

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

Injury No. 10-111396

Employee: Donnie Burk
Employer: Wilcorp Industries (Settled)
Insurer: Missouri Employers Mutual Insurance Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to determine the sole issue of Second Injury Fund liability.

The administrative law judge rendered the following determinations: (1) employee's Exhibit H is not admissible because it lacked foundation under § 287.210 RSMo; (2) employee's Exhibit D is admissible under § 287.140.7 RSMo; and (3) the Second Injury Fund is liable for 9.28 weeks of permanent partial disability benefits.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in excluding employee's Exhibit H from evidence; (2) in failing to include in her calculation of Second Injury Fund liability employee's permanent partial disability referable to a May 5, 2010, accident; and (3) in finding the Second Injury Fund is not liable for permanent total disability benefits.

For the reasons stated below, we modify the award of the administrative law judge referable to the issue of Second Injury Fund liability.

Discussion

Admissibility of employee's Exhibit H

Section 287.210.7 RSMo provides, as follows:

The testimony of a treating or examining physician may be submitted in evidence on the issues in controversy by a complete medical report and shall be admissible without other foundational evidence subject to compliance with the following procedures. The party intending to submit a complete medical report in evidence shall give notice at least sixty days

Employee: Donnie Burk

- 2 -

prior to the hearing to all parties and shall provide reasonable opportunity to all parties to obtain cross-examination testimony of the physician by deposition. The notice shall include a copy of the report and all the clinical and treatment records of the physician including copies of all records and reports received by the physician from other health care providers. The party offering the report must make the physician available for cross-examination testimony by deposition not later than seven days before the matter is set for hearing, and each cross-examiner shall compensate the physician for the portion of testimony obtained in an amount not to exceed a rate of reasonable compensation taking into consideration the specialty practiced by the physician. Cross-examination testimony shall not bind the cross-examining party. Any testimony obtained by the offering party shall be at that party's expense on a proportional basis, including the deposition fee of the physician. Upon request of any party, the party offering a complete medical report in evidence must also make available copies of X rays or other diagnostic studies obtained by or relied upon by the physician. Within ten days after receipt of such notice a party shall dispute whether a report meets the requirements of a complete medical report by providing written objections to the offering party stating the grounds for the dispute, and at the request of any party, the administrative law judge shall rule upon such objections upon pretrial hearing whether the report meets the requirements of a complete medical report and upon the admissibility of the report or portions thereof. If no objections are filed the report is admissible, and any objections thereto are deemed waived. Nothing herein shall prevent the parties from agreeing to admit medical reports or records by consent.

Prior to a legislative amendment which took effect on January 1, 2014, the foregoing language included this caveat: "The provisions of this subsection shall not apply to claims against the second injury fund." At the May 7, 2014, hearing before the administrative law judge in this matter, employee offered her Exhibit H, setting forth reports from her medical expert, Dr. Koprivica. The Second Injury Fund objected to employee's Exhibit H, arguing that because § 287.210.7 did not "apply to claims against the second injury fund" before January 1, 2014, the administrative law judge was prohibited from accepting employee's Exhibit H into evidence.

The Second Injury Fund did not raise any other evidentiary objection, such as that employee's Exhibit H amounts to hearsay or lacks foundation. Nor does the Second Injury Fund allege that it was surprised or in any way prejudiced by employee's offer of Exhibit H. Notably, the Second Injury Fund did not request a continuance of the hearing for the purpose of obtaining cross-examination of Dr. Koprivica.

It is uncontested that on October 14, 2011, and on December 5, 2011, employee provided notice to the Second Injury Fund of her intent to submit at hearing Dr. Koprivica's opinions via a complete medical report. Those notices included copies of Dr. Koprivica's original report, an addendum report, and copies of the records Dr. Koprivica reviewed in reaching his opinions. The Second Injury Fund identifies no substantive objection to the form of

Employee: Donnie Burk

- 3 -

these notices. Nor does the Second Injury Fund argue that it was without opportunity or otherwise prevented from obtaining cross-examination of Dr. Koprivica. Rather, the Second Injury Fund relies solely on the argument that employee's Exhibit H is inadmissible because employee did not resend her notices on or after January 1, 2014, rendering them "ineffective" against the Second Injury Fund for purposes of § 287.210.7.

We agree with the Second Injury Fund to the extent that we are convinced that it had no obligation to dispute via written objection, within ten days of its receipt of employee's notices, whether the notices met the elements of a complete medical report, because as of October 14, 2011, and December 5, 2011, those provisions of § 287.210.7 did not apply to employee's claim against the Second Injury Fund. (Nor would we impose an obligation upon the Second Injury Fund to provide written objections as of or within ten days after January 1, 2014.) We also agree that we are not *required* by the language of § 287.210.7 to admit employee's Exhibit H based on her compliance with the provisions of that subsection because, once again, the language of that subsection did not apply to employee's claim against the Second Injury Fund at the time that she provided her notices.

However, we discern no language in § 287.210.7 that would specifically *preclude* our admitting employee's Exhibit H into the record given the particular circumstances involved in this case. The Missouri courts have long made clear that "[u]nder the [Missouri Workers' Compensation Law], substantial rights are to be enforced at the sacrifice of procedural rights," *Parsons v. Steelman Transp., Inc.*, 335 S.W.3d 6, 18 (Mo. App. 2011), and § 287.550 RSMo provides that "[a]ll proceedings before the commission or any commissioner shall be simple, informal, and summary, and without regard to the technical rules of evidence." As noted above, the Second Injury Fund identifies no other objection to the form of employee's Exhibit H, and makes no claim that it was without opportunity to obtain cross-examination of Dr. Koprivica if it so desired.

Given these circumstances, the Second Injury Fund's objection is overruled, and employee's Exhibit H is hereby received into evidence.

Second Injury Fund liability

The administrative law judge determined that the Second Injury Fund is liable for 9.28 weeks of enhanced permanent partial disability benefits. In calculating this amount, the administrative law judge did not consider any permanent partial disability referable to a May 5, 2010, accident wherein employee bent over to pick up an empty can of Dippity Doo and suffered a back injury. The administrative law judge reasoned that employee did not reach maximum medical improvement for the May 2010 back injury until Dr. Woodward sent a report to employer on December 14, 2010, a date after employee suffered the primary injury.

We disagree. Employee's last actual in-person treatment with Dr. Woodward referable to the May 2010 back injury appears to have taken place on November 22, 2010. On that date, Dr. Woodward performed an examination of the employee, noted his impression of her continued back problems, and recommended employee discontinue physical therapy. Dr. Woodward also ordered a home TENS unit for employee and reviewed lifting and postural recommendations. That same day, Dr. Woodward issued

Employee: Donnie Burk

- 4 -

a report to employer indicating employee could return to full-time work with a 30 pound continuous lift restriction.

Thereafter, Dr. Woodward issued orders on November 30, 2010, instructing that employee continue use of her at-home TENS unit for 6 months, then discontinue all treatment. It does not appear from Dr. Woodward's note of December 14, 2010, that he examined employee or provided any actual treatment on that date in reference to the May 2010 injury; rather, it appears Dr. Woodward's only action was to send a report to employer setting forth his opinion with respect to maximum medical improvement and the degree of employee's permanent disability and restrictions. There is no evidence to suggest that employee's physical condition referable to the May 2010 back injury *actually* improved after her last in-person treatment with Dr. Woodward on November 22, 2010, nor is there any evidence to indicate that Dr. Woodward's action of issuing a report to employer on December 14, 2010, had any effect on employee's physical condition. To the extent that the Second Injury Fund argues that we are not permitted to find that employee reached maximum medical improvement until Dr. Woodward sent a letter to employer including those specific words, we are not persuaded. The Missouri courts have long held that there is nothing "talismanic" about a doctor's use of particular words and phrases; rather, we are permitted to resolve factual issues by reference to the actual evidence. *Mayfield v. Brown Shoe Co.*, 941 S.W.2d 31, 36 (Mo. App. 1997).

We find that employee reached maximum medical improvement on November 22, 2010, when Dr. Woodward provided his last in-person treatment, discontinued her physical therapy, ordered an at-home TENS unit, and returned employee to full-time work.

Based on the foregoing, we conclude that it is appropriate to include employee's permanent partial disability referable to the May 2010 injury in the calculation of Second Injury Fund liability for enhanced permanent partial disability benefits. We find that employee suffered a 12.5% permanent partial disability of the body as a whole as a result of the May 2010 work injury. We otherwise defer to the administrative law judge's ratings with respect to the nature and extent of permanent partial disability referable to employee's preexisting conditions of ill-being and the primary injury. This brings the total preexisting permanent partial disability and disability referable to the primary injury to 142.8 weeks. Applying a 10% load factor and the stipulated \$211.24 rate for permanent partial disability benefits, the Second Injury Fund is liable for 14.28 weeks of enhanced permanent partial disability, or \$3,016.51.

Conclusion

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability.

The Second Injury Fund is liable for \$3,016.51 in permanent partial disability benefits.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued July 3, 2014, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Employee: Donnie Burk

- 5 -

The Commission approves and affirms the administrative law judge's allowance of an 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 19th day of December 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Donnie Burk

Injury No. 10-111396

Dependents: N/A

Employer: Wilcorp Industries (settled)

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

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

Insurer: Missouri Employers Mutual Insurance Co. (settled)

Hearing Date: May 7, 2014

Checked by: VRM/ps

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: On or about December 12, 2010.
5. State location where accident occurred or occupational disease was contracted: Springfield, 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: Clamant fell over a box on a pallet.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Right leg at the knee.

14. Nature and extent of any permanent disability: 6.25 percent PPD to the right leg at the knee as against Employer/Insurer; 9.28 weeks PPD as to the Second Injury Fund.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$4,942.66.
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: Sufficient to yield the following rate.
19. Weekly compensation rate: \$211.24.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer previously settled.

22. Second Injury Fund liability: Yes.

9.28 weeks of PPD x \$211.24 =

TOTAL: \$ 1,960.31

23. Future requirements awarded: None.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Randy Alberhasky.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Donnie Burk

Injury No. 10-111396

Dependents: N/A

Employer: Wilcorp Industries (settled)

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

Insurer: Missouri Employers Mutual Insurance Co. (settled)

Hearing Date: May 7, 2014

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

Checked by: VRM/ps

INTRODUCTION

The parties appeared before the undersigned administrative law judge on May 7, 2014, for a final hearing to determine the liability of the Second Injury Fund with respect to the claims filed in Injury Numbers 10-037678 and 10-111396. These cases were tried simultaneously. Attorney Randy Alberhasky represented Claimant Donnie Burk. He seeks a 25 percent fee of any amounts awarded. Assistant Attorney General Catherine Goodnight represented the Treasurer of Missouri as Custodian of the Second Injury Fund. Employer Wilcorp Industries, and its Insurer, Missouri Employers Mutual Insurance Co., previously settled with Claimant in each case and did not participate in the hearing.

STIPULATIONS

The parties stipulated to the following facts:

1. Claimant was an employee of Wilcorp Industries, a fully insured employer, at the time she was hurt in two separate accidents.
2. The accidents that occurred on or about May 5, 2010 (Injury Number 10-037678) and on or about December 12, 2010 (Injury Number 10-111396), both arose out of and in the course of Claimant's employment with Wilcorp Industries.
3. Both accidents occurred in Springfield, Greene County, Missouri. Venue and Jurisdiction are appropriate in Greene County.
4. Both Claimant and her employer were subject to, and covered by, the provisions of Chapter 287 RSMo.
5. There is no dispute with respect to notice or statute of limitations.

6. Claimant's average weekly wage at the time of each injury was sufficient to yield a permanent partial disability rate of \$211.24.
7. With respect to Injury 10-037678, Employer/Insurer paid \$135.79 in temporary total disability, and \$8,084.69 in medical expenses. With respect to Injury Number 10-111396, Employer/Insurer paid no temporary total disability and \$4,942.66 in medical expenses.
8. Claimant settled her claim with Employer/Insurer in Injury Number 10-037678 for 12.5 percent of the body as a whole. With respect to Injury Number 10-111396, Claimant settled her claim for 6.25 percent of the right lower extremity rated that the 160-week (knee) level.

EXHIBITS

The Second Injury Fund offered no exhibits. Claimant offered the following exhibits:

Medical Records

- A. Cox Medical Center
- B. Cox Monett Hospital
- C. Family Medical Walk-In Clinic
- D. SNSI (certified April 2, 2012) (admitted in part)
- E. SNSI (certified May 6, 2011)
- F. Southwest Spine and Sports
- G. St. Johns Hospital-Aurora

Report

- H. Dr. Brent Koprivica (excluded)
 1. Curriculum Vitae
 2. Report dated August 29, 2011
 3. Report dated October 23, 2011

Documents

- I. Claim (Injury Number 10-037678)
- J. Claim (Injury Number 10-111396)
- K. Answer of Second Injury Fund (Injury Number 10-037678)
- L. Answer of Second Injury Fund (Injury Number 10-111396)
- M. Amended Claim (Injury Number 10-037678)
- N. Amended Answer (Injury Number 10-037678)
- O. Correspondence – Section 287.210 letter (October 14, 2011)
- P. Correspondence – Section 287.210 letter (December 5, 2011)

Evidentiary Rulings on Exhibits

The Administrative Law Judge made the following rulings upon the Second Injury Fund's objection to exhibits D and H:

1. Over the objection of the Second Injury Fund, the Administrative Law Judge provisionally admitted Exhibit D (SNSI records certified April 2, 2012); however, references to Dr. Koprivica's report in Exhibit D were excluded.
2. The Administrative Law Judge sustained the Second Injury Fund's objection to Exhibit H (Dr. Koprivica's Report). Exhibit H was excluded in its entirety.

Exhibit D in its entirety, as well as Exhibit H, are included in the file solely for purposes of review should either of the two cases be appealed.

ISSUES

The issues to be determined are:

1. Is Dr. Koprivica's medical report (Exhibit H) admissible against the Second Injury Fund?
2. To what extent are the medical records contained in Exhibit D admissible?
3. What, if any, is the nature and extent of the Second Injury Fund's liability in each case? Employee seeks permanent total disability, or in the alternative, permanent partial disability.

FINDINGS OF FACT

Educational and Work History

Claimant Donnie Burk is 54-years-old. She completed the 11th grade, but did not obtain a GED. Upon leaving school, Claimant obtained employment in a variety of occupations. She has been a cashier, a kitchen aide, and a bartender. Her last employment was in production beginning in 2002 for Wilcorp Industries (a division of 3M). She denied having any work-related injuries prior to her employment at Wilcorp Industries.

1. May 2010 Injury

In May 2010, Claimant bent over to retrieve a "Dippity Doo" can from the floor. Although these cans weigh 10 to 15 pounds when filled with product, the can Claimant was retrieving was *empty*. At the time of the incident, Claimant experienced a pull or pop in her back and a sensation that she described as being paralyzed.

Employer sent Claimant for treatment at the Family Medical Walk-in Clinic on May 13, 2010. Claimant complained of low back pain and stiffness from the work incident. She noted she had a

right hip replacement in 2006 and suffered from chronic right hip pain. She was given medication and an off work slip. A subsequent May 31, 2010 medical record entry indicates that at that time, Claimant had only a *mild* right low back pain and mild spasm or tenderness of the paraspinal muscles, a full range of motion in the back, no limping and no radiating symptoms.

Despite the mild findings at the May 31, 2010 examination, Claimant continued to complain of low back pain. On July 13, 2010, she complained of right hip pain from related therapy treatment. Dr. Boyd Crockett performed a series of right sacroiliac injections. In an August 12, 2010 medical record, Dr. Crockett noted that Claimant was 90 percent improved. The physician returned Claimant to work with restricted duty for one week, and then a return to full duty.

Claimant returned to Dr. Crockett on August 31, 2010, stating that her pain had returned and became worse when her prescription medications of Hydrocodone, Naproxen, Ibuprofen, and Flexeril ran out. Dr. Crockett ordered an MRI at the T12-L1 to L5-S1 levels. The findings from the MRI were:

1. Multilevel degenerative disk disease and spondylosis.
2. T12-L1 small left central zone disk protrusion, L3-4, L4-5, and L5-S1. Left central and subarticular zone small protrusion with annular fissure. No impingement.
3. L1-2, right central and subarticular zone small disk extrusion with annular fissure. Right lateral recess stenosis and mild vertebral canal narrowing.

Dr. Crockett concluded in his September 28, 2010 medical record, that Claimant's "[u]nderlying deg. [degenerative] changes were present prior to injury, and vocational injury exacerbated, and caused pain." (Exhibit F).

Claimant next saw Dr. Jeff Woodward at the Springfield Neurological & Spine Institute on October 6, 2010. Dr. Woodward determined that Claimant suffered a work related lower lumbar strain with ongoing lumbar spine pain and mild right L4 radicular symptoms; however, he found no objective neurologic deficits. He noted that Claimant's preexisting lumbar spine degenerative disc disease and right hip condition contributed to Claimant's symptoms. He also specifically noted that the disc bulges at L4-5 and L5-S1 on the left were discordant with the work injury pain and were unrelated to the work injury event. Dr. Woodward thereafter prescribed Neurontin, Naproxen, traction, and a home TENS unit as a trial. Claimant also participated in some physical therapy. Dr. Woodward, nor any other physician, has suggested surgery.

Claimant last participated in physical therapy on November 10, 2010, although she had additional appointments. She contended at the hearing that the physical therapist hurt her. Claimant returned to Dr. Woodward on November 22, 2010, at which time she was returned to full-time work with modified duty of lifting no more than 30 pounds continuously two-thirds of the time. On November 30, 2010, Dr. Woodward wrote that Claimant could continue her in-home TENS unit for six months and then discontinue total treatments. She had a return appointment.

On December 8, 2010, prior to her release from Dr. Woodward's care, Claimant reported to Dr. Woodward that she had fallen at work the previous day (December 7, 2010). Dr. Woodward commenced treating Claimant for this second injury.

It was not until December 14, 2010, approximately a week later, that Dr. Woodward finally released Claimant from his care for the May 2010 work accident. Dr. Woodward made the following medical records entry on December 14, 2010:

The patient has reached MMI for the lumbar spine work injury condition occurring in May 2010. No additional work injury treatment is necessary for the May 2010 work injury. With regard to May 2010 work injury, patient may perform full time regular work duties. No permanent disability identified with the May 2010 work injury caused by very light lifting injury event.

The patient has sustained a new work injury from fall at work last week which including right hip strain/contusion; lumbar strain and left elbow contusion which require additional work injury treatment and temporary work duty restrictions.

(Exhibit E).

Based on the medical records in evidence, I find that Claimant reached maximum medical improvement for the May 2010 work accident on December 14, 2010. This was after Claimant sustained the second work accident in December 2010.¹

2. *December 2010 Injury*

The December 2010 injury occurred when Claimant, while carrying a large box, tripped over a box on a pallet. She landed on her right knee, hip, and elbow. Although Claimant testified that she also hurt her shoulder, Dr. Woodward recorded no shoulder complaints when he first examined her after the December 2010 work accident. A subsequent imaging report revealed no evidence of loosening or dislocation of the hip prosthesis, no fracture or dislocation of the elbow, there was facet arthropathy of L3-S1, mild disk height loss and degenerative disk disease at L4-5, and mild levoscoliosis apex L2-3.

Dr. Woodward identified a right hip strain/contusion, a lumbar strain, and left elbow contusion due to a December 7, 2010 fall. In a December 23, 2010 medical record, Dr. Woodward recommended that Claimant continue with medications for eight weeks, but he found no permanent disability and no need for additional treatment. He wrote, "The patient has significant preexisting lumbar spine and right hip joint degenerative conditions that contribute to current symptoms/status." (Exhibit E).

Claimant again saw Dr. Woodward more than a year later on January 18, 2012, for ongoing knee complaints. At that time, Dr. Woodward found no objective neurologic deficits on his physical examination of Claimant; however, he ordered an x-ray of the right knee. The January 24, 2012

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• ¹ Although the parties stipulated to December 12, 2010 as the injury date, medical records indicate that the work accident occurred on December 7, 2010. Irrespective of which date is used, Dr. Woodward did not maximum medical improvement and permanency until *after* the December 2010 injury.

x-ray report was normal. Claimant believed that before seeing Dr. Woodward the last time she had some injections in her knee, but she admitted she does not have a good memory.

Despite her complaints of pain, Claimant continued to work full time in her regular job for many months into 2011, at least until May 2011. She left work only because the company closed its doors and she was laid-off. She was one of the last employees laid off, and would have continued working for Wilcorp Industries had the plant not closed. She thereafter drew unemployment for a year. While Claimant has received no offers of employment, she has expressed an interest only in part-time employment.

Current Condition

Claimant states that her right knee still hurts, particularly when she climbs stairs. She can squat but needs help getting up. She is unable to lift her grandchildren. She said her back hurts constantly. She no longer can ski, fish, ride a bike, run, jump on a trampoline, or hunt. Because she lives in a housing unit, she does not have to perform yard work. She cleans but not to the degree she feels is appropriate. On a typical day, she rests during the day, drives to her grandchildren's home and helps them get off to school. She occasionally watches her one-year-old grandbaby. She currently takes medication prescribed by a personal physician. Until recently, she took only over-the-counter medication.

Preexisting Hip Condition

In 2003, Claimant was diagnosed with avascular necrosis of the right hip. She underwent core decompression of the right femoral head and was unable to work for two to three months. She did not obtain substantial relief from this intervention. Claimant saw Dr. Roeder, a different orthopedic surgeon, on December 16, 2005, who recommended a right total hip arthroplasty. Dr. Roeder performed that surgery. Claimant was hospitalized from March 13, 2006 to March 17, 2006, after which she was off work for about six months. Once released from treatment, Claimant was to avoid bending and squatting and was given a temporary 10-pound lifting restriction. She admitted that these restrictions were not permanent.

After her release from care for her hip replacement, but before her first work accident, Claimant generally worked 40 hours per week, although she took several personal days from work because her hip bothered her. She testified credibly to ongoing pain, discomfort from standing on hard surfaces, difficulty with heavy lifting, and problems engaging in some personal activities due to the artificial hip. Medical records substantiate that Claimant suffered from years of chronic hip pain. Based on the whole record, I find Claimant has a preexisting 40 percent permanent partial disability at the 207-week level of the right leg. The preexisting hip disability posed a hindrance or obstacle to employment or reemployment.

Settlements

Based on the parties' stipulations of fact, Claimant settled with Employer/Insurer in each of her workers' compensation cases for permanent partial disability. I find that the settlement with respect to Injury Number 10-037678 for 12.5 percent permanent partial disability to the body as

a whole accurately reflects the degree of disability that Claimant sustained from the May 2010 injury. I also find that the settlement in Injury Number 10-111396, for 6.25 percent permanent partial disability to the right lower extremity rated at the 160-week (knee) level, accurately reflects the degree of disability from the last work injury in December 2010. Given the entire record, I do not find credible that portion of Dr. Woodward's opinions that Claimant suffered no disability from either of the work injuries.

Evidence of Synergistic Effect

Claimant attributes difficulty in performing daily household tasks, as well as some job duties such as standing, lifting and stacking, to chronic pain in her hip, knee, and back. The chronic pain stems from her preexisting hip disability, as well as the injuries from the work accident in May 2010, and December 2010. Based on Claimant's credible testimony that it is all of her ailments in combination that cause her difficulty, I find that Claimant's preexisting disability to her hip combines synergistically with *each* of Claimant's 2010 work injuries to cause a greater disability than their simple sums.

CONCLUSIONS OF LAW

Admissibility of Dr. Koprivica's report (Exhibit H) against the Second Injury Fund

Claimant offered Exhibit H (including attachments 1 through 3) as the complete medical report of Dr. Koprivica, pursuant to § 287.210.7 RSMo Supp. 2013. The Second Injury Fund voiced a foundational objection to the admission of Dr. Koprivica's report, contending that Claimant failed to comply with the statute's notice requirements. The Administrative Law Judge sustained the objection, but allowed the parties to address the issue in their briefs.

A complete medical report of an examining physician, completed at the request of an attorney, may be admissible in place of live or deposition testimony of the medical expert, if the proponent of the report complies with the statutory procedures set forth in § 287.210.7 RSMo Cum Supp. 2013. Section 287.210.7 RSMo Cum. Supp. 2013, provides in applicable part, as follows:

The testimony of a treating or examining physician may be submitted in evidence on the issues in controversy by a complete medical report and shall be admissible without other foundational evidence subject to compliance with the following procedures. **The party intending to submit a complete medical report in evidence shall give notice at least sixty days prior to the hearing to all parties and shall provide reasonable opportunity to all parties to obtain cross-examination testimony of the physician by deposition.** The notice shall include a copy of the report and all the clinical and treatment records of the physician including copies of all records and reports received by the physician from other health care providers. The party offering the report must make the physician available for cross-examination testimony by deposition not later than seven days before the matter is set for hearing....**Within ten days after receipt of such notice a party shall dispute whether a report meets the requirements of a complete medical report by providing written objections to the offering party stating the grounds for the dispute,** and at the request of any party, the administrative law judge shall rule upon such objections upon pretrial hearing whether the report meets the requirements of a complete medical report and upon the admissibility of the report or portions thereof. If no

objections are filed the report is admissible, and any objections thereto are deemed waived. Nothing herein shall prevent the parties from agreeing to admit medical reports or records by consent [emphasis added].

Under this section, the party intending to admit a complete medical report must give notice to all parties 60 days prior to the hearing, include a copy of the report together with treatment or clinical records, and provide the opposing parties an opportunity to cross-examine the physician who authored the report not later than 7 days before the matter is set for hearing. If the proponent fails to follow the requirements of this statute, the medical report is not admissible. *Burchfield v. Renard Paper Co., Inc.*, 405 S.W.3d 589, 591 (Mo. App. E.D. 2013). Prior to a 2013 amendment, this provision did not apply to claims against the Second Injury Fund. *Brufat v. Mister Guy, Inc.*, 933 S.W.2d 829, 834 (Mo. App. W.D. 1996) *overruled on other grounds in Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Claimant argues first that she provided appropriate notice of her intent to rely upon Dr. Koprivica's complete medical report (*See Exhibits O and P – letters dated letter dated October 14, 2011 and December 5, 2011*). While Claimant concedes that these letters obviously were forwarded to the opposing counsel *prior to* the effective date of 2013 amendment of § 287.210.7 RSMo, she contends that the notice fully complied with a strict construction of the new statute, having been made more than 60 days before the May 7, 2014 hearing. She also contends that because this is a procedural statute, its provisions are retroactive in effect. Because the Second Injury Fund never filed a written objection prior to the hearing and did not request a continuance, Claimant believes any objection has been waived, and Dr. Koprivica's medical report (Exhibit H) is admissible.

Assuming the 2013 amendment to § 287.210.7 RSMo is procedural, allowing a proponent to use the amended provision against the Second Injury Fund in cases arising prior to the amendment's effective date of January 1, 2014, Claimant's 2011 notice was ineffectual. The Second Injury Fund was under no obligation in 2011 to object to the complete medical report. The 10-day window for objections (which applied to other parties) did not apply to the Fund in 2011. The 10-day window following the 2011 notice has long since expired. Unless a new notice is provided (sent after the effective date of the amended statutory provision), there is no mechanism to trigger the timeframe for the Second Injury Fund's objection.

Had Claimant merely forwarded a new 60-day notice letter after the effective date of the statutory amendment, there would be no controversy. Claimant failed to comply with the provisions of the amended statutory provision. There was no foundation for the complete medical report. The complete medical report was inadmissible. *See Burchfield v. Renaud Paper*, 405 S.W.3d at 592 (holding that records were inadmissible when the employee failed to comply with the statutory foundational requirements of § 287.210.7 RSMo).

Admissibility of Exhibit D

The Second Injury Fund contends that Exhibit D, containing certified medical records from SNSI, having not been provided to them seven days in advance of the hearing, are inadmissible, pursuant to § 287.210 RSMo Cum Supp. 2013. Section 287.140.7 RSMo 2000, however, provides that that all entities "furnishing the employee with medical aid" shall permit the copying of its records and "certified copies of the records shall be admissible in evidence at any

such proceedings.” As Claimant notes, § 287.800.1 RSMo Cum Supp. 2005, requires strict construction of the Workers’ Compensation Law. Even if the result appears harsh, under such strict construction, the statutory provision clearly makes certified copies of medical records admissible. Nothing in that statute requires seven-day notice.

Also included in Exhibit D, however, was Dr. Koprivica’s medical report. Dr. Koprivica was not a treating physician. Because Dr. Koprivica did not furnish employee with medical aid, his medical report is not admissible under § 287.140.7 RSMo 2000. Claimant may not “back-door” an otherwise inadmissible medical report of a non-treating examiner merely because it somehow was included with other admissible medical records. Exhibit D is admissible with the exception of Dr. Koprivica’s report.

Nature and Extent of Disability

A claimant in a workers’ compensation proceeding has the burden of proving all elements of her claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo. App. E.D. 2008). To recover against the Second Injury Fund, Claimant must prove she sustained a compensable injury, referred to as “the last injury,” which resulted in permanent partial disability. § 287.220.1 RSMo. She also must prove that she had a preexisting permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15 percent for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo. App. E.D. 2008). “Once the threshold is met, all of [Claimant’s] disabilities should be considered in calculating the extent of the fund’s liability.” *Treasurer v. Witte*, 414 S.W.3d 455, 468 (Mo. banc 2013). “By its plain and ordinary language, section 287.220.1 does not require a disability from the last injury to meet a numerical threshold to trigger liability.” *Witte*, 414 S.W.3d at 466.

When a claimant alleges permanent total disability, the Administrative Law Judge first must consider the liability of the employer in isolation by determining the degree of disability due to the last injury. *APAC Kansas, Inc. v. Smith*, 227 S.W.3d 1, 4 (Mo. App. W.D. 2007), and *Hughey v. Chrysler Corp.* 34 S.W.3d 845, 847 (Mo. App. E.D. 2000). If Claimant’s last injury in and of itself rendered Claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. *Feld v. Treasurer of Missouri as Custodian of Second Injury Fund*, 203 S.W.3d 230, 233 (Mo. App. E.D. 2006).

Permanent total disability means an employee is unable to compete in the open labor market. *Forshee v. Landmark Excavating and Equip.*, 165 S.W.3d 533, 537 (Mo. App. E.D. 2005). This means the inability to perform the usual duties of the employment in a manner that such duties are customarily performed by the average person engaged in such employment. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849 (Mo. App. S.D. 1995). While “total disability” does not require that the Claimant be completely inactive or inert, *Sifferman v. Sears Roebuck and Co.*, 906 S.W.2d 823, 826 (Mo. App. S.D. 1996), *overruled on other grounds Hampton v. Big Boy Steel Erection*, 121 S.W. 2d 220 (Mo. banc 2003), it does require a finding that the Claimant is unable to work in any employment in the open labor market, and not merely the inability to

return to the employment in which Claimant was engaged at the time of the accident. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo. App. S.D. 2001), *overruled on other grounds Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003). It is within the province of the Administrative Law Judge to determine the extent of any permanent disability. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo. App. E.D. 1998).

Injury Number 10-111396 (December 2010 Injury)

There is no evidence in the record even remotely suggesting that Claimant is permanently and totally disabled from the December 2010 injury in isolation. Rather, Claimant suffered a 6.25 percent permanent partial disability to the right lower extremity at the knee for a total of 10 weeks of disability. This is consistent with the stipulation for compromise settlement that Claimant signed with her employer and its insurer.

There also is no expert or vocational opinion in evidence suggesting that Claimant is permanently and totally disabled in combination with one or more preexisting conditions. *See Mell v. Biebel Bros., Inc.*, 247 S.W.3d 26, 29 (Mo. App. E.D. 2008) (finding Commission's determination of permanent partial disability was supported by the evidence where no medical experts in that case offered an opinion of permanent total disability). The Second Injury Fund had no obligation to present conflicting or contrary evidence on the claim for permanent total disability benefits. *Dunn v. Treasurer of Mo.*, 272 S.W.3d 267, 275 (Mo. App. E.D. 2008). Rather, Claimant "must prove the nature and extent of any disability by a reasonable degree of certainty." *Elrod v. Treasurer of Mo.*, 138 S.W.3d 714, 717 (Mo. banc 2004). Claimant failed to prove permanent total disability against the Second Injury Fund.

After the last work accident in December 2010, Claimant continued to work in her usual job for several months, leaving her employment only because the employer closed its doors. Claimant was one of the last employees laid-off, suggesting that she was performing adequately. She clearly explained that she would have continued to work for Wilcorp Industries had the business not closed. She then drew unemployment for a year, suggesting that she believed she was capable of work. In fact, she admitted she believed she could work at least some part-time jobs.

While Claimant is not permanently and totally disabled from a combination of disabilities, she has demonstrated that the last injury, combined with her preexisting permanent partial disability to her hip has caused a greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004).

The Second Injury Fund's liability is calculated as follows:

- Claimant sustained a compensable last injury resulting in permanent partial disability equal to 6.25 percent to the right leg at the knee (10 weeks of disability).
- At the time of the last injury in December 2010, Claimant had a preexisting 40 percent permanent partial disability to the right leg at the hip (82.80 weeks). This disability posed a hindrance or obstacle to employment or reemployment.

- At the time of the last injury in December 2010, Claimant's back injury was not at maximum medical improvement. Claimant still was under a doctor's care. Not until December 14, 2010, did the physician release and rate the Claimant for the May 2010 work injury. A condition that is not yet permanent cannot be included in the calculation for permanent partial disability in a claim against the Second Injury Fund. *Hoven v. Treasurer*, 414 S.W.3d 676 (Mo. App. E.D. 2013).
- The simple sum of the preexisting hip and the last disability to the knee is 92.80 weeks.
- Credible evidence established that the last injury (right knee), when combined with the preexisting permanent partial disabilities to the right leg at the hip, causes 10 percent greater overall disability than the independent sum of the disabilities.

The Second Injury Fund is liable for 9.28 weeks of overall greater disability. When multiplied by Claimant's permanent partial disability rate of \$211.24, the Second Injury Fund is liable for \$1,960.31 in enhanced permanent partial disability in Injury Number 10-111396.

Attorney Randy Alberhasky, shall have a lien of 25 percent of this amount as a reasonable fee for necessary legal services provided to Claimant.

Made by: /s/ Victorine R. Mahon

Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation

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