

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

Injury No.: 99-065506

Employee: Mickey Snider
Employer: Cooperative Workshop, Inc.
Insurer: Sheltered Workshop Insurance (Self-Insured)
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 (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence, read the briefs, heard oral arguments, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the Administrative Law Judge Henry T. Herschel, dated November 4, 2008, as supplemented herein.

The findings of fact and stipulations of the parties were accurately recounted in the award of the administrative law judge and are adopted by the Commission.

The administrative law judge concluded that employee suffered a work-related back injury in March 1999, which resulted in employee's permanent total disability and the need for future medical treatment. The administrative law judge found employer to be liable for employee's permanent total disability benefits, reimbursement for past medical expenses, and future medical treatment. The administrative law judge determined there to be no Second Injury Fund liability.

The Commission agrees with the administrative law judge in finding that there is no Second Injury Fund liability for employee's permanent total disability. However, the Commission does not agree with the administrative law judge's analysis in arriving at that conclusion.

The administrative law judge essentially found that there is no Second Injury Fund liability because employee's preexisting ailment does not reach the threshold of 12.5% permanent partial disability of the body as a whole.

First of all, the administrative law judge erred in evaluating Second Injury Fund liability before first assessing employee's permanent disability attributable to the last injury alone, as required in Section 287.220.1 RSMo.

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." The employer's liability must first be considered in

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isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Had the administrative law judge first considered employer's liability in isolation, he would have determined that any discussion regarding Second Injury Fund liability is superfluous in light of the fact that he found employee to be permanently and totally disabled solely as a result of the March 8, 1999, work-related injury.

Also, even if it was determined that employee was permanently and totally disabled as a result of a combination of employee's preexisting disabilities and employee's disabilities resulting from the last injury, the administrative law judge's mention of the percentage thresholds for preexisting permanent disabilities provided in section 287.220 RSMo is misplaced. It is misplaced because the thresholds do not apply when an employee is determined to be permanently totally disabled. The thresholds only apply when the previous disability or disabilities and the last injury combine to result in only permanent partial disability, not permanent total disability. Section 287.220.1 RSMo.

The November 4, 2008, award and decision is attached and incorporated to the extent it is not inconsistent with this supplemental opinion.

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

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

Given at Jefferson City, State of Missouri, this 29th day of September 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Mickey Snider

Injury No. 99-065506

Dependents: N/A

Employer: Cooperative Workshop, Inc.

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

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

Insurer: Sheltered Workshop Insurance (Self Insured)

Hearing Date: July 31, 2008

Checked by: HTH/scb

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: March 8, 1999.
5. State location where accident occurred or occupational disease was contracted: Sedalia, Pettis 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: Slipped on ice on stairs and hurt her right shoulder and her lower back.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Right shoulder and lower back.
14. Nature and extent of any permanent disability: N/A.
15. Compensation paid to-date for temporary disability: \$525.16.
16. Value necessary medical aid paid to date by employer/insurer? \$7,851.73.

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17. Value necessary medical aid not furnished by employer/insurer? \$83,480.37.
18. Employee's average weekly wages: \$319.23.
19. Weekly compensation rate: \$212.89.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: Prior medical bill and future benefits.
22. Future requirements awarded: Medical care.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Mickey Snider	Injury No. 99-065506
Dependents:	N/A	Before the DIVISION OF WORKERS' COMPENSATION
Employer:	Cooperative Workshop, Inc.	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Treasurer of the State of Missouri as Custodian of the Second Injury Fund	
Insurer:	Sheltered Workshop Insurance (Self Insured)	Checked by: HTH/scb

PRELIMINARIES

The parties appeared before the undersigned Administrative Law Judge on July 31, 2008. The Division has jurisdiction to hear this case pursuant to §287.110 RSMo 2000. The parties provided briefs on the relevant issues on approximately August 18, 2008.

STIPULATIONS

1. The employee and the employer were operating under the provisions of the Workers' Compensation Law on or about March 8, 1999;
2. The employer's liability was insured by Sheltered Workshop Insurance;
3. The employer had notice of the alleged accident and a claim for compensation was timely filed;
4. The Employee's average weekly wage was \$319.33;
5. The rate of compensation for temporary total disability was \$212.89 and \$212.89 for permanent partial disability; and
6. The employer has paid \$525.16 in TTD and \$7,851.73 in medical benefits to date.

DISPUTED ISSUES

1. Is the employer/insurer liable for claimant's medical care for her back;
2. Did the claimant injure her back when she fell on the stairs in March of 1999;
3. Is the Second Injury Fund liable for a portion of her disability;
4. Is the claimant permanently and totally disabled;

5. Is the employer/insurer responsible for future medical care?

EVIDENCE

EMPLOYEE'S EXHIBITS:

- A Incident Report
- B Medication List
- C Award from Injury No. 02-147690
- D Medical Evaluation by Dr. J. Hanson
- E Medical Report of Dr. J. Stuckmeyer
- F Medical Report of Rehabilitation Expertise L.L.C.
- G Medical Records of Dr. S. Butts, PhD.
- H Deposition of T. Cordray, M.S. and Exhibits
- I Deposition of Dr. J. Hanson and Exhibits
- J Deposition of Dr. J. Stuckmeyer and Exhibits
- K Medical Records, Volume I
- L Medical Records, Volume II
- M Medical Records, Volume III
- N Medical Bill Summary
- O Report of Injury, Dated April 26, 1999

EMPLOYER/INSURER'S EXHIBITS:

- 1 Medical Report of Dr. R. Clemens
- 2 Medical Report of Dr. T. Strouse
- 3 Medical Records of Dr. R. Hyatt
- 4 Medical Records of Dr. O. Gronstedt
- 5 Medical Records of Lab Corp. and Dr. D. Wilson
- 6 Medical Records of Dr. R. Edwards
- 7 Patient Intake Form from Headache and Pain Center
- 8 Medical Report from MidAmerican Neurospine
- 9 Medical Report from Kansas University Physicians, Inc.
- 10 Physical Therapy Evaluation from Bothwell Regional Health Center
- 11 Medical Records
- 12 Medical Records from Dr. K. Gunter
- 13 Medical Reports from Dr. R. Edwards.

SECOND INJURY FUND EXIBITS:

- I Medical Records of Capital City Medical Associates

FINDINGS OF FACTS

Mickey Snider (Claimant) is a 52-year-old woman with a General Ed Degree (G.E.D.). She received an associate's degree in business at State Fair Community College in 1995. In 1996, she started work for the Center for Human Services (The Center). It was her job to supervise a crew of clients of The Center. The Center allows its clients, all of which have some mental or physical handicaps, to be employed by local businesses to enhance their life skills and self esteem. Claimant was a supervisor of such a crew at Hayes-Wheels. In that capacity, the crews worked in their plant separating and stacking pallets. Claimant drove a forklift, but spent most of her time supervising the clients. She noted that her charges were hard workers but needed to be supervised so that they would not be injured. On March 8, 1999, she was leaving her place of employment when she slipped on an icy patch on the outdoor stairs and fell. As she was falling, she grabbed the handrail and pulled her shoulder, neck, and back. At first her shoulder seemed to be the most severely injured and the most painful. Later, her neck and back exhibited symptoms of injury.

Claimant's supervisor was notified that Claimant had suffered an injury. On the accident report, Claimant's back and shoulder were indicated. (Cl. Exh. A). Further, Claimant testified that the Report of Injury filed with the Division of Workers' Compensation also indicated injury to back and shoulder. (Cl. Exh. O).

Claimant has a history of assorted health conditions. In 1991, she was diagnosed with fibromyalgia. The fibromyalgia caused her to have upper and lower back pain. (Emp./Ins. Exh. 1, pp1-2). Claimant had a history of lower back pain and headaches dating back to 1997. (*Id.* at pp3-6; Emp./Ins. Exh. 2, pp1-2).

Prior to the March 1999 injury, Claimant had various treatments for pain in her back and her pre-existing condition of fibromyalgia. Subsequent to the March 1999 injury, she also suffered falls and strains that would not qualify for coverage under workers' compensation. The pain and disabilities of Claimant prior to the March 1999 injury were not significant enough to force her to abandon her employment as a waitress or housekeeper. She did not have shoulder or lower back restrictions before the March 1999 injury.

Claimant was treated by Dr. Edwards for her shoulder, including arthroscopic surgery. During the aforementioned treatment by Dr. Edwards, there are no medical entries describing any discomfort or treatment for any back ailments. (Emp./Ins. Exh. 6, pp3-20).

Claimant was referred to Dr. J. Hanson for treatment of her back in March 2001. At first, Dr. Hanson treated Claimant for degenerative disc disease, a condition common in most adults over the age of 40. (Cl. Exh. I, pp7, 12-13). He performed surgery to fuse her back at the L5-S1

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disc level in May 2001. (*Id.* at 16; see also Cl. Exh. 2, tab 12, pp554-555). Dr. Hanson provided the opinion that:

- Q. Doctor, do you have an opinion based on a reasonable degree of medical certainty as to whether trauma can aggravate or accelerate that degenerative condition?
- A. I believe that an unusual force on stress applied to a weakened anatomic structure such as a disc could predispose to injury.
- Q. Okay. Do you have an opinion based on a reasonable degree of medical certainty as to whether trauma can increase the symptomology of the disease?
- A. I believe that it can.
- Q. Okay. Is this the type of disease -- and I believe I asked you this before -- where the symptoms can come and go?
- (*Id.* at p 23).

Claimant testified that she did not complain more often about her lower back because after her accident the shoulder injury was more painful. She also believed that the pain medication masked the pain of her lower back.

Claimant employed Mr. T. Cordray, a vocational expert, to determine if she reasonably could be expected to be employed. (Cl. Exh. F).

Therefore it would be my vocational rehabilitation opinion that Ms. Snider is currently totally disabled from all jobs in the labor market through the combination of limitations incurred in her work related injury as well as her preexisting medical conditions including her migraine headaches and fibromyalgia with the resultant use of medications including Neurontin, Amatriptaline, Nadolol and Imitrex. I do not believe it is reasonable to expect that an employer in the State of Missouri in the normal course of business would retain an individual who presents as Ms. Snider and that she is totally and permanently disabled from all jobs in the labor market. (Cl. Exh. F, p18).

Dr. J. Stuckmeyer was hired by Claimant to evaluate her and he determined that she was at 35% permanent partial disability for lower lumbar spine and 20% to her right shoulder. He also found 10% to PPD to cervical spine. (Cl. Exh. E, p9).

Claimant was treated by Dr. Kloster for pain. He provided her with a series of epidural injections and spinal tap stimulator and pump. (Cl. Exh. L, tab 20, pp360-370).

CONCLUSIONS OF LAW

Is the employer/insurer liable for claimant's medical care for her back?

Claimant argues that she should receive medical reimbursement for the medical treatment for her back. The Employer/Insurer argues that she never asked for treatment, that treatment was ineffectual, and that the medical bills were already paid.

The Employer/Insurer had notice of the injuries to Claimant's shoulder and back. There is no doubt that prior to the injury of March 1999 she complained of pain in her back, but that fact does not preclude that a sudden, traumatic slip, fall, and the jolt of grabbing a handrail on an icy stair could have caused a traumatic injury to her back as well as the injury to her shoulder. What the injury report to employer and the Report of Injury to the Division of Workers' Compensation demonstrates are that the Employer/Insurer was on notice that there are two injuries, not one. Sections 287.420 or 287.430 RSMo requires a claimant to notify an employer of the fact of an injury. The need for medical follows from that notice. As noted in Brown v. Douglas Candy Company:

The purpose of the statute is designed to give the employer timely opportunity to investigate the facts pertaining to whether an accident occurred, and if so, to give the employee medical attention in order to minimize the disability. (Emphasis added.) Brown v. Douglas Candy Company, 277 S.W.2d 657, 662 (Mo.App.W.D.1955).

I believe that the employer/insurer was on notice that there was a back injury related to Claimant's injury. Claimant testified she told the employer/insurer she needed medical care and then sought treatment when her employer ignored her. Seeking treatment when the employer does not provide it allows for Claimant to obtain a doctor of her choosing. As is noted in Blackwell v. Puritan-Bennett Corp.:

The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those costs against his employer. Therefore, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. Hawkins v. Emerson Electric Co., 676 S.W.2d 872,

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880 (Mo.App.1984). Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App.E.D.1995).

The Employer/Insurer proposes a proposition that Claimant's medical care did not "cure or relieve" her and, therefore, they are not liable for the injury. That is a unique argument, but without citation I will discount it as not consistent with the intent of the legislation to provide medical treatment to all injured employees regardless of medical outcome.

The Employer/Insurer also contend that all of the bills are paid and, therefore, they are not liable for them. Under §287.270 RSMo:

No savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder...

Claimant was injured on the job and should have been provided medical care. The medical cost incurred by Claimant should be reimbursed. See Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818, 822 (Mo. banc 2003). A review of Claimant's exhibits indicate that Claimant's insurance paid \$80,771.33 and Claimant paid \$2,709.04, for a total of \$83,480.37¹. (Cl. Exh. N). The employer/insurer are liable for the bills for treatment and surgery.

Did the claimant injure her back when she fell on the stairs in March 1999?

Claimant alleges that the injury of March 1999 is the cause of her injuries to her back. As noted in Blackwell:

Claimant has the burden to prove that the injury was work related and that his symptoms were related to that injury. Cook v. Sunnen Product Corp., 937 S.W.2d 221, 223 (Mo.App.E.D. 1996) citing: Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute, 793 S.W.2d 195 (Mo.App.E.D. 1990) overruled on other grounds Hampton v. Big Boy Steel Erection, 121 S.W.3d (Mo. Banc 2003).

I believe that Claimant has met her burden to prove she suffered a back injury when she slipped and fell on the stairs to the workshop. She testified that she hurt her back at that time but that her shoulder hurt more. The failure to recognize or complain immediately about all the injuries proximately caused by an occupational injury is not an absolute bar to compensation. If

¹ There is a hint in Employer/Insurer's brief that some of the bills are for other ailments besides the treatment of Claimant's lower back. This award is only for the payment of treatments directly related to Claimant's back and for no other medical charges.

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complaints of pain from an injury are far removed from the date of injury, it would naturally go to the credibility of the claim. It is also not a bar that Claimant did not raise her back pain at every possible occasion on her medical visits. See generally: Cass v. City of Rolla, 73 S.W. 3d 884, 888 (Mo.App.S.D. 2002). In the instant case, the claimant clearly gave timely notice to her employer of her injury to her back. Claimant also had treatment at the Bothwell Hospital, Dr. M. Dittmer, Dr. D. Kloster, and finally she had surgery by Dr. Hanson on the L5-S1 level. At his deposition Dr. Hanson believed that the long history of degenerative disc disease was aggravated by her March 1999 fall. (Cl. Exh. I, pp12-13).

The lower back pain that Claimant suffered after her fall radiated down her leg and was sufficiently different to lead me to believe that the fall was a separate injury. Finally, Dr. J. Stuckmeyer noted that the surgery that Dr. Hanson performed would not have been performed to correct the symptoms of fibromyalgia. As Dr. Stuckmeyer noted:

- Q. And fibromyalgia could be causing her back pain?
- A. Fibromyalgia would not have been the diagnosis that would lead to the development of a surgical instrumentation fusion. I believe I testified there is no surgical procedure for treating fibromyalgia.
- Q. On March 99, Ms. Snider slipped but she did not fall, correct. She did not fall to the ground.
- A. I believe I commented that she jerked backwards and also commented she did not fall on her buttocks.
- Q. And a slip without a fall, could that have caused her low back problems?
- A. It could, yes.
- Q. Realistically could it have caused the low back problems?
- A. Yes, sir.
- Q. And even if she wasn't complaining about it until six or seven months after the primary injury?
- A. You know, counselor, I believe I have been relatively clear in my response to this. And going back to paragraph 3 and paragraph 4. Based on review of the medical records, I commented that there was a time frame in October of 2000. I commented that there was a consultation predating that with Dr. Ditmore, I believe, describing some radicular type symptoms.
- On paragraph 4, I questioned the patient regarding this discrepancy and she commented the most symptomatic symptoms initially were related to the shoulder and cervical spine and she commented however in the fall she suffered injury to her lower back and that her upper extremity condition was addressed, her lower back condition became more symptomatic. That is my recollection of the discussion that I had specific to this discrepancy.
- (Cl. Exh. J, pp61-62; see also Depo. Exh. 2, p8).

It is the Commission's duty to determine credibility as the Court in Smith v. Richardson Brothers Roofing noted:

In our review of the foregoing evidence, we have kept in mind that the "Commission is the sole judge of the credibility of the witnesses." Reese v. Gary & Roger Link, Inc., 5 S.W.3d 522, 525 (Mo.App. 1999). "Additionally, the Commission has sole discretion to determine the weight given to expert opinions." *Id.* "[T]he extent and percent of disability is a finding of fact within the Commission's discretion and the Commission is not bound by the expert's exact percentages." Jones v. Jefferson City Sch. Dist., 801 S.W.2d 486, 490 (Mo.App. 1990). "The testimony." *Id.* Hence, " 'when medical theories conflict, deciding which to accept is an issue peculiarly for determination of the Labor and Industrial Relations Commission.' " Grimes v. GAB Bus. Servs., Inc., 988 S.W.2d 636, 641 (Mo.App. 1999) (quoting Hawkins v. Emerson Elec. Co., 676 S.W.2d 872, 877 (Mo.App. 1984)). Smith v. Richardson Brothers Roofing, 32 S.W.3d 568, 575 (Mo.App.S.D. 2000).

I find Claimant credible, and the medical records demonstrated that although she had a history of back complaints, after the fall of March 1999 she had a new and significant injury to her back. This conclusion is based on the opinions of her treating and expert physician and the medical records of her numerous treatments for back pain since March 1999. Copeland v. Thurman Stout, Inc., 204 S.W.3d 737, 743 (Mo.App.S.D. 2006).

Is the Second Injury Fund liable for a portion of her disability?

As to the issue of permanent total disability and its liability, I conclude that the Second Injury Fund (SIF) is not liable for coverage of Claimant because her ailment does not reach the threshold of 12.5% body as a whole before the March 1999 injury. This is based on the medical records and the testimony of Claimant in which she noted that she was capable of a number of jobs before the March 1999 injury and was not significantly disabled. By her own testimony, the fibromyalgia, headaches, and broken wrist did not restrict her from working as a waitress, housekeeper, and attending school. She was an active and fully functional adult before her injury with no restrictions whatsoever in her activities. Section 287.220 RSMo requires the pre-existing injuries must "combine to result in disability substantially greater than the last injury." Miller v. State Treasurer 678 S.W.2d 808, 809 (Mo.App.W.D. 1998). The injury of March 1999 was in its result far more severe than any of the ailments that Claimant suffered before. The liability for permanent total disability, if applicable, will be the responsibility of the Employer/Insurer.

Is the claimant permanently and totally disabled?

When determining that a Claimant is permanently totally disabled, one must determine the Claimant's ability to function in the labor force. In Richardson, the Court noted:

Under Missouri law, a Workers' Compensation claimant alleging permanent disability must adduce medical evidence demonstrating with reasonable certainty that the disability is in fact permanent. Cochran, 995 S.W.2s at 497. There is nothing talismanic about the phrase "reasonable certainty." The words a medical expert uses when testifying are important, not in themselves, but as a reflection of any doubts [one] may have about the permanence of the injury. *Id.* (quoting P.M. v. Metromedia Steakhouses Co., 931 S.W.2d 846, 849 (Mo.App. 1996)). Total disability means the inability to return to any reasonable employment. *Id.* It does not require that the claimant be completely inactive or inert. *Id.* The determination of whether [Claimant] was totally and permanently disabled was a question of fact for the Commission. *Id.* The Commission does not have to make its decision only upon testimony from physicians, it can make its findings from the entire evidence. Cochran, 995 S.W.2d at 497. Smith v. Richardson Bros. Roofing, 32 S.W. supra at 573.

Mickey Snider is significantly disabled. She has lost weight, cannot perform a number of the most basic daily activities. But was this condition brought on solely by the March 1999 accident? Claimant testified that her shoulder is doing "very well" and had "minimal" complaints with it. Claimant has a significant injury to her back that has not, and may very well not be, cured in her lifetime. The evidence from Dr. Stuckmeyer is not refuted by any evidence in the record. Dr. Stuckmeyer notes:

- Q. Yes. And you qualified your answer to Mr. Kenter by saying there was some discrepancy about the back.
- A. Yes, sir.
- Q. So to get to that conclusion, you're assuming it's true her statement that she truly did have insult to her back in March 1999?
- A. Yes, sir.

* * *

And then your final opinion, I believe to Mr. Kenter, is if we look at her global situation, consider everything that's happened to her in your opinion she may be unemployable in the labor market. That's my opinion. I opined that she was permanently and totally disabled.

(Cl. Exh. J, pp45-46).

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Dr. Kloster attempted to relieve Claimant's pain by three epidural injections and implanted a permanent spinal cord stimulator and pump. (Cl. Exh. C, tab 20, p360). It was Claimant's testimony that the pump was removed because it did not relieve her pain. At this point, Claimant relies on numerous medications to obtain relief from her constant pain. (Cl. Exh. B).

Mr. Cordray, a vocational expert, testified that Claimant had less than a one percent chance to obtain employment in the market place. (Cl. Exh. 14, pp29-30). Claimant cannot sit or stand for more than 15 minutes at a time. Mr. Cordray noted:

It is noted that Ms. Snider must rotate between sitting and standing throughout the day and must lie down on a regular basis. This would prevent her from (sic) doing any jobs in the labor market. An employer in the normal course of business does not permit an employee to lie down for 30 minutes each two hours on even their best day. (Cl. Exh. F, p17).

More importantly, the evidence, although questioned, is substantially uncontradicted by any other evidence. Unimpeached evidence is entitled to some weight. As noted by Court of Appeals:

Generally, acceptance or rejection of medical evidence is for the Commission and it is free to disbelieve uncontradicted and unimpeached testimony. Alexander v. D.L. Sitton Motor Lines, 851 S.W.2d 525, 527 (Mo. Banc 1993). However, "when a workers' compensation record shows no conflict in the evidence or impeachment of witnesses, 'the reviewing court may find the award was not based upon disbelief of the testimony of the witnesses.'" Houston v. Roadway Express, Inc., 133 S.W.3d 173, 179 (Mo.App.2004), quoting Corp v. Joplin Cement Co., 337 S.W.2d 252, 258 (Mo. Banc 1960). "[T]he Commission may not arbitrarily disregard and ignore competent, substantial and undisputed evidence of witnesses *who are not shown by the record to have been impeached*, and the Commission may not base their finding upon conjecture or their own mere personal opinion unsupported by sufficient competent evidence." *Id.* [Emphasis in original.] These rules are not in contradiction and are compatible. "If the Commission expressly declares that it disbelieves uncontradicted or unimpeached testimony, or if reference to the award shows that Commission's disbelief of the employee or his doctor was the basis for the award, then the *Alexander* rule attends." *Id.* "On the other hand, the *Corp* rule attends where the record is wholly silent concerning the Commission's weighing of credibility." *Id.* Copeland v. Thurman Stout, Inc., 204 S.W.3d 737, 743 (Mo.App. S.D.2006).

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The evidence and opinions of Claimant, Dr. Hansen, Dr. Stuckmeyer, and Mr. Cordray, although vigorously questioned, stand untarnished and must be a basis for an award of total permanent disability. I believe she was permanently totally disabled by the March 1999 accident.

Is the employer/insurer responsible for future medical care?

Due to the fact that her spinal surgery did not resolve her pain, I find that there is a "reasonable probability" that Claimant may need future treatment, including but not limited to medical, physical therapy, and further surgery. Sifferman v. Sears Roebuck & Co., 906 S.W.2d 823, 828 (Mo.App.S.D. 1995). The employer/insurer is liable for her future medical treatment.

CONCLUSION

The Employer/Insurer is liable for payment of PTD of \$212.89 per week to Claimant starting May 29, 2001, and for the rest of her life. (Cl. Exh. I, pp12-30). This is the date Claimant was released from surgery. Prior medical bills for treatment of Claimant's back total \$83,480.37. (In the event that any of these bills can be shown to be not directly related to the treatment of Claimant's back, those bill amounts should be deducted.) Finally, Claimant is entitled to future medical care and treatment for her lower back. The attorney, Jerry Kenter, should receive a lien of 25% on the award and future payments.

Date: _____

Made by: _____

Henry T. Herschel
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey Buker
Director
Division of Workers' Compensation