

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

Injury No.: 07-042070

Employee: Sherry Sellars
Employer: Orkin Pest Control
Insurer: Old Republic Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 8, 2010 with this supplemental opinion. The award and decision of Administrative Law Judge Carl Mueller, issued January 8, 2010, is attached and incorporated by this reference.

We offer this supplemental opinion to explain in some detail our agreement with the conclusions of the administrative law judge. The administrative law judge found the employer/insurer liable to the employee for permanent total disability benefits as well as future medical care and treatment necessary to cure and relieve employee from the effects of the injury sustained on April 30, 2007. The parties stipulated that the injury was due to an accident arising out of and in the course of employment.

Employer/insurer principally alleges the administrative law judge erred by his emphasis of subjective over objective medical findings constituting a misapplication of law concerning section 287.190.6(2) RSMo. The relevant part of such statutory section is as follows:

In determining compensability and disability, where inconsistent or conflicting medical opinion 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 administrative law judge concluded that employee's permanent disability due to this accident was attributable to the combination of the employee's resultant physical disability and mental disability/psychic disability.

The instant case is conveniently characterized as one involving a physical accident or trauma resulting in both physical disability and mental disability i.e., a physical-mental case.

The physical accident or trauma, a motor vehicle accident, among other things, caused a compression fracture at T-12 necessitating surgery consisting of a partial bilateral T11-T12 hemilaminotomy, pedicle screw instrumentation and rods, posterolateral fusion with a left iliac crest graft and local bone graft. These physical findings are indisputable and certainly objective in nature. By its very nature, an alleged psychic disability is principally subjective, but no less compensable if proven.

Employee: Sherry Sellars

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The gist of the employer's appeal appears to be that in reaching the final conclusions of permanent total disability, the administrative law judge misapplied section 287.190.6(2) RSMo, by emphasizing subjective findings over objective findings.

In reviewing the file, we did not ascertain that the objective medical findings were in dispute. However, the presence or absence of objective findings subsequent to an injury does not make an alleged psychic disability compensable or noncompensable. The fact finder must review and weigh the entire record and make credibility findings.

The issue before the Commission is whether or not the administrative law judge may have committed err in analyzing the mental aspect or disabling psychic condition resultant from the accident.

In other words, is the subjective nature of employee's alleged psychic disability beyond the objective findings of the actual injury sustained, and if so, how would this interplay with section 287.190.6(2) RSMo?

Perhaps, another way of putting it is whether or not employee's psychological/mental complaints are out of proportion to the actual physical injury sustained.

This is a mental injury type case due to a physical stimulus, and we would emphasize the fact that mental injuries are real, but it must by the same token be stressed that malingering is real, an argument posited by employer/insurer. "Compensation neurosis" which must be distinguished from conscious malingering may take the form of an unconscious desire to obtain or prolong compensation, or perhaps of sheer anxiety over the outcome of compensation litigation; in either case producing a genuine neurosis disabling the employee. Understating the obvious, the line between neurosis and malingering is not always sharply defined.

The fact of resultant disability by reason of pain does exist. The inability of physicians to put their fingers on the exact physical cause or objective finding does not result in casting a claim overboard. With all of the knowledge now possessed by the medical profession it is certainly a matter of common knowledge that sometimes the diagnosis of human illness baffles the greatest medical minds. Mental disability cases involve all kinds of mixtures of neurosis leaving psychiatrists/psychologists and fact finders with the unenviable task of sorting out which is the really operative fact.

In the ultimate and final analysis, the problem must be left to the skill and experience of medical and psychiatric/psychological experts and of compensation tribunals/administrative law judges to carry out the ultimate fact findings.

In the instant case, the physical and objective findings due to the accident or trauma were thoroughly discussed by the administrative law judge in the award. Subsequently the administrative law judge analyzed the testimony of the employee and weighed her credibility in light of the physical injury sustained and her psychic disability complaints, and also weighed the testimony of the medical experts and psychiatric/psychological experts, and reached his ultimate conclusions based on his credibility findings. The employee's subjective complaints, inherent in a psychic disability claim, were thoroughly reviewed and analyzed, based on the objective findings, and the testimony of the various experts compared and contrasted.

The experts based their opinions on the objective findings resultant from the accident along with employee's subjective complaints. Employee's psychological expert was of the opinion that employee's physical accident or trauma augmented or increased her pre-existing

Employee: Sherry Sellars

mental/psychic disability precipitating greater permanent disability. Using essentially the same set of facts, employer's psychiatric expert disagreed, and opined that employee's mental disorder was unaffected by the accident.

The administrative law judge found the employee's psychological expert, Dr. Schmidt, more credible than the employer's psychiatric expert, Dr. Hughes. In so doing, the administrative law judge ultimately concluded that employee did sustain a psychic disability due to the physical accident, and awarded appropriate workers' compensation benefits. We would further note that Dr. Schmidt subjected employee to a battery of tests and utilized the answers in forming his opinions as to employee's ultimate psychic disability and relationship to the work related accident. On the other hand, employer's psychiatric expert, Dr. Hughes, did not conduct any tests but only interviewed the employee and reviewed medical records.

In conclusion, it is our opinion the administrative law judge did comply with the statutory requisites of section 287.190.6(2) RSMo, and reviewed the entire record ultimately giving more credence to the employee's testimony, and the opinions of employee's psychological expert, Dr. Schmidt, in reaching the ultimate conclusion concerning the employee's permanent total disability.

In so doing, the administrative law judge fully considered employee's objective findings and their effect in determining employee's disability. Accordingly, I agree with the conclusion of the administrative law judge that the employee was permanently totally disabled solely on account of the accident occurring April 30, 2007, and appropriate workers' compensation benefits were awarded.

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 13th day of August 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Sherry Sellars Injury No: 07-042070
Dependents: N/A
Employer: Orkin Pest Control
Additional Party: State Treasurer as Custodian of the Second Injury Fund
Insurer: Old Republic Ins. Co.
Hearing Date: November 23, 2009 Checked by: RCM/rm

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: April 30, 2007
5. State location where accident occurred or occupational disease was contracted: Lee's Summit, Jackson 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: Employee, while in the scope and course of her employment, was driving a vehicle and was struck by another vehicle and injured her head, neck, back, mental and emotional psyche.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Body as a whole
14. Nature and extent of any permanent disability: Permanent and total disability.
15. Compensation paid to-date for temporary disability: \$5,951.37 (\$5,733.20 in TTD and \$218.17 in TPD)
16. Value necessary medical aid paid to date by employer/insurer? \$15,270.34.

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$586.01 per week.
- 19. Weekly compensation rate: \$390.67 for permanent total disability, \$376.55 for permanent partial disability
- 20. Method wages computation: By stipulation.
- 21. Amount of compensation payable:

Medical Expenses

Medical Already Incurred.....	\$15,270.34
Less credit for expenses already paid	(\$15,270.34)
Total Medical due.....	<u>\$0.00</u>

Temporary Disability

15 5/7s weeks at \$390.67/week (May 1 through August 19, 2007)....	\$6,139.10
Less credit for benefits already paid	(\$5,733.20)
Total TTD due	<u>\$405.90</u>

Permanent Total Disability

\$376.55/week commencing January 26, 2008 for the employee's life..... Indeterminate

Total Award.....Indeterminate

- 22. Second Injury Fund liability: None.
- 23. Future requirements awarded: Medical treatment to cure and relieve the Employee from the effects of the work injury of April 30, 2007 to her mental and emotional psyche as recommended by Dr. Allan Schmidt, PhD; and, for pain management as recommended by Dr. Charles Donohoe.

Said payments to begin as of date of this award and to be payable and be subject to modification and review as provided by law.

The disability compensation awarded to Ms. Sellars shall be subject to a twenty-five percent (25%) lien, plus expenses, in favor of Frank D. Eppright, Attorney, for reasonable and necessary attorney's fees pursuant to Mo.Rev.Stat. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Sherry Sellars Injury No: 07-042070
Dependents: N/A
Employer: Orkin Pest Control
Additional Party: State Treasurer as Custodian of the Second Injury Fund
Insurer: Old Republic Ins. Co.
Hearing Date: November 23, 2009 Checked by: RCM/rm

On November 23, 2009, the employee, the employer and the Second Injury Fund appeared for a final hearing. The employee, Sherry S. Sellars, appeared in person and with counsel, Frank D. Eppright. The employer, Orkin Pest Control, appeared through counsel, Thomas V. Clinkenbeard. The Second Injury Fund was represented by Assistant Attorney General Richard Wiles. The primary issues the parties presented were to determine the nature and extent of the Ms. Sellars' disability and whether she requires additional medical care to cure and relieve her from the effects of her injury. For the reasons noted below, I find that Ms. Sellars' suffered permanent and total disability resulting from her April 30, 2007 accident alone, and that she requires additional medical care. I do not find any Second Injury Fund liability.

STIPULATIONS

The parties stipulated that on or about April 30, 2007 (the injury date):

1. Orkin Pest Control ("Orkin") was an employer operating subject to Missouri's Workers' Compensation law insured by Old Republic Ins. Co.;
2. Sherry Sellars was Orkin's employee, working subject to the law;
3. Ms. Sellars sustained an accident arising out of and in the course of her employment with Orkin;
4. Ms. Sellars notified Orkin of her injury and filed her claim within the time allowed by law;
5. Ms. Sellars earned a \$586.01 average weekly wage resulting in a \$390.67 weekly compensation rate for permanent total and temporary

total disability ("TTD") and \$376.55 for permanent partial disability benefits;

6. Orkin paid Ms. Sellars \$5,733.20 in TTD from May 1, 2007 through August 19, 2007 representing 15 5/7s weeks at the rate of \$364.84 per week, and 1 week of temporary partial disability totaling \$218.17 from January 18, 2008 through January 25, 2008; and,
7. Orkin provided Ms. Sellars with medical care costing \$15,270.34.

ISSUES

The parties requested the Division to determine:

1. Whether Orkin Pest Control must provide the employee with additional medical care?
2. Whether Ms. Sellars suffered any disability and, if so, the nature and extent of the Employee's disability and whether the employee is permanently and totally disabled?
3. Whether the SIF is liable to Employee for any disability compensation?

FINDINGS

The Employee testified on her own behalf and presented the following exhibits, all of which were admitted into evidence:

- A - Deposition of P. Brent Koprivica, M.D. taken August 31, 2009 along with Deposition Exhibits 1-5 (#1-411) Dr. Towle's report was taken out subject to the Second Injury Fund's objection.
- B - Deposition of Mary Titterington taken October 6, 2009 along with Deposition Exhibits 1-3 (#1-295)
- C - Deposition of Allan D. Schmidt, Ph.D. taken September 14, 2009 along with Deposition Exhibits 1-2 (#1-50)
- D - Wage Statement

The employer offered the following exhibits which were admitted into evidence:

- 1 - Deposition, James S. Zarr, MD, November 18, 2009
- 2 - Deposition, Patrick Hughes, MD, November 6, 2009
- 3 - Report, Terry Cordray, November 3, 2009
- 4 - Claim for Compensation filed March 4, 2009

Based on the above exhibits and the testimony of Ms. Sellars, I make the following findings. On April 30, 2007, claimant Sherry Sellars was employed by Orkin Pest Control in the capacity of a customer service technician whose job duties required her to operate a company van as she visited various locations where the employer was responsible for pest control. On April 30, 2007, while in the course and scope of this employment, she was involved in a vehicular accident on US Highway 50 in Jackson County, Missouri, when the van she was operating was struck from behind by a semi tractor-trailer. From the accident scene, she was transported to the Research Medical Center where she was diagnosed with a compression fracture at T12 with posterior ligamentous instability. The initial consultation note from Dr. Jonathan Chilton, generated on the date of the accident, states that claimant had "no memory for the events." On May 3, 2007, she underwent a partial hemilaminotomy at T11-T12 with hardware inserted in a posterolateral fusion from T10-L1, as performed by Dr. Chilton. The surgery notes from that day indicate the postoperative diagnosis being a T12 compression fracture with posterior ligamentous instability "perched T11-T12 facet." The type of surgery was listed as follows:

1. Partial bilateral T11-T12 hemilaminotomy;
2. Pedicle screw instrumentation and rods T10, T11, T12 and L1 (Medtronic 5.5 mm system);
3. Posterolateral fusion, T10 through L1;
4. Left iliac crest graft;
5. Local bone graft.

See, Claimant's Exhibit A at 345.

The employee was released from Research Medical Center on May 7, 2007. In follow-up, the employee continued to see Dr. Chilton, who prescribed Darvocet, and who had her in a back brace that extended from her shoulders to just above her hips. Dr. Chilton released the employee from care on August 6, 2007. He also discontinued the use of the back brace as well. He later, on January 22, 2008, gave permanent restrictions of avoiding both heavy lifting and pushing and pulling more than 30 lbs.

The employee continued to have problems both from a physical and a mental standpoint. She saw her family doctor, Dr. Ronald Janssen, on September 7, 2007 complaining of psychological problems as well as significant pain in the mid to low back. Dr. Janssen diagnosed the following:

1. Memory dysfunction;
2. Thoracolumbar pain;
3. Depressive disorder;
4. Post traumatic stress disorder.

Id. at 267.

Dr. Janssen prescribed Cymbalta and recommended counseling for the employee.

With these continued complaints, the employee was sent by the employer to Dr. Charles Donohoe, a neurologist. In his report dated September 13, 2007, Dr. Donohoe diagnosed

memory loss, disequilibrium, headaches and atagia. He also diagnosed stress as a component of these complaints. Dr. Donohoe recommended an MRI study of the head, neck, middle and lower back which were performed. In his office notes of January 30, 2008, Dr. Donohoe recommended no opiod medications for the employee's pain (which he noted were the employee's wishes in his previous note); however, he wanted to try Lidoderm patches and a TENS unit. *See*, Claimant's Exhibit A at 244. The employee testified the Lidoderm patches were of no relief; however, even though Dr. Donohoe, the authorized physician had recommended it, the TENS unit was never proffered by the employer.

During this time, the employee tried to go back to work in an accommodated position; however, because of her pain, she was only able to do so for a week and one-half; and she last worked on January 25, 2008.

The employee returned to see Dr. Donohoe, the authorized treating physician, on February 27, 2008. At that time, Dr. Donohoe noted the employee had persistent pain in the lower thoracic lumbar region radiating into the right leg. Dr. Donohoe felt chronic pain was the employee's major problem and recommended pain management. In addition, Dr. Donohoe noted that "At this time, I feel that [Ms. Sellars] cannot return to work on the 28th of February." *Id.* at 240.

The pain management recommended by the authorized treating physician, Dr. Donohoe, was not provided by the employer. Instead, the employee was sent to Dr. James Zarr on April 30, 2008 who evaluated the employee and gave the following restrictions:

1. light duty work;
2. no lifting greater than twenty (20) pounds;
3. occasional bending; and,
4. capable of performing light duty clerical work or any other sedentary work.

See, Employer's Exhibit 1 at 114.

In addition, Dr. Zarr concluded – contrary to the Employer/Insurer's authorized treating physician, Dr. Donohoe – that Ms. Sellars "has reached maximum medical improvement. I have no further treatment to recommend for her." *Id.* Eighteen months later based on these findings Dr. Zarr issued a report that Ms. Sellars suffered twenty percent (20%) permanent partial disability to her body as a whole related to her back injuries. *Id.* at 45.

Dr. P. Brent Koprivica examined Ms. Sellars on July 17, 2008 upon referral from her attorney. Dr. Koprivica, after reviewing the medical records and examining the employee, opined that Ms. Sellars was permanently and totally disabled from any gainful employment. *See*, Claimant's Exhibit B at 130. Dr. Koprivica rated Ms. Sellars' disability at fifty percent (50%) to her body as a whole for the physical aspects of her injuries; he also noted regional myofascial pain complaints as well as significant psychological/psychiatric disabilities. He agreed with the Employer/Insurer's authorized treating physician, Dr. Donohoe, that pain management treatment would be appropriate; in addition, Dr. Koprivica recommended referral to a mental health care expert for treatment. *Id.*

Ms. Sellars also was referred by her attorney to Dr. Allan Schmidt, a psychologist, who issued a report dated October 3, 2008. In that report, Dr. Schmidt agreed with Dr. Donohoe and Dr. Koprivica that the employee had major depressive disorder, a post traumatic stress disorder and a pain disorder associated with both psychological factors and a general medical condition. Dr. Schmidt rated thirty five percent (35%) body as a whole permanent partial disability with ten percent (10%) of that disability existing prior to her April 30, 2007 injury, together with twenty five percent (25%) body as a whole disability as a result of the psychological effects of her injury. *See*, Claimant's Exhibit C at 49. He also recommended referral for a psychiatric consultation to initiate psychotropic medication as well as psychological counseling to assist the employee in developing a more adaptive method for dealing with her pain physical limitations and significant life changes.

Ms. Sellars next was seen by Mary Titterington, a vocational expert, who opined that with the employee's physical and mental restrictions, as well as the pain she was having, and her disabilities, she was unable to return to the open labor market. *See*, Claimant's Exhibit B at 13:4-13.

The Employer/Insurer referred Ms. Sellars to Dr. Patrick Hughes a psychiatrist, and Terry Cordray a vocational expert. Dr. Hughes opined that the while Ms. Sellars had mental problems, that they were not caused in any way by her work-related injury. *See*, Employer's Exhibit 1 at 16:13-24. Dr. Patrick Hughes' report is not believable and lacks credulity. Dr. Hughes opined that Ms. Sellars was a "drama queen" who, while she did, in fact, suffer from a "major depressive disorder with panic attacks", that it resulted from "an inherited gene". *See*, Employer's Exhibit 2 at 10:10, and 20:19-21:3. Dr. Hughes, upon cross-examination, conceded that Ms. Sellars developed this major depressive disorder subsequent to her April 30, 2007 accident. *Id.* at 22:17-21. Counsel for Ms. Sellars cross-examined Dr. Hughes utilizing the American Psychiatric Association's Diagnostic and Statistical Manual-IV-TR ("DSM-IV-TR") – which he referenced in his report – about its criteria for developing post traumatic stress disorder ("PTSD"). *Id.* at 26 and 64. Ultimately, Dr. Hughes grudgingly conceded that Ms. Sellars' accident satisfied several of the elements that the DSM-IV-TR listed as being necessary to develop PTSD. In addition, he conceded that Ms. Sellars related the symptoms that the DSM-IV-TR references as being related to PTSD. However, Dr. Hughes nonetheless refused to conclude that Ms. Sellars' accident could have caused her current psychological problems. I conclude that Dr. Hughes' was not objective and therefore I reject his opinions.

Mr. Cordray opined that, while Ms. Sellars could not return to her previous job at Orkin Pest Control, she could perform some jobs within the physical restrictions outlined by the physicians. *See*, Employer's Exhibit 3 at 13. However, Mr. Cordray did not take into account any psychological factors the employee may be experiencing. Therefore, I conclude that his report is incomplete and fails to assess accurately her vocational prospects. Ignoring the psychological impact of Ms. Sellars' injury makes Mr. Cordray's report as flawed as it would have been had he ignored the vocational impact of the physical effects of her injury.

Ms. Sellars was a very credible and believable witness. I found her both truthful and factually accurate in that her testimony correlated exactly with the documentary evidence presented. I believe that she indeed does have both the physical and psychological problems of which she testified and as diagnosed by several experts. I note that Dr. Charles Donohoe – the Employer/Insurer's authorized treating doctor – together with Dr. P. Brent Koprivica and Dr.

Allan Schmidt all believed Ms. Sellars' complaints of pain and all suggested pain management and/or psychological counseling and medication. However, when Dr. Donohoe suggested pain management, the Employer/Insurer transferred Ms. Sellars' care to Dr. James Zarr who rated and immediately released her from any additional medical care. The employer also did not provide the employee with the TENS unit also recommended by Dr. Donohoe.

The Second Injury Fund did not present any witnesses or offer any exhibits.

RULINGS

The first issue to be resolved is the nature and extent of disability and whether the employee is permanently and totally disabled as a result of her April 30, 2007 work-related injury.

The claimant in a workers' compensation proceeding has the burden of proving all elements of the claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 912 (Mo.App. 2008); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997). The quantum of proof is reasonable probability. *Thorsen v. Sachs Elect. Co.*, 52 S.W. 3d 611 at 620 (Mo.App. W.D. 2001); *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Fischer v. Archdiocese of S. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990). "probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Thorsen*, 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Fischer*, 793 S.W.2d at 198.

Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). Expert Testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992). "medical causation of injuries which are not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause." *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991). Compensation is appropriate as long as the performance of usual and customary duties led to a breakdown or a change in pathology. *Bennett v. Columbia Health Care*, 134 S.W.3d 84, 87 (Mol. App. 2004).

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. *Kelly v. Banta & Stude Constr. Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992); *Hutchinson v. Tri-State Motor Transit Co.*, 71 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith v. Donco Const.*, 182 S.W. 3d 693, at 701 (Mo.App. 1986); *Bowers v. Hiland Dairy Co.*, 132 S.W. 3d 260, 263 (Mo.App. 2004). The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause and extent of disability when taken in connection with or where supported by some medical evidence.

Pruteanu v. Electro Core, Inc., 847 S.W.2d 203, 2006 (Mo.App. 1993); *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W. 2d 515, 516 (Mo.App. 1993). "While the determination of a witness's competency to testify is for the trial court, the credibility of a witness's testimony is for the fact finder to determine. *Clark v. Reeves*, 854 S.W.2d 28, 30 (Mo.App. 1993). Credibility means the capacity for being believed or credited. *Marvin E. Nieberg Real Estate Co. v. Taylor-Morley-Simon, Inc.*, 867 S.W. 2d 618, 626 (Mo.App. 1993)." *Turnbo by Capra v. City of St. Charles*, 932 S.W.2d 851, 855 (Mo.App. 1996).

Chatmon v. St. Charles County Ambulance District, 55 S.W. 3d 451 (Mo. App. 2001), outlines the basis for permanent total disability. Total disability means an inability to return to any employment and not merely an inability to return to the employment in which the employee was engaged at the time of the accident. The test for permanent total disability is a workers' ability to compete in the open labor market and that it measures the worker's potential for returning to employment. *Sutton v. V.J. Cement Contracting Company*, 37 S.W. 3d 803, 811 (Mo. App. 2000). Therefore, the critical question is whether any employer in the usual course of employment would reasonably be expected to hire this employee in his or her present physical condition. *Reese v. Gary and Roger Link, Inc.*, 5 S.W. 3d 522, 526 (Mo. App. 1999)."

The employee's vocational expert, Mary Titterington, interviewed and tested Ms. Sellars and reviewed her medical records. Ms. Titterington found Ms. Sellars to be unemployable in the open labor market. I find persuasive Dr. Koprivica's, Dr. Schmidt's and Ms. Titterington's opinions that Ms. Sellars is not employable in the open labor market and that her April 30, 2007 injury alone resulted in her permanent and total disability. Therefore, I award her permanent total disability benefits of \$390.67 per week to be paid from January 26, 2008 for the remainder of her life. In addition, I award Ms. Sellars \$405.90 in underpaid TTD benefits for the 15 5/7s weeks the Employer/Insurer paid her such benefits at an incorrect \$364.84 weekly rate.

The second issue to be resolved is whether employee is entitled to future medical treatment as a result of her April 30, 2007 work-related injury. An award of future medical benefits is appropriate if the need is demonstrated by reasonable certainty. *Landers v. Chrysler Corporation*, 963 S.W.2d 275, 283 (Mo.App. E.D. 1997). The opinions of both the Employer/Insurer's expert, Dr. Donohoe, and Claimant's experts support an award to leave future mental and psychological care open. On this point, I reject Dr. Hughes' opinions and adopt the opinions of Dr. Schmidt. Therefore, I award and leave open additional care to provide Ms. Sellars with psychiatric consultation to review medication and also to be referred for counseling to assist her in developing a more adaptive method for dealing with her cognitive and physical limitations and pain. Dr. Schmidt also recommended weekly counseling for twelve (12) months and psychiatric consultation every other month for the same period; I also award this care. Additionally, I order this treatment to be coordinated with Dr. Charles Donohoe's recommendation of pain management.

This Award is subject to a twenty five percent (25%) lien for services rendered by Attorney Frank D. Eppright.

Date: _____

Made by: _____

Carl Mueller
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation