

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

Injury No.: 05-080783

Employee: Jennifer Thomas
Employer: Forsyth Care Center
Insurer: Missouri Nursing Home Insurance

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Employer's failure to comply with the temporary award

On December 10, 2007, the administrative law judge issued a Temporary or Partial Award ordering employer to provide medical care "as may be authorized and directed by Diane Cornelison, D.O., and which is reasonable, necessary, and causally related to the accident." *Temporary Award*, page 12. But thereafter, employer failed to pay for treatments ordered by Dr. Cornelison. Specifically, employer failed to pay for or authorize nerve blocks, epidural injections, physical therapy, a repeat CT myelogram, aquatherapy, and pain medications, despite Dr. Cornelison's making clear in her treatment notes both her repeated recommendations and her inability to obtain authorizations from employer.

As a result of employer's failure to comply with the temporary award, employee was unable to obtain many of the treatments recommended by Dr. Cornelison, as she had no insurance and no way to pay for medical expenses. Employer's conduct ultimately caused employee to suffer a worse medical outcome, as Dr. Schaffer credibly opined that employee's "prognosis and treatment could have been facilitated if she had been seen sooner by an orthopedic surgeon or neurosurgeon." *Transcript*, page 896. Given these circumstances, we find employer's choice to disregard the temporary award to be particularly egregious.

On appeal before this Commission, employee asks that we apply § 287.510 RSMo and double (1) the amount of temporary total disability benefits both paid and unpaid by employer, (2) the amount of medical expenses paid by the employer, and (3) the amount of permanent total disability benefits owed from May 13, 2009, to the date of the final award. In the case of *Ball-Sawyers v. Blue Springs Sch. Dist.*, 286 S.W.3d 247 (Mo. App. 2009), the court determined that the 2005 amendments to § 287.510 RSMo are retroactively applicable to injuries, such as the one at issue herein, that occurred before the effective date of the amendments. *Id.* at 257. Section 287.510, as amended in 2005, provides as follows:

Employee: Jennifer Thomas

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In any case a temporary or partial award of compensation may be made, and the same may be modified from time to time to meet the needs of the case, and the same may be kept open until a final award can be made, and if the same be not complied with, the amount equal to the value of compensation ordered and unpaid may be doubled in the final award, if the final award shall be in accordance with the temporary or partial award.

The *Ball-Sawyers* court interpreted the words “ordered and unpaid” in the foregoing section as providing the Commission with discretion to double only the amount of compensation that is ordered in a temporary award and which remains unpaid by the employer as of the date of a final hearing. 286 S.W.3d at 256-57. Clearly then, under *Ball-Sawyers*, we cannot double the amounts that employer *paid* to employee, nor can we double any amount that was not *ordered* by the administrative law judge, such as temporary total¹ or permanent total disability benefits. Rather, the only amount in this case subject to doubling under *Ball-Sawyers* and the amended version of § 287.510 is the value of the medical care that the administrative law judge ordered and that the employer has refused to provide as of the date of the final hearing.

We would be inclined to order such a doubling in this case. But we are unable to do so on this record, because employee failed to prove the value of compensation ordered and unpaid. Employee failed to put any of her medical bills into evidence, or any other evidence (such as testimony from her medical experts) to establish the dollar value of the medical treatments which she was unable to obtain owing to employer’s conduct. Absent such evidence, there is no basis for this Commission to calculate the appropriate amount of the penalty under § 287.510.

With that said, we condemn employer’s refusal to comply with the administrative law judge’s temporary award. We note that employer offers no explanation, in its brief filed with this Commission, for its failure to authorize the treatments recommended by Dr. Cornelison. Employer asserts that it provided a neurosurgical consultation for employee with Dr. Reintjes on May 15, 2008. But employer fails to explain why it did not authorize the nerve blocks, epidural injections, physical therapy, a repeat CT myelogram, aquatherapy, and pain medications, all of which were recommended by Dr. Cornelison as necessary in connection with employee’s work injury, and all of which fell inarguably within employer’s obligations under the temporary award. From December 10, 2007, the date of the administrative law judge’s temporary award, until Dr. Cornelison last saw employee on May 12, 2009, employer failed to authorize any of these treatments, and even stopped authorizing the medications Dr. Cornelison prescribed for employee’s intractable low back pain. Employer advances no explanation for what appears from this record to be an attitude of brazen indifference toward its obligations to employee under the administrative law judge’s award.

¹ In his temporary award, the administrative law judge did not find employee was temporarily and totally disabled, nor did he order employer to pay temporary total disability benefits to employee, but instead merely noted a stipulation by the parties that employer was paying temporary total disability benefits as of the date of hearing. Section 287.510 only permits doubling of “compensation ordered and unpaid” (emphasis added).

Employee: Jennifer Thomas

Of course, “employer's reasons for nonpayment are irrelevant,” *Shaw v. Scott*, 49 S.W.3d 720, 726 (Mo. App. 2001), and we would award a doubling of the unpaid past medical expenses regardless of employer’s reasons—if this record provided evidence sufficient to permit us to do so. Because it does not, we must reluctantly deny employee’s request for a doubling under § 287.510 of her unpaid past medical expenses.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge L. Timothy Wilson, issued November 26, 2012, is attached and incorporated by this reference.

We approve and affirm 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 17th day of May 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Jennifer Thomas

Injury No. 05-080783

Dependents: N/A

Employer: Forsyth Care Center

Insurer: Missouri Nursing Home Insurance

Additional Party: N/A

Hearing Date: August 8, 2012 (Evidentiary Record Closed September 7, 2012)

Checked by: LTW

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: August 8, 2005
5. State location where accident occurred or occupational disease was contracted: Taney County, Missouri (The parties agreed to venue lying in Greene County, Missouri.)
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While engaged in her employment with Employer and attempting to get a patient up off the floor by lifting the chair with its arms and turning to assist the patient, Employee tripped on a floor mat, which caused her to twist her back. As a consequence of this incident, Employee sustained an injury to her low 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: Low Back
14. Nature and extent of any permanent disability: PTD
15. Compensation paid to-date for temporary disability: \$43,777.80
16. Value necessary medical aid paid to date by employer/insurer? \$15,642.08
17. Value necessary medical aid not furnished by employer/insurer? N/A

- 18. Employee's average weekly wages: \$397.98
- 19. Weekly compensation rate: \$265.32 (TTD / PTD / PPD)
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
 - Unpaid medical expenses:N/A
 - 31 1/7 weeks of temporary total disability compensation:\$8,262.82
 - Weeks of disfigurement from Employer:N/A
 - Permanent total disability benefits from Employer & Insurer beginning May 12, 2009, for Employee's lifetime.
- 22. Second Injury Fund liability: N/A

TOTAL: \$8,262.82, plus \$265.32 per week beginning May 12, 2009, for Employee's lifetime.

- 23. Future requirements awarded: Yes (See Award)

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 per cent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: William E. Lawrence, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jennifer Thomas

Injury No. 05-080783

Dependents: N/A

Employer: Forsyth Care Center

Insurer: Missouri Nursing Home Insurance

Additional Party: N/A

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on August 8, 2012. The record was left open for 30 days in order to afford the parties opportunity to submit additional evidence, which resulted in the evidentiary record being closed on or about September 7, 2012. Further, the parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about September 12, 2012.

The employee appeared personally and through her attorney, William E. Lawrence, Esq. The employer and insurer appeared through their attorney, Patrick M. Reidy, Esq.

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

- (1) On or about August 8, 2005, Forsyth Care Center was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Missouri Nursing Home Insurance.
- (2) On the alleged injury date of August 8, 2005, Jennifer Thomas was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about August 8, 2005, the employee sustained an accident, which arose out of and in the course of her employment with the employer.
- (4) The above-referenced employment and accident occurred in Taney County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.
- (5) The employee notified the employer of her injury as required by Section 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.

- (7) At the time of the alleged accident of August 8, 2005, the employee's average weekly wage was \$397.98, which is sufficient to allow a compensation rate of \$265.32 for temporary total disability compensation and permanent disability compensation (PPD & PTD).
- (8) Temporary total disability compensation has been provided to the employee in the amount of \$43,777.80, representing 165 weeks in disability benefits. The payment of temporary total disability compensation was terminated on October 5, 2008.
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$15,642.08 in medical expenses.

The issues to be resolved by hearing include:

- (1) Whether the alleged accident of August 8, 2005, caused the injuries and disabilities for which benefits are now being claimed?
- (2) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee from the effects of the injuries?
- (3) Whether the employee is entitled to additional temporary total disability compensation? (The employee seeks continuation of temporary total disability compensation or permanent total disability compensation from October 5, 2008, which is the date the employer and insurer terminated payment of temporary total disability compensation.)
- (4) Whether the employee sustained any permanent disability as a consequence of the alleged accident of August 8, 2005; and, if so, what is the nature and extent of the disability?

EVIDENCE PRESENTED

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

Exhibit A.....Deposition of Dr. Diane Cornelison
Exhibit B.....Deposition of Dr. Shane Bennoch, MD
Exhibit C.....Deposition of Phillip Aaron Eldred
Exhibit D..... Claimant's Medical Records
Exhibit E..... IME of Dr. James Shaeffer, MD

The exhibits were received and admitted into evidence.

The employer and insurer presented no witnesses at the hearing of this case. The employer and insurer offered for admission the following exhibits:

Exhibit 1.....	IME Report of Allen J. Parmet, MD
Exhibit 2.....	Curriculum Vitae of Allen J. Parmet, MD
Exhibit 3.....	IME Report of Stephen L. Reintjes, M.D.
Exhibit 4.....	Curriculum Vitae of Stephen L. Reintjes, M.D.
Exhibit 5.....	Payroll Records
Exhibit 6.....	November 15, 2004 MRI Report
Exhibit 7.....	August 17, 2005 MRI Report
Exhibit 8.....	Deposition of Gary Weimholt, M.S., CDMS
Exhibit 9.....	Circuit Court of Greene County Records (Case No. 31492CF0117)
Exhibit 10.....	Circuit Court of Taney County Records (Case No. CR890-320 F)

The exhibits were received and admitted into evidence. (Exhibits 8, 9 and 10 were received and admitted subsequent to the hearing prior to closure of the evidentiary record.)

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

- Letter Dated September 5, 2012 (Re: Submission of Exhibits 8, 9 & 10)
- Notice of Hearing
- Request for Hearing-Final Award
- Temporary or Partial Award
- Order Granting Motion for Leave to Withdraw & Lien for Expenses
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

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

DISCUSSION

Background & Employment

The employee, Jennifer Thomas, is 41 years of age, having been born on August 26, 1971. Mrs. Thomas resides in Kirbyville, Missouri.

Mrs. Thomas did not graduate from high school but obtained her GED in 1990 or 1991. Notably, on April 5, 1990, Ms. Thomas pleaded guilty to a felony charge of forgery in the Circuit Court of Taney County, Missouri. Approximately three years later, on February 5, 1993, Ms. Thomas pleaded guilty to a felony charge of forgery in the Circuit Court of Greene County, Missouri.

Ms. Thomas' employment history relates primarily to physical labor-oriented work. The initial employment performed by Ms. Thomas includes working in restaurants as a waitress, and working in the hotel industry as a housekeeper and front desk clerk. Later, in or around 1996,

Ms. Thomas began working in the nursing home industry. In 1996 she obtained certification as a Certified Nurse's Assistant; in 2003 she became certified as a Certified Medical Technician; and in 2003 and 2004 she obtained training as an Activities Director. (Ms. Thomas no longer holds certifications as a Nurse Assistant or Medical Technician as she has not worked since August 9, 2005, and these certifications have expired.)

Ms. Thomas began working as a nurse's aide in Linn, Missouri; she worked in this employment for approximately one year until moving to the Hollister, Missouri area. After moving to Hollister, Missouri, Ms. Thomas worked as a nurse's aide at Point Lookout Nursing and Rehabilitation. She worked for this facility on several different occasions.

It is noted that in or around 1996 Ms. Thomas worked at a few nursing homes in Missouri before taking a few odd jobs when her family moved to Arkansas. After moving back to Missouri in or around 1998, Ms. Thomas obtained employment as a Certified Medical Technician (CMT) and worked passing medications for a few months at Branson Meadows. She later moved to the Kansas City, Missouri area in order to help provide care for her ailing grandmother; during this period of her life she worked for a nursing home in Belton, Missouri.

In March 2003, Ms. Thomas obtained employment with the employer, Forsyth Care Center, working as a Certified Nurse Assistant in Forsyth, Taney County, Missouri. In this employment Ms. Thomas initially utilized her certification as CMT, and was responsible for passing medication to residents. In March 2004 she assumed the duties of an activities director, which involved less physical labor. She worked in this position for a few months prior to resuming her normal duties as a CMT. She continued in this employment through August 9, 2005. In this employment, particularly while working as a CMT, Ms. Thomas noted that she worked eight hour work shifts, which required her to be on her feet (stand and/or walk for 7 ½ hours, but she was able to sit during her breaks and lunch.

Ms. Thomas has not worked, nor has she sought any employment, since her work accident of August 8, 2005. Ms. Thomas notes that during this period of being unemployed she has not applied for unemployment compensation because she did not consider herself to be able to work.

Prior Medical Conditions

Prior to sustaining the work injury of August 8, 2005, Ms. Thomas had several medical conditions. It is disputed as to whether these medical conditions caused any degree of permanency or were a hindrance or obstacle to employment or reemployment. These prior medical conditions include:

- Low Back Pain / Hysterectomy

Ms. Thomas suffered low back pain in early 2004. She went to see Dr. Lynn Allison and was advised she needed a hysterectomy, and was further advised that the problems giving rise to the need for the hysterectomy is what caused the back problems. She had a hysterectomy in July 2004. Ms. Thomas testified that she had no further complaints with low back pain after the surgery.

Ms. Thomas was involved in a motor vehicle accident on October 10, 2004. She was a restrained driver of a motor vehicle that was struck in the driver's side by another motor vehicle. It was a low impact collision. The medical records indicate that, initially, she did not hurt much; but later she began to experience severe pain, and on the following day, October 11, 2004, presented to the emergency room of Skaggs Community Hospital in Branson, Missouri for evaluation and treatment.

The diagnostic studies performed in the emergency room of Skaggs Community Hospital on October 11, 2004 indicated that Ms. Thomas exhibited mild loss of disk space of the lumbar spine at the level of L5-S1. Subsequently, the attending physician discharged Ms. Thomas from the hospital's care, and released her to return to work following a two-day rest, on Wednesday, October 13, 2004. Ms. Thomas followed up with her personal physician, Dr. James Caesar.

Ms. Thomas had an MRI on November 15, 2004, indicating that she had a small disc protrusion at L4-5. On December 19, 2004, she was referred to Mark Crabtree, M.D., a neurosurgeon, in Springfield, Missouri. Ms. Thomas was still complaining of low back pain radiating down into her right leg. She had no symptoms in the left leg. She was taken off-work by Dr. Crabtree, and referred to Dr. Scott Ellis a pain management specialist.

Subsequent follow-up treatment included use of muscle relaxants, narcotics, and chiropractic manipulation. Additionally, on December 9, 2004, Ms. Thomas presented to H. Mark Crabtree, M.D., who is a neurosurgeon, for evaluation and treatment, resulting in Dr. Crabtree diagnosing Ms. Thomas with lumbar radicular symptoms, but with poor correlation to diagnostic studies, and referring Ms. Thomas for a CT/myelogram diagnostic study. Following this diagnostic study Ms. Thomas underwent a series of epidural injections while under the care of Ronald L. Ellis, M.D., which provided modest improvement but not complete or lasting relief.

Later, while under the care of Ronald L. Ellis, M.D., on May 19, 2005, Ms. Thomas underwent treatment in the nature of bilateral L3, L4, and L5 medial branch neurotomies with radiofrequency thermocoagulation (a procedure wherein the nerve endings are in effect "*burnt off*" to help alleviate pain) under fluoroscopic guidance. In June Ms. Thomas presented to the emergency room of Skaggs Community Health Center with complaints of a severe headache, nausea, and low back pain without radiculopathy. The attending physician prescribed rest and medication, which included prescriptions for 12 Dilaudid and 12 Phenergan.

According to Ms. Thomas, with the exception of the presenting complaints in June, the radiofrequency treatment provided her with complete relief, rendering her symptom-free, without pain or radiculopathy, until suffering the work-related injury on August 8, 2005. Ms. Thomas was released to return to work with no restrictions. She missed no further time from work leading up to the work injury of August 8, 2005. She testified that if she did have any lasting problems, they had no effect on her ability to perform her job duties.

- Bilateral Carpal Tunnel Syndrome

Mrs. Thomas suffered from bilateral carpal tunnel syndrome, which required surgical repair. The first surgery occurred in 1995, and related to the right wrist; the second surgery occurred in 2002, and related to the left wrist. According to Ms. Thomas, following these two surgeries she experienced no lingering effects from the carpal tunnel syndrome, and was able to perform all her job duties without restriction. The medical evidence does not identify any medical opinion offering an opinion of permanent disability for her right and left wrists. Similarly, there is not any evidence that this medical condition posed a hindrance or obstacle to employment or reemployment.

- Migraine Headaches

Ms. Thomas has suffered migraine headaches for most of her adult life. In treating for this medical condition she has taken over the counter medications. According to Ms. Thomas, she never missed any time from work as a result of the migraine headaches; and the headaches did not affect her ability to perform any of her jobs.

Accident (August 8, 2005)

On August 8, 2005, while engaged in employment and performing her work duties with Forsyth Care Center, Ms. Thomas was in a resident's room to administer medication, and the resident had gotten out of bed and had fallen underneath a chair. Ms. Thomas stooped forward in order to help the patient get up off the floor. As Ms. Thomas attempted to lift the chair by its arms, and turned to assist the patient, Ms. Thomas tripped on a floor mat. This incident caused Ms. Thomas to twist her back, and simultaneously she felt a pop. Ms. Thomas experienced immediate pain in her low back. Within days of this incident, Ms. Thomas began experience radiating pain down into her left lower extremity. Later, she began experiencing pain down into her right lower extremity.

Medical Treatment

Ms. Thomas first sought treatment for her work injury on August 10, 2005. At that time, she saw her personal physician, Dr. Markus Kryger. Her complaints included low back pain with slight radiation down into the left leg. Dr. Kryger noted "a long history of back pain." In light of his physical exam of Ms. Thomas, Dr. Kryger noted that Ms. Thomas had significant trigger point tenderness. He further noted that Ms. Thomas was having difficulty ambulating and reported a pain level of 10 on a 1-10 pain scale. Based on this examination, Dr. Kryger diagnosed Ms. Thomas with a low back strain, and prescribed bed rest and medication (Tylox and Skelaxin), and a diagnostic study of the lumbar spine. Additionally, Dr. Kryger excused Ms. Thomas from work for five days, and provided a referral to Diane Cornelison, D.O., of the Branson Neurology and Pain Center.

Later, on August 18, 2005, Ms. Thomas presented to Diane L. Cornelison, D.O., who is a neurologist, for evaluation and treatment. At the time of this examination, Ms. Thomas presented with complaints of "bilateral, left greater than right, down the posterior thigh, lateral calf, and the top of the foot with numbness and tingling occasionally on the top of the foot" with associated weakness, secondary to pain. Notably, at the time of this examination, Ms. Thomas identified this pain to be excruciating, being unable to "lay, sit, stand, sleep, or do any of her other activities." In light of her examination and findings, Dr. Cornelison diagnosed Ms.

Thomas with three noted conditions: (1) lumbar facet arthrosis with underlying facet syndrome and mild spondylitic change; (2) obesity; and (3) headache. Additionally, in attributing the lumbar facet arthrosis condition to be caused by the work injury of August 8, 2005, Dr. Cornelison prescribed several modalities of treatment, which included bilateral facet blocks, diagnostic therapeutic epidural and epidurogram, long-acting narcotics, massage therapy, and a TENS unit.

From August 24, 2005, up through September 7, 2005, Ms. Thomas received physical therapy at Skaggs Hospital. Ms. Thomas reported to the therapist that she was experiencing left leg weakness and would constantly stub her toe. The therapist noted that Ms. Thomas walked with an "unusual flat-footed gait on the left." It was further noted that Ms. Thomas had "a very significant left foot drop and left lower extremity weakness." The pain was getting worse so the therapist recommended that Ms. Thomas return to see Dr. Cornelison for follow-up treatment.

In September 2005 Ms. Thomas underwent additional diagnostic studies in the nature of a CT myelogram of the lumbar spine, which evidenced a focal disc protrusion of the lumbar spine at the level of L4-L5, causing mild to moderate central canal stenosis, and a left paracentral hard disk osteophyte at L5-S1, causing a minimal central canal stenosis. Additionally, the S1 nerve rootlet was noted to be slightly displaced dorsally. Later, in light of continuing symptomology, Dr. Cornelison recommended and sought medical authorization under workers' compensation for Ms. Thomas to undergo a discogram, and to be evaluated by a neurosurgeon. Also, Dr. Cornelison recommended an ankle-foot orthosis for the foot drop, weight loss and an exercise program, and an EMG for better evaluation of the underlying pathology.

In September 2005 Dr. Cornelison performed the EMG, which she identified the EMG to be "an abnormal study" consistent with: (1) acute left L5 radiculopathy; (2) no electrical evidence of a left lumbar sacral plexopathy; (3) no electrical evidence of a peripheral polyneuropathy affecting the left lower extremity; and (4) no electrical evidence of a primary myopathic process affecting the left lower extremity. In light of her examination and findings, Dr. Cornelison propounded in pertinent part her conclusions and treatment plan, as follows:

We will proceed with a left L5 transforminal block, neurosurgical evaluation, naproxen 500 mg twice a day, and left ankle-foot orthosis for now. Neurontin 300 mg will be given gradually increasing to 1 in the morning and 2 in the evening hours. Wellbutrin 150 mg may help with the underlying chronic pain as well as the secondary depression related to the chronic pain and financial stress and weight loss. We will proceed with physical therapy and TENS unit will be continued. She should not lift greater than 5 pounds at this time. She will continue Skelaxin 800 mg three times a day and MS-Contin 15 mg twice a day.

While treating with Dr. Cornelison in September 2005 Ms. Thomas told Dr. Cornelison's office that the pain was getting worse, and that she was tripping and falling over things because of her left foot drop. By this time, she was also experiencing numbness and tingling down into the left lower extremity. The impression at this visit was "lumbar spondylosis and stenosis with increased radicular pain. Foot drop on the left." A CT myelogram and EMG studies were ordered.

The CT myelogram was done on September 12, 2005. The radiologist's impression was "focal disc protrusion at L4-5." An EMG nerve conduction study was obtained on September 22, 2005. The impression from the nerve conduction study was "acute left L5 radiculopathy." Based on these findings, Dr. Cornelison recommended a left L5 transforaminal block, neurosurgical consult, pain medication and left ankle-foot orthosis. Ms. Thomas was given a lifting restriction of 5 pounds.

On October 25, 2005, Ms. Thomas presented to Skaggs Community Health Center for treatment. She presented with complaints of having fallen in her tub because of her left foot drop, and had experienced increased pain in her back and into her lower extremities. She was given pain medications and told to follow-up with Dr. Cornelison.

Ms. Thomas went back to Dr. Cornelison's office on December 5, 2005. It was noted that the TENS unit was helping a lot but that she was still experiencing persistent pain in her lower back, as well as experiencing problems with left foot drop. By this time, Dr. Cornelison's office had rewritten a prescription for a neurosurgical consult twice, and the employer and insurer had yet to approve the consult. The impression remained the same, and Dr. Cornelison's office again made a referral for a neurosurgical consult, left ankle orthosis, nerve block, and she was told to continue using the TENS unit.

On January 23, 2006, Ms. Thomas presented for follow-up appointment with Dr. Cornelison. At the time of this appointment, Ms. Thomas continued to present with low back pain and left foot drop. The pain remained unchanged from her previous visit. Dr. Cornelison's office again recommended a neurosurgical consult, pain medication, nerve block, and a new prescription for aqua therapy.

Follow-up appointments with Dr. Cornelison's office occurred on February 14, 2006, and April 11, 2006. The symptoms remained unchanged, resulting in Ms. Thomas receiving the same recommendations, which included a neurosurgical consultation.

On May 30, 2006, Ms. Thomas presented to the emergency room Skaggs Community Hospital, presenting with complaints of having experienced another episode of falling due to her left foot drop. Her primary problem on this visit was an injury to her left thumb. She was given pain medications.

Dr. Cornelison continued to provide follow-up treatment. The employer and insurer, however, declined to provide Ms. Thomas with the medical care recommended by Dr. Cornelison, contending that Ms. Thomas' medical condition and need for such treatment is not causally related to the August 8, 2005 accident. Consequently, on June 3, 2006, Dr. Cornelison directed an opinion letter to the employer and insurer. The letter addresses the employer and insurer's denial of her recommendation for a neurosurgical consult, discogram and epidural steroid injections. In this letter, Dr. Cornelison advised the employer and insurer that Ms. Thomas had developed low back pain, left lower extremity pain, and left foot drop that was directly caused by the work accident on August 8, 2005.

Apparently, Dr. Cornelison was asked by the employer and insurer to address whether there was a causal relationship of the October 2004 motor vehicle accident and Ms. Thomas'

presenting medical condition. In responding to this request, Dr. Cornelison stated: "the correlation between the work related accident and the back pain is obvious by history, examination, and abrupt reoccurrence of the pain related to the history and timing." Dr. Cornelison again recommended a neurosurgical consult, discogram and epidural steroid injections. The employer and insurer declined to accept the recommendations and opinions of Dr. Cornelison, and declined to provide such medical treatment.

Later, having failed to receive a favorable response to her earlier June 5, 2006 letter, Dr. Cornelison authored a second letter, wherein she propounded in pertinent part the following comments and opinions:

We continue to be in a holding pattern. We have recommended several tests to evaluate her continued low back pain. I did dictate a summary letterShe still continues to suffer a left L5 radicular pain, which is spondylitic most likely in nature related to the facet arthrosis with lateral recess narrowing. However, she has had little relief with injections to point. The radiofrequency rhizotomy did give her relief in Springfield when she suffered a motor vehicle accident. She was essentially pain free until she was involved in a work-related accident in which she had recurrence of the pain but worse and somewhat different than before the motor vehicle accident.

Worker's (sic) compensation was trying to nail down which is the cause of the pain. As discussed previously, I believe both issues are contributing factors. While the underlying x-rays and MRIs conclusively reveal that the patient has canal stenosis at L4-5 most prominent but also L5-S1 with a hard osteophyte at L5-S1. The CT myelogram completed on 9/12/05 is consistent also with indentation of the thecal sac with minimal stenosis at L5-S1 but a hard osteophyte with lateral recess narrowing, as well as L4-L5 with disc protrusion and canal stenosis noted.

On August 21, 2006, Ms. Thomas again presented to the emergency room of Skaggs hospital relating to a slip and fall in her bathtub, which she attributed to the left foot drop and the problems she was having because of the earlier work injury. She received conservative care, which included prescription pain medication and directions to follow-up with her physician, Dr. Cornelison.

Again, on October 9, 2006, Dr. Cornelison authored a report, wherein she addressed the issue of medical causation. In this context, and in pertinent part, Dr. Cornelison propounded the following comments:

She is a female who we follow with a history of lumbar spondylosis with facet arthrosis and exacerbation of the underlying facet arthrosis related to a work-related injury at a nursing home....

The patient is asking once again to clarify if the work-related incident at the nursing home had exacerbated the underlying chronic facet arthrosis and disc osteophyte previously evaluated per MRI. There was also associated underlying disc protrusion. The underlying discogenic pain is most likely related to the disc protrusion, as well as the facet arthrosis both contributing to the underlying pain. The patient was doing well until she had a work-related incident, which resulted in left L5 discogenic pain with lateral recess narrowing related to facet arthrosis and facet mediated pain.

To a medical certainty, the fall related to the work incident has exacerbated the underlying chronic pathology of both the facet arthrosis and discogenic pain related to disc protrusion. We are still recommending discogram for better clarification and a left L5 transforaminal block. ...

Dr. Cornelison continued to provide follow-up treatment for Ms. Thomas. Ms. Thomas' complaints remained the same, and her condition was not getting any better. During this time, Dr. Cornelison noted that Ms. Thomas was unable to "follow through with any of the tests recommended secondary to denial from workers' compensation." Because of this, Dr. Cornelison could do nothing more than prescribe pain medications to help control the pain. Dr. Cornelison continued to recommend a neurosurgical consult and epidural steroid injections. This treatment was not authorized by the employer and insurer.

Hardship Hearing (Temporary Award)

In September 2007 the employee and employer and insurer proceeded to evidentiary hearing in this workers' compensation case, wherein the employee sought a Temporary or Partial Award ordering the employer and insurer to provide Ms. Thomas with medical care, including a neurosurgical consultation for Ms. Thomas. On December 10, 2007, the undersigned issued a Temporary or Partial Award ordering the employer and insurer "to provide the employee, Jennifer Thomas, with such additional medical care, including a referral to a neurosurgeon and/or surgery, as may be authorized and directed by Diane Cornelison, D.O., and which is reasonable, necessary, and causally related to the accident of August 8, 2005."

Medical Treatment Subsequent to Issuance of Temporary Award

Following issuance of the Temporary or Partial Award, the employer and insurer scheduled a consultation with Stephen J. Reintjes, M.D., a board-certified neurosurgeon in the Kansas City area. Dr. Reintjes first saw Ms. Thomas on May 15, 2008. He ordered another MRI of the lumbar spine and an EMG of the left lower extremity. The tests were performed, and Ms. Thomas again saw Dr. Reintjes on July 14, 2008. At that time, Dr. Reintjes reported that the EMG of the lower left extremity was normal, and opined that the MRI of the lumbar spine showed extensive degenerative disc disease, and changes at L5-S1 and a left sided L5-S1 disc herniation.

Also, Dr. Reintjes reviewed the December 2004 myelogram with CT and stated, "I do not think that the disc herniation on the left at L5-S1 is large enough to explain the patient's pain medicine needs of Vicodin and methadone..." In this letter dated July 14, 2008, Dr. Reintjes further stated,

I told her that the L5-S1 disc herniation could be removed and the goal of the surgery would be to relieve left leg pain but I do not feel that it would relieve her low back pain. I would not personally consider surgery on this patient with her pain medicine demands at this level. I would like to see her wean off the narcotic based medicines prior to consideration of surgery.

As to the question of maximum medical improvement, I am uncertain. She certainly is still symptomatic and has a radiographic finding that could be treated surgically with a left L5-S1 hemilaminectomy and discectomy. Whether this operation would provide her improvement to the point where she would be satisfied or be off pain medicines, I am doubtful.

The employer and insurer elected to not provide Ms. Thomas with medical care recommended by Dr. Reintjes, including treatment that would allow Ms. Thomas to "wean off" the narcotic based medications that would allow her to undergo surgery. Nor did the employer and insurer seek a different surgical opinion, including consultation and treatment by neurosurgeons in Springfield, Missouri. Apparently, the employer and insurer continued to challenge the causal relationship of the presenting medical condition and the work injury of August 8, 2005, while seeking medical opinion in support of such a position. And on or about July 30, 2005, the employer and insurer's legal counsel tendered to Dr. Reintjes correspondence by fax, which sought to address this concern.

Responding to the July 30, 2005, inquiry from the employer and insurer legal counsel, on August 4, 2008, Dr. Reintjes wrote a letter affirming that "the left-sided L5-S1 disc herniation shown on the MRI scan could have been caused by Mrs. Thomas's work related accident of August 8, 2005." He further stated in this letter that "It is possible for someone to have a symptomatic lumbar disc herniation while at the same time having a normal EMG." Dr. Reintjes repeated his reluctance to perform surgery on a patient using such a high level of pain medicine; but Ms. Thomas could benefit through the use of conservative medical care, including lumbar epidural steroid injections. Finally, in this letter Dr. Reintjes noted that he would advise Ms. Thomas to "...avoid repetitive bending, twisting, or lifting more than 35 pounds." And in referring to Ms. Thomas' presenting symptomology and medical condition, Dr. Reintjes acknowledged that he was "not able to differentiate any symptoms or conditions of October 2004 from her work related injury of August 2005."

Subsequent to receipt of Dr. Reintjes' letter dated August 4, 2008, the employer and insurer provided, or caused to be provided to Dr. Reintjes, a copy of the MRI scan of the lumbar spine performed on Ms. Thomas on November 15, 2004. Upon reviewing this MRI scan, by letter dated February 2009, Dr. Reintjes issued a statement that noted the following:

This study shows a central and left-sided L5-S1 disc herniation effacing the left S1 nerve root.

The L5-S1 disc herniation on the left identified on the November 15, 2004 study predates the patient's work related accident of August 8, 2005.

In light of the employer and insurer not providing Ms. Thomas with treatment recommended by Dr. Reintjes, or other surgical consultation, Ms. Thomas treated with Dr. Cornelison on four occasions from August 18, 2008, until the last appointment on May 12, 2009. By this time, Ms. Thomas had been evaluated by Dr. Stephen Reintjes. Aware of this evaluation and the lack of surgery being scheduled for Ms. Thomas, Dr. Cornelison continued to prescribe epidural steroid injections and medications. However, the employer and insurer did not authorize any additional treatment with Dr. Cornelison, and the employer and insurer discontinued authorizing any medications prescribed by Dr. Cornelison.

Ms. Thomas received no further authorized treatment after May 12, 2009. She continues to follow up with her personal care physician, Dr. Marcus Kryger. Dr. Kryger is currently prescribing and monitoring Ms. Thomas' pain medications.

Independent Medical Examinations

Paul Olive, M.D.

Ms. Thomas was evaluated by Dr. Paul Olive, an orthopedic surgeon, on January 3, 2006, with a supplemental report being issued by Dr. Olive on April 27, 2006. Dr. Olive opined that Mrs. Thomas suffered a temporary exacerbation of her low back complaints in the motor vehicle accident of October 9, 2004, and that any symptoms resulting from this accident would have resolved in 6 weeks post accident. Dr. Olive felt that the motor vehicle accident did not contribute to any physical impairment, and that the "weakness in the left leg is not related to the motor vehicle accident that occurred in October, 2004."

Shane L. Bennoch, M.D.

Shane L. Bennoch, M.D., a physician practicing in the specialty of disability evaluation, performed an independent medical examination of Ms. Thomas on behalf of the employee on September 9, 2009. At the time of this examination, Dr. Bennoch took a history from Ms. Thomas, reviewed various medical records, and performed a physical examination of her. In light of his examination and evaluation of Ms. Thomas, Dr. Bennoch opined that as a consequence of the August 8, 2005, work injury, Ms. Thomas suffered a lifting injury resulting in low back pain, and in the nature of an L4-L5, L5-S1 disc disease with left radiculopathy. He further opined that prior to this work injury Ms. Thomas suffered from the following medical conditions: (1) low back pain secondary to motor vehicle accident with L4-L5 and L5-S1 discs and right radiculopathy; (2) Bilateral carpal tunnel syndrome with bilateral carpal tunnel releases; (3) hypertension; and (4) migraine headaches.

In rendering this medical opinion, Dr. Bennoch opines that Ms. Thomas is not at maximum medical improvement. According to Dr. Bennoch, Ms. Thomas is temporarily totally disabled, and has been in this condition since suffering the injury on August 8, 2005. Dr. Bennoch believes that Ms. Thomas should be afforded additional evaluation by another neurosurgeon for a second opinion for consideration of surgery or other conservative treatment.

However, in recognizing that Ms. Thomas might not be afforded additional evaluation and treatment, Dr. Bennoch offered an opinion of permanent disability referable to Ms. Thomas' medical condition. In this regard, Dr. Bennoch opines that Ms. Thomas presents with a permanent partial impairment of 30 percent to the body as a whole, referable to the lumbar spine. In apportioning this disability, Dr. Bennoch opines that the work injury of August 8, 2005, caused Ms. Thomas to sustain a permanent partial impairment of 15 percent to the body as a whole; he apportions the remaining 15 percent to preexisting back disease.

Also, in considering Ms. Thomas's overall medical condition, including consideration of her preexisting medical conditions or disabilities, Dr. Bennoch propounded the following opinions:

1. The patient had pre-existing back disease and in my opinion 15% of the 30% impairment rating should be apportioned to pre-existing back disease and the other 15% to the injury that occurred at work on 8-8-2005.
2. There is a 10% permanent partial impairment to the right upper extremity rated at the right wrist and hand due to carpal tunnel syndrome resulting in carpal tunnel release.
3. There is a 10% permanent partial impairment to the left upper extremity rated at the left wrist and hand due to carpal tunnel syndrome resulting in carpal tunnel release.

THE COMBINATION OF HER IMPAIRMENTS CREATES A SUBSTANTIALLY GREATER IMPAIRMENT THAN THE TOTAL OF EACH SEPARATE INJURY/ILLNESS AND A LOADING FACTOR SHOULD BE ADDED.

In my opinion, the patient has been temporarily totally disabled since the time of the injury at work on 8-8-2005 up to the present time.

It is also my opinion that if the patient does not get evaluation and treatment to relieve her persistent low back pain she is permanently and totally disabled.

Notably, Dr. Bennoch differentiated the back problems that were present prior to the August 8, 2005 work accident. In this regard, prior to August 8, 2005, Ms. Thomas presented with low back pain that involved radiculopathy referable to the right lower extremity. After the work accident of August 8, 2005, Ms. Thomas presented with low back pain involving radiculopathy into the left lower extremity, a completely different and new complaint. In noting this differentiation, Dr. Bennoch considered a medical history without inclusion of the June 6, 2005, hospital visit, wherein Ms. Thomas presented to the emergency room of Skaggs Community Health Center with complaints of severe back pain and headache pain.

In considering Ms. Thomas' physical capacity to engage in activities and employment, Dr. Bennoch offered the following opinion:

... if she does not have a surgical option she would be unable to return to any job that requires lifting and would certainly be limited in jobs that allow her to sit since she would be required to get up and move around at least every 30 minutes.

Notably, Dr. Bennoch attributes this limitation to Ms. Thomas' low back condition, which includes consideration of the effects caused by both the preexisting disability and work injury. He considered both disabilities attributable to the low back to constitute a hindrance or obstacle to employment.

Further, in issuing a "Medical Source Statement of Ability to do work-related activities (physical)" Dr. Bennoch issued permanent work restrictions. These restrictions include the following:

- Standing and walking is limited to less than 2 hours in an 8-hour work day.
- Sitting is limited to allow for periodically alternate sitting and standing to relieve pain or discomfort.
- Lifting / Carrying is limited to 10 pounds, with no frequent lifting.

James T. Shaeffer, M.D.

James T. Shaeffer, M.D., performed an independent medical examination of Ms. Thomas on February 8, 2011, at the request of Ms. Thomas. At the time of this examination, Dr. Shaeffer took a history from Ms. Thomas, reviewed various medical records, and performed a physical examination of her. In light of his examination and evaluation of Ms. Thomas, Dr. Shaeffer opined that Ms. Thomas suffers from a low back condition that makes her "disabled for the type of work which she was doing prior to her most recent injury, which was in August 2005." The nature of this low back condition includes consideration of the prior medical condition, as well as the work injury of August 8, 2005.

In considering Ms. Thomas's overall medical condition, including consideration of whether she is a surgical candidate, Dr. Shaeffer propounds the following opinion:

I would concur with the opinion of Dr. Crabtree, Dr. Olive, and Dr. Reintjes that she is not a good candidate for low back surgery. Dr. Reintjes did note that she had radiographic findings that could be treated surgically with a left L5-S1 hemilaminectomy and discectomy. He also stated that he was skeptical or doubtful that this would totally relieve the pain and would further to extend his opinion is to say that if did not relieve the pain, it probably would not return her to a functional status as far as employment is concerned. My overall evaluation of her makes her a poor candidate for back surgery for several reasons.

1. She has had back and leg pain now for several years.
2. She is currently taking oxycodone at a dose level where she indicated that she is probably addicted to oxycodone at the present time. She previously was given methadone by Dr. Cornelison and she is no longer being seen

by Dr. Cornelison. So, she gets the oxycodone from her primary care physician, who I believe is Dr. Kryger, Branson, Missouri.

3. She also is significantly obese and the 4th factor is that she apparently has adult-onset diabetes. A fifth factor making her poor candidate for surgery is that she suffers from a major chronic depression and she has been on Celexa, an antidepressant since her hysterectomy in 2004, following which she developed the major depression. I feel that she may need to be evaluated by an occupational medicine specialist or by vocational rehabilitation regarding her suitability for retraining into a field of employment where she could do a lot of clerical work, would not be required to be standing or sitting in one position without being able to move for more than a couple of hours at a time. I do feel that at the present time she is disabled for her previous work as a certified nurse assistant because that activity does involve some lifting or over 25 pounds and I feel that she is unable to perform that duty at this time.

I would add that her prognosis and treatment could have been facilitated if she had been seen sooner by an orthopedic surgeon or neurosurgeon.

Allen J. Parmet, M.D., MPH

Allen J. Parmet, M.D., a physician practicing in the specialty of occupational medicine, testified by deposition on behalf of the employer and insurer. Dr. Parmet performed an independent medical examination of Ms. Thomas on December 19, 2011. At the time of this examination, Dr. Parmet took a history from Ms. Thomas, reviewed various medical records, and performed a physical examination of her. In light of this examination and evaluation of Ms. Thomas, Dr. Parmet opined that Ms. Thomas presents with chronic low back pain, with with degenerative disc disease at L4-5 and L5-S1, morbid obesity, history of right and left carpal tunnel syndrome status post-surgical releases, probable sleep apnea, and diabetes-mellitus type.

Based on his review of the medical records and his examination of Ms. Thomas, Dr. Parmet propounded the following observations and comments:

DISCUSSION: While Ms. Thomas reports onset of her current symptoms entirely attributable to an event of August 8, 2005, the records available note numerous discrepancies. The earliest history available of back pain antedates her motor vehicle accident of October 2004 although it is very limited report. Dr. Olive's subsequent evaluation contains illusions of information reporting back pain prior to the October 2004 motor vehicle accident, but I do not have those records to review directly. Certainly her pain following the October 2004 accident appears to be in the low back and predominantly in the right leg with a disproportionate left-sided anatomy suggesting a left radiculopathy would have been appropriate at that time, hence, the disinclination of Dr. Crabtree to operate. She subsequently had facet blocks and rhizotomies suggesting that the facet disease was involved from the motor vehicle accident. While Ms. Thomas reports her pain was completely relieved following the rhizotomy, there is an absence of medical record documentation confirming that, at least until much after August of 2005.

... The subsequent evaluations including additional imaging studies failed to demonstrate any anatomical change in her back. The reports of neurologic loss vary from provider to provider and in particular, an abnormal EMG at one time seems to have normalized, which would be quite unusual for a disc injury with chronic radiculopathy progression over time. In addition, Ms. Thomas's use of narcotics has been, to say the least, quite high, and her current use is 80-100 mg of oxycodone, which is also accompanied and complicated by 3-3.5 grams of acetaminophen daily, which borders on the toxic level. I can certainly understand Dr. Reintjes' reluctance to operate on this individual.

My examination has incongruities present as well. While she reported not taking any oxycodone on the day of the examination, which clearly would have precipitated a withdrawal in someone who is taking such a high dose, she also very clearly had high dose opioid effects present. She also had positive symptom magnification and her purported foot drop appears to be very minimal if present at all since it was eliminated on tandem and retrograde tandem walking. Certainly, a prolonged foot drop, which in my experience tends not to originate with lumbar disc disease but more often with common peroneal nerve injuries below the knee and are often associated with a non-dermatomal sensory loss in the dorsum of the foot, such as was described.

Dr. Parmet concludes that Ms. Thomas "is not a surgical candidate due to the positive symptom magnification and multiple discrepancies in her presentation and very high use of opiates." Further, according to Dr. Parmet, while Ms. Thomas may suffer from low back complaints, objectively "she should be able to function at the light-to-medium level of labor with a 35 lb. lifting restriction and to avoid bending, squatting, and kneeling. In other words, the restrictions of Dr. Reintjes are appropriate." Dr. Parmet further concludes that Ms. Thomas presents with a permanent partial disability of 15 percent to the body as a whole, referable to the low back and attributable to "her multi-factorial back pain, which is primarily degenerative in nature and for which only a single specific trauma can be attributed to that of the motor vehicle accident of October 2004."

Vocational Opinions

Phillip Eldred, M.S., C.R.C.

Phillip Eldred, M.S., C.R.C. is a vocational consultant in Springfield, who testified by deposition in behalf of Ms. Thomas. Mr. Eldred performed a vocational examination and evaluation of Ms. Thomas on December 19, 2011, at the request of Ms. Thomas. At the time of this examination, Mr. Eldred took a history from Ms. Thomas, reviewed various medical records, and performed certain vocational testing and analysis.

Based on his vocational evaluation of Ms. Thomas, Mr. Eldred opines that Ms. Thomas is unable to perform any of her past work, and further is unemployable in the open labor market. He thus concludes that Ms. Thomas is permanently and totally disabled, which he attributes to the work injury of August 8, 2005, in isolation. Notably, in rendering this opinion, Mr. Eldred opines that Ms. Thomas' preexisting medical condition relative to the low back did not constitute

a hindrance or obstacle to employment. And he premises his opinion on Dr. Bennoch's medical opinions and inclusion of permanent work restrictions, including the 10 pound lifting restriction. (Yet, Dr. Bennoch acknowledges that the presenting low back condition includes consideration of the prior degenerative disc disease, which he considered to be an obstacle or hindrance to employment, and an industrial disability.)

Gary Weimholt, M.S.

Gary Weimholt, M.S. is a vocational consultant in Jefferson City, who testified by deposition in behalf of the employer and insurer. Mr. Weimholt performed a vocational examination and evaluation of Ms. Thomas on August 6, 2012, at the request of the employer and insurer. At the time of this examination, Mr. Weimholt took a history from Ms. Thomas, reviewed various medical records, and performed certain vocational testing and analysis.

Based on his vocational evaluation of Ms. Thomas, Mr. Weimholt opines that Ms. Thomas is employable in the open and competitive labor market, including employment in the hotel/motel industry or as an activity director similar to the position she temporarily held while employed at Forsyth Care Center. In rendering this opinion, Mr. Weimholt notes that if he considered only Ms. Thomas' complaints and presentation, she would not be employable. However, he adds, from a vocational rehabilitation perspective, the permanent total disability would be due to the combination of pre-existing problems relating to the low back and other complaints in combination with the injury of August 8, 2005. In addressing this latter concern, Mr. Weimholt propounded the following comments:

...all of the rating physicians have recognized her pre-existing low back contribution to her low back condition. Ms. Thomas has apparently withdrawn from the labor market rather than pursue a path back to employment such as retraining, obtaining basic computer literacy abilities, or other retraining.

Present Complaints

Ms. Thomas still complains of constant, significant pain in her low back and left leg with associated numbness and tingling. She is still taking a great deal of medication on a daily basis, including Percocet for pain (in lieu of methadone which she weaned herself from 2-3 years ago, according to her testimony), Efexor for depression, Zanax for anxiety and other medications for high blood pressure and to keep fluid levels down. According to Ms. Thomas, she is limited in her ability to sit and stand, and must alternate positions. After approximately 10 minutes, her legs get weak and can begin to buckle. She further notes that she has to lie down during the day for approximately 20 minutes.

FINDINGS AND CONCLUSIONS

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

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

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

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

I.

Accident / Medical Causation

Based upon all of the evidence, I find and conclude that on August 8, 2005, Ms. Thomas sustained an injury by accident, which arose out of and in the course of her employment with the employer, Forsyth Care Center. This accident occurred as Ms. Thomas was in a resident's room to administer medication, and the resident had gotten out of bed and had fallen underneath a chair. Ms. Thomas stooped forward in order to help a patient get up off the floor. As Ms. Thomas attempted to lift the chair by its arms and turned to assist the patient, Ms. Thomas tripped on a floor mat, which caused her to twist her back and to sustain an injury to her low back.

At the time of this incident, Ms. Thomas presented with pre-existing degenerative disc disease and a pre-existing disc herniation of the lumbar spine at L5-S1, which had been treated and rendered asymptomatic at the time of the August 8, 2005, work injury. The August 8, 2005, work injury caused Ms. Thomas to experience immediate pain in her low back and simultaneously to feel a pop. The incident aggravated the preexisting lumbar spine condition, causing the condition to become symptomatic, and resulted in an acceleration and deterioration of the lumbar spine condition.

After consideration and review of the evidence, and taking into consideration the understanding that the applicable law requires a liberal interpretation in favor of coverage and affords to the claimant the benefit of the doubt, I resolve the presenting issue in favor of Ms. Thomas. Viewing the evidence as a whole, I find and conclude that as a consequence of the August 8, 2005 accident, Ms. Thomas suffers chronic low back pain, with radiculopathy and a left foot drop.

II. Medical Care

The employee seeks an award for future medical care. In order to receive an award of future medical benefits under Chapter 287, RSMo, an employee does not need to show “conclusive evidence” of a need for future medical treatment. Instead, the employee need only show a “reasonable probability” that because of her work-related injury, future medical treatment will be necessary. *Stevens v. City of Citizens Memorial Healthcare Foundation*, 244 S.W. 3d 43 (Mo. App. 2008).

The evidence presented in this case is supportive of a finding that Ms. Thomas is entitled to future medical care. Notably, the August 8, 2005, work injury caused Ms. Thomas to undergo years of medical treatment, and she remains under the care of Dr. Marcus Kryger. During the lengthy course of her treatment history, none of the attending physicians questioned Ms. Thomas’ veracity or her level of pain. All of the physicians acknowledge that Ms. Thomas suffers low back pain with left sided radiculopathy. The effects of this injury cause Ms. Thomas to suffer severe pain, and to be governed by physical restrictions. As a consequence, Ms. Thomas is prescribed chronic narcotic medications to help control and decrease her pain.

Admittedly, the narcotic medications being taken by Ms. Thomas is addictive, and the nature of this condition provides reason for the surgeons to not view Ms. Thomas as a surgical candidate. In this regard, Dr. Reintjes indicated that Ms. Thomas would need to be weaned off the narcotic pain medication before she could be considered a surgical candidate. Yet, even if Ms. Thomas were to be weaned off of the narcotic pain medication, Dr. Reintjes notes that while surgery would relieve Ms. Thomas’ left leg pain, it would not relieve her low back pain. She continues to suffer persistent and significant pain. Thus, Ms. Thomas continues to be treated conservatively with pain management through use of prescription medication, which is causally related to the August 8, 2005, work injury.

In Missouri, the employee has the burden of proof that medical care past, present and future is causally related to the accidental injury. *Dean v. St. Luke's Hospital*, 936 S.W.2d 601, 603 (Mo. App. W.D. 1997). Here, all of the physicians agree that Mrs. Thomas will need future medical care in the form of treatment and medications along with assistive devices. The employee has met her burden of proof that she is in need of future medical care.

Accordingly, after consideration and review of the evidence, I find and conclude that Ms. Thomas is entitled to future medical care, which shall include treatment to the low back and left lower extremity, including prescription medication and such other modalities as may be prescribed for pain management of her low back pain. The employer and insurer are ordered to provide all additional medical treatment reasonable and necessary to cure and relieve Ms. Thomas from the effects of her lower back and lower extremity injury in accordance with the

provisions of Section 287.140, RSMo. This requirement for future medical aid shall include any care and treatment that is causally related to the August 8, 2005 work accident.

III. Temporary Disability Compensation

The parties stipulate and acknowledge that the employer and insurer provided temporary total disability compensation to Ms. Thomas for the period of August 9, 2005, through October 5, 2008. The employee, however, seeks payment of temporary total disability compensation, payable for the period of October 6, 2008, through August 8, 2012. The adjudication of this issue requires consideration of Section 287.020.7, and applicable case law.

The term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident. 'In other words, total disability means the inability to return to any reasonable or normal employment.' *Faubion v. Swift Adhesive Co.*, 869 S.W.2d 839, 841 (Mo.App. 1994).

While 'total disability' is defined by § 287.012.7, the statutes do not define 'temporary total disability.' However, as the court in *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816, 820 (Mo.App. W.D. 2003) notes:

Temporary disability awards are intended to cover a healing period. Temporary total disability is to be granted only for the time prior to when the employee can return to work. Temporary partial is to be awarded during the healing period to compensate the employee for the reduction in his working ability during the healing period. *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816, 820[9-12] (Mo.App. W.D. 2003) quoting *Williams v. Pillsbury Co.*, 694 S.W.2d 488 (Mo.App. 1985).

In determining the length of temporary disability the court may utilize or consider multiple factors. Consequently, the fact that a claimant was capable of, but did not seek, sporadic or light duty work, would not in itself disqualify the claimant from receiving temporary total disability benefits. A nonexclusive list of other factors relevant to a claimant's employability in the open labor market includes the anticipated length of time until the claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that the claimant will return to the claimant's former employment." *Cooper v. Medical Center of Independence*, 955 S.W.2d 570,575-577[15-17] (Mo.App. W.D 1997)

Finally, medical testimony is not necessary to support an award for temporary total disability. *Riggs v. Daniel International*, 771 S.W.2d 850 (Mo.App. W.D. 1989), citing *Ford v. B. State Development Agency*, 677 S.W.2d 999 (Mo.App. 1984); *Foglesong v. Banquet Foods Corp.*, 526 S.W.2d 886 (Mo.App. 1975); *Smith v. Terminal Transfer Co.*, 372 S.W.2d 659, 665 [10] (Mo.App. 1963). Likewise, an extended length of temporary total disability can be awarded when there has been disagreement as to the diagnosis and type of treatment to be provided. See, in particular, *Cunningham v. Leggett and Platt*, 929 S.W.2d 953, 956-958 (Mo.App. S.D. 1996).

See, also, Marrone v. Modine Heat and Transfer, 918 S.W.2d 315, 320 [7] (Mo.App. S.D. 1996); *Patterson v. Engineering Evaluation Inspections, Inc.*, 913 S.W.2d 344, 347-348 [6-8] (Mo.App. E.D. 1995).

The evidence presented by the parties does not offer a readily identifiable date Ms. Thomas reached maximum medical improvement. Notably, on July 14, 2008, Dr. Reintjes stated that he was uncertain as to whether Ms. Thomas was at maximum medical improvement, and later correspondence provided by Dr. Reintjes did not offer any such opinion, although he issued certain work restrictions. Ms. Thomas thus continued to treat with Dr. Cornelison through May 12, 2009, without indication that she was at maximum medical improvement. During this period of treatment, Dr. Cornelison continued to provide conservative treatment for Ms. Thomas, and never returned Ms. Thomas to work; she did not issue an opinion suggesting that Ms. Thomas reached maximum medical improvement.

Later, on September 9, 2009, Dr. Bennoch examined Ms. Thomas. During this examination Dr. Bennoch expressed his opinion that he did not believe Ms. Thomas was at maximum medical improvement, premised on the belief she needed additional evaluation by a neurosurgeon for a second opinion. Yet, on this date, and recognizing that Ms. Thomas was not likely to be offered such a surgical consultation, he evaluated Ms. Thomas' medical condition, and offered a permanent disability opinion relative to the work injury of August 8, 2005.

Accordingly, in light of the foregoing, and after consideration and review of the evidence, I find and conclude that Ms. Thomas was temporarily and totally disabled for the period of August 9, 2005, through May 12, 2009, when Dr. Cornelison ceased providing Ms. Thomas with medical care. Although Dr. Cornelison did not render an opinion of maximum medical improvement, and Ms. Thomas continued to be governed by work restrictions, I find and conclude that Ms. Thomas had reached maximum medical improvement; the actions of Dr. Cornelison suggest that Ms. Thomas' medical condition had reached a plateau and had become permanent.

Therefore, the employer and insurer are ordered to pay to the employee the sum of \$8,262.82, which represents 31 1/7 weeks of temporary total disability compensation payable for the period of October 6, 2008, through May 12, 2009, at the applicable compensation rate of \$265.32 per week.

IV. Permanent Disability Compensation

The evidence is supportive of a finding that the August 8, 2005, work injury has had a significant disabling effect on Ms. Thomas. In addressing this concern, Ms. Thomas testified that she cannot physically do what she did before the work injury of August 8, 2005. She has to rest throughout the day; she is limited in her ability to sit and stand, and must alternate positions. After approximately 10 minutes, her legs get weak and can begin to buckle. She further notes that she has to lie down during the day for approximately 20 minutes. Further, she continues to experience constant, significant pain in her low back and left leg with associated numbness and tingling. And she is still taking a great deal of medication on a daily basis, including Percocet for pain (in lieu of methadone which she weaned herself from 2-3 years ago, according to her testimony) for low back pain.

The various physicians examining and/or treating Ms. Thomas acknowledge the severity of Ms. Thomas' low back condition, and recognize that she is governed by permanent work restrictions. In this regard, the treating physician, Dr. Cornelison, prescribed restrictions that included a 10-pound weight limit. Similarly, Dr. Bennoch prescribed medical restrictions, which govern Ms. Thomas' activities. In this regard, Dr. Bennoch issued the following restrictions:

- Standing and walking is limited to less than 2 hours in an 8-hour work day.
- Sitting is limited to allow for periodically alternate sitting and standing to relieve pain or discomfort.
- Lifting / Carrying is limited to 10 pounds, with no frequent lifting.

The physicians retained by the employer and insurer similarly acknowledge that Ms. Thomas presents with a low back condition that causes her to be governed by work restrictions. In his letter dated August 4, 2008, Dr. Reintjes indicated that Ms. Thomas is governed by permanent work restrictions, which include "... avoid repetitive bending, twisting, or lifting more than 35 pounds." Dr. Parmet concurs substantially with Dr. Reintjes. According to Dr. Parmet, Ms. Thomas "should be able to function at the light-to-medium level of labor with a 35 lb. lifting restriction and to avoid bending, squatting, and kneeling."

The parties offer differing vocational opinions relative to the question of whether Ms. Thomas is unemployable in the open and competitive labor market. Mr. Eldred, a vocational rehabilitation specialist, provided credible and convincing evidence Ms. Thomas would not be employable in the open market. He proffered Ms. Thomas, could not return to her previous work, could only do less than sedentary work, had no transferable skills to that level, and could not meet the demands of working a forty hour week. Further, according to Mr. Eldred, the injuries of August 8, 2005, were the sole cause for Ms. Thomas' permanent disability.

Further, Mr. Eldred testified that the preexisting back injury, bilateral carpal tunnel syndrome and migraines did not rise to the level of an impairment which was vocationally disabling, and Dr. Paul Olive found no impairment as to the preexisting low back injury in the October 9, 2004, motor vehicle accident. This was all corroborated by the testimony of Ms. Thomas who stated that she had no preexisting impairments that hindered her ability to work, and that she missed no time for any preexisting impairments leading up to the work injury of August 8, 2005.

Although Mr. Weimbolt opines that Ms. Thomas is employable, his opinion was given in a vacuum. He failed to account for the subjective complaints and limitations of Ms. Thomas, and he completely ignored the opinions of the authorized treating physician, Dr. Cornelison, who stated in her report of May 12, 2009, that Ms. Thomas was and continued to be 100 percent disabled. Dr. Bennoch and Mr. Eldred provide the same opinion.

Ms. Thomas further produced evidence that those injuries in combination with her vocational skills rendered her unable to be employed.

In evaluating the veracity of Ms. Thomas, it is understood that she presents with a history of having two felony convictions for forgery, which is a crime involving deceit and dishonesty. Yet, she notes these convictions occurred in her early 20s (approximately 1993), and she changed her life following these convictions.

In addition, after observing Ms. Thomas throughout the course of the hearing and reviewing all of the evidence, I find she is credible. Throughout the hearing, both the appearance of Ms. Thomas and her observed behavior patterns support the conclusion that she is suffering from a significant level of pain in her lower back and lower extremities. During the course of the hearing, which began at 9:00 a.m., Ms. Thomas was unable to sit comfortably, was changing positions, and was alternating between sitting and standing in an effort to reduce her pain. This is consistent with the testimony of Dr. Bennoch and the vocational experts, Mr. Weimbolt and Mr. Eldred. Accordingly, I find Ms. Thomas credible, and accept as true her complaints of pain and limitations.

After consideration and review of the evidence, and in accepting as true Ms. Thomas' complaints of pain and limitations, I resolve the differences in vocational opinion in favor of Mr. Eldred, who I find credible, reliable and worthy of belief. Similarly, I find him persuasive.

The evidence is thus supportive of a finding, and I find and conclude that Ms. Thomas is unemployable in the open and competitive labor market. I further find and conclude that Ms. Thomas is unemployable in the open and competitive labor market as a consequence of the August 8, 2005, work injury, considered alone. No employer could reasonably be expected to hire her in her current condition, particularly when one considers the chronic pain she experiences, the need for narcotic medications, and the requirement to lie down unpredictably throughout the day, all of which is attributable to the work injury of August 8, 2005, considered alone.

Accordingly, I find and conclude that, as a consequence of the accident of August 8, 2005, considered alone, the employee is permanently and totally disabled. Therefore, in light of the foregoing, the employer and insurer are ordered to pay to the employee, Jennifer Thomas, the sum of \$265.32 per week for the employee's lifetime. The payment of permanent total disability compensation by the employer and insurer is effective as of May 12, 2009, when she reached maximum medical improvement.

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

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