

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 03-084851

Employee: Gladys Gaeke
Employer: Curators of the University of Missouri
Insurer: Corporate Claims Management, Inc.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have read the briefs, reviewed the evidence, and considered the whole record. We find that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision affirming the September 17, 2012, award and decision of the administrative law judge, as modified herein. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

From 1989 through September 2004, employee worked out of her home as a small farm educational assistant for the University of Missouri Extension Services, the employer herein. On August 19, 2003, employee was 73 years old. On that date, employee drove from the home of a client in her pickup truck and pulled onto Highway AA in Webster County. A vehicle estimated to be traveling in excess of 60 miles per hour rear-ended employee's pickup truck. As a result of the accident, employee suffered a burst fracture in her thoracic spine, a closed head injury, and neck pain radiating into her left arm. Employee spent a week in the hospital and two weeks in a rehabilitation facility after the accident. After her release from the rehabilitation facility, employee spent months in rehabilitating on an out-patient basis. Employee injured her left knee while engaged in physical therapy prescribed to help her recover from her work injuries.

Employee filed workers' compensation claims against employer and the Second Injury Fund seeking permanent total disability benefits, among other benefits. After a hearing on the claim, the administrative law judge awarded to employee permanent partial disability benefits from employer. The administrative law judge awarded no benefits from the Second Injury Fund.

Employee filed an Application for Review of the administrative law judge's award alleging the administrative law judge's determination that employee is not permanently and totally disabled is in error.

¹ Statutory references are to the Revised Statutes of Missouri 2002, unless otherwise indicated.

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Nature and Extent of Permanent Disability

Employee alleges she is permanently and totally disabled. “Pursuant to section 287.020.6, the term ‘total disability’ means the ‘inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident.’ The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. ‘Total disability’ does not require the employee to be completely inactive or inert, rather, it means the inability to return to any reasonable or normal employment.”² Courts have ruled “inability to return to any employment” means that the employee is unable to perform the usual duties of the employment under consideration *in the manner that such duties are customarily performed by the average person engaged in such employment.*³

The administrative law judge found that “claimant suffered only permanent partial disability from the last accident as [employee] was able to work full time at her job for more than one year after her release from Dr. Lennard. This was a job on the open labor market.” We disagree with the characterization of employee’s job as “on the open labor market.” Employee’s position was not in the open labor market – employee occupied the job.

More importantly, employee’s return to her job after recovering from her injury is not proof that employee could then *compete* in the open labor market. “Compete,” means, “to seek or strive for something (as a position, possession, reward) for which others are also contending.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 463 (2002). Employee last *competed* for her position in 1989 when she was hired.

An employer deciding whether to bring its injured worker back to work may be motivated by different factors than an employer filling a vacant position in the open labor market. An injured worker’s employer has many potential incentives to return its injured worker to work even if the worker is no longer able to perform all of the duties the job ordinarily entails. An employer may want to return an injured worker to her job to reciprocate for the worker’s loyalty to the employer. Or an employer may feel compelled to return an injured worker to her job to foreclose bad feelings that could give rise to legal action arising out of other events in the employment relationship. It may be more cost-effective for an employer to put a trained, injured worker back to work in a diminished capacity than it is to hire and train a new worker, even though the new worker has more physical abilities. But in an arms-length recruitment process those same employers would not reasonably be expected to hire candidates who cannot perform all of the duties of the jobs in the manner that such duties are customarily performed by average persons engaged in such employments over candidates who can perform all of the duties of the jobs in the customary manner.

² *Underwood v. High Rd. Indus., LLC*, 369 S.W.3d 59, 66-67 (Mo. App. 2012)(internal citation omitted).

³ See, e.g., *Kowalski v. M-G Metals & Sales, Inc.*, 631 S.W.2d 919, 922 (Mo. App. 1982).

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It is for reasons such as those above that the critical question in permanent total disability cases is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker given in her physical condition as it existed as of the time her disability became permanent, and expect the injured worker to perform the duties in the manner in which they are customarily performed.

We affirm the administrative law judge's determination that employee reached maximum medical improvement on May 24, 2004. Consequently, we must answer that critical question considering employee in her physical condition as it existed on May 24, 2004, at a time when she was 74 years of age.

Lay Witnesses

Employee testified about the lingering effects of her work injury. When employee returned to work for employer, employee was often limited to conducting telephone consultations with her clients due to her back pain. On many occasions when employee was feeling well enough to travel to client homes, she had to get a ride to the homes because she was still in too much discomfort to drive. After the work injury, employee was never again able to walk the fields with her clients during consultations. Employee could sometimes drive or ride about a client's property in a vehicle during a consultation. But other times employee was limited to visiting with her clients in their homes about their needs. After the work injury, employee was physically unable to take soil samples. Nor could she demonstrate planting or pruning techniques for her clients. Upon returning from client visits, employee usually had to lie down due to back pain.

Employee's work injury affected far more than her ability to perform her duties for employer. Employee was no longer able to perform many of the chores she previously performed on the farm she owns with her husband.

Employee's daughter testified to her observations regarding her mother's limitations after the work injury. She testified that some days her mother was in such pain that she could not conduct visits to client farms so employee performed telephone consultation. Approximately 25% of the time employee visited clients employee's husband drove her because employee was not feeling well enough to drive. If employee needed files for client visits, employee's family members had to load them into the vehicle because their weight exceeded employee's lifting restrictions. Employee's daughter observed that employee was relegated to the role of an observer on her visits. Employee's daughter observed that her mother had difficulty recalling information regarding farm matters and had to spend time researching matters about which she had good recall before the work injury.

Employee's daughter confirmed that after the work injury, employee's ability to help husband with farm chores was greatly diminished because she could no longer drive the tractor, lift hay bales, birth calves, or many of the other farm chores. After the work injury, employee was not even able to garden or go shopping.

Expert Witnesses

Dr. Lennard is board certified in physical medicine and rehabilitation, a specialty that deals with the diagnosis and treatment of acute and chronic musculoskeletal and peripheral

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nerve disorders. Dr. Lennard initially examined employee on January 16, 2004. He released employee to full duty without restrictions on May 24, 2004, having determined employee was at maximum medical improvement. As of that date, employee reported that she continued to have an ache in her back at the site of her fracture. Examination revealed employee was permanently tender at her fracture site between T10 and T12 in the midline and right. Employee also complained of headaches.

Dr. Lennard's final diagnosis was status post-T11 fracture; closed head injury; cervical strain; and, left knee strain. Dr. Lennard opined that as a result of the work accident employee sustained a 15% permanent partial disability of the body as a whole referable to the thoracic fracture; 5% permanent partial disability of the body as a whole referable to the cervical spine strain and resultant neck pain; 5% permanent partial disability of the left lower extremity at the knee; and, 10% permanent partial disability of the body as a whole referable to the closed head injury. In reaching his opinions, Dr. Lennard reviewed and considered medical records of treatment related to the work injury and Dr. Choe's report of February 12, 2003.

Dr. Paul examined employee for the purpose of rendering his expert medical opinions. Dr. Paul recommended several physical restrictions to which employee should adhere in light of the medical conditions resultant from the August 19, 2003, accident. Dr. Paul recommends the following restrictions on employee's physical activities solely due to the effects of the work injury

- never lift over 10 pounds (lumbar)
- limit lifting to 10 pounds occasionally, no more than 2-1/2 hours in an eight-hour workday (lumbar);
- limit sitting to one-hour increments, no more than four hours in an eight-hour day (lumbar);
- change positions every 30 to 60 minutes (lumbar);
- avoid holding head in fixed position for greater than 30 minutes without a 5-minute break (cervical spine);
- avoid repetitive use of neck in full extension or full flexion (cervical spine);
- avoid use of left shoulder for excessive overhead work (elbow);
- avoid lifting over 30 pounds with left arm from waist to shoulder (elbow);
- avoid repetitive use of left arm for tasks away from body (elbow);

In addition to the above restrictions, Dr. Paul identified other limitations employee experiences as a result of her work injury. He opined employee should avoid climbing, balance work, stooping, bending, kneeling, crouching, and crawling. Employee should also limit reaching and handling. Dr. Paul indicated that employee should periodically recline during the day to reduce pain.

In addition, Dr. Paul testified that employee had ongoing cognitive deficits, depression, and anxiety resultant from her closed head injury. Dr. Paul's impression was that employee's thought processes appeared slow and at times incoherent. Dr. Paul also opined that employee's speech quantity and speech quality are severely impaired. Dr. Paul believed

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the above-described remnants of employee's head injury would create difficulty for employee as a job applicant.

Dr. Paul also imposed restrictions due to employee's preexisting disabilities. Those restrictions are recounted in the administrative law judge's award and will not be repeated here.

Dr. Paul opined that as a result of the work accident employee sustained a 13% permanent partial disability of the body as a whole referable to the thoracic fracture; 15% permanent partial disability of the body as a whole referable to the cervical spine; 19% permanent partial disability of the body as a whole referable to the lumbar spine; 10% permanent partial disability of the left upper extremity at the 210-week level; and, 10% permanent partial disability of the body as a whole referable to the head injury.

Dr. Paul does not believe the effects of the work injury considered alone rendered employee permanently and totally disabled. Dr. Paul acknowledged that employee's clients helped employee with many job duties. Dr. Paul believed that employee was only able to maintain her work activities because she worked the job for 16 years and employer was making accommodations for her. Without accommodations, Dr. Paul believes employee would have been permanently and totally disabled in 2005.

Vocational expert Wilbur Swearingin testified at the hearing of this claim. Mr. Swearingin evaluated employee on September 20, 2010, on which date he gathered a detailed history from employee. Mr. Swearingin reviewed various medical records regarding employee's medical conditions and physical restrictions. Mr. Swearingin accepted as reasonable the physical restrictions recommended by Dr. Paul as a result of the work injury. Considering only those restrictions, Mr. Swearingin formed the opinion that employee is unable to compete in the open labor market. The restriction that most influenced Mr. Swearingin's determination that employee is unable to compete is her need to recline periodically during the day, but Dr. Paul's other physical restrictions factored heavily in Mr. Swearingin's determination as well.

Mr. Swearingin considered employee's return to work for employer in reaching his conclusions. He noted that after her return to work, employee performed her job differently than she did before the injury in that she would generally sit and direct the client. Mr. Swearingin considered the work to be accommodated work and he did not believe employee was performing the work "as people commonly do in the open labor market."

Mr. England evaluated employee on September 9, 2011. He testified he did not believe it was employee's work injury alone that was preventing employee from working because employee had returned to work, "did her regular job," and would have continued working if the job had continued. Mr. England conceded that if Dr. Paul's physical restrictions are appropriate, employee is unemployable in the open labor market based solely upon those restrictions.

We are most persuaded by the opinion of Dr. Paul regarding employee's physical abilities and limitations as a result of the work injury. As to the employee's vocational

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prospects, we accept the opinion of Mr. Swearingin that employee was rendered unable to compete in the open labor market as a result of the work injury alone. Mr. Swearingin had a better understanding of employee's post-injury work accommodations than did Mr. England.

We simply do not believe that any employer in the ordinary course of business would reasonably be expected to hire a 74 year-old worker with the work-related physical restrictions and cognitive deficits employee had as of May 24, 2004, and reasonably expect that worker to perform the duties of a job in the customary manner in which the duties are performed. Based upon the forgoing, we find that employee is permanently and totally disabled as a result of the injuries and disability she sustained from the work injury.

Award

We modify the administrative law judge's award of permanent disability benefits. Beginning May 25, 2004, employer shall pay to employee \$244.27 weekly, as and for her permanent total disability benefits, such payments to continue for employee's lifetime or until modified by law.

We further 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.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued September 17, 2012, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 19th day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Gladys Gaeke Injury No. 03-084851
Dependents: N/A
Employer: Curators of the University of Missouri
Additional Party: Treasurer of the State of Missouri as Custodian of the Second Injury Fund
Insurer: Corporate Claims Management, Inc.
Hearing Date: July 27, 2012

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

Checked by: VRM/ps

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: August 19, 2003.
5. State location where accident occurred or occupational disease was contracted: Webster 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: Claimant was leaving a farmer's home, after providing instruction, when her vehicle was struck from behind.
12. Did accident or occupational disease cause death? No. Date of death? N/A.

13. Part(s) of body injured by accident or occupational disease: Body as a whole, left leg, and left arm.
14. Nature and extent of any permanent disability: Permanent partial disability.
15. Compensation paid to-date for temporary disability: \$6,770.05.
16. Value necessary medical aid paid to date by employer/insurer? \$55,408.39.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$366.40.
19. Weekly compensation rate: \$244.27.
20. Method wages computation: By Agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

204 weeks of permanent partial disability x \$244.27 = \$49,831.08
Minus the credit for the third party recovery: - \$46,570.89

TOTAL: \$ 3,260.19.

22. Second Injury Fund liability: None.
23. Future requirements awarded:

Employer /Insurer shall provide future medical treatment to cure and relieve the effects of the work accident.

The Award is subject to a lien in the amount of 25 percent of all amounts awarded herein as a reasonable fee for necessary legal services rendered to claimant in favor of attorney:
E. Joseph Hosmer.

FINDINGS OF FACT AND RULINGS OF LAW:

Employee:	Gladys Gaeke	Injury No. 03-084851
Dependents:	N/A	
Employer:	Curators of the University of Missouri	Before the DIVISION OF WORKERS' COMPENSATION Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Treasurer of the State of Missouri as Custodian of the Second Injury Fund	
Insurer:	Corporate Claims Management, Inc.	
Hearing Date:	July 27, 2012	Checked by: VMR/ps

PRELIMINARIES

The undersigned Administrative Law Judge conducted a final hearing in this case on July 27, 2012 in Springfield, Missouri. Gladys Gaeke (Claimant) appeared with her legal counsel, Attorney E. Joseph Hosmer. The Curators of the University of Missouri-Columbia (Employer) and its claims administrator, Corporate Claims Management, Inc., appeared by Attorney George Floros. Assistant Attorneys General Cara Harris and Skyler Burks represented the Treasurer of the State of Missouri, as custodian of the Second Injury Fund (Second Injury Fund). The parties stipulated to the following facts:

STIPULATIONS

1. On August 19, 2003, Claimant was injured in an automobile accident in Webster County, Missouri. The accident arose out of and within the course of her employment with the Curators of the University of Missouri-Columbia. On that date, Claimant was covered by, and Employer was subject to, the Missouri Workers' Compensation Law.
2. Employer was fully insured or self-insured, as required by law.
3. The claim was filed timely, jurisdiction is appropriate, Employer received notice, and the parties consent to venue in Springfield, Missouri.
4. Employer paid medical benefits in the amount of \$55,408.39 and temporary disability in the amount of \$6,770.05.
5. Claimant's average weekly wage was sufficient to yield a permanent partial disability rate of \$244.27.
6. Claimant drew \$4,680.00 in unemployment benefits from November 19, 2005 to June 24, 2006.

7. Employer/Insurer received \$14,860.18 in subrogation arising out of a third-party action. Following application of the subrogation formula set forth in *Reudiger v. Kallmeyer*, 501 S.W.3d 56 (Mo. banc 1973), there remains a credit of \$46,570.89 for distribution to either Employer/Insurer or to the Second Injury Fund, or both.

ISSUES

The parties agree that the following are the sole issues for determination:

1. What is the date of Claimant's maximum medical improvement?
2. What is the nature and extent of Claimant's disability?
3. If Claimant is permanently and totally disabled at this time, is that degree of disability medically and causally related to the injuries sustained from the work accident?
4. What, if any, is the liability of Employer?
5. What, if any, is the liability of the Second Injury Fund?
6. Is Employer liable for future medical treatment?
7. Is any party entitled to a credit for the unemployment benefits drawn by Claimant?
8. Does the Administrative Law Judge have jurisdiction to award a credit for the remaining subrogation interest and, if so, how should the proceeds be distributed?

EXHIBITS

The following exhibits were offered by Claimant and admitted:

- A. Deposition – Robert Paul, M.D.
- B. Accident Report
- C. Highway Patrol Report
- D. Photos of Motor Vehicles
- E. Curriculum Vitae – Wilbur Swearingin
- F. Vocational Report – Wilbur Swearingin

The following exhibits were offered by Employer and admitted:

1. Unemployment Records
2. Claim of Injury
3. Report of Injury
4. Deposition – Ted Lennard, M.D.
5. Deposition – James England
6. Deposition – Gladys Gaeke (May 4, 2007)
7. Deposition – Gladys Gaeke (December 27, 2010)
8. Judgment – third party action
9. Letter – Joseph Hosmer to Mr. Swearingin (July 25, 2012), with attachments

10. Test List – Mr. Swearingin
11. Printout from Internet – Claimant's expertise and work history

The Second Injury Fund offered no additional exhibits.

FINDINGS OF FACT

Claimant was born in 1930. She was 82 years old at the time of this hearing. She graduated from high school in 1947, and proceeded to work a number of responsible jobs throughout her adult life. In addition to her "working" career, she raised a family and partnered with her husband in running a farm. This included feeding and moving cattle, putting up fence, stacking hay bales, running a tractor, and caring for a large garden. In her "spare" time, Claimant and her husband joined an RV camping club in 1978.

Outside of her farm activities, Claimant had held several bookkeeping and office positions. The last 16 years of her career, she worked with the University of Missouri Extension Service as a small farm educational assistant. She advised small farmers how to best operate their acreages in Webster County, Missouri. She taught farmers how to look after their livestock and what feed to use. She walked their fields and took soil samples. These samples were sent for analysis so Claimant could recommend what crops to plant. She taught basic record keeping. She advised people how to prune fruit trees. She set up educational programs on goat milk cheese making, and artwork. She wrote grant applications. She even started a "fiber fair" in Webster County so that individuals had a market for their products.

The Accident

Although much of Claimant's work was performed at her home office, conducting personal interviews and using standard office equipment, she also drove to her clients' homes to provide education. On August 19, 2003, Claimant had just finished one such work-related meeting, when she pulled on to Highway AA in Webster County. A vehicle traveling at a high rate of speed rear-ended Claimant's pickup truck. The impact was so great it broke the seat of the pickup. Claimant had no prior damage to her vehicle. She was knocked unconscious and was in the hospital for nearly a month. She suffered a burst fracture in the thoracic spine and a closed head injury. She also suffered neck pain radiating into her left arm and left knee pain.

On September 13, 2003, Claimant left the hospital and participated in a comprehensive home healthcare program while recovering from the accident. This consisted of occupational therapy, physical therapy, and speech therapy. When Claimant's treating physician, Dr. Crabtree, released her from his care, he suggested that Claimant see Dr. Ted Lennard for a course of progressive physical therapy to include upper and lower extremity strengthening.

Dr. Lennard, a physical medicine specialist, placed Claimant in a conditioning program and referred her to speech pathology. In early 2004, Claimant returned to work on a part-time basis. In April 2004, Dr. Lennard released Claimant to resume her regular 40-hour work week. By May 24, 2004, after Claimant had resumed full time work, she reported some back discomfort, but advised Dr. Lennard that she was doing her home exercise program, working her regular job, and finding over-the-counter Tylenol helpful. I find that Dr. Lennard discharged Claimant from

active treatment at that point, and on May 24, 2004, Claimant was at maximum medical improvement as a result of the injuries from the 2003 automobile accident.

Effects of the Accident

The closed head injury caused Claimant to suffer memory loss for a long period of time. Until about 2008, she took Hydrocodone up to six times per day. She now takes Tylenol as needed, and only occasionally relies on Hydrocodone. While she continues to suffer a sharp pain in her head two to three times a day, it lasts only about a minute and subsides without medication. Claimant has reduced range of motion in her neck. Her memory is not as good as before, which Claimant believes would preclude her from working in her past occupation as a bookkeeper. She suffers from depression and anxiety, and gets weepy if she is not on medication. She has taken Paxil to help her sleep since the accident. She had no anxiety problems before the accident.

Return to Work

While Claimant returned to full time work for the Extension Service from May 2004 through September 2005, she had to change her methods of execution. She no longer could walk the fields, so she would drive her pickup truck into the fields. Rather than actually taking the soil samples herself, she would direct the client how to operate the auger to take the cone sample. She would direct her clients how to prune and point out what needed pruning, but she no longer actually demonstrated the pruning techniques. While she still drove to clients' homes, she relied more heavily on phone calls. She enlisted the assistance of coworkers or family members to place multiple copies of guidebooks and pamphlets in her truck rather than lifting heavy materials herself. She conducted more group classes. Nothing indicates that the University Extension Service provided any of these accommodations to Claimant after she returned to work. Rather, these were ways Claimant found that she could continue performing the essential functions of her job.

The Job Ended

In September 2004, Claimant lost her job. The lay-off affected all workers in her job classification, and was not a situation unique to Claimant. Claimant did not choose to apply for social security disability or long-term disability through the University. Rather, Claimant applied for unemployment insurance, drawing benefits for the maximum 26 weeks. She continued to look for work during this entire time period, searching for jobs that would allow her to sit and type at a computer. She restricted her job search to the Marshfield area and to jobs that did not require extensive standing or walking. After two years, Claimant never found a paying job, although she did find volunteer positions. When it became apparent her job with the Extension Service was permanently eliminated, Claimant filed for retirement benefits from the University.

Preexisting or Other Disabilities/Conditions

Claimant had been diagnosed with a number of preexisting conditions. These included:

1. **Mitral Valve Prolapse** – Claimant was diagnosed with this condition in the 1990s. She has had no significant problems as a result of the condition.
2. **COPD/Congestive Heart Failure** – Prior to the work accident, Claimant suffered from allergies. She took Benadryl for the allergies and was advised that she might suffer from COPD. She testified she had no significant problems from this condition prior to the work accident. The definitive diagnosis of Congestive Heart Failure did not occur until *after* the work accident. She now takes prescription medication for the condition.
3. **Atrial Fibrillation** – Claimant indicated that she began taking medications in the 1990s for this condition, which included a beta blocker and a blood thinner. Claimant took these medications up until the last year, which would have been 2011.
4. **Osteoporosis** – Claimant was diagnosed with this bone disorder prior to the work accident. Her treatment now includes prescribed medication and calcium supplements.
5. **Macular Degeneration** – This eye condition was diagnosed before the work accident in 2003. This condition did not prevent Claimant from working prior to the work accident or even prior to the date the job ended in 2005. Claimant believed she had no problems until she took her driver's test in 2009.
6. **Breast Cancer** – Claimant underwent a mastectomy of the left breast in 2005. She took medications for a period of five years. She takes no medication now for that condition.
7. **Sleep Apnea** – Claimant indicated that she did not begin using a CPAP machine until after the 2003 accident.

Despite these multiple preexisting conditions, Claimant testified that she had no restrictions prior to the 2003 motor vehicle accident. She said she could walk in the fields, stand outside, see, read, operate a computer, drive, and effectively perform all of her job duties without any difficulty.

Current Activities

Claimant spends the bulk of her days watering heifers, cooking lunch, washing clothes, and maintaining container plants. She sits while performing some of these chores and relies on significant help from her family. She retains her sense of humor, testifying in 2007 that “[t]he vacuum cleaner is an ornamental at our house.” (Exhibit 6, p. 32). In that same 2007 deposition, she said she could attend to her personal hygiene, prepare meals, feed a calf while sitting on a tub, administer a shot to her husband for his diabetes, feed pets, count the calves while riding in a vehicle, and trickle some grain for the cows. She still drives into the fields and uses a golf cart around the outside of the home. Her limited vision prevents her from driving elsewhere. She can stand at least ten minutes, but finds that she has to constantly change positions. She emphatically testified that she had no limitations prior to the 2003 motor vehicle accident. Moreover, I find that Claimant did not have to lie down during the day while she was still working. Any need to lie down during the work day occurred after the job had ended.

Expert Medical Opinions

Dr. Robert Paul examined Claimant on two separate occasions, more than four years apart. He admitted that the purpose of the initial examination on September 2, 2005, was to determine the extent of Claimant's disability.

- **2005 Examination:** Dr. Paul opined that Claimant exhibited some impaired mental status, depression, and anxiety, consistent with a closed head or traumatic brain injury. He found tenderness in Claimant's elbow and in the back, along with some spasticity in the back. He believed Claimant had reached maximum medical improvement. He provided permanent partial disability ratings, and made no suggestion that Claimant was permanently and totally disabled. He acknowledged that Claimant had been working. He made no recommendation in his 2005 report that Claimant should discontinue employment. He did not include any specific work restrictions in his 2005 report or state that Claimant's complaints or exam findings rendered her incapable of employment.

In his 2005 report, Dr. Paul rated the following partial disabilities from the primary work injury:

- 15 percent to the whole body referable to the cervical spine 60 weeks
- 13 percent to the whole body referable to the thoracic spine 52 weeks
- 19 percent to the whole body referable to the lumbar spine 76 weeks
- 10 percent to the whole body due to a concussion/hematoma 40 weeks
- 10 percent of the left arm at the 210-week level 21 weeks

In 2005, Dr. Paul also rated the following preexisting disabilities which he found to be a hindrance or obstacle to employment:

- 15 percent to the whole body due to congestive heart failure 60 weeks
- 13 percent to the whole body due to pulmonary obstructive disease 52 weeks
- 13 percent to the whole body due to sleep apnea 52 weeks

With respect to the rating for preexisting congestive heart failure, Dr. Paul admitted in deposition that Claimant had no doctor-imposed restrictions related to her heart. With respect to the pulmonary obstructive disease, Dr. Paul indicated that Claimant was taking Flonase, Advair, and Singulair. He said these medications are for emphysema or chronic obstructive pulmonary disease and not necessarily for allergies. He was unaware, however, whether Claimant had been taking those medications prior to his examination in 2005. Further, Dr. Paul had no information that Claimant was using a CPAP machine prior to the 2003 work accident. Dr. Paul did not include Claimant's breast cancer in his ratings as he believed it was temporary issue that did not impact her employability. He also found that in 2005, that the macular degeneration was not a significant problem.

Dr. Paul opined that the combination of all of these disabilities was greater than their simple sum and that he would apply a loading factor. In short, while finding a significant amount of permanent partial disability, Dr. Paul in no way suggested that Claimant was permanently and totally disabled at the time of his 2005 examination.

- **2010 Examination:** Dr. Paul reexamined Claimant on April 1, 2010. In his April 2, 2010 report, Dr. Paul continued to opine that Claimant was at maximum medical improvement and iterated his earlier permanent partial disability ratings. For the first time, however, Dr. Paul stated that Claimant was permanently and totally disabled. He attributed this to the combination of the disabilities from her 2003 motor vehicle accident and her preexisting medical disabilities. Dr. Paul also recommended open future medical, noting that Claimant should continue indefinitely a prescription for Paxil, anti-inflammatory medications, and non-narcotic pain medicines, as well as have ongoing physical monitoring by a physician.

In his 2010 report and subsequent deposition, Dr. Paul said Claimant had the following restrictions because of the 2003 accident: no lifting over 10 pounds, occasional lifting up to 10 pounds, frequent lifting of only negligible amounts, no holding the head in a fixed position for greater than 30 minutes without a five minute break, no repetitive full extension or flexion of the neck, no use of the left shoulder for excessive overhead work, no lifting over 30 pounds with the left arm from the waist to shoulder height, and no repetitive use of the left arm for tasks away from the body. He also noted that Claimant had been taking Vicodin and it was necessary for Claimant to lie down to reduce pain after light housework or activity.

Dr. Paul said in his deposition that he also placed restrictions on Claimant because of her preexisting disabilities. He said Claimant should be restricted from all jobs requiring anything but mild exertion. Specifically, she should avoid all running, jogging, climbing, and exposure to electrical, mechanical, or chemical hazards. He said these restrictions were relative to Claimant's heart and lungs. As a result of both the last or primary injury and the preexisting disabilities, Dr. Paul said Claimant should avoid environmental and physical hazards such as fumes, odors, dust, electrical shock, high exposed places, explosive, toxic caustic chemicals, and temperature extremes.

On cross-examination, Dr. Paul testified that Claimant would have been permanently and totally disabled at the time of his previous examination had Claimant not had an accommodated job, although such opinion is conspicuously absent from his 2005 report. Dr. Paul conceded on cross-examination that it was possible for someone over a five year time period, from age 75 to 80 years, to develop decreased range of motion in the cervical spine simply due to age. He said that age "has to be a consideration" in determining one's disability, even though it is not a ratable condition.

Dr. Ted Lennard was a treating physician who also provided expert testimony for Employer/Insurer. Dr. Lennard diagnoses from the 2003 work accident included a T-11 fracture, closed head injury, cervical strain, and left knee strain. He rated Claimant as having a 20 percent permanent partial disability of the whole body referable to the back. This encompassed both the compression fracture at the thoracic spine (15 percent) and the injury to the cervical spine (5 percent). He assigned 5 percent permanent partial disability of the left leg at the 160-week level for the knee, and a 10 percent permanent partial disability to the whole body due to closed head injury.

On November 30, 2010, Dr. Lennard reevaluated Claimant. At that time, Dr. Lennard noted that Claimant was reporting more low back, hip, and extremity pain than what she reported in 2004 when she was released from Dr. Lennard's care. She was able to sit and stand independently, but

had diffuse tenderness in her mid and low back with pain on motion, mild limitation of motion of the neck, no spasm, and a normal neurological exam. He continued to feel that she was at maximum medical improvement with regard to the August 19, 2003 work accident, and remained capable of working from the standpoint of the work injuries alone. He noted, however, that Claimant, now 80 years old, had multiple other health issues that would, when combined with her age, prevent her from working. He opined that there was some overall deterioration in Claimant's health status between 2004 and 2010 and attributed this to aging.

Dr. Lennard noted in his November 3, 2010 report that Claimant was able to tolerate full work through September 2005 until her job was eliminated. He stated that with respect to the motor vehicle accident, Claimant had no work limitations; however, due to Claimant's age and co-morbidities, he believed Claimant now would have difficulty with lifting greater than 10 pounds, or engaging in prolonged standing or walking, or bending. The co-morbidities referenced by Dr. Lennard included hypertension, heart disease, breast cancer, chest pain, anxiety, asthma, and respiratory problems. Dr. Lennard opined that as of the date he saw Claimant in 2010, she was permanently and totally disabled because of her widespread degenerative joint disease, atrial fibrillation requiring anticoagulation, history of breast cancer, sleep apnea and advanced age. Dr. Lennard admitted in deposition that he did not have medical evidence of Claimant's preexisting disabilities other than a report from Dr. Choe dated February 12, 2003. He said it is a fair statement that he was unaware of any preexisting disability and did not really focus on them.

Dr. Lennard testified that Claimant should have a 10 pound lifting restriction and participate in no prolonged standing, walking, and bending. These restrictions, however, were primarily due to Claimant's age and also due to her multiple degenerative changes in the lumbar spine, knees and the cardiac condition. Dr. Lennard also testified, credibly, that Claimant would benefit from ongoing use of Hydrocone as needed.

Expert Vocational Testimony

Wilbur Swearingin, a rehabilitation consultant, met with Claimant on September 20, 2010, to perform a vocational evaluation of employment potential at the request of her attorney. He concluded that the medical restrictions provided by Dr. Paul, Claimant's limited educational background, her history of farm related work, and her advanced age, left her neither placeable nor employable on the open labor market. He opined that Claimant was permanently and totally disabled as a result of the August work accident in isolation. Mr. Swearingin specifically noted that Claimant's history of preexisting conditions did not interfere with her working ability before August 19, 2003.

James England, a vocational counselor, evaluated Claimant at the request of Employer. He did not conduct any testing because Claimant's macular degeneration made it impossible for her to read. After interviewing Claimant and reviewing all of the medical information, Mr. England concluded that the 2003 work injury, alone, did not render Claimant permanently and totally disabled, noting that Claimant had returned to work after her release from Dr. Lennard and would have continued working had the job not been abolished. Mr. England opined that Claimant's condition had deteriorated since the date she was laid off in 2005, and that it was her age and deteriorating health that made her unemployable rather than the work accident:

Since that time she has obviously aged considerably and has developed more problems with her vision to the point that she is unable to drive and cannot even read regular print. Considering her vision problems, her age, the fatigue problems associated with her heart alone, I believe she would not be employable in today's labor market regardless of any problem she might have with her back.

(Exhibit 5, deposition exhibit).

In short, Mr. England opined that Claimant was *now* unemployable because of her age, the vision problems which had prevented her from driving since 2009 and reading regular print, the fatigue caused by her deteriorating cardiac and pulmonary conditions, the work injuries, and the various other health problems documented in the medical records. Mr. England further indicated that Claimant's deteriorating vision problems, alone, would make it very difficult for Claimant to work. This was because Claimant cannot drive and there is no public transportation where she lives. "On top of that...you normally have to be able to see to be able to read and handle the paperwork that's involved in a lot of those jobs, or to see to do other activities that she would be doing as a part of the job." (Exhibit 5, page 19).

Additional Findings

While I find Dr. Paul's ratings from his first report to be helpful in determining the amount of permanent partial disability Claimant suffered from the last work accident, I do not accept as credible his more recent opinion. When Dr. Paul made his initial evaluation in 2005, he did not even hint that Claimant could be permanently and totally disabled. Nothing in his initial report suggested that Claimant could be unemployable if she lost her job with the Extension Service. He did not defer to a vocational expert, nor did he provide any physical restrictions in his first report. That he could so drastically change his mind in the intervening five years, now finding that Claimant is permanently and totally disabled from a combination of alleged *preexisting* disabilities and the disabilities from the 2003 accident, is simply not believable. Concomitantly, I am not persuaded by the testimony of Mr. Swearingin that Claimant is permanently and totally disabled from the last accident because his vocational opinion relies heavily on the restrictions contained in Dr. Paul's 2010 report.

I find Dr. Lennard's opinion credible that Claimant is only permanently and partially disabled from the last accident. Dr. Lennard, unlike Dr. Paul, was a treating physician. He saw Claimant on multiple occasions, tracking her progress, as is evidenced by the medical records and his deposition. I do find, however, that some of Dr. Lennard's opinions as to the percentage of permanent partial disability are inadequate given Claimant's description as to how she had to modify some of her work duties to accommodate her inability to walk and stand for long periods of time.

I generally find Mr. England's vocational opinion credible and persuasive. I agree that if Claimant is permanently and totally disabled, it is due to a physical deterioration of preexisting conditions that occurred after the work accident. In particular, Claimant's macular degeneration would eliminate Claimant from working.

Finally, while Dr. Lennard did not focus on the degree of disability stemming from any preexisting conditions, I find that Claimant's preexisting conditions were not *disabilities* as of

August 19, 2003. Rather, these conditions have deteriorated. I find that the preexisting conditions do not combine to create enhanced permanent partial disability or permanent total disability. Contrary to Dr. Paul's opinion, Claimant emphatically testified that her preexisting conditions provided her no problems prior to August 19, 2003. There is no credible evidence that these preexisting conditions had any impact or potential impact on Claimant's employment prior to the 2003 accident.

For the reasons detailed further in the following Conclusions of Law, I find that Claimant suffered permanent partial disability from the work accident in 2003. Specifically, I find that Claimant suffered 204 weeks of disability from the primary injury, calculated as follows:

- 35 percent to the whole body referable to the back, including the cervical, thoracic, and lumbar spine 140.0 weeks
- 10 percent to the whole body due to the closed head injury, including concussion and/or hematoma 40.0 weeks
- 7.5 percent of the left leg pain at the 160-week (knee) level 12.0 weeks
- 7.5 percent of the left arm pain at the 210-week level 12.0 weeks

I find no preexisting *disabilities* that combine with the disabilities from the primary injury.

CONCLUSIONS OF LAW

Claimant has the burden of proving all of the essential elements of her claim. *Royal v Advantica Rest. Group, Inc.*, 194 S.W.3d 371, 376 (Mo. App. W.D. 2006). "The claimant bears the burden to show that a disability resulted from an accident and the extent of that disability." *Bock v. City of Columbia*, 274 S.W.3d 555, 560 (Mo. App. W.D. 2010). "When seeking disability benefits with respect to a work-related injury, the claimant has the burden of proof to show that a disability resulted and the extent of such disability." *Zimmerman v. City of Richmond Heights*, 194 S.W.3d 875, 878 (Mo. App. E.D. 2006). "Claimant must prove the nature and extent of any disability by a reasonable degree of certainty." *Royal*, 194 S.W.3d at 878.

The test for determining whether a claimant is permanently and totally disabled is whether Claimant is competent to compete in the open labor market, given her situation and condition. *Rector v. Gary's Heating & Cooling*, 293 S.W.3d 143, 147 (Mo. App. S.D. 2009). "The central question is whether in the ordinary course of business, an employer would reasonably be expected to hire the claimant in his present physical or mental condition reasonably expecting him to perform the work for which he is hired." 293 S.W.3d at 147.

Claimant has failed to meet her burden of establishing permanent total disability from the last injury or in combination with any preexisting disabilities. As noted above, I specifically have found that Claimant suffered only permanent partial disability from the last accident, as Claimant was able to work full time at her job for more than one year after her release from Dr. Lennard. This was a job on the open labor market. Her unemployment occurred because the program ended. This event was not unique to Claimant, but to all employees in her job classification. While it is true that Claimant looked for work for two years, she restricted her job search to the Marshfield/Webster County area. And, as Claimant readily admitted at hearing, she could find volunteer positions, just not paying ones. The fact that Claimant drew unemployment and looked for work suggests that at least in Claimant's mind, she was physically capable of

continuing to work in the open labor market. And as Claimant readily admitted, she would have continued working for the University of Missouri Extension Service had the program and the jobs not ended.

Second Injury Fund

Having determined that Claimant was not permanently and totally disabled from the last injury, alone, the next issue is whether Claimant is permanently and totally disabled from a combination of primary and preexisting disabilities. The Second Injury Fund's liability is based on the four part test set forth in *APAC Kansas, Inc. v. Smith*, 227 S.W.3d 1, 3 (Mo. App. W.D. 2007):

We first consider the liability of the employer in isolation by determining the degree of the employee's disability due to the last injury. Then the degree of the employee's disability attributable to all injuries is determined; followed by a deduction of the degree of preexisting injury from the total disability following the last injury. The balance of liability is assigned to the Second Injury Fund. In order for the preexisting disability to be eligible for Second Injury Fund liability, the preexisting disability must be of such seriousness that it constituted a "hindrance or obstacle to employment or to obtaining reemployment."
§ 287.220.1. [case citations omitted].

The Second Injury Fund is liable for Permanent Total Disability if the disability from the last work injury and the preexisting disabilities together result in total disability.

[E]xcept that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund"....

§ 287.220.1 RSMo.

While Claimant had a number of preexisting *conditions* that were diagnosed prior to the 2003 work accident, the credible and substantial evidence in the record reveals that none of the *conditions* was a *disability* prior to the 2003 work accident. Claimant confessed to having no problems as a result of sleep apnea, atrial fibrillation, breast cancer, osteoporosis, macular degeneration, mitral valve prolapse, COPD, or any other physical problem *at the time of the last injury*. Not every condition is a disability. "Preexisting conditions are not denominated 'disabilities' as of the date of the second injury simply because, at some point in the future, they combine with that injury to render the claimant permanently and totally disabled." *Gassen v. Lienbengood*, 134 S.W.3d 75, 81 (Mo. App. W.D. 2004). The Second Injury Fund is not liable for any subsequent deterioration in Claimant's condition. Its liability is fixed at the time of the last injury. *Lawrence v. Joplin R-VIII Sch. Dist.*, 834 S.W.2d 789, 793 (Mo. App. S.D. 1992). This is exactly the type of case where the preexisting conditions deteriorated and became disabilities only after the 2003 work accident. The Fund has no liability in the instant case.

Future Medical

Section 287.140.1 RSMo 2000, entitles a worker to medical treatment as may be reasonably required to cure and relieve from the effects of the injury, including future medical treatment. "To support an award for future medical care, the need for that care 'must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible.'" *Farmer v. Advanced Circuitry Div. of Litton*, 257 S.W.3d 192, 197 (Mo. App. S.D. 2008) (quoting *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 270 (Mo. App. S.D. 2004)). While Claimant has the burden of proof, she need not prove the need with absolute certainty. It is sufficient if the evidence shows by "reasonable probability" that she is in need of additional medical treatment by reason of the work-related accident. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo. App. E.D. 1997). Treatment to relieve the effects of the injury is appropriate even if the condition is not expected to improve. *Bowers*, 132 S.W.3d at 270. Based on Dr. Lennard's credible opinion, Claimant has some ongoing medication needs related to the back injury. Therefore, Employer is liable to provide such future medical care as is necessary to cure and relieve the effects of the work injury.

Subrogation Interest

Section 287.150 RSMo 2000, sets forth an employer's right to subrogation in the proceeds from a third party recovery. In *Ruediger v. Kallmeyer Bros. Serv.*, 501 S.W.2d 56 (Mo. banc 1973), the Missouri Supreme Court set forth the proper method for apportioning third-party recovery under the statute. In this case, the parties have stipulated that the Claimant's portion of the recovery, after application of the *Ruediger* formula, is \$46,570.89. This is the amount subject to a credit. In the event that this amount should be exhausted, the worker then is entitled to future compensation benefits. 502 S.W.2d at 57. The Commission retains jurisdiction for the purpose of continuing benefits after the exhaustion of the third-party recovery. 502 S.W.2d at 57.

The Second Injury Fund noted that it, too, has a subrogation right, but such right is equitable and based on common law rather than statute, citing *Banks v. Zweifel*, 298 S.W.3d 869 (Mo. banc 2009). "The circuit court is the proper venue for the fund to assert a subrogation interest." 298 S.W.3d at 870. As I have found that the Second Injury Fund is not liable for any disability, it owes nothing on which to assert a credit. I have jurisdiction under *Ruediger* to award the full amount of the credit to Employer/Insurer in the amount of \$46,570.89.

Credit for Unemployment

Under the law as it existed on August 19, 2003, I find no provision for awarding Employer/Insurer a credit for any unemployment that Claimant may have drawn. Employer/Insurer also cited no precedent.

SUMMARY

Claimant is not permanently and totally disabled as a result of the work accident or as a result of the combination of disabilities from the last accident and those preexisting August 19, 2003. Employer/Insurer is liable for permanent partial disability equal to 204 weeks, minus its subrogation credit. Its liability is calculated as follows:

204 weeks of permanent partial disability x \$244.27	\$49,831.08
Minus the credit for the third party recovery	<u>- \$46,570.89</u>
Liability of Employer/Insurer	\$ 3,260.19

Employer/Insurer also is liable for future medical treatment to cure and relieve the effects of the work accident. The Second Injury Fund has no liability.

Claimant's attorney, E. Joseph Hosmer, is awarded 25 percent of this Award as a reasonable fee for necessary legal services provided to Claimant. This fee shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation