

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

Injury No. 08-067091

Employee: Pamela S. Chesser  
Employer: Pepsi Americas  
a/k/a Pepsi-Cola General Bottlers, Inc.  
Insurer: Indemnity Insurance of North America  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Denied)

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

The award and decision of Administrative Law Judge Robert B. Miner, issued October 15, 2014, is attached and incorporated by this reference.

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

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

We conclude that employee's Motion to Strike the Brief of Appellant/Employer is moot in light of our award and decision herein.

Given at Jefferson City, State of Missouri, this 14<sup>th</sup> day of May 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

AWARD

Employee: Pamela S. Chesser

Injury No.: 08-067091

Employer: Pepsi Americas, a/k/a Pepsi-Cola  
General Bottlers, Inc.

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri

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

Insurer: Indemnity Insurance Co. of North America,  
c/o Sedgwick Claims Management

Hearing Date: July 15, 2014

Checked by: RBM

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: July 28, 2008.
5. State location where accident occurred or occupational disease was contracted: St. Joseph, Buchanan 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: A pallet fell and struck Claimant on her neck and right leg.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Neck, head, right leg.
14. Nature and extent of any permanent disability: Permanent and total disability as a result of Employee's July 28, 2008 injury considered alone.
15. Compensation paid to-date for temporary disability: \$67,950.31 in temporary total disability and \$2,620.00 in temporary partial disability.
16. Value necessary medical aid paid to date by employer/insurer? \$106,108.05.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$690.51.
19. Weekly compensation rate: \$460.34 for temporary total disability, and \$460.34 for permanent total disability, and \$404.66 for permanent partial disability.
20. Method wages computation: Section 287.250, RSMo for temporary total disability and permanent total disability, and by agreement of the parties for permanent partial disability.

#### COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None.

No weeks of temporary total disability (or temporary partial disability).

Three (3) weeks of disfigurement from Employer at the rate of \$404.66 per week = \$1,213.98.

Employer is directed to authorize and furnish additional medical treatment to cure and relieve Employee from the effects of her July 28, 2008 work injury, in accordance with section 287.140, RSMo.

Permanent total disability benefits from Employer beginning April 12, 2011, and thereafter, at the rate of \$460.34 per week for claimant's lifetime.

Employer is entitled to a credit for a temporary total disability over-payment in the amount of \$8,051.20 based upon \$62.90 per week times 128 weeks.

22. Second Injury Fund liability: None. Employee's claim against the Second Injury Fund is denied.

23. Future requirements awarded: As awarded.

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% after expenses of all payments hereunder in favor of the following attorneys for necessary legal services rendered to Claimant: Robert E. Douglass and James F. Nadolski, to be divided one-half to each.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Pamela S. Chesser

Injury No.: 08-067091

Employer: Pepsi Americas, a/k/a Pepsi-Cola  
General Bottlers, Inc.

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri

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

Insurer: Indemnity Insurance Co. of North America,  
c/o Sedgwick Claims Management

Hearing Date: July 15, 2014

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PRELIMINARIES

A final hearing was held in this case on Employee's claim against Employer and The Treasurer of the State of Missouri as Custodian of the Second Injury Fund on July 15, 2014 in St. Joseph, Missouri. Employee, Pamela S. Chesser, appeared in person and by her attorney, Robert E. Douglass. Employer, Pepsi Americas, a/k/a Pepsi-Cola General Bottlers, Inc., and Insurer, Indemnity Insurance Co. of North America, c/o Sedgwick Claims Management, appeared by their attorney, David F. Menghini. The Second Injury Fund appeared by its attorney, Richard C. Wiles. Robert E. Douglass requested an attorney's fee of 25% after expenses, to be divided one-half to him, and one-half to James A. Nadolski, from all amounts awarded. It was agreed that post-hearing briefs would be due on August 12, 2014.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about July 28, 2008, Pamela S. Chesser ("Claimant") was an employee of Pepsi Americas, a/k/a Pepsi-Cola General Bottlers, Inc., ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.

2. On or about July 28, 2008, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by Indemnity Insurance Co. of North America, c/o Sedgwick Claims Management.

3. On or about July 28, 2008, Claimant sustained an injury by accident in St. Joseph, Buchanan County, Missouri, arising out of and in the course of her employment.

4. Employer had notice of Claimant's alleged injury.

5. Claimant's Claim for Compensation was filed within the time allowed by law.

6. The weekly rate of compensation for permanent partial disability is \$404.66.

7. Employer/Insurer has paid \$67,950.31 in temporary total disability at the rate of \$523.24 per week for the period October 28, 2008 through April 11, 2011, and Employer/Insurer has paid \$2,620.00 in temporary partial disability from August 3, 2008 through February 7, 2009.

8. Employer/Insurer has paid \$106,108.05 in medical aid.

9. Claimant reached maximum medical improvement on April 4, 2011 when Dr. Bailey released Claimant.

## ISSUES

The parties agreed that there were disputes on the following issues:

1. What is the average weekly wage, and what is the weekly rate of compensation for temporary total disability and permanent total disability?

2. Is Employer entitled to a credit for an overpayment of temporary total disability payments?

3. What is the nature and extent of permanent disability, and what is Employer's liability for permanent partial disability benefits, or in the alternative, permanent total disability?

4. What is Employer's liability for disfigurement?

5. What is Employer's liability, if any, for future medical aid?

6. What is the liability of the Second Injury Fund for permanent partial disability benefits, or in the alternative, permanent total disability?

Claimant testified in person. In addition, Claimant offered the following exhibits which were admitted in evidence without objection:

A—First Amended Contract of Employment

B—Central High School records

C—Stipulation for Compromise Settlement for December 1, 1996 injury

D—Employee Statement dated August 1, 2008

E—Medical Report of Dr. Truett Swaim for February 20, 2012 Examination

F—Deposition of Dr. Truett Swaim taken October 23, 2013 with Deposition Exhibits

G—Deposition of Mary Titterington taken October 22, 2013 with Deposition Exhibits

I—Letter from David Menghini to Robert Douglass dated May 8, 2013 with Wage Information

J—Records of Missouri Division of Workers' Compensation

L—Records of Precision Spine and Orthopedics

Employer offered the following exhibits which were admitted in evidence without objection:

1—Records of Advanced Spine and Orthopedic Specialists

2—Records of Comprehensive Family Care

3—Records of Heartland Occupational Medicine

5—Deposition of Dr. David J. Clymer taken on January 27, 2014 with Deposition Exhibits

6—Deposition of Dr. Alexander Bailey taken on January 16, 2014 with Deposition Exhibits

7—Deposition of Terry Cordray taken March 18, 2014 with Deposition Exhibits

8—Deposition of Pamela Chesser taken on December 10, 2013

Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

The Post-Hearing Briefs have been considered.

### **Findings of Fact**

Claimant was hired by Employer on May 29, 2007 as a merchandiser. She always worked for Employer as a merchandiser. She put product on the floors of stores. She had to throw cases of pop that weighed 21 pounds. Claimant never had to lift 100 pounds when working for Employer. The most she lifted was two cases that weighed about 40 pounds. 100 cases of pop loaded on a pallet weighed 2,100 pounds. The most she pulled was 2,100 pounds. Her ordinary hours at Employer were from 5:30 a.m. until around 2:30 p.m. or 3:00 p.m.

Claimant was injured on July 28, 2008 at Wal-Mart South in St. Joseph, Missouri while working for Employer when an empty pallet being loaded by a man fell and struck Claimant on the back of her neck and right leg.

Claimant took an incident report to Wal-Mart after the accident. She then went to Employer and reported the incident. She returned to Wal-Mart, and by that time another employee of Employer had finished her work.

Claimant had horrible headaches and took the next two days off work. Employer sent Claimant to Heartland Occupational Medicine. Claimant identified Exhibit D, a record of Heartland Occupational Medicine that she had signed. The document was in her writing and relates to her July 28, 2008 accident.

Claimant was transferred to Dr. Alexander Bailey. Dr. Bailey first saw Claimant on September 12, 2008. He put Claimant on light duty with restrictions after the accident. Claimant worked on light duty for a time cleaning out coolers and checking coolers in convenience stores. She traveled a lot when she was on light duty. The light duty job was eventually eliminated.

Claimant had three epidural injections, but they did not benefit her. Claimant had neck surgery on January 19, 2009 by Dr. Bailey. Claimant had two or three occipital nerve blocks after that surgery. Claimant did not work after her January 19, 2009 surgery.

Claimant was also been seen by Dr. Peterson, a neurosurgeon.

Dr. Bailey performed a second neck surgery on February 23, 2010. Claimant did not recall if she had any injections after her second surgery. Claimant was released in April 2011 by Dr. Bailey. Dr. Bailey's restrictions included Claimant should avoid lifting over 20 pounds on an occasional basis.

Claimant graduated from Central High School in 1977 at age 20. She was a very poor student. She identified her Central High School transcript, Exhibit B.

Claimant was married after high school and had three children who are grown. She was divorced in 1993.

Claimant went to Vatterott College in 1982 or 1983 for nine months. She did not receive a Certificate there.

Claimant worked as a CNA at Methodist before her divorce. After her divorce, she worked at Monfort for two months, and then after it closed, she went to H.D. Lee, a jeans factory where she worked as a laborer.

Claimant worked as a laborer in construction between 1994 and 2004. She worked for J.E. Dunn and Rand & Sons, which were construction firms. She cleaned concrete, poured concrete, demolished, tore down walls, and swept. She worked a 40-hour week plus overtime. She lifted 50 pounds. She used a tool belt. She could physically perform her job. Nothing interfered with her doing her job. She worked mostly with men.

Claimant worked in a grain mill at Lifeline Foods for a year as a spotter. She walked and made sure there were no over-flows. She swept, shoveled, and used an air hose. That work was very physical. She did not perform clerical work there. She worked 40 hours per week. She did not have problems performing that job. She was not disciplined there. She received good evaluations there. She quit work at Lifeline Foods to care for her ill mother.

Claimant applied for work at Triumph after she worked at Lifeline, but she was not hired at Triumph.

Claimant sustained a head injury in July 1996 when she was hit by a piece of steel. She was off work for two or three weeks for a neck injury. She was fine after three to four months.

Claimant testified in her deposition that a piece of metal fell and hit her on the neck in approximately 1995 while working for J.E. Dunn. (Chesser deposition, page 32). She felt immediate pain and went to Cameron Hospital. (Chesser deposition, page 33).

She was given a neck brace. She did not file a formal Claim. The pain and stiffness went away. (Chesser deposition, page 34).

Claimant testified in her December 10, 2013 deposition that she injured her low back in 1999 while working at Rand & Sons. (Chesser deposition, pages 9, 12). She was lifting water pails that caused pain in her back. (Chesser deposition, pages 10-11). She went to Dr. Turner and was prescribed Hydrocodone in 1998 and 1999. (Chesser deposition, page 12). Her back pain never completely resolved following that event. (Chesser deposition, page 12). She could not recall when Dr. Turner prescribed Hydrocodone. (Chesser deposition, page 13). She had injections in her low back before Dr. Turner put her on Hydrocodone. (Chesser deposition, page 13).

Claimant had good days and bad days after that back injury. (Chesser deposition, pages 14-15). She had been on Hydrocodone since Dr. Turner put her on it up to July 28, 2008. There were days when she was not in a lot of pain that she did not take it. (Chesser deposition, page 17). Her pain did not prevent her from working but it slowed her down. (Chesser deposition, page 18). She thought she could lift 50 pounds before the July 28, 2008 accident. (Chesser deposition, page 22).

Claimant had bilateral carpal tunnel surgery while she was employed at J.E. Dunn. She received a settlement for that injury. She identified Exhibit C, the Stipulation for Compromise Settlement regarding the bilateral carpal injury. Claimant said her hands were good after her surgery up to the time of the July 28, 2008 accident.

Claimant was in an automobile accident March 1999 when the driver's side of her car was struck in the back side. She had contusions on her forehead, abdomen, thigh, and left knee, and she sustained a cervical strain. (Chesser deposition, pages 35-36). Her neck was very stiff after the accident. Her neck felt better later and resolved. (Chesser deposition, page 37).

Claimant's personal doctor is Dr. Davin Turner. His records show that she had a motor vehicle accident in March 1999. No suit was filed. She made a settlement for that accident. She did not have problems from that injury prior to July 2008. Claimant's two prior neck injuries resolved.

Claimant's low back problems continued to July 2008. Her low back pain before the 2008 injury was a five to six out of ten.

Claimant took Hydrocodone on a daily basis while working for Employer before the July 28, 2008 accident. (Chesser deposition, page 30). She needed to take that to be able to get through the work day. (Chesser deposition, page 23). It would have been

difficult for her to her work on a full-time basis without the Hydrocodone. (Chesser deposition, page 30).

Claimant did not have any pain in her neck from any other issue prior to July 28, 2008. (Chesser deposition, page 37). She was not having problems with her neck before July 28, 2008. (Chesser deposition, page 41). She was still having constant back pain then. (Chesser deposition, page 41). She did not have numbness in her hands before July 28, 2008, other than from her wrist injury at J.E. Dunn. (Chesser deposition, pages 41-42, 44). Most of her wrist symptoms resolved. She did not have any issues with her upper extremities prior July 28, 2008. (Chesser deposition, page 44). Claimant's back had not gotten worse, and was the same, right before she had neck surgery. She continued to take Hydrocodone. (Chesser deposition, page 45).

Dr. Turner sees Claimant every six months for renewal of her Lortab prescription. She still takes Lortab.

Claimant wears hearing aids every day. She uses a cane at times when her legs and her low back hurt. Use of the cane causes pain in her neck. The cane was not prescribed by a doctor. She holds the cane with her right hand. She is not sure when she first started using a cane, but she began using the cane after July 2008. Claimant sometimes does not use a cane for several days. She uses a cane for her legs.

Claimant uses the cane because of her low back pain. Use of her cane causes pain from using her arms. (Chesser deposition, page 47).

Claimant's low back became significantly worse after her 2008 accident and before her deposition was given on December 10, 2013. Claimant had increasing pain in her back and legs over time after 2008 injury.

Claimant has difficulty walking due to pain in her low back. She has pain in her legs and her low back. Her pain in her legs is due to her low back. She has difficulty walking more than one block due to her low back.

Claimant can sit for two hours if she has to. She would have to stand due to pain in her back and legs. Sitting is not as hard as standing.

Claimant cannot stand for a long time because of pain in her back and legs. She does not know if she could stand for one-half hour. Using the cane aggravates her shoulder and neck.

Claimant sometimes leans on a cart when she walks without a cane because of her back and legs.

Claimant had some severe headaches before the 2008 injury. She has not had any migraine headaches since then. (Chesser deposition, page 65).

About a year after the 2008 injury, Claimant's back really started getting bad. (Chesser deposition, page 49). It went from what it had always been for many years to hurting more. (Chesser deposition, page 49). The pain was a five or six before July 28, 2008 in her low back. The pain had been a pretty constant 8 or 9 since about a year after the July 28, 2008 event. (Chesser deposition, page 50). Claimant has constant low back pain on a daily basis. (Chesser deposition, page 51). It is in her whole lower back. It causes her difficulty walking on some days. (Chesser deposition, page 51). Sitting for long periods causes problems. She can sit for about an hour. (Chesser deposition, page 52). She cannot stand very long without the pain becoming so severe that she has to sit or lie down because of pain in her legs. (Chesser deposition, page 52). She does not lift her grandson who weighs 25 pounds. (Chesser deposition, page 53).

Claimant agreed that she testified in her 2013 deposition that her low back pain had increased to an eight or nine. She has constant low back pain. Bending affects her low back very much.

Claimant has increased the amount of Lortab she takes because of an increase in pain in her low back. She takes six Lortab a day, ten milligrams each, every day. She took 30 milligrams of Lortab a day total before the July 2008 accident. Claimant is taking more Hydrocodone since before the 2008 accident because her low back is worse. (Chesser deposition, page 69).

Running the sweeper, mopping the floor, and dusting up high irritates her neck. (Chesser deposition, page 56). The average pain in her neck is a five. (Chesser deposition, page 60). She has avoided lifting more than 20 pounds on an occasional basis, which is Dr. Bailey's recommendation, and 10 pounds on a frequent basis. (Chesser deposition, pages 64-65).

Claimant always has stiffness or pain in her neck. The stiffness was aggravated six months prior to the hearing due to walking. Lifting increases her pain at times. Her back is very painful if she squats. When Claimant tries to lift her three-year-old grandson, she has pain in her neck and back. Lifting her grandson affects her whole body. Claimant does not run a sweeper because it hurts her neck.

Claimant did not have constant neck pain as of the date of her December 10, 2013 deposition. She notices neck pain on a daily basis depending on what she does. (Chesser deposition, page 46).

Claimant does some cleaning. She does very little grocery shopping. She does not mow the grass, does not walk her dog or camp.

Claimant will hardly drive outside of St. Joseph. It is hard for her to turn her neck. She had no problems driving before July 2008.

Claimant lies down during the day. She agreed that she testified that in her deposition that she would lie down 15 to 30 minutes three times per day. She did not lie down during the day prior to her 2008 injury. The main reason she lies down is pain in her legs and back.

Claimant lies down more because of her low back than her neck. (Chesser deposition, page 72). She has to lie down five or six days in a week, and she lies down mostly because of her lower back. (Chesser deposition, page 73).

No doctor has told Claimant not to drive.

Claimant did not look for a job after she was released by Dr. Bailey in 2011. She asked who would hire her. She said she cannot do anything.

Claimant is receiving Social Security Disability. She started receiving Social Security Disability in December 2013.

Claimant was born on August 23, 1957 and is 57-years-old. She lives with her daughter and family.

Before July 2008, Claimant played with her grandchildren, went camping, and walked her dog. She did not have physical problems doing her job for Employer before the July 2008 injury.

Claimant was examined by Dr. Truett Swain. She saw Mary Titterington.

The Court observed that Claimant does not have scars on the front of her neck. She has a scar that is three inches by one-sixteenth inch long on the back of her neck from her surgery.

Claimant identified Exhibit A, her Contract with her attorneys Robert Douglass and James Nadolski providing a 25 percent fee after expenses. Mr. Douglass and Mr. Nadolski are splitting the fee.

The Court observed that Claimant's neck appeared to be stiff throughout the hearing. Claimant moved her head slowly from side-to-side. She appeared to have significant limitation of motion in her neck.

I find Claimant's testimony to be credible.

*Medical Evidence*

*Dr. Alexander Bailey*

Dr. Alexander Bailey treated Claimant for her July 28, 2008 injury. Dr. Bailey performed cervical surgery on Claimant on January 19, 2009 and February 23, 2010. Dr. Bailey's Office Visit note dated May 12, 2010 notes Claimant's pain was 10/10, and was worse than ever. It also notes Claimant had occipital headaches.

Claimant's Follow-up History dated April 4, 2011 in Dr. Bailey's records notes Claimant recorded severity 8 out of 1-10 in C-spine all day with occipital headaches.

Dr. Bailey's April 6, 2011 report states:

Ms. Pamela Chesser was last evaluated in the Orthopaedic Spine Clinic at Advanced Spine and Orthopaedic Specialists on 04/04/11. Based upon my evaluation, she presented with a history of permanent aggravating injury to her cervical spine as a result of an accident occurring on 07/28/08. In this accident, apparently a pallet fell on the back of the patient's neck and she reported it shortly after the injury. The patient was managed on a nonoperative, conservative basis over an extended period of time, but ultimately underwent surgical intervention to include an anterior cervical decompression and fusion across three levels. The patient after surgical intervention had a variety of improvements, but continued to have complaints. In ongoing follow-up, the patient was identified to have pseudoarthrosis and was taken for a second surgical intervention to include a posterior cabling and bone graft augmentation. Since that second surgical intervention for the treatment of her work related injury, the patient has progressed to a various degree. She continues to have some complaints, but there is little more that we can provide her. We maximized surgical care and we maximized conservative care. At the present time, based on the maximization of the patient's overall condition and care, we find her at maximum medical improvement.

I do not find further evidence of need for additional surgical and/or medical attention as it solely and specifically relates to her 07/28/08 injury. She is solidly fused.

In terms of work status, I have released the patient to a light physical demand level on a permanent basis. Give the patient's cervical spinal condition and her three-level fusion, I think light duty status permanently is appropriate. She is released to light duty, permanently.

In terms of rating, using all available information including x-rays, MRIs and physical examination, I find the patient has sustained approximately a 15% permanent partial disability to the body as a whole. The patient on studies did have findings of some degenerative arthrosis and some degenerative disc disease, and a full 50% of this overall rating is assigned to a pre-existing condition. The patient therefore has a residual 7.5% permanent partial disability to the body as a whole as it directly and solely relates to her work related injury of 07/28/08.

Please note the above opinions are deemed to be truthful and accurate in my professional, medical and ethical opinion. They are also stated within a reasonable degree of medical certainty.

Dr. Bailey's April 4, 2011 report containing restrictions states:

I recommend his/her return to work with the following restrictions beginning 4/4/11: Light Work, 20# lifting or carrying on an occasional basis for permanent.

Positional Tasks: A=Avoid, O=Occasional; F=Frequent, blank=No limitation

Alternate Standing &		
Sitting	<u>  O  </u>	
Bending	<u>  O  </u>	
Squatting	<u>  O  </u>	
Kneeling	<u>  O  </u>	(Occasional is no greater than 1/3 of normal working day)
Climbing	<u>  A  </u>	
Reaching	<u>  O  </u>	(Frequent is no greater than 2/3 of normal working day)
Sitting	<u>  O  </u>	
Standing	<u>  O  </u>	(Avoid is no use)
Twisting	<u>  O  </u>	

Due to nature of injury or if he/she is post surgery, the additional restrictions are recommended: perm. MMI/rtn.

Dr. Bailey's deposition taken on January 16, 2004 was admitted as Exhibit 6. Dr. Bailey is an orthopedic surgeon. He was Fellowship trained in Spine Surgery with 100 percent practice focus on the treatment of the spine. He is Board Certified in Orthopedic Surgery. (Bailey deposition, page 3). He sees about 5,000 patients a year. About 30 to 35 percent of his practice is for Workers' Compensation. (Bailey deposition, page 4). About 75 percent is lumbar and 25 percent is cervical. (Bailey deposition, page 5).

Dr. Bailey first examined Claimant on September 12, 2008. He performed a physical examination. Her chief complaint was neck and arm pain. She did not mention any problems with her lower back at that time. (Bailey deposition, page 6). He reviewed x-rays and an MRI that showed abnormalities that he could see at the C4-5, 5-6 and 6-7 levels consisting of degenerative disc disease, disc herniations, and spinal stenosis. (Bailey deposition, page 7). He recommended cervical intervention, and he performed two surgical procedures. He first performed a three-level anterior cervical decompression and fusion. (Bailey deposition, page 7). After that, Claimant had physical therapy, medication management, activity restrictions, with gradual improvement.

Dr. Bailey eventually performed a second procedure which was a revision to augment her fusion through posterior cabling and bone grafting. (Bailey deposition, page 8). There was a solid fusion after the second cervical procedure. (Bailey deposition, page 19). Claimant continued to complain of pain after the second surgery. (Bailey deposition, page 19).

After the second surgery, Claimant had standard restrictions, activity modifications, medications, and physical therapy. Dr. Bailey found that Claimant reached maximum medical improvement on April 4, 2011. (Bailey deposition, page 8). At that point he provided permanent restrictions of a light physical demand level with occasional lift, bend, and other activities. (Bailey deposition, page 9). He found that at that point she had 15 percent permanent partial disability to the body as a whole, 7.5 percent of which related to her work-related condition injury, and other aspects being degenerative. (Bailey deposition, page 9).

Claimant continued to have complaints of pain, but Dr. Bailey felt he maximized her medical and surgical condition to the best of their ability and did not find additional treatments worthwhile. (Bailey deposition, page 9). At that point he indicated that Claimant can function in the open labor market at a light duty status as it relates solely and specifically to the cervical spine issue. (Bailey deposition, page 10).

Dr. Bailey treated Claimant from September 12, 2008 until he released her on April 4, 2011. In his review of his medical records, Claimant's handwritten documents, pain diagrams, there is no indication of a complaint as it related to a low back condition as it related to this work injury, either being caused or aggravated in an event. (Bailey deposition, page 11). None of his records document any symptoms with the low back. (Bailey deposition, page 11). Claimant did not relate to him any significant issue with low back or leg symptomatology affecting gait. (Bailey deposition, page 11). He found no incident affecting Claimant's low back. (Bailey deposition, page 12). Claimant specifically denied any preexisting conditions to her cervical spine. (Bailey deposition, page 12). Claimant did not tell Dr. Bailey that she had suffered from migraine headaches prior to the work injury. (Bailey deposition, page 12).

Dr. Bailey stated headaches can be related to a cervical injury. Dr. Bailey could not tell for sure whether Claimant had headaches caused by the July 28, 2008 work accident, but it was possible. (Bailey deposition, page 13). The headaches could be completely unrelated to a cervical issue. (Bailey deposition, page 14). Dr. Bailey identified his work-status assessment of April 4, 2011. It indicated a light-duty restriction of 20 pounds lifting, occasional sit, bend, squat, kneel, reaching, sitting, standing and twisting, avoid climbing. That was the last restriction he issued. (Bailey deposition, page 16). Dr. Bailey's April 4, 2011 written restrictions are noted to be permanent. The record also states in part: "MMI/R&R."

All of Dr. Bailey's April 4, 2011 restrictions related to the injury to her neck. (Bailey deposition, page 20).

Dr. Bailey believed that as long as Claimant could find employment within his restrictions, she could go back to work. (Bailey deposition, page 21).

#### *Evaluation of Dr. Truett Swaim*

The deposition of Dr. Truett Swaim taken on October 23, 2013 was admitted as Exhibit F. Dr. Swaim graduated from medical school in 1977 and went into practice in 1983. He became board certified in orthopedic surgery and fellowed with the American Academy of Orthopedic Surgery. In 1997, Dr. Swaim herniated a disk in his neck and had to stop practice. He became board certified by the American Board of Independent Medical Examiners and fellowed with the American Academy of Disability Evaluating Physicians. He performed surgery of neck and back in practice for 15 years. (Swaim deposition, page 6). Sixty to 65 percent of his evaluations are done for Workers' Compensation, and in those cases, 80 to 85 percent are for the plaintiff, and 15 to 20 percent are for the defense. (Swaim deposition, page 7). Dr. Swaim generally does not do orthopedics and he has not done surgery since 1998. (Swaim deposition, page 58).

Dr. Swaim identified Exhibit 1, a copy of his report. He examined Claimant on February 20, 2012. He was furnished medical records prior to the examination that he identified. He took a history from Claimant. Dr. Swaim's report summarizes medical treatment records regarding Claimant.

Dr Swaim noted that in 1999 Claimant was involved in a motor vehicle accident and had contusions. She was seen in 2001 for migraine headaches. The CT of her head was normal. She was seen for headaches in 2001 and 2004 for migraine headaches. (Swaim deposition, page 10). She complained of back discomfort in the lumbar region in January 2006. She complained of discomfort in her neck and upper back in August 2008 when she was injured at work when a pallet fell from overhead and hit her back and neck and thoracic spine. She noted she continued to work with progressive discomfort.

Dr. Swaim noted Claimant followed with Heartland Occupational Medicine on August 5, 2008 reporting headaches and her neck condition getting worse. (Swaim deposition, page 12). She had muscle spasms in her neck and guarded motion of her upper extremities. She was treated with muscle relaxant and anti-inflammatory medication and placed in physical therapy.

Dr. Swaim noted Claimant was placed in physical therapy on August 12, 2008. She reported no improvement with numbness and tingling in upper extremities. She was kept on work restrictions and given stronger analgesic. She followed later in August with continued discomfort and headaches and was given a Medrol dose pack. An MRI of her neck was obtained on September 3, 2008 that revealed a small disk protrusion at the C3-5 level and a broad-based central disk protrusion at the C4-5 and disk osteophyte complexes at C5-6 and C6-7. She was referred to Dr. Bailey on September 12, 2008. (Swaim deposition, page 13).

Dr. Swaim noted Claimant followed with the Occupational Health Clinic complaining of severe headaches, hand discomfort with numbness and tingling and cervical pain. She was kept off work and referred to Pain Management Clinic in North Kansas City on September 30 and underwent a cervical epidural steroid injection. (Swaim deposition, page 14). She followed up with the Occupational Clinic in October.

Dr. Swaim noted Claimant had a second opinion at Heartland Neurosurgery December 9, 2008 where the doctor agreed with the plan for a three-level anterior cervical discectomy fusion. Dr. Swaim noted that doctor's opinion was that her neck pain and disk herniation were directly related to the work injury from July. Dr. Swaim notes Dr. Bailey performed surgery on January 19, 2009, and following the surgery her arm symptoms were gone. Dr. Swaim's report describes Claimant's post surgery treatment, including therapy. (Swaim deposition, pages 16-18).

Dr. Swaim noted Claimant saw Dr. Bailey May 22, 2009 complaining of ongoing headaches, neck pain and some shoulder pain. Claimant underwent occipital nerve blocks on June 17, 2009 that resulted in short-term relief. She went through work hardening and had a second occipital nerve block July 15, 2009. (Swaim deposition, page 18). A functional capacity evaluation was performed August 5, 2009 that revealed that she could occasionally lift 30 pounds from the floor to the waist and waist to shoulder and could frequently lift 30 pounds from floor to waist and waist to shoulder.

Claimant returned to Dr. Bailey reporting her symptoms were worse. Dr. Bailey thought there may be a pseudoarthrosis, which meant that the fusion did not take and that the bone did not heal together. (Swaim deposition, page 19). Claimant underwent an occipital nerve block on August 6, 2009 with 50 percent improvement. She followed with Dr. Bailey on September 4, 2009 and October 2, 2009. A CT myelogram was done October 20.

Dr. Swaim notes Claimant returned to Dr. Bailey, and he recommended surgery posteriorly. She underwent surgery by Dr. Bailey on February 23, 2010 which was a posterior segmental instrumented fusion from C4 to C7. She followed with Dr. Bailey after surgery. She reported on May 12, 2010 that she was worse now than ever. She had occipital nerve blocks June 30.

Dr. Swaim notes Claimant saw Dr. Burton for low back pain on December 14, 2010. Some abnormalities in the lumbar region by MRI scan were shown with spondylolisthesis at L4-5 and L5-S1 level and spinal stenosis at those levels and a 30 degree scoliosis in the thoracolumbar region. (Swaim deposition, page 23). Dr. Burton felt Claimant would be a good candidate for surgery of the lumbar region.

Dr. Swaim notes Claimant saw Dr. Bailey on April 4, 2011 and he placed her on light duty status permanently and did not think any additional treatment would be helpful. She followed with Dr. Bailey on May 20, 2011 and he stated that he had nothing to offer and she was released to follow up on an as-needed basis.

Dr. Swaim said that it is extremely rare for there to be fusion of the neck both from the front and the back. (Swaim deposition, page 26).

Dr. Swaim was asked the following questions and gave the following answers at Swaim deposition, pages 27 through 29.

Q. Did you take any information from Ms. Chesser regarding her current status?

A. Yes.

Q. And what information did you obtain?

A. Well, she said that she had ongoing constant pain in her neck with associated occipital headaches. And the discomfort varied between, you know, a throbbing sensation and a burning sensation. And her discomfort increased with use of her arms, especially above shoulder height or extended away from the body. She had not had consistent, significant radicular pain in the arms, but she had ongoing weakness of her arms and intermittent numbness of both hands. Her discomfort improved with use of medication, but her discomfort never went away.

She also had constant low back pain that radiated down both legs with variation of back pain. And her leg pain was a stabbing pain. She had back discomfort with bending and stooping and prolonged sitting or lifting. She also had discomfort and weakness and intermittent [*sic*] of her hands related to a previous carpal tunnel condition and surgery.

Q. Did you obtain any information regarding her functional status at that point during the examination?

A. She – she stated that she was having difficulties and increased pain with essentially everything, with household chores and yard work and some driving and shopping and personal hygiene like, you know, bathing and doing her hair and other things. And she stated she was on permanent restrictions, which consisted of a 20-pound lifting limit. And she could –one-eighth of the day she could stand, sit, walk. And there was no use of ladders.

Dr. Swaim was asked the following question and gave the following answer on Swaim deposition, pages 30-31.

Q. What other information did you get regarding her functional status?

A. Well, I had her do a [*sic*] Oswestry function test, which is – and that's a test to just see how they feel about themselves. And she stated that the pain killers gave her very little relief from her pain. And she needed help to manage most of her personal care. She could only lift

very light objects. And – and – or could not to the – or couldn't lift or carry anything at all.

She could only walk using a cane or crutches. She could sit in her favorite chair as long as she liked. She had pain that prevented her from standing for more than ten minutes. Even when she took medication she slept less than four hours.

She stated her sex life was severely restricted by pain. She had pain that restricted her social life between no social life at all or just social life at home. Pain restricted her to journeys less than an hour. On her pain disability index she assessed that the pain affected her hand – her family and home responsibilities to a level 9, recreation abilities to a level 10, social activity a level 10, occupational activity a level 10, sexual activity at a level 10, self care at a level 8, and life support is a level 2, with life support being able to, you know, breathe and go to the bathroom and that kind of thing.

Dr. Swaim performed a physical examination of Claimant. He observed limited cervical range of motion that he described as “severe.” (Swaim deposition, page 34). He noted examination of her low back revealed positive Lesegue sign on the left that caused discomfort of her back when performed on the right. No pain was noted with range of motion testing. He noted muscle spasm and guarding. Range of motion deficit was mild to moderate. She had difficulty navigating steps. She was able to walk with normal gait. (Swaim deposition, page 35-36). He reviewed diagnostic studies.

Dr. Swaim testified regarding his diagnosis, and his testimony is consistent with his report. He assessed a 40 percent permanent partial disability to the body as a whole, 160 weeks, due to the cervical spine condition that included the associated occipital headaches for the occupational injury of July 28, 2008 she sustained working for Employer that was the prevailing factor that caused her to develop that permanent partial disability. (Swaim deposition, pages 38-39). He testified regarding what restrictions he would place on Claimant with regard to the July 28, 2008 injury. Those restrictions are set forth in his report.

Dr. Swaim testified that he believed Claimant will need to take analgesics and/or muscle relaxants “indefinitely to treat the cervical condition.” He stated that the occupational injury of July 28, 2008 was the prevailing factor that caused her the necessity for her to undergo this future treatment.

Dr. Swaim was asked the following question and gave the following answer at Swaim deposition, pages 39-40.

Q. And, first of all, what restrictions would you place with Ms. Chester [*sic*] with regard to the primary injury of July 28, 2008?

A. Well, the restrictions would be to restrict her occupational stressors to light work level according to the US Department of Labor and Dictionary of Occupational Titles with the ability to exert up to 20 pounds of force occasionally, up to 10 pounds of force frequently, and negligible amount of force constantly to move objects.

She – probably she – she should avoid climbing or crawling would be –and twisting would be related to the neck condition. The ability to change positions frequently would also be related to the neck condition, avoid repetitive, prolonged or forceful use of the upper extremities above shoulder height or extended away from the body would be related to her neck condition. Avoid use of vibrating or jarring equipment and tools would be related to her neck condition. And – and she would – she would have limitation of her motion because she has limited motion too. That was just kind of a given because of her severe restriction of cervical motion.

Dr. Swaim stated that before July 28, 2008, Claimant had a preexisting lumbar condition, prior median neuropathy on both wrists, and a prior hearing loss. He stated the preexisting medical conditions were industrially disabling and would interfere with the Claimant getting a job or retaining a job if she was working. (Swaim deposition, page 42).

Dr. Swaim was asked the following questions and gave the following answers at Swaim deposition, pages 42-43:

Q. Which leads to my next question, did you arrive at any opinion based upon reasonable medical certainty as to a percentage of disability with regard to conditions existing before July 28, 2008?

A. Yes.

Q. And what were those opinions?

A. I assessed that she had a pre-existing 20 percent permanent partial disability to the body as a whole or 80 weeks due to her pre-existing lumbar condition, a 20 percent permanent partial to the right arm at the 175-week level, 35 weeks due to her right wrist median

neuropathy, and a pre-existing 15 percent partial disability of the left arm at the 175-week level or 26.25 weeks due to the left wrist median neuropathy.

And I assessed that she had a 25 percent binaural hearing loss based on her April 12, 2005, audiogram, which is also based on following the AMA Guides to the evaluation of this.

Dr. Swaim was asked the following questions and gave the following answers at Swaim deposition, page 43:

Q. Based upon reasonable medical certainty, do you believe there was any synergistic effect, if I can use that expression, with regard to her various pre-existing injuries?

A. Yes.

Q. And what was your opinion in that regard?

A. I assessed that the combined effects of the disability arose to the level that they created an enhancement or her overall disability. And it was enhanced by 12.5 percent of her body as a whole at 50 weeks.

Q. And was that opinion based on reasonable medical certainty?

A. Yes.

Dr. Swaim was asked the following questions and gave the following answers at Swaim deposition, pages 44-45:

Q. Doctor, in your opinion, again, based upon reasonable medical certainty, is Ms. Chesser permanently totally disabled?

A. From an occupational standpoint that would [*sic*] my assessment.

Q. Okay. In your opinion, again, based upon reasonable medical certainty, is such permanent total disability a result of the injuries which arose out of the accident of July 28, 2008, in and of itself or is such permanent total disability a result of injuries which arose out of the accident of July 28, 2008, in combination with her pre-existing conditions relative to her low back, wrist, and loss of hearing?

Do you want me to restate that?

A. Well – well – no, don't restate it.

The – she was presented as she was. And so there was a combined – the combined effect of all these disabilities did affect her. Considering the – the – her age and her educational background and her occupational history and the neck condition, especially the severe limitation of motion with associated ongoing pain and the – and the kind of surgery she underwent, I think she would be – she would not be expected to be able to obtain or maintain gainful employment related to that last condition alone. I mean, the – the – from the occupational injury.

Q. Okay.

A. The – the – I think the cervical spine condition, the two surgeries and then this – this significant range of motion deficit and ongoing problems with associated headaches would, in and of itself, be a condition that would reasonably not allow her to be gainfully employed in terms of maintaining or obtaining gainful employment.

Claimant told Dr. Swaim that during the past month her pain averaged a 9 out of 10 scale with a high of 10 and low of 8. (Swaim deposition, page 64).

Claimant told Dr. Swaim that she had lower back problems for a long time. (Swaim deposition, page 66). He did not recall asking Claimant if she had been taking Hydrocodone for a number of years prior to the July 28, 2008 accident as a result of her low back pain. (Page 66). He did not know how long she had been taking it. He did not get a history of any significant prior neck condition. He did not know if Claimant had an injury to her neck before July 28, 2008 or whether she had any permanent restrictions placed on her before July 28, 2008. (Swaim deposition, page 68).

Claimant reported to Dr. Swaim that she had some persistent discomfort, weakness, and intermittent tingling in both hands despite bilateral carpal tunnel surgery in 1996. (Swaim deposition, pages 69-70). She explained similar symptoms following the second surgery. (Swaim deposition, page 70).

Dr. Swaim stated he would impose the following restrictions on Claimant because of her low back complaints: avoid bending, stooping, twisting, crawling, prolonged sitting, changing of positions, prolonged standing or walking, avoid lifting from below

cap level, somewhat jarring equipment and tools and vibrating would be back condition as well. Vibrating would affect both the neck and back. (Swaim deposition, page 77).

Dr. Swaim recommended Claimant limit exposure to loud noise because of her hearing loss. (Swaim deposition, page 78). He would recommend that she avoid repetitive forceful use of the hands and avoid vibrating tools because of her bilateral carpal tunnel syndrome. (Page 78-79). His restrictions regarding avoiding crawling, climbing, stand, stooping, walking and avoiding lifting below cap level would be appropriate restrictions for Claimant's low back or because of her low back before July 28, 2008. (Swaim deposition, page 79).

Dr. Swaim stated that restrictions that apply solely to Claimant's cervical spine condition would be she should be restricted in the ability to exert up to 20 pounds occasionally, and/or up to 10 pounds frequently, and/or a negligible amount of force constantly to move objects. In addition, she should have restrictions regarding climbing and crawling, and the ability to change positions and repetitive or prolonged or forceful use of the upper extremities above shoulder height and extended away from the body. (Swaim deposition, page 81). Dr. Swaim did not expect Claimant to be able to maintain gainful employment or maintain gainful employment when looking only at the restrictions and limitations associated with the cervical spine, along with her age, educational background, and occupational history. (Swaim deposition, page 82).

Dr. Swaim had not seen anything stating that Claimant's back condition had gotten a lot worse following 2009. He noted Dr. Clymer's opinion that Claimant's lumbar spine, pelvis and lower extremities were the result of a chronic, gradually progressive degenerative process. Dr. Swaim stated those kinds of situations are like rust and always get worse, and her back would get worse too. (Swaim deposition, page 82). They get worse no matter what. (Swaim deposition, page 83).

Dr. Swaim noted that when he saw Claimant on February 20, 2012, she reported she had constant low back pain, and that pain radiated down both legs. The leg pain was a stabbing pain that varied in intensity. (Swaim deposition, page 83). Claimant did not report whether the pain in her legs or low back was worse than it had been in years past. (Swaim deposition, page 83). She had reported she had constant low back pain and that she had low back pain which developed in 2001 that was managed with medication. He noted that Dr. Burton had reported a history of back pain and leg symptoms for approximately ten years that was unrelated to her Workers' Compensation claim regarding her neck. (Swaim deposition, page 84).

Dr. Swaim is not a vocational expert. He did not know if there were jobs available for Claimant within his restrictions. (Swaim deposition, page 86).

Dr. Swaim's report pertaining to his February 20, 2012 evaluation of Claimant sets forth the following conclusions:

### **Conclusions**

Diagnosis: Chronic cervical pain and cervical radiculopathy with significant cervical spine range of motion deficit; status post January 19, 2009 cervical spine surgery; status post February 23, 2010 cervical spine surgery.

Occipital headaches associated with the cervical condition.

Chronic lumbar pain and lumbar radiculopathy with disc protrusion and spondylolisthesis resulting in neuroforaminal narrowing and spinal stenosis.

Persistent bilateral median neuropathy, status post 1996 right carpal tunnel release and left carpal tunnel release.

Causation: The injury of July 28, 2008, caused or was a substantial contributing factor to cause Ms. Chesser to develop chronic cervical pain and cervical radiculopathy, with associated occipital headaches. The injury of July 28, 2008, caused or was a substantial contributing factor to cause the necessity for the evaluation and treatment Ms. Chesser has had for the cervical spine condition since the injury occurred.

The injury of July 28, 2008, caused Ms. Chesser to sustain a right leg contusion at the popliteal region, necessitating the evaluation Ms. Chesser for the right leg/knee following that injury.

I cannot state within a reasonable degree of medical certainty that the injury of July 28, 2008, caused or was a substantial contributing factor to cause Ms. Chesser to develop chronic lumbar pain and lumbar radiculopathy. I cannot state within a reasonable degree of medical certainty that the injury of July 28, 2008, caused or was a substantial contributing factor to cause the necessity for the evaluation and treatment Ms. Chesser has had for the lumbar spine condition since the injury occurred. (The University of Kansas December 14, 2010 evaluation by Dr. Burton appears to be the first medical record indicating evaluation and treatment for her lumbar condition, following the July 28, 2008 injury).

Prognosis: Ms. Chesser will have ongoing neck pain with cervical radiculopathy and associated occipital headaches. She has a chronic lumbar condition which will cause ongoing low back pain and lumbar radiculopathy. Her lumbar condition will eventually necessitate surgical intervention.

Maximum Medical Improvement: Ms. Chesser has reached maximal medical improvement from treatment of the injury of July 28, 2008.

Work/Functional Restrictions: Ms. Chesser should restrict occupational stresses to a light work level according to the U.S. Department of Labor, *Dictionary of Occupational Titles*. With the ability to exert up to 20 pounds occasionally, and/or up to 10 pounds frequently, and/or a negligible amount of force constantly, to move objects.

Ms. Chesser should avoid repetitive bending, stooping, twisting, squatting, climbing, kneeling, or crawling. Ms. Chesser should sit the majority of the time, with the ability to change positions frequently. She should avoid prolonged sitting, standing, or walking. She should avoid lifting from below calf level. Ms. Chesser should avoid repetitive, prolonged, or forceful use of the upper extremities above shoulder height, or extended away from body. Ms. Chesser should avoid repetitive forceful use of the hands. Ms. Chesser should avoid use of vibrating or jarring equipment/tools.

Considering the effects of Ms. Chesser's functional limitations in combination with her age, educational background, and occupational history, it is not expected that Ms. Chesser is capable of obtaining or maintaining gainful employment.

Recommendations and Estimate of Future Medical Needs: Ms Chesser will need to take analgesic medication and/or muscle relaxants indefinitely to treat the cervical spine condition. The injury of July 28, 2008, caused or was a substantial contributing factor to cause the necessity for Ms. Chesser to undergo this future treatment. At this point in time, it does not appear that Ms. Chesser needs additional invasive treatment for her cervical spine condition.

Qualifications: The above opinions, statements, and conclusions in this report are based to a reasonable degree of medical certainty and

probability unless otherwise stated. My qualifications for coming to these conclusions and making this report are based on my previous training and experience having worked as an orthopedic surgeon for fifteen years. I received my medical degree from the University of Missouri at Kansas City in 1977. I graduated from an orthopedic residency in 1983. I was board certified in orthopedic surgery in 1988, by the American Board of Orthopedic Surgery, and recertified in 1997. I became a Fellow of the American Academy of Orthopedic Surgery in 1989. I am a Fellow of the American Academy of Disability Evaluating Physicians and I am board certified by the American Board of Independent Medical Examiners.

*Evaluation of Dr. David Clymer*

The deposition of Dr. David Clymer taken on January 27, 2014 was admitted as Exhibit 5. Dr Clymer is an orthopedic surgeon and is certified by the American Academy of Orthopedics and American Board of Orthopedic Surgery. (Clymer deposition, page 3). He currently actively treats patients. (Clymer deposition, page 4). He treats patients that have back disorders and treats 10 to 15 percent of his patients for low back complaints. (Clymer deposition, page 5). He treats 15 to 18 patients at an average half-day.

Dr. Clymer's examination was an independent medical evaluation. The significant majority of Dr. Clymer's independent medical evaluations are done at the request of Employers or their insurance companies, probably 90 percent or more. (Clymer deposition, page 11). Dr. Clymer has never performed surgeries with regards to patients' necks. (Clymer deposition, page 12).

Dr. Clymer examined Claimant at Employer's attorney's request on February 14, 2011. (Clymer deposition, page 5) He reviewed records and took a history. Claimant stated she first developed low back problems in early 2000. She described a workplace injury in 2000, but could not describe any particular accident or injury. (Clymer deposition, page 6). She could not tell Dr. Clymer that those problems resolved by July 2008. She told Dr. Clymer that she did not feel that the work-related accident had affected her low back. (Clymer deposition, page 6-7). She reported that she noticed an increase in symptoms in her low back after July 2008.

Dr. Clymer was asked the following questions and gave the following answers at Clymer deposition, pages 7-8:

Q. Okay. According to your report you had the opportunity to read some diagnostic tests, is that correct, regarding the low back?

A. Yes.

Q. What did those reveal?

A. She had rather significant degenerative lumbar spondylosis with some degenerative disc bulging and a mild grade 1 spondylolisthesis which resulted in some canal narrowing at several levels.

Q. And any of those conditions that were revealed on the MRI, could those have been caused by the July 28, 2008, work-related accident?

A. No, I don't think so.

Q. What are the causes of those disorders?

A. Those are in general a degenerative process that occurs with time and usually gradual advances with time.

Q. And could you have an opinion what would have caused those conditions?

A. Again I think those are degenerative and so those problems that I note on the MRI are most probably the result of time and aging and activities over years.

Q. Okay. And did you, Doctor, have an opinion what, if any, impact the July 2008 work-related accident would have had on her low back?

A. I did have an opinion.

Q. What was that opinion?

A. I didn't feel the work-related accident had any significant effect on her low back.

Q. You didn't discuss this in your report, but did you have an opinion whether or not the July 28, 2008 work-related accident would necessitate any permanent restrictions to the low back? Just the July 28, 2008 accident.

A. No, I don't believe so.

Q. Okay. Do you have an opinion as to whether or not the July 28, 2008 work-related accident would necessitate any future medical care for the low back?

A. No, I don't believe so.

Q. Okay. It's your opinion that you don't believe she would need any additional care because of the July 28, 2008 accident?

A. That is my opinion.

Q. She has described in her deposition that the low back pain has gotten to a point where it's so severe and radiates into her lower extremities that she's having difficulty walking. Do you have an opinion whether or not the July 28, 2008 work-related accident would be a factor in causing her symptoms into her lower extremities?

A. I do not believe the work-related accident would be a factor in that progression of symptoms.

Q. Okay. Have all your opinions been given within a reasonable degree of medical certainty?

A. Yes.

Dr. Clymer's February 14, 2011 report states in part:

In summary, Ms. Chesser's current symptoms with regard to the lumbar spine, pelvis and lower extremities is the result of a chronic, gradually progressive degenerative process. Her history and findings would suggest that she has multilevel degenerative disk disease which has been progressive since 2000 and she has been on chronic oral narcotic medications for the past 10 years for this process. I believe this has progressed gradually over time and she probably has a greater scoliosis curve now than in the past. There is probably also some progression in the multilevel degenerative disk disease and the spinal stenosis. This contributes to her low back discomfort and some buttock and thigh pain.

After review of her history and radiographic studies, I do not feel the workplace event on 7/28/2008 resulted in any significant aggravation or progression in this degenerative lumbar process. Subsequently her

symptoms have advanced rather gradually over time and more principally at a time when she was not working. This suggests that any progression in the degenerative lumbar spondylosis process is a result of time and aging and natural progression in this chronic degenerative process. I do not feel the workplace event had any direct cause or effect with regard to the low back degenerative spondylosis. I do not feel that the work event is the prevailing factor in causing the need for any further evaluation or treatment with regard to the lumbar spine.

With regard to your final question involving her smoking history, I feel her smoking is certainly a complicating factor with regard to her failed neck surgery. There is certainly good evidence in the literature that smoking creates difficulty with bone healing and may cause problems or complications with regard to neck or spine fusions. I suspect this was a significant factor in the failure of her initial surgery and in her ongoing symptoms at that point. Without further evaluation by her treating surgeon, it is not clear to me whether her most recent surgery has been successful or not and whether her neck has gone on to a successful fusion. She certainly remains symptomatic and the multiple surgeries and progressive degenerative changes combined with her smoking history all contribute to this process. Given this history and given the multilevel degenerative process in the low back, I would not favor surgery in the lumbar spine at this time. I think this is the same advice that her treating physicians have offered. In either case, further evaluation and any possible potential treatment with regard to the low back in the future should be most appropriately managed outside the Workmans' Compensation system.

### *Vocational Evidence*

#### *Vocational Evaluation of Mary Titterington*

The deposition of Mary Titterington taken October 22, 2013 was admitted as Exhibit G. Ms. Titterington has a Masters in Guidance and Counseling from Creighton University. (Titterington deposition, page 3). She has been doing vocational evaluation since she was in graduate school, and vocational rehabilitation for 35 years. (Titterington deposition, page 4). She identified her July 11, 2013 report pertaining to her vocational evaluation of Claimant, Titterington deposition Exhibit C-2. She is a certified disability management specialist (CDMS). She has performed thousands of evaluations over the last 20 years. (Titterington deposition, page 6). About 60 percent have been plaintiff and 40 percent defense. (Titterington deposition, page 7).

Ms. Titterington met with Claimant on July 9, 2013. The evaluation took three and one-half hours. (Titterington deposition, page 9). She reviewed records of Heartland Hand and Spine operative report, Heartland Occupational Medicine treatment records, Dr. Bailey's treatment records, Dr. Swaim's independent examination, Dr. Clymer's independent evaluation, and a job summary for Employer. She also reviewed Claimant's high school transcript that revealed a lot of D's and F's. (Titterington deposition, pages 9-10).

Ms. Titterington obtained a work history from Claimant which is primarily skilled and unskilled, and from light level exertion to heavy level exertion. (Titterington deposition, page 10).

Ms. Titterington did testing with reference to Claimant. Claimant's intelligence test put her in the low average range of intellectual ability, with a general IQ of 92. (Titterington deposition, page 11). She also gave Claimant the Wide Range Achievement Test, Revision 4 that supported Claimant's difficulty she had in high school. (Titterington deposition, page 12). She gave Claimant a general clerical test that showed Claimant's attention to detail and work speed was very slow. (Titterington deposition, page 13).

Ms. Titterington is familiar with Dr. Bailey's restrictions, including lifting no more than 20 pounds, alternating sitting and standing, or sitting on an occasional basis up to one-third of a day and restrictions regarding squatting occasionally, bending occasionally, kneeling occasionally, no climbing, occasional reaching, and occasional twisting. (Titterington deposition, page 15).

Ms. Titterington testified that Dr. Bailey's statement regarding light physical demand work is not in reality the definition used by the Department of Labor, and is used commonly in vocational rehabilitation because of the limitations he placed on standing and sitting, and occasional reaching. Ms. Titterington noted that light work requires almost constant use of the upper extremities and constant standing. She stated that Dr. Bailey's restrictions put Claimant to less than a full range of sedentarial. (Titterington deposition, page 16).

Ms. Titterington was asked the following questions and gave the following answers at Titterington deposition, pages 16-18:

Q. Based upon your interview of Miss Chesser, your review of the medical and other records furnished to you, Miss Chesser's work history and transferable skills, or lack thereof, Miss Chesser's educational background, the testing you performed, Dr. Bailey's

conclusions regarding how Miss Chesser's physical activities should be restricted, and Dr. Swaim's conclusions with how Miss Chesser's physical activity should be restricted, do you have an opinion based upon reasonable vocational certainty as to whether any employer in the usual course of its business would reasonably be expected to employ Miss Chesser in her present physical condition and reasonably expect Miss Chesser to perform work for which she is hired?

A. I do.

Q. And what is that opinion?

MR. MENGhini: I'm just going to object. That's a compound question. You're asking multiple questions within one big question.

Q. You may answer.

A. Okay. My opinion is, given those facts, that Ms. Chesser is not employable in the open labor market.

Q. Based upon your interview of Miss Chesser, your review of the medical and other records furnished to you, Miss Chesser's work history and transferable skills, if any, Miss Chesser's educational background, the testing you performed, Dr. Bailey's conclusions regarding how Miss Chesser's physical activities should be restricted, do you have an opinion based upon reasonable vocational certainty as to whether any employer in the usual course of its business would reasonably be expected to employ Miss Chesser in her present physical condition and reasonably expect Miss Chesser to perform work for which she is hired?

A. I do.

Q. And what is that opinion?

A. She would be unemployable in the open labor market in work that is customarily - - as work is customarily performed.

Ms. Titterington was asked the following question and gave the following answer at Titterington deposition, page 21:

Q. And you don't know what the restrictions listed there are associated with solely her neck problems?

A. You know, she has obviously a number of issues. And I don't feel that I have the medical expertise to be able to sort it out, even if they did it in their reports. I believe that is an issue that they would have to address.

Ms. Titterington agreed that Claimant's prior low back pain would be an obstacle or a hindrance to employment or reemployment. (Titterington deposition, page 23). She agreed hearing loss would be an obstacle or hindrance to employment or reemployment. (Titterington deposition, page 23). She stated that Claimant's need to take Hydrocodone in order to deal with low back pain can be an obstacle or hindrance to employment or reemployment. (Titterington deposition, page 24).

Ms. Titterington noted that Claimant reported to her that she needs to lie down to relieve the pain in her neck and head. (Titterington deposition, page 29). Claimant did not relate having to lie down prior to the work injury, at least not on work hours. (Titterington deposition, page 29).

Ms. Titterington stated that if someone finds himself needing to lie down unpredictably and for an undetermined amount of time throughout the day, that makes him unemployable, especially in an unskilled level. (Titterington deposition, page 29).

Ms. Titterington was asked the following questions and gave the following answers at Titterington deposition, pages 31-32:

Q. Did Miss Chesser report to you having problems performing her job duties prior to the work accident in 2008 with Pepsi?

A. She – what she reported is that when she would come home from work she would pretty much be wiped out and she would have to rest, lie down after she got home from work, that without the pain medication she couldn't have functioned at times.

Q. Okay. When you saw Miss Chesser, was she using a cane?

A. Yes.

Q. Okay.

A. Let me double-check that. I believe so. Yes.

Q. Okay. And did she discuss with you or did you ask her about when she started using that cane?

A. Two years before I saw her, so 2011 she said she bought it because her legs hurt so bad and that she was tripping a lot.

Mary Titterington's July 11, 2013 report states in part:

Vocational Implications

Ms. Chesser's work during the last twenty years has been in labor-intensive occupations. She worked as a merchandiser, laborer, construction laborer, and nurse aid. All of these jobs required extensive reaching, handling, lifting, carrying, bending, stooping and twisting. They either required sustained standing and walking or at times sustained sitting while driving. The restrictions established by Dr. Bailey and Dr. Swaim preclude her from returning to any of these former positions. A functional capacity evaluation was performed that supported the limitations established by the physicians.

Due to the restrictions established by Dr. Bailey, she was released from her job at Pepsi. No other positions were available with this large corporation within her limitations and skills.

Ms. Chesser's past work was primarily unskilled or performed at a low semi-skilled level without transferable skills. She did not develop any transferable skills through the performance of her work, education or avocational pursuits. She is an unskilled worker.

Her lack of work skills is important when combined with her limited educational skills, low general learning ability and the extensive functional limitations established. Her work base is eroded.

There is no expectation that Ms. Chesser can return to work in the open labor market with her current functioning level. She doe [sic] not have the ability or skills to perform or learn highly skilled occupations that do not require more than sedentary work with little use of the hands or turning of the neck.

Jobs that allow rotation of positions are typically skilled. There are a very limited number of jobs at the unskilled or semi-skilled level of work that do allow rotating between sitting, standing and walking.

Examples of these jobs would be front desk clerk, security monitor or a limited number of machine operators/tenders. She does not have the academic proficiency for the desk clerk positions and her use of narcotics on a daily basis would preclude her from being hired into security positions. With the restrictions on her hands and her numbness she could not perform the machine operator jobs.

When Ms. Chesser's total functioning level is considered there is no expectation that she could perform the essential characteristics of work. She would have difficulty with the following essential behaviors:

- Report to work on a consistent basis
- Stay on task throughout the day
- Meet production goals for quality or quantity

Ms. Chesser is unemployable in the open labor market under the restrictions established by the physicians and the FCE. It is unclear whether these restrictions consider both the neck, upper back and low back problems therefore it would be deferred to the physicians to clarify the restrictions.

Her hearing deficit does impact her ability to compete for some positions in the open labor market.

Her continued use of narcotics and her need to lie down to reduce the headache pain will have a major impact on her ability to return to work. The need to lie down during the workday is an unacceptable work practice. And the use of narcotics on a routine daily basis will have an impact on her ability to locate unskilled employment.

The above conclusions are given within a reasonable degree of vocational certainty. They are based on the records provided, this evaluation, standardized references in the field of Vocational Rehabilitation, and this consultant's thirty-five years of placement experience.

*Vocational Evaluation of Terry Cordray*

The deposition of Terry Cordray taken on March 18, 2014 was admitted as Exhibit 7. Mr. Cordray is vocational rehabilitation counselor. (Cordray deposition, page 4). He has a master's degree in rehabilitation counseling from Emporia State. (Cordray

deposition, page 4). He is a certified rehabilitation counselor, a certified case manager, and he has Diplomate status with the American Board of Vocational Experts. He is a licensed professional counselor in Illinois. (Cordray deposition, page 5). He started a private practice as a vocational expert in 1999 after working for several employers before that and after 1974.

Mr. Cordray spends about two-thirds of his time as a vocational expert on Kansas and Missouri Workers' Compensation cases and some civil cases, and they are 50 percent defense and 50 percent plaintiff. (Cordray deposition, page 8). He worked as a vocational expert for the Social Security Administration from 1994 to 2003. (Cordray deposition, page 9). He also does job placement. (Cordray deposition, page 10). He has dealt with hundreds of individuals that have had either an injury to their neck or low back. (Cordray deposition, page 10). He has done thousands of vocational assessments in his career. (Cordray deposition, page 11).

Mr. Cordray examined Claimant at Employer's attorney's request on December 19, 2013. He examined medical records provided to him to determine what restrictions and what functional limitations that had been advised by the treating and examining doctors. (Cordray deposition, page 12). He noted Claimant's educational and work background. He did the Wide Range of Achievement Tests and the Wonderlic Test. The Wonderlic Test showed Claimant's IQ at 98. (Cordray deposition, page 15).

Mr. Cordray understood Dr. Bailey's restrictions were to the light and physical demand level on a permanent basis on April 6, 2011. (Cordray deposition, page 16). Mr. Cordray did a labor market search based on Claimant's restrictions. It was his opinion there were jobs available within her home area through the state employment's website that were within her restrictions. (Cordray deposition, page 17).

Mr. Cordray was asked the following question and gave the following answer at Cordray deposition, pages 18-19:

Q. So do you have an opinion as to whether or not Ms. Chesser is permanently and totally disabled when considering the July 28, 2008, accident in isolation?

A. It's my opinion if one considers the restrictions that have been advised by Dr. Bailey at the light physical demand category, when one considers that she's a high school graduate, she's not taking any medications that affect her ability to perform jobs, that she took the same medications before, that she's employable in the labor market.

Q. Did she tell you that she had any medical problems prior to July 28, 2008?

A. She did.

Q. What did she tell you?

A. She said that prior to her injury she had a low back injury in 2001. She received injections. She did not have surgery. And she noted, and it was in the medical records, that she had been taking Hydrocodone for her low back prior to this injury and she said she'd taken them for 10 years.

Mr. Cordray noted Claimant had bilateral carpal tunnel release in 1996. She told Mr. Cordray that was not an obstacle or hindrance to employment. He noted Claimant said she did not have absenteeism related either to her back or to her hands. (Cordray deposition, pages 19-20).

Mr. Cordray was asked the following question and gave the following answer at Cordray deposition, page 20:

Q. An individual that is required to use Hydrocodone, would that be considered a hindrance or obstacle to employment or reemployment?

A. It is only an obstacle to employment if it affects their ability to be alert and attentive. And she had been taking it for a period of time and it did not ever affect her ability to perform her job at Pepsi America, therefore it was not an obstacle to employment.

Mr. Cordray stated that the Claimant may not be in traffic control or a pilot if she were taking medications but for a job she was otherwise qualified for, it did not affect her ability to be employed. (Cordray deposition, page 21).

Mr. Cordray was asked the following questions and gave the following answers at Cordray deposition, pages 25-27:

Q. All right. Do you think that those particular restrictions set forth in Exhibit 3 are significant –

A. Those –

Q. - - as to –

A. I'm sorry, I interrupted you.

Q. That's all right.

A. Go ahead.

Q. Do you think that they're significant, where the doctor concludes that she should alternate standing and sitting, occasional bending, occasional squatting, occasional kneeling, no climbing, occasional reaching, occasional sitting, occasional standing, occasional twisting? Don't you find those significant?

A. No. With the exception of retail salesperson, the jobs that I identified on page 15 of Exhibit 2, my report, could still be performed within those restrictions. Cashier, telemarketer, bill collector, bank teller and hotel desk clerk can all be performed within the postural limitations that he identified.

If you look at the postural limitations of occasion bending, sitting, squatting, kneeling, reaching, sitting, standing and twisting, it's my opinion that even given the additional postural limitations of April 4, 2011, it would continue to be my opinion she could be a cashier, telemarketer, bank teller and hotel desk clerk.

Q. But with those additional restrictions there, assuming that was his opinion on the 11<sup>th</sup> and the following two days, would that impact your position as to her being in the light physical demand area, which was his opinion?

A. Well, light jobs typically require you to frequently stand and walk throughout the day, so this would limit her from a full range of light jobs. She couldn't do all light jobs, but she could do some light jobs.

Mr. Cordray concluded that Claimant is unable to do any of the jobs that she had up to the date of her injury. (Cordray deposition, page 28). She had no transferable skills from her prior job. (Cordray deposition, page 29) He concluded Claimant can do sedentary work and some light jobs. He stated: "Light jobs that would allow her the opportunity to alternate sitting and stand, like a hotel desk clerk or bank teller." (Cordray deposition, page 29).

Mr. Cordray was asked the following questions and gave the following answers at Cordray deposition, pages 31-32:

Q. (By Mr. Douglass) Did you read the report of Mary Titterington?

A. Let me see if it's listed. Yes

Q. And do you recall in her report, in her opinion Ms. Chesser would not qualify for either light physical duty or sedentary jobs?

A. No, I don't recall it. But, you know, Mary and I have known each other for 30 years, we can agree to disagree.

Terry Cordray's January 31, 2014 report states in part:

CONCLUSIONS:

A review of Ms. Pamela Chesser's vocational profile includes one's review of her age in combination with her previous education and skill level, in combination with her current physical restriction as a result of her injury on July 28, 2008, in addition to any pre-existing restrictions or vocational barriers from pre-existing medical problems.

A review of Ms. Chesser's vocational profile indicates that on July 28, 2008, she was an individual with a high school education, as well as vocational training in construction labor, previous training in clerical skills, and certified nurse aide training.

The training that she received as a certified nurse aide is craft-specific for the medium strength demand job and was last utilized in 1999, over 15 years ago.

The training that she utilized as a secretary is no longer current.

The training that she received as a laborer is for the heavy strength demand job that is not realistic for her.

Therefore, given her residual functional capacity, Ms. Chesser must be considered a high school graduate.

Subsequent to her July 28, 2008 injury Ms. Chesser had surgery performed by Dr. Bailey.

A review of the medical records indicates that Dr. Bailey, in his report of May 12, 2010, states the following:

‘I have her at a light physical demand level and will follow up with her on an every-four-weeks basis.’

Based upon these restrictions, it is my opinion that Ms. Chesser cannot return to her previous job at Pepsi America.

Within these restrictions, it is my opinion that Ms. Chesser cannot return to any of her previous jobs. Prior to Pepsi America Ms. Chesser was performing medium strength demand work at Lifeline Foods, heavy work at the laborer’s local union, medium work as a certified nurse aid, and the job at H.D. Lee no longer exists.

Therefore, within Dr. Bailey’s restrictions, Ms. Chesser cannot return to her previous jobs.

Within these restrictions, however, there are jobs in the St. Joseph, Missouri area that Ms. Chesser can perform. These jobs including the following: retail sales, cashier, telemarketer, hotel desk clerk, bank teller.

According to the U.S. Department of Labor Bureau of Labor Statistics, May 2012, Occupational Employment Statistics for the St. Joseph, Missouri area, the following jobs with median wages would be relevant to Ms. Chesser’s current restrictions as advised by Dr. Alexander:

Cashier	\$8.73
Retail Salesperson	\$9.61
Telemarketer	\$8.70
Bank Teller	\$10.75
Hotel Desk Clerk	\$8.76

As noted, if Ms. Chesser chose to receive short term vocational rehabilitation training for office computer clerical skills, she would be capable of accessing sedentary occupations.

According to the Bureau of Labor Statistics, May 2012, statistics for St. Joseph area, general office clerks have a median wage of \$12.15,

data entry keyers earn \$13.64, and secretaries earn \$13.28 – approximately her previous wages.

Dr. Clymer, in his report of February 14, 2011, discusses Ms. Chesser's preexisting lumbar condition, which he notes has required her to utilize chronic oral narcotic medications for the past ten years.

It is my opinion that Ms. Chesser did have a preexisting condition that was a hindrance and obstacle to employment; however, I note that she was working for the past ten years on an apparently full time basis while taking her Hydrocodone.

Therefore, I do not find that there are Second Injury Fund issues, and I do not find that Ms. Chesser is totally vocationally disabled.

Based upon the restrictions of Ms. Chesser's treating physician, it is my opinion that she can work at the light physical demand category. I note that Ms. Chesser remained in a seated position for two hours in our interview and testing. Ms. Chesser did not need to alternate between sitting and standing.

I find no comments from any physician about Ms. Chesser's need to utilize a cane.

Therefore it is my opinion that, based upon the limitations as advised by Dr. Alexander [*sic*], she is capable of working at sedentary and light occupations and there are such in the St. Joseph, Missouri area.

The opinions expressed are based upon a reasonable degree of vocational rehabilitation certainty as well as 40 years of professional experience as a vocational rehabilitation counselor. I have also relied on accepted standard treatises in the field of vocational rehabilitation, including the Dictionary of Occupational Titles, the Handbook for Analyzing Jobs, Job Browser Pro by SkillTRAN, the Missouri State Employment Office, the Bureau of Labor Statistics Occupational and Employment Statistics, City of Atchison, and the City of St. Joseph.

### *Wage Information*

Exhibit I sets forth Claimant's wage information for the thirteen weeks immediately preceding the July 28, 2008 injury. Exhibit I reveals Claimant's regular pay and overtime pay for that period is as follows:

Week	Pay Period Ending	Regular Hours Worked	Overtime Hours	Total Hours	Regular Pay	Overtime Pay	Total regular and overtime pay
1	July 26, 2008	40	17	57	\$526.00	\$335.33	\$861.33
2	July 19	32	2.25	34.25	\$420.80	\$44.38	\$465.18
3	July 12	40	4.25	44.25	\$526.00	\$83.83	\$609.83
4	July 5	39	4	43	\$512.85	\$78.90	\$591.75
5	June 28	40	8.25	48.25	\$526.00	\$162.73	\$688.73
6	June 21	40	5	45	\$526.00	\$98.63	\$624.63
7	June 14	40	3.5	43.5	\$526.00	\$69.04	\$595.04
8	June 7	16	1.25	17.25	\$210.40	\$24.66	\$235.06
9	May 31	21.5	9.25	30.75	\$282.73	\$182.46	\$465.19
10	May 24	40	20.75	60.75	\$526.00	\$409.29	\$935.29
11	May 17	40	23	63	\$526.00	\$453.68	\$979.68
12	May 10	40	3	43	\$526.00	\$59.18	\$585.18
13	May 3	40	6.25	46.25	\$526.00	\$123.28	\$649.28
<b>TOTALS</b>		<b>468.5</b>	<b>107.75</b>	<b>576.25</b>	<b>\$6,160.78</b>	<b>\$2,125.39</b>	<b>\$8,286.17</b>

Exhibit C is a copy of an approved Stipulation for Compromise Settlement between Claimant and J. E. Dunn Construction pertaining to an injury on December 1, 1996. The Stipulation provides in part, “This Settlement is based upon approximate disability of 20% of the right wrist.”

**Rulings of Law**

Based on a comprehensive review of the substantial and competent evidence, the stipulations of the parties, and the application of the Workers’ Compensation Law, I make the following Rulings of Law:

*1. What is the average weekly wage, and what is the weekly rate of compensation for temporary total disability and permanent total disability?*

Section 287.800, RSMo<sup>1</sup> provides in part that administrative law judges shall construe the provisions of this chapter strictly and shall weigh the evidence impartially

<sup>1</sup> All statutory references are to RSMo 2006 unless otherwise indicated. In a workers’ compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman*

without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Section 287.808, RSMo provides:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Section 287.020.2, RSMo provides:

The word 'accident' as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

The workers' compensation claimant bears the burden of proof to show that her injury was compensable in workers' compensation. *Johme v. St. John's Mercy Healthcare*, --- S.W.3d ----, 2012 WL 1931223 (Mo.) (citing *Sanderson v. Producers Comm'n Ass'n*, 360 Mo. 571, 229 S.W.2d 563, 566 (Mo. 1950)).

"In a workers' compensation case, the claimant carries the burden of proving all essential elements of the claim." *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo.App. 1990), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 230 (Mo.banc 2003)<sup>2</sup>. The employee must establish a causal connection between the accident and the claimed injuries. *Thorsen v. Sachs Elec. Co.*, 52 S.W.3d 616, 618 (Mo.App.2001); *Williams v. DePaul Ctr*, 996 S.W.2d 619, 625 (Mo.App. 1999); *Decker v. Square D Co.*, 974 S.W.2d 667, 670 (Mo.App. 1998); *Fischer*, 793 S.W.2d at 198.

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*v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000). *See also Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

<sup>2</sup>Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (*Id.* at 224-32). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus *Hampton's* effect thereon will not be further noted.

Section 287.250, RSMo provides in part:

287.250. 1. Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:

(4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision;

.....

2. For purposes of this section, the term "gross wages" includes, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging or similar advance received from the employer, except if such benefits continue to be provided during the period of the disability, then the value of such benefits shall not be considered in calculating the average weekly wage of the employee. The term "wages", as used in this section, includes the value of any gratuities received in the course of employment from persons other than the employer to the extent that such gratuities are reported for income tax purposes. "Wages", as used in this section, does not include fringe benefits such as retirement, pension, health and welfare, life insurance, training, Social Security or other employee or dependent benefit plan furnished by the employer for the benefit of the employee. Any wages paid to helpers or any money paid by the employer to the employee to cover any special expenses incurred by the employee because of the nature of his employment shall not be included in wages.

.....

4. If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.

Section 287.253, RSMo provides:

A monetary bonus, paid by an employer to an employee, of up to three percent of the employee's yearly compensation from such employer shall not have the effect of increasing the compensation amount used in calculating the employee's compensation or wages for purposes of any workers' compensation claim governed by this chapter.

Employer asserts Claimant has an average weekly wage of six hundred fifteen dollars and thirty five cents (\$615.35). Employer argues Claimant did not submit any evidence that she missed any scheduled work days during the thirteen weeks preceding the date of accident, and that therefore, the most accurate way to calculate the average weekly wage is to divide the gross earnings by thirteen weeks. I disagree with Employer's position.

Claimant testified her ordinary hours at Employer were from 5:30 a.m. until around 2:30 p.m. or 3:00 p.m. I find this evidence is credible. This testimony demonstrates a regular work day consisted of eight hours per day, after time for lunch and breaks.

Exhibit I shows numerous weeks where regular pay was paid for forty hours. Further, the entries for holiday pay and grievance pay for the period ending July 5, 2008 are shown to be for eight hours each. The pay period ending July 19, 2008 shows thirty-two regular hours worked. These hours worked also demonstrate a regular work day consisted of eight hours per day.

I find and conclude Claimant's regular work day was eight hours.

The summary of Claimant's wages paid for the thirteen weeks immediately before her July 28, 2008 accident shown on page 42 of this Award shows in part that Claimant

worked fewer than forty hours in weeks 2, 8, and 9. Exhibit I does not clearly show the number of days Claimant worked during those weeks.

Exhibit I reflects that Claimant worked 32 regular hours and 2.25 overtime hours in week 2, 16 regular hours plus 1.25 overtime hours in week 8, and 21.5 regular hours plus 9.25 overtime hours in week 9. This demonstrates that Claimant worked four days in week 2, two days in week 8, and three days in week 9. I find and conclude Claimant was absent one day in week 2, three days in week 8, and two days in week 9. I find and conclude Claimant was absent a total of six days during the thirteen weeks immediately preceding the July 28, 2008 accident.

I find and conclude that Claimant was absent for at least five, but not more than ten regular or scheduled work days, even though not in the same calendar week. Pursuant to section 287.250.1(4), RSMo, this absence shall be considered as absence for a calendar week. Claimant's wages should therefore be divided by 12, and not by 13.

Employer argues other payments Claimant received during the thirteen weeks preceding the accident should not be used in calculating her average weekly wage. Employer notes that over the thirteen weeks prior to the accident, Claimant received additional compensation from Employer not shown in the table, to wit: \$105.20 for "grievance" pay and \$105.20 for "holiday" pay during the pay period ending July 5, 2008 to July 11, 2008, and \$105.20 for "HolTwdFOT" during the pay period ending May 31, 2008.

Black's Law Dictionary defines bonus as "a premium paid in addition to what is due or expected." I find the grievance pay and holiday pay received on a week where the Claimant worked 43 hours are unexpected premiums and qualify as bonuses. Additionally, Claimant has produced no evidence indicating what "HolTwdFOT" is or why it should be included in her wage calculation. These monetary bonuses are less than three percent of Claimant's possible annual compensation and thus should not be considered when calculating Claimant's average weekly wage.

None of these payments for grievance pay, holiday pay, or "HolTwdFOT" represent work Claimant performed for Employer. There is no evidence suggesting that these payments were anything other than benefits and bonuses, and therefore they should not be used when calculating the Claimant's average weekly wage. I find and conclude that these payments should not be included when calculating the Claimant's average weekly wage.

Claimant's attorney acknowledges that the 40 hours of vacation pay in the amount of \$526.00 for the pay period ending May 24, 2008 should not be included in the total wages in calculating Claimant's average weekly wage. I find and conclude that the

vacation pay in the amount of \$526.00 does not constitute wages earned by Claimant. I find and conclude that the vacation pay in the amount of \$526.00 should not be included when calculating the Claimant's average weekly wage.

I find and conclude that the wages earned by Claimant while actually employed by Employer in each of the last 13 calendar weeks immediately preceding the week in which Claimant was injured is \$8,286.17. I find and conclude that this amount should be divided by 12 which results in an average weekly wage of \$690.51. Two-thirds of \$690.51 equals \$460.34. I find and conclude that the compensation rate for temporary total disability is \$460.34 per week and the compensation rate for permanent total disability is \$460.34 per week in this case.

*2. Is Employer entitled to a credit for an overpayment of temporary total disability payments?*

Employer paid \$67,950.31 in temporary total disability benefits during the period October 28, 2008 through April 11, 2011 at the rate of \$523.24 per week. I find and conclude that Employer paid temporary total disability benefits to Claimant in the amount of \$62.90 per week more than the correct weekly temporary total disability rate of \$460.34 in this case. I find and conclude that Employer is entitled to a credit for a temporary total disability over-payment in the amount of \$8,051.20 based upon \$62.90 per week times 128 weeks.

*3. What is the nature and extent of permanent disability, and what is Employer's liability for permanent partial disability benefits, or in the alternative, permanent total disability?*

Claimant requests a finding that she is entitled to permanent total disability benefits from either the Employer or the Second Injury Fund from her July 28, 2008 injury.

*a. What is the degree of Claimant's disability from her injury on July 28, 2008 alone?*

Section 287.020.3, RSMo provides in part:

3. (1) In this chapter the term 'injury' is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. 'The prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

- (2) An injury shall be deemed to arise out of and in the course of the employment only if:
- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
  - (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.
- (3) An injury resulting directly or indirectly from idiopathic causes is not compensable.
- (5) The terms 'injury' and 'personal injuries' shall mean violence to the physical structure of the body. . . .

Section 287.020.10, RSMo provides:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of 'accident', 'occupational disease', 'arising out of', and 'in the course of the employment' to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

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. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992) ), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 229 (Mo. banc 2003); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004).

The Commission may not arbitrarily disregard and ignore competent, substantial, and undisputed evidence of witnesses who are not shown by the record to have been impeached and the Commission may not base its findings upon conjecture or its own

mere personal opinion unsupported by sufficient and competent evidence. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 907 (Mo.App. 2008), citing *Copeland v. Thurman Stout, Inc.*, 204 S.W.3d 737, 743 (Mo.App. 2006).

The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993), 29; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993).

Section 287.190.2, RSMo provides:

(2) Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

An employee has the burden to establish permanent total disability by introducing evidence to prove her claim. *Carkeek v. Treasurer of State-Custodian of Second Injury Fund*, 352 S.W.3d 604, 608 (Mo.App. 2011), citing *Clark v. Harts Auto Repair*, 274 S.W.3d 612, 616 (Mo.App.2009).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 908 (Mo.App. 2008); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989). 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. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*,

71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo. App. 1985); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros.*, 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. *Cardwell*, 249 S.W.3d at 908; *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Cardwell*, 249 S.W.3d at 908; *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

“The evaluation of medical testimony concerning a claimant's disability is within the peculiar expertise of the Commission, and, as such, the Commission is free to disbelieve the testimony of the claimant's medical expert.” *Tombaugh v. Treasurer of State*, 347 S.W.3d 670, 675 (Mo.App. 2011).

The finding of disability may exceed the percentage testified to by the medical experts. *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289. The Commission “is free to find a disability rating higher or lower than that expressed in medical testimony.” *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490 (Mo.App. 1990); *Sellers*, 776 S.W.2d at 505. The Court in *Sellers* noted that “[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, ‘the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.’” *Sellers*, 776 S.W.2d at 505. 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*, 801 S.W.2d at 490.

The court in *Carkeek v. Treasurer of State-Custodian of Second Injury Fund*, 352 S.W.3d 604 (Mo.App. 2011) states at 610:

The question whether a claimant is totally and permanently disabled is not exclusively a medical question. *Crum v. Sachs Elec.*, 769 S.W.2d 131, 136 (Mo.App.1989), *overruled in part by Hampton*, 121 S.W.3d at 220. The Commission, in arriving at its ultimate conclusion as to the degree of a claimant's disability, need not rely exclusively on the testimony of medical experts; rather, it may consider all the evidence

and the reasonable inferences drawn from that evidence. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 239 (Mo.App.2003).

Section 287.220. 1, RSMo provides in part:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury

or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the 'Second Injury Fund' hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141.

The Court in *Lewis v. Treasurer of State*, 2014 WL 2928017 (Mo.App. E.D. 2014) states:

Fund liability for PTD under Section 287.220.1 occurs when the claimant establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. *Highley*, 247 S.W.3d at 55; Section 287.220.1. For a claimant to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo.App. E.D.2007); Section 287.220.1.

In deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone. *Michael*, 334 S.W.3d at 663; *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003); *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. 2000). Accordingly, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself renders the employee permanently and totally disabled, then the fund has no liability and the employer is responsible for the entire amount of compensation. *Landman*, 107 S.W.3d at 248; *Hughey*, 34 S.W.3d at 847.

The court in *Knisley v. Charleswood Corp.*, 211 S.W.3d 629 (Mo. App. 2007) states at 634-35:

To prevail against the SIF on a claim for permanent total disability, a claimant must establish that: (1) she had a permanent partial disability at the time she sustained the work-related injury and

(2) the pre-existing permanent partial disability was of such seriousness as to constitute a hindrance or obstacle to her employment. Section 287.220.1 RSMo 2000; *Motton v. Outsource Intern.*, 77 S.W.3d 669, 673 (Mo.App. E.D.2002). “The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment.” *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo.App. E.D.2000) (overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)); *Garrone v. Treasurer of State of Missouri*, 157 S.W.3d 237, 244 (Mo.App. E.D.2004). The primary determination is whether an employer can reasonably be expected to hire the employee, given his or her present physical condition, and reasonably expect the employee to successfully perform the work. 157 S.W.3d at 244.

Section 287.020.7, RSMo provides: “The term ‘total disability’ as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident.” The phrase “inability to return to any employment” has been interpreted as “the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment.” *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Knisley*, 211 S.W.3d at 635; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo.App. 2001); *Reiner v. Treasurer of the State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.1992); *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 792 (Mo.App. 1992).

Total disability means the “inability to return to any reasonable or normal employment.” *Lawrence*, 834 S.W.2d at 792; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990); *Kowalski*, 631 S.W.2d at 992. An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Brown*, 795 S.W.2d at 483 The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Lewis v. Kansas University Medical Center*, 356 S.W.3d 796, 800 (Mo.App. 2011); *Molder v. Missouri State Treasurer*, 342 S.W.3d 406, 411, (Mo.App. 2011); *Carkeek*, 352 S.W.3d at 608; *Knisley*, 211 S.W.3d at 635; *Brown*, 795 S.W.2d at 483; *Reiner*, 837 S.W.2d at 367; *Kowalski*, 631 S.W.2d at 922. See also *Thornton v. Hass Bakery*, 858 S.W. 2d 831, 834 (Mo.App. 1993).

The court in *Knisley*, 211 S.W.3d states at 635:

Section 287.200.1 does not require a claimant to distinguish each disability and assign a separate percentage for each of several pre-existing disabilities to prevail on a claim for permanent total disability. Section 287.200.1; *See Vaught v. Vaughns, Inc.*, 938 S.W.2d 931, 942 (Mo.App. S.D.1997) (overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)). Rather, a claimant must establish the extent, or percentage, of the permanent partial disability resulting from the last injury only, and prove that the combination of the last injury and the pre-existing disabilities resulted in permanent total disability. *Id.*

*See also, Lewis v. Treasurer of State*, 2014 WL 2928017 (Mo.App. E.D. 2014).

The court in *Vaught*, 938 S.W.2d 931, states at 939:

As explained in *Stewart, id.* at 854, § 287.220.1 contemplates that where a partially disabled employee is injured anew and sustains additional disability, the liability of the employer for the new injury “may be at least equal to that provided for permanent total disability.” Consequently, teaches *Stewart*, where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Id.* The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). *Id.* If the compensation to which the employee is entitled for the new injury is *less* than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. § 287.220.1

The Missouri Supreme Court states in *Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund*, 138 S.W.3d 714 (Mo. 2004) at 717-18:

Total disability preventing reasonable employment must be more than post-accident worsening of preexisting disabilities. *Lawrence v. Joplin R–VIII School Dist.*, 834 S.W.2d 789, 793 (Mo.App.1992). *Elrod* must show that the worsening was caused or aggravated by the primary injury. *Id.*

Elrod did not meet this burden.

The Court in *Abt v. Mississippi Lime Co.*, 420 S.W.3d 689 (Mo.App. 2014), states at 699:

Having held that the existence of the claimant's permanent total disability has been conclusively decided, the question then becomes the *cause*, and thus the compensability, of the claimant's permanent total disability. No one argues that the disability is without cause, or that its cause cannot be found in the record. Thus, logic dictates that the claimant's permanent total disability here must result from one of the following four causes: 1) subsequent deterioration of pre-existing conditions alone; 2) some other injury or condition alone; 3) the 2001 primary injuries alone; or 4) the 2001 injuries in combination with the claimant's pre-existing conditions.

The first possibility is that deterioration of the claimant's pre-existing conditions alone caused his permanent total disability. In *Abt I*, however, we observed that:

Significantly, none of the foregoing medical experts [Dr. Poetz, Dr. Cadiz, or Dr. Tate] concluded that [the claimant] was permanently and totally disabled solely because of subsequent deterioration of [the claimant's] preexisting disabilities. Nonetheless, the Commission stated: "The record clearly supports a finding that [the claimant's] permanent total disability condition was a result of subsequent deterioration and not a result of [the claimant's] January 16, 2001 work injury." Rather than choosing one of the medical opinions, the Commission made a finding that is not consistent with any medical opinion in the record. Because no medical expert concluded that [the claimant] was permanently and totally disabled due solely to subsequent deterioration, the Commission's finding is not supported by substantial and competent evidence.

8 CSR 50–2.010(14) states in part, "Prior to hearing, the parties shall stipulate uncontested facts and present evidence only on contested issues." Such stipulations "are controlling and conclusive, and the courts are bound to enforce them." *Hutson v. Treasurer of Missouri as Custodian of Second Injury Fund*, 369 S.W.3d 269, 2012 WL 1319428 (Mo.App. 2012) (citing *Boyer v. Nat'l Express Co.*, 29 S.W.3d 700, 705 (Mo.App. 2001)).

The parties stipulated that on or about July 28, 2008, Claimant sustained an injury by accident in St. Joseph, Buchanan County, Missouri, arising out of and in the course of her employment. Dr. Swaim stated the injury of July 28, 2008, caused or was a substantial contributing factor to cause Claimant to develop chronic cervical pain and cervical radiculopathy, with associated occipital headaches. I find this opinion is credible. I find and conclude that on July 28, 2008, Claimant sustained an injury by accident in St. Joseph, Buchanan County, Missouri, arising out of and in the course of her employment for Employer, resulting in injury to her head and neck, and disability.

Based on the substantial and competent evidence and the application of the Workers' Compensation Law, I find and conclude that Claimant's injury on July 28, 2008, considered alone, in isolation, and in and of itself, rendered Claimant permanently and totally disabled. I find and conclude that no employer in the usual course of business would be reasonably expected to hire her in her condition, reasonably expecting her to perform the work for which she is hired.

Factors which support my finding and conclusion that Claimant's injury on July 28, 2008, considered alone, in isolation, and in and of itself, rendered Claimant permanently and totally disabled include the following.

Claimant had three-level cervical fusion surgeries on January 19, 2009 and February 23, 2010 by Dr. Bailey. Dr. Bailey released Claimant on April 4, 2011 at maximum medical improvement with permanent restrictions of light work, 20# lifting or carrying on an occasional basis, and occasional bending, squatting, kneeling, reaching, sitting, standing, and twisting (with "occasional" noted to be "no greater than 1/2 of normal working day") and avoid climbing, (with "avoid" noted to be "no use").

Claimant always has stiffness or pain in her neck. She has severe limitation of motion in her neck. It is hard for her to turn her neck. She has headaches. She continues to take Lortab for pain. Pain medication gives her little relief. I find and conclude Claimant's July 28, 2008 accident has caused her to have ongoing pain and stiffness in her neck and headaches.

Claimant is 57 years old. She has limited education and limited job skills. She has not worked since she was released by Dr. Bailey. She does not believe she can work. She does not believe anyone would hire her.

I find Claimant's description of her complaints and limitations to be credible.

Dr. Bailey's Office Visit note dated May 12, 2010 notes Claimant's pain was 10/10, and was worse than ever. It also notes Claimant had occipital headaches.

Claimant's Follow-up History dated April 4, 2011 in Dr. Bailey's records notes Claimant recorded severity 8 out of 1-10 in C-spine all day with occipital headaches.

Dr. Swaim testified that when he examined Claimant on February 20, 2012, she reported ongoing constant pain in her neck with associated occipital headaches. She complained that the discomfort varied between a throbbing sensation and a burning sensation and increased with use of her arms, especially above shoulder height or extended away from the body. She reported she had not had consistent, significant radicular pain in the arms, but she had ongoing weakness of her arms and intermittent numbness of both hands. Her discomfort improved with use of medication, but her discomfort never went away.

Dr. Swaim believed Claimant is permanently and totally disabled. He testified that considering Claimant's age, educational background, and occupational history and the neck condition, especially the severe limitation of motion with associated ongoing pain and the kind of surgery she underwent, she would not be expected to be able to obtain or maintain gainful employment related to that last condition alone—from the occupational injury. I find this opinion is credible and persuasive.

Dr. Swaim stated that restrictions that apply solely to Claimant's cervical spine condition would be she should be restricted in the ability to exert up to 20 pounds occasionally, and/or up to 10 pounds frequently, and/or a negligible amount of force constantly to move objects. In addition, she should have restrictions regarding climbing and crawling, and the ability to change positions and repetitive or prolonged or forceful use of the upper extremities above shoulder height and extended away from the body. I find these restrictions are credible.

Dr. Swaim did not expect Claimant to be able to maintain gainful employment or maintain gainful employment when looking only at the restrictions and limitations associated with the cervical spine, along with her age, educational background, and occupational history. I find this opinion is credible and persuasive.

Mary Titterington is familiar with Dr. Bailey's restrictions, including lifting no more than 20 pounds, alternating sitting and standing, or sitting on an occasional basis up to one-third of a day, and restrictions regarding squatting occasionally, bending occasionally, kneeling occasionally, no climbing, occasional reaching, and occasional twisting.

Ms. Titterington testified that based upon her interview of Claimant, her review of the medical and other records furnished to her, Claimant's work history and transferable skills, if any, Claimant's educational background, the testing she performed, Dr. Bailey's conclusions regarding how Miss Chesser's physical activities should be restricted, and

based upon reasonable vocational certainty as to whether any employer in the usual course of its business would reasonably be expected to employ Claimant in her present physical condition and reasonably expect Claimant to perform work for which she is hired, that Claimant would be unemployable in the open labor market in work as work is customarily performed. I find this opinion is credible and persuasive.

Dr. Bailey stated Claimant had sustained approximately a 15% permanent partial disability to the body as a whole, 50% of which was assigned to a pre-existing condition due to degenerative arthrosis and some degenerative disc disease. He stated Claimant has a residual 7.5% permanent partial disability to the body as a whole as it directly and solely relates to her work related injury of July 28, 2008. I find this rating is not credible or persuasive.

Dr. Bailey testified that Claimant can function in the open labor market at a light duty status as it relates solely and specifically to the cervical spine issue and that as long as Claimant could find employment within his restrictions, she could go back to work. I find these opinions are not credible or persuasive.

Terry Cordray testified if one considers the restrictions that have been advised by Dr. Bailey at the light physical demand category, and when one considers that Claimant is a high school graduate, and Claimant is not taking any medications that affect her ability to perform jobs, that she took the same medications before, that Claimant is employable in the labor market. Mr. Cordray stated there are jobs in the St. Joseph, Missouri area within Dr. Bailey's restrictions that Claimant can perform. I find these opinions are not credible or persuasive.

I find the opinions of Dr. Swaim are more persuasive than the opinions of Dr. Bailey regarding whether Claimant is able to work.

I find the opinions of Mary Titterington are more persuasive than the opinions of Terry Cordray regarding whether Claimant is able to compete in the open labor market.

Dr. Swaim noted no indication of a complaint of a low back condition as it related to this work injury. None of Dr. Bailey's records document any symptoms with the low back. Dr. Clymer did not feel the work-related accident had any significant effect on Claimant's low back. I find Claimant's July 28, 2008 accident did not result in an injury to her low back.

I also find Claimant's prior neck injuries had resolved before she sustained her July 28, 2008 injury. I believe her testimony that she was not having cervical complaints before that injury. There are no medical records in evidence documenting she was treating for a cervical condition at the time of her July 28, 2008 injury.

Claimant's preexisting low back condition deteriorated after her July 28, 2008 injury. There are no medical opinions in evidence that Claimant was permanently and totally disabled solely because of subsequent deterioration of preexisting disabilities. I find and conclude that the competent and substantial evidence does not establish that Claimant was permanently and totally disabled solely because of subsequent deterioration of preexisting disabilities.

Claimant worked full time without restrictions for many years before her July 28, 2008 injury. She had not had surgery to her neck or low back before July 29, 2008.

I find and conclude that the competent and substantial evidence does not establish that Claimant was permanently and totally disabled due to the combination of her present compensable injury and preexisting partial disability.

I find and conclude that Claimant's injury on July 28, 2008, considered alone, in isolation, and in and of itself, rendered Claimant permanently and totally disabled. I find and conclude that no employer in the usual course of business would be reasonably expected to hire her in her condition, reasonably expecting her to perform the work for which she is hired.

The court in *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902 (Mo.App. 2008), stated at 910:

After reaching the point where no further progress is expected, it can be determined whether there is either permanent partial or permanent total disability and benefits may be awarded based on that determination. One cannot determine the level of permanent disability associated with an injury until it reaches a point where it will no longer improve with medical treatment. Furthermore, an employers' liability for permanent partial or permanent total disability does not run concurrently with their liability for temporary total disability.

Although the term maximum medical improvement is not included in the statute, the issue of whether any further medical progress can be reached is essential in determining when a disability becomes permanent and thus, when payments for permanent partial or permanent total disability should be calculated.

Dr. Bailey saw Claimant on April 4, 2011 and stated Claimant was at maximum medical improvement. I find this opinion is credible and true.

Claimant has not worked since April 4, 2011 when Dr. Bailey put her on permanent restrictions and Employer did not accommodate Dr. Bailey's restrictions.

Dr. Swaim saw Claimant on February 2, 2012 and stated Claimant was at maximum medical improvement. I find this opinion is credible and true.

Claimant has not worked for Employer or anywhere else since Dr. Bailey released her on April 4, 2011. I find that since Claimant was placed on permanent restrictions on April 4, 2011 by Dr. Bailey, Claimant has not been able to work and has been totally disabled because of her July 28, 2008 work injury.

The parties stipulated that Claimant reached maximum medical improvement on April 4, 2011 when Dr. Bailey released Claimant.

I find and conclude that Claimant's cervical condition caused by her July 28, 2008 work injury reached the point where no further progress was expected and would no longer improve with medical treatment, on April 4, 2011. I find and conclude Claimant reached maximum medical improvement on April 4, 2011 in connection with her July 28, 2008 work injury.

I find Claimant's permanent total disability began on April 4, 2011. I find that since April 4, 2011, Claimant has not been able to compete in the open labor market, and since that time, no employer in the usual course of business would be reasonably expected to hire her in her condition, reasonably expecting her to perform the work for which she is hired.

I have previously found that the rate of compensation is \$460.34 per week for temporary total disability and \$460.34 per week for permanent total disability.

I find that Employer has paid \$67,950.31 in temporary total disability at the rate of \$523.24 per week, and that temporary total disability was paid through April 11, 2011.

I award Claimant permanent total disability benefits against Employer in the amount of \$460.34 per week beginning on April 12, 2011.

I therefore order and direct Employer to pay to Claimant permanent total disability benefits beginning April 12, 2011, and thereafter, at the rate of \$460.34 per week for Claimant's lifetime.

#### *4. What is Employer's liability for disfigurement?*

The Court observed that Claimant does not have scars on the front of her neck. She has a scar that is three inches by one-sixteenth inch long on the back of her neck from

her surgery. The Court assesses three (3) weeks disfigurement in this case at the agreed permanent partial disability rate of \$404.66 per week, which amounts to \$1,213.98. I award the sum of \$1,213.98 in favor of Claimant against Employer for disfigurement.

5. *What is Employer's liability, if any, for additional medical aid?*

Claimant is requesting an award of additional medical aid. Section 287.140, RSMo 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." This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 266 (Mo.App. 2004). Medical aid is a component of the compensation due an injured worker under Section 287.140.1, RSMo. *Bowers*, 132 S.W.3d at 266; *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). 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. *Farmer v. Advanced Circuitry Division of Litton*, 257 S.W.3d 192, 197 (Mo. App. 2008); *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997).

It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment. *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 524 (Mo.App. 2011); *Farmer*, 257 S.W.3d at 197; *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 53 (Mo. App. 2007); *Bowers*, 132 S.W.3d at 270; *Mathia*, 929 S.W.2d at 277; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *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. Section 287.140.1, RSMo does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Tillotson*, 347 S.W.3d 525; *Forshee v. Landmark Excavating & Equipment*, 165 S.W.3d 533, 538 (Mo. App. 2005); *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, 394 (Mo.App. 1983).

The type of treatment authorized can be for relief from the effects of the injury even if the condition is not expected to improve. *Farmer*, 257 S.W.3d at 197; *Bowers*, 132 S.W.3d at 266; *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo.banc 2003). Future medical care must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible. *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 83

(Mo.App. 2006). Once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. *Id*; *Tillotson*, 47 S.W.3d 519.

The court in *Tillotson* states at 347 S.W.3d 519:

The existing case law at the time of the 2005 amendments to The Workers' Compensation Law instructs that in determining whether medical treatment is “reasonably required” to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 83 (Mo.App. S.D.2006). Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. *Id*. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. *Id*.

The court in *Tillotson* states at 347 S.W.3d 524:

To receive an award of future medical benefits, a claimant need not show ‘conclusive evidence’ of a need for future medical treatment.” *Stevens*, 244 S.W.3d at 237 (quoting *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo.App.W.D.2007)). “Instead, a claimant need only show a ‘reasonable probability’ that, because of her work-related injury, future medical treatment will be necessary. A claimant need not show evidence of the specific nature of the treatment required. *Id*.

The court in *Tillotson* also states at 525:

In summary, we conclude that once the Commission found that Tillotson suffered a compensable injury, the Commission was required to award her compensation for medical care and treatment reasonably required to cure and relieve her compensable injury, and for the disabilities and future medical care naturally flowing from the reasonably required medical treatment.

Claimant has continuing complaints relating to her neck.

It is Dr. Swaim's opinion that Claimant will have ongoing neck pain with cervical radiculopathy and associated occipital headaches. It is Dr. Swaim's opinion that Claimant will need to take analgesic medication and/or muscle relaxants indefinitely to treat the cervical spine condition and that the injury of July 28, 2008, caused or was a substantial contributing factor to cause the necessity for Ms. Chesser to undergo this future treatment. I find these opinions of Dr. Swaim are credible and persuasive.

Dr. Clymer testified:

Q. Okay. Do you have an opinion as to whether or not the July 28, 2008 work-related accident would necessitate any future medical care for the low back?

A. No, I don't believe so.

Q. Okay. It's your opinion that you don't believe she would need any additional care because of the July 28, 2008 accident?

A. That is my opinion.

I find Dr. Clymer's opinion that Claimant would not need any additional care because of the July 28, 2008 accident is not credible or persuasive. Dr. Clymer's evaluation related primarily to whether Claimant sustained an injury to her low back on July 28, 2008. He has never performed surgeries with regards to patients' necks. His report states: "I do not feel the workplace event had any direct cause or effect with regard to the low back degenerative spondylosis. I do not feel that the work event is the prevailing factor in causing the need for any further evaluation or treatment with regard to the lumbar spine." I believe Dr. Clymer's opinion that Claimant would not need any additional care because of the July 28, 2008 accident relates to her low back.

Dr. Bailey noted in his April 6, 2011 report that he did not find further evidence of need for additional surgical and/or medical attention as it solely and specifically related to Claimant's July 28, 2008 injury. I find this opinion is not persuasive. Claimant has had ongoing cervical complaints since her release by Dr. Bailey.

I find the opinion of Dr. Swaim that Claimant will need to take analgesic medication and/or muscle relaxants indefinitely to treat the cervical spine condition is more credible and persuasive than the opinions of Dr. Clymer and Dr. Bailey regarding whether Claimant will need additional medical care in the future.

Based on competent and substantial evidence and the application of the Missouri Workers' Compensation Law, I find Claimant will need additional medical aid to cure and relieve her from the effects of her July 28, 2008 compensable injury.

Employer is directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of her July 28, 2008 injury, in accordance with section 287.140, RSMo.

*6. What is the Second Injury Fund's liability for permanent partial disability benefits, or in the alternative, permanent total disability benefits?*

Although the competent and substantial evidence establishes that at the time of Claimant's July 28, 2008 primary injury, she had preexisting permanent partial disability that was a hindrance or obstacle to her employment or reemployment if she becomes unemployed, it is not necessary to determine the nature and extent of Claimant's preexisting permanent partial disability because I have found and concluded Claimant's injury on July 28, 2008, considered alone, in isolation, and in and of itself, rendered Claimant permanently and totally disabled. I have found and concluded Employer is responsible for the entire amount of compensation in this case, and the Second Injury Fund therefore has no liability in this case. Claimant's claim against the Second Injury Fund is denied.

#### *Attorney's Fees*

Claimant's attorney is entitled to a fair and reasonable fee in accordance with Section 287.260, RSMo. An attorney's fee may be based on all parts of an award, including the award of medical expenses. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). During the hearing, and in Claimant's presence, one of Claimant's two attorneys, Robert E. Douglass, requested an attorney's fee of 25% after expenses, to be divided one-half to him, and one-half to co-counsel James A. Nadolski, from all amounts awarded. Claimant did not object to that request. I find Claimant's attorneys are entitled to and are awarded a total attorney's fee of 25% after expenses to be divided one-half to him, and one-half to co-counsel James A. Nadolski of all amounts awarded for necessary legal services rendered to Claimant. The compensation awarded to Claimant shall be subject to a lien in the amount of 25% after expenses of all payments hereunder in favor of the following attorneys for necessary legal services rendered to Claimant: Robert E. Douglass and James F. Nadolski, to be divided one-half to each.

Made by: /s/ Robert B. Miner  
Robert B. Miner  
*Administrative Law Judge*  
*Division of Workers' Compensation*