

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

Injury No. 01-044035

Employee: Jane Cook Noyes
Employer: Wal-Mart Associates (Settled)
Insurer: American Home Assurance (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled 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 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 dated October 22, 2014. The award and decision of Administrative Law Judge David L. Zerrer, issued October 22, 2014, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 9th day of April 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Jane Cook

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Dependents:

Employer: Wal-Mart Associates

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer:

Hearing Date: August 12, 2014

Checked by: DLZ

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: April 3, 2001
5. State location where accident occurred or occupational disease was contracted: Macon, Macon 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:
Claimant was bending down to remove items from drawer when felt pain in back
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Back; body as a whole
14. Nature and extent of any permanent disability: 35% body as a whole
15. Compensation paid to-date for temporary disability: \$1,854.99
16. Value necessary medical aid paid to date by employer/insurer? \$13,435.58

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$304.34
- 19. Weekly compensation rate: \$202.89
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

All issues of primary claim settled previously

- 22. Second Injury Fund liability: Yes No Open

Permanent total disability benefits from Second Injury Fund:
\$202.89 per week beginning May 29, 2008, and, thereafter, for Claimant's lifetime

TOTAL: \$65,678.39

- 23. Future requirements awarded: None

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

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

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jane Cook

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Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Wal-Mart Associates

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer:

Checked by: DLZ

On the 12th day of August, 2014, the parties appeared before the undersigned Administrative Law Judge for final hearing on Claimant's claim against the Second Injury Fund. Claimant appeared in person and by her attorney, Truman Allen. The Employer, having previously compromised and settled all issues in the primary claim, comes not and does not appear at this hearing. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, appeared by Assistant Attorney General Maggie Ahrens. The award being sought is a final award against the Second Injury Fund. The record was ordered to be left open until 5:00 p.m. September 5, 2014.

The parties entered into a stipulation with regard to certain facts which are not at issue in this claim as follows, to wit: On or about the 3rd day of April, 2001, Wal-Mart Associates was an employer operating subject to the Missouri Workers' Compensation Law; on the alleged injury date of April 3, 2001, Jane Cook was an employee of the Employer; the Claimant was working subject to the Missouri Workers' Compensation Law; the parties agree that on or about April 3, 2001, Claimant sustained an accident, which arose out of the course of and scope of employment; the employment occurred in Macon County, Missouri, and the parties agree that Macon County, Missouri, is the proper venue for this hearing; the Claimant notified the Employer of the injury as required by Section 287.420; the Claimant's claim was filed within the

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time prescribed by Section 287.430; at the time of the claimed accident, Claimant's average weekly wage was \$304.34, sufficient to allow a compensation rate of \$202.89 for temporary total disability, permanent partial disability, and permanent total disability; temporary disability benefits have been paid in the amount of \$1,854.99; Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award.

ISSUES

The liability of the Second Injury Fund for permanent total disability/enhanced permanent partial disability?

DISCUSSION

A legal file was established for this hearing, which consisted of the following documents, to wit: Report of Injury; Claim for Compensation, filed with the Division May 30, 2002; Amended Claim for Compensation, filed with the Division August 22, 2007; Answer of Second Injury Fund to Claim for Compensation, filed with the Division June 14, 2002; Answer of Second Injury Fund to Amended Claim for Compensation, filed with the Division August 31, 2007; Stipulation for Compromise Settlement of the primary claim, approved by the Division March 12, 2008; Request for Final Hearing, filed with the Division April 18, 2014.

Claimant offered, and there was admitted without objection, Exhibits 1 through 23. The Second Injury Fund offered and there was admitted without objection, Exhibit A and Exhibit B.

Jane Cook, claimant herein, testified in her own behalf. Claimant testified that she has also been known from time to time as Jane Cook-Noyes and Jane Noyes. She was born

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April 9, 1945, and is 69 years of age at the date of this hearing. Claimant has a high school diploma and no other special or military training.

Claimant testified that she has worked in the past as a waitress, as well as a cook at a nursing home. Claimant had been employed by the Employer for 18-1/2 years prior to the date of injury. She indicated that she was the manager of the jewelry department for about the last 15 years prior to the injury. Claimant testified that her job duties included pricing items for sale, dealing with and serving customers, and arranging displays. Claimant stated that she had the same duties as other workers in her department, except that Claimant made out work schedules, did price changes in the computer, prepared claim forms for broken jewelry, and prepared orders for the repair of customers' jewelry.

Claimant testified that on April 3, 2001, she was preparing for inventory in the jewelry department where she worked. She indicated that she was looking under drawers of a jewelry showcase in order to assure that no items had fallen under or behind the drawers which were located on the bottom of the showcase. Claimant stated that she was putting a drawer back into the showcase when she felt a pull in her back. Claimant finished her workday but was in severe pain by the end of the day.

Claimant testified that she used a chiropractor for nearly all of her medical treatment prior to April 3, 2001. She testified that she went to her chiropractor on her own for treatment on several occasions and was sent by the Employer to Dr. Deline for additional treatment. Dr. Deline ordered an MRI and prescribed physical therapy. Dr. Deline referred Claimant to Dr. Silvers, a neurologist, who referred Claimant to Dr. Alander, an orthopedist. Claimant stated that she was diagnosed with disc bulges and that she was administered several injections in her back along with more physical therapy.

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Claimant testified that in January 2003 she was sent to Dr. Robson for an independent medical evaluation. Dr. Robson recommended surgery, which was authorized by Employer, and Claimant had surgery on her low back in March 2005 with Dr. Robson. Dr. Robson placed Claimant at maximum medical improvement on September 20, 2005. She indicated that Dr. Robson gave her restrictions of no lifting more than 10-15 pounds. Claimant also stated that Dr. Robson's medical records may state a restriction of 25 pounds, but Claimant understood that her restriction on lifting was 10-15 pounds with no front carrying.

Claimant testified that between 2003 and 2005 she received treatment for a damaged cervical disc. She also testified that in 1988 Claimant had surgery on her cervical region at the C6-7 level. Claimant stated that Dr. Raskas, the surgeon for the 2005 neck surgery, indicated that the chronic pain suffered by Claimant in the cervical region was related to her work for the Employer over a period of time.

Claimant testified that she had umbilical hernia surgery in October 2000. After the initial surgery, the wound became infected and a second surgery was performed. Claimant further testified that in February 2001 she was diagnosed with a recurrent hernia and another surgery was recommended, which took place after the date of Claimant's injury.

Claimant testified that after Claimant's unrelated cervical surgery release in 2005 she was ready to return to work when Employer authorized her surgery on the low back (the primary injury in this claim). Claimant also testified that from June 2004 through September 2004, she voluntarily cut her working hours in order to take care of her husband who was dying. She stated that when she returned to work in September 2004, she was made a door greeter instead of jewelry department supervisor. Claimant also indicated that later she was changed again to be a check-out person. Claimant stated that after May 2006 her work schedule was cut to two days

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per week, usually Thursday and Saturday. Claimant stated that by that time she could not work two days in a row because her arms, shoulders, and neck would be too painful. Claimant testified that she worked part time until January 2007.

Claimant testified that since about 2007, because of her low back pain, she cannot garden, mow, or do other outside chores. She indicated that her low back pain is a chronic 3-4 level on a scale of 1-10. She also stated that she has intermittent pain in her legs if lifting, bending, or twisting, and that her worst pain is a 10 on occasions, especially when weather is bad or a long day at the church. She stated that when her back pain is high, she takes Ibuprofen, hot and cold packs, and sits and rests.

Claimant testified that her cervical pain was improved with the surgery, but that she continues to have radicular pain in her arms. Her hernias have resulted in a weakness in her stomach and abdominal walls which prevents her from lifting very much weight.

Claimant testified concerning a day in her current life. She indicated that she does her back exercises in the morning, drinks some coffee and watches the news. On a bad day she will use a heat pack on the low back. On a good day she will do dishes, housework, sew, or read. She states that she cannot vacuum and that her daughters help with cleaning and laundry. Claimant stated that driving very far wears her out. She does not like to shop for clothes, and she goes to the grocery store one time a week.

Claimant stated that she can sit for about two hours at a time; she can stand for about 15 minutes, and she can walk about one block without pain.

Claimant testified on cross-examination that she had some supervisory classes when she worked in food service and that she supervised about ten employees. Claimant admitted that she supervised about eight to ten employees as manager of the jewelry department. She also

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admitted that she is a Mary Kay makeup consultant, but she does not do any marketing or parties and that she keeps her affiliation to get a 50% discount on cosmetics for herself and her daughters.

Claimant admitted that she spends about one hour each week teaching Sunday school at church, but she sits and stands at will while teaching the class. She also admitted as a department manager of Employer she stood most of the day and that there was a lot of bending over to get into display cases when showing jewelry.

Claimant admitted that she terminated her employment partly because of her age; she wanted to keep working, but she was down to so few hours that she decided to quit in January 2007. She also admitted that as a cashier, the hardest job task was bagging and picking up bags of merchandise.

Claimant admitted that she can sew for about 30 minutes at a time. After that, her pain is increased in her low back and feet. She has to get up and move around to relieve the pain in her feet. Claimant further admitted that after a hard day at work for the Employer, her neck would hurt, but the pain did not prevent her from doing her job at the Employer.

Claimant admitted that Dr. Robson gave her restrictions of not lifting over 10-15 pounds, notwithstanding the fact that Dr. Robson's medical records show restriction of 25 pounds. She also admitted that she does not think she can lift 25 pounds without pain in her low back.

Claimant admitted that she continued to have radicular pain after her surgery that grew worse over time, especially after Claimant returned to work with the Employer. Claimant admitted that she did not really get better after the surgery and that Dr. Robson told her the nerves in her back were too injured to be good and that would be permanent.

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Claimant admitted that she was department manager until 2004 and that she never returned to that position after December 2004 because she was reassigned to be a greeter.

Dr. David Robson testified on behalf of Claimant by deposition. Dr. Robson testified that he performed an independent medical evaluation of the Claimant for which he authored a written report dated January 3, 2003. He stated that he took a history from the Claimant, reviewed certain medical records, and performed a physical examination before rendering his opinions in the written report. He also testified that he issued a supplemental report dated January 7, 2004, following a review of certain medical records concerning the administering of facet injections to the Claimant.

Dr. Robson testified that after the injury of April 3, 2001, Claimant developed low back pain with radiating pain into the interlateral aspect of the left leg. Claimant did not give a history of these symptoms prior to the April 3, 2001, incident. He further stated that Claimant had degenerative changes at L4-5 and L4-5-S1 with a disc bulge at L4-5 on the left side. He testified that the radiographic findings and the physical exam correlated with these findings.

On cross-examination Dr. Robson admitted that he conducted a thorough and complete medical examination of the Claimant and further that his written reports of January 3, 2003, and January 7, 2004, included all significant findings including his recommendations for evaluation and treatment of the Claimant.

Dr. Robson admitted that Claimant was taking pain medication at the time of the evaluation and that the pain medication was for back pain. He also admitted that the degenerative changes in Claimant's low back were developed over time and were not caused by a traumatic event. He further admitted that Claimant had flexion of the back to 80 degrees, which was confirmed by having Claimant bend over and touch her toes, as well as the straight leg raise

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test. Dr. Robson admitted that the results of his tests were not based on the truthfulness of Claimant's history and that Claimant did not have control of her reflexes and motor function during the tests.

Dr. Robson's reports were admitted into evidence as Exhibits 10 and 11. Exhibit 10 sets out, in part, the treatment recommendations reached as a result of the independent medical evaluation stating that treatment in the form of a selective nerve block at the L4-5 level and re-evaluation to determine if conservative treatment is an option or consideration of surgery at the L4-5 level. Exhibit 11 sets out the report of January 7, 2004, wherein medical records concerning the administering of facet injections were reviewed. Dr. Robson repeated his recommendation that a selective nerve block injection be administered rather than a facet injection.

Dr. David Volarich testified on behalf of the Claimant by deposition. Dr. Volarich testified that he performed an independent medical evaluation of the Claimant. He stated that he took a history from the Claimant, reviewed certain medical records, and performed a physical examination of the Claimant, after which he authored a report dated August 23, 2006, expressing his findings and opinions of the evaluation. Dr. Volarich's report is admitted into evidence as Exhibit 17.

Dr. Volarich testified that he found that Claimant had a pre-existing minor lumbar syndrome with no radicular symptoms prior to the April 3, 2001, injury. He also stated that he gave Claimant restrictions to the low back which involved both the primary injury, as well as the pre-existing low back condition. Dr. Volarich testified that his restrictions were severe and placed Claimant into a sedentary work load category at best. He advised Claimant to avoid bending, twisting, lifting, pushing, pulling, carrying, and climbing; he further advised no weights

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over 15 pounds with proper lifting technique. Also, carry no weight over head or away from her body. He also told Claimant to avoid staying in a fixed position for more than 20-30 minutes, changing positions frequently. Dr. Volarich further testified that he did not express an opinion in his written report as to Claimant's employability, but if Claimant would have told him she could not work anymore, he would have agreed with her because of the severity of the problems Claimant had with her neck, back, and hernia. Dr. Volarich further testified that he would defer to the vocational assessment as to Claimant's ability to get back to work.

Dr. Volarich testified that Claimant was not capable of competing in the open labor market as a combination of the April 3, 2001, injury and her pre-existing conditions including the cervical condition and the hernias. He stated that the conditions and injuries affect different body parts and, therefore, affects different lifting capabilities. He also indicated that his lifting restriction of 10 to 15 pounds fits the combination of the injuries to the spine, recognizing that Dr. Robson gave a restriction of 25 pounds relative to the lumbar region only. Dr. Volarich testified: "...The next thing you look at is, you know, how do each of these injuries to the neck and low back affect her. We'll just look at those two for now. We have fusions at all these levels, we have lost motion. She's going to be moving differently. She's going to be restricted in fluid movements of looking side to side with the head and neck, looking up and down, bending over, twisting or leaning side to side. I, again, you just have the neck and low back, I'm sorry, neck as a problem, your lower spine will move more freely. With both of them, she's got more problems with stiffness and motion and less fluid in all movements. You add the abdominal wall to that and the hernia, the difficulties with lifting and strain on the abdominal wall, now she's got even more difficulties trying to lift something up. So, I think if you just think about the different body parts involved, the fusions involved, the surgeries involved, it's pretty

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easy to say, in my mind, that this is a lady that can't work because of a combination of all of these difficulties, not just one alone."

On cross-examination, Dr. Volarich admitted that Claimant was placed on a 25-pound restriction over head work, and no repetitive bending, stooping, or twisting at the legs when released from treatment for her low back in August 2005. Claimant was placed at maximum medical improvement in August 2005. He also admitted that Claimant was a cashier at the time of the evaluation and that she had to stand most of the day except during breaks when she could walk around. He further admitted that Claimant related that she could lift an amount about equal to a ten-pound jug of laundry detergent.

Dr. Volarich admitted that his restrictions for the Claimant were to avoid all bending, twisting, lifting, pulling, pushing, carrying, and climbing; to not handle weights greater than 10 to 15 pounds; to not handle weight over her head or away from her body; to avoid remaining in a fixed position for any more than 20 to 30 minutes. He indicated that the restrictions related to Claimant's entire spine from pre-existing conditions as well as from the April 3, 2001, injury.

Dr. Volarich admitted that Claimant worked full duty at the Employer for 13 years after her cervical injury. He further admitted that his report did not indicate that Claimant is permanently totally disabled nor did the report state that he would defer the issue of employability to a vocational expert.

Mr. Gary Weimholt testified on behalf of Claimant by deposition. Mr. Weimholt testified that he performed a vocational evaluation of the Claimant and authored a written report of his evaluation dated July 9, 2008. Mr. Weimholt testified that he took a history from the Claimant, reviewed certain medical records, and administered certain tests as part of his vocational evaluation.

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Mr. Weimholt testified that his record indicated that Claimant worked until January 2007, having been found to be at maximum medical improvement by Dr. Robson on September 20, 2005. However, after that date, about six months later, Claimant returned to Dr. Robson for follow-up at which time Dr. Robson noted that working as a cashier resulted in increased back pain, which caused Claimant to have problems adjusting to her new job duties so that eventually Claimant continued to cut back on her hours worked per week until she had to work only alternating days and eventually Claimant retired entirely.

Mr. Weimholt testified that Claimant had beginning level computer skills, which excludes the use of word processing and business software; therefore, Claimant would not be prepared to meet any standards of productivity using a computer. Mr. Weimholt further testified that Dr. Volarich's restrictions put Claimant at less than full range of light work and that only specialized work environments would accommodate less than light duty work or sedentary work.

Mr. Weimholt testified that Claimant's restrictions from bending, stooping, twisting, or doing overhead work, along with lifting restrictions on weight, would prevent her from seeking cashiering jobs in the open competitive labor market. Mr. Weimholt testified that he did not consider Claimant's job as a department manager at Employer to be comparable with a department manager in a retail sales business because a department manager would be someone who is very highly skilled in a retail establishment, can move from department to department without any difficulty, could be an assistant manager of a store, or manage a large number of staff and operations.

Mr. Weimholt's report states, in part, that Claimant would need a very specialized work environment that allows for frequent work place accommodation for sitting and standing and little, if any, other positional activities or pushing, pulling, and lifting. The report further states

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“After considering Mrs. Cook-Noyes’ education, work history, work restrictions, on-going symptoms and limitations of activities of daily living, it appears that she would have difficulty meeting the work place competencies for using her time wisely at work, maintaining good work habits, providing leadership abilities, making use of computer literacy or having good transferable job specific skills to less physical jobs.”

On cross-examination, Mr. Weimholt admitted to a review of Claimant’s work duties at the Employer as a department manager. He admitted that he was aware that Claimant did repetitive lifting, bending, squatting, looking underneath drawers, and stocking merchandise. He further admitted that, in his opinion, Claimant is totally and permanently disabled.

Mr. Weimholt admitted that Claimant’s age goes more to placability than to employability, and that employability would be a concept reflected on paper, such as a person’s education and their range of physical capabilities to match with a job. He further admitted that placability takes into consideration the labor market that exists for a particular job in relation to the number, the particular abilities, and past history of applicants for a position. He also admitted that placability is often the most important determining factor in whether a person becomes employable in a labor market.

Claimant offered, and there was admitted, exhibits which contain certain medical records referring to Claimant’s primary injury treatment, as well as her pre-existing conditions. The testimony of witnesses substantially supports the contents of the medical records admitted into evidence.

Mr. James England testified on behalf of the Second Injury Fund by deposition. Mr. England testified that he is a certified rehabilitation counselor and that he performed a review of records vocational rehabilitation evaluation of the Claimant. He stated that he

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reviewed certain medical records, doctors' reports, deposition of Jane Cook-Noyes, deposition of Dr. Volarich, and a report from another rehabilitation counselor, after which he authored a written report dated April 15, 2013, including his findings and opinions as to Claimant's ability to be employed in the open labor market.

Mr. England testified that Claimant's age put her beyond normal retirement age. He indicated that Claimant had a job history of food service at a nursing home; she used the internet for banking, email, playing games, and doing Google searches. He further testified that Claimant had "an incredible stable work history." Mr. England testified that he felt Claimant would have transferable knowledge from her past work history to a light level of exertion based on her sales manager experience. He also indicated that Claimant could use some of her transferable skills in a sedentary sit down job.

Mr. England testified that Claimant thought she could function in her home at the sedentary to light level of work; however, Claimant did state that on some days her back has so much pain that she would have to lie down because of the pain. He stated that his analysis of Claimant's ability to be employed in the open labor market consisted of reviewing the medical records for treatment to determine the ultimate restrictions Claimant was given. Also, taking into account the Claimant's age, education, work experience, and combining all of this data to form an opinion as to whether she would still be capable of some type of work activity.

Mr. England testified that he did not actually meet with the Claimant during the evaluation. He stated that in the vast majority of cases he evaluates at the request of the Second Injury Fund, he does not personally meet with or interview the Claimant prior to or after the evaluation and written report. He did indicate that he reviewed the Claimant's deposition as part of his record review.

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Mr. England testified that it was his opinion that Claimant could have continued in general retail sales work, cashier type work. He also stated that with Dr. Volarich's restrictions Claimant could still do inside sales, telemarketing, receptionist work, customer service work, or jobs that are closely related to the jobs Claimant has done in the past. He also stated that he thought Claimant, based on the work she had done in the past, could still do that type of work even at a less physically demanding level of activity.

Mr. England's report, admitted as Exhibit A, indicates that Claimant was working full time before the primary injury with no assigned restrictions other than the 25-pound lifting restriction and was not missing work. Further, that Claimant was able to return to work for several years after the primary injury until she chose to voluntarily retire rather than being terminated because of inability to do her job.

On cross-examination, Mr. England admitted that Claimant returned to work as a greeter rather than a department manager working more hours, and then Claimant cut back to cashiering, and then cut back her hours and days. He further admitted that in a retail setting, if a person misses two or three days a month with any kind of regularity, they are not going to be retained as an employee.

FINDINGS OF FACT AND RULINGS OF LAW

The liability of the Second Injury Fund for permanent total disability/enhanced permanent partial disability?

Before making a determination with regard to liability of the Second Injury Fund for permanent total disability, a determination of the disability attributable to the primary injury must be determined. Exhibit 23 sets out the settlement of the primary claim. The exhibit states that the permanent partial disability for the primary injury is 30%; however, the amount of the

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settlement for permanent disability is \$28,404.60 after adjustment for unpaid mileage.

Apparently Claimant's primary injury was settled for 35% disability to the body as a whole referable to the low back. I find that there is substantial and competent evidence that Claimant suffered a permanent partial disability of 35% of the body as a whole as a result of the primary injury. I further find that Claimant is not permanently totally disabled from the last injury alone.

Section 287.020.7 RSMo. (2000) defines total disability as the, "inability to return to any employment and not merely . . . (the) inability to return to the employment in which the employee was engaged at the time of the accident." The primary determination with respect to the issue of total disability is whether, in the ordinary course of business, any Employer would reasonably be expected to employ the employee in his or her present physical condition and reasonably expect him or her to perform the work for which he or she is hired. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo. App. 1992) (overruled on other grounds by *Hampton v. BigBoy Steel Erection*, 121 S.W.3d 220 (Mo. Banc 2003)). The test for permanent and total disability is whether, given the employee's condition, he or she would be able to compete in the open labor market; the test measures the employee's prospects for obtaining employment. *Reiner* at 367.

In *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849 (Mo. App. S.D. 1995), the Court set forth the general definition of total disability as above and then added:

An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The pivotal question is whether any Employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d at 367. See also *Thornton v. Haas Bakery*, 858 S.W.2d 831, 834 (Mo.App.E.D.1993); *Kowalski v. M-G Metals and Sales*, 631 S.W.2d at 922.

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The court further commented on Claimant's activity level:

“Mr. Gordon clearly is active to the extent of his physical limitations and pain tolerances; but he does not have to be bedridden, in a wheel chair or inert to be declared permanently and totally disabled. I find and conclude that given Claimant [sic] age, education and physical condition, no Employer could be expected to employ him. He is unemployable and is permanently and totally disabled. (Emphasis added). *Id.* at 854.

A person who is totally disabled does not have to be unable to return to any employment, but that person must be unable to perform the usual duties for the employment under consideration in the manner that such duties are customarily performed by the average person engaged in that employment. *Groce v. Pyle*, 315 S.W.2d 482 (Mo. App. 1958)

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that the Claimant suffered a permanent partial disability of 35% of the body as a whole as a result of the primary injury. I further find that Claimant had pre-existing disabilities consisting of 25% of the body as a whole referable to the cervical spine, 5% of the body as a whole referable to the lumbar spine, and 10% of the body as a whole referable to the abdominal region as a result of hernias.

I further find that Claimant has sustained her burden of proof with substantial and competent evidence that she is permanently totally disabled as a result of a combination of the primary injury and her pre-existing injuries and/or medical conditions.

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Mr. Weimholt testified that it was his professional opinion that Claimant was not employable in the open labor market. Mr. England testified that Claimant had a work history that he described as “incredible stable work history.”

Mr. England admitted that if a person missed as much as three to four days per month because of medical conditions, that person probably would not be able to sustain employment, although Mr. England opined that Claimant could do inside sales work and several other customer oriented type jobs, all or most of which would necessitate Claimant standing for periods of time. Claimant’s testimony indicates that when she returned to work after her surgery from the primary injury, she tried to work a full schedule, but eventually was not able to perform her job duties because of the pain, she cut back her days working per week, then modified her work schedule to two days per week, then modified the work schedule to avoid working two days in a row, due to the pain in her body.

Based on the evidence adduced at the hearing, I find Mr. Weimholt’s opinions with regard to the employability of the Claimant more persuasive than the opinions of Mr. England. I find that Claimant is not employable in the open labor market as those terms are set out in Chapter 287 and the case law.

Claimant reached maximum medical improvement September 20, 2005. The primary claim was settled for 140 weeks of permanent partial disability. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is hereby ordered to pay to the Claimant the sum of \$202.89, beginning September

Employee: Jane Cook

Injury No. 01-044035

21, 2005; provided however the Second Injury Fund is given a credit, as provided by law, for 140 weeks, the period of permanent partial disability benefits paid by the Employer.

The Second Injury Fund is hereby ordered to pay to Claimant the sum of \$202.89 per week beginning May 29, 2008, and continuing for Claimant's lifetime, according to law. Claimant is owed 323-5/7 weeks of benefits up to the date of trial in the sum of \$65,678.39.

I find this issue in favor of Claimant.

Claimant's attorney has requested approval of an attorney fee of 25% of the amount of any award. Claimant's attorney's fee request is hereby approved. Claimant's attorney is hereby awarded an attorney fee of 25% of the amount of this award. Claimant's attorney is hereby granted a lien on the proceeds of this award unless and until the attorney fee shall have been paid in full.

Made by: _____
David L. Zerrer
Administrative Law Judge
Division of Workers' Compensation