disease was contracted St. Louis City
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? Self-insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was struck in the head and face by a prisoner.
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: neck and face
14. Nature and extent of any permanent disability: 5% permanent partial disability of the body referable to the cervical spine
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$2,484.83

Employee: Sonya Nebbitt

Injury No. 08-017535

- 17. Value necessary medical aid not furnished by employer/insurer? None claimed
- 18. Employee's average weekly wages: \$619.00
- 19. Weekly compensation rate: \$412.67 TTD/ \$389.04 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

20 weeks of permanent partial disability from Employer	\$7,780.80
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22. Second Injury Fund liability: N/A

TOTAL:	\$7,780.80
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23. Future requirements awarded: None

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

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

Mark Cordes

FINDINGS OF FACT and RULINGS OF LAW:

Claimant:	Sonya Nebbitt	Injury No. 08-017535
Dependents:	N/A	Before the
Employer:	City of St. Louis	Division of Workers' Compensation
Additional Party:	None	Department of Labor and Industrial Relations of Missouri
Insurer:	Self-insured	Jefferson City, Missouri Checked by: JHP

A hearing in this proceeding was held on October 13, 2009. Both parties submitted proposed awards on November 10, 2009.

STIPULATIONS

The parties stipulated that on or about February 6, 2008:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was self-insured;
3. the employee's average weekly wage was \$619.00;
4. the rate of compensation for temporary total disability was \$412.67 and the rate of compensation for permanent partial disability was \$389.04; and
5. the employee sustained an injury as a result of an accident arising out of and in the course of employee's employment occurring in St. Louis City, Missouri.

The parties further stipulated that:

1. the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law;
2. no compensation has been paid; and
3. employer has paid \$2,484.83 in medical expenses.

ISSUES

The sole issue to be resolved in this proceeding is the nature and extent of any permanent disability, if any, sustained as a result of the work-related injury of February 6, 2008.

PERMANENT DISABILITY

The appellate courts have long held that the employee must prove the nature and extent of any disability by a reasonable degree of certainty.¹ Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970).

Section 287.020.3(1) Mo. Rev. Stat. (2005 Supp.), which was added in 2005, provides in pertinent part that “[a]n injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability.” “Prevailing factor” is defined as “the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.”

Section 287.190.6(2) Mo. Rev. Stat. (2005 Supp.), which was added in 2005, provides that “[p]ermanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.”

The appellate courts have long held that the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174 (Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. 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). The provisions of Section 287.190.6(2) have probably modified the unfettered discretion previously given to the fact finder in accepting or rejecting expert opinions to the extent that the fact finder must now accept those opinions which are based on objective findings and reject inconsistent opinions based on subjective findings.

However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence of the nature, cause, and extent of disability. Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo. App. 1995). This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corp., 526 S.W.2d 886, 892 (Mo. App. 1975). The trier of facts may even base its findings solely on the testimony of the

¹ It is unclear whether this standard has been changed by the adoption of Section 287.808 Mo. Rev. Stat. (2005 Supp.) which modified the burden of proof for factual propositions to “more likely to be true than not true.”

employee. Fogelson at 892. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony is given. Hutchinson v. Tri-State Motor Transit Co., *supra* at 161-2; Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993); Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267, 269 (Mo. App. 1993). The provisions of Section 287.190.6(2) have probably modified the unfettered discretion previously given to the fact finder in accepting or rejecting lay opinions to the extent that the fact finder must now reject lay opinions which conflict with medical opinions based on objective findings.

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 appellate 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. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 505 (Mo. App. 1989); Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, 238 (Mo. App. 1986); Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo. App. 1983); Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980); McAdams v. Seven-Up Bottling Works, 429 S.W.2d 284, 289 (Mo. App. 1968). 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. Fogelson v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The finding of disability may exceed the percentage testified to by the medical experts. Quinlan v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. Gilley v. Raskas Dairy, 903 S.W.2d 656, 658 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

Findings of Fact

Based on my observations of Claimant's demeanor during her testimony, I find that she is a credible witness and that her testimony is generally credible. Based on the credible testimony of Claimant and on the medical records, I make the following findings of fact.

Description of Accident

On February 6, 2008, Sonya Nebbitt, Claimant herein, was employed by the City of St. Louis Department of Corrections as a correctional officer. She was responsible for supervising inmates. On February 6, 2008, while moving an inmate on suicide watch, Ms. Nebbitt was struck in the head and face by the inmate with her handcuffs. The inmate was subsequently subdued. The accident was witnessed by Employee's lieutenant and another officer. Employee did not lose consciousness. She did have pain in her head.

Medical Treatment

Employee received treatment from St. Louis University Hospital on the day of the assault. At the time of the admission assessment, Employee told the registered nurse that she had been hit in the face and left arm by an inmate. Employee stated that she had no loss of consciousness. A CT scan of the brain was performed. The radiologist indicated that it revealed no acute intracranial process. Employee was diagnosed with a left arm strain, face contusions and myalgia, given an injection of Toradol, discharged, and told to follow-up with a workers' compensation doctor the following day. (Claimant's Exhibit A)

On February 7 Dr. Ashokkumar B. Patel of Concentra examined Claimant. She complained of pain in the left face region and in the back of the neck. She also complained of occasional light-headedness. On physical examination, there was soft tissue swelling of the left cheek. Range of motion of the cervical spine was slow and full with pain on full flexion. Dr. Patel diagnosed Employee with a contusion of the left face/head and a cervical strain. He released Employee to return to work modified duty with no climbing and only ground level/sedentary work and prescribed physical therapy. Ms. Nebbitt returned to Concentra on February 8. Dr. Rudolph E. Catanzaro examined Employee. She had not noted any improvement from the medication. On physical examination, she had full range of motion of the cervical spine, but with pain at the terminal ranges of motion. She was advised to continue with the medication and the therapy. She was given with the same work restrictions. (Employer's Exhibit 1)

Employee also received treatment at Forest Park Hospital on February 9, 2008. Employee complained of pain in the face and temple. The physician prescribed methocarbamol, a muscle relaxant, and Ibuprofen. She was diagnosed with a facial injury and discharged. (Claimant's Exhibit B)

Employee went to physical therapy on February 14. She also returned to Dr. Patel on February 14 and complained of headaches and pain in the left face and trapezius area. On examination there was no cervical spine tenderness or swelling, but there was tenderness in the right trapezius muscle and much guarding. Range of motion of the neck was slow and full with pain at the terminal ranges of motion. All reflexes were normal. Employee was diagnosed with a face/scalp contusion, a concussion with no loss of consciousness and a trapezius strain. She was referred to a neurologist. (Employer's Exhibit 1)

Dr. David Peeples, a neurologist, examined Ms. Nebbitt on March 7, 2008. Employee described the February 8 incident. She reported that her initial symptoms included headache, swelling, and pain in the left side of her face and temple region. She also had neck and back discomfort, as well as pain and swelling in the left arm. Employee advised that the left side of her face had become very swollen. She reported developing memory problems that had progressively worsened. She had not returned to work despite being released to light duty. She also described two episodes of "body shaking." Employee's told Dr. Peeples about a car-jacking episode four months prior to this incident. She was struck in the left side of the face. She had facial swelling, headache and sensitivity in the left side of her face. These complaints had resolved as of the time of the February injury. (Claimant's Exhibit C)

On physical examination, there was no facial swelling. Range of motion of the cervical spine was normal. Neurologic exam revealed her to have a dysphoric affect. She spoke softly and

tended to avoid eye contact. Facial sensation and strength were normal. She had a normal motor examination. Reflexes were normal. Sensation was normal. Dr. Peeples' impression was that Employee was afraid to return to the workplace. He did not believe her progressive memory problems were reasonably explainable on the basis of a concussion. He noted her neurologic examination was normal. He ordered an MRI of the brain. Employee was to return in three weeks. (Claimant's Exhibit C)

Ms. Nebbitt underwent an MRI of her brain on March 14, 2008. She then followed up with Dr. Peeples on March 18. Dr. Peeples noted the MRI was normal. Employee reported intermittent headaches, which was an improvement. On examination, mental status was normal. Dr. Peeples prescribed medication for employee's headaches. Employee was released to return to work regular duty. She was advised to return to see the doctor in three weeks. (Claimant's Exhibit C)

Employee returned to Dr. Peeples on March 24. She reported that, upon returning home from her prior appointment, her symptoms returned. She got very dizzy and her head started to hurt. She called requesting to be put back on restrictions. She admitted that she was scared to return to normal work activities. Examination on that date was normal. Dr. Peeples felt that Employee's fear of returning to work was her major problem, which could be addressed by a psychological evaluation.² Dr. Peeples did think it was appropriate to not let her have any physical interaction with inmates or chronic suspects. He did not feel he could help her anymore and released her from his care. (Claimant's Exhibit C)

Claimant's Testimony

Approximately four months before this accident, in late 2007, Ms. Nebbitt sustained another head injury during a carjacking. The assailant struck Employee's left temple with a gun. Her face was swollen as a result of this attack. She went to Forest Park Hospital on one occasion for evaluation and treatment. She missed no time from work as a result of this incident. She had dizziness on one occasion. Employee testified that her symptoms from the carjacking had resolved before February 6, 2008.

Ms. Nebbitt testified that she still has burning pain in her head, as well as "real bad" headaches, every day. In addition, Employee testified that she has memory problems all the time. On one occasion, she could not recall her mother's name. She also has difficulty remembering events or milestones. She reported that she is unable to sit and talk for long periods of time due to concentration problems. She also complained of dizziness. Ms. Nebbitt never returned to work for the City of St. Louis. She did try working a lighter duty job with Thomas Enterprises. This involved working with senior citizens. Employee was unable to perform this work.

Medical Opinions

² There was no record in evidence of any psychological evaluation.

Dr. Dwight Woiteshek evaluated Employee on June 27, 2008 at the request of her attorney. His medical report was admitted into evidence. Employee described the work-related incident. She complained of pain in the left face area and cervical spine, dizziness, headaches, and burning in her skull. Employee also complained of having problems with driving and bending. She described the prior left face injury from the carjacking in 2007. On physical examination, Dr. Woiteshek found no gross motor or sensory deficits. He noted decreased range of motion, tenderness, and muscle spasm in the cervical spine. Reflexes were symmetric. Employee had good strength in the upper extremities. On examination of the face, Employee had tenderness to deep palpation of the facial area on the left side. (Claimant's Exhibit D)

Based on his examination and review of the medical records, Dr. Woiteshek diagnosed Employee with a cervical strain and face, scalp and neck contusions. He opined that the accident of February 6, 2008 was the prevailing factor in causing these injuries. Dr. Woiteshek assigned 20% permanent partial disability of the body referable to the cervical strain and 5% permanent partial disability of the body due to the facial injuries. (Claimant's Exhibit D)

Dr. Anne-Marie Puricelli evaluated Employee on July 22, 2009 at the request of Employer. Her medical report was admitted into evidence. Ms. Nebbitt described the work-related incident. Employee told Dr. Puricelli that she had not returned to work at her former position. She had tried working in home health, but stated her memory was too bad for the work. She had also been going to school, but had to stop because she was doing poorly. At the time of this evaluation, Employee's primary complaints were low and mid-back pain. She complained of difficulties with short-term and long-term memory. She also complained of headaches, a burning sensation in her temporal area, and dizziness associated with the headaches. (Employer's Exhibit 1)

On physical examination, Employee was not in any acute distress. She was tearful at times, particularly when speaking about the recent death of her grandmother. Dr. Puricelli performed a mini-mental examination, which was normal. On physical examination Employee had full range of motion of the neck and back. She had good strength in her upper extremities and her sensory examination was normal. Dr. Puricelli diagnosed Employee with a resolved contusion to the left face, a resolved cervical strain, and clinical depression. Dr. Puricelli opined that Employee had reached maximum medical improvement and had not sustained any sustained permanent partial disability due to the work-related accident. Dr. Puricelli did not believe that Employee's complaints of memory loss, headaches and low back pain were related to her accident of February 6, 2008. (Employer's Exhibit 1)

Additional Findings

Based on all of the evidence, I find that Employee sustained a cervical strain and facial contusions as a result of the February 6, 2008 assault at work. As Dr. Puricelli's examination was more than 17 months after the injury, I find that her findings on physical examination more accurately represent Claimant's objective symptoms than the findings on Dr. Woiteshek's examination, which occurred only 5 months after the assault. The additional 12 months between examinations allowed additional time for Claimant's physical injuries to largely heal.

Based on all of the evidence, I find that Employee sustained 5% permanent partial disability of the body referable to the cervical spine due to the February 6, 2008 assault at work.

As Dr. Puricelli opined that Employee's complaints of headaches and memory loss were not caused by the February 6, 2008 assault and as Dr. Woiteshek did not address this issue, I find that Employee's complaints of headaches and memory loss were not caused by the February 6, 2008 assault.

ATTORNEY'S FEES

This award is subject to a lien in the amount of 25% of the additional payments hereunder in favor of the employee's attorney, Mark Cordes, for necessary legal services rendered to the employee.

Date: _____

Made by: _____

JOHN HOWARD PERCY
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

NAOMI PEARSON
Division of Workers' Compensation