

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

Injury No.: 03-081916

Employee: Maurnita White
Employer: Baden Christian Child Care Center
Insurer: Argonaut Great Central Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)
Date of Accident: August 11, 2003
Place and County of Accident: St. Louis City, 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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 19, 2006. The award and decision of Administrative Law Judge John Howard Percy, issued January 19, 2006, is attached and incorporated by this 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 10TH 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: Maurnita White

Injury No.: 03-081916

2 weeks of temporary total disability (or temporary partial disability)	\$234.90
40 weeks of permanent partial disability from Employer	\$5,600.00

22. Second Injury Fund liability: No

TOTAL: UNDETERMINED

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 \$675.64 in favor of the following attorney for necessary legal services rendered to the claimant:

Andrew Weigley

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Maurita White	Injury No.: 03-081916
Dependents:	N/A	Before the
Employer:	Baden Christian Child Care Center	Division of Workers'
Additional Party:	Second Injury Fund (previously dismissed)	Compensation
Insurer:	Argonaut Great Central Insurance Co.	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: JHP

A hearing in this proceeding was held on August 9, 23, September 13, 23, October 27, and November 28 and 29, 2005 pursuant to Employee's request for a temporary award as provided in Section 287.510 Mo. Rev. Stat. (2000). The hearing date was advanced on the docket pursuant to Employee's request made under the provisions of Section 287.450. Employee requested additional medical treatment and reimbursement for incurred medical expenses as provided in Section 287.140 and an award of compensation for temporary total disability pursuant to Section 287.170. Both parties submitted proposed awards on December 20, 2005.

STIPULATIONS

The parties stipulated that on or about August 11, 2003:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was insured by Argonaut Great Central Insurance Co.;
3. the employee's average weekly wage was \$176.17 for temporary disability purposes and \$210.00 for permanent disability purposes;
4. the rate of compensation for temporary total disability was \$117.45 and the rate of compensation for permanent partial disability and permanent total disability was \$140.00; and
5. the employee sustained an injury by accident arising out of and in the course of employee's employment occurring in St. Louis City, Missouri.

The parties further stipulated that:

1. the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law;
2. compensation has been paid in the amount of \$2,030.23 representing 17-2/7 weeks of benefits covering the period from August 12 through December 10, 2003; and
3. employer/insurer have paid \$17,881.54 in medical expenses.

ISSUES

The issues to be resolved in this proceeding are:

1. whether the cysts in claimant's spine were caused or aggravated by the work-related accident of August 11, 2003;
2. if the employee sustained a compensable injury, whether employee is entitled pursuant to Section 287.140 Mo. Rev. Stat. (2000) to be reimbursed for the medical bills set forth in employee's Exhibits JJ and LLL;
3. if the employee sustained a compensable injury, whether the employee should be provided with any additional medical treatment;
4. if the employee sustained a compensable injury, whether employee is entitled pursuant to Section 287.170 Mo. Rev. Stat. (2000) to any additional temporary total disability compensation subsequent to December 10, 2003;
5. if the employee sustained a compensable injury, whether and to what extent employee sustained any permanent partial disability which would entitle her to an award of compensation; and
6. the amount of any attorney's lien.

MEDICAL CAUSATION

There is no dispute that claimant sustained low back, neck and left shoulder strains as a result of the work-related injury. Maurnita White, employee herein, also claims that the two cysts in her thoracic spine were either caused or aggravated by the work-related accident of August 11, 2003. Employer/insurer contend that the spinal cysts were preexisting conditions and were not aggravated by the work-related accident.

The employee must establish a causal connection between the accident and the claimed injuries. Davies v. Carter Carburetor Div., 429 S.W.2d 738 (Mo. 1968); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo. App. 1994); Blankenship v. Columbia Sportswear, 875 S.W.2d 937, 942 (Mo. App. 1994); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 198 (Mo. App. 1990); Cox v. General Motors Corp., 691 S.W.2d 294 (Mo. App. 1985); Griggs v. A.B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974); Smith v. Terminal Transfer Company, 372 S.W.2d 659, 664 (Mo. App. 1963).

Amendments made to Section 287.020.2 in 1993 require that the injury be "clearly work related" for it to be compensable. An injury is clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor." The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. Injuries which are triggered or precipitated by work may nevertheless be compensable if the work is found to be a "substantial factor" in causing the injury. Kasl, *supra* at 853. A substantial factor does not have to be the primary or most significant causative factor. Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo. App. 2000); Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998). An accident may be both a triggering event and a substantial factor in causing an injury. *Id.* Subsection 2 also provides that an injury must be incidental and not independent of employment relationship and that "ordinary, gradual deterioration or progressive degeneration of the body caused by aging" is not

compensable unless it "follows as an incident of employment." The extent to which the 1993 amendments have further modified prior caselaw will be determined by the appellate courts. See Cahall, *supra* at 372.

The quantum of proof is reasonable probability. Davies, *supra* at 749; Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); White v. Henderson Implement Co., 879 S.W.2d 575, 577 (Mo. App. 1994); Fischer at 199; Banner Iron Works v. Mordis, 664 S.W.2d 770, 773 (Mo. App. 1983); Griggs at 703. "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Fischer at 198.

Such proof is made only by competent and substantial evidence. It may not rest on speculation. Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). Expert testimony is required where the cause and effect relationship between the claimed injury or condition and the alleged cause is not within the realm of common knowledge. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo. App. 1994); Brundige v. Boehringer Ingelheim, 812 S.W.2d 200, 202 (Mo. App. 1991). Expert testimony is essential where the issue is whether a preexisting condition was aggravated by a subsequent injury. Modlin v. Sun Mark, Inc., 699 S.W.2d 5 (Mo. App. 1985). The fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174 (Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986). An administrative law judge may not constitute himself or herself as an expert witness and substitute his or her personal opinion of medical causation of a complicated medical question for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. 1994); Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Eubanks v. Poindexter Mechanical, 901 S.W.2d 246, 249-50 (Mo. App. 1995). However, even uncontradicted medical evidence may be disbelieved. Massey v. Missouri Butcher & Cafe Supply, 890 S.W.2d 761, 763 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490 (Mo. App. 1990).

On the other hand, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768 (Mo. App. 1994); Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Ford v. Bi-State Development Agency, 677 S. W. 2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corp, 526 S.W.2d 886, 892 (Mo. App. 1975). The trier of facts may even base its findings solely on the testimony of the employee. Fogelsong at 892. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony is given. Hutchinson v. Tri-State Motor Transit Co., *supra* at 161-2; Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993). Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267, 269 (Mo. App. 1993).

Employer is liable for any aggravation of a preexisting asymptomatic condition caused by the primary injury. Gennari v. Norwood Hills Corporation, 322 S.W.2d 718, 722-23 (Mo. 1959); Miller v. Wefelmeyer, 890 S.W.2d 372, 376 (Mo. App. 1994); Weinbauer v. Gray Eagle Distributors, 661 S.W.2d 652, 654 (Mo. App. 1983); Johnson v. General Motors Assembly Division, 605 S.W.2d 511, 513 (Mo. App. 1980); Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 891 (Mo. App. 1975); Mashburn v. Chevrolet Kansas City Div., G.M. Corp., 397 S.W.2d 23 (Mo. App. 1965); Garrison v. Campbell "66" Express, 297 S.W.2d 22 (Mo. App. 1956); accord, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994); Terrell v. Board of Education, City of St. Louis, 871 S.W.2d 20 (Mo. App. 1993). In Weinbauer claimant had preexisting cervical osteoarthritis. In Johnson claimant had preexisting spondylolisthesis. In Miller, employer/insurer were held liable for the complete loss of the employee's right eye due to a work injury, even though he had been diagnosed with a preexisting, dormant condition in both eyes.

Findings of Fact

Based on my observations of claimant's demeanor during her testimony, I find that she is only partially credible. Based on that portion of claimant's testimony which I find to be credible and on the medical records, I make the following findings of fact.

Description of Accident

Maurnita White took care of infants and toddlers in Employer's day care center. On August 11, 2003 a metal folding in which employee was sitting and holding an infant collapsed. Claimant landed on her buttocks. She initially thought that she was unhurt. However, after a few hours her back tightened up. Claimant asked Lisa McKeown if employer had a doctor for her to see. She replied that employer did not. (Claimant's Testimony)

Medical Treatment

Employee initially sought treatment from the Forest Park Hospital emergency room. She subsequently received treatment from Peoples Health Center on three occasions.^[1] (Claimant's Testimony) Dr. Sandra Knoll and Dr. Samuel Joseph ordered a CT examination of the low back and x-rays of the neck. (Claimant's Exhibit II, Pages 1-2)

Claimant underwent a CT examination of the lumbar spine on August 23, 2003 at Forest Park Hospital. The radiologist noted questionable disk bulges at L4-5 and L5-S1. No other abnormality was identified. (Claimant's Exhibits BB, Page 2 & II, Page 1) X-rays taken of claimant's cervical spine on August 29, 2003 showed only mild degenerative changes with a mild loss of lordosis possibly due to a muscular spasm, but no fracture or other abnormality.^[2] (Claimant's Exhibit II, Page 2)

On September 22, 2003 Dr. Cynthia D. Byler examined claimant at the request of employer/insurer. Ms. White described the accident and indicated that she had been under the care of Dr. Samuel Joseph and was taking Flexeril and tramadol. Employee complained that her left upper extremity was weak. Dr. Byler noted that she constantly flexed and extended her left arm at the elbow and only stopped when she was asked to flex and extend during the examination. On examination claimant had left paracervical tenderness at C5, C6, and C7, but no frank spasm. Cervical range of motion was unrestricted. She had tenderness in the left paralumbar region, but no frank spasm. She was able to forward flex her lumbar spine to 60 degrees with complaint. All other aspects of the examination were normal. Dr. Byler reviewed the reports of the CT scan of the lumbar spine and cervical spine x-rays. She diagnosed her with neck and low back pain and ordered an MRI of the cervical spine.^[3] (Employer/Insurer's Exhibit 2, Page 1)

An MRI of claimant's cervical spine was performed on September 24, 2003. Dr. Catherine Beal, the radiologist, noted degenerative disk disease throughout the cervical spine with intervertebral disk space narrowing and anterior disk bulging with mild end plate spurring. However they were not associated with central neural foraminal stenosis. She noted mild narrowing of the C5-6 neural foramen secondary to uncovertebral joint spurring and asymmetric disk bulging. She noted displacement of the thoracic cord at the T2-3 level which appeared to be associated with a cystic structure within the spinal canal. This study did not specifically examine the thoracic spine. (Claimant's Exhibit II, Page 3 and Employer/Insurer's Exhibit 2, Page 3)

Dr. Byler reexamined claimant on September 26, 2003. Ms. White continued to complain of pain and weakness in her left upper extremity, but she was not actively flexing and extending her left arm at the elbow. She complained of soreness in the left parathoracic and paralumbar region. On examination she had tenderness in the left paracervical and left trapezius, but full range of motion of the cervical spine. She had tenderness to the left of T12, L1, and L2. Dr. Byler reviewed the MRI report, noted the arachnoid cyst and opined that it was not secondary to the incident of August 11, 2003. She noted that the MRI report indicated that claimant had endplate spurring and disk space narrowing in her cervical spine. She referred claimant to Dr. Allan Gocio, a spine specialist, for a consultation regarding her cervical and lumbar complaints. (Employer/Insurer's Exhibit 2, Page 4)

Dr. Gocio of the Neuroscience Institute at Forest Park Hospital examined claimant on October 2, 2003. Ms. White told him that she fell directly onto her buttocks on August 11, 2003. She had no pain immediately after the incident, but three hours later she began to experience bilateral low back pain, pain down both legs and numbness and tingling in the left leg. She complained to Dr. Gocio of left arm pain. On examination she had normal range of motion in the neck and low back. No spasm was noted. He thought that her lumbar CT of August 23, 2003 appeared normal. He noted that her cervical MRI of September 24, 2003 showed subarachnoid cysts in the upper thoracic area with displacement of the spinal cord with cervical spondylosis and bulging disks at several levels. He was concerned that claimant had a congenital arachnoid cyst with enlargement of the spinal cord and possibly syringomyelia. He indicated that this condition would typically not be related to a single event trauma such as claimant experienced. He opined that her findings were minimal and her symptomatology was very widespread and diffuse. He recommended a cervical myelogram and CT scan and EMGs and nerve conduction studies of the left upper extremity. He prescribed Neurontin. (Claimant's Exhibit W & Employer/Insurer's Exhibit 3)

A post myelogram CT of claimant's cervical spine was performed on October 8, 2003. No central or neural foraminal

stenosis was noted. It showed minimal posterior disk bulging at C3-4, C4-5, and C5-6 and minimal end plate spurring at C4-5, C5-6, and C6-7. The overall conclusion was mild cervical spondylosis. (Claimant's Exhibit II, Page 4) A post myelogram CT of claimant's thoracic spine (T1 through T12) was performed on October 8, 2003. The radiologist noted the presence of a cerebral spinal fluid filled density which communicated with the subarachnoid space associated with compression of the thoracic cord at the level of T2 through T4. (Claimant's Exhibit II, Pages 4-5)

On October 16, 2003 Dr. Byler reexamined claimant. She noted that employee had recently undergone cervical and thoracic myelograms which showed an arachnoid cyst, which was not the direct result of the injury, but which may have been aggravated with the injury. Employee complained of a pin sensation in the right shoulder blade, continued weakness of the left arm, and weakness of the right arm. She complained of low back pain. On examination she was sensitive to light touch in the paracervical region of C5, C6, and C7. Range of motion with distraction was maintained in the cervical spine. There was no tenderness in the thoracic spine. There was tenderness to the right of L2 and L3 with muscle tone increased. She noted that Dr. Gocio mentioned the congenital arachnoid cyst. Dr. Byler concluded that employee's symptomatology and clinical findings did not correlate well. The findings seemed to be minimal in relation to her symptomatology. She recommended physical therapy and evaluation by Dr. Bernard Randolph. (Employer/Insurer's Exhibit 2, Page 5)

Claimant was evaluated at HealthSouth on October 17, 2003. Her chief complaints were low back pain with radiation to the buttock and posterior neck and shoulder weakness down the arms to the hands. Skilled rehabilitative therapy was recommended and started. Employee went three times per week. (Claimant's Exhibit PPP)

On October 22, 2003 Dr. Allan Gocio opined that claimant had a congenital abnormality with a possible arachnoid cyst causing deviation of the thoracic spinal cord. He indicated that this may be causative of some of her diffuse symptomatology. He thought it was very unlikely to be causing her arm symptomatology. He further opined that the abnormality was not likely to be related to her work injury. He recommended EMG's and nerve conduction studies of her left upper extremity in six to eight weeks. He urged claimant to seek a second opinion if she desired as concerning her arm symptomatology. He opined that she was suitable for light duty activity except for holding infants due to the weakness she complained of in her left arm. (Employer/Insurer's Exhibit 3)

Dr. Bernard C. Randolph, a specialist in physical medicine and rehabilitation, examined claimant on October 27, 2003. Claimant described the accident to Dr. Randolph and her medical treatment. He noted that the MRI of the cervical spine showed some degenerative disk disease without discrete disk herniations. There was also evidence of an arachnoid cyst at the upper thoracic level. He reviewed the report of Dr. Gocio and the subsequent CT myelograms. On examination she complained of mild pain at the extremes of flexion, extension, and rotation of the cervical and lumbar spines.

Dr. Randolph reviewed the MRI of the cervical and upper thoracic spine. He noted the anterior displacement of the cord from an apparent cyst at T2-3. He indicated that the cyst did not appear to be an injury of any type and had no relationship to her pain. He saw no evidence that it had been aggravated. He also reviewed the post myelogram CTs of the lumbar and cervical spines. He saw no significant abnormalities in the cervical spine and some mild degenerative changes in the lumbar spine. He diagnosed claimant with a cervical sprain, sensory disturbance of the left upper extremity, myofascial pain involving the left trapezius, and a lumbar sprain. He injected several trigger points in the left trapezius with Marcaine and recommended therapy at HealthSouth and electrodiagnostic studies of the left upper extremity. (Joint Exhibit LL-1, Page 9 & depo ex 2)

On November 11, 2003 after 10 sessions of physical therapy, employee had not met any of her goals and was viewed as not a good candidate for physical therapy. She tolerated only minimal activity due to complaints of pain. (Claimant's Exhibit PPP)

On November 13, 2003 Dr. Randolph performed extensive electrodiagnostic testing to evaluate cervical nerve root and peripheral nerve function of claimant's left upper extremity. All test results were normal. An EMG of multiple muscle groups of the left arm was normal. Dr. Randolph concluded that while employee continued to experience cervical and proximal shoulder girdle myofascial pain, the studies revealed no evidence of a radiculopathy, plexopathy, or peripheral nerve injury. He prescribed Amitriptyline and Etodolac, an anti-inflammatory. (Joint Exhibit LL-1, Page 11 & depo ex 2)

Ms. White returned to Dr. Randolph on November 24, 2003. She continued to complain of pain in the left trapezius area. Spurling's test was negative for nerve root impingement. He diagnosed her with left shoulder girdle and cervicothoracic sprain with associated myofascial pain. He administered two trigger point injections in the left upper trapezius. (Joint Exhibit LL-1, Page 12 & depo ex 2)

On December 5, 2003 after 19 sessions of physical therapy, claimant had made little progress. (Claimant's Exhibit

PPP)

On December 10, 2003 claimant told Dr. Randolph that she was doing about the same. The last set of injections had not changed her symptoms. She complained of tightness and pain in the proximal shoulders and midback region and occasional numbness and tingling in her legs. Palpation revealed diffuse tenderness in the neck, proximal shoulders, and upper trapezius. He diagnosed her with multiple soft tissue contusions and strain and some signs of symptom magnification. Dr. Randolph testified that her pain behavior was increased without any clinical findings which would explain her verbalized levels of pain. He continued the Amitriptyline and prescribed Vioxx. (Joint Exhibit LL-1, Pages 22-23 & depo ex 2)

Dr. Randolph reexamined Ms. White on December 24, 2003. She complained of persistent mild discomfort in her neck and proximal shoulders and occasional numbness in her hands. On examination she had normal range of motion in her neck and shoulders. Examination of the low extremities was normal. She continued to have some soft tissue pain which Dr. Randolph thought would continue to improve with exercise. He opined that she was at maximum medical improvement and allowed her to work without restrictions. (Joint Exhibit LL-1, Pages 14-15 & depo ex 2)

Claimant apparently returned to the People's Health Center. Dr. Delani Mann-Johnson ordered an MRI of claimant's left shoulder. It was performed at St. Mary's Health Center on March 26, 2004. The only positive findings were degenerative changes at the acromioclavicular joint. The rotator cuff was intact and there was no evidence of impingement. (Claimant's Exhibit J) Dr. Samuel Joseph referred claimant to Dr. Howard Place, an orthopedic surgeon. (Claimant's Testimony)

Dr. Place ordered an MRI of employee's thoracic spine which was performed at St. Mary's Health Center on April 22, 2004.^[4] It showed an elongated epidural mass within the spinal canal, intradural, extending from T3 to T11 which was thought to be an arachnoid cyst. It also revealed an ovoid cystic structure at the T6 level which was thought to be an enteric duplication cyst. The vertebral bodies and the disk spaces were unremarkable. There was no spinal canal stenosis. (Claimant's Exhibits J & II, Pages 6-7)

Dr. Gocio reexamined claimant on May 5, 2004. He noted that her prior workup showed an incidental arachnoid cyst, which he opined was a congenital lesion and not contributory to the employee's condition associated with her work injury. He noted that she also had mild degenerative disk disease in the cervical and lumbar regions, which did not correlate with her symptomatology. Dr. Gocio reviewed the medical reports of Drs. Musich^[5] and Randolph. He indicated that they suggested that she had a soft tissue injury and no evidence for radiculopathy, myelopathy, or peripheral neuropathy. Ms. White described her pain as 10/10 in the low back, neck and left arm. When he questioned her about the treatment by Drs. Randolph and Musich, she became hostile and angry. During his physical examination she resisted movement in all extremes in her neck. Dr. Gocio again opined that there was no indication of myelopathy or radiculopathy. He opined that she sustained a cervicothoracic strain which should have resolved with the treatment rendered by Drs. Byler, Randolph and Musich. He noted that her symptomatology far outweighed any objective findings in her condition. Dr. Gocio opined that claimant had a strong functional overlay; he recommended against narcotic pain mediation. He opined that she could work, but with lifting restriction of 30 pounds with the left arm. He thought that her emotional instability and anger were not connected to her physical injuries, but related to some sort of psychogenic pain syndrome or symptom magnification for secondary gain in her compensation case. He opined that all of her impairment was related to functional overlay. (Claimant's Exhibit W & Employer/Insurer's Exhibit 3)

Claimant sought treatment from Myrtle Hilliard Davis Comprehensive Health Center on September 14, 2004. X-rays taken of claimant's cervical spine showed minimal old healed compression fractures of the bodies of C4, C5, and C6, a double fracture of a bridging spur between the C4 and C5 bodies, and an old chip fracture of a spur of the C6 body. There was moderate scoliosis concave to the right of the cervical spine. X-rays of the dorsal spine showed minimal bone spurs at the margins of the vertebral plates of the bodies from C7 to T12 and minimal scoliosis concave to the left of the dorsal spine. No other abnormalities were seen. X-rays of the lumbar spine showed bone spurs between L3 and L4 and mild scoliosis concave to the right of the lumbar spine. (Claimant's Exhibits K & II, Pages 8-9)

Dr. Allan Gocio apparently referred claimant to Dr. Lukasz J. Curylo, a spine surgeon, for a second opinion. Dr. Curylo examined Ms. White on December 14, 2004. She described the accident and her course of treatment. She complained of chronic daily pain which was aggravated by any type of activity. On examination employee had pain over the entire lumbar spine of her spinous processes, a slightly positive Hoffmann's sign on the right side. She three out of five positive Waddell's signs. Dr. Curylo reviewed the September 24, 2003 MRI of the cervical spine which he felt showed an arachnoid cyst at the T2-3 level and multilevel degenerative disk disease in the cervical spine. He also reviewed the (October 8, 2003) CT myelogram of the cervical and thoracic spine and concluded that they showed evidence of a structure which was consistent with an enteric duplication cyst as well as an interspinal arachnoid cyst at the T3-T11 levels. He noted some slight epidural compression. He reviewed the x-rays taken on September 14, 2004 of employee's cervical, thoracic, and lumbar

spine which showed normal alignment with very minimal scoliotic deformity and multilevel degenerative disk disease in the cervical, thoracic and lumbar spine. He noted that employee had some psychosocial magnification of her symptoms. He agreed with pain management. He noted that the cyst was outside his area of specialty. He referred employee to the neurosurgery clinic at Barnes Hospital. Dr. Curylo saw a normal spine alignment and multilevel degenerative disk disease in the cervical, thoracic, and lumbar spine which required only nonoperative pain management. (Claimant's Exhibit SSS)

Claimant returned to the Myrtle Hilliard Davis Comprehensive Health Center on January 28, 2005. She complained of pain in her neck, left shoulder, back and leg due to a trauma at work in August of 2003. Dr. Gina Smith prescribed Amitriptyline and Vicodin. (Claimant's Exhibit K) On February 25, 2005 claimant complained of mid and low, left back pain and numbness to her hands. Dr. Smith diagnosed Ms. White with neck and back pain and referred pain. She prescribed Amitriptyline and Vicodin. On March 25, 2005 Ms. White returned to the clinic for evaluation of her neck, left shoulder and back pain. Dr. Smith prescribed Amitriptyline, Vicodin and Naprosyn. X-rays taken of her chest a few old small calcified granulomatous nodules in both lungs, minimal dorsal scoliosis. No other abnormalities were seen. Claimant was diagnosed with bronchitis on April 22. On May 27, 2005 claimant complained of pain in her neck, back, legs, buttocks and numbness in her legs, hands and feet. Dr. Smith prescribed Wellbutrin and Hydrocodone; the Amitriptyline was discontinued. Dr. Smith referred employee to pain management. On June 28, 2005 Ms. White returned to Dr. Smith and complained that she was unable to sleep due to back pain; she also complained of numbness in her legs and hands. Dr. Smith gave her a neurology referral. Claimant returned to Dr. Smith on July 12, 2005 and continued to complain of neck and back pain and numbness in her hands and feet. Dr. Smith discontinued the hydrocodone, prescribed Darvocet and again referred her to the Center for Intervention Pain Management. (Claimant's Exhibit K)

Medical Opinions

On September 26, 2003 Dr. Byler noted the arachnoid cyst and opined that it was not secondary to the incident of August 11, 2003. (Employer/Insurer's Exhibit 2, Page 4) On October 16, 2003 Dr. Byler noted that employee had recently undergone cervical and thoracic myelograms which showed an arachnoid cyst, which was not the direct result of the injury, "but which may have been aggravated with the injury". (Employer/Insurer's Exhibit 2, Page 5)

On October 16, 2003 Dr. Byler diagnosed claimant with neck and low back pain and left upper extremity weakness by history and discharged her to the care of Dr. Randolph. (Employer/Insurer's Exhibit 2, Page 5)

On October 22, 2003 Dr. Allan Gocio opined that claimant had a congenital abnormality with a possible arachnoid cyst causing deviation of the thoracic spinal cord. He indicated that this "may be causative of some of her diffuse symptomatology". He thought it was very unlikely to be causing her arm symptomatology. He further opined that the abnormality was not likely to be related to her work injury. (Employer/Insurer's Exhibit 3) Dr. Gocio reexamined claimant on May 5, 2004. He noted that her prior workup showed an incidental arachnoid cyst, which he opined was a congenital lesion and not contributory to the employee's condition associated with her work injury. (Claimant's Exhibit W & Employer/Insurer's Exhibit 3)

On October 27, 2003 Dr. Randolph reviewed the MRI of the cervical and upper thoracic spine. He noted the anterior displacement of the cord from an apparent cyst at T2-3. He indicated that the cyst did not appear to be an injury of any type and had no relationship to her pain. He saw no evidence that it had been aggravated. (Joint Exhibit LL-1, depo ex 2)

Dr. Randolph testified by deposition on behalf of employer/insurer on October 18, 2004. On cross examination he stated that an arachnoid cyst was found on imaging studies of her thoracic spine. He indicated that it was a congenital abnormality. There was no clinical evidence of myelopathy (i.e. compression of the spinal cord on a clinical or neurological basis.) He testified that he found no evidence of any nerve root compression in the cervical spine on electrodiagnostic studies or on clinical assessment. (Joint Exhibit LL-1, Pages 21 & 25)

On cross examination Dr. Randolph opined that employee's cyst was not an aggravating factor for employee's current symptoms because the cyst was at a level that would not cause complaints in the shoulder or in the arm. The cyst was at the T-2 level, which is below the level for the spinal nerve roots which control arm function. (Joint Exhibit LL-1, Page 24) Dr. Randolph testified that he did not detect any thoracic nerve root compression on clinical examination. (Joint Exhibit LL-1, Page 25)

In his report of January 20, 2004 Dr. Randolph opined that claimant sustained and developed mild, myofascial pain involving the cervical and proximal shoulders as a result of the August 11, 2003 accident.. He stated that shortly after the injury she also had a minor strain of her low back. He indicated that she also had preexisting, mild degenerative disk disease of the lumbar spine. (Joint Exhibit LL-1, depo ex 2)

In his report of May 6, 2004 Dr. Gocio diagnosed claimant with a cervicothoracic strain. Dr. Gocio again opined that there was no indication of myelopathy or radiculopathy. He also stated that she had mild degenerative disk disease in her cervical and lumbar region which did not correlate with her symptomatology and findings. (Claimant's Exhibit W & Employer/Insurer's Exhibit 3)

Claimant's Testimony & Brief

Claimant testified that her prior x-rays in 2000, 2001, and 2002 showed that there was nothing wrong with her back. Indeed, chest x-rays taken on April 25, 2000, November 9, 2001, and May 19, 2002 were normal. (Claimant's Substitute Exhibit L)

Employee opined that the thoracic cyst was not in her spine prior to her work-related injury. She claimed that the growth of the cyst, between the time that it was discovered at T2-3 by the September 24, 2003 MRI of the cervical spine and the April 22, 2004 MRI of employee's thoracic spine which showed an elongated epidural mass within the spinal canal extending from T3 to T11, showed that the work-related accident had caused the cyst.

Additional Findings

The flaw in Ms. White's theory that her prior normal chest x-rays in 2000, 2001, and 2002 prove that her back was normal prior to August 11, 2003 is her assumption that chest x-rays will demonstrate pathology in the thoracic spine. There is no medical opinion in evidence that chest x-rays will demonstrate pathology in the thoracic spine. That is part of employee's burden of proof. Having failed to adduce such expert testimony, it is not possible for the trier of fact to draw the inference which she would like. Furthermore, subsequent chest and dorsal spine x-rays failed to show any spinal cyst. X-rays taken of employee's dorsal spine on September 14, 2004 at Myrtle Hilliard Davis Comprehensive Health Center showed minimal bone spurs at the margins of the vertebral plates of the bodies from C7 to T12 and minimal scoliosis concave to the left of the thoracic spine. No other abnormalities were seen. (Claimant's Exhibit K & II, Pages 8-9) X-rays taken of employee's chest on April 22, 2005 showed a few old small calcified granulomatous nodules in both lungs and minimal dorsal scoliosis. No other abnormalities were seen. (Claimant's Exhibit K) Does the absence of the spinal cyst on these subsequent x-rays suggest that it disappeared or that spinal cysts are not seen on x-rays?

There are two flaws in Ms. White's theory that the spinal cyst grew between the September 24, 2003 cervical spine MRI and the April 22, 2004 thoracic spine MRI. The first is her assumption that the September 24, 2003 cervical MRI included the entire thoracic spine. It did not; it included only the T1 and T2 levels of the thoracic spine. Consequently, while the September 24, 2003 films showed the top of the cyst at T2-3, they did not show the bottom of the cyst. The second flaw is that employee ignored Dr. Curylo's reading of the October 8, 2003 CT myelogram of the cervical and thoracic spine. He indicated that the myelogram demonstrated an interspinal arachnoid cyst at the T3-T11 levels. (Claimant's Exhibit W) Thus, two weeks after the top of the cyst was first discovered at T2-3, its bottom was discovered at T11. The subsequent April 22, 2004 MRI of the thoracic spine showed the cyst from T3-T11. Thus, contrary to claimant's theory, there is no evidence that the cyst grew between October 8, 2003 and April 22, 2004. If Dr. Curylo had thought that the cyst had grown during the two week interval, he could have suggested that in his report. Furthermore, one could argue that if the cyst had grown from T3 to T11 during the two week interval, it should have continued to grow during the subsequent 29 weeks, which apparently did not happen. ⁶¹

The issue of whether employee's spinal cyst was caused by the work-related injury is a complicated medical question and requires expert testimony. Claimant has the burden of proof on that question. No finding on that issue can be made in the absence of medical testimony. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo. App. 1994); Brundige v. Boehringer Ingelheim, 812 S.W.2d 200, 202 (Mo. App. 1991).

Claimant offered no medical opinion into evidence that the spinal cyst was caused by or aggravated by the August 11, 2003 fall. The predominant expert testimony was that the cyst was congenital. Drs. Byler, Gocio, and Randolph all agreed that the cyst was congenital. While Dr. Byler speculated that it "may" have been aggravated by the fall, that opinion was conjectural and not stated within a reasonable degree of medical certainty. While Dr. Gocio speculated that the spinal cyst "may" have been the cause of some of claimant's diffuse symptoms, he further testified that the abnormality was not likely to be related to her work injury. Dr. Randolph testified that the spinal cyst would not cause her shoulder complaints because its location in the thoracic portion of the spine would not compress any nerves going to the left arm. He also opined that there was no clinical evidence of any compression of any of the thoracic nerve roots or of the spinal cord. Thus, he opined that the cyst was not an aggravating factor for her symptoms.

Based on the uncontradicted opinions Drs. Byler, Gocio, and Randolph, I find that claimant's spinal cyst from T3 to T11 is congenital and was not caused by the August 11, 2003 work-related fall. I further find based on the opinion of Dr. Randolph that the work-related accident did not aggravate claimant's spinal cyst.

Based on the opinions of Drs. Randolph and Gocio, I find that as a result of the August 11, 2003 fall claimant sustained a cervicothoracic strain, bilateral shoulder strains, and a mild, low back strain.

Based on the opinions of Drs. Randolph and Gocio, I further find that as of August 10, 2003 claimant also had mild degenerative disk disease in her cervical and lumbar spine which did not correlate with her symptomatology.

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REIMBURSEMENT FOR MEDICAL EXPENSES

Employee is seeking reimbursement for medical bills incurred as a result of treatment provided for her work-related injuries. The bills are included in Claimant's Exhibits JJ and LLL. Claimant is also seeking reimbursement for co-payments which she paid for prescriptions.

Section 287.140.1 Mo. Rev. Stat. (2000) provides in part:

In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines as may reasonably be required after the injury or disability to cure and relieve [the employee] from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.

While the employer has the right to select the provider of medical and other services, this right may be waived by the employer if the employer after notice of the injury, refuses or neglects to provide the necessary medical care. Shores v. General Motors Corp, 842 S.W.2d 929 (Mo. App. 1992); Sheehan v. Springfield Seed & Floral, 733 S.W.2d 795 (Mo. App. 1987); Wiedower v. ACF Industries, Inc., 657 S.W.2d 71 (Mo. App. 1983); Hendricks v. Motor Freight Corp., 570 S.W.2d 702 (Mo. App. 1978). While an employer initially has the right to select the medical care provider, the employer may waive that right, by failing, neglecting or refusing to provide medical treatment after receiving notice of an injury. Under such circumstances the employee may make his or her own selection, procure the necessary treatment and have the reasonable costs thereof assessed against the employer. Wiedower at 74; Hendricks at 709. The employer may also consent affirmatively to the selection of a health care provider by the employee or consent inferentially by failing to object to the employee's selection after having knowledge of that selection. Hendricks at 709-710.

If, on the other hand, the employee selects his or her own treating doctor without notifying his or her employer of the need for treatment of a work-related injury or requesting that employer provide treatment, then the employee is not entitled to reimbursement of such expenses. Hawkins v. Emerson Elec. Co., 676 S.W.2d 872 (Mo. App. 1984); Anderson v. Parrish, 472 S.W.2d 452 (Mo. App. 1971). The court of appeals in Sheehan v. Springfield Seed & Floral, supra, indicated that the foregoing rule assumes that the employee realizes that he or she has sustained a work-related injury or disability. "Where an employee does not know at the time that he or she receives medical treatment that he or she has suffered a compensable injury, and the employee contracts for medical services without the employer's knowledge, the employer is not relieved from liability for necessary medical services." Id. at 798.

If a claimant declines to accept treatment from physicians selected by the employer and seeks treatment from a physician of his or her own choice, then the employer will not be liable for the cost of such treatment, unless it is shown that the treatment is being furnished "in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby, ..." Stawizynski v. J.S. Alberici Const. Co., 936 S.W.2d 159, 164 (Mo. App. 1996); Roberts v. Consumers Market, 725 S.W.2d 652, 653 (Mo. App. 1987); Hawkins v. Emerson Elec. Co. at 880. If, after the treating physician selected by the employer has provided medical treatment and released the employee to return to work, the employee seeks additional treatment without notifying the employer that further treatment is needed, then the employee and not the employer is liable for the cost of such treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo. App. 1995).

If the employer/insurer discontinue treatment even though the employee needs further treatment to cure and relieve the effects of his or her injury, then the employer/insurer will be liable for the entire cost of such additional treatment to the extent the treatment is proved by the employee to be reasonably necessary to cure employee of the effects of the work-

related injury. Emert v. Ford Motor Company, 863 S.W.2d 629 (Mo. App. 1993); Wood v. Dierbergs Market, 843 S.W.2d 396 (Mo. App. 1992); see Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 822 (Mo. App. 1995).

The employee must prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury. Chambliss v. Lutheran Medical Center, 822 S.W.2d 926 (Mo. App. 1991); Jones v. Jefferson City School District, 801 S.W.2d 484 (Mo. App. 1990); Roberts v. Consumers Market, 725 S.W.2d 652 (Mo. App. 1987); Brueggemann v. Permaneer Door Corp., 527 S.W.2d 718 (Mo. App. 1975).

Employee must establish the causal relationship between the bills for medical services and the treatment provided. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989). It is not necessary to have testimony on the medical-causal relationship of each individual expense where the causal relationship can reasonably be inferred. Lenzini v. Columbia Foods, 829 S.W.2d 482, 484 (Mo. App. 1992). Employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence which relate to the services provided. Idem.; Wood v. Dierbergs Market, 843 S.W.2d 396, 399 (Mo. App. 1992); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo. App. 1994). In the absence of such proof, medical bills may be excluded. Cahall v. Riddle Trucking, Inc., 956 S.W.2d 315, 322 (Mo. App. 1997); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo. App. 1994). Bills showing only a balance due may be excluded for lack of adequate foundation. Hamby v. Ray Webbe Corp., 877 S.W.2d 190 (Mo. App. 1994).

Claimant's Testimony

Claimant testified that she had a \$2.00 co-payment with her prescriptions and she requested reimbursement for \$50.00 in total payments which she made for Darvocet, Oxycontin, Vicodin, and Duragenic patches. She also testified that she received a bill from Dr. Gocio (Claimant's Exhibit JJ), but did not know whether it had been paid. She also requested that the lien filed by the Missouri Department of Social Services be paid. (Claimant's Exhibit LLL)

Medical Opinions

Based on his examination of December 24, 2003 Dr. Randolph concluded that Ms. White had reached maximum medical improvement, advised her to complete her current medications and to continue the exercises which she learned in therapy, lifted all restrictions, and discharged her from his care. (Joint Exhibit LL-1, Pages 13-15)

Dr. Randolph explained that employee's condition had plateaued, that appropriate workup and treatment had been rendered, and that it was not likely that there would be a significant change in outcome or clinical status with additional evaluation or treatment for the work-related injuries. (Joint Exhibit LL-1, Pages 19-20)

Dr. Randolph opined that claimant did not require any additional trigger point injections. (Joint Exhibit LL-1, Pages 26-27)

On May 6, 2004 Dr. Gocio opined that claimant should have recovered from her cervicothoracic strain as a result of the treatment provided by Drs. Byler, Randolph, and Musich. During his physical examination she resisted movement in all extremes in her neck. Dr. Gocio again opined that there was no indication of myelopathy or radiculopathy. He opined that she sustained a cervicothoracic strain which should have resolved with the treatment rendered by Drs. Byler, Randolph and Musich. He noted that her symptomatology far outweighed any objective findings in her condition. Dr. Gocio opined that claimant had a strong functional overlay; he recommended against narcotic pain mediation. (Claimant's Exhibit W & Employer/Insurer's Exhibit 3)

Additional Findings

The claimant has the burden of proving that any medical care for which she seeks reimbursement is causally connected to the work-related injury and that it was reasonable and necessary to cure and relieve the work-related conditions. Though Ms. White obtained additional medical care for her neck, shoulders, and back after she was discharged by Dr. Randolph, there were no medical opinions in evidence that any of such care was causally connected to her work-related injuries (i.e. a cervicothoracic strain, bilateral shoulder strains, and a mild, low back strain) and that such care was reasonable and necessary to cure and relieve her from those work-related injuries.

While claimant sought treatment from other physicians after Dr. Randolph released her from treatment, none of those physicians opined that the subsequent treatment was causally connected to the work-related injury and that it was reasonable and necessary to cure and relieve the work-related injuries.

Based on the uncontradicted opinions of Drs. Randolph, I find that claimant reached maximum medical improvement

for her work-related injuries on December 24, 2003. Based on the uncontradicted opinions of Drs. Randolph and Gocio, I find that claimant did not require any additional medical treatment for her work-related injuries after she was discharged from treatment by Dr. Randolph. Claimant's preexisting degenerative disk disease in her cervical and lumbar spine and her spinal cyst may or may not be the cause(s) for any post-December 24, 2003 medical treatment.

While claimant sought reimbursement for co-payments which she made for prescriptions, she failed to introduce into evidence any of her receipts. Claimant would be entitled to reimbursement for any co-payments for medications prescribed by Drs. Byler, Gocio, or Randolph. Employer/insurer are hereby ordered to reimburse claimant for any co-payments which she made on any medications prescribed by Drs. Byler, Gocio, or Randolph. If she has any receipts, she should present them to the insurance company for reimbursement. As there were no medical opinions in evidence that her work-related medical condition required any medications after December 24, 2003, she is not entitled to reimbursement for any medications which may have been prescribed by her other physicians.

As Employer/Insurer authorized Dr. Gocio to treat claimant, I find that they are liable for the balance of his treatment bills. (Claimant's Exhibit JJ) Employer/Insurer are hereby directed to the balance of Dr. Gocio's charges for treating employee.

Turning to the lien filed by the Missouri Department of Social Services (Claimant's Exhibit LLL), as there are no medical records in evidence in support of the charges by Christian Hospital and Diagnostic Cardiology for May 22, 2004 or for St. Louis University on April 12, 2004, I cannot make any findings concerning these charges. As these expenses were incurred after claimant was discharged from treatment by Dr. Randolph on December 24, 2003 and as there was no medical opinions in evidence that this treatment was causally connected to the work-related conditions and that it was reasonable and necessary to cure or relieve the work-related conditions, I find that charges of Christian Hospital, Diagnostic Cardiology, and St. Louis University paid by the Missouri Department of Social Services are not reimbursable.

With respect to the prescription charges of Walgreens, I find that the charges on August 18 and 26, 2003 were for prescriptions which claimant obtained for treatment of her work-related injuries. Employer/insurer are hereby ordered to pay the Missouri Department of Social Services \$40.51 for three prescriptions. As all other prescription charges of Walgreens, Peoples Health, Myrtle Hilliard David, and Forest Park Hospital were incurred after December 24, 2003 and as there was no medical opinions in evidence that these prescriptions were causally connected to the work-related conditions and that they were reasonable and necessary to cure or relieve the work-related conditions, I find that remaining prescription charges on Claimant's Exhibit LLL are not reimbursable.

FUTURE MEDICAL CARE

Employee is requesting an award of future medical care for neck, shoulders, and low back.

Section 287.140 Mo. Rev. Stat. (2000) requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). It can be awarded even where permanent partial disability is determined. The employee must prove beyond speculation and by competent and substantial evidence that his or her work-related injury is in need of treatment. Williams v. A.B. Chance Co., 676 S.W.2d 1 (Mo. App. 1984). Conclusive evidence is not required. However, evidence which shows only a mere possibility of the need for future treatment will not support an award. It is sufficient if claimant shows by reasonable probability that he or she will need future medical treatment. Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997); Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996); Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823, 828 (Mo. App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Sifferman at 828.

Where the sole medical expert believes that it is "very likely" that the claimant will need future medical treatment, but is unable to say whether it is more likely than not that the claimant will need such treatment, that opinion, when combined with credible testimony from the claimant and the medical records in evidence, can be sufficient to support an award which leaves the future treatment issue open. This is particularly true where the medical expert states that the need for treatment will depend largely on the claimant's pain level in the future and how well the claimant tolerates that pain. Dean, supra at 604-06.

The amount of the award for future medical expenses may be indefinite. Section 287.140.1 does not require that the medical evidence identify particular procedures or treatments to be performed or administered. Dean, supra at 604; Talley v.

Runny Meade Estates, Ltd., 831 S.W.2d 692, 695 (Mo. App. 1992); Bradshaw v. Brown Shoe Co., 660 S.W.2d 390, 393-394 (Mo. App. 1983). The award may extend for the duration of an employee's life. P.M. v. Metromedia Steakhouses Co., Inc., 931 S.W.2d 846, 849 (Mo. App. 1996). The award may require the employer to provide future medical treatment which the claimant may require to relieve the effects of an injury or occupational disease. Polavarapu v. General Motors Corporation, 897 S.W.2d 63 (Mo. App. 1995). It is not necessary that such treatment has been prescribed or recommended as of the date of the hearing. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). Where future medical care and treatment is awarded, such care and treatment "must flow from the accident before the employer is to be held responsible." Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo. App. 1985); Talley v. Runny Meade Estates, Ltd. At 694. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. Hall v. Spot Martin, 304 S.W.2d 844, 854-55 (Mo. 1957). However, where preexisting conditions also require future medical care, the medical experts must testify to a reasonable medical certainty as to what treatment is required for the injuries attributable to the last accident. O'Donnell v. Guarantee Elec. Co., 690 S.W.2d 190, 191 (Mo. App. 1985).

Claimant's Testimony

Claimant testified that she wanted to receive treatment from a pain management clinic and an order for future medical treatment, including surgery, imaging, and medications.

Medical Opinions

Based on his examination of December 24, 2003 Dr. Randolph concluded that Ms. White had reached maximum medical improvement, advised her to complete her current medications and to continue the exercises which she learned in therapy, lifted all restrictions, and discharged her from his care. (Joint Exhibit LL-1, Pages 13-15) Dr. Randolph explained that employee's condition had plateaued, that appropriate workup and treatment had been rendered, and that it was not likely that there would be a significant change in outcome or clinical status with additional evaluation or treatment for the work-related injuries. (Joint Exhibit LL-1, Pages 19-20) Dr. Randolph opined that claimant did not require any additional trigger point injections. (Joint Exhibit LL-1, Pages 26-27)

On May 6, 2004 Dr. Gocio opined that claimant should have recovered from her cervicothoracic strain as a result of the treatment provided by Drs. Byler, Randolph, and Musich. During his physical examination she resisted movement in all extremes in her neck. Dr. Gocio again opined that there was no indication of myelopathy or radiculopathy. He opined that she sustained a cervicothoracic strain which should have resolved with the treatment rendered by Drs. Byler, Randolph and Musich. He noted that her symptomatology far outweighed any objective findings in her condition. Dr. Gocio opined that claimant had a strong functional overlay; he recommended against narcotic pain mediation. (Claimant's Exhibit W & Employer/Insurer's Exhibit 3)

Additional Findings

The only physician who recommended additional treatment for claimant is Dr. Gina Smith. On July 12, 2005 she recommended that claimant be treated at a pain clinic. She did not, however, opine that such treatment was for claimant's work-related injuries. No other physician opined that claimant requires any additional or future medical care to cure and relieve her work-related medical conditions.

The claimant has the burden of proving that any additional or future medical care which she seeks is causally connected to the work-related injury and that is reasonable and necessary to cure and relieve the work-related conditions. Though Dr. Gina Smith recommended treatment at a pain clinic, she did not opine that such treatment would be causally connected to employee's work-related injuries (i.e. a cervicothoracic strain, bilateral shoulder strains, and a mild, low back strain) and that it was reasonable and necessary to cure and relieve her from those work-related injuries.

Based on the uncontradicted opinions of Drs. Randolph and Gocio, I find that claimant does not require any additional or future medical treatment for her work-related injuries. Claimant's preexisting degenerative disk disease in her cervical and lumbar spine and her spinal cyst may or may not be the cause for any additional or future medical treatment.

TEMPORARY TOTAL DISABILITY

Employee is seeking temporary total disability compensation for the period from December 10, 2003 through the date of the hearing.

Section 287.170 Mo. Rev. Stat. (2000) provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7 as the "inability to return to any employment and not merely ... [the] inability to return to the employment in which the employee was engaged at the time of the accident." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. Vinson v. Curators of Un. of Missouri, 822 S.W.2d 504 (Mo. App. 1991); Phelps vs. Jeff Wolk Const. Co., 803 S.W.2d 641, 645 (Mo. App. 1991); Williams v. Pillsbury Co., 694 S.W.2d 488 (Mo. App. 1985).

With respect to possible employment, the test is "whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in his present physical condition." Brookman v. Henry Transp., 924 S.W.2d 286, 290 (Mo. App. 1996). The refusal of an employer to allow an employee, who has been released by the treating physician to return to light duty work, to return to such work is some evidence that the employee could not find any reasonable or normal employment. Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 821 (Mo. App. 1995). However, an employer is not required to either provide light duty or pay temporary total disability compensation solely because the employee is still receiving medical treatment for a condition which is reasonably expected to improve. Cooper v. Medical Center of Independence, 955 S.W.2d 570, 575 (Mo. App. 1997).

An employee's unsuccessful attempts to perform some of the activities connected with his or her job do not in and of themselves constitute conclusive evidence that the employee was capable of working after the accident. Reeves v. Midwestern Mortg. Co., 929 S.W.2d 293, 296-96 (Mo. App. 1996). The failure of an employee who is released to light duty to seek sporadic or light duty work in the open labor market would not automatically disqualify the employee from receiving temporary total disability compensation. Cooper, supra at 575. While the ability of the employee to physically perform some work is relevant, it is not dispositive. Idem. An employee's ability to engage in occasional or light duty work in a protected environment where the employee is able to work at his or her own pace or with the help of friends or family members, does not necessarily disqualify employee from receiving temporary and total disability compensation. Minnick v. South Metro Fire Prot. Dist., 926 S.W.2d 906, 910-11 (Mo. App. 1996). Employee's performance of some work during the period of temporary disability is not controlling on whether employee was temporarily and totally disabled. Other factors, such as economic necessity, the expected period of time until claimant's medical condition reaches maximum medical improvement, the nature of the continuing course of treatment, whether there is a reasonable expectation that claimant will return to his or her former job, the nature of the work, and whether such work should not have been performed from a medical standpoint are important in deciding that issue. Cooper, supra at 576; Brookman, supra.

The employee has the burden of proving that he or she is unable to return to any employment. Such proof is made only by competent and substantial evidence. It may not rest on speculation. Griggs v. A.B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). The employee's testimony alone can constitute substantial evidence to support an award of temporary total disability. Unlike proof of permanency, evidence of temporary disability given by the employee is not necessarily beyond the realm of understanding by lay persons. Riggs v. Daniel Intern., 771 S.W.2d 850, 851 (Mo. App. 1989).

Temporary disability payments 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 total disability is not expected to encompass disability after the condition has reached the point where further improvement is not expected. Where further improvement of employee's is not likely, employee is no longer temporarily and totally disabled. Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Williams v. Pillsbury, 694 S.W.2d 488, 489 (Mo. App. 1985). Employer is entitled to a credit for any temporary total disability payments made with respect to any period after employee is no longer temporarily totally disabled. Parker v. Mueller Pipeline, Inc., 807 S.W.2d 518, 522 (Mo. App. 1991).

Claimant's Testimony

Ms. White testified that in the fall of 2003 she asked the manager of employer if there was any light duty for her and she was told there was none. Employee acknowledged that on December 10, 2003 Dr. Randolph released her to work with a thirty pound lifting restriction. She requested light duty, but it was not offered to her by employer. Claimant testified that she could have answered the telephone, watched the kids, or cooked.

Ms. White acknowledged that Dr. Randolph released her to full duty on December 24, 2003. She again asked to return to work, but she was not allowed to. Claimant applied for unemployment compensation in January, 2004. She has not looked for any other employment since January of 2004.

Medical Opinions

On September 22, 2003 Dr. Byler opined that claimant could return to work with a 20-pound lifting limit. (Employer/Insurer's Exhibit 2, Page 1)

On October 2, 2003 Dr. Gocio opined that claimant was capable to light duty with a 10 pound lifting restriction; however he recommended against lifting infants due to her complaints of left arm weakness. (Claimant's Exhibit W, Pages 2-3)

On October 27, 2003 Dr. Randolph opined that claimant could work with a lifting limitation of 5 to 10 pounds and avoidance of frequent or continual lifting. On November 24, 2003 Dr. Randolph opined that claimant could work with a lifting limitation of 25 pounds. (Joint Exhibit LL-1, depo ex 2)

On December 10, 2003 He opined that claimant could perform the vast majority of her duties, but with a lifting limitation of 30 pounds. On December 24 Dr. Randolph opined that Ms. White had reached maximum medical improvement and could perform normal activity. (Joint Exhibit LL-1, depo ex 2)

In his report of May 6, 2004 Dr. Gocio opined that Ms. White could work, but with a lifting restriction of 30 pounds with the left arm. (Claimant's Exhibits W, Pages 7-9, FFF & GGG)

Additional Findings

Employer/insurer paid temporary disability compensation to December 10, 1993. On that day Dr. Randolph opined that claimant could work with a lifting limitation of 30 pounds. Claimant offered to perform light duty. Employer did not allow claimant to return to work.

On December 24, 2003 Dr. Randolph opined that claimant had reached maximum medical improvement and could perform normal activity without any restrictions. Though claimant wanted to return to work, Employer did not allow her to return to work. She was told that there was no work for her.

Based on the evidence I find that from December 10 to December 24, claimant remained temporarily and totally disabled. She was still under treatment by Dr. Randolph. She was still taking pain medication. She had a lifting limitation of 30 pounds and expected to return to her old job with Employer when her treatment ended. I find that it is highly unlikely that any employer in the open labor market would have hired Ms. White during that period. On December 24, 2003 claimant reached maximum medical improvement and Dr. Randolph allowed her to work without restrictions. I find that she was no longer temporarily and totally disabled as of that date because she had reached maximum medical improvement. Temporary disability ends when the employee reaches maximum medical improvement.

Based on the foregoing findings, employer/insurer are hereby order to pay claimant two additional weeks of temporary total disability compensation for the period from December 10 through December 24, 2003.

PERMANENT DISABILITY

The employee must prove the nature and extent of any disability by a reasonable degree of certainty. Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelson v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 505 (Mo. App. 1989); Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, 238 (Mo. App. 1986); Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo.

App. 1983); Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980); McAdams v. Seven-Up Bottling Works, 429 S.W.2d 284, 289 (Mo. App. 1968). The fact finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The finding of disability may exceed the percentage testified to by the medical experts. Quinlan v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. Gilley v. Raskas Dairy, 903 S.W.2d 656, 658 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

Claimant's Testimony

Claimant testified that she still has problems with her neck and back. She testified that her back sometimes feels as though it is on fire with pain radiating down the back of both legs, the left more than the right. Sometime she has numbness and pins and needles in both feet. Sometimes her hands go numb. Her children do the laundry. On rebuttal Ms. White testified that she feels as though she is being slowly paralyzed by the cyst in her back. She testified that she still has numbness and tingling in her hands, feet and toes and weakness in her left arm.

Medical Opinions

On October 16, 2003 Dr. Byler concluded that employee's symptomatology and clinical findings did not correlate well. The findings seemed to be minimal in relation to her symptomatology. (Employer/Insurer's Exhibit 2, Page 5)

On December 10, 2003 Dr. Randolph concluded that claimant exhibited some signs of symptom magnification. Dr. Randolph testified that her pain behavior was increased without any clinical findings which would explain her verbalized levels of pain. (Joint Exhibit LL-1, Pages 22-23 & depo ex 2)

On May 5, 2004 Ms. White told Dr. Gocio that her pain was 10/10 in the low back, neck and left arm. When he questioned her about the treatment by Drs. Randolph and Musich, she became hostile and angry. During his physical examination she resisted movement in all extremes in her neck. Dr. Gocio again opined that there was no indication of myelopathy or radiculopathy. He opined that she sustained a cervicothoracic strain which should have resolved with the treatment rendered by Drs. Byler, Randolph and Musich. He noted that her symptomatology far outweighed any objective findings in her condition. Dr. Gocio opined that claimant had a strong functional overlay; he recommended against narcotic pain mediation. He opined that she could work, but with a lifting restriction of 30 pounds with the left arm. He thought that her emotional instability and anger were not connected to her physical injuries, but related to some sort of psychogenic pain syndrome or symptom magnification for secondary gain in her compensation case. He opined that all of her impairment was related to functional overlay. (Claimant's Exhibit W & Employer/Insurer's Exhibit 3)

On December 14, 2004 Ms. White complained to Dr. Lukasz J. Curylo of chronic daily pain which was aggravated by any type of activity. On examination employee had pain over the entire lumbar spine of her spinous processes, a slightly positive Hoffmann's sign on the right side. She had three out of five positive Waddell's signs. He noted that employee had some psychosocial magnification of her symptoms. He agreed with pain management. Dr. Curylo saw a normal spine alignment and multilevel degenerative disk disease in the cervical, thoracic, and lumbar spine which required only nonoperative pain management. (Claimant's Exhibit SSS)

Dr. Randolph opined that claimant had 2% permanent partial disability of the body referable to residual mechanical pain in the neck and soft tissue structures around the neck following the August 11, 2003 injury. He also opined that claimant sustained 1% permanent partial disability of the body due to myofascial pain resulting from a thoracic strain injury occurring on August 11, 2003. Dr. Randolph opined that claimant also had 2% permanent partial disability of the body referable to preexisting nonwork-related disease of the thoracic spine. He found no permanent partial disability of the body referable to the lumbar spine. (Joint Exhibit LL-1, Page 16)

Additional Findings

Drs. Randolph, Gocio, and Curylo felt that claimant showed signs of symptom magnification. Dr. Byler observed that her findings seemed to be minimal in relation to her symptomatology.

Claimant appeared at the hearing on seven different days over a period of thirteen hours. She exhibited signs of

physical distress only during the two short periods when she was testifying about her current symptoms. At all other times she did not appear to be experiencing any physical distress. Based on the opinions of the physicians and my observations of claimant's demeanor during the hearing, I find that she exaggerated the extent of her pain symptomatology.

Based on all of the evidence and my prior findings, I find that claimant recovered from her low back strain and bilateral shoulder strains and that she sustained 10% permanent partial disability of the body referable to the neck and upper back due to the August 11, 2003 work-related injuries.

ATTORNEY'S FEES

This award is subject to a lien in the amount of \$675.64 in favor of the employee's attorney, D. Andrew Weigley, for necessary legal expenses incurred on behalf of the employee. (Claimant's Exhibit YY)

Date: _____

Made by: _____

John Howard Percy
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

[1] Neither the emergency room records nor the records of the Peoples Health Center were offered into evidence.

[2] The report of the radiologist was not offered into evidence.

[3] Dr. Byler's office note indicates that she intended to order an MRI of the lumbar spine. However the next record is the MRI of the cervical spine. Dr. Byler is shown to be the ordering physician.

[4] Dr. Place's records were not offered into evidence.

[5] Dr. Thomas Musich's medical report of January 22, 2004 was not admitted into evidence because claimant failed to follow the procedure set forth in Section 287.210.7 Mo. Rev. Stat. (2000). (Claimant's Exhibits GG and RRR)

[6] No physician explained the difference between the August 29, 2003 and September 14, 2004 cervical spine x-rays. The August 29, 2003 x-rays showed only mild degenerative changes with a mild loss of lordosis possibly due to a muscular spasm, but no fracture or other abnormality. The September 14, 2004 x-rays showed minimal old healed compression fractures of the bodies of C4, C5, and C6, a double fracture of a bridging spur between the C4 and C5 bodies, and an old chip fracture of a spur of the C6 body.