

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

Injury No.: 07-124868

Employee: Melvin Doss  
Employer: St. Louis Public Schools  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

**Introduction**

The issues stipulated in dispute at the hearing were: (1) whether employee's accident was the cause of a medical condition for which employee seeks compensation; (2) the nature and extent of employee's disability; and (3) liability of the Second Injury Fund for permanent partial or permanent total disability benefits.

The administrative law judge found: (1) employee failed to meet her burden of proving the accident is the prevailing factor in causing both the resulting medical condition and disability; (2) employee has no permanent partial disability due to the accident; and (3) the issue of Second Injury Fund liability is moot.

Employee filed an Application for Review alleging the administrative law judge erred in not finding her testimony and that of her experts to be credible.

For the reasons set forth herein, we reverse the award of the administrative law judge.

**Findings of Fact**

*Preexisting conditions*

Employee suffers from diabetes, hyperlipidemia, and gastroesophageal reflux disease. Between 1998 and 2004, employee was unable to work because of psychiatric illness; she received Social Security disability benefits during this time period.

In May 2004 employee sought treatment for her low back. In July 2004, employee underwent a laminectomy of the lumbar spine at L4-5 along with an anterior fusion and posterior fixation with bone graft and hardware. In October 2004, employee fell down some stairs at work, injuring her right knee and low back. Employee settled a workers' compensation claim for 7.5% permanent partial disability of the body as a whole referable to the back and 6% of the right knee. Employee had ongoing back complaints and in May 2006 underwent another laminectomy and fusion surgery, this time at L3-4.

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Dr. Poetz opined that, as of the date of the primary injury, employee suffered from the following preexisting permanent partially disabling conditions: 35% of the body as a whole referable to the 2004 low back surgery, 20% of the body as a whole referable to the October 2004 injury, and 15% of the right knee. We credit Dr. Poetz on this issue and adopt these ratings as our own.

Primary injury

On December 21, 2007, employee, a teacher's aide, sustained an accident at work when she slipped and fell in a school hallway. Employee refused treatment because she felt okay after the fall, but two days later she went to Christian Hospital with complaints of soreness in her lower back. Doctors found a normal musculoskeletal exam, found employee's weight bearing, gait, and posture to be normal, and diagnosed low back, chest, and left shoulder pain, prescribed Ultram, and released employee with a 25-pound lifting restriction.

Employer sent employee to Concentra on January 2, 2008, where doctors diagnosed a contusion of the lumbar region and a lumbar strain, with no anticipation of permanent disability. Doctors prescribed Tylenol and Cyclobenzaprine, placed employee on modified duty of no lifting over ten pounds, and sent employee to physical therapy. Conservative treatment was ineffective in relieving employee's ongoing low back symptoms, so doctors sent employee to a physiatrist for pain management. Employee continues to see pain management doctors for epidural steroid injections and prescriptions for pain medicine.

Before the December 2007 injury, employee could skate, bowl, and take her grandchildren to the zoo or movies. Employee can no longer do any of these activities following the December 2007 injury. Employee is now unable to walk more than ten feet before she feels pain.

Employer presents the expert medical testimony of Dr. Doll, who opined the December 2007 fall was not the prevailing factor causing employee's current condition. Dr. Doll did not review any medical records from Christian Hospital, or from Dr. Hoffman (who provided the bulk of employee's preexisting low back treatment), or any medical records related to employee's previous surgeries for the low back, and did not even have certain of the Concentra records. Specifically, Dr. Doll did not have the initial note from January 2, 2008, when the Concentra doctors diagnosed lumbar strain/contusion. On cross-examination, Dr. Doll testified he would be happy to review additional medical records if someone would provide them to him, but nevertheless insisted he had enough background to make his determination to a reasonable degree of medical certainty.

We are not persuaded. Employee has an extensive and complicated medical history with regard to her low back, and now claims a new injury to the same part of her body. That Dr. Doll believes he can render a medical causation opinion without seeing any of the records from employee's preexisting back surgeries, and without even the benefit of the initial treatment notes from Christian Hospital and Concentra, renders his testimony, in our view, completely unbelievable.

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Employee presents the expert medical testimony of Dr. Poetz, who opined the December 2007 fall was the prevailing factor causing employee to sustain the following permanent partially disabling conditions: 15% of the low back, 15% of the left knee, and 15% of the left shoulder. Dr. Poetz opined that employee is permanently and totally disabled owing to the combination of her primary injury and preexisting conditions.

Employee presents the expert vocational testimony of James England. Mr. England opined employee cannot successfully compete for employment nor sustain it in the long run, and that her lack of employability is due to her preexisting problems involving her back combined with her current back problems and emotional difficulties. Mr. England explained that employee's presentation, which included walking with a cane, appearing tired and depressed, having almost no teeth, and having difficulty getting up out of her chair after sitting for only 15-20 minutes will be factors a potential employer would consider and would further hurt employee's chances at competing for jobs.

We credit Dr. Poetz and Mr. England. We find that employee suffered a lumbar strain and permanent disability in the December 2007 fall. We find that employee reached maximum medical improvement on April 11, 2008, the day Dr. Poetz saw employee and reached findings regarding permanent partial disability. We find employee will be unable to compete for jobs or sustain them in the long run owing to her preexisting and current back complaints.

### **Conclusions of Law**

#### Medical causation

Section 287.020.3(1) RSMo sets forth the standard for medical causation applicable to this claim and provides, as follows:

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

We conclude that employee has met her burden on the issue of medical causation. We have credited Dr. Poetz's testimony that the December 2007 accident caused employee to suffer a lumbar strain and some permanent partial disability. Consequently, we conclude the December 2007 accident was the prevailing factor causing employee to sustain a lumbar strain/contusion and a 10% permanent partial disability of the body as a whole referable to the low back. Employer is liable for permanent partial disability benefits.

#### Second Injury Fund liability

Section 287.220 RSMo creates the Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that she suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to

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obtaining reemployment if the employee becomes unemployed ...” *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a “hindrance or obstacle to employment”:

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

*Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

We have credited Dr. Poetz’s testimony that employee’s preexisting low back and right knee conditions were permanently and partially disabling as of the date of the primary low back injury. When we apply the foregoing test, we are convinced that employee’s preexisting low back and right knee conditions had the potential to combine with subsequent work injuries to cause greater disability than in the absence of these conditions. Accordingly, we conclude each of these conditions were serious enough to constitute hindrances or obstacles to employment for purposes of § 287.220.1 RSMo.

For the Fund to be liable for permanent total disability benefits, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with the prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have determined that employee sustained a 10% permanent partial disability of the body as a whole referable to the low back. It follows that the primary injury, considered in isolation, does not render employee permanently and totally disabled. We have found, based on Mr. England’s credible testimony, that employee is unable to compete in the open labor market owing to her preexisting disabling conditions in combination with her complaints referable to the primary injury.

We conclude employee met her burden of establishing Second Injury Fund liability for permanent total disability benefits under § 287.220.1. We conclude employee is entitled to, and the Second Injury Fund is obligated to pay, permanent total disability benefits. We have found employee reached maximum medical improvement on April 11, 2008. Because the rate for permanent partial and permanent total disability benefits is the same, and because employer’s liability for the primary injury amounts to 40 weeks of permanent partial disability benefits, we conclude the Second Injury Fund is liable to pay permanent total disability benefits beginning January 16, 2009, at the stipulated rate of \$224.36 per week.

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**Conclusion**

We reverse the award of the administrative law judge. Employer is liable for permanent partial disability benefits consistent with our determination that employee sustained a 10% permanent partial disability of the body as a whole referable to the lumbar spine owing to the primary injury.

The Second Injury Fund is liable to employee for permanent total disability benefits in the amount of \$224.36 per week beginning January 16, 2009. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued November 10, 2011, is attached solely for reference.

For necessary legal services rendered to employee, Scott R. Pecher, Attorney at Law, is allowed a fee of 25% of the compensation awarded, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 30<sup>th</sup> day of August 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

## AWARD

Employee:	Melvin Doss	Injury No.:	07-124868
Dependents:	N/A		Before the
Employer:	Saint Louis Public Schools		<b>Division of Workers'</b>
Additional Party:	Second Injury Fund		<b>Compensation</b>
Insurer:	Self-insured		Department of Labor and Industrial
Hearing Date:	August 8, 2011		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	KOB:dwp

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: December 21, 2007
5. State location where accident occurred or occupational disease was contracted: Saint Louis City
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 slipped on a shiny object on a marble floor and fell.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Alleged back, knee(s), shoulder
14. Nature and extent of any permanent disability: None.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$2,135.63

Issued by DIVISION OF WORKERS' COMPENSATION

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$336.64
- 19. Weekly compensation rate: \$224.36/\$224.36
- 20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

TOTAL: \$0.00

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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

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

Employee:	Melvin Doss	Injury No.: 07-124868
Dependents:	N/A	Before the
Employer:	Saint Louis Public Schools	<b>Division of Workers'</b>
Additional Party: Second Injury Fund		<b>Compensation</b>
Insurer:	Self-insured	Department of Labor and Industrial
Hearing Date:	August 8, 2011	Relations of Missouri
		Jefferson City, Missouri
		Checked by: KOB:dwp

### **PRELIMINARIES**

The matter of Melvin Doss ("Claimant") proceeded to hearing to determine whether Claimant is entitled to benefits under the Missouri Workers' Compensation Act. Attorney Scott Pecher represented Claimant. Attorney Robert Hart represented Saint Louis City Public Schools ("Employer"), which is self insured. Assistant Attorney General Da-Niel Cunningham represented the Second Injury Fund.

The parties stipulated that on or about December 21, 2007, Claimant sustained an accidental injury arising out of and in the course of employment when she slipped and fell in a school hallway. The parties agreed Claimant was an employee of Employer, venue was proper in the City of Saint Louis, Employer received proper notice, and Claimant filed her claim within the time required by law. At the relevant time, Claimant earned an average weekly wage of \$336.64, which results in a rate of compensation of \$224.36 for both temporary total disability benefits and permanent partial disability benefits. Employer paid no temporary total disability benefits, but did pay medical benefits totaling \$2,135.63.

The issues to be determined are: 1) Is the accident the cause of the medical condition for which Claimant seeks compensation; 2) what is the nature and extent of Claimant's permanent partial disability and/or permanent total disability; and 3) What, if any, is the liability of the Second Injury Fund? Claimant seeks permanent total disability compensation.

### **FINDINGS OF FACT**

Claimant is a 63-year-old woman who lost her husband at age 21 and raised three children on her own. Claimant graduated from Sumner High School, and attended the University of Missouri-Saint Louis to earn a Bachelors degree in Sociology. Claimant worked as a police dispatcher, attempted to become a police officer but could not pass the firearms training, and worked briefly as a welfare caseworker. From 1978 through 1998, Claimant worked as a substitute teacher. In October 2004, Claimant became an employee of Saint Louis Public Schools. Her job duties were to teach reading and writing, grade papers, and otherwise work with children with autism. When her son passed in 2005, she became the primary care giver of her two granddaughters, who are now 9 and 13 years old.

Claimant's general medical history is significant for several metabolic disorders such as diabetes, hyperlipidemia, and hypertension. There was no evidence presented of how these conditions affected her life and work ability. Claimant also has a history of treatment for a psychological condition that was not developed. She testified she used to take medication for "voices," and medical records refer to at least one psychiatric hospitalization. From 1998 to 2004, Claimant was on disability for "mental therapy," and did not work.

Claimant's extensive history of treatment for her back began in May 2004, when she had initial contact with Dr. William F. Hoffman, who performed an L4-5 decompression and posterior lateral fusion with bone graft and hardware in July of 2004. None of the records leading up to and including this hospitalization was included in the record, but in subsequent records, Dr. Hoffman described his initial treatment, and x-rays showed the hardware. Claimant testified she stopped driving due to her back in 2004.

On October 25, 2004, her first day of employment at Clayton Elementary, Claimant fell down the stairs. She sustained a lumbar strain and knee contusion.<sup>1</sup> Treatment consisted of physical therapy, medication, and rest, and was carried out in emergency rooms, at Concentra Health, with Dr. Hoffman, and by chiropractors. According to Dr. Poetz, Claimant's IME doctor, she also had an epidural steroid injection from Dr. Polinsky in December 2004. Dr. Poetz diagnosed lumbar strain with exacerbation of prior lumbar fusion and right knee contusion regarding the October 25, 2004 work fall. He found limited right knee flexion, lumbar flexion limited by pain at 30 degrees, positive provocative tests for back pain, and absent or feeble reflexes. The 2004 workers' compensation claim settled for 7 ½% of the body and 6% of the right knee.

Claimant developed additional back complaints in 2005 and 2006. On July 28, 2005, Dr. Hoffman noted that Claimant had progressive problems with pain radiating around the front of her abdomen and in her buttocks but not going down her legs. An MRI showed a mild increase in the disc bulge at L3-4 and questionable streaking in the Cauda Equina. Dr. Hoffman noted, and a myelogram of the lumbar spine revealed, a severe extradural defect L3-4 with almost complete block at that level. Dr. Hoffman related this instability to her previous surgery and recommended Claimant undergo a fusion at the L3-4 level. As of March 30, 2006, Dr. Hoffman noted, "It is my feeling that this lady is disabled at this point in time from any employment and may be disabled permanently."

On May 5, 2006, Claimant underwent removal of instrumentation L4-5, bilateral wide laminectomy L3, transforaminal lumbar interbody fusion at L3-4 with cages, infused bone morphogenic protein, posterolateral fusion with allograft bone and polyaxial compression pedicle screw and rods by Dr. Hoffman at Christian Hospital. An x-ray in July 26 revealed satisfactory results, and her pain was reduced. On July 24, 2006, Dr. Hoffman noted Claimant would return to work on September 11, 2006, and follow up with another x-ray in six months. When Claimant returned to work, she was working one-on-one in a seated position.

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<sup>1</sup> There is contradictory evidence as to which knee was injured in the 2004 fall. The Christian Hospital records contain references to an abrasion of the left knee and bilateral knee symptoms, the Pro Rehab records indicate the left knee is better but the right knee is bothering her. The Employer ultimately paid 6% PPD of the right knee.

On the alleged date of injury in the present case, December 21, 2007, Claimant was on her way to the school office when she slipped on a shiny object on the marble floor and fell, hitting her head and injuring her back and knee. Teacher Eric Trice helped her, and Claimant reported the fall to the principal. However, she refused treatment that day because, according to later records, she felt fine.

The first treatment Claimant had following the fall on December 21<sup>st</sup> consisted of a December 23<sup>rd</sup> visit to Christian Hospital Northeast, where she complained of soreness in the lower back and shoulders, as well as the chest and knees (although she denied contusion to those areas). The musculoskeletal exam was completely unremarkable. She was given Ultram for pain and released. Claimant visited Concentra three times. On January 2, 2007, Claimant complained of pain in the low back and knees. She had some pain and limitation with lumbar motion, but there were no signs of injury to the shoulder or knees. She was scheduled for therapy and told to modify her lifting, pushing, pulling and bending. On January 7, 2008, Claimant had not attended her physical therapy, but the doctor did not anticipate any permanent sequelae from the injury. On February 28, 2008, Dr. Patel noted Claimant had not been working because she chose not to work. She had only attended six physical therapy visits and taken medication, but reported no improvement. The knees continued to be unremarkable on exam, and the back tender with range of motion limited by pain. Concentra released Claimant from care with a referral to a physiatrist. She had no further treatment related to the December 2007 fall, and she did not return to work.

On March 5, 2008, Claimant drafted a letter of resignation expressing regret for leaving her employment with Employer. She spoke fondly of her job and coworkers. The only reason she articulated for her resignation was her obligation to care for her granddaughters, aged four and seven. Claimant ended with the hope she could someday return to her employment.

When she presented to Dr. Doll for an IME on March 10, 2008, Claimant's subjective complaints were consistent. On exam, she had tenderness, and moderately limited lumbar range of motion in all planes secondary to pain. The lower extremities had nondermatomal, decreased sensation and diffuse collapsing weakness, left greater than right. Dr. Doll found her to be at maximum medical improvement ("MMI") for the 2007 fall, and suggested she follow up with her own physicians for non-work related conditions.

Claimant described her current limitations. When Claimant cares for her granddaughters, who have been her responsibility since mid- 2006, she watches television and sits with them to do homework. She can no longer take them anywhere. The children make her breakfast. She reads the Bible and poetry, but she does not do any chores. Claimant testified she has used a walker for about two years, and that before 2007, she would skate, bowl, and take the children to the zoo or movies. Now, Claimant says she can only walk 10 feet before she feels pain. Claimant currently takes a number of medications, including Percocet for back pain, blood pressure and anxiety medicine, Ambien to help her sleep, muscle relaxants, and insulin for diabetes. Claimant also used to take medication for voices, but claims she no longer hears the voices.

Claimant gave conflicting testimony on her use of the walker. She said she used the walker all the time, but admits she used the cane when she saw Mr. England. She testified she had significant restrictions following her 2006 surgery, including no walking more than 25 feet, no bending, and no steps. Claimant had epidural injections after the 2006 incident. Claimant

also testified that she had trouble standing straight after the 2007 fall, but in the deposition, she testified it was after the 2006 injury that she became unable to stand straight.

*Opinion Evidence*

**Dr. James Doll** examined Claimant at the request of Employer on March 10, 2008. At his exam, a few weeks after the accident, there was no evidence of strain or muscle spasm. Based on his examination, his review of the medical records and radiographic findings from Concentra Medical Center and his interview with the Claimant, Dr. Doll made the following diagnoses: 1) Diffuse low back pain, status post strain; 2) Left greater than right lower extremity pain and paresthesias; and 3) History of lumbar fusion in 2004 and 2006 with L3 through L5 vertebrae fused and hardware evident at L3-4. Dr. Doll's opinion within a reasonable degree of medical certainty is that Claimant's work injury of December 21, 2007 was not the prevailing factor in the medical causation of her current condition. Dr. Doll concluded Claimant had not sustained any permanent disability attributable to her work injury.

**Dr. Robert Poetz** examined Claimant on April 11, 2008, and reviewed the relevant medical records. Objective findings on exam, included decreased left shoulder motion and decreased bilateral knee flexion. Dr. Poetz also noted a five degree lack of extension on the right knee and a ten degree lack of extension on the left knee. Dr. Poetz further notes thoracic rotoscoliosis, flattening of the lumbar lordosis and a 21 cm. vertical lumbar scar.

Dr. Poetz diagnosed and provided permanent partial disability ("PPD") ratings as follows:

1. Status post lumbar fusion L5-S1, 7/04 (35% PPD);
2. Lumbar strain with exacerbation of prior lumbar fusion, 10/25/04 (20% PPD);
3. Status post removal of the instrumentation at L4-5, bilateral wide laminectomy at L3, and transforaminal lumbar interbody fusion at L3-4 from the left side due to instability following prior laminectomy and fusion, 2006 (20% PPD);
4. Right knee contusion, 10/25/04 (15% PPD);
5. Metabolic syndrome (diabetes, hypertension, hyperlipidemia)(30% PPD);
6. Lumbar strain with exacerbation of prior lumbar fusions, *primary injury of 12/21/07* (15% PPD);
7. Left knee sprain, *primary injury of 12/21/07* (15% PPD); and
8. Left shoulder sprain, *primary injury of 12/21/07* (15% PPD).

Dr. Poetz testified that Claimant is permanently and totally disabled and unemployable in the open labor market as a result of the combination of her December 21, 2007 work related injuries and her pre-existing conditions.

**James England**, a well-recognized vocational expert, examined Claimant on October 13, 2009 at the request of Claimant's counsel. He concluded that "considering this woman's presentation along with her emotional difficulties, her walking with a cane, coming across as tired, depressed, etc., I do not believe that she is going to successfully compete for employment, nor would she be able to sustain it in the long run." Mr. England believes her lack of employability is due to a combination of pre-existing problems involving her back as well as her emotional situation combined with her current back problems and emotional difficulties.

## **RULINGS OF LAW**

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

I. The December 21, 2007 accident is not the medical cause of Claimant's disability.

In every workers' compensation case, the claimant has the burden of proof on all essential elements of the claim, including medical causation between the accident and the injury of which the employee complains. *Groce v Pyle*, 315 S.W. 2d 482 (Mo. App. W.D. 1958); *Goleman v MCI Transporters*, 844 S.W. 2d 463 (Mo. App. W.D. 1992). Pursuant to §287.020.3 RSMo, an injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

In the present case, Claimant's primary work accident of December 21, 2007 is not the primary factor in causing her medical condition and disability. While there is no doubt Claimant fell at work, she was feeling fine initially, and when she eventually did seek treatment, it was for only four medical visits and some therapy. The objective evidence of injury was either nonexistent, or similar to findings made prior to the 2007 fall. The impact of the accident is miniscule compared to the serious preexisting disability Claimant had from two prior fusion surgeries and other falls.

On the issue of causation, I find the opinion of Dr. Doll to be more credible and convincing than the competing opinion of Dr. Poetz. Dr. Doll examined Claimant less than three months after the accident, and for no objective evidence of strain, no muscle spasm, and no radiological evidence of injury. He appropriately considered the lack of evidence regarding any significant change of condition as compared to her pre-accident status. Dr. Poetz made findings of disability to the shoulder and knee despite a total lack of medical treatment to those body parts. To a large extent, Dr. Poetz bases his findings on the Claimant's self-reported complaints, which I find unreliable. Claimant exhibited difficulty distinguishing between her pre- and post-2007 symptoms, and I find her to be an unreliable historian on this critical issue.

Claimant has not met her burden of proving her December 21, 2007 accident is the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

II. Claimant has no permanent partial disability due to the December 21, 2007 accident.

Under the Missouri Workers' Compensation Act, the claimant who alleges permanent disability must adduce medical evidence that demonstrates with reasonable certainty that the claimed disability is permanent. *Cochran v. Industrial Fuels & Resources, Inc.*, 995 S.W.2d 489, 497 (Mo. App. S.D. 1999). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). "[The factfinder] has discretion as to the amount of the award and how it is to be calculated... It is the duty of the [factfinder] to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability

suffered." *Rana v. Landstar TLC*, 46 S.W.3d 614, 626 (Mo.App. W.D. 2001), citing *Sapienza v. Deaconess Hosp.*, 738 S.W.2d 149, 151 (Mo.App.1987).

Claimant has no permanent disability because of the December 21, 2007 accident. On this issue, I find the opinion of Dr. Doll credible. This is consistent with the finding of the Concentra doctor who did not anticipate any permanent sequelae from the injury, the minimal treatment required, and the vast degree of preexisting disability. Claimant's prior disability was so significant Dr. Hoffman noted in 2006, "It is my feeling that this lady ... may be disabled permanently." Specifically, I find there is no additional permanent disability to the low back, and that any permanent lumbar disability preexisted and is unrelated to the primary injury. As to the knees and shoulders, there is no credible evidence of injury. Claimant's history is not supported by the treatment records, and her complaints do not support a finding of disability.

III. The issues of Permanent Total Disability and Liability of the Second Injury Fund are moot.

Claimant seeks to recover permanent total disability from the Second Injury Fund. Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent total disability benefits, employee 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. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

Claimant has failed to meet her burden on the issue of liability of the Second Injury Fund. She has not suffered from a permanent partial disability as a result of the last compensable injury. The issues of total disability and Second Injury Fund liability are moot.

**CONCLUSION**

Claimant has not met her burden of proof on causation and permanent partial disability. The claims against Employer and the Second Injury Fund are denied.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Karla Ogrodnik Boresi  
Administrative Law Judge  
Division of Workers' Compensation