

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

Injury No.: 98-177043

Employee: Mary Ann Speckhals

Employer: ALS Association

Insurer: TIG Insurance Company

Date of Accident: November 6, 1998

Place and County of Accident: Cole County, Missouri

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. Pursuant to section 286.090 RSMo, subsequent to reviewing the evidence, reading the briefs, hearing oral argument and considering the entire record, the Commission modifies the award and decision of the administrative law judge dated July 22, 2005. The award and decision of Administrative Law Judge Robert J. Dierkes, issued July 22, 2005, is attached and incorporated by this reference.

All findings of fact and conclusions of law made by the administrative law judge are affirmed, except for the issue involving future medical care and treatment.

As to the issue of future medical care and treatment, the administrative law judge found the following:

“Claimant is still in need of medications for her migraines and occipital neuralgia. As I find that the work-related accident is the cause of the occipital neuralgia and has caused an increase in the frequency and severity of the migraines, I find that Employer and Insurer should be responsible to continue to provide those medications, as well as to provide physician oversight of those medications.”

Based on the above finding, the administrative law judge ordered the employer/insurer to pay a lump sum amount to the employee for her future medical needs, in the amount of \$25,000.00, with the payment to absolve employer and insurer from any further liability concerning this issue.

The Commission finds awarding employee the sum of \$25,000.00 for her future medical needs, and absolving employer and insurer from any additional liability concerning this issue, to be an arbitrary and capricious determination, and consequently, not based on the substantial and competent evidence in the record. Accordingly, the Commission reverses and modifies this part of the award.

In lieu thereof, the Commission awards the employee future medical care and treatment deemed reasonable and necessary to cure and relieve her from her residual headaches attributable to the accident, and the employer is responsible for this future treatment by providing medical oversight of her necessary medications. The Commission relies on the testimony of Dr. Sher in support of this finding. Dr. Sher was unequivocal that employee would need ongoing monitoring of her medications for her headaches, which was a sequela of her injury.

Based on the above modification, the conclusion and determination by the administrative law judge that employer/insurer is to pay employee the sum of \$25,000.00 for her future medical needs, and absolve employer/insurer from any additional medical liability, is reversed. In lieu thereof, employer/insurer is to provide future medical care and treatment reasonable and necessary to cure and relieve employee from the residual headaches attributable to the accident, in the form of providing appropriate medical oversight and medical monitoring of her prescription medications.

The remainder of the award issued by the administrative law judge is affirmed. The award and decision of Administrative Law Judge Robert J. Dierkes, dated July 22, 2005, as modified, is attached and incorporated by reference.

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

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

Given at Jefferson City, State of Missouri, this 25<sup>th</sup> day of August 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

AWARD

Employee: Mary Ann Speckhals

Injury No. 98-177043

Dependents: N/A

Employer: ALS Association

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

Additional Party: N/A

Insurer: TIG Insurance Company

Hearing Date: May 18, 2005      Checked by: RJD/tmh

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: November 6, 1998.
5. State location where accident occurred or occupational disease was contracted: Cole 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 was driving to an appointment and was involved in a motor vehicle collision.
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: Head, neck, hands.
14. Nature and extent of any permanent disability: 50% permanent partial disability of the body as a whole.
15. Compensation paid to-date for temporary disability: \$67,175.80.
16. Value necessary medical aid paid to date by employer/insurer? \$96,379.11.
17. Value necessary medical aid not furnished by employer/insurer? \$45.00.
18. Employee's average weekly wages: \$571.25.
19. Weekly compensation rate: \$380.83/\$294.73.
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:

|  |                    |
|--|--------------------|
| 200 weeks of permanent partial disability benefits:  | \$58,946.00        |
| 29 3/7 weeks of temporary total disability benefits: | \$11,207.28        |
| Reimbursement of medical costs:                      | \$ 45.00           |
| Lump sum future medical costs:                       | \$25,000.00        |
| Attorney's fees:                                     | <u>\$ 2,800.00</u> |

TOTAL: \$97,998.28

23. Future requirements awarded: None.

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

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

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Mary Ann Speckhals

Injury No: 98-177043

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

Dependents: N/A

Employer: ALS Association

Additional Party: N/A

Insurer: TIG Insurance Company

Checked by: RJD/tmh

### ISSUES DECIDED

An evidentiary hearing was held in this case in Columbia on May 18, 2005. The parties requested leave to file post-hearing briefs, which leave was granted. The case was submitted on June 21, 2005. It is noted here that the undersigned administrative law judge issued a temporary or partial award in this case on March 26, 2001. It is also noted that on September 28, 2000, the undersigned administrative law judge approved a STIPULATION FOR COMPROMISE SETTLEMENT AS TO CARPAL TUNNEL INJURIES ONLY in this case.

The hearing was held to determine the following issues:

1. Whether Employer and Insurer shall be liable for additional temporary total disability or permanent total disability benefits from and after July 4, 2003;
2. Whether Employer and Insurer shall be ordered to reimburse Claimant for medical bills and charges she incurred, allegedly due to the work-related accident of November 6, 1998;
3. Whether Employer and Insurer shall be ordered to provide future medical treatment for Claimant, pursuant to Section 287.140, RSMo, to cure and relieve Claimant from the effects of her work-related injury;
4. Whether Employer and Insurer failed to comply with the TEMPORARY OR PARTIAL AWARD issued March 26, 2001, and, if so, whether any sums should be doubled for such failure;
5. The liability, if any, of Employer and Insurer for permanent partial disability benefits or permanent total disability benefits;
6. Whether costs and attorney's fees shall be awarded pursuant to Section 287.203 or 287.560, RSMo; and
7. The amount of credit due to Employer and Insurer for the partial settlement of September 28, 2000.

## *STIPULATIONS*

The parties stipulated to the following:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue is proper in Cole County and adjoining counties and that Boone County is an adjoining county to Cole County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations;
4. That the rates of compensation are \$380.83/\$294.73, based on an average weekly wage of \$571.25;
5. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
6. That Claimant Mary Ann Speckhals sustained an accident arising out of and in the course of her employment with ALS Association on November 6, 1998;
7. That the notice requirement of section 287.420 is not a bar to this action;
8. That TIG Insurance Company fully insured the Missouri workers' compensation liability of ALS Association at all relevant times;
9. That Employer and Insurer have paid medical benefits in the amount of \$96,379.11; and
10. That Employer and Insurer have paid TTD benefits totaling \$67,175.80, representing payment from February 15, 2000, through July 4, 2003, a total of 176 2/7 weeks.

## *EVIDENCE*

The evidence consisted of the testimony of Claimant, Mary Ann Speckhals; the testimony of Nancy "Nonnie" Pyle; the testimony of Patricia Fetters; the testimony of Elaine Fosler, Claimant's mother; the testimony of Robert Speckhals,

Claimant's husband; extensive medical records; extensive correspondence; educational records; medical reports and evaluations; the deposition testimony of: Dr. Robert Silvers, Dr. Jeffrey Belden, Dr. Allyn Sher, Dr. Jon Rupright, Dr. Renee Stucky, Dr. Patrick Caffrey, Dr. Michael Ryan, and Mr. Gary Weimholt; and numerous other documents.

## *FINDINGS OF FACT AND RULINGS OF LAW*

I find from the evidence that Claimant, Mary Ann Speckhals, was born on May 23, 1965, and began work for Employer in October 1997 as a "patient services coordinator". I find that Employer is a benevolent organization which provides support to patients who are terminally ill with Amyotrophic Lateral Sclerosis, and to their families. This required Claimant to travel to Jefferson City, Springfield, Branson, Kirksville, and elsewhere to meet with patients, families and support groups, and to attend funerals. This required Claimant to drive quite a bit. Claimant estimated her driving at an average of 200-300 miles per week. Prior to working for Employer, Claimant had worked as a social worker in a nursing home, and as a home health social worker.

In 1996, Claimant began treatment with Dr. Jeffrey Belden, her family physician, for migraine headaches. According to Dr. Belden's records, these were related to her menstrual cycle. They appeared to be well-controlled with medication, however, on an August 11, 1998, visit to Dr. Belden, Claimant reported worse headaches in the last month, or so, with frontal location with nausea, photophobia, and sometimes scotomata. On that date, Dr. Belden prescribed Naprosyn to be taken "during the time before her menses, since that's the major exacerbation". Dr. Belden also gave Claimant samples of Migranal. On November 2, 1998, Claimant saw Dr. Robert Silvers, a neurologist, upon referral from Dr. Belden for "jaw popping", which was diagnosed as possible temporomandibular joint syndrome. Dr. Silvers noted at that time that Claimant "feels that her migraine is doing relatively well at the present time."

I find that on November 6, 1998, Claimant was on her way to visit a patient in Linn, Missouri, and was driving her Ford Escort eastbound on Highway 50 in Jefferson City, when she stopped for the stoplight at Broadway Street. There were two vehicles stopped in front of Claimant. Claimant's vehicle was "rear-ended" by another vehicle, and the impact caused a chain reaction, with Claimant's vehicle being propelled into the vehicle in front of hers, and that vehicle being propelled into the next vehicle. Claimant called Employer and informed Employer of the accident and that she would not be keeping her appointment with the patient. The next day (Saturday) Claimant noticed that her left arm was bruised and she began to feel soreness in her neck. On Sunday, she noticed her neck getting stiffer.

On November 10, 1998, Claimant saw her family physician, Dr. Jeffrey Belden. She was diagnosed with a neck strain, and told to take Flexeril and Ibuprofen, and not to drive out of town. On November 17, 1998, she again saw Dr. Belden, complaining of more pain in the right neck and shoulder region. Claimant informed Dr. Belden that she was ready to go back to work the following week, and would be driving to Springfield and carrying a lot of equipment with her. Dr. Belden thought it was all right to drive to Springfield, but that Claimant should not lift over 20 pounds. The revised diagnosis was neck strain and trapezius strain, both accident-related.

Claimant returned to see Dr. Belden December 9, 1998. Her pain was worse and she had seen a chiropractor. She also complained of a "fast vibrating sensation up over the skull posteriorly and then sometimes bilaterally on the face." Dr. Belden recommended physical therapy or conservative chiropractic measures, and Claimant apparently preferred to see a chiropractor. On December 16, 1998, Claimant was seen by Dr. Jennifer Clark of Columbia Orthopaedic Group at Employer's request. Claimant complained of numbness involving her entire head, headaches, aching and burning in both shoulders, aching and burning in the right hip, and numbness in both hands. Dr. Clark's diagnosis was "cervical strain and post-traumatic headaches". Dr. Clark recommended use of prescription Ibuprofen and a physical therapy program, and also recommended a cervical MRI. The cervical MRI was done on December 23, 1998, and was interpreted as being essentially normal, except for a small central disc protrusion at C5-6 with minimal indentation of the thecal sac. Also on December 23, 1998, Claimant saw Dr. Clark again, and it was noted that Claimant was "doing about the same", but had "also been having her tension headaches". Claimant was to start her physical therapy and was to take Nortriptyline at night for her headaches.

On January 5, 1999, Dr. Clark first made the diagnosis of occipital neuralgia. Dr. Clark recommended injections by an anesthesiologist and continued use of Nortriptyline. Dr. Myla Cunningham, an anesthesiologist, administered a bilateral occipital nerve block. On January 19, 1999, Claimant reported to Dr. Clark that the nerve block seemed to have helped, and that the Nortriptyline was helping with her sleep and seemed to be preventing some of her headaches. The physical therapy was moving along slowly, but well. However, on February 1, 1999, Claimant reported to Dr. Clark a flare of her pain when she was required to drive 500 miles in three days. She had a horrible headache. On February 3,

1999, Claimant phoned Dr. Clark's office to advise that the tingling in her face had returned. Dr. Clark decided at this point that Claimant should see a neurologist.

Claimant was seen by Dr. Robert Silvers, a neurologist, on February 24, 1999. As noted, Dr. Silvers had seen Claimant once before, on November 2, 1998, just four days before her work-related automobile accident. Dr. Silvers felt it was necessary to obtain an MRI of the brain, and this was done on March 2, 1999, at Boone Hospital Center, and was interpreted as completely normal. Dr. Silvers prescribed Depakote for "post-traumatic vascular headache complaints". Claimant was seen by Dr. Jennifer Clark again on April 2, 1999, and was given a prescription to begin physical therapy. Claimant saw Dr. Silvers on April 8, 1999, and it was noted that therapy had begun at Health South, although the records of Health South show that therapy was actually commenced on April 12, 1999. Dr. Silvers noted that Claimant had improvement in migraine frequency, experiencing less than one headache per week. She remained on Depakote, Atenolol, Claritin, Migranal, Relafen, Nortriptyline, and Flexeril. Claimant completed her therapy at Health South on May 24, 1999.

Sometime in the summer of 1999 (the date is unclear from the evidence), Claimant resigned her position with Employer, due to her inability to tolerate the driving. On August 12, 1999, Claimant again saw Dr. Robert Silvers, who noted that Claimant "has had difficulty with migraine, the last occurring two weeks ago." Dr. Silvers also noted that, since the motor vehicle accident, Claimant "has had occasional sharp shooting pain, parietal occipital, right greater than left", as well as an accompanying "warm sensation". Claimant was continued on her same medications.

Claimant began working for the Columbia Public Schools in August 1999 as a vocational evaluation aide at the Career Center. On September 14, 1999, Dr. Jeffrey Belden saw Claimant for a physical examination at the request of Columbia Public Schools. As part of Dr. Belden's notes from that examination, Dr. Belden wrote: "She hasn't had any migraines for six months. They had been almost every two days."

On February 15, 2000, Claimant was again seen by Dr. Silvers. The notes for this visit state:

The patient is seen in neurologic follow up. The patient's Depakote level was 99.2. The patient is experiencing headache with an average frequency of three per week. The patient describes headache as bifrontal and pulsatile, associated with nausea, vomiting, photophobia, and phonophobia. The patient remains intolerant of disagreeable odors. The patient complains of a burning sensation, painful, in the occipital region.

Dr. Silvers recommended another occipital nerve block, as well as a trial of Sansert and Depakote. February 14, 2000, was the last day that Claimant worked for Columbia Public Schools, and she has not sought work since. Dr. Silvers indicated in writing that Claimant was unable to work from February 15, 2000, through July 19, 2000.

On May 12, 2000, Claimant saw Dr. Jeffrey Belden. His office note states:

Mary Ann has had quite a difficult time with her migraines since an exacerbation that was accident related. She had a past history of migraine headaches that were well regulated with PRN Imitrex or Zomig. Then on November 6, 1998, she sustained injuries from an automobile accident and has had posttraumatic migraine and occipital neuralgia ever since then. It's been quite difficult to control. She's been seeing Dr. Silvers in neurology. He gave her Depakote which markedly increased her appetite and she gained weight. Sansert was not effective. Topamax is helping but as her dose has been tapered upward she's had increasingly worse side effects.

She's been off work since February 15 through June 15. There's a lot of conflict coming up at work since she was driving when she was injured and it's considered work related. There's litigation beginning to happen between her employer's insurance carrier and herself. "They don't think I'm sick." They allege that since she had migraines before her accident that they shouldn't have to be covering this now.

Currently her mood is about 2 on a 10 scale, though it had been 7 on a 10 scale prior to the February work absence. Her sleep is poor. Her concentration and memory are somewhat impaired. She isn't suicidal, there are no psychotic features.

Currently she's had a 14 pound weight loss, diarrhea, sharp lower abdominal pains, a bad taste in her mouth, no appetite and impaired memory and concentration and is depressed and tearful.

Dr. Belden recommended that Claimant reduce her Topamax dose to 50 mg. twice a day and to notify Dr. Silvers of the reduction in dosage. Dr. Belden also recommended counseling, and prescribed Nortriptyline for depression as well as for

migraine prophylaxis.

Claimant saw Dr. Silvers on July 31, 2000. Dr. Silvers stated that Claimant's migraine symptoms were thought to be somewhat better controlled on Topamax, and that Claimant was tolerating the Topamax well. Dr. Silvers noted that Claimant "is felt to be somewhat improved with migraine-related symptoms." Dr. Silvers also stated: "She is to continue present medications and to return for neurologic follow up in 4-6 months. Should her symptoms continue to respond to treatment, I would not object to a trial of return to work."

Claimant was seen by Dr. David Peeples, a St. Louis neurologist, on October 16, 2000, at the request of Employer-Insurer. Dr. Peeples issued a report dated November 16, 2000, in which he opined that Claimant was not suffering from occipital neuralgia, that Claimant had sustained a cervical strain in the automobile accident, and that her cervical strain was at maximum medical improvement. Dr. Peeples also opined in his report that the cervical strain may have caused an exacerbation of Claimant's underlying migraine disorder, but that "at the present time her headaches are fully consistent with migraine". Dr. Peeples opined that "her current headaches are most likely a continuation of her preexistent migraine syndrome. Any exacerbation is probably minimally contributory, if at all, this far out from the incident."

On November 3, 2000, Claimant was seen by Dr. Lynn Mitchell of Progressive Spine Care & Rehabilitation in Columbia, upon referral from Dr. Robert Silvers, for neck and upper back pain with associated headache. Dr. Mitchell recommended a regimen of physical rehabilitation, which she began.

On December 4, 2000, Claimant saw Dr. Silvers. Dr. Silvers noted that Claimant was undergoing physical rehabilitation with Progressive Spine Care. Dr. Silvers noted that Claimant was still having occipital neuralgic pain as well as symptoms suggesting muscle contraction headache complicating migraine. Dr. Silvers felt that Claimant was doing well on current medications, and no changes were made. On that date, Dr. Silvers wrote a work excuse "until June 5<sup>th</sup>, 2001".

On February 13, 2001, Dr. Lynn Mitchell issued a "cervical discharge report", releasing Claimant from formal physical rehabilitation. Dr. Mitchell assessed Claimant's response to rehabilitation as "good" with "significant improvement".

Dr. Robert Silvers testified by depositions taken June 16, 2000, and February 2, 2001. Dr. Silvers' testimony was consistent with his records. Dr. Silvers testified that, as a result of the work-related motor vehicle accident of November 6, 1998, Claimant sustained post-traumatic migraine headaches, cervical strain, occipital neuralgia, as well as an exacerbation of her preexisting migraine headaches. As of February 2, 2001, Dr. Silvers did not believe that Claimant had reached maximum medical improvement regarding these conditions, although he stated he would defer to Dr. Mitchell regarding when Claimant was at maximum medical improvement regarding the cervical strain. Dr. Silvers testified that he did not believe that Claimant could successfully return to full-time employment at that time. He testified that when he last saw Claimant on 12/4/00, he didn't pursue the issue of a return to work "contingent on her progress in spine rehabilitation."

Dr. Jeffery Belden testified by deposition taken June 20, 2000. Dr. Belden testified that he believed the work-related motor vehicle accident of November 6, 1998, was the cause of Claimant's increase in migraine symptoms, although Dr. Belden testified that he believed that to be true merely because Dr. Silvers said so. Dr. Belden testified that Claimant did not have cervical problems or occipital neuralgia prior to the 11/6/98 accident, and he believed the accident to be the cause of those conditions.

Dr. David Peeples testified by deposition taken February 21, 2001. Dr. Peeples' testimony was consistent with his written report. Dr. Peeples testified that Claimant had migraine headaches prior to the work-related motor vehicle accident of November 6, 1998, that people with migraines generally have them throughout their entire lives, and that stress can exacerbate migraines. Dr. Peeples also testified that he had little doubt that Claimant's migraines were worse after the accident, but that the exacerbation of the frequency and severity of the headaches from trauma is usually temporary and not a longstanding change. He stated that it was possible that, if Claimant's headaches are currently more severe and more frequent than before the 11/6/98 accident, it could still be due to the exacerbation caused by the accident.

On March 1, 2001, an evidentiary hearing was held in this case, and on March 26, 2001, a TEMPORARY OR PARTIAL AWARD was issued by the undersigned administrative law judge. I found that Claimant's migraines were more frequent and more severe after the November 6, 1998, work-related motor vehicle accident, and that the accident was a

substantial factor in the cause of Claimant's exacerbated migraine condition. I also found that the work-related accident caused Claimant's neck problems. Employer-Insurer was ordered to pay Claimant's medical bills, to pay TTD benefits through February 13, 2001, to pay \$2500.00 in attorney's fees and \$2591.50 in litigation costs, and to continue to provide Claimant with medical treatment. In that award, I also wrote the following:

Regarding Claimant's continuing work status, I would like to make a few additional observations. Claimant is a very intelligent young woman. Claimant and her husband have both testified that Claimant would love to return to work. Claimant's husband testified that Claimant "loved her job." It is abundantly clear to me that Claimant derived much satisfaction from her work. It is also clear that Claimant *needs* to work for her happiness and self-esteem. This is my observation from the evidence as a whole, and is perhaps crystallized in a remark found in Dr. Belden's office note of May 12, 2000: "Currently her mood is about 2 on a 10 scale, though it had been 7 on a 10 scale *prior to the February work absence.*" I would strongly encourage Claimant to return to work as soon as is reasonably possible.

Shortly after the TEMPORARY OR PARTIAL AWARD was issued, Employer-Insurer paid the TTD benefits, medical bills, attorney's fees and costs. Employer-Insurer also paid additional TTD benefits through July 4, 2003. Employer-Insurer also provided additional medical benefits for Claimant (almost \$70,000.00 in additional medical benefits).

At the time I wrote the TEMPORARY OR PARTIAL AWARD, I was of the belief that Claimant's medical condition was improving, and that she would be able to return to work and to resume her life shortly, with minimal permanent disability. Four years and \$70,000 in medical treatment later, Claimant has still not returned to work, and is claiming she is permanently and totally disabled.

At the time of the March 1, 2001, hearing, Claimant's accident-related diagnoses were basically two: exacerbated migraines and chronic cervical strain. (A possible third diagnosis, occipital neuralgia, appeared to be a "sub-diagnosis" of one or both of the other diagnoses.) However, shortly after the March 1, 2001, hearing, a new, additional diagnosis surfaced: "mild traumatic brain injury". This possible diagnosis first appeared in a report of a psychological evaluation performed on March 6, 2001, by psychologist Ruthie Moccia, in which Ms. Moccia gave "Diagnostic Impressions" of "dementia due to head trauma" and "history of vehicular injury with head trauma". On May 8, 2001, Dr. Jon Rupright evaluated Claimant for the first time for the following reason: "Mary Ann is in requesting an opinion regarding mild traumatic brain injury." Dr. Rupright's impression was that Claimant did have a mild traumatic brain injury, and recommended neuropsychology testing "to evaluate the complexities of the TBI". A neuropsychological evaluation was performed on Claimant on May 17, 2001, by Dr. Stephanie Reid-Arndt. Dr. Reid-Arndt diagnosed "Traumatic Brain Injury" and "Mild Cognitive and Personality Changes Due to TBI". A second neuropsychological evaluation was done on August 15, 2002, by Dr. Renee Stucky. Dr. Stucky felt that Claimant had "Cognitive Decline Due to TBI". This decline in cognitive function was described as difficulty in reading maps, poor concentration and memory, spatial disorientation, poor planning and judgment, and inability to follow conversations. According to Dr. Stucky, Claimant also had significant symptoms of depression, including anhedonia, dysphoric mood, hypersomnia, and social isolation and withdrawal.

In March 2002, an incident occurred that Claimant is "still pissed about". Claimant was driving her automobile in Columbia and realized she was being followed. She became very upset and felt she was being "terrorized". She eventually alerted the police who determined that the person following Claimant was a private investigator hired to perform surveillance on Claimant at the request of Employer-Insurer. Claimant testified that Insurer is "nasty and mean and I am just tired of the whole thing" and that she has "a whole lot of anger in the last seven years at TIG (Insurer)". Claimant testified that this incident "set me back six months". There are numerous references to this incident in Claimant's medical records as well, as several health care providers have noted that Claimant's functional decline appeared to coincide with this incident.

Claimant was treated for mild traumatic brain injury by Dr. Rupright through September 23, 2002. Claimant has continued to be treated by various physicians for migraine headaches, occipital neuralgia, chronic cervical strain and chronic pain syndrome.

Nancy "Nonnie" Pyle is a social worker who worked with Claimant through 1997 at Physician's Home Health Corp. Prior to the hearing, Ms. Pyle had not seen Claimant since 1997. Pyle described Claimant as the "most predicible social worker I have known in 35 years" and an "excellent communicator" who "enjoyed her work". Pyle also described Claimant as reliable, dependable, compassionate, creative, bright, hard working, and efficient.

Patricia Feters is a registered nurse who currently works as a Nurse Case Manager at Rusk Rehabilitation Center

in Columbia. Ms. Feters worked with Claimant through 1997 at Physician's Home Health Corp. Feters had not seen Claimant from 1997 until one or two years prior to the 5/18/05 evidentiary hearing, when Feters "ran into" Claimant when Claimant was a patient at Rusk. Feters described Claimant as "one of the best" social workers she had met, "right up there at the top". Feters described Claimant as being very good at crisis intervention, very "down to earth with people". Feters also described Claimant as a hard-worker, good at multi-tasking, and as friendly, pleasant, and happy.

Robert Speckhals, Claimant's husband, testified that Claimant had no memory problems prior to 11/6/98, and that Claimant enjoyed work and that her work was "fulfilling" prior to 11/6/98. Mr. Speckhals testified that now, Claimant experiences bad migraines three to five times each week, that Claimant's medications make her sleepy and groggy, and that Claimant is "basically incapacitated for days at a time". Mr. Speckhals testified that his wife "does what she can when she has good days". Mr. Speckhals testified that Claimant is irritable and angry most of the time.

Elaine Fosler, Claimant's mother, testified that Claimant was "happy-go-lucky" prior to 11/6/98, active in her church and active on the board of the Alzheimer's Society. Fosler testified that the 11/6/98 accident has changed Claimant from "an out-going person into a hermit".

Dr. Michael Ryan is a neurologist who evaluated Claimant on November 25, 2003, at the request of Employer-Insurer. Dr. Ryan testified that he believed that the 11/6/98 accident caused a whiplash-type of injury, cervical strain, and post-traumatic headaches that were muscle contraction in origin. Dr. Ryan did not believe that Claimant had sustained a traumatic brain injury, nor any closed head injury. Dr. Ryan testified that he did not believe that Claimant had a traumatic brain injury because there was no history of head trauma, and because there were no symptoms of traumatic brain injury for more than two years post-accident. Dr. Ryan testified that the 11/6/98 accident was not responsible for any exacerbation of Claimant's migraine headaches, as the frequency and severity of the headaches was a subjective thing. Dr. Ryan did not believe that Claimant sustained any permanent disability from a purely neurologic standpoint.

Dr. Patrick Caffrey is a psychologist who evaluated Claimant on October 9, 2003, at the request of Employer-Insurer. Dr. Caffrey testified to his belief that Claimant had a mild cognitive impairment of a global nature. Dr. Caffrey testified that personality testing indicated that Claimant's physical symptoms increase in times of stress, and that there is secondary gain associated with the symptoms. Dr. Caffrey believes that Claimant sustained a mild traumatic brain injury as a result of the 11/6/98 accident. Dr. Caffrey believes that Claimant's cognitive impairments affect Claimant's ability to work. Dr. Caffrey testified that Claimant can and should return to work, and that one of the best ways for Claimant to normalize her life is to return to work and perform meaningful daily activity.

Medical issues. I concluded after the March 1, 2001, hearing that the 11/6/98 accident caused an increase in the frequency and severity of Claimant's migraine headaches and also caused a chronic neck strain. Dr. Ryan's testimony notwithstanding, I again make the same findings.

Regarding the issue of whether Claimant sustained a mild traumatic brain injury as a result of the 11/6/98 accident, I again note that all of the medical professionals, except Dr. Ryan, agree that Claimant has sustained a mild traumatic brain injury as a result of the 11/6/98 accident. I find that Claimant did sustain a mild traumatic brain injury as a result of the 11/6/98 accident. Despite the testimony of Claimant and her husband that Claimant suffers from short-term memory loss, Dr. Rupright opined that testing proved Claimant's short-term memory to be normal. Claimant does, however, have deficits in attention span and concentration, which, according to Dr. Rupright, "can look like short-term memory loss". Dr. Rupright testified that Claimant had a 10% permanent partial impairment due to deficits in attention span and concentration. Dr. Rupright testified: "I think she will probably have some attention span and some concentration difficulties from now on." Dr. Rupright did not believe that Claimant will require any additional medical treatment related to the traumatic brain injury.

Claimant also clearly suffers from depression. Claimant has also been diagnosed with chronic pain syndrome. Despite a huge amount of medical evidence in this case, these two issues have not been explained to my satisfaction. It appears to me that Claimant's depression and her inordinate perception of pain may be as disabling as the other factors (migraines, neck strain, occipital neuralgia and mild traumatic brain injury) that have been fully addressed. It is clear that Claimant had some problems with depression prior to the 11/6/98 accident. The depression at that time appeared to center around the death of Claimant's sister, marital problems, and conflicts between work and family. Claimant sought help for depression prior to the 11/6/98 accident, and, by all accounts, was functioning well at work prior to 11/6/98. Claimant's depression has clearly gotten worse since the 11/6/98 accident. Part of this is undoubtedly due to the increased migraines, the occipital neuralgia and the deficits in attention span and concentration. I believe it is also due to Claimant's loss of self-worth by her (perceived) inability to work. I believe that Claimant's chronic pain syndrome is, as Dr. Caffrey suggests, "increased in times of stress". It is unclear whether Claimant's chronic pain syndrome was, in a

medical-legal sense "caused" by the 11/6/98 accident.

Disability issues. Claimant is alleging that she is permanently and totally disabled. The test for permanent total disability is whether, given the employee's situation and condition, she is competent in the open labor market. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App.E.D. 1992). The pivotal question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which she is hired. *Reiner, supra* at 367. Factors such as age, education, and work experience may be considered in determining employability. *Reves v. Kindell's Mercantile Co., Inc.*, 793 S.W.2d 917 (Mo.App.S.D. 1990).

Gary Weimholt testified by deposition. Weimholt is a vocational rehabilitation consultant who evaluated Claimant at the request of Claimant's attorney. Weimholt testified that Claimant is not competent in the open labor market. The most significant factors in that determination were Claimant's low intellectual functioning (her IQ was measured to be in a range from 70 to 84), and her need to work at a slow pace, due to poor attention span and concentration. Weimholt did not appear strongly to consider Claimant's migraines, neck problems, or chronic pain in making his determination that Claimant is totally disabled.

Dr. Allyn Sher also testified that Claimant was totally disabled. On cross-examination, Dr. Sher gave this testimony:

Q. Now, you've rendered an opinion earlier, though I objected to it, that you didn't feel that she was capable of working; correct?

A. Yes.

Q. Now, if you factor out the cognitive impairments that you just described, which would just leave you with the carpal tunnel syndrome, the migraine, the occipital neuralgia, do you feel that she'd be capable of working if you eliminated the cognitive impairments?

A. I think she could probably do something, yes.

As noted earlier herein, the issue of traumatic brain injury and resultant cognitive impairments were unknown and undiagnosed at the time of the March 1, 2001, evidentiary hearing. My impression after that hearing was that Claimant could and should be working, despite the migraines, occipital neuralgia, and neck problems. That impression is essentially the same as Weimholt's findings, and Dr. Sher's testimony, i.e., that but for the cognitive impairments, Claimant is employable.

Are Claimant's cognitive impairments significant enough to render Claimant unemployable, particularly considering Claimant's young age (40) and college education? Dr. Rupright was Claimant's treating physician for her traumatic brain injury. Dr. Rupright testified by deposition taken December 16, 2004, and a portion of his testimony is as follows:

Q. Now, Doctor, on June 23<sup>rd</sup>, 2004, you authored a narrative report; is that correct?

A. Oh, this June 23<sup>rd</sup>. Okay, yeah, to Mr. Mingus.

Q. And that letter was requested in response to a letter you received from Mr. Mingus?

A. Yes.

Q. At this time I'll have your June 23<sup>rd</sup>, 2004 report marked as Exhibit 3. And Exhibit 3 was rendered in response to a letter you received from Mr. Mingus on June 15<sup>th</sup>, 2004, correct?

A. Yes, it was.

Q. Now, you were asked whether Ms. Speckhals was totally and permanently disabled; correct?

A. Yes.

Q. And what was your answer to that question?

A. "Totally and permanently disabled." "The patient in my opinion from a cognitive standpoint is not totally and permanently disabled. I gave her a rating of 10 percent permanent partial disability. I feel that is permanent but I do not feel she is totally impaired but again I was only rating her memory issues, not the other medical or physical issues."

Q. So, you're just looking at her from a cognitive standpoint from the alleged brain injury and you feel she is able to function in the open labor market?

A. Yes.

Considering this testimony from Dr. Rupright, *Claimant's treating physician for the traumatic brain injury*, it is difficult for me to make a finding that Claimant's cognitive impairments are significant enough to render Claimant unemployable. That being said, Mr. Weimholt's analysis begins to break down. By basing his conclusion that Claimant is incompetent in the open labor market almost exclusively on the cognitive defects, Weimholt appears to contradict the medical expert whose testimony is the lynchpin of the whole issue of traumatic brain injury and resultant cognitive defects.

Despite the new and additional diagnosis of mild traumatic brain injury since the March 1, 2001, hearing, my impression of Claimant remains essentially unchanged. I still believe that Claimant is an intelligent young woman. I still believe that Claimant derived much satisfaction from her work. It is clearer to me than ever that Claimant *needs* to work for her happiness and self-esteem. Claimant has not worked for over five years; during that time, despite the best efforts of multiple physicians, Claimant has not gotten any better.

Dr. Caffrey stated in his report:

I believe it would be in Maryann Speckhals' best interest to minimize the effects of the injury as a way to normalize her life. One of the best ways to normalize a person's life is to return to work. ... Normally, persons who have a brain injury have a period where they are not functioning well, and then over time gradually improve. ... I believe that once the workers' compensation issue has been resolved, she may enjoy a surge in her overall recovery.

I agree with Dr. Caffrey. I believe that Claimant should "normalize her life" by returning to work. I believe Claimant can work and should work. As Claimant is receiving disability benefits from the Social Security Administration, I recognize the fact that Claimant may choose never to return to work; however, I truly believe that Claimant's quality of life will be immeasurably poorer if she makes that choice.

I find that Claimant is not totally disabled. I find that Claimant has sustained a permanent partial disability of 50% of the body as a whole due to the increased migraines, occipital neuralgia and mild traumatic brain injury caused by the work-related accident of November 6, 1998. This results in 200 weeks of benefits at the stipulated rate of \$294.73, totaling \$58,946.00. Employer and Insurer are ordered to pay Claimant the sum of \$58,946.00 for permanent partial disability benefits.

I find that Claimant was at maximum medical improvement on January 26, 2004, the last date she saw Dr. Allyn Sher. Employer-Insurer paid TTD benefits through July 4, 2003. I find that Claimant was entitled to additional TTD benefits from July 5, 2003, through January 26, 2004, a period of 29 3/7 weeks. Claimant is entitled to 29 3/7 weeks of TTD benefits at the stipulated rate of \$380.83, totaling \$11,207.28. Employer and Insurer are ordered to pay Claimant the sum of \$11,207.28 for temporary total disability benefits.

Medical bills. The only medical bill in evidence was the bill of Neurology, Inc. (Dr. Allyn Sher), which showed an unpaid balance of \$45.00. I find that Dr. Sher's treatment was necessitated by the November 6, 1998, accident. Employer and Insurer are ordered to pay Claimant the sum of \$45.00 for medical charges.

Future medical treatment. As noted above, Dr. Rupright testified that Claimant is in need of no further treatment for her mild traumatic brain injury. Claimant is still in need of medications for her migraines and occipital neuralgia. As I find that the work-related accident is the cause of the occipital neuralgia, and has caused an increase in the frequency and severity of the migraines, I find that Employer and Insurer should be responsible to continue to provide those medications, as well as to provide physician oversight of those medications.

"In permanent partial disability cases, the Commission's award may contain an allowance for the cost of future medical treatment." *Povalarapu v. General Motors Corp.*, 897 SW2d 63, 66 (Mo. App. E.D. 1995). The phrase "allowance for the cost of future medical treatment" indicates that a lump sum may be awarded to cover the cost of future medical treatment.

Because of the ongoing conflicts between Claimant and Insurer, I find that it is not in the parties' best interests to have a continuing relationship with one another. Therefore, I find it most appropriate for Employer-Insurer to pay a lump sum which Claimant can utilize for her future medical needs, the payment of which will absolve Employer and Insurer from any further liability to Claimant. Employer and Insurer are ordered to pay Claimant the sum of \$25,000.00 for her future medical needs.

Compliance with temporary or partial award. I find that Employer and Insurer complied with the terms of the TEMPORARY OR PARTIAL AWARD issued in this case on March 26, 2001.

Credit for partial settlement for bilateral carpal tunnel syndrome. As permanent total disability benefits have not been awarded herein, Employer and Insurer are not entitled to any credit for the amounts paid under the partial settlement.

Costs and attorney's fees. Claimant is requesting that costs and attorney's fees be awarded pursuant to either §287.560, RSMo, or §287.203, RSMo. Section 287.560 provides for costs and attorney's fees only "if the division or commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground". I do not find Employer-Insurer's defense of this case to be without reasonable ground. Employer-Insurer has merely vigorously (and thus far successfully) defended against Claimant's allegation that she is permanently and totally disabled. I find no grounds for an award of costs and attorney's fees under §287.560.

If Section 287.203 applies to this case, "reasonable cost of recovery *shall* be awarded to the prevailing party". The phrase "cost of recovery" in §287.203 "contemplates an award of attorney's fees on its face" *P.M. v. Metromedia Steakhouses*, 931 S.W.2d 846, 849 (Mo. App. E.D. 1996). Section 287.203 applies "whenever the employer has provided compensation under Section 287.170 ... and terminates such compensation". Section 287.170 is the section regarding TTD benefits. Employer paid TTD benefits to Claimant through July 4, 2003. Claimant has disputed the termination of those benefits. The parties framed the first contested issue in this case as: "Whether Employer and Insurer shall be liable for additional temporary total disability or permanent total disability benefits from and after July 4, 2003". Additional TTD benefits of \$11,207.28 have been awarded from and after July 4, 2003, thus Claimant is the "prevailing party" on this issue and is entitled to an award of attorney's fees. Employer and Insurer are ordered to pay the sum of \$2,800.00 to Claimant's attorney, Thomas Mingus, for necessary attorney's fees.

In addition to the above award of attorney's fees, Claimant's attorney, Thomas Mingus, is allowed 25% of the permanent partial disability award and 15% of the future medical award for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon.

Interest shall accrue as per applicable law.

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

Made by:

\_\_\_\_\_  
ROBERT J. DIERKES  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*