

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

Injury No.: 03-055457

Employee: Robin Crank  
Employer: Willow Brook Foods  
Insurer: Zurich North American Insurance Company  
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 section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 24, 2009. The award and decision of Administrative Law Judge Margaret Ellis Holden, issued November 24, 2009, 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 21<sup>st</sup> day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: Robin Crank Injury No. 03-055457  
Dependents: N/A  
Employer: Willow Brook Foods  
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund  
Insurer: Zurich North American Insurance Company  
Hearing Date: 8/26/09 Checked by: MEH

### 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: 6/16/03
5. State location where accident occurred or occupational disease was contracted: GREENE COUNTY, MO
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 LOST HER BALANCE AND FELL WHEN PUTTING ON BOOTIES.
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: BODY AS A WHOLE
14. Nature and extent of any permanent disability: 15%
14. Compensation paid to-date for temporary disability: NONE
16. Value necessary medical aid paid to date by employer/insurer? \$1,068.82

Employee: Robin Crank

Injury No. 03-055457

- 17. Value necessary medical aid not furnished by employer/insurer?
- 18. Employee's average weekly wages: \$340
- 19. Weekly compensation rate: \$226.66
- 20. Method wages computation: BY AGREEMENT

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Unpaid medical expenses: NONE

3 6/7 weeks of temporary total disability (or temporary partial disability)

60 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

- 22. Second Injury Fund liability: Yes No  Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: NONE

Permanent total disability benefits from Second Injury Fund:  
weekly differential (0) payable by SIF for 0 weeks, beginning N/A  
and, thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

- 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:

JIM CORBETT & JOHN NEWMAN

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Robin Crank Injury No. 03-055457  
Dependents: N/A  
Employer: Willow Brook Foods  
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund  
Insurer: Zurich North American Insurance Company  
Hearing Date: 8/26/09 Checked by: MEH

The parties appeared before the undersigned administrative law judge on August 26, 2009, for a final hearing. This claim was heard along with Injury No. 05-042195. The claimant appeared in person represented by Jim Corbett and John Newman. The employer and insurer appeared represented by David Bogden. The Second Injury Fund appeared represented by Cara Harris. Memorandums of law were filed by September 21, 2009.

The parties stipulated to the following facts: On or about June 16, 2003, and May 13, 2005, Willow Brook Foods was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Zurich North American Insurance Company. On the alleged injury dates of June 16, 2003, and May 13, 2005, Robin Crank was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. The parties agree that on or about May 13, 2005, the claimant sustained an accident which arose out of and in the course and scope of employment. The parties do not agree that an accident was sustained on June 16, 2003. The alleged accidents occurred in Greene County, Missouri. The claimant notified the employer of her injuries as required by Section 287.420, RSMo. The claimant's claims for compensation were filed within the time prescribed by Section 287.430, RSMo. At the time of the alleged accident on June

16, 2003, the claimant's average weekly wage was \$340, sufficient to allow a compensation rate of \$226.66 for temporary total and permanent partial disability compensation. At the time of the alleged accident on May 13, 2005, the claimant's average weekly wage was \$418.81, sufficient to allow a compensation rate of \$279.20 for temporary total and permanent partial disability compensation. In Injury No. 03-055457 no temporary total disability benefits were paid to the claimant. In Injury No. 05-042195 temporary disability benefits have been paid to the claimant in the amount of \$4,785.84, representing 18 4/7 weeks in disability benefits at the rate of \$257.70. In Injury No. 03-055457 the employer and insurer have paid medical benefits in the amount of \$1,068.82. In Injury No. 05-042195 the employer and insurer have paid medical benefits in the amount of \$33,483.05. The attorney fee being sought is 25%.

#### ISSUES:

1. Whether the claimant sustained an accident which arose out of and in the course and scope of employment.
2. Whether the accident caused the injuries and disabilities for which benefits are being claimed.
3. Whether the employer is obligated to pay past medical expenses.
4. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.
5. Any temporary total benefits owed to the claimant.
6. The nature and extent of permanent disabilities.
7. The liability of the Second Injury Fund for enhanced permanent partial disability.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The claimant is 50 years old. She has a high school degree and attended college, earning an Associates of Arts in Business. She worked in clerical positions from 1986 – 1992. She has also

worked as a jewelry designer, with handicapped children, in factories, Wal-Mart, and McDonalds. Prior to 2003 she had no health problems that prevented her from working.

The employer operates a poultry processing plant. Claimant went to work for the employer in 2003. She worked in various areas of the plant including production line, boxing and wrapping, scanning and bar-coding.

On June 16, 2003, the claimant was putting blue booties over her shoes. She was required to put these on to walk through the raw side area of the plant to get to the cook side of the plant. The bench that was ordinarily in the area had been removed so the claimant was required to stand on one foot to put these on. She had put the first one on, and when she rose up to put the second one on she lost her balance and began to fall. In an attempt to keep her balance, she stumbled approximately 8-10 feet backwards before falling through two steel doors. When she fell she landed on her buttocks and hit the doors. The doors swung back and struck her head. She testified that she would not have fallen if she had not had to put on the booties and if she had the bench to sit on while putting them on.

As a result she suffered a laceration to the back of her head. She testified that she was definitely dizzy after the fall. Her head was bleeding. Someone called her daughter, and the employer sent them both by taxi to Concentra Medical Centers.

The records from Concentra Medical Centers state the claimant gave a history of "bent over to put on bootie and felt a little dizzy. Then bent over again and when standing, again got light-headed and fell backward hitting left side of head." This had not happened before. She was diagnosed with syncope and a head laceration with sutures.

She had migraines prior to a hysterectomy in 2000, which resolved after this surgery. She had no other headaches until hitting her head June 16, 2003. Claimant testified that since this time she has had pressure headaches at the temples that spread to the back of her neck. Claimant said that she can't

function or work with these headaches unless she takes medications. She would take medication for these headaches after the injury when she worked.

Claimant also testified that the day after this injury she had back pain. The employer denied the back injury. Claimant testified that this pain was across the low back. She did not have radicular pain at this time. She went to Dusty Campbell, the employer's nurse, and Kathy Best. The employer denied the back injury and did not provide her with treatment for it. In 2004 she started to develop pain in her leg. This was approximately 2 months before she saw Dr. Kyle Smith on July 15, 2004.

Dr. Smith took a history of low back problems with pain in her left leg for one month. He ordered a lumbar spine series which showed decreased disc space at L5-S1. Dr. Smith ordered medications and noted he wanted to take her off work under the Family Medical Leave Act, and that paper work was filled out accordingly. He returned her to work on August 11, 2004, without restriction. He referred her to Dr. Lee, a neurosurgeon.

An MRI was performed on July 26, 2004. This showed a mild disc bulge at L5-S1 with mass effect on the S1 nerve root as well as degenerative changes at L3-4, L4-5 and L5-S1.

Dr. Lee saw her on August 23, 2004. She gave a history of left leg pain and low back pain for a year. She had positive straight leg raising. Dr. Lee prescribed physical therapy and epidural steroid injections. At some point she took four weeks off under the Family Medical Leave Act. Claimant had physical therapy and three injections. Claimant testified that she had more relief after the third shot. She was working during this time in the stripping room.

She was released from treatment in September 2004. She said at hearing that after these shots she was 90% symptom free. She had no limitation on her ability to work. She had headaches but could take medication and work.

On May 13, 2005, claimant was working in the box room. She bent to pick up some unmade boxes. These were approximately 3' by 4'. When she bent over to pick them up and twisted, she felt immediate pain, dropped the boxes and fell to the floor. She described it at hearing as if something collapsed in her back.

Claimant reported this to the company nurse and was sent to Concentra Medical Centers. She was seen at Concentra that day by Dr. Proctor. She gave a history of sudden onset of pain in the posterior left leg when she turned. She reported pain in her back as well as her leg. This pain was reported as similar to an injury a year earlier. She was diagnosed with a lumbar radiculopathy and a strain, prescribed physical therapy and returned to regular duty. On June 8, 2005, she returned to Dr. Proctor after attending physical therapy. She reported no improvement in her symptoms, and that the therapy had actually made her pain worse. Dr. Proctor ordered an MRI.

On June 21, 2005, claimant was examined by Dr. Shane Bennoch for an independent medical examination at her request. She gave Dr. Bennoch a history of falling in June 2003 and injuring her head and back. She described to him the dizziness occurring after the fall, not the reason for the fall. She also gave the history of physical therapy and injections. She said the pain went away for a while but would come back. She gave no history of an injury while lifting boxes a month earlier, on May 13, 2005.

At the exam, the claimant described her symptoms to Dr. Bennoch as pain in her low back going down her left leg and into the ankle. She also described headaches.

Dr. Bennoch diagnosed her with a trauma to the head and back, laceration to the scalp, posttraumatic headaches, and L5-S1 disc with nerve impingement, most likely S1. He concluded that the accident, when she fell on June 16, 2003, was the substantial cause of her injuries. He concluded that she was not at maximum medical improvement due to continued back pain. He rated her with a

permanent partial disability of 15% of the body as a whole for the head injury but did not rate the lumbar spine as he felt further work-up was needed, namely a repeat MRI and neurosurgical evaluation.

The MRI that Dr. Proctor recommended was performed in September 2005. Dr. Proctor noted that it showed a left paracentral disc protrusion at L5-S1 which appeared similar to the MRI of 7/26/04. He also noted a small left lateral protrusion at L3-4 which appeared new.

Dr. Mark Crabtree, a neurosurgeon, saw her on November 8, 2005, and diagnosed her with a herniated disc with radiculopathy. He performed a hemilaminotomy with microdiscectomy at L5-S1 on October 13, 2006. Claimant testified that between November 2005 and October 2006 she continued to have severe back pain, leg weakness, and problems walking.

After the surgery she was treated by Dr. Jeffrey Woodward. On November 28, 2006, Dr. Woodward took a history of work-related injuries in both June 2003 and May 2005. He states the first injury occurring when claimant fell through doors, and the second injury when lifting boxes. Another MRI was performed on April 20, 2007, which showed post-operative changes at L5-S1 with epidural fibrosis in the ventral epidural space and surrounding left S1 nerve root and lateral recesses, no recurrent or residual disc herniation and no facet arthropathy at L3-4 and L4-5 with minimal vertebral canal stenosis. Dr. Woodward released her to light duty on January 31, 2007. Claimant said that after the surgery she was better for a while. She said while her leg pain has not gone away it was not as bad. She returned to work but said she could only do the work with assistance.

On May 7, 2007, Dr. Woodward found the claimant at maximum medical improvement. In a report dated May 25, 2007, Dr. Woodward states "I provided medical treatments for the patient's work-related injury with the following final diagnosis: s/p left L5S1 discectomy with residual lumbar and left radicular pain noted; no objective neurological deficits noted on physical exam." He recommended no further medical treatment. She was released to full time modified work with restrictions of continuous

lift/push/pull 0-15 pounds. He stated no future medical treatment was necessary. He then says, "I recommend a permanent partial impairment/disability rating of 12% at the 400-week level for the work-related condition." He does not specify which date of injury he is referring to.

On August 23, 2007, Dr. Bennoch issued a report stating he had reviewed the records of Dr. Crabtree and Dr. Woodward. He noted the MRI on April 20, 2007, showed epidural fibrosis surrounding the S1 nerve root. He diagnoses failed back syndrome with S1 radiculopathy secondary to epidural fibrosis. He rated her with 30% permanent partial disability to the body as a whole for the injury to her back and stated it was his opinion "that the accident that occurred on June 16, 2003, while working at Willow Brook Foods was the prevailing cause of Ms. Crank's back injury and subsequent surgery." He did not note any injury in May 2005.

Dr. Bennoch issued an addendum report on June 25, 2008, after the claimant returned to him and reported pain in her back all of the time. He diagnosed failed back syndrome with S1 radiculopathy secondary to epidural fibrosis and rule out facet discitis. His opinion was the claimant needed to be seen by a pain management specialist. He said the claimant had little medication to manage her pain, and felt it would need to be addressed much more aggressively. Again, he did not note any 2005 injury.

The claimant continued to work for employer in the date gun and stripping departments. She worked for the employer until the plant was closed in September 2008. She has looked for work but has not worked since.

Phil Eldred, a certified vocational rehabilitation counselor, evaluated the claimant on April 29, 2008. He met with the claimant and reviewed medical records. Mr. Eldred testified at the hearing that it is his opinion the claimant is permanently totally disabled as a result of her injury on May 13, 2005, combined with her preexisting injury on June 16, 2003. He found the claimant had a disability from the June 2003 injury that was a hindrance or obstacle to her employment. He found that, likewise, her May

2005 injury caused a disability that was a hindrance or obstacle to employment. He felt that although she had the ability and willingness to be retrained, she has a lot of functional limitations that would prevent her from doing sedentary employment.

Claimant returned to Dr. Crabtree on April 3, 2009. The purpose of the visit was to review an MRI of the lumbar spine. The claimant reported to him that her symptoms remained unchanged with low back and left lower extremity pain with numbness, burning and tingling from posterior left thigh down to left foot. She rated her pain at a 7/10 and stated she is not taking any medications.

Dr. Crabtree diagnosed lumbago and a herniated lumbar disc with radiculopathy. He also noted failed back syndrome. He ordered a new medication. He did not feel further surgery was needed, but did state primary care physician was to continue medical treatment for chronic pain.

Debbie Tolliver, a physical therapist, performed a Functional Capacity Evaluation of the claimant on May 19, 2009. She testified at the hearing that the claimant presented with symptoms of low back pain, pain in the left leg, right leg pain at the knee, numbness and tingling in the left leg, trouble sleeping, and headaches daily. Ms. Tolliver performed testing including hand strength testing, posture and ambulation, isometric muscle testing, strength testing, range of motion testing, and flexibility/positional testing. She found the claimant cooperative. She saw consistent pain behavior. She also noted guarded gait and movement. Ms. Tolliver questioned the claimant's ability to do an eight hour job. Her conclusion was that the claimant could work in a sedentary level; she needs to be able to change positions as needed, not stand for more than 10-15 minutes, and not do repetitive activities. She also thought a TENS unit might be something to try but doubted it would affect claimant's present limitations. She also thought some range of motion gentle stretching would be beneficial but that it probably would not change her work level abilities.

Dr. Bennoch testified at the hearing. He testified that he rated her 30% permanent partial impairment to the body as a whole referable to the back portion of claimant's June 16, 2003, injury. He also stated that his restrictions became more significant from 2005 to 2008. He said in 2005 she could occasionally lift 20 pounds, but in 2008 reduced it to less than 10 pounds; and in 2005 she could frequently lift less than 10 pounds, but in 2008 no frequent lifting.

Dr. Bennoch also testified that he thought the claimant was symptom-free following the epidurals in 2004. He noted the problem is whether her relief was temporary from the epidurals, saying, "So now the question is: Is she healed from the old injury and doing fine, and the second injury a new injury? That is the question." When asked if the 30% impairment to the body relates to the 2003 injury Dr. Bennoch testified: "That was in the report, yes. Q: And that's your testimony today? A: Well, I mean, if you ask me specifically, and she is symptom free in May of '05 when she has a second injury, then obviously some of that impairment would be a new injury. Therefore, it would have to be for the May '05 injury." When asked about the change in restrictions from 2005 to 2008 he said, "I think she has developed epidural fibrosis and has persistent radiculopathy and finds now that any activity really flares everything up. That requires more strict restrictions."

On further cross-examination by the Second Injury Fund he stated that when he authored his reports he related the entire 30% permanent partial impairment to the 2003 injury because that was the only injury he knew about. He said that while he thinks part of the 30% impairment relates to the 2003 injury, part of it may relate to the 2005 injury. He has not authored any additional reports allocating how much of the 30% disability is attributable to either injury.

Dr. James Shaeffer, an orthopedic surgeon, testified at the hearing. He examined the claimant and reviewed her medical records. He issued a report on December 2, 2008. Dr. Shaeffer testified that he is familiar with epidural fibrosis, which he described as "an unfortunate process where there is a lot

of scar tissue that forms following – usually following surgery on the spine. And typically it will encase or irritate the dura which is the lining of the spinal canal and/or nerve roots in the spinal canal.” He said this is probably the most common cause of failed back syndrome. Dr. Shaeffer found claimant had limitation of back movement, positive straight leg raising, and an absent ankle jerk with some weakness of some of the muscles of her left leg that are innervated by the first sacral nerve root on the left. He testified that “the anatomical cause of her injury and damage was originally her disc herniation at the L5-S1 interval on the left side was putting pressure on the first sacral or S1 nerve root, and then the subsequent surgery that she had which resulted in a lot of scar tissue or epidural fibrosis around that nerve root. So I thought at this point, based on her status and her history, including the procedures that she had done, that this was probably a permanent or irreversible nerve injury.”

Dr. Shaeffer testified that there is no good definitive treatment for epidural fibrosis, and that further surgery can frequently result in more scar formation. Sometimes epidural blocks or injections can help but they are not permanent. He did not feel she could work at the time he saw her.

Dr. Shaeffer testified that he believes claimant will need some permanent care including another MRI and nerve conduction study. He said possible treatments are implantable nerve stimulators or pain relievers that can be implanted in the region of the spine. He said the most extreme procedure is a de-innervation where the nerve is cut to try and relieve the pain, but it usually doesn't work if the pain has gone on over a year.

On cross-examination he testified that the purpose of the additional studies he suggested, another MRI and EMG, would be to try to determine if there is anything further to be done to help alleviate her pain and to make sure she did not have a small disc fragment or something of that nature. He did note that the MRI performed in March 2009 after he saw her did not show any recurrent disc herniation.

Claimant testified that at present she cannot carry over 10 pounds, has trouble sitting over 10 minutes, and can stand 1 hour. On a typical day she gets up, eats breakfast and washes dishes. She lies down by 1:00. She uses her lap top. She can pick something up but has problems straightening back up. She would like to return to work.

Subsequent to the close of the hearing and receipt of memorandums, I gave an oral opinion in a conference call on November 13, 2009. Attorneys for all parties were present on this call. Later I was notified that they were not able to settle the case and requested I issue an award. On November 18 and November 19, 2009, prior to this award being issued, the claimant sent me a total of seven emails. I did not open any attachments nor did I read these emails. Upon receipt I immediately forwarded these to attorneys Jim Corbett, John Newman, David Bogden, and Cara Harris. This award is being entered in accordance with the oral opinion that was issued previously, and the emails have in no way modified or influenced my decision and award in these claims.

After carefully considering all of the evidence, I make the following conclusions:

1. Whether the claimant sustained an accident which arose out of and in the course and scope of employment.

At the time the claimant fell, she was in the process of putting booties over her shoes. She had put one on and was preparing to put on the second. The employer required she wear these booties when walking through one area of the plant to get to another area. This was necessary for her to do as part of her employment.

I find the claimant fell when she lost her balance while in the process of putting on the booties, which caused her to lose her balance, stumble, and unable to regain her balance and fall backwards, on her buttocks and hitting her head. Although she reports being dizzy after hitting her head in the fall, I

do not find that dizziness caused her to fall; therefore, I find that the accident when she fell while putting booties over her shoes arose out of the course and in scope of her employment.

2. Whether the accident caused the injuries and disabilities for which benefits are being claimed.

Based on the records of Dr. Crabtree, Dr. Woodward, and Dr. Bennoch, and the claimant's testimony, I find that the accident which occurred when the claimant was putting on booties caused the injuries and disabilities to her head and back for which benefits are now being claimed.

3. Whether the employer is obligated to pay past medical expenses.

Based on the claimant's testimony and Dr. Bennoch's opinions, I find the medical treatment the claimant received from Dr. Smith and Dr. Lee, including the physical therapy and injections, were directly related to the work-injury on June 16, 2003. No evidence was presented as to what these specific bills were, therefore, I have no basis to award these bills paid.

4. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.

Dr. Woodward found that claimant was at maximum medical improvement on May 7, 2007, and specifically stated that no further medical treatment was necessary. While Dr. Shaeffer, Dr. Crabtree and Dr. Bennoch recommend further medical treatment, they do not state it is related to this injury. I do not find that any further medical treatment is necessary as the result of the injuries sustained in the June 16, 2003, accident.

5. Any temporary total benefits owed to the claimant.

Claimant testified that she took 4 weeks off under the Family Medical Leave Act during her treatment for this injury. On July 15, 2004, Dr. Smith took her off work under the Family Medical Leave Act. He returned her to work on August 11, 2004, without restriction. Under his direction she was off 3 6/7 weeks. The records do not show any other physicians taking her off work for any other

time period; therefore, I find the claimant was temporarily and totally disabled for 3 6/7 weeks between July 15, 2004, and August 11, 2004. The employer and insurer shall pay her temporary total disability during this period.

6. The nature and extent of permanent disabilities.

Only two physicians have assessed any permanent disability. Dr. Woodward rated claimant with 12% permanent partial disability/impairment to the body as a whole at the 400-week level for “the work-related condition.” Dr. Bennoch also gave an opinion of 15% permanent disability to the body as whole due to the injury to the claimant’s head. He later gave an opinion that claimant had sustained a 30% permanent partial disability to the body as a whole for the back injury she sustained on June 16, 2003. At the hearing he testified that a portion of this 30% disability for the back condition would be related to the May 13, 2005, injury but he did not specify how much.

The claimant incurred an injury to her head and an injury to her back. Based on Dr. Bennoch’s opinion, I find the claimant sustained a permanent partial disability of 15% to the body as a whole at the 400-week level as a result of the injury to her head.

Regarding permanent disability for the back injury, claimant has alleged two specific accidents on different dates resulting in two separate and distinct injuries to her back. The claimant’s testimony and the medical records support the claims that she had an accident on June 16, 2003, when she fell hitting her head and injuring her back as well as a separate accident on May 13, 2005, when she injured her back lifting boxes.

The medical evidence and her testimony establish that she reached maximum medical improvement in September 2004 when she was released from treatment. She testified that her back was 90% improved at this time. Furthermore, the claimant’s testimony, the medical records, and the MRI

performed in September 2005 all confirm additional injury to her back. I find that both of these injuries caused her permanent disability to her back.

The employee has the burden of proving the extent of all of her injuries. “Expert opinion evidence is necessary in order to prove the extent of a preexisting disability, so that such percentage can be evaluated against the disability percentage existing after the compensable injury, in order to determine what percentage of permanent partial disability is attributable to the job-related injury which is the basis for the worker's compensation claim. It was Plaster's duty to offer such testimony if she hoped to recover anything for any additional disability incurred by reason of the job related injury that she suffered on September 10, 1983. Her failure to do so bars her from recovering permanent partial disability benefits.” *Plaster v. Dayco Corp.*, 760 S.W.2d 911, 913 (Mo.App. 1988); *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 704-705 (Mo.App. 1973).

I find that the claimant has failed to prove the extent of her injury to the back resulting from the June 16, 2003, injury. Dr. Woodward was aware of both the 2003 and 2005 injury when he assessed 12% permanent partial disability/impairment for the “work-related condition.” Although his records reflect he was aware of both injuries, Dr. Woodward fails to specify which injury he is referring to, or whether he is referring to a combination of both. Dr. Bennoch originally assessed 30% permanent partial impairment for the 2003 injury, but after becoming aware of the 2005 injury he testified that some of that impairment would be attributable to the new injury in 2005.

Unfortunately, no expert apportioned or allocated how much of the impairment or disability they assessed was attributable to each injury. This is a matter that requires expert testimony to establish. Therefore, I am unable to determine the amount of disability to the claimant’s back attributable to the injury on June 16, 2003, and as a result am precluded from awarding any disability for this injury.

7. The liability of the Second Injury Fund for enhanced permanent partial disability.

I find no evidence of a prior disability that combines with the work injury of June 16, 2003 to create any liability on the part of the Second Injury Fund. The Second Injury Fund is not liable for any benefits in this claim.

Attorneys for the claimant, Jim Corbett and John Newman, are awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Date: November 24, 2009

Made by: /s/ Margaret Ellis Holden  
Margaret Ellis Holden  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ Naomi Pearson  
Naomi Pearson  
*Division of Workers' Compensation*

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

Injury No.: 05-042195

Employee: Robin Crank  
Employer: Willow Brook Foods  
Insurer: Zurich North American Insurance Company  
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 section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 24, 2009. The award and decision of Administrative Law Judge Margaret Ellis Holden, issued November 24, 2009, is attached and incorporated by this reference.

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Given at Jefferson City, State of Missouri, this 21<sup>st</sup> day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: Robin Crank Injury No. 05-042195  
Dependents: N/A  
Employer: Willow Brook Foods  
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund  
Insurer: Zurich North American Insurance Company  
Hearing Date: 8/26/09 Checked by: MEH

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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: 5/13/05
5. State location where accident occurred or occupational disease was contracted: GREENE COUNTY, MO
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 INJURED HER BACK WHILE LIFTING BOXES.
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: BODY AS A WHOLE
14. Nature and extent of any permanent disability: NONE
14. Compensation paid to-date for temporary disability: \$4,785.84
16. Value necessary medical aid paid to date by employer/insurer? \$33,483.05

Employee: Robin Crank

Injury No. 05-042195

- 17. Value necessary medical aid not furnished by employer/insurer? NONE
- 18. Employee's average weekly wages: \$418.81
- 19. Weekly compensation rate: \$279.20
- 20. Method wages computation: BY AGREEMENT

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Unpaid medical expenses: NONE

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

UNDERPAYMENT OF TEMPORARY TOTAL DISABILITY \$399.29

- 22. Second Injury Fund liability: Yes No  Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:  
weekly differential (0) payable by SIF for 0 weeks, beginning N/A  
and, thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

- 23. Future requirements awarded: FUTURE MEDICAL TREATMENT

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:

JIM CORBETT & JOHN NEWMAN

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Robin Crank Injury No. 05-042195  
Dependents: N/A  
Employer: Willow Brook Foods  
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund  
Insurer: Zurich North American Insurance Company  
Hearing Date: 8/26/09 Checked by: MEH

The parties appeared before the undersigned administrative law judge on August 26, 2009, for a final hearing. This claim was heard along with Injury No. 03-055457. The claimant appeared in person represented by Jim Corbett and John Newman. The employer and insurer appeared represented by David Bogden. The Second Injury Fund appeared represented by Cara Harris. Memorandums of law were filed by September 21, 2009.

The parties stipulated to the following facts: On or about June 16, 2003, and May 13, 2005, Willow Brook Foods was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Zurich North American Insurance Company. On the alleged injury dates of June 16, 2003, and May 13, 2005, Robin Crank was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. The parties agree that on or about May 13, 2005, the claimant sustained an accident which arose out of and in the course and scope of employment. The parties do not agree that an accident was sustained on June 16, 2003. The alleged accidents occurred in Greene County, Missouri. The claimant notified the employer of her injuries as required by Section 287.420, RSMo. The claimant's claims for compensation were filed within the time prescribed by Section 287.430, RSMo. At the time of the alleged accident on June

16, 2003, the claimant's average weekly wage was \$340, sufficient to allow a compensation rate of \$226.66 for temporary total and permanent partial disability compensation. At the time of the alleged accident on May 13, 2005, the claimant's average weekly wage was \$418.81, sufficient to allow a compensation rate of \$279.20 for temporary total and permanent partial disability compensation. In Injury No. 03-055457 no temporary total disability benefits were paid to the claimant. In Injury No. 05-042195 temporary disability benefits have been paid to the claimant in the amount of \$4,785.84, representing 18 4/7 weeks in disability benefits at the rate of \$257.70. In Injury No. 03-055457 the employer and insurer have paid medical benefits in the amount of \$1,068.82. In Injury No. 05-042195 the employer and insurer have paid medical benefits in the amount of \$33,483.05. The attorney fee being sought is 25%.

#### ISSUES:

1. Whether the employer and insurer are obligated for an underpayment of temporary total benefits to the claimant.
2. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.
3. The nature and extent of permanent disabilities.
4. The liability of the Second Injury Fund for permanent total disability.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The claimant is 50 years old. She has a high school degree and attended college, earning an Associates of Arts in Business. She worked in clerical positions from 1986 – 1992. She has also worked as a jewelry designer, with handicapped children, in factories, Wal-Mart, and McDonalds. Prior to 2003 she had no health problems that prevented her from working.

The employer operates a poultry processing plant. Claimant went to work for the employer in 2003. She worked in various areas of the plant including production line, boxing and wrapping, scanning and bar-coding.

On June 16, 2003, the claimant was putting blue booties over her shoes. She was required to put these on to walk through the raw side area of the plant to get to the cook side of the plant. The bench that was ordinarily in the area had been removed so the claimant was required to stand on one foot to put these on. She had put the first one on, and when she rose up to put the second one on she lost her balance and began to fall. In an attempt to keep her balance, she stumbled approximately 8-10 feet backwards before falling through two steel doors. When she fell she landed on her buttocks and hit the doors. The doors swung back and struck her head. She testified that she would not have fallen if she had not had to put on the booties and if she had the bench to sit on while putting them on.

As a result she suffered a laceration to the back of her head. She testified that she was definitely dizzy after the fall. Her head was bleeding. Someone called her daughter, and the employer sent them both by taxi to Concentra Medical Centers.

The records from Concentra Medical Centers state the claimant gave a history of "bent over to put on bootie and felt a little dizzy. Then bent over again and when standing, again got light-headed and fell backward hitting left side of head." This had not happened before. She was diagnosed with syncope and a head laceration with sutures.

She had migraines prior to a hysterectomy in 2000, which resolved after this surgery. She had no other headaches until hitting her head June 16, 2003. Claimant testified that since this time she has had pressure headaches at the temples that spread to the back of her neck. Claimant said that she can't function or work with these headaches unless she takes medications. She would take medication for these headaches after the injury when she worked.

Claimant also testified that the day after this injury she had back pain. The employer denied the back injury. Claimant testified that this pain was across the low back. She did not have radicular pain at this time. She went to Dusty Campbell, the employer's nurse, and Kathy Best. The employer denied the back injury and did not provide her with treatment for it. In 2004 she started to develop pain in her leg. This was approximately 2 months before she saw Dr. Kyle Smith on July 15, 2004.

Dr. Smith took a history of low back problems with pain in her left leg for one month. He ordered a lumbar spine series which showed decreased disc space at L5-S1. Dr. Smith ordered medications and noted he wanted to take her off work under the Family Medical Leave Act, and that paper work was filled out accordingly. He returned her to work on August 11, 2004, without restriction. He referred her to Dr. Lee, a neurosurgeon.

An MRI was performed on July 26, 2004. This showed a mild disc bulge at L5-S1 with mass effect on the S1 nerve root as well as degenerative changes at L3-4, L4-5 and L5-S1.

Dr. Lee saw her on August 23, 2004. She gave a history of left leg pain and low back pain for a year. She had positive straight leg raising. Dr. Lee prescribed physical therapy and epidural steroid injections. At some point she took four weeks off under the Family Medical Leave Act. Claimant had physical therapy and three injections. Claimant testified that she had more relief after the third shot. She was working during this time in the stripping room.

She was released from treatment in September 2004. She said at hearing that after these shots she was 90% symptom free. She had no limitation on her ability to work. She had headaches but could take medication and work.

On May 13, 2005, claimant was working in the box room. She bent to pick up some unmade boxes. These were approximately 3' by 4'. When she bent over to pick them up and twisted, she felt

immediate pain, dropped the boxes and fell to the floor. She described it at hearing as if something collapsed in her back.

Claimant reported this to the company nurse and was sent to Concentra Medical Centers. She was seen at Concentra that day by Dr. Proctor. She gave a history of sudden onset of pain in the posterior left leg when she turned. She reported pain in her back as well as her leg. This pain was reported as similar to an injury a year earlier. She was diagnosed with a lumbar radiculopathy and a strain, prescribed physical therapy and returned to regular duty. On June 8, 2005, she returned to Dr. Proctor after attending physical therapy. She reported no improvement in her symptoms, and that the therapy had actually made her pain worse. Dr. Proctor ordered an MRI.

On June 21, 2005, claimant was examined by Dr. Shane Bennoch for an independent medical examination at her request. She gave Dr. Bennoch a history of falling in June 2003 and injuring her head and back. She described to him the dizziness occurring after the fall, not the reason for the fall. She also gave the history of physical therapy and injections. She said the pain went away for a while but would come back. She gave no history of an injury while lifting boxes a month earlier, on May 13, 2005.

At the exam, the claimant described her symptoms to Dr. Bennoch as pain in her low back going down her left leg and into the ankle. She also described headaches.

Dr. Bennoch diagnosed her with a trauma to the head and back, laceration to the scalp, posttraumatic headaches, and L5-S1 disc with nerve impingement, most likely S1. He concluded that the accident, when she fell on June 16, 2003, was the substantial cause of her injuries. He concluded that she was not at maximum medical improvement due to continued back pain. He rated her with a permanent partial disability of 15% of the body as a whole for the head injury but did not rate the lumbar spine as he felt further work-up was needed, namely a repeat MRI and neurosurgical evaluation.

The MRI that Dr. Proctor recommended was performed in September 2005. Dr. Proctor noted that it showed a left paracentral disc protrusion at L5-S1 which appeared similar to the MRI of 7/26/04. He also noted a small left lateral protrusion at L3-4 which appeared new.

Dr. Mark Crabtree, a neurosurgeon, saw her on November 8, 2005, and diagnosed her with a herniated disc with radiculopathy. He performed a hemilaminotomy with microdiscectomy at L5-S1 on October 13, 2006. Claimant testified that between November 2005 and October 2006 she continued to have severe back pain, leg weakness, and problems walking.

After the surgery she was treated by Dr. Jeffrey Woodward. On November 28, 2006, Dr. Woodward took a history of work-related injuries in both June 2003 and May 2005. He states the first injury occurring when claimant fell through doors, and the second injury when lifting boxes. Another MRI was performed on April 20, 2007, which showed post-operative changes at L5-S1 with epidural fibrosis in the ventral epidural space and surrounding left S1 nerve root and lateral recesses, no recurrent or residual disc herniation and no facet arthropathy at L3-4 and L4-5 with minimal vertebral canal stenosis. Dr. Woodward released her to light duty on January 31, 2007. Claimant said that after the surgery she was better for a while. She said while her leg pain has not gone away it was not as bad. She returned to work but said she could only do the work with assistance.

On May 7, 2007, Dr. Woodward found the claimant at maximum medical improvement. In a report dated May 25, 2007, Dr. Woodward states "I provided medical treatments for the patient's work-related injury with the following final diagnosis: s/p left L5S1 discectomy with residual lumbar and left radicular pain noted; no objective neurological deficits noted on physical exam." He recommended no further medical treatment. She was released to full time modified work with restrictions of continuous lift/push/pull 0-15 pounds. He stated no future medical treatment was necessary. He then says, "I

recommend a permanent partial impairment/disability rating of 12% at the 400-week level for the work-related condition.” He does not specify which date of injury he is referring to.

On August 23, 2007, Dr. Bennoch issued a report stating he had reviewed the records of Dr. Crabtree and Dr. Woodward. He noted the MRI on April 20, 2007, showed epidural fibrosis surrounding the S1 nerve root. He diagnoses failed back syndrome with S1 radiculopathy secondary to epidural fibrosis. He rated her with 30% permanent partial disability to the body as a whole for the injury to her back and stated it was his opinion “that the accident that occurred on June 16, 2003, while working at Willow Brook Foods was the prevailing cause of Ms. Crank’s back injury and subsequent surgery.” He did not note any injury in May 2005.

Dr. Bennoch issued an addendum report on June 25, 2008, after the claimant returned to him and reported pain in her back all of the time. He diagnosed failed back syndrome with S1 radiculopathy secondary to epidural fibrosis and rule out facet discitis. His opinion was the claimant needed to be seen by a pain management specialist. He said the claimant had little medication to manage her pain, and felt it would need to be addressed much more aggressively. Again, he did not note any 2005 injury.

The claimant continued to work for employer in the date gun and stripping departments. She worked for the employer until the plant was closed in September 2008. She has looked for work but has not worked since.

Phil Eldred, a certified vocational rehabilitation counselor, evaluated the claimant on April 29, 2008. He met with the claimant and reviewed medical records. Mr. Eldred testified at the hearing that it is his opinion the claimant is permanently totally disabled as a result of her injury on May 13, 2005, combined with her preexisting injury on June 16, 2003. He found the claimant had a disability from the June 2003 injury that was a hindrance or obstacle to her employment. He found that, likewise, her May 2005 injury caused a disability that was a hindrance or obstacle to employment. He felt that although

she had the ability and willingness to be retrained, she has a lot of functional limitations that would prevent her from doing sedentary employment.

Claimant returned to Dr. Crabtree on April 3, 2009. The purpose of the visit was to review an MRI of the lumbar spine. The claimant reported to him that her symptoms remained unchanged with low back and left lower extremity pain with numbness, burning and tingling from posterior left thigh down to left foot. She rated her pain at a 7/10 and stated she is not taking any medications.

Dr. Crabtree diagnosed lumbago and a herniated lumbar disc with radiculopathy. He also noted failed back syndrome. He ordered a new medication. He did not feel further surgery was needed, but did state primary care physician was to continue medical treatment for chronic pain.

Debbie Tolliver, a physical therapist, performed a Functional Capacity Evaluation of the claimant on May 19, 2009. She testified at the hearing that the claimant presented with symptoms of low back pain, pain in the left leg, right leg pain at the knee, numbness and tingling in the left leg, trouble sleeping, and headaches daily. Ms. Tolliver performed testing including hand strength testing, posture and ambulation, isometric muscle testing, strength testing, range of motion testing, and flexibility/positional testing. She found the claimant cooperative. She saw consistent pain behavior. She also noted guarded gait and movement. Ms. Tolliver questioned the claimant's ability to do an eight hour job. Her conclusion was that the claimant could work in a sedentary level; she needs to be able to change positions as needed, not stand for more than 10-15 minutes, and not do repetitive activities. She also thought a TENS unit might be something to try but doubted it would affect claimant's present limitations. She also thought some range of motion gentle stretching would be beneficial but that it probably would not change her work level abilities.

Dr. Bennoch testified at the hearing. He testified that he rated her 30% permanent partial impairment to the body as a whole referable to the back portion of claimant's June 16, 2003, injury. He

also stated that his restrictions became more significant from 2005 to 2008. He said in 2005 she could occasionally lift 20 pounds, but in 2008 reduced it to less than 10 pounds; and in 2005 she could frequently lift less than 10 pounds, but in 2008 no frequent lifting.

Dr. Bennoch also testified that he thought the claimant was symptom-free following the epidurals in 2004. He noted the problem is whether her relief was temporary from the epidurals, saying, "So now the question is: Is she healed from the old injury and doing fine, and the second injury a new injury? That is the question." When asked if the 30% impairment to the body relates to the 2003 injury Dr. Bennoch testified: "That was in the report, yes. Q: And that's your testimony today? A: Well, I mean, if you ask me specifically, and she is symptom free in May of '05 when she has a second injury, then obviously some of that impairment would be a new injury. Therefore, it would have to be for the May '05 injury." When asked about the change in restrictions from 2005 to 2008 he said, "I think she has developed epidural fibrosis and has persistent radiculopathy and finds now that any activity really flares everything up. That requires more strict restrictions."

On further cross-examination by the Second Injury Fund he stated that when he authored his reports he related the entire 30% permanent partial impairment to the 2003 injury because that was the only injury he knew about. He said that while he thinks part of the 30% impairment relates to the 2003 injury, part of it may relate to the 2005 injury. He has not authored any additional reports allocating how much of the 30% disability is attributable to either injury.

Dr. James Shaeffer, an orthopedic surgeon, testified at the hearing. He examined the claimant and reviewed her medical records. He issued a report on December 2, 2008. Dr. Shaeffer testified that he is familiar with epidural fibrosis, which he described as "an unfortunate process where there is a lot of scar tissue that forms following – usually following surgery on the spine. And typically it will encase or irritate the dura which is the lining of the spinal canal and/or nerve roots in the spinal canal." He said

this is probably the most common cause of failed back syndrome. Dr. Shaeffer found claimant had limitation of back movement, positive straight leg raising, and an absent ankle jerk with some weakness of some of the muscles of her left leg that are innervated by the first sacral nerve root on the left. He testified that “the anatomical cause of her injury and damage was originally her disc herniation at the L5-S1 interval on the left side was putting pressure on the first sacral or S1 nerve root, and then the subsequent surgery that she had which resulted in a lot of scar tissue or epidural fibrosis around that nerve root. So I thought at this point, based on her status and her history, including the procedures that she had done, that this was probably a permanent or irreversible nerve injury.”

Dr. Shaeffer testified that there is no good definitive treatment for epidural fibrosis, and that further surgery can frequently result in more scar formation. Sometimes epidural blocks or injections can help but they are not permanent. He did not feel she could work at the time he saw her.

Dr. Shaeffer testified that he believes claimant will need some permanent care including another MRI and nerve conduction study. He said possible treatments are implantable nerve stimulators or pain relievers that can be implanted in the region of the spine. He said the most extreme procedure is a de-innervation where the nerve is cut to try and relieve the pain, but it usually doesn't work if the pain has gone on over a year.

On cross-examination he testified that the purpose of the additional studies he suggested, another MRI and EMG, would be to try to determine if there is anything further to be done to help alleviate her pain and to make sure she did not have a small disc fragment or something of that nature. He did note that the MRI performed in March 2009 after he saw her did not show any recurrent disc herniation.

Claimant testified that at present she cannot carry over 10 pounds, has trouble sitting over 10 minutes, and can stand 1 hour. On a typical day she gets up, eats breakfast and washes dishes. She lies

down by 1:00. She uses her lap top. She can pick something up but has problems straightening back up. She would like to return to work.

Subsequent to the close of the hearing and receipt of memorandums, I gave an oral opinion in a conference call on November 13, 2009. Attorneys for all parties were present on this call. Later I was notified that they were not able to settle the case and requested I issue an award. On November 18 and November 19, 2009, prior to this award being issued, the claimant sent me a total of seven emails. I did not open any attachments nor did I read these emails. Upon receipt I immediately forwarded these to attorneys Jim Corbett, John Newman, David Bogden, and Cara Harris. This award is being entered in accordance with the oral opinion that was issued previously, and the emails have in no way modified or influenced my decision and award in these claims.

After carefully considering all of the evidence, I make the following conclusions:

1. Whether the employer and insurer are obligated for an underpayment of temporary total benefits to the claimant.

The employer paid the claimant temporary total disability for 18 4/7 weeks at the rate of \$257.70. This rate is incorrect. The correct rate is \$279.20, resulting in an underpayment of \$21.50 per week. Therefore, the employer and insurer shall pay claimant \$399.29 representing an additional \$21.50 per week for 18 4/7 weeks.

2. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.

Dr. Bennoch stated that the claimant needed to be seen by a pain management specialist and felt her pain should be managed more aggressively. In his office note of April 3, 2009, Dr. Crabtree stated that no further surgery was needed, but that the claimant's primary care physician should continue her medical treatment for chronic pain. Dr. Shaeffer testified that he recommends further diagnostic testing

to determine what could further be done to alleviate the claimant's pain. In addition, he specifically discussed some possible treatments for pain management including implantable nerve stimulators or pain relievers.

Based on the medical opinions of Dr. Crabtree, Dr. Bennoch, and Dr. Shaeffer, I find that the claimant will need future medical care to treat her ongoing pain as the result of the work-related injury occurring on May 13, 2005. Therefore, the employer and insurer shall provide future medical treatment, including pain management. The employer shall have the right to direct this medical treatment, and employer and insurer shall provide such treatment as recommended to cure and relieve the claimant of the effects of her injuries of May 13, 2005.

### 3. The nature and extent of permanent disabilities.

Only two physicians have assessed any permanent disability. Dr. Woodward rated claimant with 12% permanent partial disability/impairment to the body as a whole at the 400-week level for "the work-related condition." Dr. Bennoch also gave an opinion of 15% permanent disability to the body as whole due to the injury to the claimant's head. He later gave an opinion that claimant had sustained a 30% permanent partial disability to the body as a whole for the back injury she sustained on June 16, 2003. At the hearing he testified that a portion of this 30% disability for the back condition would be related to the May 13, 2005, injury but he did not specify how much.

Claimant has alleged two specific accidents on different dates resulting in two separate and distinct injuries to her back. The claimant's testimony and the medical records support the claims that she had an accident on June 16, 2003, when she fell hitting her head and injuring her back as well as a separate accident on May 13, 2005, when she injured her back lifting boxes.

The medical evidence and her testimony establish that she reached maximum medical improvement in September 2004 when she was released from treatment. She testified that her back was

90% improved at this time. Furthermore, the claimant's testimony, the medical records, and the MRI performed in September 2005 all confirm additional injury to her back. I find that both of these injuries caused her permanent disability to her back.

The employee has the burden of proving the extent of all of her injuries. "Expert opinion evidence is necessary in order to prove the extent of a preexisting disability, so that such percentage can be evaluated against the disability percentage existing after the compensable injury, in order to determine what percentage of permanent partial disability is attributable to the job-related injury which is the basis for the worker's compensation claim. It was Plaster's duty to offer such testimony if she hoped to recover anything for any additional disability incurred by reason of the job related injury that she suffered on September 10, 1983. Her failure to do so bars her from recovering permanent partial disability benefits." *Plaster v. Dayco Corp.*, 760 S.W.2d 911, 913 (Mo.App. 19880; *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 704-705 (Mo.App. 1973).

I find that the claimant has failed to prove the extent of her injury to the back resulting from the May 13, 2005, injury. Dr. Woodward was aware of both the 2003 and 2005 injury when he assessed 12% permanent partial disability/impairment for the "work-related condition." Dr. Bennoch originally assessed 30% permanent partial impairment for the 2003 injury, but after becoming aware of the 2005 injury he testified that some of that impairment would be attributable to the new injury in 2005.

Unfortunately, no expert apportioned or allocated how much of the impairment or disability they assessed was attributable to each injury. This is a matter that requires expert testimony to establish. Therefore, I am unable to determine the amount of disability to the claimant's back attributable to the injury on May 13, 2005, and as a result am precluded from awarding any disability for this injury.

4. The liability of the Second Injury Fund for permanent total disability.

In order to determine the Second Injury Fund's liability, I am first required to determine the amount of disability from the last injury alone. After this I next determine the extent of her overall disability, subtracting out any prior disabilities, to determine if any remains. This remainder, resulting from an enhanced disability due to the combination results in liability of the Second Injury Fund. *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-743 (Mo.App. 1996).

Since I was unable to determine the amount of disability from the last injury alone, namely the injury of May 13, 2005, I am unfortunately unable to complete the remainder of the calculation to determine what, if any, liability the Second Injury Fund would have. Therefore, I find the Second Injury Fund has no liability.

Attorneys for the claimant, Jim Corbett and John Newman, are awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Date: November 24, 2009

Made by: /s/ Margaret Ellis Holden  
Margaret Ellis Holden  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson  
Naomi Pearson  
Division of Workers' Compensation