

AWARD

Employee: Sheran Robinson

Injury No. 04-106888

Dependents: N/A

Employer: Hannibal Council on Alcohol & Drug Abuse

Insurer: Cincinnati Insurance Co.

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

Hearing Date: June 1, 2012

Checked by: LTW

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: October 8, 2004
5. State location where accident occurred or occupational disease was contracted: Howell County, Missouri (The parties agree to venue lying in Greene 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: While engaged in employment with the Employer, Employee opened the top drawer of a filing cabinet. In doing so, the filing cabinet fell on top of Employee causing the filing cabinet to strike Employee and to cause Employee to fall and strike a window air-heating unit. As a consequence of this work incident Employee sustained injuries to her neck, back and left upper extremity.
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, back, left upper extremity and BAW
14. Nature and extent of any permanent disability: Permanent Total Disability
15. Compensation paid to-date for temporary disability: \$14,869.39
16. Value necessary medical aid paid to date by employer/insurer? \$32,249.25

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$448.00
- 19. Weekly compensation rate: \$298.67 (TTD / PTD / PPD)
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses:	N/A
Weeks of temporary total disability (or temporary partial disability):	N/A
Weeks of permanent partial disability from Employer / Insurer:	N/A
Weeks of disfigurement from Employer / Insurer:	N/A

Permanent total disability benefits from Employer Hannibal Council on Alcohol & Drug Abuse / Insurer Cincinnati Insurance Co. in the amount of \$298.67 per week, beginning September 26, 2005, for Employee's lifetime.

- 22. Second Injury Fund liability: No

TOTAL: \$298.67 PER WEEK, FOR EMPLOYEE'S LIFETIME

- 23. Future requirements awarded:

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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Larry Pitts, Esq.

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Dependents: N/A

Employer: Hannibal Council on Alcohol & Drug Abuse

Insurer: Cincinnati Insurance Co.

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on June 1, 2012. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about June 19, 2012.

The employee appeared personally and through her attorney, Larry J. Pitts, Esq. The employer and insurer appeared through their attorney, Brandon Potter, Esq. The Second Injury Fund appeared through its attorney, Cara Harris, Assistant Attorney General.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about October 8, 2004, Hannibal Council on Alcohol & Drug Abuse was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Cincinnati Insurance Co.
- (2) On the injury date of October 8, 2004, Sheran Robinson was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about October 8, 2004, the employee, Sheran Robinson, sustained an accident, which arose out of and in the course of her employment with the employer, Hannibal Council on Alcohol & Drug Abuse.
- (4) The above-referenced employment and accident occurred in Howell County, Missouri. The parties agreed to venue lying in Springfield, MO, Greene County, Missouri. Venue is proper.
- (5) The employee notified the employer of her injury as required by Section 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.

- (7) At the time of the claimed accident of October 8, 2004, the employee's average weekly wage was \$448.00, which is sufficient to allow a compensation rate of \$298.67 for temporary total disability compensation / permanent total disability compensation, and permanent partial disability compensation.
- (8) Temporary disability benefits have been provided to the employee in the amount of \$14,869.39, representing approximately 50.42 weeks in disability benefits. (\$14,677.33 was payable as temporary total disability compensation and \$192.06 was payable as temporary partial disability compensation.)
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$32,249.25 in medical expenses.
- (10) The employee reached maximum medical improvement on or about September 26, 2005, relative to the work injury of October 8, 2004.

The sole issues to be resolved by hearing include:

- (1) Whether the employee sustained any permanent disability as a consequence of the accident of October 8, 2004; and, if so, what is the nature and extent of the disability?
- (2) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation, if any?

EVIDENCE PRESENTED

The employee testified at the hearing in support of her claim. In addition, the employee offered for admission the following exhibits:

- Exhibit A..... Report of Injury (Injury No. 04-106888)
- Exhibit B..... Claim for Compensation (Injury No. 04-106888)
- Exhibit C..... Medical Records (Volume I)
 - Tab 1 Medical Records from Cox Hospital South
 - Tab 2 Medical Records from Springfield Neurological & Spine Institute
 - Tab 3 Medical Records from West Plains Open MRI
 - Tab 4 Medical Records from Southern Missouri Community Health Center
 - Tab 5 Medical Records from Ozarks Medical Center
 - Tab 6 Medical Records from South Howell County Ambulance
 - Tab 7 Medical Records from J. Scott Swango, M.D.
 - Tab 8 Medical Records from Physical Therapy Specialists Clinic, Inc.
 - Tab 9 Medical Records from Ozark Medical Center
- Exhibit D..... Medical Records (Volume II)
 - Tab 1 Medical Records Ozarks Medical Center

- Tab 2 Medical Records from Jeffrey Silverman, M.D.
- Tab 3 Medical Records from Southern Missouri Community Health Center
- Tab 4 Medical Records from Jeffrey Dryden, D.O.
- Tab 5 Medical Records from Robert Shaw, M.D.
- Exhibit E Deposition of Sheran Robinson
- Exhibit F..... Deposition of Shane Bennoch, M.D.
(Inclusive of Deposition Exhibits)
- Exhibit G..... Deposition of Phillip Eldred, CRC
(Inclusive of Deposition Exhibits)

The exhibits were received and admitted into evidence. Exhibit G was received and admitted into evidence inclusive of the attached deposition exhibits identified as Employee A, Employee B and Employee D; Employer 1 and Employer 3; and Fund 2. The receipt of Exhibit G includes the attached deposition exhibit labeled Employee C; however this exhibit was not admitted as substantive evidence. Rather, it was received solely for the purpose of identifying the records that were reviewed by Mr. Eldred.)

The employer and insurer did not present any witnesses at the hearing of this case. However, the employer and insurer offered for admission the following exhibits:

- Exhibit 1 Deposition of Norbert Thomas Belz, M.D.
(Inclusive of Deposition Exhibits)
- Exhibit 2..... Deposition of James England, CRC,
(Inclusive of Deposition Exhibits)

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses or offer any additional exhibits at the hearing of this case.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

- Notice of Hearing
- Notice of Commencement / Termination of Compensation
- Answer of Second Injury Fund to Claim for Compensation
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

DISCUSSION

Background & Employment

The employee, Sheran Robinson, is 64 years of age, having been born on July 20, 1947. Ms. Robinson resides in Pomona, Missouri, which is about 8 miles north-west of West Plains, MO.

Ms. Robinson attended but did not graduate from West Plains High School; she left high school in the 12th grade due to pregnancy. She obtained a GED in 1974. She attended college, majoring in general studies, graduating with a 2 year Associate degree from MSU-West Plains Campus. She had one year of nursing school from MSU and also attended the South Central Career Center for EMT and Paramedic training. She passed her EMT test and was licensed, but failed a portion of the paramedic written test and did not receive licensure as a paramedic.

Ms. Robinson is currently divorced with no children under the age of 18. She is 5 feet 2 inches tall, right hand dominant, and weighed 197 pounds on the date of trial.

Her vocational history began as a stay at home mother and homemaker from 1965 to 1979. She had three natural children plus one adopted son.

Subsequently, following a divorce, from 1979 to 1989, she obtained employment with ShowBiz Pizza, working in Arkansas, Texas, and Georgia as an assistant manager and then general manager. (The move to different states related to promotions in her employment with ShowBiz Pizza.) The heaviest item lifted was a crate of produce that weighed up to 75 pounds. She described the job as being on her feet.

During cross-examination, Ms. Robinson testified that as general manager she was responsible for the hiring, firing, and disciplining of employees.

She returned to West Plains, MO in 1989 with her adopted son and took over the operation and general management of her father's business, Video II. She ran the store until 2001, when the store was forced out of business through the competitiveness of a chain store-Movie Gallery. She was responsible for any hiring, firing, and disciplining of part time employees, but this was primarily a family run business with other family members working with her.

The heaviest weight lifted by Ms. Robinson was 50 pounds, which included boxes of paper supplies. The typical weight was 5-7 pounds, which was a VCR and video being rented out to a customer. She performed customer service, cleaning the store, and some data entry into the computer. She described the job as being on her feet and sitting.

The store was open 7 days a week, 365 days per year, opening at 10:00 AM and closing at midnight. She testified to working up to 80 hour work weeks under otherwise normal circumstances.

In or around 2001, she obtained employment with the employer, South Central Mo. Rehab--later Hannibal Council on Alcohol & Drug Abuse, working initially as an EMT position—taking blood pressures, charting, HIV testing for the clients.

She then moved into a front office position as an assistant manager: checking files and paperwork, billed charts to the state, and preparing the files for state audits that were necessary for state payments. The heaviest weight lifted was 50 pounds—cases of office files and paperwork. On a typical day, she handled 5 to 10 pounds at a time with clients' files. Ms. Robinson described the work as being on her feet and sitting.

In this employment as well, Ms. Robinson indicated that before Hannibal Council bought out South Central Rehab, she regularly worked more than 40 hour work weeks, working 60 to 80 hours per week. These overtime hours were directed at getting the client files ready for state audit. Subsequent to Hannibal Council taking over the business, she was prohibited from engaging in such overtime employment.

Prior Medical Conditions

Prior to sustaining the work injury of October 8, 2004, Ms. Robinson suffered several medical conditions, which caused her to present with certain permanent disability. These prior medical conditions include:

- **Hysterectomy:** While in her twenties, and prior to moving out of state and beginning employment with ShowBiz Pizza, Ms. Robinson underwent a hysterectomy. Following recovery from the hysterectomy she experienced no difficulty or lingering problems. She specifically testified that she had no difficulty in any job as a result of her undergoing the hysterectomy, or the medical condition that gave rise to the surgery.
- **Morbid Obesity / Colon, Stomach Surgery / Gall Bladder Removal:** In the 1980s Ms. Robinson underwent a lap band procedure to help with her obesity as well as removal of her gall bladder. Following this surgery she lost 125 lbs. She testified that after her recovery time she had no ongoing problems or issues with these surgeries. She specifically testified that she had no difficulty working in any of her jobs following these surgeries, and as a result of these conditions.
- **Breast Cancer:** In 1994 Ms. Robinson was diagnosed with breast cancer and underwent a right radical mastectomy. Following her recovery from this surgery she experienced no ongoing problems as a result of the surgery or cancer. She specifically testified that she has had no difficulty in any of her jobs as a result of her undergoing this surgery or suffering from breast cancer.
- **Hypertension:** Prior to suffering the work injury of October 2004, Ms. Robinson suffered from, and was diagnosed with, hypertension. According to Ms. Robinson, following the diagnosis she began to receive treatment that included prescription medication, which has allowed her to manage and control this medical condition. She specifically testified that she has no difficulty or lingering problems as a result of her suffering from hypertension so long as she takes her medication. Also, she

specifically testified that she has experienced no difficulty in performing her job duties as a result of this medical condition. And she denied any side effects from the hypertension medication.

- **Bilateral Lower Extremity Peripheral Neuropathy:** Several years prior to the work injury of October 8, 2004, Ms. Robinson suffered from cramping and twitching in her legs; it would be worse at night. This condition was later diagnosed as bilateral lower extremity peripheral neuropathy. Notably, approximately one to two years prior to the work injury of October 8, 2004, Ms. Robinson received treatment for this condition, which included prescription medication in the nature of Neurontin.

In describing the nature of this medical condition, Ms. Robinson indicated that at times her legs ached, and would jerk or twitch, usually at night. Additionally, she describes feeling pins and needles in her legs. When she does not take her medication the pain is very bad; however, with the prescription medication she is able to tolerate the pain. Ms. Robinson specifically testified that this medical condition did not prevent her from working or performing the duties of her various employment positions.

In her trial testimony, both in direct and cross-examination by the Second Injury Fund attorney, and in her deposition, Exhibit E, page 45, Ms. Robinson denied that any of the above medical conditions caused lingering problems or continuing difficulties after recovery. She testified that before the injury of October 8, 2004, she was not having any problems in completing her job duties. She testified specifically that none of the above conditions interfered with her performing her last job at the rehab center.

Accident

On October 8, 2004, while engaged in employment and performing her work duties with Hannibal Council, Ms. Robinson opened a vertical four drawer filing cabinet. In doing so, the weight of the file cabinet became unbalanced and tipped over, knocking her into an air conditioner-heating wall unit that was about 3-4 feet from her on the opposite wall. Further, upon falling to the ground, the filing cabinet fell on top of Ms. Robinson.

Ms. Robinson described the filing cabinet in question as heavy—the weight of one of the drawers was too heavy for her to lift. All of the 4 drawers were full of client files. She described the filing cabinets as unstable and not anchored to the floor and wall. It took two males to remove the file cabinet and free Ms. Robinson from being pinned below the cabinet.

Upon being free from the file cabinet, Ms. Robinson got up and sat in a chair. She experienced immediate pain in her back and neck, and subsequent bruises on both upper extremities and chest. In light of her presenting complaints and the nature of the incident, South Howell County ambulance was called, and Ms. Robinson was transported to the emergency room of Ozarks Medical Center in West Plains, Missouri.

Medical Treatment

The South Howell County medical records incorrectly note that the ambulance was dispatched for a “person hit by filing cabinet” and patient was found by paramedics “sitting in a chair.” The paramedics concluded that the filing cabinet had not fallen on her, perhaps because it had been removed from her, and then replaced back in its former position by coworkers, but paramedics noted that she was “pushed into a unit (sic)”. She reported some back pain. Her chief complaint was “body aches” and she was then transported to the local hospital—OMC. Id.

Upon arriving in the emergency room for treatment, Ms. Robinson presented with complaints of pain to the back and neck, and she had tenderness around her cervical and lumbar spine. X-rays of the spine were all negative other than some degenerative changes in the lumbar spine. The diagnosis was back contusion. She was told to follow up with a local physician for coverage reasons.

The patient was seen four days later by Nurse Practitioner Sally Beltz. Ms. Robinson provided a history of the filing cabinet having fallen on top of her, and she presented with continuing complaints of neck and back pain. Additionally, she was unable to turn her head from side to side secondary to pain, and an unrelenting headache.

On exam, Nurse Practitioner Sally Beltz noted multiple contusions and areas of ecchymosis to Ms. Robinson’s left arm from just above the wrist to within 2 inches from the interior of the elbow. Also, Ms. Beltz noted that Ms. Robinson had contusions to the chest area. Ms. Robinson continued to present with limited range of motion in her neck secondary to discomfort, and she presented with reproducible back pain to palpation. Her back muscles were tense bilaterally down the spine to the SI.

Ms. Robinson continued to be seen by Nurse Practitioner Beltz through December 2004, and continued to be very tender to her neck and back areas.

An MRI was performed on the 11th and 12th of November 2004. The lumbar spine revealed mild foraminal narrowing at L4-L5 with some facet hypertrophy and a mild disk bulge at L5-SI with moderate facet arthropathy. There was also modest facet arthropathy at L1 and L3-L4.

In regard to the thoracic spine area, the MRI revealed a tiny disk bulge at T5-T6 and T8, but no cord compression or central stenosis. However, there was a loss of normal lordotic curvature of the cervical spine that was due to either positioning or muscle spasm.

Nurse Practitioner Beltz recorded that the patient remained hypersensitive on exam, and even light touches caused immediate withdrawal from pain. Her back muscles remained tight, and the patient had reproducible pain in the upper back starting at the T7-T9 and radiating upward, and pain was present all the way to the base of the neck.

On December 14, 2004, Nurse Practitioner Beltz noted that the employer was going to allow Ms. Robinson to return to work for 4 hours to try to slowly increase her capacity of functioning. However, in her deposition, and in her trial testimony, Ms. Robinson testified to an unsuccessful attempt to return to part-time work at Hannibal Council. She testified to shredding paper (old files) sitting in a chair. Further, according to Ms. Robinson, the repetitive nature of

the task, and hunching over in the chair to insert paper in the shredder produced significantly increased back, neck, and shoulder pain.

During the period of receiving treatment with Nurse Practitioner Beltz, Ms. Robinson received physical therapy and attended 15 physical therapy sessions. Her pain scale ratings ranged from a five to an eight. The Discharge Summary noted that the therapy goals were "unmet". It was noted that Ms. Robinson experienced a lot of trouble with the deep massage secondary to pain. Also, she presented with complaints of pain with new physical therapy exercises.

Sometime in early December 2004, the insurance carrier took formal charge of the medical treatment, resulting in Ms. Robinson receiving a referral to Dr. Lennard on December 7, 2004. On examination, all her movements reproduced pain; there were mild limitations in lumbar flexion and side to side movements. She was generally tender diffusely in the thoracic and upper lumbar spine. Dr. Lennard's impression was thoracic and lumbar pain.

Diagnostic studies in the nature of a bone scan was ordered and performed on December 9, 2004. She continued to complain of pain generally in the mid and lower back. She was prescribed pain medications, and physical therapy was again ordered. At that time, she was placed on a 10 pound lifting restriction with occasional bending.

Ms. Robinson continued to treat regularly with Dr. Lennard between December 30, 2004, and May 18, 2005. On April 25, 2005, Dr. Lennard noted that Ms. Robinson's symptoms were unchanged now for several months. Dr. Lennard's treatment included prescriptions for pool therapy to benefit Ms. Robinson's muscle spasms, and more physical therapy. Additionally, Dr. Lennard prescribed a TENS Unit for Ms. Robinson.

The physical therapy prescribed by Dr. Lennard included treatment with Physical Therapy Specialists Clinic. These services included EMS, cold packs to thoracic and lumbar areas, massage, soft tissue manipulation as tolerated, and pool therapy. Additionally, she was required to perform pushups – where she would lie flat on her belly and put her elbows and her forearms on the floor and then raise her body weight up on her elbows and forearms.

Ms. Robinson attended 49 physical therapy and/or related treatment sessions during the period of December 13, 2004, to April 22, 2005. Her pain scale rating ranged from an eight initially to 5.5 in later sessions. Near the end of the treatments on April 18, 2005, she reported a pain rating scale of 5.5. She reported that this pain level stays generally greater than "uncomfortable level."

In addition, while treating with Dr. Lennard, Ms. Robinson continued to see Nurse Practitioner Sally Beltz. Treatment with Nurse Practitioner Sally Beltz included treatment for a variety of complaints, including complaints of numbness in her 4th and 5th digits of her left hand. Ms. Robinson attributed these problems with her left hand to be the October 8, 2004, work injury. In treatment with Nurse Practitioner Sally Beltz, Ms. Robinson continued to present with complaints of pain involving her left arm, neck and upper and lower back pain.

In light of continuing and unresolved pain involving her left upper extremity, Dr. Lennard referred Ms. Robinson to Scott Swango, M.D, who is an orthopedic surgeon. Dr.

Swango saw Ms. Robinson on April 25, 2005. Based on his examination of Ms. Robinson, Dr. Swango diagnosed Ms. Robinson with left ulnar neuropathy of the elbow occupationally acquired.

Subsequent to the initial examination, Dr. Swango initiated a course of treatment. On June 27, 2005, Dr. Swango, on clinical examination, found her grip strength on the left was 25 as compared to 55 on the right and pinch strength testing was 8 pounds vs. 19 pounds on the right. Upon determining that Ms. Robinson was a surgical candidate, on July 26, 2005, Dr. Swango performed surgery involving an anterior ulnar nerve transposition of the left elbow. In later visits, both Ms. Robinson and Dr. Swango concluded that she was doing relatively well overall in regard to the surgery, but with continued tenderness along the medial aspect of the left elbow.

On August 29, 2005, Dr. Swango placed the following work restrictions: “may start using the left hand as a helping hand, no lifting or gripping over five pounds, no more than two hours of repetitive work with the left hand per day”. On Sept. 26, 2005, Dr. Swango noted that Ms. Robinson may return to full duty, but off work if modified duty, as outlined, was not available, and additional restriction of no overtime for 3 weeks.

On September 26, 2005, both Dr. Swango and Dr. Lennard saw Ms. Robinson for consideration of whether she had reached maximum medical improvement. Dr. Swango noted that the numbness and tingling of the left hand / elbow had improved substantially, but Ms. Robinson continued to complain of tenderness along the medial aspect of the left elbow. On exam, the scar was mildly tender, and she had a full range of motion and normal 2-point discrimination. Dr. Swango did not offer a permanent disability rating.

Dr. Lennard’s final impression was post left ulnar nerve transposition and thoracic lumbar strain. Dr. Lennard noted that Ms. Robinson had been through a long course of treatment. Dr. Lennard further noted that the initial MRI’s at West Plains [OMC] revealed bulging discs. In his final report of September 27, 2005, Dr. Lennard summarized the treatment as an extensive treatment regiment: physical therapy, TENS Unit, and multiple medications. Yet, Dr. Lennard noted that Ms. Robinson exhibited “little improvement” in her pain symptoms despite treatment efforts.” Dr. Lennard further noted that Ms. Robinson was on Soma, and would probably need that for an additional six months.

In assessing the nature and extent of the permanent disability referable to the October 8, 2004, work injury, Dr. Lennard opined that Ms. Robinson had sustained a permanent partial impairment of 10 percent to the left upper extremity referable to the left elbow; and Ms. Robinson sustained a permanent partial impairment of 5 percent to the body as a whole referable to the thoracic and lumbar strain. Additionally, Dr. Lennard released Ms. Robinson to return to work, modified duty if available, with a 30 pound lifting restriction, with encouragement to continue exercises for her lower back and upper extremities.

Post Work Injury Medical Condition (Heart, Sleep Apnea, and COPD)

On July 19, 2007, almost two years after Ms. Robinson reached MMI, she presented to Norbert Belz, M.D., for an independent medical examination at the request of the employer and insurer. In the course of providing this examination Dr. Belz noted that Ms. Robinson presented with “irregularities in the heart beat . . . and some concerning symptomatology.”

In light of this examination, Ms. Robinson returned to Ozarks Medical Center (“OMC”) in West Plains, Missouri for evaluation. The attending physician diagnosed Ms. Robinson with an irregular heart beat with accompanying angina symptoms. In light of this examination and findings, Ms. Robinson was admitted into the hospital for overnight evaluation. She was later released with a referral to Dr. Silverman. The medical records of this treatment note a clinical finding of irregular heart beat with no arrhythmia. The attending physician, Dr. Qadir, notes in his release from the hospital that Ms. Robinson was “asymptomatic throughout her hospital stay” and she was sent home with a 48 hour Holter.

A Persantine Nuclear Stress test was performed on September 7, 2007, at OMC, and the Impression was negative. The Nuclear Spect Scan suggested findings consistent with a prior infarct. The radiology report was for no acute cardiopulmonary disease. Ms. Robinson saw Dr. Silverman for follow-up treatment on two occasions: August 22, 2007, and September 12, 2007. On the former visit, Ms. Robinson gave a history of having chest discomfort, precordial, with a lack of energy for approximately two months. Pain was described as a stabbing with a severity rating of 1 to 2.

On the latter occasion, she noted an acute chest pain discomfort, a rating scale of 4 or 5, associated with starting after eating, but advised that she was fine now. The chest pain did not radiate, and was not associated with nausea, vomiting, or diaphoresis. Further, Dr. Silverman noted that the Persantine nuclear stress test “did not demonstrate any significant reversible ischemia, . . . (but) it would possibly show the artery disease.” Dr. Silverman concluded that the Echocardiogram revealed “Normal left ventricular cavity size and function. No significant pathology noted.” However, Dr. Silverman noted that Ms. Robinson did present with “very mild mitral valve prolapsed, with very minimal valvular heart disease,” and placed her on Protonix 40 mg daily and nitroglycerin 2.5 mg q 12h. Additionally, in identifying Ms. Robinson’s presenting medical condition Dr. Silverman propounded the following impression:

1. Atypical chest pain.
2. GERD.
3. Hypertension.
4. Arrhythmia.
5. Obesity.
6. COPD.
7. Status post right mastectomy without radiation.

During the hearing of this case, Ms. Robinson testified to taking the prescription of daily dosages of nitroglycerin, but indicated that she had never had necessity to use the under-the-tongue nitroglycerin for an acute attack. According to Ms. Robinson, she was of the understanding that the OMC tests results were that she had not had a heart attack nor needed heart surgery. Further, it is noted that at the hearing, and while testifying, Ms. Robinson was seated for the first half of the hearing, she then asked to stand after the recess, and did not present with a portable oxygen bottle.

Ms. Robinson returned to Nurse Practitioner Sally Beltz on May 1, 2007, prior to the irregular heart beat incident. Ms. Robinson returned with complaints of chronic back pain “secondary to an injury.” She was having muscle spasms on a daily basis, worse during the night

such that she could not sleep or rest. Nurse Practitioner Beltz noted muscle tension and spasms from the mid thoracic all the way through the lumbosacral spine, with the worst spasms occurring in the mid back. Nurse Practitioner Beltz noted reproducible pain in the L-S area. The assessment was chronic back pain secondary to previous injury. She received a prescription for Cleocin, Soma, and Tramadol.

On August 6, 2007, Ms. Robinson followed-up with Nurse Practitioner Sally Beltz. Ms. Robinson presented with a singular complaint of being physically exhausted over the last few weeks. Ms. Robinson denied noticing any kind of irregular heart beat and denied any feeling of chest pains or heart palpitations. She acknowledged “fleeting discomfort” in the high left upper chest. Her heart rate and rhythm were normal with historically “two episodes of irregular beat noted with extended auscultation.”

In 2008 Ms. Robinson presented to Terrence D. Coulter, M.D. (Ozarks Medical Center, Sleep Disorder Laboratory) with history of respiratory insufficiency and purpose to obtain a titration study. In light of this study, Dr. Coulter recommended BiPAP 12/7 cm of water.

Subsequently, Ms. Robinson began to treat with Jeffrey Dr. Dryden, D.O., who is at the same clinic as Nurse Practitioner Beltz. On May 22, 2008, Ms. Robinson presented with history of having been in the hospital over the weekend with complaints of chest pain or discomfort, palpitations, and leg symptoms. In August 2008 Ms. Robinson returned to see Dr. Dryden and, in light of tests performed, diagnosed Ms. Robinson with the following conditions:

- Benign essential hypertension
- Diastolic dysfunction
- Chronic obstructive pulmonary disease
- Hyperlipidemia

In February and March 2009 Dr. Dryden provided Ms. Robinson with treatment and offered a similar diagnosis. Notably, on March 4, 2009, Ms. Robinson presented with complaints of increased back pain but out of Tramadol, as well as intermittent SOB. During the March 4, 2009, examination Dr. Dryden noted that the “pulmonary auscultation revealed abnormalities decreased BS at bases, no wheeze.” In subsequent exams Dr. Dryden continued to diagnose Ms. Robinson with chronic airway obstruction, although his notations varied – from instances of finding that the “auscultation of the lungs revealed breath sounds bilaterally. Breath sounds were normal in volume” to finding that the “auscultation of the lungs reveals clear breath sounds bilaterally. Breath sounds were diminished in the bases.”

Subsequently, Ms. Robinson changed her primary care provider and began treating with Robert Shaw, M.D., who is located in Willow Springs, Missouri. Ms. Robinson first saw Dr. Shaw on September 27, 2010. He noted that Ms. Robinson was a new patient with multiple problems, but stable. In providing a history to Dr. Shaw, Ms. Robinson is noted to have told him that she had “learned to live with her back problems.” Dr. Shaw further commented that Ms. Robinson’s leg neuropathy was “actually more of a restless leg type problem.” And in October 2010 Ms. Robinson underwent a Nuclear Spect Scan, which revealed “Relatively fixed inferior and lateral perfusion defect consistent with prior infarct. Ejection fraction 61% with mild inferior hypokinesis.”

In regard to Ms. Robinson's sleep apnea condition, Dr. Shaw noted that Ms. Robinson did not qualify on clinical testing for a CPAP machine, but that she does use oxygen at night. The original sleep apnea study was done July 9, 2009, at OMC. Notably, on December 6, 2011, Dr. Shaw affirmed the diagnosis of COPD, and continued the prescription for oxygen. This prescription included use of a portable oxygen device, with use as follows:

Night time 3 LPM (Liters per Minute) Hours used 8 – 10
Exercise 3 LPM (Liters per Minute) Hours used 1 – 4
Portable 3 LPM (Liters per Minute) Hours used 1 – 4
Activities of Daily Living (ADL) 3 LPM (Liters Per Minute) Hours used 1 – 4

Additionally, Dr. Shaw noted that Ms. Robinson's hypertension was being controlled with current medications.

Ms. Robinson returned for routine follow-up examinations. She had prescriptions refilled four times from March 30, 2011, to February 16, 2012. In February 2012 Ms. Robinson was noted to have suffered a couple of falls, causing her to present with increased back pain. Notably, in the office visit of February 16, 2012, Ms. Robinson was noted to have suffered a vasovagal syncopal episode in the middle of the night.

Presenting Complaints of Ms. Robinson

In regard to her physical complaints for the period of September 26, 2005, (MMI date) to July 19, 2007, (irregular heart beat episode) Ms. Robinson presented the following testimony:

- **Neck:** According to Ms. Robinson, during this period she experienced constant neck pain with headaches. The treatment for this pain included prescriptions - Soma, Tramadol, and Hydrocodone. Additionally, she received shots for pain 2 or 3 times.
- **Low Back:** Ms. Robinson describes experiencing during this period constant pain in her low back. She was heavily medicated, and limited her activities of daily living to avoid increasing the pain levels. If she turned the wrong way it increased her pain.
- **Left Upper Extremity:** Ms. Robinson notes that during this period she experienced numbness in the hand. She avoided repetitive use of the hand due to swelling.

Ms. Robinson testified that during this period her daily activities were very limited due to pain she was experiencing in her neck and back. As a consequence, she says she would sit for 30 minutes, up for 30 minutes, and then go lay down. She was not able to pick up heavy objects such as a full gallon milk weighing approximately 8.5 pounds with her left hand/arm.

In regard to her physical complaints for the period of July 19, 2007, (irregular heart beat episode) to the present, Ms. Robinson presented the following testimony:

- **Neck:** Ms. Robinson testified that during this period her neck felt better, which she attributed to her avoiding or quitting activities that caused pain such as mopping, sweeping, and vacuuming. However, she continues take prescription medications for pain.

- **Low Back:** Ms. Robinson indicated that her low back pain was much better because she is aware of her limitations, and simply avoids activities that produce or cause increased pain.
- **Left Upper Extremity:** According to Ms. Robinson, her left hand is better. But she now uses both hands for picking up heavier objects, such as a full one gallon container of milk.

Ms. Robinson testified that during this period she was doing better. She explains that after experiencing the July 2007 incident she quit pushing herself. Although she may go to family functions, she avoids physical activities. She walks her dog for short distances. She still does not mop the floor, sweep, or vacuum. She avoids repetitive motion activities with the left arm; she avoids bending over from the waist due to pain; and she avoids standing for long periods [1 to 2 hours] due to back pain.

Ms. Robinson acknowledged that she made trips by car and plane to Florida, Las Vegas, and Michigan. Additionally, she acknowledge helping her daughter by providing care for her grandchildren, which includes taking the grandchildren to sporting events in West Plains and then returning home to Pomona.

She denied any past medical problems before October 8, 2004, which limited her in household chores or shopping. And she denied having any neck, back, left arm, or headache complaints or problems prior to October 8, 2004.

Vocational Impact

Ms. Robinson testified following her work injury of October 8, 2004, she was not able to return to work. Similarly, she said she could not work, and that her current source of income is Social Security Disability.

In describing her limitations and restrictions, which she attributes to the October 8, 2004, work injury, Ms. Robinson states that she cannot sit or stand for 8 hours per day; the pain medications cause her to experience recall problems with names, dates, and that she did not have the recall problems before she started the pain medications; she can sit only for 30 minutes to 2 hours; standing up causes her back to hurt, which requires her to sit down; she cannot lift a full gallon of milk or an 84 ounce Clorox bottle with her left hand, but had no such problems with the left hand in lifting prior to the injury.

Independent Medical Examinations

Shane Bennoch, M.D.

Shane Bennoch, M.D., a physician practicing in the specialty of occupational medicine, testified by deposition on behalf of Ms. Robinson. Dr. Bennoch performed an independent medical examination of Ms. Robinson on medical examination of the claimant on May 3, 2006. At the time of this examination, Dr. Bennoch took a history from Ms. Robinson, reviewed various medical records, and performed a physical examination of her.

In light of his examination and evaluation of Ms. Robinson, Dr. Bennoch opined that the work injury of October 8, 2004, was the prevailing factor in causing Ms. Robinson to sustain injuries to her neck, back and left elbow. In describing the nature of these injuries, Dr. Bennoch propounded the following diagnoses:

1. Musculoligamentous strain of the cervical spine with tearing of muscles and ligaments and persistent pain with overactivity.
2. Musculoligamentous strain with tearing of muscles and ligament in the lower lumbar spine with scarring and persistent pain and spasm.
3. Multilevel disks of the thoracic spine and the lumbar spine
4. Ulnar neuropathy at the left elbow secondary to trauma.
5. Anterior ulnar nerve transposition, left elbow.

In considering the nature and extent of the disability caused by these injuries, Dr. Bennoch propounded the following opinion:

1. There is a 10% permanent partial impairment to the body as a whole rated at the cervical spine due to musculoligamentous strain with muscle and ligament tearing, subsequent scarring, and persistent spasm with overuse and pain.
2. There is a 15% permanent partial impairment to the body as a whole rated at the lumbar spine due to musculoligamentous strain with muscle and ligament tearing, subsequent scarring, and inflammation with overuse and pain.
3. There is a 25% permanent partial impairment to the left upper extremity rated at the left elbow due to traumatic injury to the ulnar nerve resulting in ulnar neuropathy. The rating takes into account the fact that patient required an anterior ulnar nerve transposition. The rating also takes into account that with overuse she has some pain in the elbow area.

In addition, Dr. Bennoch opined that prior to the work injury of October 8, 2004, Ms. Robinson presented with several preexisting medical conditions or disabilities, which served as a hindrance to employment or reemployment. In rendering this opinion, Dr. Bennoch propounded the following opinion:

1. There is a 5% permanent partial impairment to the body as a whole rated at the cardiovascular system due to hypertension. The rating takes into account the fact that the patient requires 3 medications to control her hypertension.

2. There is a 10% permanent partial impairment to the lower extremities rated at the knees due to neuropathy. The rating also takes into account the fact that the patient requires Neurontin to keep muscle tremor and chronic pain under control.
3. The patient had a mastectomy but this is not ratable since the patient has had a hysterectomy and is not of childbearing age.
4. The patient also has hypothyroidism but it is considered borderline and well controlled with Levoxyl.

He further concluded that the combination of disabilities attributable to the work injury of October 8, 2004, combined with the preexisting disabilities to have caused Ms. Robinson to have suffered “a substantially greater impairment than the total of each separate injury and/or illness, and a loading factor should be added.”

Yet, in considering the persistent pain to Ms. Robinson’s neck and lower back, as well as the restrictions referable to the use of her left upper extremity, Dr. Bennoch opined that Ms. Robinson is permanently and totally disabled as a consequence of the work injury of October 8, 2004, considered alone. Notably, Dr. Bennoch opined that the restrictions in her lifting with the left arm alone would be no repetitive lifting. But she has restrictions in her left arm lifting secondary to her back and neck injuries. Further, according to Dr. Bennoch, the persistent pain to her neck and low back renders her unlikely to be capable of working any job eight hours daily, five days a week.

In the MSS-P, Dr. Bennoch restricted Ms. Robinson to no frequent lifting of five pounds or less, standing or walking for 2 hours out of 8, sit for 5 hours out of 8, but only continuously for 30 minutes, the left upper extremity was limited to 20 pounds and no repetitive, unscheduled rest breaks during the day due to chronic pain or side effects from medications.

In describing the principal medical condition, including signs and symptoms from which the restrictions stemmed, Dr. Bennoch stated: “Patient has tearing of muscles & lig [ligaments] in the cervical & lumbar spine areas. The muscles injuries healed by scaring, as a result, (with) over use she has (increased) pain.”

Norbert Belz, M.D.

Norbert Belz, M.D., a physician practicing in the specialty of occupational medicine, testified by deposition on behalf of the employer and insurer. Dr. Belz performed an independent medical examination of Ms. Robinson on July 19, 2007, and again on August 13, 2008. During the first examination of July 19, 2007, Dr. Belz noted an irregular heart beat, and discontinued the evaluation until Ms. Robinson was seen by a cardiovascular physician, which subsequently occurred. Dr. Belz completed this evaluation on August 13, 2008. Through these examinations, Dr. Belz took a history from Ms. Robinson, reviewed various medical records, and performed a physical examination of her.

In light of his examination and evaluation of Ms. Robinson, Dr. Belz opined that the work injury of October 8, 2004, was the prevailing factor in causing Ms. Robinson to sustain

injuries to her neck and back and are in the nature of a sprain/strain. In examining the nature and extent of the disability referable to the back and neck, Dr. Belz opined that Ms. Robinson is governed by permanent restrictions and limitations, which he described as follows:

The individual is not to lift in excess of 35 to 45 pounds. Proper body mechanics and biomechanics to be utilized.

Further, Dr. Belz opined that as a result of this injury Ms. Robinson sustained a permanent partial disability of 2.5 to 5 percent to the body as a whole.

In addition, Dr. Belz opined that as a consequence of suffering this work injury, Ms. Robinson received a prescription for physical therapy as part of the treatment for her back, which caused her to undergo a significant amount of physical therapy. And during this physical therapy she was required to engage in pushups ("prone-on elbow press ups with repetitions and static posturing"). According to Dr. Belz, Ms. Robinson suffered from a preexisting medical condition involving peripheral neuropathy, which rendered her very susceptible to suffering nerve damage, and the high risk maneuvers associated with the physical therapy caused her to suffer an additional work injury in the nature of left cubital tunnel syndrome, which necessitated receipt of surgery in the nature of a left cubital tunnel release and transposition of the left ulnar nerve. In examining the nature and extent of the disability referable to the left elbow, Dr. Belz opined that Ms. Robinson is governed by permanent restrictions and limitations, which he described as follows:

The individual is to avoid direct pressure to the area of the transposed left ulnar nerve. Ms. Robinson is not to perform full complete elbow flexion through extension greater than two times per minute. Lesser excursions, of course, can be performed much more frequently.

Dr. Belz further opined that as a result of this injury, Ms. Robinson sustained a permanent partial disability of 12.5 to 15 percent referable to the left elbow.

Notably, in examining the nature and extent of Ms. Robinson's injuries and physical condition, Dr. Belz observed that Ms. Robinson lacked certain credibility in her description of pain, range of motion, and the severity of limitations / restrictions. Dr. Belz premised this observation in part based on the way Ms. Robinson responded to his examination and questions. In this regard, Dr. Belz propounded the following comments:

The individual sits comfortably and quietly in a padded chair with padded arm rests throughout the extensive history and evaluation. Ms. Robinson ambulates normally. Ambulation is brisk and normal. Station is normal.

In evaluating ranges of motion, on causal observation the neck ranges of motion are all full and fluid. The individual normally and fluidly flexes the neck to examine the painted toenails. During formal examination, the neck movements are halted and jerking. Initially, cervical flexion is halted and jerking, progressing at 5 degree increments, only achieving 40 degrees of cervical flexion. Then with distraction, cervical flexion is later measured at 60 degrees (normal). Again, on causal observation, neck ranges of motion are fluid and full in all planes.

Likewise, when measuring cervical right lateral flexion initially, 35 degree in halted jerking manner. Then with distraction, much more normal. Same with cervical rotation in each direction, especially to the right. Same non-physiologic.

On lumbosacral formal exam, the flexion was limited to 40 degrees with normal 60. Then at casual observation, the lumbosacral flexion was far greater. Again, no spasm about the cervical, thoracic or lumbosacral paravertebral musculature. All movements at distraction were fluid. Same non-physiologic.

The Jamar Dynamometer readings were flat and non-physiologic and inconstant. Initially only 25 pounds maximum on the right and 20 pounds maximum on the left at position 2. Then with distraction and rapid exchange, up to 40 bilaterally. Likewise, lateral pinch grip measurements initially were non-physiologic and with distraction normalized.

During formal examination, straight leg raising was resisted bilaterally at 10 degrees. The individual was then asked to actively raise one leg, then the other. Ms. Robinson raised each leg only 10 degrees. At distraction, straight leg raising was normal and fluid. The individual then sat straight legged on the exam table demonstrating no pain behaviors. Seated distracted leg raising likewise completely normal at 90 degrees. Same non-physiologic.

In light of the foregoing, Dr. Belz opined that Ms. Robinson is not permanently and totally disabled as a consequence of the work injury of October 8, 2004, considered alone.

In considering whether Ms. Robinson suffered or presented with permanent disability prior to the work injury of October 8, 2004, Dr. Belz opined that prior to October 8, 2004, Ms. Robinson suffered from several medical conditions (hypertension, breast cancer and mastectomy, cholecystectomy, morbid obesity and gastric banding, total abdominal hysterectomy, bilateral salpingo-oophorectomy) that did not cause her to suffer or present with any permanent disability. However, Dr. Belz opined that prior to October 8, 2004, Ms. Robinson was diagnosed and treated for bilateral lower extremity peripheral neuropathy, which caused her to present with certain permanent disability. In describing the nature of this medical condition, Dr. Belz noted that the symptoms relating to this condition occurred shortly after Ms. Robinson underwent the mastectomy and chemotherapy; and chemotherapy can cause peripheral neuropathy. Additionally, Dr. Belz noted that Ms. Robinson's father suffered from peripheral neuropathy, and this condition could be hereditary.

Further, Dr. Belz noted that while this medical condition did not preclude Ms. Robinson from working full time, 40 plus hours per week, including 80 to 100 hours per week at times, this medical condition would sufficiently justify imposition of permanent restrictions and limitations prior to the work injury. In identifying these permanent restrictions, Dr. Belz propounded the following comments:

The individual is not to function in ambient temperatures below 45 degrees Fahrenheit. The individual is not to function on ladders beyond a less than occasional basis. Ms. Robinson is not to ambulate continuously or near

continuously as a condition of employment. For example, the individual is not to function as a night watchman walking a beat or as a mail delivery person.

In light of the foregoing, Dr. Belz opines that prior to the work injury of October 8, 2004, Ms. Robinson presented with a permanent partial disability of 5 percent to the left lower extremity at the 207-week level, and she presented with a permanent partial disability of 5 percent to the right lower extremity at the 207-week level, referable to the bilateral lower extremity peripheral neuropathy. Further, Dr. Belz opines that consideration of this preexisting disability, in combination with the permanent disabilities referable to the work injury of October 8, 2004, does not render Ms. Robinson permanently and totally disabled. Rather, Dr. Belz opines, the pre-existing disability referable to the bilateral lower extremity peripheral neuropathy and the disability referable to the work injury of October 8, 2004, combined to create a greater disability than the simple sum, and a load factor of 10 percent would be appropriate.

Finally, Dr. Belz opines subsequent to the work injury of October 8, 2004, Ms. Robinson was diagnosed and treated for COPD; and since 2007 has undergone treatment for her cardiorespiratory status, including use of BiPAP machine for nighttime desaturation. Dr. Belz further noted that Ms. Robinson has disability referable to her non-occupational cardiopulmonary status and "requires continuous daytime oxygen, and by her statement, nighttime BiPAP as well." Dr. Belz considers this subsequent non-occupation medical condition to be a permanent disability that may render Ms. Robinson permanently and totally disabled. In this regard, Dr. Belz propounded the following comments:

The individual may well be permanently and totally disabled referencing the subsequent non-occupational cardiopulmonary status acting alone and/or in combination with all earlier diagnosis.

Again, quantification of the subsequent non-occupational status must await complete record attainment and review.

Vocational Opinions

Phillip Eldred, CRC

Phillip Eldred, CRC, who is a vocational consultant, testified by deposition on behalf of Ms. Robinson. Mr. Eldred performed a vocational evaluation of Ms. Robinson on April 14, 2010. At the time of his evaluation, Mr. Eldred took a vocational history from Ms. Robinson, performed a vocational profile and performed certain vocational testing.

In light of his examination and evaluation of Ms. Robinson, Mr. Eldred opined as to the following:

1. The physical and activity restrictions that were relied on in forming this evaluation are listed on pages two through fourteen of this report.
2. Ms. Robinson did have a pre-existing physical impairment, but it was not vocationally disabling such as to constitute a hindrance or obstacle to employment before October 8, 2004.

3. Ms. Robinson is unable to perform any of her past work.
4. It is highly unlikely that any reasonable employer in the normal course of business would hire Ms. Robinson for competitive, gainful employment.
5. Ms. Robinson was not found to have any transferable jobs for the sedentary work level even if she could perform work at the sedentary work level.
6. Ms. Robinson was not found to have any transferable jobs for the light work level even if she could perform work at the light work level.
7. Ms. Robinson would have problems being retrained in a formal training program due to her constant pain and use of narcotic pain medication.
8. Ms. Robinson is unemployable in the open labor market.
9. Ms. Sheran Robinson is permanently and totally disabled as a result of her injury on October 8, 2004 in isolation.
10. Ms. Sheran Robinson was disabled prior to her subsequent heart irregularities.

Mr. Eldred concluded and opined that the bilateral lower extremity condition [neuropathy or restless leg syndrome] was a pre-existing impairment, but it was not a hindrance or obstacle to employment before October 8, 2004. In considering the restrictions imposed by the various physicians, Mr. Eldred noted the following:

- Dr. Belz imposes restrictions that place Ms. Robinson at the light work level.
- The work restrictions imposed by Dr. Swango on August 29, 2005 were very restricting but ambiguous in light of the September 26, 2005 limitations; so, Mr. Eldred regarded the final restrictions by Dr. Swango as “undefined.”
- The restrictions imposed by Dr. Bennoch, as reflected in the Medial Source Statement-Physical, places Ms. Robinson at “less than sedentary level” of work, and, thus, disabled.

Mr. Eldred noted the results of the Purdue Pegboard tests: The scores were 13 and 11 respectively with the right and left hands; using both hands together, the score was 10. On the assembly aspect, using alternating hands, she scored a 24 or in the fifth percentile. Using each hand, she was in the first percentile and both hands together, the second percentile. According to Mr. Eldred, the results of this test are “low.” He thus concluded that she should not do production work. Mr. Eldred further concluded that in dealing with office work, a person having these problems using their arms and hands would not be very quick in doing clerical work.

In addition, Mr. Eldred opined that Ms. Robinson had no transferable skills to either light or sedentary work. She is now unable to perform any of her past work, and that a reasonable employer would not hire her given an understanding of her functional limitations, age, and

medications. Although he acknowledges that she has the capacity to be retrained if she were not limited by her constant pain and narcotic pain medications.

In light of the foregoing, Mr. Eldred opines that Ms. Robinson is unemployable in the open and competitive labor market; she is permanently and totally disabled as a result of the accident of October 8, 2004, considered alone. In rendering this opinion Mr. Eldred notes that Ms. Robinson was rendered permanently and totally disabled before her subsequent heart irregularities and diagnosis of COPD.

James England, CRC

James England, CRC, who is a vocational consultant, testified by deposition on behalf of the employer and insurer. Mr. England performed a vocational evaluation of Ms. Robinson through a record review, which included review of various medical records, depositions of Drs. Belz and Bennoch, deposition of Ms. Robinson, and the report and deposition of Mr. Eldred.

In light of his evaluation of Ms. Robinson, Mr. England opined that if he assumed the restrictions imposed by Dr. Belz, as well as the restrictions imposed by Dr. Lennard, Ms. Robinson was employable in the open and competitive labor market. He thus concluded “there would be no contraindication to her returning to essentially any of the work she had performed in the past.” However, Mr. England notes that the cardiopulmonary problems developed subsequent to the work injury, as discussed by Dr. Belz, Ms. Robinson may be unemployable, but such disability is not related to the work injury.

In addition, Mr. England notes that Dr. Bennoch imposes more restriction upon Ms. Robinson, and if he assumed these additional restrictions, “she would miss more than three days per month and would need more than normal breaks.” But “she would still be able to perform work on a seven hour per day basis at sedentary level positions similar to what she has done in the past taking into account the other restrictions he mentioned.”

Notably, on cross-examination, Mr. England discussed the restrictions imposed by Dr. Bennoch. In this inquiry, Mr. England propounded the following testimony:

Q. [Mr. Pitts] You do note on page seven, of course, that it was Dr. Bennoch’s opinion she had been temporarily totally disabled from the time of the accident through the present time, meaning the time that he saw her, correct?

A. Correct.

...

Q. So if a person cannot therefore work eight hours a day, five days a week, fifty weeks out of the year, they can’t work in gainful employment in competition with others in the open labor market or sustain that employment, correct?

A. I think if that’s the definition of full time employment, yes, I would agree with that.

Q. Dr. Bennoch completed a Medical Source Statement and you noted that, correct?

A. Correct.

Q. The postural limitations that Dr. Bennoch puts on the claimant specifically stand or walk a total of two hours in an eight hour day, but continuously for two hours, set a total of five hours, but set continuously on a regular basis in an eight hour work day for only thirty minutes at a time?

A. Right.

Q. Are those restrictions consistent with working an eight hour day?

A. No.

Q. And further, Dr. Bennoch in the lifting notes that the frequent lifting or carrying one third to two thirds of the time during a typical eight hour day, he simply says no on that, correct?

A. Right.

Q. And if we accept those restrictions at face value for sitting, standing, and lifting, such person would not be competitive in the open labor market, nor could they sustain employability at either sedentary or light level?

A. If you add all those things together, I think that's true. Exhibit 2, pages 25-27.

Q. ...Dr. Bennoch, in his assessment, Medical Source Statement, said she would miss more than three times a month due to medical issues relating to her work. Is missing more than three times a month consistent with maintaining employability?

A. No.

Q. It's also true that she was terminated in December of 2004 prior to any heart problems that surfaced on July 19, 2007, correct?

A. Right.

Q. And that her termination in December of 2004, apparently from her deposition, had nothing to do with her heart problem?

A. I think that's fair.

Q. All right. Thank you. Now one of the factors identified by Dr. Bennoch in his Medical Source Statement, he thought she should be able to rest beyond normal rest breaks of fifteen minutes in the morning, fifteen in the afternoon, or thirty at lunch, and that this was medically necessary or appropriate. Are you aware of that restriction by Dr. Bennoch?

A. Yes.

Q. Is it not true, Mr. England, that such a restriction would effectively preclude either securing or maintaining employment at any exertional level, sedentary or light?

A. I think that's probably true.

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying workers' compensation case involving an accident date of October 8, 2004, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on October 8, 2004, which is substantive in nature, and not procedural, governs substantively the adjudication of this case. Accordingly, in this context, several familiar principles bear reprise.

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo.App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo.Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo.App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo.App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Bruflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo.App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo.App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Further, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo.App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575,577 (Mo.App., W.D. 1994); and *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650 (Mo.App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo.App. W.D. 1993).

I. Accident & Injury

The evidence is supportive of a finding, and I find and conclude that on October 8, 2004, the employee, Sheran Robinson, sustained an injury by accident that arose out of and in the course of her employment with the employer, Hannibal Council on Alcohol & Drug Abuse. This incident occurred as Ms. Robinson opened a vertical four drawer filing cabinet. In doing so, the weight of the file cabinet became unbalanced and tipped over, knocking Ms. Robinson into an air conditioner-heating wall unit that was about 3-4 feet from her on the opposite wall. Then, upon falling to the ground, the filing cabinet fell on top of Ms. Robinson.

This filing cabinet was heavy — the weight of one of the drawers was too heavy for her to lift. All of the 4 drawers were full of client files. And because this filing cabinet was unstable

and not anchored to the floor and wall, it fell on top of her. Further, it took two males to remove the file cabinet and free Ms. Robinson from being pinned below the cabinet.

The immediate impact of this incident caused Ms. Robinson to sustain injuries to her back and neck, as well as bruises on both upper extremities and chest. Additionally, this accident resulted in Ms. Robinson suffering further injury to her left upper extremity. The injury to the back and neck were in the nature of sprain / strain. The injury to the left upper extremity was in the nature of left ulnar neuropathy of the elbow (cubital tunnel syndrome).

All physicians presenting testimony and medical opinions in this case express agreement that Ms. Robinson sustained a compensable work injury to her back, neck and left upper extremity; and the injury to the left upper extremity necessitated receipt of surgery. Dr. Belz, however, attributed the need for the left ulnar surgery to the physical therapy rather than the actual incident of October 8, 2004. Regardless, established case law recognizes that any injury caused by medical care provided to an employee, which was necessitated by a work injury, is compensable and relates to the underlying accident.

Accordingly, after consideration and review of the evidence, I find and conclude that the employee, Sheran Robinson, sustained an injury by accident that arose out of and in the course of her employment with the employer, Hannibal Council on Alcohol & Drug Abuse. And this accident caused Ms. Robinson to sustain injuries to her back, neck and left upper extremity.

II. Medical Care

The work injury of October 8, 2004, necessitated receipt of medical care. This medical care included receipt of conservative treatment that required Ms. Robinson to undergo multiple diagnostic studies and extensive multiple physical therapy sessions, as well as left ulnar surgery. The employer and insurer provided Ms. Robinson with the requisite medical care, resulting in Ms. Robinson being released from medical treatment.

The employee does not seek additional or future medical care, and it is not an issue presented for adjudication. Therefore, future medical care is not awarded to employee.

III. Permanent Disability Compensation & Liability of Second Injury Fund

The evidence is supportive of a finding that the October 8, 2004, work injury has had a significant disabling effect on Ms. Robinson. Notably, Ms. Robinson is governed by medical restrictions. The physicians, however, offer different medical restrictions, and offer different opinions as to the nature and extent of Ms. Robinson's disability as it relates to the work injury of October 8, 2004. The adjudication of this issue is not easily or readily resolved, and is not without doubt.

In addressing this issue, I note that Ms. Robinson appeared at trial, and provided testimony regarding her medical conditions, restrictions, and daily activities, both from September 26, 2005, the date of release at MMI, to July 19, 2007, date of medically determinable onset of irregular heart beat and thereafter. The employee's trial testimony was consistent with

the medical records as a whole, the deposition testimony and testing of Dr. Shane Bennoch, Dr. Ted Lennard's medical records, and both sets of physical therapy records.

Further, I note that Ms. Robinson enjoys an excellent work history - both in managerial positions and as a responsible employee for her last employer, Hannibal Council. She obtained a GED post high school and then became a licensed EMT professional, completed one year of nurse training, and secured an Associate Degree in General Studies [2 year program]. Up to the date of last injury, she was working extensive overtime hours that ranged from 80 to 100 hours per week, which certainly speaks to her work ethic.

In addition, in her managerial positions at both ShowBiz pizzas and Video II, she was responsible for the hiring, firing, and disciplining of employees. In her trial testimony, she testified that she would not hire herself with her current conditions. She testified that she could not complete an 8 hour day. Also, she noted that as a consequence of suffering this injury she is receiving prescriptions for pain medications, which include: Soma, 350 mg, 4 times daily, Tramadol, 50 mg, 1-2 times daily as needed, and Hydrocodine, 500 mg, every 4 to 6 hours as needed. Additionally, she noted that she has begun to take Hydrocodine 3 to 4 times in the last several months. And she notes that the more active her schedule, the more frequent is her need for the medications.

Yet, it is noted that Dr. Belz offers a different opinion of Ms. Robinson's presentation of complaints and pain, and thus her credibility. And Dr. Belz explains the basis of his credibility assessment of Ms. Robinson. This opinion makes the adjudication of this issue difficult and not without doubt. Dr. Belz is a credible physician. However, considering the extensive medical treatment, including the significant number of physical therapy sessions for treatment of Ms. Robinson's back and neck, the treatment prescribed by the other physicians weigh against the opinion of Dr. Belz.

Further, the findings by Dr. Lennard are consistent with the final diagnosis or impression of Dr. Bennoch approximately one year later; namely, "musculoligamentous strain of the cervical spine with tearing of muscles and ligaments and persistent pain with over activity and musculoligamentous strain with tearing of muscles and ligament in the lower lumbar spine with scarring and persistent pain and spasm." Both findings are supported by the medical records and justify the prescriptions for extensive and multiple for physical therapy sessions, which included EMS, cold packs to thoracic and lumbar areas, massage, and soft tissue manipulation as tolerated, and pool therapy.

Also, Dr. Lennard's final impression was post left ulnar nerve transposition and thoracic lumbar strain. He noted that Ms. Robinson had been through a long course of treatment. And in his final report dated September 27, 2005, he summarized the treatment as an extensive: physical therapy, TENS Unit, and multiple medications. He further noted that despite this treatment, Ms. Robinson had experienced "little improvement" in her pain symptoms. He similarly noted that Ms. Robinson was on Soma, and would probably need that for an additional six months. In fact, she has continued on multiple pain medications indefinitely.

In light of the foregoing, having had an opportunity to observe, in person, Ms. Robinson at the hearing, and having reviewed and considered all the evidence in light of applicable case law, which requires all doubt to be resolved in favor of the employee and in favor of coverage, I

resolve this doubt in favor of Ms. Robinson. I find Ms. Robinson credible, reliable and worthy of belief. I accept as true her complaints of pain and limitations.

The parties offer differing vocational opinions relative to the question of whether Ms. Robinson is unemployable in the open and competitive labor market. I resolve the differences in the opinion in favor of Mr. Eldred, who I find credible, reliable and worthy of belief. Similarly, I find him persuasive.

The evidence is supportive of a finding, and I find and conclude that Ms. Robinson is unemployable in the open and competitive labor market. Yet, a questions remains -- is Ms. Robinson unemployable in the open and competitive labor market as a consequence of the October 8, 2004, work injury, considered alone?

In this case where there are limited contested issues, and where permanent total disability is alleged, the Administrative Law Judge must first consider the liability of the employer in isolation by determining the degree of disability due to the last injury. *APAC Kansas, Inc. v. Smith*, 227 S.W.3d 1,4 (Mo. App.W.D. 2007). If Claimant is not permanently and totally disabled from the last accident, then the degree of disability attributable to all injures is determined. 227 S.W.3d at 4.

The inability to return to any employment means the inability to perform the usual duties of the employment in a manner that such duties are customarily performed by the average person engaged in such employment. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849 (Mo. App. S.D. 1995). In determining whether Claimant can return to employment, the Missouri law allows the consideration of Claimant's age and education, along with physical abilities. *BAXI v. United Technologies Automotive*, 956 S.W.2d 340 (Mo. App. E.D. 1997). While "total disability" does not require that the Claimant be completely inactive or inert, *Sifferman v. Sears Roebuck and Co.*, 906 S.W.2d 823, 826 (Mo. App. S.D. 1996), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. Banc 2003), it does require a finding that the Claimant is unable to work in any employment in the open labor market, and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo. App. S.D. 2001), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003). The central question is: In the ordinary course of business, would any employer reasonably be expected to hire Claimant in his [or her] physical condition? *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. W.D.2000) *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003).

"The term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the claimant was engaged at the time of the accident." Section 287.020.7 RSMo. 1994. "The test for permanent total disability is whether, given the claimant's situation and condition, he or she is a competent to compete in the open labor market. [citation omitted] The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hire." *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo. App. 1992).

Two vocational rehabilitation counselors testified by deposition, Mr. Eldred for the employee and Mr. England for the employer-insurer. Both reached very similar conclusions which supported the claimant's testimony and claimant's permanent total disability. Both agreed that if a person could not work 8 hours per day, it was inconsistent with full time employment. Both agreed that the employee was permanently totally disabled based upon Dr. Bennoch's Medical Source Statement-Physical. Dr. Bennoch's Medical Source Statement-Physical was his assessment of her restrictions from the October 8, 2004 injury alone.

Mr. Eldred noted that Ms. Robinson's low scores and performance on the Purdue Pegboard test would make clerical employment, such as her latter work at Hannibal Council, problematic. Mr. England acknowledged that unscheduled rest breaks during the work day were inconsistent with maintaining employment at any exertional level, sedentary or light.

Certainly, the fact that someone has a prior disability which causes some restrictions can be a contributing factor to them being permanently and totally disabled. The evidence is supportive of a finding that prior to the work injury of October 8, 2004, Ms. Robinson suffered from bilateral lower extremity peripheral neuropathy, which caused her to present with certain permanent disability, and sufficient to support being governed by a prescription for permanent restrictions.

However, under the workers' compensation statute, that is not the question. The question is - does the compensable injury alone, without consideration of any restrictions from pre-existing disabilities cause the employee to be permanently and totally disabled? If so, there is no further inquiry into the extent of the pre-existing disabilities and any restrictions they may have caused. One cannot be more than permanently and totally disabled, and even if a pre-existing condition causes additional disabilities or even the same restrictions as the last injury, it does not matter. If the compensable injury alone, and the restrictions of the compensable injury alone would necessitate, causes an employee to be permanently and totally disabled, the employer, not the Second Injury Fund, is liable for permanent total disability.

Thus, after consideration and review of the evidence, and in light of applicable case law, I find and conclude that as a consequence of the accident of October 8, 2004, and the resulting injury in the nature of a musculoligamentous strain of the cervical spine with tearing of muscles and ligaments, and persistent pain with over-activity and musculoligamentous strain with tearing of muscles and ligament in the lower lumbar spine with scarring and persistent pain and spasm, as well as left ulnar neuropathy requiring surgical repair, Ms. Robinson suffers significant and persistent pain. She is unemployable in the open and competitive labor market, and is thus permanently and totally disabled. Although Ms. Robinson suffered from a preexisting disability referable to bilateral lower extremity peripheral neuropathy, I find and conclude that the last injury (work injury of October 8, 2004), considered alone, renders Ms. Robinson permanently and totally disabled.

Accordingly, I find and conclude that as a consequence of the accident of October 8, 2004, considered alone, the employee is permanently and totally disabled. Therefore, in light of the foregoing, the employer and insurer are ordered to pay to the employee Sheran K. Robinson the sum of \$298.67 per week for the employee's lifetime. The payment of permanent total disability compensation by the employer and insurer is effective as of September 26, 2005, when she reached maximum medical improvement.

In light of the foregoing, Ms. Robinson is not eligible for receipt of scarring / disfigurement compensation. Although this work injury resulted in Ms. Robinson suffering left ulnar neuropathy, which necessitated receipt of surgery and caused her to experience scarring to her left arm, disfigurement compensation is not allowed. Awarding of disfigurement is part of permanent partial disability compensation, and is not allowed in an award finding the employer and insurer liable for payment of permanent total disability compensation. Similarly, in light of this award finding the employer and insurer liable for payment of permanent total disability compensation, the Claim for Compensation filed against the Second Injury Fund is denied.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable. The award is subject to modifications as provided by law.

Made by: _____
L. Timothy Wilson
Administrative Law Judge
Division of Workers' Compensation