

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

Injury No.: 04-148856

Employee: Louetta K. Elwell
Employer: Stahl Specialty Company
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. 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 affirms the award and decision of the administrative law judge dated February 10, 2011, with this supplemental opinion. The Commission adopts the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the supplemental opinion set forth below.

Introduction

The issues stipulated in dispute at the hearing were: (1) accident; (2) occupational disease; (3) notice; (4) whether employee's injuries arose out of and in the course of employment; (5) medical causation; (6) past medical expenses; (7) future medical care; (8) temporary total disability; (9) nature and extent of permanent disability; (10) liability of the Second Injury Fund; and (11) whether employee's claim for compensation was timely filed.

The administrative law judge made the following findings: (1) employee met her burden of proof as to future medical care; (2) employee sustained a 12.5% permanent partial disability of the body as a whole as a result of her work injury; (3) employee's workplace exposures are a substantial factor resulting in her pulmonary injury; (4) the sum of \$4,559.83 is reasonable to treat employee for her work-related pulmonary disease and employer must pay this sum to the employee, her attorney, and Healthnet; (5) employee is not entitled to temporary total disability benefits; and (6) the Second Injury Fund is liable for 24.03 weeks of permanent partial disability benefits.

Employer submitted a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in finding employee permanently and partially disabled and ignoring the testimony of Dr. Kerby and finding work a substantial factor in employee's condition; (2) in finding employee's date of injury was June 1, 2004, rather than a later date that would result in application of the 2005 amendments to this claim; and (3) in awarding medical benefits because employee's condition didn't arise out of her employment and work was not a prevailing or substantial factor in employee's condition.

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The Second Injury Fund also submitted a timely Application for Review with the Commission joining employer's arguments that the administrative law judge erred in finding permanent partial disability and in finding a date of injury before August 28, 2005.

Discussion

Date of injury for employee's occupational disease

The appropriate date of injury of employee's occupational disease is a determinative issue in this matter, as it controls whether we apply the 2005 amendments to the Missouri Workers' Compensation Law to the facts of this case, see *Tillman v. Cam's Trucking, Inc.*, 20 S.W.3d 579, 585-86 (Mo. App. 2000), and, by extension, whether employee may recover any benefits for her pulmonary condition, as it is apparent from the record that employee's expert medical evidence does not meet the "prevailing factor" standard for medical causation applicable after August 28, 2005, the effective date of the amendments. It appears that the administrative law judge found June 1, 2004, to be the date of injury, but did not specifically treat the issue in his award or provide any analysis. Accordingly, we write this supplemental opinion to explain why we believe that June 1, 2004, is the correct date of injury for this occupational disease claim.

Assigning a "date of injury" to an occupational disease that develops gradually over time can be a counterintuitive task, and the courts have acknowledged this difficulty. See *Miller v. U.S. Airways Group, Inc.*, 316 S.W.3d 462, 468 (Mo. App. 2010) (Smart, J., concurring) (pointing out that "[u]nlike an injury due to accident, an occupational disease develops over a period of time and is not caused by an event on a single day"). Employer argues the date of injury is the same date that the statute of limitations begins to run under § 287.063.3 RSMo, or whenever it becomes reasonably discoverable and apparent to an employee that they have suffered a work injury. For purposes of this case, employer suggests this occurred on November 1, 2006, the date of a treatment note from Dr. Bower indicating the doctor's suspicion that there was a connection between employee's work environment and her pulmonary disease. Employer argues that *McGhee v. W.R. Grace & Co.*, 312 S.W.3d 447 (Mo. App. 2010) supports such an analysis. We believe employer misreads *McGhee*.

A review of the relevant case law reveals that the courts have consistently linked the "date of injury" in occupational disease cases to the date the disease first becomes "compensable," which typically has been interpreted to mean the date an employee first experiences some disability from the disease. See *Garrone v. Treasurer of State*, 157 S.W.3d 237, 242 (Mo. App. 2004) (holding that an employee's carpal tunnel syndrome did not become a compensable injury until the date he missed work for surgery, as he worked without restriction up until that date), and *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755, 759 (Mo. App. 1997) (noting that "Missouri courts have interpreted section 287.063 to provide that an employee with an occupational disease is 'injured' ... when the disease causes a 'compensable injury'"). *McGhee* is consistent with this trend. Although the *McGhee* court looked at the date of an employee's diagnosis of asbestosis (rather than the date of last exposure) to determine what compensation rates to apply, the actual holding in *McGhee* states that "the date of injury for purposes of determining which compensation rate cap should be applied under section 287.200 is the date on which the injury becomes 'compensable' -- the date on

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which the claimant becomes disabled.” *McGhee*, 312 S.W.3d at 450. Clearly, the *McGhee* court equated a diagnosis of asbestosis with the employee’s experiencing some disability from that condition: “[i]f Claimant’s occupational disease ‘injury’ for purposes of section 287.200 ‘occurred’ at the time he became disabled and unable to work, the applicable date of injury was in 2001, when he was diagnosed as having asbestosis ...” *Id.* at 455 (emphasis added). Notably, the *McGhee* court did not discuss whether the 2001 diagnosis of asbestosis involved a doctor’s belief that there was a work connection.

Applying the principles espoused in the foregoing cases, we believe the appropriate date of injury for this claim is June 1, 2004, when employee first missed work (and thus experienced disability) as a result of her pulmonary condition. For these reasons we adopt the finding of the administrative law judge that the date of injury is June 1, 2004. As a result, the 2005 amendments are not applicable to this claim.

Unauthorized past medical treatment

At oral arguments in this matter, employer raised the contention that employee is not entitled to her past medical expenses because employer did not authorize that treatment. We disagree.

[I]f an employee seeks necessary medical treatment for a work-related condition without knowledge at the time of that treatment that the condition was work related and the employer is not prejudiced by such treatment, then a liberal construction of 287.140 requires the employer to reimburse the employee for such medical treatment under section 287.140.1 even though the employer did not have the opportunity to select the treatment providers as granted by section 287.140.10.

Meyers v. Wildcat, Inc., 258 S.W.3d 77, 82 (Mo. App. 2008).

Here, the employee’s occupational disease is a pulmonary condition that developed over time, the nature and symptoms of which were not immediately manifest to her. Employee was not aware that there might be a work connection behind her pulmonary issues until November 2006, when Dr. Bower suggested it. It follows that she could not have had the requisite “desire” to select her own physicians under § 287.140.1 RSMo (and thereby have voluntarily waived her right to medical expenses), because she was unaware that she had a workers’ compensation claim for her pulmonary disease at the time she sought the treatment in question. See *Meyers* at 80: “A desire to choose one’s own medical provider can only arise when an employee has knowledge of the existence of a work-related injury needing medical treatment and can, thus, voluntarily elect to forego the employer’s obligation to provide medical treatment.”

Given these circumstances, and the binding precedent of *Meyers*, we are not persuaded by employer’s arguments regarding unauthorized treatment and we affirm the award of the administrative law judge that employee is entitled to her past medical expenses.

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Conclusion

The Commission supplements the findings of the administrative law judge as to the appropriate date of injury referable to employee's occupational disease and as to the award of past medical expenses.

The award and decision of Administrative Law Judge Mark S. Siedlik issued February 10, 2011, as supplemented herein, is attached, affirmed, and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award and decision herein.

We approve and affirm 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 15th day of November 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

CONCURRING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Louetta K. Elwell

CONCURRING OPINION

I write separately to disclose the fact that I did not participate in the September 28, 2011, oral argument in this matter. I have reviewed the evidence, read the briefs of the parties, and considered the whole record. I concur with the decision of the majority of the Commission.

Curtis E. Chick, Jr., Member

AWARD

Employee: Louetta K. Elwell Injury No: 04-148856
Dependents: N/A
Employer: Stahl Specialty Company
Additional Party: Second Injury Fund
Insurer: Self
Hearing Date: November 9, 2010
Briefs Filed: December 20, 2010 Checked by: MSS/lh

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: June 1, 2004
5. State location where accident occurred or occupational disease was contracted: Kingsville, Johnson 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: Employee was repeatedly exposed to aluminum dusts, machine oils, and other workplace chemicals and compounds, which were a significant factor in causing injury and disability to her pulmonary system.

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: Lungs (pulmonary system)
14. Nature and extent of any permanent disability: 12.5% permanent partial disability to the Body as a whole, referable to the pulmonary system.
15. Compensation paid to date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: None (furnished by group health insurer.)
17. Value necessary medical aid not furnished by employer/insurer? \$4,559.83
18. Employee's average weekly wages: \$502.40
19. Weekly compensation rate: \$344.93
20. Method wages computation: Stipulation of the Parties
21. Amount of compensation payable:

Medical Expenses

Medical Already Incurred	\$4,559.83
Less credit for expenses already paid.....	\$0.00
Total Medical Owing	\$4,559.83

Temporary Disability

.....

Less credit for benefits already paid	
Total TTD Owing	\$ none

Permanent Partial Disability

(12.5% x 400 weeks) 50 x \$344.93/week.....\$17,246.50

Total Award as to Employer-Insurer:\$21,806.33

22. Second Injury Fund liability:
24.03 weeks of compensation, at \$344.93/week.....\$8,288.67

TOTAL:\$30,095.00

23. Future requirements awarded: Employee is to be provided such medical care and attention as may reasonably be required in order to cure or give her relief from the effects of her work-related injuries.

Said payments to begin as of date of this award 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 twenty-five percent (25%) in favor of John B. Boyd, of Boyd & Kenter, PC, for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Louetta K. Elwell Injury No: 04-148856
Dependents: N/A
Employer: Stahl Specialty Company
Additional Party: State Treasurer, Custodian, Second Injury Fund
Insurer: Self
Hearing Date: November 9, 2010
Briefs Filed: December 20, 2010 Checked by: MSS/lh

On November 9, 2010, the Employee, Employer and State Treasurer, as custodian of the Second Injury Fund, appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, Ms. Louetta K. Elwell, appeared in person and with her counsel, Mr. John B. Boyd. The Employer, Stahl Specialty Company, appeared through its counsel, Mr. Joseph Ebbert. The Second Injury Fund appeared through its counsel, Ms. Kimberly Fournier, Assistant Attorney General. Two claims were tried simultaneously, but separate awards will be issued. For the purpose of clarity, this Award will recite only the evidence relevant to the June 1, 2004 claim.

The primary issue the parties raised for the 2004 claim concerned whether or not Employee's pulmonary disease was work related, and if so, what was the corresponding permanent partial and/or permanent total disability arising either from this claim, or, arising so as to create Second Injury Fund responsibility. For the reasons noted below, I find that Employee sustained a compensable injury arising from workplace exposures on June 1, 2004, and that the disability arising directly from that claim is 12.5% to the Body as a Whole. Because of substantial pre-existing disability, when combined with the disability, attributable to this disability, the Employee is entitled to permanent partial disability compensation from the Second Injury Fund.

STIPULATIONS

The parties stipulated that:

1. On or about June 1, 2004 ("the injury date"), Stahl Specialty Company ("Employer") was an employer operating subject to Missouri's Workers' Compensation law with its liability fully insured by authority to self-insure;

2. Louetta K. Elwell ("Employee") was its employee working subject to the Missouri Workers' Compensation law in Kingsville, Johnson County, Missouri;
3. The average weekly was \$502.40, which resulted in a compensation rate of \$334.93 per week being applicable.
4. Employee timely filed her Claim for Compensation.
5. No temporary-total disability or medical care was furnished by Employer.

ISSUES

The parties presented the following issues to be determined:

- A. Whether Employee sustained an accident, series of accidents, or occupational disease arising out of and in the course of her employment?
- B. Whether Employee sustained any temporary-total disability or any permanent disability?
- C. Whether Employee notified Employer of her injury?
- D. Whether Employee's work was a substantial factor in causing an injury and disability?
- E. Whether Employer was responsible for past and will be responsible for future medical aid?
- F. Whether the Employee is entitled to an award against the Second Injury Fund for permanent partial or permanent total disability?

FINDINGS FACT & RULINGS OF LAW

Employee testified on her own behalf, and presented a lay witness from a former co-worker, Mike Flores. She presented the following exhibits, all of which were admitted into evidence without objection:

- Exhibit A – Deposition of P. Brent Koprivica, MD, of April 9, 2010 (Containing medical report, *Curriculum Vitae*, and medical records of treatment.)
- Exhibit B – Deposition of Terry Cordray, Vocational Expert, of April 20, 2010 (Containing narrative report and *Curriculum Vitae*.)
- Exhibit C – Deposition of Theresa Roscher, LPN, of August 6, 2010 (Containing various records from the Employer)
- Exhibit D – Medicaid lien of November 3, 2010
- Exhibit E – Billing from Dr. Blatt

Employer called Theresa Roscher as its sole witness, and presented the following exhibits, all of which were admitted into evidence without objection except for Exhibit 3, upon which I withheld ruling until the award, with the consent of the parties. The objections to Exhibit 3 are over-ruled, and such exhibit is admitted.

- Exhibit 1 - Deposition of Gerald Kerby, MD
- Exhibit 2 - Deposition of David Clymer, MD
- Exhibit 3 - Disability Insurance form
- Exhibit 4 - Deposition of Employee, taken August 15, 2007
- Exhibit 5 - Deposition of Employee, taken September 16, 2005

The Second Injury Fund called no witnesses and presented no exhibits. Instead, its defense consisted of vigorous cross-examination of the expert witnesses and of the Employee.

Employee related that she presently resides in Montrose, Missouri with her disabled ex-husband. She is a 66 year old Caucasian female, having been born on July 7, 1944. She stands 5'4" in height, weighs typically 180 pounds and is right hand dominant. Employee is the mother of two grown children. A high school graduate, she has not attended any formal college course work or trade school training.

Employee was employed from July 14, 1999 to August 1, 2006 by Stahl Specialty Company at its plant in Kingsville, Missouri,. During her employment, she initially worked for about three years in general maintenance, with her duties taking her to all parts of the plant in order to perform cleaning and sweeping tasks.. She would be exposed to aluminum dusts, chemicals, oils and solvents, and her clothing would be soiled from these contacts. Although her job assignment changed to production, she there would use machinery to sand, buff, and debur aluminum parts, which produced dusts into the ambient air. Her last date of work was August 1, 2006.

Employee's past work history is principally manual, unskilled and physical labor with medium strength demand work. Jobs held prior to employment with Stahl Specialty included work at Wal-Mart retail store stocking shelves. Other prior jobs included work for approximately seven years at the Golden Valley cheese plant in Clinton, Missouri as an assembly line worker. Prior to working at the cheese plant, for 13 years, the employee owned a small restaurant/bar in Montrose where she cooked, carried packages of food up to 35 pounds, took orders from customers, and operated a cash register.

A claim for compensation was filed by the Employee, wherein she claims the repetitive exposures to dusts and other impurities in the ambient air at her place of employment. were a substantial factor in causing her pulmonary disease. For the purposes of the claim, she has alleged a date of on or about June 1, 2004.

On May 7, 2004, Ms. Elwell was seen at the Wetzel Clinic for complaints of shortness of breath. She was referred to the Pulmonary Clinic where she was seen ten days later. Results of Spirometry testing showed "There is moderate obstructive lung defect. Because expiratory time to FVC is less than 5 seconds, the degree of obstruction may be underestimated. The airway obstruction is confirmed by the decrease in flow rate at peak flow and flow at 25%, 50% and 75% of the flow volume curve. An additional restrictive lung defect cannot be excluded by spirometry alone. On the basis of this study, more detailed pulmonary function testing may be useful if clinically indicated. FVC changed by 38%. This is interpreted as a mild response to bronchodilator."

On June 1, 2004, she was taken from work by an ambulance to Western Missouri Medical Center ER and was admitted. This is the first time for which she lost work due to pulmonary disability, and coincides with the date of her Claim. Her complaints were shortness of breath and air for 3 weeks and she reported having recently been seen by her family doctor (Dr. Gialdi) and a pulmonologist. A diagnosis of Asthma related to Tobacco abuse was suspected. A diagnosis of early Chronic Obstructive Pulmonary Disease with features of Bronchitis and Pneumonia were considered.

When seen three days later on June 4, 2004 Western Missouri Medical Center ER, her diagnosis of early COPD and carpal tunnel syndrome were considered, and it was noted that the acute episode of bronchitis pneumonia was resolved.

Follow up x-rays done on June 24, 2004 at Western Missouri Medical Center ER for her continued Bronchitis were interpreted as revealing minimal hyperinflation with no acute infiltrate; resolution of the previously seen right lower lobe infiltrate; aortic atherosclerosis; degenerative changes in the thoracic spine. She was prescribed: Zithromax; Prednisone; Pheneregan; Combovent

On November 6, 2004 she was again seen at Western Missouri Medical Center ER: Diagnosed, Pneumonia and COPD-acute exacerbated. Cough, cold and congestion for several months; generalized aches and pinas, "was leaving work tonight and states "couldn't take it anymore." Myalgia started 3-4 days ago that caused her to come in, used inhaler. Chest x-ray: stable chest exam with no evidence of acute abnormality; aortic atherosclerosis; minimal hyperinflation; mild degenerative changes in the thoracic spine. She was pprescribed: Levaquin, Medrol Dose Pak, Albuterol Inahler, and was administered a Nebulizer for breathing treatments.

On January 30, 2005 when seen at the Cass Family Care for shortness of breath complaints, the physician recorded that her symptoms continued based upon exertional activities, even with smoking cessation. She reported having stopped smoking on November 6, 2004.

On April 9, 2005, she again was seen at Western Missouri Medical Center ER for shortness of breath complaints. She demonstrated audible wheezes with trouble breathing. Breathing treatment given. Chest x-ray was interpreted to show hyper-inflated lungs; no pulmonary infiltrate; scattered post inflammatory calcification; no heart enlargement; mild complex scoliosis.

She was taken by Ambulance to Community Memorial Hospital in Appleton City, d/b/a Ellet Memorial Hospital on August 3, 2005. She was treated in the emergency room for status asthmaticus, right apical lung mass, COPD and acute sinusitis. It was noted that the employee "works in dusty environment." The employee was instructed to wear a mask if in increased dust. A chest x-ray was taken with showed "right apical lung capacity which could be due to mass, pleural thickening or scarring." Employee did not work this date, excused by Richard Dailey, DO.

She followed up the next day on August 4, 2005 Cass Family Care, Robert Wheeler, M.D, for another episode of shortness of breath, diaphoresis, sinus infection. Asthmatic

bronchitis was the diagnosis. Continue with Medrol Dosepak, Doxycycline 100 mg. Referred to pulmonologist. Samples of Spiriva given and script of Albuterol.

On August 11, 2005 the employee underwent a CT scan of the chest at Ellett Memorial Hospital. It was noted that the right brachiocephalic vein overlies the right lung apex, a finding which would account for right apical lung density on previous chest film.

On August 12, 2005 Cass Family Care, Dr. Schwartz: Employee requests permission to return to work on 8/15/05.

On January 8, 2006 the employee was seen at Golden Valley Memorial Hospital in the emergency room for shortness of breath with complaint of shortness of breath for two weeks. Chest x-rays concluded 1) no evidence of pulmonary infiltrate 2) atherosclerotic vascular disease 3) degenerative change in the thoracic spine.

On June 10, 2006, the employee was taken by ambulance and treated at Ellett Memorial Hospital in Appleton City with complaints of difficulty breathing since yesterday at work (became worse this morning taking a shower). There was a question of hyperinflation of the lungs, consistent with chronic obstructive pulmonary disease. Chest x-ray questioned chronic obstructive pulmonary disease in an otherwise unremarkable chest. No acute disease process was identified.

She next was treated on June 12, 2006 at the Wetzel Clinic which recorded that employee went to Appleton City ER due to asthma attack and put on Nebulizer treatments and Prednisone. On September 21, 2006, the employee was taken by ambulance to Golden Valley Memorial Hospital. When she was examined by ambulance attendants at Stahl Specialty Company premises, she had an O2 saturation of 78% reported.

On September 21, 2006 (5:45 pm arrival time by ambulance) the employee was admitted to Golden Valley Memorial Hospital through the emergency room with presenting chief complaint of shortness of breath, which she has had for a long period of time, however, worsened over the past two days. She states she was unable to breathe. Has had a non-productive cough and a long history of chronic obstructive pulmonary disease-bronchitis. *"Has been a smoker in the past and worked in dust and has a long time history of chronic pulmonary disease."* Admitting Diagnosis: Chronic obstructive pulmonary disease - bronchitis with marked bronchospasm.

On September 25, 2006 the employee was seen at Golden Valley Memorial Hospital in the Nuclear Medicine Department for a "NM Lung with Vent" procedure, ordered by James Clouse, DO. He noted evidence of a homogeneous distribution of the radionuclide throughout both right and left lungs, no evidence of segmental or subsegmental perfusion defect, and suspected a low likelihood of pulmonary embolus.

A ventilation lung scan was also performed which was interpreted as normal for pulmonary perfusion., but revealing abnormal ventilation lung scan with air trapping commonly seen with chronic obstructive pulmonary disease and/or bronchitis.

On October 6, 2006, she was seen at the Wetzel Clinic, which reported that she had been admitted to Golden Valley Hospital on 9/21/06 and 9/29/06 for COPD and DJD of c-spine.

She next was seen on November 1, 2006 by Dr. Bowers of the KC Pulmonary Clinic who recorded an approximate 80 pack year history of cigarette smoking. Intermittent difficulty with wheezing and dyspnea for several years. It is noted that the employee's work environment is "extremely dusty and hot." The work environment was described as having fumes from melted aluminum and the employee noted that she develops increased dyspnea and wheezing in her workplace. Smoked 2 packs of cigarettes per day x 40 years. On exam, forced expiratory time is 4 seconds. PA and lateral chest x-ray reveal no active cardiopulmonary process. Maximal expiratory flow volume loop reveals a moderate severe obstructive ventilatory defect. The patient performed post-bronchodilator spirometry and had a 26% improvement in FEV1. This is indicative of substantial persistent airways hyper-reactivity.

On November 16, 2006 Obstructive lung disease pre-op evaluation - Dr. Bowers, KC Pulmonary Clinic reported Chronic obstructive pulmonary disease with a significant asthmatic component; with treatment with both an anti-inflammatory and a long-acting bronchodilator.

Spirometry tests were interpreted by Dr. Bowers as revealing maximal expiratory flow volume loop reveals moderately severe obstructive ventilatory defect. When compared to previous study of November 1, 2006, the pre-bronchodilator FEV1 is significantly improved. (Noteworthy is the employee stopped working on 8/1/06).

In a November 16, 2006 letter faxed to Jeanne Adams of Stahls Specialty Co. - from Kansas City Pulmonary Clinic, Inc., James Bower, M.D. stated "Louetta Elwell is currently unable to return to work. She will be re-evaluated in six weeks."

On January 30, 2007 James Bower, M.D., Kansas City Pulmonary Clinic saw Ms. Elwell in follow up of chronic obstructive pulmonary disease with an asthmatic component and recent surgery for cervical disk disease. Occasional nonproductive cough was noted. CT at Golden Valley on December 28, 2006 was ordered to evaluate possible pulmonary nodule; chest CT shows evidence of mild chronic interstitial changes in the lingular subsegment of the left upper lobe and adjacent to the major fissure in the right upper lobe, but no nodules. Chronic obstructive pulmonary disease with a significant asthmatic component.

Plan: Continue with Advair 250/50; 1 inhalation BID; and albuterol, 2 puffs QID PRN for obstructive airways disease. Dr. Bower noted that she previously had worked at Stahl's Specialty and has worked buffering auto parts. Work environment is extremely dusty and causes her to wheeze whenever she is in that environment. "I do not believe that she can return to work in an environment where there are significant dusts and fumes."

On July 9, 2007 she was seen at the Golden Valley Memorial Hospital Pulmonary Clinic for complaints of shortness of breath. Dr. Thomas Beller indicated the patient had mild dyspnea which is intermittent and associated with occasional cough and wheezing. Dr. Beller noted that "she previously worked at Stahl's Specialty and was around a lot of dust and fumes in the work place." Dr. Beller stated that "her work environment resulted in significant worsening of her respiratory symptoms and it has been the opinion of her physicians that she not return there

because of her respiratory problems.” Patient to follow up in pulmonary clinic to obtain a routine pulmonary function test.

On October 15, 2007 the Employee was seen at the Golden Valley Memorial Hospital for spirometry testing ordered by Dr Beller. This revealed “mild to moderate obstructive defect with minimal improvement following bronchodilator therapy.” He noted the employee had “mild dyspnea which is intermittent and occasionally associated with cough and wheezing.” Dr. Beller noted that her respiratory symptoms are much improved using Advair 50-250 one pull two times a day and an Albuterol inhaler. Dr. Beller indicated that “patient was also working in a dusty environment and she has not been at work in several months which is helping as well.” Dr. Beller stated that the pulmonary function test demonstrated a forced vital capacity 100% of predicted, FEV1 88% of predicted, FEV1 ratio 70% and post bronchodilator modest improvement. The study showed a minor obstructive change confined to the smaller airways with improvement post bronchodilator.

When seen on January 28, 2008 at Golden Valley Memorial Hospital, Joseph Gialde, MD: Returns in follow up to her asthmatic bronchitis and mild chronic obstructive pulmonary disease. She continues to have intermittent episodes of dyspnea and sometimes affect her activities. She reports occasional wheezing but not much of a problem with cough. She is taking Advair 250-50 one puff twice per day and sometimes doesn't use it at all. Medications include: Hydrocodone, Tylenol, Prilosec, Ambien, Alprazolam, Advair, Albuterol. Impression: Asthmatic bronchitis, mild chronic obstructive pulmonary disease, obesity, history of cervical spine surgery and total knee replacement, anxiety, past history of left upper lobe pulmonary nodule which was resolved on CT scan of the chest performed less than a year ago. Will repeat pulmonary function testing in four months.

Also on January 28, 2008 in correspondence from the KC Pulmonary Practice, Thomas Beller, M.D. reported that she has COPD with significant asthmatic component. “She has a history of work environment that is dusty and causes her to wheeze.” She should avoid exposure to fumes, dusts, smoke and respiratory irritants. She is treated with an Advair inhaler and uses supplemental albuterol as needed.

Ms. Elwell testified that she advised her supervisor, Dan George, and the plant's nurse of her pulmonary symptoms. This testimony was supported by the testimony of her co-worker, Mike Flores, who described coming to her aid, getting her to sit down in the nurse's station, getting her water.

Theresa Roscher, RN, testified on behalf of the Employer. She had previously been deposed by Claimant's counsel, who offered her deposition without objection. Ms. Roscher is a nurse employed by Employer. She denied speaking with the Claimant about her pulmonary complaints, her cervical spine complaints, and said that any files maintained by the Employer were given to the insurance adjuster. She denied knowledge of an ambulance at the Employer's premises to administer first aid to the Claimant for her pulmonary distress, denied having a conversation with Ms. Elwell's supervisors including Dan George who remains employed by the Employer. She denied speaking with Mike Flores, an independent witness who as an EMT trained fire fighter in a second job, provided assistance to Ms. Elwell on more than one occasion related to her inability to perform her work because of physical symptoms.

Mr. Flores was an employee of Stahl Specialty, and corroborated the Claimant's history of physical complaints and described how he obtained supervisory authority from Dan George to drive with Ms. Elwell to the emergency room of a nearby hospital. Mr. Flores, appearing pursuant to a subpoena, was at one point a supervisor as he held the title of Cell Leader. He described the dust and oils in the ambient air throughout the manufacturing areas of the property, and how he had discussions with Ms. Elwell and with her supervisor, Mr. George.

P. Brent Koprivica, M.D., testified by deposition at the request of the employee. Dr. Koprivica is a board certified occupational medicine physician who also possesses board certification in emergency medicine. He evaluated the employee on May 28, 2008.

Dr. Koprivica noted that the employee initially had objective evidence of obstructive lung disease as evidenced by the spirometry testing on May 17, 2004. He opined that this occupational exposure to dusts and fumes, in particular aluminum dust, led her to become short of breath, led her to leave work and become hospitalized on June 1, 2004. Ms. Elwell gave Dr. Koprivica a history of occupational exposures to aluminum dust from buffing of automotive parts, the actions of which produce the dust which she inhaled.

He performed a clinical evaluation, and observed that by her history of cigarette smoking, it would be a significant non-work related contributor to her pulmonary disability. He believed that her workplace exposure from 1999 onward was a substantial contributor as well. He pointed out that the medical literature recognizes that exposures to dust produces obstructive lung disease. He correlated her workplace exposures to dust and the needs for hospitalizations as demonstrating a temporal relationship to the development of her disease.

Dr. Koprivica related that when the smoking history is mixed in with the multi-year exposures to aluminum and other dusts and fumes, the impact upon Ms. Elwell allows for a greater injury to occur. The impact of combining the work and non-work exposures geometrically increase the risk of Ms. Elwell contracting a pulmonary disease. She required ongoing medical treatment, in his opinion, that she be followed by a pulmonary specialist.. She will require medications, monitoring of her status, and is at risk for further hospitalizations.

He also found that she had degenerative disc disease in the lower back, with spondylolisthesis objectively determined at L4-L5 by testing on July 14, 1997. She was limited in her ability to bend at the waist, push, pull and twist. Her ability to lift heavier weights was compromised. For this condition, he believed she presented with a 15% permanent partial disability of the body as a whole.

She also had degenerative joint disease of the right knee. Prior to June 1, 2004, she had surgery, and after that date of this claim, she underwent a total knee replacement. He assessed the disability from the right knee, as it existed before this claim, at 35% at the 160 week level. Moreover, he observed that Ms. Elwell had problems with her hands and upper extremities following trigger finger releases and carpal tunnel releases. He assessed the right upper extremity disability at 25% at the 175 week level, and the left upper extremity permanent partial disability at 15% at the 175 week level. These disabilities posed a hindrance and an obstacle to

the employee in finding and maintaining employment. He felt the combined disability resulted in a 10% loading factor.

Ms. Elwell continues to take a number of medications to aide her in her breathing. This appears to be reasonable, and is necessary to give her relief from her pulmonary disability even though such is not curative in nature. Accordingly, Employee has met her burden of proof as to future medical care. The Employer-Insurer are directed to provide Employee such medical care and treatment as may reasonably be required in order to cure, or if not to cure, then to give her relief from the effects of her pulmonary disease.

In Leake v. City of Fulton, 316 S.W.3d 528, (Mo.App.WD 2010), Employee's work as a police officer in helping a victim of a motor vehicle accident was a substantial factor in causing death, despite the existence of a pre-existing cardiovascular disease which the employer asserted was always the prevailing factor. There, as in this Claim, different expert opinions conflicted as to whether the work performed was the prevailing factor or whether the pre-existing disease was the prevailing factor. The Western District opinion, authored by Judge Karen King Mitchell, did not accept that the mere presence of a pre-existing disease would always be the prevailing factor. Id., at 532. Moreover, the determination of whether the work activity is the prevailing factor is a factual question consistent with the interpretation of the 'substantial factor' criterion of prior law. Id., FN 3 at 532.

The test of "a substantial factor" instead of "the prevailing factor" is one which was changed following the 2005 amendments to the Missouri Workers' Compensation Act. Although Ms. Elwell's burden is to prove that work is a substantial factor, and not the sole cause or prevailing cause which the 2005 law changes wrote, she must instead show through medical evidence that a probability exists that working conditions caused the occupational disease, although they need not be the sole cause. A single medical opinion relating the disease to the job is sufficient to support a decision for the employee. Vickers v. Missouri Department of Public Safety, 283 S.W.3d 287, Mo App. WD, 2009)

Gerald Kerby, MD, a board certified pulmonary specialist, testified that 90% of Ms. Elwell's respiratory problems were from smoking, and 10% were caused by the effects of occupational dust and fume exposure. He could not, however, identify if he reviewed all the records of Ms. Elwell's treatment, and could not produce any at his deposition. He could not relate what records he saw regarding pulmonary complaints or symptoms prior to her commencement of work at Stahl Specialty. He based a great deal of his testimony on what he seemed to recall, but could not demonstrate records to support his recollection.

Dr. Kerby was not familiar with OSHA's guidelines for aluminum use, and was unfamiliar with the precautionary warnings from OSHA that if aluminum dust contacts the skin, the workers should flush then wash the affected areas with water, then soap and water. He was unfamiliar with the OSHA warnings that contaminated clothing should be removed, that those who launder the clothing should be warned to take precautions, and that workers should thoroughly wash their hands and face before eating, using toilets, and using tobacco. He was unfamiliar with the plant, the engineering controls at the plant, whether respirators were in use.

In short, Dr. Kerby's opinions lacked adequate foundation, and I believe are not as persuasive as that of the other experts. Besides evaluating Dr. Koprivica, the Employee produced evidence from two of her treating pulmonary specialists and her family doctor, who recited the history of workplace exposures to aluminum dust, as well as smoking. Dr. Beller was the more forceful of these treating experts, and he wrote: "*her work environment resulted in significant worsening of her respiratory symptoms and it has been the opinion of her physicians that she not return there because of her respiratory problems.*"

Employee, along with lay testimony of the co-worker Mr. Flores, described the exposures in the workplace as significant. Dr. Beller, Dr. Gialde, and Dr. Bower, in their records of treatment, set forth the occupational exposure. A significant worsening of her respiratory symptoms caused by work is further evidence of the work being a substantial causative factor.

Accordingly, I find and believe that the Employee has sustained a 12.5% permanent partial disability to the body as a whole related to her work place exposures which are a substantial factor resulting in the needs for treatment which she continues to experience. I find that overall, the Employee has a 30% permanent partial disability related to her pulmonary condition, with the remainder related to non-occupational causes.

The cost of the treatment which Ms. Elwell has incurred has been paid by Missouri Health Net. I find and believe that the sum of \$4,559.83 is reasonable to treat Ms. Elwell for her work related pulmonary disease, and order the Employer to pay to the Employee, her attorney and Healthnet this sum for such necessary treatment. 287.266 R.S.Mo does allow for a lien in favor of Healthnet for these payments.

From the evidence, Ms. Elwell lost periodic time from work until she retired on August 1, 2006. However, much of her lost time arose after that date, and the evidence is not clear as to whether such disability was temporary. I therefore deny any compensation for temporary-total disability.

The synergistic effect of combining her 12.5% permanent partial disability arising from the June 1, 2004 claim, with the pre-existing disability of 35% to the knee, 25% to the right wrist, 15% to the left wrist, 15% to the low back, results in a significantly greater disability than considering the disability in isolation from this claim. It is for that reason that I believe the Second Injury Fund is liable for permanent partial disability equal to 24.03 weeks of additional compensation; representing overall weeks from above at 192.25 and a 12.5 percent load factor. This results in a lump sum of \$8,288.67.

Claimant's attorney has requested a fee equal to 25% of all amounts awarded for disability. I find that such request is fair and reasonable and order a lien to attach to this award for sums due and owing at present and for sums accruing in the future.

Date: _____

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this ____ day of _____, 2011, by:

Naomi Pearson
Division of Workers' Compensation

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 06-130623

Employee: Louetta K. Elwell
Employer: Stahl Specialty Company
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. 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 modifies the award and decision of the administrative law judge dated February 10, 2011. The Commission adopts the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the decision set forth below.

Introduction

The issues stipulated in dispute at the hearing were: (1) accident; (2) occupational disease; (3) notice; (4) whether employee's injuries arose out of and in the course of employment; (5) medical causation; (6) past medical expenses; (7) future medical care; (8) temporary total disability; (9) nature and extent of permanent disability; and (10) liability of the Second Injury Fund.

The administrative law judge made the following findings: (1) employee's cumulative work effort was the prevailing factor in causing her medical condition and need for surgery; (2) employee sustained a 25% permanent partial disability of the body as a whole referable to the cervical spine as a result of her cumulative work; (3) employee is entitled to \$16,195.80 in past medical expenses from employer; (4) employee is not entitled to temporary total disability benefits; (5) employer is obligated to provide future medical treatment to employee; (6) employee is permanently and totally disabled due to a combination of the primary injury and employee's preexisting conditions of ill; (7) the Second Injury Fund is liable for permanent total disability benefits; and (8) employee's permanent total disability commenced on August 1, 2006.

Employer submitted a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in finding employee permanently and totally disabled; (2) in finding employee gave proper notice of her injury; and (3) in awarding medical expenses.

The Second Injury Fund also submitted a timely Application for Review with the Commission joining employer's arguments that the administrative law judge erred as to the issues of permanent total disability and notice.

For the reasons set forth in this award and decision, we modify and supplement the analysis of the administrative law judge as to the following: (1) employer's argument that employee's

Employee: Louetta K. Elwell

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claim for past medical treatment is barred because her liability has been extinguished; and (2) the timing and commencement of payment of permanent total disability benefits. We affirm all other findings and conclusions of the administrative law judge to the extent they are not inconsistent with our modifications and supplementation herein.

Discussion

Past medical expenses

Employer argues employee cannot recover the amount awarded by the administrative law judge for her past medical expenses because employee testified that she did not pay this sum “out of pocket.” Employer suggests claimant only paid a \$21.60 copayment, and that she is limited to collecting this amount. In relevant part, § 287.140.1 RSMo provides:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

By producing the bills and the related treatment records and credibly identifying them as records and bills generated in connection with her treatment for the compensable injury, and by providing Dr. Koprivica’s credible expert opinion as to the reasonableness and necessity of the treatment, employee met her burden under *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111 (Mo. 1989). Accordingly, the burden shifts to employer to demonstrate (1) employee will not be required to pay the billed amounts; (2) employee’s obligation to reimburse the healthcare provider has been extinguished; and (3) employee’s obligation has not been reduced due to a “collateral source” for purposes of § 287.270 RSMo. See *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818, 823 (Mo. 2003) and *Ellis v. Mo. State Treasurer*, 302 S.W.3d 217, 225 (Mo. App. 2009).

We acknowledge employer’s attorney’s cross-examination pressing employee to explain her liability and asking her what certain notations on her medical bills meant. We further acknowledge employee’s responses protesting her lack of knowledge as to her liability to pay her medical bills. We are not persuaded, however, that this testimony constitutes evidence sufficient to satisfy employer’s burden of proving employee’s liability is extinguished. This is because employer’s attorney was asking employee to make what amounts to legal conclusions as to her liability. But there is no indication that employee is an attorney or an expert in medical billing, and thus it would appear that she is not qualified, as a witness, to render such opinions.

If employer believes employee’s liability really is less than the amount shown on her bills, employer easily could have presented evidence from someone with competent, firsthand knowledge of such. Because employer did not produce or identify evidence from a credible source to demonstrate employee’s obligation to reimburse the healthcare providers is extinguished, let alone any evidence to demonstrate that employee’s obligations were reduced by a means other than the collateral sources excluded under § 287.270 RSMo, its argument that employee’s liability is extinguished is unavailing—regardless whether employee has only paid, to date, a \$21.60 copayment for her medical

Employee: Louetta K. Elwell

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treatment. See *Ellis*, 302 S.W.3d at 225-26. Accordingly, we adopt and affirm the award granting to employee her past medical expenses.

Timing and commencement of permanent total disability benefits

We agree with the administrative law judge that employee is permanently and totally disabled due to a combination of the effects of her primary injury and preexisting conditions, and that she is entitled to permanent total disability benefits from the Second Injury Fund. We disagree, however, with the administrative law judge's finding that employee's permanent total disability commenced on August 1, 2006. We must address this finding because of its bearing on the appropriate date of commencement of permanent total disability benefits from the Second Injury Fund.

Although the statutes involving temporary total disability and permanent disability do not set out a specific time line, there is an intended timing of benefits paid by employers. Temporary total disability benefits are due from the date of the injury through the date the condition has reached the point where further progress is not expected. Courts have used various terms to determine when an employee's condition has reached the point where further progress is not expected, including the term maximum medical improvement. *Vinson v. Curators of the University of Missouri*, 822 S.W.2d 504, 508 (Mo. App. E.D. 1991)(interpreting a doctor's testimony of employee's maximum treatment potential to mean maximum medical improvement); *Cooper*, 955 S.W.2d at 575 (using the term maximum medical progress to define the point where no further progress is expected for an employee's condition).

After reaching the point where no further progress is expected, it can be determined whether there is either permanent partial or permanent total disability and benefits may be awarded based on that determination. One cannot determine the level of permanent disability associated with an injury until it reaches a point where it will no longer improve with medical treatment. Furthermore, an employers' liability for permanent partial or permanent total disability does not run concurrently with their liability for temporary total disability.

Although the term maximum medical improvement is not included in the statute, the issue of whether any further medical progress can be reached is essential in determining when a disability becomes permanent and thus, when payments for permanent partial or permanent total disability should be calculated.

Cardwell v. Treasurer of Mo., 249 S.W.3d 902, 910 (Mo. App. 2008).

Employee stopped working on August 1, 2006, but there is no other significance to this date. As of August 1, 2006, employee had not even undergone surgery with Dr. Blatt, and thus any determination as to the nature and extent of permanent disability related to the primary injury would be premature. The record reveals that employee continued to receive treatment related to her cervical spine injury until February 2007. We find that

Employee: Louetta K. Elwell

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employee reached maximum medical improvement on February 5, 2007, the date of her last follow-up examination with Dr. Blatt.

Given the foregoing, the administrative law judge erred in finding that employee's permanent total disability commenced on August 1, 2006. Accordingly, we modify the award of the administrative law judge and conclude that employee was permanently and totally disabled as of February 5, 2007. The parties stipulated that the rate of permanent partial and permanent total disability benefits are equal at \$344.93. Employer's liability for the primary injury amounts to 100 weeks of permanent partial disability benefits, and thus, January 5, 2009—100 weeks after February 5, 2007—is the appropriate date for commencement of permanent total disability benefits from the Second Injury Fund.

Accordingly, we further modify the award of the administrative law judge to order payments of permanent total disability benefits to commence from the Second Injury Fund on January 5, 2009.

Conclusion

The Commission supplements the findings of the administrative law judge as to the award of past medical expenses. The Commission also modifies that portion of the award of the administrative law judge ordering payments to commence from the Second Injury Fund beginning July 2, 2008. Such payments shall commence instead on January 5, 2009.

The award and decision of Administrative Law Judge Mark S. Siedlik issued February 10, 2011, as modified and supplemented herein, is attached, affirmed, and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award and decision herein.

We approve and affirm 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 15th day of November 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

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

Attest:

Secretary

Employee: Louetta K. Elwell

CONCURRING OPINION

I write separately to disclose the fact that I did not participate in the September 28, 2011, oral argument in this matter. I have reviewed the evidence, read the briefs of the parties, and considered the whole record. I concur with the decision of the majority of the Commission.

Curtis E. Chick, Jr., Member

AWARD

Employee: Louetta K. Elwell Injury No: 06-130623
Dependents: N/A
Employer: Stahl Specialty Company
Additional Party: Second Injury Fund
Insurer: Self
Hearing Date: November 9, 2010
Briefs Filed: December 6, 2010 Checked by: MSS/lh

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: July 12, 2006
5. State location where accident occurred or occupational disease was contracted: Kingsville, Johnson 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: Employee was repeatedly lifting automotive parts from boxes upon pallets, for the purpose of inspecting and buffing them. She would lift objects from above her shoulder level throughout the course of a work day, and worked at benches of varying heights with her next flexed and her arms straight out in front of her. This cumulative work effort was the

prevailing factor in causing injury and disability to her cervical spine.

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 (cervical spine)
14. Nature and extent of any permanent disability: 25% permanent partial disability to the Body as a whole, referable to the cervical spine.
15. Compensation paid to date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: None (furnished by group health insurer.)
17. Value necessary medical aid not furnished by employer/insurer? \$16,195.80
18. Employee's average weekly wages: \$502.40
19. Weekly compensation rate: \$344.93
20. Method wages computation: Stipulation of the Parties
21. Amount of compensation payable:

Medical Expenses

Medical Already Incurred	\$16,195.80
Less credit for expenses already paid.....	\$0.00
Total Medical Owing	\$16,195.80

Temporary Disability

.....
Less credit for benefits already paid

Total TTD Owing	\$ none
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Permanent Partial Disability

(25% x 400 weeks) 100 x \$344.93/week.....	\$34,493.00
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Total Award as to Employer-Insurer:	<u>\$50,688.80</u>
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22. Second Injury Fund liability:
- | | |
|--|----------------------------|
| Permanent total disability benefits from Second Injury Fund: | Undetermined Amount |
| -- \$344.93 per week beginning July 2, 2008 (which is 100 weeks after the last day worked) | |
| For Claimant's lifetime..... | Undetermined Amount |
| TOTAL: | <u>UNDETERMINED</u> |

23. Future requirements awarded: Employee is to be provided such medical care and attention as may reasonably be required in order to cure or give her relief from the effects of her

work-related injuries.

Said payments to begin as of date of this award 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 twenty-five percent (25%) in favor of John B. Boyd, of Boyd & Kenter, PC, for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Louetta K. Elwell Injury No: 06-130623
Dependents: N/A
Employer: Stahl Specialty Company
Additional Party: State Treasurer, Custodian, Second Injury Fund
Insurer: Self
Hearing Date: November 9, 2010
Briefs Filed: December 20, 2010 Checked by: MSS/lh

On November 9, 2010, the Employee, Employer and State Treasurer, as custodian of the Second Injury Fund, appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, Ms. Louetta K. Elwell, appeared in person and with her counsel, Mr. John B. Boyd. The Employer, Stahl Specialty Company, appeared through its counsel, Mr. Joseph Ebbert. The Second Injury Fund appeared through its counsel, Ms. Kimberly Fournier, Assistant Attorney General. Two claims were tried simultaneously, but separate awards will be issued. For the purpose of clarity, this Award will recite only the evidence relevant to the July 12, 2006 claim.

The primary issue the parties raised for the 2006 claim concerned whether or not Employee's cervical spine injury was work related, and if so, what was the corresponding permanent partial and/or permanent total disability arising either from this claim, or, arising so as to create Second Injury Fund responsibility. For the reasons noted below, I find that Employee sustained a compensable injury arising from cumulative work activity on July 12, 2006, and that the disability arising directly from that claim is 25% to the Body as a Whole. Because of substantial pre-existing disability, when combined with the disability, attributable to this disability, the Employee is permanently and totally disabled.

STIPULATIONS

The parties stipulated that:

1. On or about July 12, 2006 ("the injury date"), Stahl Specialty Company ("Employer") was an employer operating subject to Missouri's Workers' Compensation law with its liability fully insured by authority to self-insure;

2. Louetta K. Elwell ("Employee") was its employee working subject to the Missouri Workers' Compensation law in Kingsville, Johnson County, Missouri;
3. The average weekly was \$502.40, which resulted in a compensation rate of \$334.93 per week being applicable.
4. Employee timely filed her Claim for Compensation.
5. No temporary-total disability or medical care was furnished by Employer.

ISSUES

The parties presented the following issues to be determined:

- A. Whether Employee sustained an accident, series of accidents, or occupational disease arising out of and in the course of her employment?
- B. Whether Employee sustained any temporary-total disability or any permanent disability?
- C. Whether Employee notified Employer of her injury?
- D. Whether Employee's work was the prevailing cause of an injury and disability?
- E. Whether Employer was responsible for past and will be responsible for future medical aid?
- F. Whether the Employee is entitled to an award against the Second Injury Fund for permanent partial or permanent total disability?

FINDINGS FACT & RULINGS OF LAW

Employee testified on her own behalf, and presented a lay witness from a former co-worker, Mike Flores. She presented the following exhibits, all of which were admitted into evidence without objection:

- Exhibit A – Deposition of P. Brent Koprivica, MD, of April 9, 2010 (Containing medical report, *Curriculum Vitae*, and medical records of treatment.)
- Exhibit B – Deposition of Terry Cordray, Vocational Expert, of April 20, 2010 (Containing narrative report and *Curriculum Vitae*.)
- Exhibit C – Deposition of Theresa Roscher, LPN, of August 6, 2010 (Containing various records from the Employer)
- Exhibit D – Medicaid lien of November 3, 2010
- Exhibit E – Billing from Dr. Blatt

Employer called Theresa Roscher as its sole witness, and presented the following exhibits, all of which were admitted into evidence without objection except for Exhibit 3, upon

which I withheld ruling until the award, with the consent of the parties. The objections to Exhibit 3 are over-ruled, and such exhibit is admitted.

- Exhibit 1 – Deposition of Gerald Kerby, MD
- Exhibit 2 – Deposition of David Clymer, MD
- Exhibit 3 – Disability Insurance form
- Exhibit 4 – Deposition of Employee, taken August 15, 2007
- Exhibit 5 – Deposition of Employee, taken September 16, 2005

The Second Injury Fund called no witnesses and presented no exhibits. Instead, its defense consisted of vigorous cross-examination of the expert witnesses and of the Employee.

Employee related that she presently resides in Montrose, Missouri with her disabled ex-husband. She is a 66 year old Caucasian female, having been born on July 7, 1944. She stands 5'4" in height, weighs typically 180 pounds and is right hand dominant. Employee is the mother of two grown children. A high school graduate, she has not attended any formal college course work or trade school training.

Employee was employed from July 14, 1999 to August 1, 2006 by Stahl Specialty Company at its plant in Kingsville, Missouri. Her last job was that of a processor. Those job duties entailed the handling, packaging, buffing and rotary filing of primarily aluminum automotive parts. This work required her to reach into large bins which contained parts in order to place such upon a work table. Employee worked at various tables which had no uniform height. She would utilize power equipment to remove metal burrs and finish the casted parts into a condition for shipping. To remove the parts from the bins, she would reach and lift objects with her arms extended, and depending upon the dimension of the parts, would hold the part with one arm extended while holding the power equipment with the other. This work process was repeated throughout the day, and she would have her hands and arms extended and lifting from frequently to constantly.

Prior to working as a processor, she worked for about three years in general maintenance, with her duties taking her to all parts of the plant in order to perform cleaning and sweeping tasks. She would lift, carry, twist, and work with her neck flexed and extended in order to perform those tasks. Her last date of work was August 1, 2006.

Employee's past work history is principally manual, unskilled and physical labor with medium strength demand work. Jobs held prior to employment with Stahl Specialty included work at Wal-Mart retail store stocking shelves, with lifting up to 40 pounds, and extensive bending, kneeling, walking, standing, reaching and gripping. Other prior jobs included work for approximately seven years at the Golden Valley cheese plant in Clinton, Missouri as an assembly line worker. This job involved constant standing and reaching. Prior to working at the cheese plant, for 13 years, the employee owned a small restaurant/bar in Montrose where she cooked, carried packages of food up to 35 pounds, take orders from customers, and operate a cash register. She was on her feet most of the day.

A claim for compensation was filed by the Employee, wherein she claims the repetitive nature of her work was the prevailing cause of injury and disability to her cervical spine. For the

purposes of the claim, she has alleged a date of on or about July 12, 2006.

She first was seen for her complaints on July 10, 2006 at the Wetzel Clinic (Steve Gialde, D.O.) with complaints of left shoulder and neck pain. Dr. Gialde, her family doctor, ordered an MRI of the neck in view of clinical evidence of radiculopathy. The MRI of the cervical spine revealed:

- A. Evidence of a disc herniation at the C3-4 level into the right lateral recess and foramina with spinal cord impingement and stenosis of the right lateral recess.
- B. Evidence of a midline bulging disc causing severe stenosis at the C4-5 level and impingement on the spinal cord suspected at midline. Bilateral recess stenosis greater on the left than the right was read.
- C. Bulging disc at the C7-T1 level without definite spinal cord impingement.
- D. Degenerative disc disease C3-4, 4-5 and C7-T11 with hypertrophic spurring.

She continued to see Dr. Gialde on July 12, 2006, and he referred her to neurosurgeon, Geoffrey Blatt, MD. On August 9, 2006, Dr. Blatt reported that Employee had complaints of stiffness in her neck with pain radiating out into both shoulders and right scapular region, and, intermittent numbness of hands and generalized weakness. Fine motor dysfunction was noted in her fingers. Left-sided neck and shoulder pain worse. MRI shows bulging disc at C3-4 with multilevel degenerative changes. Bulging at C4-5 with moderate spinal stenosis and probable spinal cord compression was his interpretation. Ms. Elwell testified that she advised her supervisor, Dan George, and the plant's nurse of her need for surgery, and of her physical complaints prior to seeing a physician. She was directed to turn in her claim to the human resources office, which in turn determined to handle the needs as personal rather than through workers' compensation.

Theresa Roscher, RN, testified on behalf of the Employer. She had previously been deposed by Claimant's counsel, who offered her deposition without objection. Ms. Roscher is a nurse employed by Employer. She denied speaking with the Claimant about her pulmonary complaints, her cervical spine complaints, and said that any files maintained by the Employer were given to the insurance adjuster. She denied knowledge of an ambulance at the Employer's premises to administer first aid to the Claimant for her pulmonary distress, denied having a conversation with Ms. Elwell's supervisors including Dan George who remains employed by the Employer. She denied speaking with Mike Flores, an independent witness who as an EMT trained fire fighter in a second job, provided assistance to Ms. Elwell on more than one occasion related to her inability to perform her work because of physical symptoms.

Mr. Flores was an employee of Stahl Specialty, and corroborated the Claimant's history of physical complaints and described how he obtained supervisory authority from Dan George to drive with Ms. Elwell to the emergency room of a nearby hospital. Mr. Flores, appearing pursuant to a subpoena, was at one point a supervisor as he held the title of Cell Leader. He described the dust and oils in the ambient air throughout the manufacturing areas of the property, and how he had discussions with Ms. Elwell and with her supervisor, Mr. George.

Ms. Elwell's significant medical history was recorded as anxiety attacks, osteoarthritis, knee replacement, carpal tunnel release in both hands, fatty tumor removed in stomach, sinus

problems, shortness of breath, cervical pain with headaches. After an examination, Dr. Blatt entered a diagnosis of cervical myelopathy with bulging cervical disc at C3-4, spinal cord compression and cervical spinal stenosis at C4-5, for which he recommended surgery on August 18, 2006.

On August 31, 2006 at Menorah Medical Center Dr. Blatt noted, in preparation for surgery, that the admitting diagnosis was cervical myelopathy and radiculopathy with cervical spine stenosis at C3-C4 and C4-C5. Her physical complaints were recorded as Employee complaining of weakness and numbness in her hands. She is having difficulty with fine motor coordination. She cannot climb stairs and has been staggering. She has been off work for over one month. The left side tends to be worse than the right. MRI of the cervical spine shows significant spinal stenosis and lateral recess stenosis with cord impingement at C3-4 and to a lesser extent at C4-5. A 2 level anterior cervical discectomy and fusion with donor bone graft and anterior instrumentation was to have been performed. Dr. Blatt opined "subtle cervical myelopathy with cord compression at C3-C4 and to a lesser extent at C4-C5 with multilevel degenerative changes." However, this surgery was postponed because of pulmonary distress which Employee needed to have treated. Approximately 3 ½ months later, she was taken to surgery.

Thus, on December 18, 2006, Dr. Blatt noted the Employee was still complaining of stiffness and pain in her neck with weakness in her hands as well as difficulty climbing stairs and walking. Left side is worse. She was sent for pulmonary work up. Significant spinal stenosis at C4-5 and to a lesser extent at C3-4 was recorded by Dr. Blatt. Some of her symptoms were felt to be related to cord compression, and some was suspected to be associated with generalized spondylosis in her neck and arthritis in her extremities. Surgery was performed at Research Medical Center.

When seen on January 8, 2007 Dr. Blatt noted she was two weeks post op for a two level anterior cervical discectomy and fusion with donor bone and anterior instrumentation which he had performed. Her complaints were fewer, as her headaches were gone. On January 22, 2007 post-op x-rays were taken at Golden Valley Memorial Hospital ordered by Geoffrey Blatt, M.D. The radiologist commented there was evidence of previous fusion at C3-4, 4-5 and 5-6 without evidence of metallic fatigue fracture or loosening of the plate and screws, and he observed degenerative disc disease C6-7.

When seen last by Dr. Blatt on February 5, 2007, he opined that there was excellent position of the instrumentation and bone grafts. He also questioned the accuracy of the radiology report, in that it "suggests that she is fused across C5-6 as well, but this is not true. She does have fusion from C3-5 that should become solid over the next 6-12 months."

P. Brent Koprivica, M.D., testified by deposition at the request of the employee. Dr. Koprivica is a board certified occupational medicine physician who also possesses board certification in emergency medicine. He evaluated the employee on May 28, 2008.

Dr. Koprivica noted that the employee had a remote history of an injury to her neck dating back to a motor vehicle collision occurring in April of 1997. She underwent an x-ray of the cervical spine which showed she had disc disease at C4-5 and C6-7. However, she denied

having any ongoing disabling symptoms on a chronic basis after recovery from that motor vehicle collision. He found of importance the history that Ms. Elwell's neck condition progressed and her symptoms arose after commencing work with the employer Stahl Specialty Company in 1999 until July 12, 2006.

Dr. Koprivica described a history that he obtained from Ms. Elwell that she had to handle boxes of aluminum automotive parts. These were stacked on pallets to a position above her shoulder height. She would lift these boxes over time from an overhead position. She started having symptoms of neck pain that began radiating into her arm and associated it with lifting the boxes from an overhead position.

He noted that she had first gone to a welfare clinic on July 10, 2006, where her complaints were documented. An MRI scan was ordered in July of 2006 which showed a herniation of disc material at C3-4 and either a significant bulge or disc herniation at C4-5. From his review of the records and his evaluation of Ms. Elwell, Dr. Koprivica believed there were no cervical radicular symptoms prior to 1999 and there was no radiographic evidence of symptomatic stenosis of the cervical spine prior to commencement of work activities with Stahl Specialty.

When questioned further about the lifting that Ms. Elwell undertook, Dr. Koprivica indicated that she would lift regularly these boxes and if often was forceful. The positioning being overhead was of significance and Ms. Elwell associated the development of her problems an there progression with this particular work activity. He felt those to be factors of significance in determining a cause and effect relationship between work and the ensuing injury and disability.

Dr. Koprivica pointed to studies from the United States Department of Health and Human Services and NIOSH that was relevant to Ms. Elwell's condition. Specifically, factors from workplace which were associated with producing injury to the cervical spine included overhead positioning with force. The odds ratio are greater than three (3) which Dr. Koprivica explained meant there was a 300% increase in risk from doing the type of work activities that Ms. Elwell described and the production of injury in the neck versus the population in general. As an occupational physician, this is the type of information from which his profession looks at in terms of identifying causes, what type of activities produce harm and which do not.

Dr. Koprivica pointed out that besides being exposed to this risk of 300% increase, he found it relevant that Ms. Elwell associated her symptoms and their onset to activity that she described and, which is documented in the medical records which he reviewed. Dr. Koprivica indicated that there is a "very clear-cut cause relationship that lead to this - not only the structural changes, but the disability that now follows those structure changes and the surgery that was necessitated." The cord impingement and narrowing causing impingement upon a nerve root correlated with the clinical findings of the treating physician which necessitated the surgery. Prior to employment with Stahl, there was no evidence of spinal cord impingement, no evidence of a need for surgery to the cervical spine, no recommendation that Ms. Elwell undergo surgery for a condition in the surgical spine, and no evidence of any type of a neurological compromise into either of her upper extremities all prior to her commencement of work with Stahl Specialty Company.

Dr. Koprivica opined to a reasonable degree of medical certainty that the work effort at Stahl Specialty was the prevailing factor in producing not only injury to the cervical spine but the disability that has resulted in the cervical spine, and that the treatment provided by Dr. Blatt was both reasonable and necessary in order to cure or give her relief from the effects of the work place injury to the cervical spine.

Dr. Koprivica found it very important that Dr. Blatt clinically determined there was myelopathy on his August 9, 2006, exam. Myelopathy, he defined, as referring to disease of the spinal cord where upper motor neuron abnormalities are present and this represents significant compression upon the spinal cord. This finding, Dr. Koprivica believes, illustrates that the work place exposure to the probability of risk coupled with the temporal relationship of complaints to abnormality arise from the workplace exposure.

The workplace exposure is a competent producing activity to cause injury that the Department of Health and Human Services and NIOSH have recognized but then the subjective association, along with the objective testing done by Dr. Blatt are consistent. During his clinical assessment, Dr. Koprivica noted a loss of motion in the neck, particularly with loss of extension. There was lateral flexion loss as well and a moderate loss of rotation. Dr. Koprivica's opinion that such is a residual from the surgery that was necessitated by the 2006 primary work injury.

When questioned about prevailing factor, Dr. Koprivica's testimony is illuminating. As a result of the July 12, 2006, work place cumulative exposure claim to the cervical spine with its residual effects, Dr. Koprivica opined that the nature of the injury and resulting disability consisted of an aggravating injury to the cervical spondylosis over time. She developed disc herniations that were objectively identified which had resulted in the development of myelopathy and radiculopathy for which she underwent an anterior discectomy and fusion at C3-4 and C4-5.

He assigned a 30% permanent partial disability rating to the body as a whole and believed that the work effort at Stahl Specialty was the prevailing factor in causing the resulting injury and disability. He explained that prevailing factor is to him a predominate factor. Without her work place exposure, he believed it is pure speculation to suggest that cervical spondylosis (degenerative osteoarthritis) that existed in 1999 with aging alone was going to progress where symptoms would be predictable. There is no way he believes that to a reasonable degree of medical certainty such could have been predicted and there is no data to support such an attempt. What is clear is the longitudinal studies previously mentioned that increased the risk probability by 300% over a seven (7) year period of employment is a clear-cut association subjectively with those activities and the timing of the identification of pathology with the work place activities.

Dr. Koprivica assessed the disability arising from the cervical spine injury as representing 30% permanent partial disability to the body as a whole. Predating this condition was disability of 30% due to the body as a whole due to the pulmonary condition; 15% permanent partial disability to the lower back and body as a whole; 50% permanent partial disability to the right knee; 25% disability to the right upper extremity at the 175 week level and, 15% permanent partial disability to the left upper extremity at the 175 week level. Dr. Koprivica believed these pre-existing conditions had the potential to combine with a serious disabling condition so as to result in a significant enhancement beyond the simple arithmetic. He felt that the synergism from

the combination of all conditions resulted in permanent total disability. In terms of future medical care, Dr. Koprivica testified that Ms. Elwell would require follow-up care from a spinal surgeon. Her musculoskeletal complaints needed to be followed for her complaints of pain, and for possible future surgery because of the adjacent segment disease which is at increased risk following the fusion surgery.

David Clymer, M.D., performed a medical evaluation at the request of the employer. He offered an opinion that the work activities at Stahl from 1999 through 2006 were not the prevailing factor for the cervical fusion and resulting disability. He assigned a 15% permanent partial disability rating, and of that amount, attributed one-third of that rating, or, 5% as work related. He believed that the degenerative processes are a result of time and aging and the wear and tear of home and work life.

He recommended that she avoid repetitive overhead work or activity, and lift no more than 40-50 pounds below the shoulder height. He did not treat the employee. Dr. Clymer is a board certified orthopedic surgeon. He described that at most the work activity might have contributed up to 5% of the overall 15% disability which he assigned to the cervical spine condition. However, he did not indicate that the work performed by Ms. Elwell at Stahl Specialty was the prevailing cause of the cervical spine disability. He did indicate that the employee should avoid repetitive overhead work activity and that she should be limited in terms of what she would lift in the 40-50 lb. range below shoulder height. Dr. Clymer has not performed the type of surgery to the cervical spine that Ms. Elwell has received.

He was of the opinion that the number of health problems that Ms. Elwell presented in addition to the cervical spine limitations impacted her activities of daily living and these posed an obstacle to her finding and maintaining employment in their totality. Dr. Clymer noted that the employee believed she felt that her symptoms progressed principally after she changed her work from custodian type work to production work that involved repetitive tasks.

Based upon his review of all the records that had been provided to him by counsel, he found no evidence of myelopathy relating to the cervical spine, which pre-dated Ms. Elwell's employment at Stahl Specialty. Dr. Clymer did not recall any evidence of Ms. Elwell seeing a health care provider for ongoing problems of her neck involving cervical radiculopathy or myelopathy prior to the commencement of her employment at Stahl Specialty. Dr. Clymer believed that Ms. Elwell had ongoing disability because of her carpal tunnel disease which pre-dated her cervical spine surgery.

Part of Ms. Elwell's exposure to cumulative work effort, repetitive in nature, involving her upper extremities, occurred prior to a significant change in the Missouri Workers' Compensation law on August 29, 2005. Prior to that date, the standard of proof was different for proving work relatedness of the medical abnormality. The former standard was whether or not work was a substantial factor in causing resulting medical condition.

Dr. Clymer was asked about whether or not he had been provided any information by the employer that would allow him to weigh the impact of Ms. Elwell's employment in the period of time she was performing repetitive tasks prior to August 28, 2005. He did not have such information. He did indicate that when she worked in maintenance and as a custodian, her work

involved cleaning rest rooms and other common areas, cleaning up trash and performing general housekeeping.

Upon her transference to the production work, she had difficulty that developed because of the handling of many parts per day in the range of 80-100 parts that were variable in size from 2 lbs. to 25 lbs. in weight. She would handle those and move them and use an air activated grinder or brush to clean them. This change, he believes occurred in March of 2004, that is the change from maintenance and custodian work to production work. As he understood the work activities, they were somewhat less significant contributing factors with the degenerative process being the more prevailing factor.

Dr. Clymer felt that the employee should avoid constant or repetitive flexion and extension of the cervical spine, constant or repetitive rotation of the cervical spine. To a reasonable degree of medical certainty, he believes that Ms. Elwell had some aggravation of the pre-existing abnormalities of her cervical spine that developed as a result of her work. "I think it is probable that those activities (work activities) were at least an aggravating factor." (Clymer Deposition Ex. 2, p. 34, l. 6-13). Dr. Clymer felt that the symptoms that she experienced and the accumulative affect of the degenerative process had some impact or relationship to the work activities but he could not distinguish other than to say that they "all combined to get her where she is now." (Clymer Deposition Ex. 2, p. 35, l. 13-15).

Terry Cordray, vocational expert, evaluated the medical records and the employee on August 13, 2008. Mr. Cordray performed multiple forms of vocational testing and, following a complete vocational interview and assessment, opined that he did not believe the employee would be hired by any employer for any job given her situation. He elaborated that she is 64 years old, unskilled, has had no formal education for a period of 46 years. She had no post high school education or training. She has a history of a right knee total replacement which limits her to a sedentary work station. He believes that she needs the ability to change positions as needed. She's got demonstrated limitations in pushing, pulling, bending, reaching above her shoulders, climbing, squatting, kneeling, repetitive hand tasks to perform any kind of unskilled work in a clean environment for which she is restricted.

Mr. Cordray believed that to a reasonable degree of vocational certainty, no one specific medical anomaly considered in isolation is sufficient to render the employee totally disabled vocationally. However, taking into account the disabling conditions that existed before July 12, 2006, acting in concert with the cervical spine disability attributable to the July 12, 2006, claim, Mr. Cordray explained that Ms. Elwell was totally disabled vocationally.

The chronic obstructive pulmonary disease requires her to work in a clean work environment. She has to be outside of a grinding and smoke or an environment with fumes. She is limited to sedentary work but because of the bilateral disability of her hands and arms, coupled with the absence of any transferable skills, she has no realistic chance of finding employment. Add to that the results of the testing that he performed and Mr. Cordray believes these results are also an explanation for the vocational limitations.

For example, Ms. Elwell reads at the fifth grade level and performs arithmetic and spelling at the sixth grade level. He administered an IQ test and that measured 88. Mr. Cordray

believed that Ms. Elwell could not remediate educationally and then taking into account her age of middle sixties, no employer reasonably could be expected to employ her.

In *Leake v. City of Fulton*, 316 S.W.3d 528, (Mo.App.WD 2010), Employee's work as a police officer in helping a victim of a motor vehicle accident was a substantial factor in causing death, despite the existence of a pre-existing cardiovascular disease which the employer asserted was always the prevailing factor. There, as in this Claim, different expert opinions conflicted as to whether the work performed was the prevailing factor or whether the pre-existing disease was the prevailing factor. The Western District opinion, authored by Judge Karen King Mitchell, did not accept that the mere presence of a pre-existing disease would always be the prevailing factor. *Id.*, at 532. Moreover, the determination of whether the work activity is the prevailing factor is a factual question consistent with the interpretation of the "substantial factor" criterion of prior law. *Id.*, FN 3 at 532.

Most recently, in *Morrison v. Murphy Co.*, ___ S.W.3d ___, 2010 WL 4628111 (Mo.App E.D.), in a Per Curiam opinion, the Missouri Labor & Industrial Relations Commission's award allowing compensation to the employee, Morrison, was affirmed. The Commission's award, 2010 WL 1830513 (Mo.Lab.Ind.Rel.Com.), Injury No. 07-014847, dec'd April 20, 2010, considered facts similar to those before this Administrative Law Judge. The employee was performing repetitive tasks involving the use of his upper extremities and submitted to surgery for bilateral carpal tunnel syndrome.

The Murphy Co.'s evaluating experts concluded that risk factors of pre-existing obesity and hyperthyroidism, as well as cervical stenosis were contributing factors to the work factors, and they did not believe that work was the prevailing factor. There, as here, the employee offered substantial evidence from a qualified physician that the workplace exposure was the prevailing factor in causing the medical condition and disability. There, as here, the workplace duties were demanding in terms of what was physically required of the employee.

A different result for the employee in *Johnson v. Indiana Western Express, Inc.*, 281 S.W.3d 885 (Mo.App.S.D., 2009) was seen. He was denied compensation because of a failure to fully recover from a prior injury which precluded a finding of prevailing factor as alleged. Unlike Mr. Johnson, however, Ms. Elwell testified that she fully recovered from the soft-tissue injury. Ms. Elwell's objective testing demonstrated that she had no radicular symptoms from the collision, and Dr. Clymer, as well as Dr. Koprivica, found no evidence of ongoing treatment or symptoms related to the prior injury.

I find from all of the competent and substantial evidence that Employee has met her burden of proof in demonstrating that the resulting medical condition, surgery and disability were sufficiently related to her work. I therefore hold that the cumulative work effort was a prevailing factor in causing her underlying medical condition to become symptomatic and in need of the surgery she underwent. As a result of her cumulative work, I find that Employee has sustained a 25% permanent partial disability to the body as a whole, referable to her cervical spine. The cost of the surgery proven by the Employee was the billing submitted by the operative surgeon, Geoffrey Blatt, MD, which I find was reasonable and necessary in an effort to cure and relieve the Employee from the effects of her injury. Accordingly, I award her the sum of \$16,195.80 for such services.

From the evidence, there is however insufficient clarity with which to determine a healing period following the surgery, so I therefore deny any compensation for temporary-total disability. However, Employee has met her burden of proof that she will require further treatment. I find the testimony of Dr. Koprivica reasonable, and thus, order the Employer-Insurer to provide Ms. Elwell with future treatment in an effort to cure and relieve her from the effects of her cervical spine injury.

Claimant has alleged she is permanently and totally disabled. In order to determine whether an employee is deemed totally disabled under the Missouri Workers' Compensation Law, it must be found that the Claimant is unable to return to any employment. §287.020(7) RSMo (2000) defines total disability as "an inability to return to any employment and not merely...inability to return to the employment which the employee was engaged at the time of the accident."¹ *Reese v. Gary & Roger, Inc.*, 5 SW 3d 522 (Mo. App. 1999); *Fletcher v. Second Injury Fund*, 922 SW 2d 919, 921 (Mo. App. 1982); *Groce v. Pyle*, 315 SW 2d 482, 490 (Mo. App. 1958). It is not necessary that an individual be completely inactive or inert in order to meet the statutory definition of permanent total disability.

It is necessary, however, that they be unable to compete in the open labor market. See *Reese v. Gary & Roger Link, Inc.* 5 SW 3d 522 (Mo. App. 1999); *Carlson v. Plant Farm*, 952 SW 2d 369, 373 (Mo. App. 1997); *Fletcher v. Second Injury Fund*, 922 SW 2d 402 (Mo. App. 1996); *Searcy v. McDonnell Douglas Aircraft*, 894 SW 2d 173 (Mo. App. 1995); *Reiner v. Treasurer*, 837 SW 2d 363 (Mo. App. 1992); *Brown v. Treasurer*, 795 SW 2d 478 (Mo. App. 1990). Missouri courts have repeatedly held that the tests for determining permanent total disability is whether the individual is able to compete in the open labor market and whether the Employer in the usual course of business would reasonably be expected to employ the Employee in his present physical condition. See *Garcia v. St. Louis County*, 916 S.W.2d 263 (Mo. App. 1995); *Lawrence v. R-VIII School District*, 834 S.W.2d 789 (Mo. App. 1992); *Carron v. St. Genevieve School District*, 800 S.W.2d 6 (Mo. App. 1991); *Fischer v. Arch Diocese of St. Louis*, 793 S.W.2d 195 (Mo. App. 1990).

In other words, a determination of permanent total disability should focus on the ability or inability of the Employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employment. *Gordon v. Tri-State Motor Transit*, 908 S.W.2d 849 (Mo. App. 1995). The courts of the State have held that various factors may be considered including a claimant's physical and mental condition, age, education, job experience and skills in making the determination as to whether a claimant is permanently and totally disabled. See e.g., *Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo. App. 1997); *Olds v. Treasurer*, 864 S.W.2d 406 (Mo. App. 1993); *Brown v. Treasurer*, 795 S.W.2d 439 (Mo. App. 1990); *Patchin v. National Supermarkets Inc.*, 738 S.W.2d 166 (Mo. App. 1987); *Laturno v. Carnahan*, 640 S.W.2d 470 (Mo. App. 1982); *Vogel v. Hall Implement Co.*, 551 S.W.2d 922 (Mo. App. 1977).

Applying these standards and tests to the facts of this case, it is clear that the Claimant is unable to compete for gainful employment. She has been incapable of working since her last day

¹ Although effective August 28, 2005, S.B.1 materially altered multiple provisions of Chapter 287, the test for total disability and Second Injury Fund responsibility was not changed.

of work on August 1, 2006. In order to establish Second Injury Fund Liability for permanent total disability benefits, the Claimant must prove:

1) that she has a permanent disability resulting from a compensable work-related injury, See §287.220.1 RSMo (1994); I find and believe that her disability is 25% permanent partial disability to the body as a whole, and that such, in isolation, does not render her totally disabled.

2) that she has permanent disability predating the compensable work-related event which is “of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the employee becomes unemployable.” §287.220.1 RSMo (1994), *Messex v. Sachs Electric Co.*, 989 SW 2d 206 (Mo. App. 1997); *Garibay v. Treasurer*, 964 SW 2d 474 (Mo. App. 1998); *Rose v. Treasurer*, 899 SW 2d 563 (Mo. App. 1995); *Leutzinger v. Treasurer*, 837 SW 2d 615 (Mo. App. 1995); I accept the ratings of disability expressed by Dr. Koprivica which I have earlier set forth in this award as demonstrating serious disabling conditions which had the potentials to be a hindrance and an obstacle to maintaining employment.

3) that the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time the last injury was sustained results in permanent total disability. *Boring v. Treasurer*, 947 SW 2d 483 (Mo. App. 1997); *Reiner v. Treasurer*, 837 SW 2d 363 (Mo. App. 1992); *Frazier v. Treasurer*, 869 SW 2d 152 (Mo. App. 1994). *Miller v. State Treasurer*, 978 SW 2d 808 (Mo. App. 1998)

I find that the Claimant is permanently and totally disabled and clearly such disability is the result of the combined effect of the disability resulting from Ms. Elwell’s 2006 cervical spine injury and the disability attributable to her preexisting lower back (15% body as a whole), right arm (25% at the 175 week level); left arm (15% at the 175 week level); right knee (50% at the 160 week level); and pulmonary system (30% body as a whole.. These prior disabilities provided her with a long standing hindrance and obstacle to daily work. I believe the permanent disability assessments of Dr. Koprivica are reasonable, probative, convincing and accept those. I believe the vocational evidence and opinions offered by expert Terry Cordray are reasonable, probative, and, convincing.

Claimant accommodated herself due to these many conditions which caused her pain, loss of strength, limitations of motion and mobility, throughout her employment history. She changed occupations in an effort to find work she could perform so as to support herself and her disabled ex-husband.

There is essentially no evidence in this case to combat a finding that the Claimant is permanently and totally disabled nor is there any evidence which would sustain a finding that the Second Injury Fund is not liable. All of the evidence in this case points to the Second Injury Fund liability and I find accordingly that the Fund is liable for permanent total disability benefits to the Claimant for the rest of her life.

The Claimant's permanent total disability commenced on August 1, 2006. Her permanent disability benefits would commence to run from that point in time. There is, in this case, no

difference in the permanent partial and permanent total compensation rates. Thus, for a period of 100 weeks following August 1, 2006, the Second Injury Fund has no obligation to pay compensation benefits. However, starting thereafter on July 2, 2008, the Fund is liable for weekly benefits of \$344.93 and continuing on for the rest of Claimant's life.

Claimant's attorney has requested a fee equal to 25% of all amounts awarded for disability. I find that such request is fair and reasonable and order a lien to attach to this award for sums due and owing at present and for sums accruing in the future.

Date: _____

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this ____ day of _____, 2011, by:

Naomi Pearson
Division of Workers' Compensation