Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 04-009996

Employee: Odessa Current

Employer: Little Hills Health Care, LLC (Settled)

Insurer: Travelers Commercial Casualty Company (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 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 February 9, 2011. The award and decision of Administrative Law Judge Edwin J. Kohner, issued February 9, 2011, 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 26th day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be modified and employee should be awarded permanent total disability benefits against the Second Injury Fund.

First, there is no dispute that employee suffered an accident that arose out of and in the course of her employment on February 6, 2004, and that the injuries resulting from said accident combined with employee's preexisting disabilities to trigger Second Injury Fund liability. The issue is whether the combination of employee's primary injury and preexisting disabilities resulted in employee's permanent and total disability, irrespective of any alleged post-accident worsening of her preexisting condition.

The ALJ found that employee is permanently and totally disabled, but not solely due to the combination of her primary injury with her preexisting disabilities. Instead, the ALJ found that employee's total disability resulted from the combination of her primary injury, her preexisting disabilities, *and* the degeneration of her cervical spine months after the work-related accident. Therefore, the ALJ only awarded enhanced permanent partial disability benefits against the Second Injury Fund and denied employee's claim for permanent total disability benefits. I find that the competent and substantial evidence establishes that the combination of employee's primary injury and preexisting disabilities, alone, caused employee's permanent total disability.

Although employee did suffer from a preexisting cervical condition, there was no competent and substantial evidence presented at the hearing, nor in the transcript and medical records, to suggest that any post-accident worsening of this preexisting condition contributed to employee's permanent total disability.

The ALJ largely bases his award on a finding that employee's cervical disc herniation was caused by the post-accident worsening of employee's preexisting degenerative cervical condition. However, Dr. Volarich credibly opined that the primary injury was the substantial factor as well as the prevailing or primary factor causing the disc herniation at C4-5 as well as the aggravation of degenerative disc disease and degenerative joint disease at C4-5, C5-6, C6-7, all of which required extensive repair in the form of a 3-level anterior cervical discectomy with fusion and instrumentation. Dr. Volarich noted that employee's "symptoms changed dramatically after she fell on the steps February 6, 2004 and what was found on the subsequent imaging studies correlate with the kind of problem she had from that fall and after the fall." Dr. Volarich ultimately opined that employee is permanently and totally disabled as a direct result of the primary injury in combination with her preexisting conditions.

The ALJ relied on Dr. Rutz' opinion that employee's herniated disc was the natural progression of her preexisting condition. However, the ALJ's reliance on the opinion of Dr. Rutz is misplaced in that Dr. Rutz only had 75 pages of medical records concerning employee, where her total medical records number in the hundreds of pages. Dr. Rutz

did not have the benefit of a full copy of Dr. Kantor's records, a full copy of the Barnes Jewish-St. Peters emergency room record from the day of the incident, the Health South records, or employee's June 2004 MRI report, which is significant in that it clearly evidences complaints related to employee's left upper extremity. Because Dr. Rutz lacked the aforementioned medical records, he was under the impression that employee's complaints had significantly changed when she came to see him. If he had reviewed **all** of the medical records he would have known that this was not the case. Dr. Rutz' opinions are based on a mere portion of the medical records chronicling the treatment employee received for the primary injury and, therefore, it cannot be said that his medical causation opinions are more credible than those of Dr. Volarich, who reviewed all of employee's medical records.

I find that the ALJ's reliance on Dr. Rutz' opinions is misplaced and that employee's permanent total disability is the result of his primary injury combining with his preexisting disabilities, irrespective of any post-accident worsening of any alleged preexisting degenerative condition. As such, I would modify the award of the administrative law judge merely awarding employee permanent partial disability benefits and award employee permanent total disability benefits against the Second Injury Fund.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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Curtis E. Chick, Jr., Member

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee:	Odessa Current	Injury No.: 04-009996
Dependents:	N/A	Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer:	Little Hills Health Care, LLC (Settled)	
Additional Party:	Second Injury Fund	
Insurer:	Travelers Commercial Casualty Company (Settled)	
Hearing Date:	December 20, 2010	Checked by: EJK/ch

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: February 6, 2004
5. State location where accident occurred or occupational disease was contracted: St. Charles 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:
    The claimant, an assistant supervisor of housekeeping for a nursing facility, slipped and fell on an icy surface while disposing of trash.
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: Left shoulder and cervical spine
14. Nature and extent of any permanent disability: 32 ½% permanent partial disability to the cervical spine
15. Compensation paid to-date for temporary disability: $2,346.52
16. Value necessary medical aid paid to date by employer/insurer: $5,732.20

17. Value necessary medical aid not furnished by employer/insurer? None

18. Employee's average weekly wages: $424.80

19. Weekly compensation rate: $283.20

20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

	Previously settled

22. Second Injury Fund liability: Yes

26.2 weeks of permanent partial disability from Second Injury Fund	$7,419.84
Permanent total disability benefits from Second Injury Fund: weekly differential () payable by SIF for weeks beginning and, thereafter, for Claimant's lifetime	
TOTAL:	$7,419.84

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: Anthony M. Pugliese, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Odessa Current Injury No.: 04-009996

Dependents: N/A

Employer: Little Hills Health Care, LLC (Settled)

Additional Party: Second Injury Fund

Insurer: Travelers Commercial Casualty Company (Settled)

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri
Checked by: EJK/ch

This workers' compensation case requires a determination of Second Injury Fund liability arising out of a work related injury in which the claimant, an assistant supervisor in housekeeping for a nursing facility, suffered a neck injury while taking trash to a trash container on an icy surface. The issues for determination are (1) Medical causation and (2) Second Injury Fund liability. The evidence compels an award for the claimant for permanent total disability benefits.

At the hearing, the claimant testified in person and offered depositions of David T. Volarich, D.O., and William M. England, records from the Division of Workers' Compensation, and voluminous medical records. The defense offered a deposition of Kevin D. Rutz, M.D.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident was alleged to have occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

On February 6, 2004, this fifty-six year old claimant, an assistant supervisor of housekeeping for a nursing facility, slipped and fell on an icy surface while disposing of trash striking her head and neck on the concrete steps. She developed pain in her head, neck, and low back. The claimant went by ambulance to Barnes-Jewish Hospital in St. Peters with complaints of head and neck pain with immediate onset after the fall. See Exhibit G. X-rays revealed moderate degenerative changes of the cervical spine but no evidence of acute fracture. See Exhibit G. She received a diagnosis of multiple contusions and prescription medications on discharge.

Dr. Tate provided follow up care for myofascial pain syndrome and provided trigger point injections, heat, stretching, physical therapy, Celebrex, and Flexeril. See Exhibit K. On April 5, 2005, Dr. Tate examined the claimant and founded

> Neck is supple. There is no paravertebral muscle spasm or tenderness. Cervical range of motion is intact. Foraminal encroachment is negative bilaterally. There are no longer any trigger points identified. There is no significant tightness. … Musculoskeletal examination of the upper extremities reveals shoulder range of motion to be 80% of normal. There is no increased pain with resisted shoulder abduction or external rotation. There is negative drop arm, negative apprehension, and negative impingement sign. There is normal range of motion of the left shoulder, bilateral elbows, and bilateral wrists. … Gait is within normal limits. Patient is able to ambulate without specific deficits. There are no coordination deficits. The patient has continued subjective complaints of neck, right shoulder, and knee pain with no objective findings. See Exhibit K.

She opined that the claimant was at maximum medical improvement and that she could continue to work without restrictions. See Exhibit K. Dr. Tate released the claimant from her care on April 5, 2004. See Exhibit K.

Dr. Kantor provided additional follow up care for a large collection of medical conditions including headaches in March 2004, breathing in April 2004, arms giving out in May 2004. See Exhibit C.

Dr. Rutz, an orthopedic spine surgeon, examined the claimant for cervical pain in August 2004, and took a medical history:

> Mrs. Current has a history of pain in her neck, which on 2/6/004 increased when she had a fall at work. She complains of pain in her neck, with pain going down into her arms. Her arms go numb at times. She complains of an occasional sensation of her legs feeling weak. … She has some pain in her lower back with occasional pinching and tingling in her lateral calves, which has gone for one week. The patient has difficulty clearly describing the location of her arm pain. She states that it does not seem to go into her hands. Her symptoms are aggravated by lifting, twisting, bending and straining and improved with heat. See Exhibit H.

Dr. Rutz reviewed a cervical x-ray revealing severe degenerative changes at C4-5, C5-6, C6-7 and to a lesser extent at C7-T1 and a cervical MRI demonstrating central stenosis at C4-5 and bilateral foraminal stenosis at C4-5, greater left than right and to a lesser extent on the left at C5-6 and on the right at C6-7. See Exhibit H. He diagnosed cervical spondylosis and cervical radiculopathy. See Exhibit H.

Dr. Kantor provided additional follow up care for neck issues and lower extremity pain in September 2004, Lupus in October 2004, and Lupus and blood tests in November 2004. See Exhibit C. On January 5, 2005, the claimant reported that she had difficulty sleeping and intermittent left side numbness and a drawn face when the numbness occurred. See Exhibit C. On January 6, 2005, the claimant reported that she had intermittent recurrent weakness in the upper extremities beginning 3-4 days ago. See Exhibit M. She reported paresis in both arms lasting for several minutes and then partially recovering. See Exhibit M. She reported numbness

and tingling in the upper extremities. See Exhibit M. She also had cervical area discomfort of moderate degree. See Exhibit M.

On January 6, 2005, a cervical MRI revealed a large disc herniation with pressure effect on the anterior cord at C4-C5. See Exhibit M. Dr. Rutz opined that the MRI revealed multilevel degenerative changes with narrowing of the nerve tunnels and diagnosed spondylosis, which means arthritis and cervical radiculopathy. See Dr. Rutz deposition, page 11. He opined that the degenerative changes predated the February 2004 accident. See Dr. Rutz deposition, page 11.

On February 17, 2005, Dr. Rutz identified and removed a moderate to large herniated disc fragment at C4-C5 and performed a fusion from C-4 through C-7. See Exhibit H. The diagnosis was C4-5, C5-6, C6-7 spinal stenosis, cervical spondylosis and cervical radiculopathy plus C4-5 disc herniation. See Exhibit H. On April 19, 2006, Dr. Rutz removed the hardware from the first surgery and performed another fusion from C4 through T-1. See Exhibit H. The diagnosis was non-union C4-C7 and C7-T1 degenerative disc disease and cervicalgia. See Exhibit H.

Preexisting Conditions

The claimant suffered from preexisting neck, shoulder, and back pain. See Exhibit C. The claimant suffered from migraine headaches. See Exhibit D. The claimant suffered from preexisting depression with an episode requiring a three week hospitalization in 2002. See Exhibit F. The claimant has received ongoing treatment from Dr. Kantor and Dr. Goldmeier, a psychiatrist. See Exhibits C, E.

Dr. Volarich

Dr. Volarich examined the claimant on October 11, 2005, and November 1, 2006, and found that the claimant had severe limitations in cervical range of motion in all plane and in the lumbar spine in flexion. He also found that the claimant's C-5 reflex was absent bilaterally in the arms and only trace reflexes were present at C-6 and C-7. He diagnosed herniated nucleus pulposus at C4-5, aggravation of cervical spine degenerative disc disease and degenerative joint disease at C-4 through C-7, status post anterior cervical discectomy with three level fusion and instrumentation at C-4 through C-7. He also diagnosed lumbar strain/sprain and right shoulder bursitis. After the second surgical procedure, he also diagnosed pseudoarthrosis C4-5 and C6-7 with juxtalfusional disc herniation at C7-T1, status post redo cervical fusion with removal of old hardware , revision of the C4-C7 fusion, discectomy at C7-T1, and new instrumentation at C4-T1 (four levels).

He opined that the claimant suffered a 65% permanent partial disability to his cervical spine, a 5% permanent partial disability to her lumbar spine, and a 20% permanent partial disability to his right shoulder from the accident. See Dr. Volarich deposition, pages 25, 26, 38. He opined that the claimant suffered preexisting permanent partial disabilities of 15% to the cervical spine, 10% of the lumbar spine, and 20% of the left shoulder. See Dr. Volarich deposition, page 28. He also opined that the work related accident was the substantial factor as well as the prevailing or primary factor causing the disc herniation at C4-5 as well as the aggravation of degenerative disc disease and degenerative joint disease at C4-5, C5-6, C6-7, all of which required extensive repair in the form of a 3-level anterior cervical discectomy with

fusion and instrumentation. See Dr. Volarich deposition, page 24. He also opined that the claimant suffered strains to her low back and right shoulder from the accident. See Dr. Volarich deposition, page 24.

Dr. Volarich testified that the claimant had a lot of degenerative conditions in her cervical spine. See Dr. Volarich deposition, page 54. In response to whether the disc herniation was due to a natural progression from the aging process, he testified:

> It's possible, but the size of that herniation, I think, is what we have to look at. A small herniation can be present as a result of the degenerative process, but her symptoms changed dramatically after she fell on the steps 2-6-04 and what was found on the subsequent imaging studies correlate with the kind of problems she had from that fall and after the fall. So I don't think the herniation by itself as just natural aging. … You would expect some of that [spondylosis and stenosis] in anybody that's over 35 or 40 years old that does labor work their entire life. So I would expect that probably everything there is a pre-existing condition. That's why I rated it the way I did. See Dr. Volarich deposition, page 54, 55.

Dr. Rutz

Dr. Rutz provided medical and surgical care to the claimant from August 2004 through August 2006 including two surgical fusions at the request of the claimant's primary care physician. He testified that the x-rays revealed moderate degenerative changes at C3-4 and severe degeneration at C4-5, C5-6, and C6-7, and then a lesser degree at C7-T1. See Dr. Rutz deposition, pages 10, 11. He testified that the MRI revealed lateral stenosis at C4-5, left greater than right-sided foraminal stenosis atC4-5, and some on the left at C5-6 and on the right at C6-7. See Dr. Rutz deposition, page 11. He diagnosed degenerative cervical spondylosis, which means arthritis, and cervical radiculopathy. See Dr. Rutz deposition, pages 11, 12. He opined that the claimant's degenerative changes predated the accident, because they took years to form. See Dr. Rutz deposition, page 12.

Mr. England

James England interviewed and tested the claimant on September 12, 2006. He found that the claimant is 56 years old with a limited, special education background, is functionally illiterate and cannot really read and understand basic information. See England deposition, page 10. The claimant has a Stanford Binet IQ of 67, which places her at almost the second percentile as far as intelligence meaning that 98% of the people in the U.S. would do better than that and is in the mentally retarded range. See England deposition, page 13. After administering the Wide-Range Achievement test, he concluded that the claimant can recognize words at the 4th grade level, handle written math at the 5th grade level, and had reading comprehension at the 3rd grade level. He opined that the claimant could not compete for work that would involve paperwork, reading, writing, recording data, or handling money. See England deposition, page 10. He opined that Dr. Volarich's restrictions limited the claimant to sedentary work. See England deposition, page 10.

He opined that the claimant is not able to successfully compete for or sustain employment in the open labor market in the long run as a result of a combination of her problems. See England deposition, page 14.

> I think the physical problems knock her out of what she did before, and then the mental limitations … going back to birth, limit her from doing work that does involve more than very simple repetitive kinds of things that can be learned through observation and watching other people. So it's the combination of these two things combined with the fact that … you've got a woman in her '50's who just doesn't really have any other kind of ability or skill to make her particularly attractive to an employer. I just don't believe, as she comes across, and considering her poor academic ability, combined with physical problems, I don't think that there's anything that she's going to be successful in competing for or sustaining. See England deposition, pages 14, 15.

MEDICAL CAUSATION

"The claimant in a workers' compensation case has the burden to prove all essential elements of her claim, including a causal connection between the injury and the job." Royal v. Advantica Rest. Group, Inc., 194 S.W.3d 371, 376 (Mo.App.W.D.2006) (citations and quotations omitted). "Determinations with regard to causation and work relatedness are questions of fact to be ruled upon by the Commission." Id. (citing Bloss v. Plastic Enters., 32 S.W.3d 666, 671 (Mo.App.W.D.2000)). Under the statute, "[a]n injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability." § 287.020.2. On the other hand, "[a]n injury is not compensable merely because work was a triggering or precipitating factor." Id. "Awards for injuries 'triggered' or 'precipitated' by work are nonetheless proper *if* the employee shows the work is a 'substantial factor' in the cause of the injury." "Thus, in determining whether a given injury is compensable, a 'work related accident can be both a triggering event and a substantial factor.' Royal, 194 S.W.3d at 376 (quoting Bloss, 32 S.W.3d at 671).

Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of preexisting disability and its extent, the proof of causation is not within the realm of lay understanding nor -- in the absence of expert opinion -- is the finding of causation within the competency of the administrative tribunal. Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175, 176 (Mo.App. E.D. 1995). This requires claimant's medical expert to establish the probability claimant's injuries were caused by the work accident. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Id.

"[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence." Elliot v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D. 2002). Accordingly, where expert medical testimony is presented, "logic and common sense," or an ALJ's personal views of what is "unnatural," cannot provide a sufficient basis to decide the causation question,

at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) ("The commission may not substitute an administrative law judge's opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert."). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

In this case, the claimant had a severe preexisting condition, fell on ice at work on February 6, 2004, and experienced neck and right shoulder pain. Dr. Volarich examined the claimant on October 11, 2005, and on November 1, 2006, took a medical history, and opined that the claimant suffered a 65% permanent partial disability to her cervical spine, a 5% permanent partial disability to her low back, and a 20% permanent partial disability to her right shoulder as a direct result of the occurrence. Dr. Tate examined and treated the claimant through April 5, 2004, but offered no evaluation relating to disability from the accident. See Exhibit K. Dr. Rutz opined that the claimant suffered a 3% permanent partial disability to her cervical spine from the accident. See Dr. Rutz deposition, page 40. Based on the evidence of record, the claimant suffered permanent partial disability to her cervical spine from the occurrence. Therefore, the claimant met her burden of proof and prevailed on this issue.

SECOND INJURY FUND

"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in '[a]ll cases of permanent disability where there has been previous disability.'" For the Fund to be liable for permanent, total disability benefits, the claimant must establish that: (1) he suffered from a permanent *partial* disability as a result of the *last* compensable injury, and (2) that disability has combined with a *prior* permanent *partial* disability to result in total permanent disability. Section 287.220.1. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined...."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 50 (Mo.App. W.D. 2007).

The test for permanent, total disability is the worker's ability to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 48 (Mo.App. W.D. 2007).

Applying the test for total disability, the claimant is 56 years of age, has no high school diploma, had special education courses in high school, has an IQ of 67, and a history of employment in housekeeping and cleaning services. Dr. Volarich restricted the claimant to

sedentary work due to neck, shoulder, and arm pain. Dr. Volarich and Mr. England credibly opined that the claimant is unemployable in the open labor market, and the defense offered no contrary evidence. The defense contends that Mr. England's opinion is not well founded, because he based his findings on an assumption that the claimant had Lupus before the occurrence and the claimant's diagnosis was after the occurrence (about the time that the claimant's symptoms of nerve compression became severe.) However, the evidence supports a finding that the claimant is unemployable in the open labor market based on her age, education, past relevant work history, lack of transferable skills, and her limitations and restrictions. Based on the overwhelming evidence on this point, the claimant is permanently and totally disabled.

The claimant has permanent partial disabilities that predate the February 2004 accident. Dr. Volarich opined that the claimant suffered preexisting permanent partial disabilities of 15% to the cervical spine, 10% of the lumbar spine, and 20% of the left shoulder. See Dr. Volarich deposition, page 28. In addition, the claimant suffered from a 7 ½% permanent partial disability to her left shoulder from a November 2002 work related injury that was apparently rated separately in Dr. Volarich's reports and deposition testimony. Logically, the 7 ½% disability from the 2002 accident would combine with the 20% disability that predated the 2002 accident to create a 27 ½% preexisting permanent partial disability to the claimant's left shoulder. Dr. Volarich credibly testified that all of these permanent partial disabilities combined with the claimant's permanent partial disability from the 2004 accident to result in an overall greater disability than the simple sum of the individual disabilities.

The claimant also had preexisting depression and had slow learning skills, however the claimant's experts, Dr. Volarich and Mr. England, offered no rating or expert opinion evidence to prove that those conditions constituted permanent partial disabilities. In addition, the record discloses no evidence whether those conditions combined with the claimant's permanent partial disability from the 2004 accident to result in an overall greater disability that the simple sum of the individual conditions.

The claimant settled her claim against the employer in this case on the basis of a 32 ½% permanent partial disability to her neck and an MSA. Unquestionably, the claimant suffered a cervical strain or sprain as a direct result of the February 2004 work related accident. The critical issue in this case is whether the claimant's February 2004 work related accident was a substantial factor causing the claimant's severe cervical condition that required two fusion surgeries with a less that optimal result. Two experts offered conflicting forensic medical opinions.

Dr. Volarich opined that the work related accident was the substantial factor as well as the prevailing or primary factor causing the disc herniation at C4-5 as well as the aggravation of degenerative disc disease and degenerative joint disease at C4-5, C5-6, C6-7, all of which required extensive repair in the form of a 3-level anterior cervical discectomy with fusion and instrumentation. See Dr. Volarich deposition, page 24. In response to whether the disc herniation was due to a natural progression from the aging process, he testified that the size of the herniation and the change in symptoms after the accident supported his forensic evaluation. See Dr. Volarich deposition, page 54, 55.

Dr. Rutz opined that the claimant's herniated disk was the natural progression of her preexisting condition and was spontaneous. He based his opinion on the temporal relationship of

the claimant's symptoms and the severe degeneration observed in imaging that takes years to develop.

Both experts left room for doubt as to whether a contrary opinion was possible, but both testified that their opinions were expressed to a reasonable degree of medical certainty. Both experts are practicing physicians licensed by the Missouri Board of Healing Arts. However, Dr. Rutz findings are more credible for a number of reasons. First, he has a specialized expertise in orthopedic spine surgery which is the subject of the issue. Dr. Volarich has a specialized expertise in nuclear medicine, nuclear cardiology, and occupational medicine. Dr. Rutz' specialized expertise in orthopedic spine surgery suggests that his findings are more credible. Second, Dr. Rutz was the treating physician, observed the claimant's condition over a two year period, read the actual imaging films, performed two surgical procedures on the claimant's cervical spine, and was not selected by any of the three parties to his litigation. Dr. Volarich examined the claimant on one occasion and prepared a forensic medical report solely for this litigation. Finally, Dr. Rutz' opinions were well supported by the temporal relationship of the facts in this case. Dr. Rutz testified extensively about these factors.

Dr. Rutz looked to the claimant's change in symptoms in August 2004 as evidence that her surgery was necessary due to her continued degeneration, not due to the work event. Dr. Rutz testified that before the 2004 accident, the claimant had a degenerative condition in her neck. See Dr. Rutz deposition, page 12. Dr. Rutz noted that after the accident she complained of neck and right shoulder pain. See Dr. Rutz deposition, page 12. When she first saw Dr. Rutz, he found the problem to be not a shoulder problem, but a nerve problem going in to her arm. See Dr. Rutz deposition, page 13. Dr. Rutz testified that the surgery he performed was not for neck pain, but rather for nerve compression. See Dr. Rutz deposition, page 15. He testified, ". . .even after her accident, after she was released, she had significant change in her symptoms shortly before she came to see me, where she started having, at least by Kantor's notes in August 7, 2004, increased tingling in the arms and legs, which is a significant change and would be consistent with having aggravation of the spinal cord." See Dr. Rutz deposition, page 15, 16. Dr. Rutz opined the onset of neurologic symptoms occurred after the claimant had been released from treatment for her work injury. See Dr. Rutz deposition, page 18.

Dr. Rutz opined that if the claimant had experienced spinal cord compression at the time of her fall, she would have experienced a rapid onset of symptoms. See Dr. Rutz deposition, page 18. However, Dr. Rutz testified that the notes from Dr. Kantor show a change in symptoms right before he referred the claimant to Dr. Rutz, including more pain and a significant increase in the tingling sensation in the arms and legs. See Dr. Rutz deposition, page 18, 19. Dr. Rutz testified that this significant change in symptoms is consistent with disc herniation with spinal cord compression. See Dr. Rutz deposition, page 19.

Dr. Rutz testified that when the claimant saw him her more significant symptoms were on the left side. See Dr. Rutz deposition, page 46. The claimant's pain that she reported to Dr. Tate and Health South was in the right shoulder. See Dr. Rutz deposition, page 46. Dr. Rutz testified:

> Generally, I would expect if someone had a disc herniation to be on one side or the other, to develop the onset of symptoms on that side. Generally, I would consider within a day or two, sometimes all -- it makes sense to me if it takes up

> to -- a little bit longer than that, like a week, but I wouldn't lean towards something that happens months later blaming it on an accident from months before. See Dr. Rutz deposition, page 51.

Based on this analysis, the claimant's total disability resulted from the combination of her work related injury, her preexisting disabilities and the degeneration of her cervical spine months after the work related accident. Therefore, The Second Injury Fund has no liability for any post-accident worsening of the claimant's preexisting disabilities that are not caused or aggravated by the last work related injury or for any conditions that arise after the last work related injury. Garcia v. St. Louis County, 916 S.W.2d 263, 266 (Mo. App. E.D. 1995); Frazier v. Treasurer of Missouri, 869 S.W.2d 152 (Mo. App 1994); Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789 (Mo. App. 1992). An interesting question is whether the claimant's Lupus diagnosed a few months after the accident was a factor in her unemployability. However, none of the experts opined that the claimant's Lupus was a substantial factor in her employability. Therefore, that issue does not seem to affect the outcome of this case.

Nonetheless, the claimant is entitled to additional permanent partial disability benefits from the Second Injury Fund based on a combination of her 32 ½% permanent partial disability to her cervical spine and her 27 ½% permanent partial disability to her shoulder. The simple sum of these two disabilities is 193.8 weeks or an unscheduled disability of 48.45%. The claimant's overall disability is 55% as an unscheduled disability or 220 weeks. The difference is 26.2 weeks, and the claimant is awarded an additional 26.2 weeks of permanent partial disability benefits from the Second Injury Fund.

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 9th day of February, 2011.

/s/ NAOMI L. PEARSON
Naomi L. Pearson
Division of Workers' Compensation