

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

Injury No.: 05-105502

Employee: Lois Dampier
Employer: Curators of the University of Missouri
Insurer: Self-Insured

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

Discussion

Affirmative factual findings

The administrative law judge noted that the parties dispute whether employee voluntarily left her job with employer or whether employer fired her when she was unable to perform her duties under the restrictions imposed by the authorized treating physician, Dr. Hoerner. Employee correctly notes, in her brief, that she provided the only firsthand testimony on this issue when she described a conversation with a manager who informed her that she no longer had a job given the restrictions imposed by Dr. Hoerner. Given the uncontested testimony from employee, we find the greater weight of the evidence to support a finding that employee did not quit her job but instead that employer fired her because she was no longer able to perform the job given her permanent restrictions, and we so find.

Although employee was unable to return to her job with employer in light of her physical restrictions, this is not dispositive of the issue of total disability, as § 287.020.6 RSMo makes clear that "[t]he term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." We turn now to the question whether the effects of the work injury rendered employee unable to return to any employment.

Permanent total disability

The administrative law judge entered an award of permanent partial disability benefits against the employer. Employee appeals, arguing the evidence shows that she is permanently and totally disabled as a result of the work injury. We agree with the administrative law judge's determinations for the following reasons.

First, the administrative law judge had the opportunity to observe employee's testimony and demeanor at the hearing. He rendered findings as to the nature and extent of employee's permanent disability that were specifically based upon those observations. In her brief, employee provides no argument why we should disregard the administrative law judge's personal observations at the hearing.

Second, we agree with the administrative law judge's finding that employee failed to prove she sustained any psychiatric disability as a result of the work injury. Dr. Hughes testified that employee's history of childhood abuse is likely the driving force behind the psychogenic portion of employee's current pain complaints, and after careful consideration, we find this testimony to be

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reasonable and ultimately more persuasive than the competing expert testimony. With that said, we wish to make clear that we find wholly unpersuasive Dr. Hughes's position, expressed elsewhere in his testimony, that a physical or orthopedic injury falling short of direct trauma to the brain itself cannot cause any major psychiatric injury regardless of the sequelae that may be produced by such an injury. We affirm the administrative law judge on this point not because we accept this absolutist position from Dr. Hughes, but rather because we are simply not persuaded that the accident was the prevailing factor causing employee to sustain any psychiatric disability.

Finally, we note the evidence that employee has an I.Q. of 70 (a condition diagnosable under the DSM-IV as "borderline intellectual functioning") and that the vocational expert Wilbur Swearingen persuasively testified that this preexisting condition would prevent employee from vocational education or retraining. We also note the evidence of significant preexisting degenerative disc disease as demonstrated on the diagnostic studies, and that employee sought medical care for her neck, shoulder, and back prior to the work injury in the form of chiropractic treatment and treatment with Dr. Wallace at University Hospital Family Medicine Clinic. Especially in light of the effect that these preexisting conditions have on employee's overall vocational presentation, we are unable to reach a finding that employee is permanently and totally disabled as a result of the last injury considered alone.

Conclusion

We affirm and adopt the award of the administrative law judge with this supplemental opinion.

The award and decision of Administrative Law Judge Robert J. Dierkes, issued April 10, 2013, is attached and incorporated by this reference.

The Commission approves and affirms as fair and reasonable the administrative law judge's allowance of a 25% lien in favor of employee's attorney on compensation awarded herein.

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

Given at Jefferson City, State of Missouri, this 10th day of April 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Lois Dampier

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Dependents:

Employer: Curators of the University of Missouri

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: None.

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

Insurer: Self-insured

Hearing Date: January 10, 2013

Checked by: RJD/cs

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: October 17, 2005.
5. State location where accident occurred or occupational disease was contracted: Boone 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? Employer is self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was lifting and transferring a heavy bag 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: neck and low back.
14. Nature and extent of any permanent disability: 20% permanent partial disability of the body as a whole.
15. Compensation paid to-date for temporary disability: \$1,365.54.
16. Value necessary medical aid paid to date by employer/insurer? \$4,419.56.
17. Value necessary medical aid not furnished by employer/insurer? Unknown.

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18. Employee's average weekly wages: \$411.33.

19. Weekly compensation rate: \$274.22.

20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. From Employer:

80 weeks of permanent partial disability benefits: \$21,937.60

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

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FINDINGS OF FACT AND RULINGS OF LAW:

Employee: Lois Dampier

Injury No. 05-105502

Dependents:

Employer: Curators of the University of Missouri

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

Additional Party: None.

Insurer: Self-insured

Hearing Date: January 10, 2013

ISSUES DECIDED

The evidentiary hearing in this case was held on January 10, 2013 in Columbia. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on April 2, 2013. The hearing was held to determine the following issues:

1. Whether the work-related accident of October 17, 2005 was the prevailing factor in the cause of any or all of the injuries and/or conditions alleged in the evidence;
2. Whether the claim for psychiatric injury is barred by the statute of limitations;
3. Whether the notice requirement of §287.420 serves as a bar to the claim for psychiatric injury;
4. The nature and extent of disability, if any, attributable to the work related accident of October 17, 2005;
5. Employer's liability, if any, for permanent partial disability benefits or permanent total disability benefits;
6. Employer's liability, if any, for payment for Claimant's past medical treatment;
7. Whether Employer shall be ordered to pay temporary total disability ("TTD") benefits, and, if so, for what period(s) of time; and
8. The liability, if any, of Employer-Insurer for future medical benefits pursuant to Section 287.140, RSMo.

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STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue for the evidentiary hearing is proper in Boone County;
3. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
4. That Claimant's average weekly wage is \$411.33, with compensation rates of \$274.22 for temporary total disability benefits and permanent total disability benefits and \$274.22 for permanent partial disability benefits;
5. That Employer has paid \$4,419.56 in medical benefits and \$1,365.54 in temporary total disability benefits; and
6. That the University of Missouri was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, Lois Dampier; the testimony of Wilbur Swearingin, a certified vocational rehabilitation counselor; the testimony of Thomas Dampier; and the exhibits listed below.

The following exhibits were admitted on behalf of claimant:

- A - Curriculum Vitae of Dr. Koprivica;
- B - Reports of Dr. Koprivica;
- B1 - Report of August 19, 2006
- B2 - Report of July 12, 2009

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- B3 - Report of October 28, 2009
- C - Medical Records Provided by the Employer and Insurer
- D - Medical Records of the University Hospital & Clinics through 2/12/07
- E - Medical Records of University Hospital & Clinics through 1/28/09
- F - Medical Records of University of Missouri – Green Meadows Clinic/Dr. LeFevre
- F1 - University Physicians Medical Bills with Affidavit
- I - Dr. Joel Jeffries Medical Records
- J - Columbia Public Schools Records
- K - Report of Dr. John Pro
- L - Reports of Wilbur Swearingin
- L1 - Report of December 3, 2007
- L2 - Report of April 2, 2010
- L3 - Report of June 18, 2010
- M- (Exhibit M was withdrawn.)
- N - Deposition of Dr. Koprivica
- O - Health South Medical Bills

The following exhibits were admitted on behalf of the employer and insurer:

- 1 - Original Claim for Compensation receipt of which was acknowledged by the Division of Workers' Compensation on May 25, 2006;

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- 2 - Original Answer to Claim for Compensation filed May 30, 2006, receipt of which was acknowledged by the Division of Workers' Compensation on June 2, 2006;
- 3 - First Report of Injury filed October 19, 2005;
- 4 - Certified medical records of Green Meadows Clinic;
- 5 - Medical records of University Hospital and Clinics;
- 6 - Certified medical records of University Hospital and Clinics;
- 7 - Deposition of Dr. Michael Chabot, M.D.;
- 6 - Deposition of Dr. Patrick Hughes, M.D.;
- 7 - Deposition of Gary Weimholt, M.S.;
- 8 - March 4, 2011 letter from Gary Weimholt, M.S.;
- 9 - Records of payments.

DISCUSSION

Lois Dampier ("Claimant") was born on April 20, 1962. She graduated from Hickman High School in 1981 and did not attend college. She has three biological children and two step-children. Two of her children are 16-year-old twins that still live with Ms. Dampier and her husband.

Prior to working at the University of Missouri, Claimant was employed at Nowell's Grocery, Burger King and Taco Tico. Claimant began her employment at the University of Missouri in the kitchen where she remained employed for ten years. She then transferred to her most recent position as a custodian where she remained for five years. Claimant described her work activities as a custodian to include cleaning and dusting, sweeping and mopping floors, vacuuming with a backpack vacuum, and emptying trash into large containers that she would push onto a trash compactor.

Claimant was involved in a serious motor vehicle accident as a child. Her father and five siblings died in the accident and Claimant was seriously injured and required a long recovery.

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Before October 17, 2005, Claimant was diagnosed with plantar fasciitis, a painful arch and heel.

On April 7, 2005, Claimant reported to University of Missouri Hospital for neck and shoulder pain after she fell off of a pogo stick the day before. She reported to Dr. Ernest Wallace that she did not have shoulder or neck pain at the time of her injury, but awoke on April 7 with stiffness in her shoulders and neck. She was prescribed Flexeril and ibuprofen and told to apply heat to the area.

On October 17, 2005, Claimant was pulling trash out of a large barrel when she felt pain down the right side of her neck down into her mid and low back. Claimant testified that it felt like an iron had been placed on her back. Claimant continued working for awhile after the incident before finally reporting it to her supervisor. Claimant's supervisor sent her to the health office. There, Claimant was diagnosed with a right trapezius/subscapular strain and left lumbosacral strain and was prescribed pain medication.

On October 25, 2005, Employer arranged for Claimant to see Dr. John Hoerner. Claimant reported to Dr. Hoerner that the pain in her upper trapezius and in the lower lumbar region increased with the use of her arm, but she felt like her problems were somewhat better overall. Dr. Hoerner restricted Claimant's lifting to twenty pounds, advised her not to use the backpack vacuum at work and limited her work shift to six hours. He sent her to the Work Center for physical therapy. In his office note, Dr. Hoerner stated that he saw no evidence of a serious injury and expected Claimant's strains to heal. Claimant returned to work approximately five days after her injury and was placed on light duty. While on light duty, she performed light cleaning for four to six hours per day.

Claimant returned to Dr. Hoerner on November 2, 16, and 30, 2005. She also attended physical therapy during that time. Throughout this period, Claimant reported that her pain was consistently improving and Dr. Hoerner progressively lightened her work restrictions. On November 30, 2005, however, Claimant reported increased cervical and lower back pain. Dr. Hoerner ordered X-rays of her cervical and lumbar spine which showed degenerative changes at C5-6 and degenerative disc disease at T9-10 and L4-5. Dr. Hoerner advised Claimant that she could return to work full duty, and she told Dr. Hoerner that she was "not so sure she can handle this, but is willing to try."

On December 6, 2005, Claimant followed up with Dr. Hoerner and reported that her low back was doing well but that she had more upper trapezius region pain after working a few full days. He diagnosed Claimant with persistent mechanical cervical complaints that he described as a trapezius strain superimposed upon preexistent cervical degenerative disc disease. Dr. Hoerner advised Claimant to return to work light duty the following day.

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On December 15, 2005, Claimant underwent an MRI of her cervical spine which showed severe degenerative disc disease at C5-6 and C6-7 along with spinal stenosis at both levels. The MRI also showed bilateral neural foramina narrowing at C5-6 and at C7-L1, at a mild level due to a sequestered fragment. Dr. Hoerner opined that Ms. Dampier had some preexistent cervical degenerative disc disease that was exacerbated by her current injury; Dr. Hoerner limited Claimant's lifting to 25 pounds, advised her not to use the backpack vacuum and told her to engage in limited squatting and neck extension.

On December 30, 2005, Dr. Hoerner examined Claimant for the final time. His final diagnosis was significant cervical degenerative disc disease that is preexistent to her cervical strain. He also stated that her prior lumbar strain had resolved. Because of Claimant's ongoing pain complaints and degenerative disc disease, Dr. Hoerner issued permanent work restrictions and advised Claimant against lifting over 25 pounds, neck extension and repetitive pushing or pulling beyond 50 pounds of force. He released Claimant at maximum medical improvement and opined that she suffered a 20% permanent partial disability to her body as a whole, referable to the cervical spine. He related 90% of her impairment to her preexisting cervical degenerative condition and 10% of her impairment to her work-related strain. Dr. Hoerner opined that Claimant did not suffer any impairment due to her lumbar injury and advised that she had no work restrictions related to such.

Claimant left her employment with Employer on the same day she last saw Dr. Hoerner, December 30, 2005. Claimant contends either that she was physically unable to continue working because of the restrictions, or that Employer would not allow her to continue working because of the restrictions; Employer contends that Claimant voluntarily chose to leave employment on that date. Nevertheless, it is clear that Claimant did apply for long-term disability insurance benefits through Employer.

Claimant did not seek or require any treatment for more than nine months after Dr. Hoerner released her from his care and she quit her job until she presented on October 5, 2006 to Dr. Michael LeFevre, her personal care physician, for aching pain in her neck and trapezius area bilaterally. Dr. LeFevre ordered an MRI scan which showed moderate C5-C6 and C6-C7 spondylosis and foraminal stenosis along with mild C4-C5 spondylosis and foraminal stenosis. Dr. LeFevre referred Claimant to Dr. Joel Jeffries.

Dr. Jeffries examined Claimant on November 13, 2006. After reviewing her latest MRI, Dr. Jeffries diagnosed Claimant with a cervical disk herniation at C6-C7 with degenerative disc disease at C5-C6 resulting in moderate spinal stenosis and bilateral foraminal encroachment. He recommended an aggressive rehabilitation program, but no surgery and no work restrictions. Claimant underwent this recommended therapy at HealthSouth. When Dr. Jeffries saw Claimant again on December 13, 2006, she reported that her back pain is diminished and examination of

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the cervical spine revealed only a modest reduction in her active range of motion. Claimant did not request additional treatment from Employer prior to seeing Dr. LeFevre, Dr. Jeffries or HealthSouth; there is no evidence that Employer was aware that Claimant was seeking or receiving medical treatment, and there likewise is no evidence that Employer authorized this treatment.

In the fall of 2009, Claimant was involved in a car accident. Claimant testified that she was sitting at a complete stop when she was rear-ended by another vehicle. She stated that she was shook up after this accident and went to Boone Hospital claiming that her doctor had told her that if she fell just right or was in a car accident, she could be paralyzed. She was released from Boone Hospital that day and prescribed Vicodin. Following this accident, Ms. Dampier experienced increased pain, but she testified at trial that her pain has since returned to its baseline level.

Dr. Brent Koprivica performed an independent medical evaluation of Claimant at the request of her attorney on August 19, 2006. Dr. Koprivica stated that Claimant's primary problem area was her neck, but she was also complaining of low back pain, as well. Dr. Koprivica opined that the work injury of October 17, 2005 was the prevailing factor in the development of her chronic cervicothoracic pain as well as her chronic mechanical low back pain. With regard to the neck, Dr. Koprivica recommended a spinal surgical evaluation and opined that if Claimant required surgery, it was a direct result of the October 17, 2005 accident.

Notwithstanding his belief that Claimant should undergo a surgical consult, Dr. Koprivica considered Claimant to be at maximum medical improvement, assigned a 25% permanent partial disability for the cervical condition, and 15% permanent partial disability for the low back pain. He based his recommendations on Claimant's pain complaints and her loss of range of motion with cervical flexion and extension. Dr. Koprivica provided Claimant with significant restrictions, including no climbing; avoiding jarring activities, above-shoulder lifting, frequent bending at the waist, pushing, pulling or twisting, and awkward positions of the lumbar spine; limit sitting to a maximum of 1.5 hours; only occasionally lift or carry 20 pounds for below the shoulder level lifting; and a limit of 30 minutes of standing and walking. Dr. Koprivica concluded that Claimant suffered an overall permanent partial disability of 45% of the body as a whole, but if a vocational expert determined that Claimant is not employable, he would consider her permanently and totally disabled as a result of the October 17, 2005 injury in isolation.

In his deposition, Dr. Koprivica testified that Ms. Dampier's degenerative disease in her neck and low back predated the October 17, 2005 injury, but these conditions were not disabling before then because she said they were not symptomatic. Dr. Koprivica testified that Claimant told him she had received chiropractic care prior to October 17, 2005 and Dr. Koprivica agreed that people normally do not go to a chiropractor unless they are symptomatic. He also reviewed Claimant's MRI and X-rays and confirmed they showed degenerative changes that predated the

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October, 17, 2005 injury. He agreed that the disc bulging seen on Ms. Dampier's MRI could have predated October 17, 2005.

Dr. Koprivica testified that there are a number of factors that contribute to Claimant's degenerative condition. This would include genetics which was not something that he looked into during his examination of Ms. Dampier. Dr. Koprivica also acknowledged that Claimant had left foot problems and opined that this could result in the development of mechanical back pain as the foot pain could have caused her gait to change. Dr. Koprivica also stated that Claimant is overweight and this could contribute to her chronic pain.

Dr. Koprivica re-examined Claimant and authored an addendum report on October 28, 2009 after considering the opinions of two vocational experts, Gary Weimholt and Wilbur Swearingin, and the independent medical examination report of Dr. Chabot. If Mr. Weimholt's vocational report is accepted as true, it is Dr. Koprivica's opinion that Claimant suffered a 45% permanent partial disability to her body as a whole and can return to work in the open labor market. In the alternative, if the report of Wilbur Swearingin is accepted as true, he believes Claimant is permanently and totally disabled. Of note, Dr. Koprivica pointed out that Claimant was involved in a subsequent motor vehicle accident that occurred on August 31, 2009 which exaggerated her complaints. He also noted, for the first time, that Claimant was suffering from some psychological overlay and reported that Claimant exhibited positive Waddell's signs, overreaction and symptom magnification.

At Employer's request, Dr. Michael Chabot examined Claimant on August 8, 2009. Dr. Chabot is a spine surgeon in the St. Louis area. Dr. Chabot diagnosed Claimant with neck pain, chronic back pain, evidence of a disc herniation at C6-7, and cervical spinal stenosis with no evidence of active radiculopathy. Dr. Chabot also noted that it is impossible to determine whether the disc herniation at C6-7 predated the injury of October 17, 2005. Dr. Chabot explained that the MRI studies of the cervical spine showed degenerative changes with disc spur complexes at C5-6 and spinal stenosis as well as disc degeneration at C5-6 and C6-7 which all predated Claimant's injury of 2005. Additionally, neither Dr. Hoerner nor Dr. Koprivica found radiculopathy when they examined Claimant.

Dr. Chabot testified that degeneration and spondylosis, which was observed on Claimant's initial x-rays, is a slow, progressive process that occurs over a long period of time. Dr. Chabot stated that the diagnostic studies failed to reveal evidence of any acute change in Claimant's spine. He did state, however, that the burning sensation Claimant described at the time of her injury is consistent with a strain injury and that Dr. Hoerner noted some muscle spasms in Claimant's trapezius which is typical for a strain injury.

Dr. Chabot also noted there was evidence of symptom magnification and inconsistencies with Claimant's range of motion of the lumbar spine. For example, Claimant

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was able to remove her shoes and socks while seated in a cross legged position without any difficulty. He noted that Claimant had near normal range of motion in her cervical spine, with only a mild diminished amount of extension, but her range of motion was essentially normal for her age. Claimant exhibited positive Waddell's signs, however, with diffuse discomfort to touch involving her cervical region. In his deposition, Dr. Chabot explained that Waddell's signs can be used to expose individuals who may be exhibiting non-physiological complaints, meaning they do not have a physiological, organic basis and may strongly suggest psychosocial issues and symptom magnification.

Claimant reported that her pain was a level 8 out of 10 to Dr. Chabot, but on physical examination of her, Dr. Chabot did not find any significant tissue changes or objective findings that corroborated her subjective pain complaints. Dr. Chabot did not believe Claimant was a surgical candidate, was at maximum medical improvement, was employable in the open labor market, and could perform lifting up to 20 to 25 pounds with no repetitive overhead lifting. Dr. Chabot related these restrictions entirely to Claimant's degenerative spine. It was his opinion that Claimant had sustained some degree of permanent partial disability associated with her strain injury of October 17, 2005, which he believed was 10% of the cervical spine with 90% of that due to her preexisting degenerative disc disease. He also assessed a 5% permanent partial disability to the low back with 90% of that due to her preexisting degenerative disc disease. He believes that the majority of Claimant's symptoms are related to the preexisting conditions in both her lumbar and cervical spine.

At the request of Claimant's attorney, Dr. John Pro, a psychiatrist, examined Claimant for psychological issues on January 27, 2010, after Dr. Koprivica noted psychological overlay in his second report. Dr. Pro noted Claimant's past psychosocial history included the loss of three brothers, two sisters, and her father in a motor vehicle accident at age 6. He stated that Claimant was also injured in that accident and required a long recovery. In her adult life, Claimant has been divorced and remarried. Dr. Pro diagnosed Claimant with an adjustment disorder with depressed mood and nocturnal anxiety. He noted that Claimant's symptoms did not meet the severity threshold for major depression. He opined that the work incident of October 17, 2005 was the prevailing cause of her adjustment disorder and assigned a 22.5% permanent partial disability rating to the body as a whole for psychological impairment. Dr. Pro noted that Claimant would benefit from the use of anti-depressants, and may benefit from trials of other drugs for persistent pain. Lastly, Dr. Pro concluded that Claimant is permanently and totally disabled when her psychiatric disability is combined with the other orthopedic ratings.

At Employer's request, Dr. Patrick Hughes, a psychiatrist, examined Claimant on May 4, 2010. With respect to Claimant's disability status, Dr. Hughes testified that she has a partially legitimate neurological disability and partially non-bona fide, self-assumed psychological invalidism. Dr. Hughes believes that about 51% of Claimant's pain complaints

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are based on legitimate physical problems, and the rest are exaggerated psychogenic complaints. He pointed out that Dr. Koprivica and Dr. Chabot determined that Claimant exhibited positive Waddell signs and exaggerated physical pain complaints. Dr. Hughes believes the fact that Claimant has young children and a disabled husband contributes primarily to her inability or unwillingness to return to work.

In his deposition, Dr. Hughes stated that Claimant's history of sustaining an injury after she lifted trash and developed neck, shoulder and low back pain do not cause psychological conditions in people according to the American Psychiatric Association. There is no record of any treatment of any kind for psychiatric problems and no diagnosis until Claimant saw Dr. Pro. Dr. Pro opined that if Claimant has psychiatric problems, there are a lot of prior unrelated stressors that have caused or contributed to cause her overall psychiatric condition. Claimant sustained verbal, physical, and sexual abuse as a child which commonly leads to adults reporting physical symptoms that do not exist.

With respect to Dr. Pro's report, Dr. Hughes opined that Dr. Pro's diagnosis of "nocturnal anxiety" is just a symptom and does not exist in the Diagnostic and Statistical Manual of Mental Disorders. Dr. Hughes disagreed with Dr. Pro's disability assessment and stated that he did not believe Claimant had any permanent disability whatsoever from a psychiatric standpoint. He also did not believe Claimant would need any additional medical treatment.

On October 17, 2007, Mr. Wilbur Swearingin, a rehabilitation consultant, evaluated Claimant's employment potential. He reviewed Claimant's treatment records and also the independent medical examination of Dr. Koprivica. Based on Dr. Koprivica's report, Mr. Swearingin did not believe that Ms. Dampier had impairments which would be vocationally disabling sufficient to constitute a hindrance or obstacle to employment prior to October 17, 2005.

Mr. Swearingin determined that Claimant had only worked in unskilled labor positions and stated that this, by definition, means that she does not have any transferable skills. While Claimant has a high school education, she currently demonstrates fourth to sixth grade academic skills and below average vocational aptitude.

Assuming the restrictions of Dr. Hoerner, Mr. Swearingin opined that Claimant would be able to perform most sedentary and light work. Assuming the restrictions of Dr. Koprivica, she would be unable to perform sedentary or light work, and given her history of limited education, pain complaints and history of unskilled labor work, Claimant would be neither employable nor placeable in the competitive labor market thus making her permanently and totally disabled. He stated that an employer in the normal course of business would not likely consider employing

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Claimant due to her pain complaints, poor tolerance of sitting, standing and walking and limited education and history of unskilled labor work.

On April 2, 2010, Mr. Swearingin wrote an addendum to his initial report after receiving and reviewing further medical records from Claimant's personal care physician, the independent medical examination of Dr. Chabot, Dr. Koprivica's addendum report of October 28, 2009 and Ms. Dampier's Social Security Disability Award. None of the additional reports Mr. Swearingin considered changed his initial opinions although he did state that the records reflected a significant psychological component to her disability. Mr. Swearingin opined that considering the reports of Dr. Koprivica and Dr. Pro, along with Claimant's pain complaints, limited education and history of unskilled labor, Claimant is permanently and totally disabled as a result of the October 17, 2005 work injury in isolation. Mr. Swearingin testified live at the hearing. He agreed that it is important to have a complete set of records to properly evaluate a person. Mr. Swearingin did not have the benefit of Dr. Hughes' report or deposition, Dr. Chabot's deposition, or Gary Weimholt's report and deposition. He also did not have chiropractic records available from Claimant's treatment prior to her accident.

Mr. Swearingin testified that a claimant's motivation to return to work affects his or her ability to do so and that Claimant told him she had not attempted to work, applied for or even looked for work since December 30, 2005. Mr. Swearingin testified that Claimant described herself as an average student, but her school transcript showed that she was a pretty poor student. Testing included the PTI Oral Directions test that measures the ability to follow instructions, and she scored very low. In addition, she scored extremely low in the occupational interest test. The Purdue Pegboard test which tests hand eye coordination and dexterity was administered and she scored very low on that test. Her I.Q. of 70 is defined by the DSMV-IV as borderline intellectual functioning. This is what prevents her from vocational education. Such education would not be beneficial because she has a physical inability to learn. Her ability to understand and her memory are moderately impaired. This in and of itself therefore constitutes a hindrance or obstacle to employment or reemployment in the open labor market.

According to Mr. Swearingin at the hearing, Dr. Hoerner's restrictions still allow Claimant to be employed in light and sedentary occupations. Dr. Jeffries and Dr. Chabot provided similar restrictions that would allow her to be employable. Dr. Koprivica's restrictions cause there to be less available jobs, but it is only when considering her education level combined with her physical restrictions that she is unemployable. Substituting Dr. Hoerner's, Dr. Jeffries' or Dr. Chabot's restrictions for Dr. Koprivica's would allow Claimant to be employable, but her psychiatric disabilities, that only Dr. Pro provided, further limit her employability.

Mr. Swearingin testified that the degenerative disc disease in the neck and back predated the accident, but because Claimant was not symptomatic, this did not constitute a hindrance or

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obstacle to employment. He was not aware that Claimant had seen Dr. Wallace just 5-6 months prior to her accident complaining of neck and shoulder pain. She did not tell him that and he did not review those records.

While having to lie down during the day further limits the number of jobs available in the open labor market, Mr. Swearingen confirmed that no doctor has imposed a restriction or limitation requiring Ms. Dampier to lie down during the day, not for her neck, her back or any injury.

Mr. Gary Weimholt examined Claimant at the request of Employer on February 28, 2008. Mr. Weimholt is a vocational rehabilitation consultant who has been practicing primarily in the area of workers' compensation for 25 years.

As part of Claimant's evaluation, Mr. Weimholt reviewed the restrictions placed on Claimant by Dr. Hoerner, Dr. Koprivica, Dr. Chabot and Dr. Jeffries. He does not believe Dr. Hoerner, Dr. Koprivica, Dr. Chabot or Dr. Jeffries' restrictions cause Ms. Dampier to be unemployable. Of note, Mr. Weimholt found it significant that Dr. Koprivica stated that Claimant's back pain is "without clear-cut neurological deficit" which would suggest that Claimant's physical complaints have no actual basis.

After evaluating Claimant, Mr. Weimholt opined that Claimant is capable of light work where no more than twenty pounds is lifted or where standing or walking exceeds a third of her working time. His vocational examination of Claimant revealed that she scored at the eighth grade level for reading and seventh grade level for arithmetic. Mr. Weimholt concluded that Claimant was employable in the open labor market in entry-level positions. Claimant is a younger woman so at her age, her lack of transferable skills would not create a significant hindrance to her employability. In his deposition, Mr. Weimholt discussed how computer training, which is often offered on the job, allows a person of average ability, like Claimant, to perform entry-level jobs like hotel system or data entry. Mr. Weimholt also stated that Claimant would not have to exceed any of even Dr. Koprivica's restrictions working most cashier, fast food or cafeteria jobs.

I observed Claimant closely at the hearing in this case. She was seated for her testimony for close to two hours and did not appear to be uncomfortable. I did not observe anything that would indicate any psychiatric impairment.

It is clear to me that Claimant had significant degenerative disease in her cervical spine prior to the work-related accident of October 17, 2005. It is also clear that Claimant's cervical spine was *not* asymptomatic prior to October 17, 2005, as evidenced by her chiropractic visits and the pogo stick accident and hospital visit of April 7, 2005; nevertheless, it does appear that Claimant was successfully performing her duties as a custodian prior to October 17, 2005. I also

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note that Claimant was released by Dr. Hoerner on December 30, 2005 and has not worked since that date (presumably due to the pain from the October 17, 2005 accident). Claimant waited over nine months before seeking any additional care from her primary care physician, Dr. Michael LeFevre; Claimant saw Dr. LeFevre on January 19, 2006, February 16, 2006, April 13, 2006, August 24, 2006 and September 15, 2006 without any mention of neck or back problems. I also note that when Claimant saw Dr. LeFevre on October 5, 2006, she reported the pain in her upper back as “5”; when Claimant saw Dr. Jeffries on November 13, 2006 she reported her pain as “8”. However, on December 13, 2006, Claimant told Dr. Jeffries that since she has been off work her pain has diminished and her headaches are less frequent.

There is no question that Claimant sustained a neck sprain and low back sprain in the work-related accident of October 17, 2005. What is less clear is whether Claimant sustained any disc injury in the October 17, 2005 accident. Dr. Koprivica appears to place significance on the suggestion of a disc injury on the MRI films, although he also concedes the possibility that any disc injury pre-dated the October 17, 2005 accident. Neither Dr. Jeffries (a former spine surgeon) nor Dr. Chabot (a spine surgeon) recommended surgery for the suggested disc injury, nor have they recommended surgery for Claimant’s degenerative disc disease. Dr. Chabot opined that the MRI did not evidence any acute injury, and that Claimant’s injury from the October 17, 2005 accident was a sprain.

From the evidence, I find that the work-related accident of October 17, 2005 was the prevailing factor in causing Claimant’s neck sprain and low back sprain. I find that Claimant received appropriate treatment for those sprains, and that her condition reached maximum medical improvement on December 30, 2005. There is no credible evidence of any serious disc injury.

Regarding Claimant’s claim that the work-related accident of October 17, 2005 was the prevailing factor in causing a psychiatric disability, I find the evidence supporting such a claim quite unconvincing. Claimant has never sought nor received any psychiatric treatment or counseling since the work-related accident, nor has she taken any medications for depression, anxiety or other psychiatric conditions. Claimant does not mention any psychiatric injury or disability in her claim for compensation. Although Claimant was thoroughly evaluated by Dr. Koprivica on August 19, 2006, it is not until October 2009 that Dr. Koprivica first makes any mention of the possibility of a psychiatric injury or disability. Claimant’s demeanor and testimony at the hearing did not suggest psychiatric problems; the only portion of Claimant’s testimony that might suggest a psychiatric problem concerns “panic attacks”. Claimant testified that she was having panic attacks and took medication therefor for three days; however, Claimant further testified that since she stopped taking tramadol, the panic attacks have ceased. There is simply no credible evidence to support a claim for psychiatric disability. As there is no evidence to support a claim for psychiatric disability, the issues of notice and statute of limitations (regarding the claim for psychiatric disability) are moot.

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Claimant is requesting permanent total disability benefits from Employer. Under section 287.020.7, "total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The test for permanent and total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo.App. E.D. 2007). The primary inquiry is whether an employer can reasonably be expected to hire the claimant, given his present physical condition, and reasonably expect the claimant to successfully perform the work. *Id.*

Claimant's condition reached maximum medical improvement on December 30, 2005. In determining Claimant's claim for permanent total disability benefits, I must consider her physical condition as of December 30, 2005. On that date, Claimant was 43 years old. Claimant's only significant work restriction at that time was a 25 pound lifting restriction. Claimant appeared to be functioning well at that time with her neck and back, as she saw Dr. LeFevre five times between January 19, 2006 and September 15, 2006 with no mention of any neck or back problems. While it is clear to me that Claimant could have successfully competed in the open labor market at that time had she chosen to do so, Claimant's focus at that time was apparently to seek disability benefits. Claimant did receive long-term disability insurance benefits and subsequently qualified for Social Security disability benefits. Claimant has not sought any employment at any time since December 30, 2005; Claimant has chosen instead to stay home and take care of her children and grandchildren and her disabled husband, which she certainly has a right to do. It does appear that Claimant does not wish to return to work; Wilbur Swearingin, the vocational rehabilitation counselor who testified on Claimant's behalf, testified that Claimant's "CAREER OCCUPATIONAL INTERESTS" didn't make sense as Claimant "has no real interest in doing anything". Claimant has appeared to have "settled in" to a life without employment, which, again, she certainly has a right to do.

Despite the fact that Claimant's testing indicates an IQ of 70, Claimant had certainly demonstrated the ability, historically, to obtain and maintain employment. There is certainly no reason to believe that a chronic cervical and lumbar sprain, with a 25 pound lifting restriction, would render Claimant unable to compete in the open labor market.

I find, therefore, that Claimant is not permanently and totally disabled. I find that Claimant has sustained a permanent partial disability of 20% of the body as a whole as a result of her chronic cervical and lumbar sprains. This results in 80 weeks of benefits at the stipulated rate of \$274.22, totaling \$21,937.60.

Claimant is requesting reimbursement for physical therapy bills; these bills were incurred when Claimant was treating with Dr. Jeffries in 2006. No demand for additional medical

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treatment was made by Claimant and thus Claimant clearly exercised her right to seek and obtain medical treatment at her own cost.

As I find that Claimant's condition reached maximum medical improvement on December 30, 2005, the claim for temporary total disability benefits is denied.

Claimant's chronic cervical and lumbar sprain condition reached maximum medical improvement on December 30, 2005. There is no credible evidence that Claimant requires additional medical treatment for this condition.

FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties stipulated, I find the following:

1. The work related accident of October 17, 2005 is the prevailing factor in the cause of Claimant's neck sprain and low back sprain;
2. Claimant received appropriate treatment for the work-related neck sprain and low back sprain, and her condition achieved maximum medical improvement on December 30, 2005;
3. The work related accident of October 17, 2005 is not the prevailing factor in the cause of any disc injury;
4. The work related accident of October 17, 2005 did not cause any psychiatric condition or disability;
5. Claimant does not suffer from any psychiatric condition or disability;
6. The statute of limitations defense regarding the claim for psychiatric condition or disability is moot;
7. The issue as to whether Claimant complied with the notice requirement of Section 287.420 with regard to the claim for psychiatric condition or disability is moot;
8. Claimant is able to compete in the open labor market;
9. Claimant is not permanently and totally disabled;
10. Due to the work related neck sprain and low back sprain sustained by Claimant on October 17, 2005, Claimant has sustained a permanent partial disability of 20% of the body as a whole; this entitles Claimant to 80 weeks of benefits at the stipulated rate of \$274.22, totaling \$21,937.60;
11. Claimant is not in need of additional medical treatment for the neck sprain and low back sprain, and therefore no award of future medical benefits is justified.

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ORDER

Employer is ordered to pay Claimant the sum of \$21,937.60 for permanent partial disability benefits.

Claimant's attorney, Roger Brown, is allowed 25% of all benefits awarded herein as and for necessary attorney's fees, and the amount of such fees shall constitute a lien on those benefits.

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

Made by /s/Robert J. Dierkes – 4-10-2013

Robert J. Dierkes

Administrative Law Judge

Division of Workers' Compensation