

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

Injury No.: 11-037876

Employee: Wanae Glasco
Employer: Citicorp, Inc. (Settled)
Insurer: Constitution State Services Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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

Introduction

The parties asked the administrative law judge to resolve the following issues: (1) nature and extent of the primary injury; (2) employee's average weekly wage and benefit rates; (3) whether employee's preexisting disability was a hindrance or obstacle to her ability to maintain employment or to be reemployed should she become unemployed; and (4) whether the Second Injury Fund is liable to employee for any disability compensation.

The administrative law judge issued an award that determined as follows: (1) employee has a compensable work-related injury resulting in a 15% permanent partial disability to the left knee at the 160-week level; (2) there is no dispute that employee had significant and debilitating preexisting low back problems that affected her employment and employability; (3) based upon employee's April 27, 2011, injury and her preexisting back injury and her age and training, no employer would reasonably be expected to employ employee in the open labor market; and (4) employee's average weekly wage was \$655.60 which corresponds to a permanent total disability rate of \$437.29.

The Second Injury Fund filed a timely application for review with the Commission alleging the administrative law judge erred: (1) because employee's personal physician testified that the total disability is a result of the preexisting back dysfunction; and (2) because employee's pay stubs don't substantiate the rate assigned by the judge.

For the reasons set forth below, we reverse the award and decision of the administrative law judge.

Findings of Fact

Employee was born on August 11, 1956. She is a high-school graduate with a degree in nursing and a Missouri LPN license. She has an additional BS degree in accounting. On August 14, 2000, she went to work for employer in the collections department.

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Employee has suffered from low back pain and disability since the late 1990s, for which she sought treatment including approximately four lumbar spine surgeries prior to 2008.¹ In June 2008, Dr. Robert Drisko performed a right L3-4 laminectomy for stenosis and a herniated disc; a posterolateral fusion at L3-4; and the placement of a bone growth stimulator.

Employee has also suffered from pain and swelling affecting her right knee since at least 2005. Dr. Alexandra Strong performed an arthroscopic surgery of employee's right knee in 2005 to address a lateral meniscus tear. In late 2009, employee experienced a recurrence of pain and swelling in her right knee. She saw Dr. Strong again on January 12, 2010. Dr. Strong noted that three cortisone shots to the right knee had been ineffective in relieving employee's symptoms, and recommended another arthroscopic surgery to address a suspected lateral meniscus tear.

On January 28, 2010, Dr. Strong performed an arthroscopic medial and lateral meniscectomy of the right knee. Following the surgery, employee underwent physical therapy and was off work until March 8, 2010. In the interim, employee developed a painful infection of pseudogout which required additional evaluation and intervention by Dr. Strong in the form of knee aspirations, a steroid injection, and prescription pain medications.

On May 17, 2010, employee saw Dr. Jonathan Jacobs reporting a history of severe back pain despite having taken 3 or 4 hydrocodone pills that day. Dr. Jacobs determined that employee had failed back syndrome and a flat affect from the long-acting narcotic analgesics she was taking. Dr. Jacobs recommended employee see a pain specialist and also a psychiatrist, but noted that employee felt unable to pursue these options owing to her finances.

On October 19, 2010, employee returned to Dr. Drisko reporting a recent onset of severe pain in the left side of her back, with radiating pain down the back of her leg and sometimes into the foot. Dr. Drisko noted employee's desire to rest, and took her off work until October 29, 2010. He also ordered an SI injection.

On January 18, 2011, Dr. Drisko noted employee's history of severe low back pain with radiation into both legs following two recent falls down flights of stairs. He diagnosed post-traumatic radicular flares, and provided employee with another SI joint injection, and a prescription for Flexeril. Dr. Drisko again took employee off work, and this time he filled out short-term disability paperwork to that end.

Dr. Drisko's notes on the short-term disability forms reveal the following restrictions on employee's physical activities during this time period: no lifting, carrying, pushing, pulling, or climbing, and an inability to work. On February 3, 2011, employee reported to Dr. Drisko that she could not stand up straight, that she was suffering constant pain in

¹ Neither the parties nor the medical experts in this case were able to identify, with specificity, the exact number of low back surgical procedures, or the nature of such procedures, that employee underwent prior to 2008.

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her left leg, and that she was miserable. Dr. Drisko recommended an MRI, prescribed a Medrol Dosepak, and decided to continue employee off work because she couldn't get around.

An MRI study of February 5, 2011, suggested the following pathology with regard to the lumbar spine: a broad-based disc bulge at L1-2 without significant central canal or neuroforaminal narrowing; a broad-based disc protrusion at L2-3 causing mild right neuroforaminal stenosis without significant central canal or left neuroforaminal narrowing; a broad-based disc bulge at L3-4 with facet arthrosis and thickening of the ligamentum flavum, changes of a right hemilaminectomy, and mild right neuroforaminal stenosis without central canal or left neuroforaminal narrowing; a diffuse facet arthropathy at L4-5 with thickening of the ligamentum flavum, without compromise of the central canal; and severe disc desiccation at L5-S1 as well as postsurgical changes of bilateral laminectomies, without significant central canal or neuroforaminal narrowing.

On February 10, 2011, Dr. Drisko noted employee was continuing to have severe pain in her left leg causing her to suffer sleep deprivation and a great deal of anxiety. Dr. Drisko felt it was necessary for employee to receive psychiatric assistance, and recorded a history from employee that she could not do anything at all owing to the constant pain and numbness in her left leg, and that medication was not helpful. Dr. Drisko felt employee might be a candidate for a dorsal column stimulator, and referred her for a consultation.

On March 29, 2011, employee saw Dr. Strong again for follow-up regarding her right knee. Employee reported popping and swelling in her knee developing over the last two weeks. Dr. Strong determined that employee probably had a recurrence of pseudogout, and performed an aspiration and injection of lidocaine.

Also on March 29, 2011, employee returned to Dr. Drisko, reporting continued severe back and left leg pain, but she decided not to go forward with the procedure to implant a dorsal column stimulator. Instead, Dr. Drisko performed an SI injection with cortisone, and noted employee's desire to return to work in about two weeks.

As of April 12, 2011, Dr. Drisko released employee to return to light duty work, with the following restrictions: no lifting, carrying, pushing, or pulling, and the requirement that she be permitted to get up every 2 hours for 10 minutes at a time.

On April 27, 2011, there was a tornado drill at employer's premises. While descending the stairs to an on-site tornado shelter, a coworker shoved employee from behind. Employee's right foot slipped off the step, and she fell partway to the ground, but was able to stop her fall with the assistance of a coworker. In the course of this motion, employee's left knee bent underneath her, with her buttocks resting against the back of her left leg. Following this event, employee experienced the onset of significant left knee pain.

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Employee saw Dr. David Prickett on May 6, 2011. Dr. Prickett diagnosed a left knee strain, ordered an MRI, and determined employee was able to work with the caveat she be permitted to use a cane if she desired. On May 25, 2011, Dr. Prickett noted that the MRI showed tiny chondral defects of the medial femoral condyle, and determined that because employee's pain continued to worsen 28 days after the tornado drill event, an orthopedic referral was appropriate. Nevertheless, he reiterated his diagnosis of a left knee strain and continued his recommendation that employee return to work with the sole restriction that she be permitted to use a cane if desired. He also prescribed hydrocodone.

On June 6, 2011, employee saw Dr. Ryan Snyder in connection with Dr. Prickett's referral. Dr. Snyder diagnosed left medial knee and thigh pain most likely related to pedis bursitis, with incidental findings of a couple of small chondral lesions of the medial femoral condyle. Dr. Snyder ordered physical therapy, which employee began on June 13, 2011.

Employee filed a claim for compensation in connection with the April 2011 accident alleging she suffered injuries to her back, neck, left knee, left leg, and body as a whole. She ultimately settled her claim against the employer consistent with an approximate 15% permanent partial disability rating of the left knee.

It does not appear that employee sought any additional treatment for the other injuries she alleges to have resulted from the April 2011 accident, until she returned to Dr. Drisko on July 19, 2011, reporting a chief complaint of severe pain in her low back and over her SI joints, and a twisting injury to the low back at work about three weeks prior. Dr. Drisko diagnosed sacroiliac joint dysfunction, as well as an acute on chronic lumbar strain, and took employee off work. Dr. Drisko completed new disability paperwork for employee which took her off work until approximately October 18, 2011, for lumbar stenosis and back pain, with restrictions of no lifting, pushing, pulling, carrying, climbing, bending, or stooping, and an inability to work. Dr. Drisko also ordered a lumbar myelogram.

On August 1, 2011, employee attended another physical therapy session ordered by Dr. Snyder; notes from that visit suggest employee did not tolerate any exercise and reported pain with all movements. Employee returned for another session on August 9, 2011, but reported to the therapist that Dr. Drisko had informed her that her left leg complaints were due to her low back condition, and that physical therapy should be discontinued until a lumbar myelogram was obtained.

On August 17, 2011, employee underwent a lumbar myelogram which suggested the following pathology with regard to the lumbar spine: no significant central canal or neuroforaminal compromise at L1-2; indentation upon the left paracentral and lateral aspect of the thecal sac at L2-3 causing mild stenotic disease with suspected left lateral recess narrowing and mild right neuroforaminal narrowing; postsurgical changes of a right hemilaminectomy at L3-4 without significant central canal stenosis but with some possible mild narrowing of the right nerve root sleeve; no significant central canal or

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neuroforaminal narrowing at L4-5; and an L5-S1 bilateral laminectomy without significant central or nerve root sleeve compromise, and the presence of a nerve stimulator.

Dr. Drisko's note from August 23, 2011, suggests that he read the August 17, 2011, myelogram to show a symptomatic herniated disc at L5-S1 on the left, despite the absence of any such indication by the radiologist, Dr. Christopher Formen, on the actual report itself. *Transcript*, page 674. Also in his note of August 23, 2011, Dr. Drisko recorded his recommendation that employee undergo an additional surgery to address the L5-S1 pathology, and that employee was in agreement with that course of treatment. *Id.* Dr. Drisko also identified a herniated L5-S1 disc as the objective finding prompting him to fill out additional disability paperwork for employee on October 18, 2011. *Transcript*, page 729.

In contrast, Dr. Drisko's pre-surgical report from September 19, 2011, suggests he read the myelogram to reveal stenosis at L2-3 with associated spondylosis, and does not reference *any* pathology at L5-S1. *Transcript*, page 694. Dr. Drisko went on to perform a spinal decompression and left discectomy at L2-3; exploration of a fusion mass; and a fusion at L2-3 using pedicle screw instrumentation and an EBI bone stimulator. Dr. Drisko's September 19, 2011, surgery did not address any pathology at L5-S1.

At his deposition, Dr. Drisko clarified that his September 2011 surgery was intended to address degenerative changes at L2-3 which were referable to what he termed a transition syndrome, or increased stress at that level resulting from employee's prior lumbar spine surgeries. He confirmed that his September 2011 surgery did not address any traumatic changes in the low back. He also clarified that his reason for taking employee off work in January 2011, July 2011, and following the September 2011 surgery was not related to any work injury, but instead was owing to her disability referable to transition syndrome. We find Dr. Drisko's testimony persuasive in this regard.

As we have noted, Dr. Drisko filled out new disability paperwork following the September 2011 surgery, which kept employee off work until at least December 12, 2011. Dr. Drisko later filled out Social Security disability paperwork for employee on December 19, 2011. Therein, Dr. Drisko indicated employee had an inability to stand or sit for more than 30 minutes, and was significantly limited in her activities of daily living.

Dr. Drisko saw employee for follow-up on March 7, 2012. At that time, he noted that employee was walking better and that her radicular symptoms were improved, but that employee continued to suffer from significant pain, allodynia, and burning in her lumbar spine. Dr. Drisko thought employee might be developing an RSD, and recommended she be seen by pain management. He also provided a prescription for oxycodone.

Employer discharged employee on August 12, 2012, because she was unable to return to work.

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Expert opinion evidence

Employee claims that she is permanently and totally disabled owing to a combination of her preexisting conditions of ill-being and the work injury of April 27, 2011. Employee procured the expert medical opinion of Dr. Daniel Zimmerman, who authored a report indicating that employee suffered a traumatic injury to her low back as a result of the April 27, 2011, work injury, as well as a left knee injury. Specifically, Dr. Zimmerman diagnosed an aggravation of multilevel lumbar degenerative disc disease and spinal stenosis, which he rated at 30% permanent partial disability of the body as a whole; and chondromalacia patella and osteoarthritis affecting the left knee, which he rated at 35% permanent partial disability of the left knee.

Dr. Zimmerman additionally opined that employee is permanently and totally disabled owing to a combination of the April 2011 accident and her preexisting lumbar spine disability, as well as preexisting disability referable to the preexisting right knee condition and a cardiac condition requiring surgeries and the need for chronic use of an anticoagulant. For employee's preexisting low back disability, Dr. Zimmerman rated a 20% permanent partial disability of the body as a whole; thus, Dr. Zimmerman believed at the time of authoring his report that employee's low back disability referable to the April 2011 accident was actually *greater* than any low back disability she suffered prior to that accident.

This belief appears to have resulted, in part, from employee's failure to provide Dr. Zimmerman with a complete set of records from Dr. Drisko, or an accurate history with regard to her preexisting low back disability, or even an accurate history with regard to the April 2011 accident. Specifically, Dr. Zimmerman lacked Dr. Drisko's actual notes on examination, and believed that a re-injury to the lumbar spine was what prompted Dr. Drisko to perform the September 2011 surgery; as we have noted above, Dr. Drisko made clear that he performed that surgery solely to address preexisting degenerative conditions of employee's low back. Dr. Zimmerman was also unaware that employee had undergone multiple spinal surgeries prior to 2008. With regard to the April 2011 accident, Dr. Zimmerman agreed that the history he recorded of employee having "fallen down steps," *Transcript*, page 407, was inconsistent with what employee reported to initial treating physicians.² Dr. Zimmerman ultimately conceded he was unaware whether employee had actually fallen to the ground.

Critically, Dr. Zimmerman also appears to have been wholly unaware that employee had only worked approximately two weeks in 2011 before suffering the April 2011 accident, or that Dr. Drisko had taken employee off work and placed her on short-term disability for three months owing to severe low back and left leg radicular pain complaints. When he was confronted, on cross-examination, with Dr. Drisko's notes from late 2010 and early 2011 reflecting this information, he conceded it would have been helpful to have these records in forming his opinions, and that they were relevant to the issue of any apportionment of disability as between the April 2011 accident and employee's preexisting conditions.

² We note that the history employee (apparently) provided Dr. Zimmerman is also inconsistent with her own sworn testimony, at the hearing before the administrative law judge, describing the accident.

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Where a medical expert relies upon a demonstrably incomplete and/or incorrect history of an employee's medical treatment in connection with preexisting conditions of ill-being—especially where that treatment involves multiple lumbar spine surgeries and a lengthy period of short-term disability—we simply cannot credit their ultimate opinions with regard to the nature and extent or combination of any disability referable to a claimed work injury versus such preexisting conditions. For this reason, we must find that Dr. Zimmerman's analysis and opinions lack any persuasive value in this case.

Employee also obtained an expert vocational evaluation from Michael Dreiling. As with Dr. Zimmerman, however, employee failed to provide Mr. Dreiling with a complete and accurate history with regard to her preexisting low back disability. Specifically, employee failed to provide Mr. Dreiling with *any* of Dr. Drisko's records predating the work injury. When he was confronted, on cross-examination, with a more accurate history with regard to employee's low back, Mr. Dreiling flatly conceded that, assuming employee had suffered no injury to her left knee in the April 2011 accident, she still would be unable to compete for work in the open labor market based on her low back condition, considered alone. We find Mr. Dreiling's concession, after having been provided a more accurate history with regard to employee's preexisting low back disability, more persuasive than his initial opinions in this case.

The employer procured the expert medical opinions of Dr. Daryl Thomas, which the Second Injury Fund offered into evidence in this matter. Dr. Thomas believes the April 2011 accident was the prevailing factor causing employee to suffer a left knee contusion and strain with continued chronic pain and reduced range of motion, for which he rated 10% permanent partial disability at the level of the knee; however, Dr. Thomas believes that accident was not the prevailing factor causing employee to suffer any additional disability to the low back. We find Dr. Thomas's opinion persuasive with regard to the left knee; we find that employee suffered a left knee contusion and strain with continued chronic pain and reduced range of motion as a result of the April 2011 accident. We find that this resulted in a 15% permanent partial disability of the left knee.

As we have noted above, Dr. Drisko also provided his deposition testimony in this matter, wherein he opined that employee's total disability is based on her preexisting back condition. Dr. Drisko made clear that he does not dispute that employee hurt her knee at work in April 2011, and that such injury may be a contributing factor in employee's disability. However, he maintained his opinion that employee was unable to work based on the preexisting low back condition alone, unrelated to the April 2011 accident. We credit Dr. Drisko in this regard.

In sum, we are convinced that employee suffered a 15% permanent partial disability of the left knee. However, based on employee's failure to provide any credible expert medical opinion evidence to establish that she suffered any additional low back disability as a result of the April 2011 accident, we find that the primary injury plays no role whatsoever in her inability to compete for work in the open labor market. Consequently, we find that employee is not permanently and totally disabled by reason of any combination of the effects of the primary injury and her preexisting conditions of

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ill-being. Instead, employee is permanently and totally disabled on the basis of her non-work-related low back disability, considered alone.

Conclusions of Law

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." The Fund is liable for permanent total disability benefits only where the work injury combines with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

We have found the opinion from employee's medical expert, Dr. Zimmerman, to lack any persuasive value with regard to the nature and extent of any permanent disability referable to the primary injury versus employee's preexisting conditions of ill-being. Nor were we able to credit Dr. Zimmerman as persuasively establishing a combination effect between the primary injury and employee's preexisting conditions of ill-being. We have also credited the opinions from Dr. Drisko and Mr. Dreiling and found that employee is permanently and totally disabled owing to her low back disability considered in isolation, without regard to any contribution from the primary injury. It follows that there can be no Second Injury Fund liability under § 287.220, because the primary injury does not combine with employee's preexisting conditions of ill-being to result in permanent total disability.

To be clear, we believe it is generally consistent with the purposes underlying the Second Injury Fund to compensate an injured worker who, despite considerable preexisting disability, was tenacious enough to attempt to continue working, at least until the April 2011 accident. However, based on the record we have been provided, there is simply no credible evidence supporting a claim for permanent total disability benefits from the Second Injury Fund. Nor, for that matter, is there any actual argument currently pending before this Commission as to how or why we may reasonably credit the opinions from employee's medical and vocational experts, where they were provided demonstrably—and *critically*—incorrect information regarding employee's low back disability. Consequently, we are constrained to deny the claim.³

Decision

We reverse the award of the administrative law judge. Employee's claim against the Second Injury Fund is denied because employee failed to demonstrate that the primary injury combined with her preexisting conditions of ill-being to result in permanent total disability.

³ Employee did not advance any alternative argument that she may be entitled to enhanced permanent partial disability benefits from the Second Injury Fund, nor did her experts consider or describe any synergistic interaction between the left knee primary injury and, for example, employee's preexisting right knee disability.

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The award and decision of Administrative Law Judge Lawrence G. Rebman, issued January 29, 2016, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 28th day of September 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

13. Part(s) of body injured by accident or occupational disease: Left knee and low back
14. Nature and extent of any permanent disability: 15% at the 160 week level
15. Compensation paid to-date for temporary disability: \$0
16. Value of necessary medical aid paid to date by employer? \$2,725.12
17. Value of necessary medical aid not furnished by employer? -0-
18. Employee's average weekly wages: Disputed
19. Weekly compensation rate: \$437.29/\$418.58
20. Method of wages computation: Based upon evidence of hourly rate and settlement stipulation at trial.

COMPENSATION PAYABLE

21. Amount of Compensation payable from the Employer: Settled prior to trial for \$10,045.92

22. Second Injury Fund Liability:

Permanent total disability. Employee did not receive TTD benefits. The Second Injury Fund is ordered to pay \$437.29 per week to Ms. Glasco for permanent total disability benefits for life or so long as she remains so disabled and is entitled to a credit of \$10,045.92 for PPD payments by the employer.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of George Wheeler for necessary legal services rendered to the claimant.

23. Future requirements awarded: None

ISSUES

The parties agreed that the issues to be resolved by this hearing are as follows:

1. Whether Ms. Glasco has a compensable injury that resulted in permanent partial disability;
2. Whether Ms. Glasco suffered any pre-existing disability that was a hindrance or obstacle to her employment or to her reemployment should she become unemployed;
3. Whether the Second Injury Fund is liable to Ms. Glasco for any disability compensation; and
4. What is Ms. Glasco's average weekly wage and benefit rate.

EXHIBITS

The employee testified at the hearing in support of his claim. Also, the employee presented for admission the following exhibits which were admitted without objection:

- A. Curriculum Vitea of Dr. Zimmerman
- B. Medical Records Vol. 1
- C. Medical Records Vol. 2
- D. Deposition of Dr. Zimmerman
- E. Deposition of Michael Dreiling with attachments.

The Second Injury Fund offered the following exhibits:

1. Deposition of Dr. Robert Drisko
2. Deposition of Daryl Thomas, M.D.
3. File of Dr. Drisko

FINDINGS OF FACT

Ms. Glasco was born August 11, 1956 and at the time of the hearing was 58 years of age. Ms. Glasco is a high school graduate and has received her LPN license in the state of Missouri. She has experience using computers. After high school, Ms. Glasco began working for Children's Mercy Hospital and received her LPN license. She left Children's Mercy in 1993. Then she went to work for PRA International recruiting subjects for pharmaceutical studies until 2000, after which she went to work for Citicorp, Inc., as a customer service representative. As a customer service representative, she worked collecting delinquent accounts and making settlement offers. Ms. Glasco testified that she worked 10 hour shifts and made roughly \$16.00 per hour as well as monthly bonuses. Ms. Glasco did not testify specifically to the wages she earned during the thirteen weeks preceding the accident but did state she averaged \$48,000.00 per year in income. Ms. Glasco last worked in July 2011 and was terminated from her job in July 2012. She has applied and is receiving social security disability.

Prior to the date of injury, Ms. Glasco suffered extensively from back problems. From mid-January to mid-March of 2011, Ms. Glasco had been off work on short-term disability. Ms. Glasco testified that she was feeling fine on April 27, 2011 and was participating in a fire drill when she was pushed from behind injuring her left knee and low back.

Shortly after the injury, she reported it to Kelly Wood and to Human Resources. The Employer/Insurer referred her to Work Health Solutions on May 6, 2011 for treatment (Claimant's Exhibit B. Work Health Solutions performed an MRI and diagnosed Ms. Glasco with a left knee strain and released her to return to work. Ms. Glasco was referred to Dr. Ryan Snyder and on June 6, 2011 he diagnosed her with left leg bursitis. She was prescribed hydrocortisone injections and physical therapy.

Following her treatment with Dr. Snyder, Ms. Glasco went to see her own physician, Dr. Drisko, for her left knee and low back. A lumbar myelogram was performed which showed a disk protrusion at L5-S1. On September 19, 2011, Ms. Glasco underwent surgery on her low back. Dr. Drisko performed a redo of the laminectomy medial facetectomies and fusion at L2-L3 as well as the placement of a bone growth stimulator and the re-exploration of the fusion at L3-L4. Dr. Drisko performed a posterolateral fusion at L3-L4 and the placement of a bone growth stimulator.

Pre-existing Injuries/Disabilities:

The evidence in this case from Dr. Drisko's deposition and Ms. Glasco indicates that she has had between three and six surgeries to her low back from 1997 through 2011. There are no medical records predating the 2008 surgery to her low back.

In 2005 Ms. Glasco had a right knee arthroscopy performed by Dr. Alexandra Strong for cartilage damage. In 2010 she had another right knee arthroscopy performed for meniscal damage.

On February 6, 2007, Ms. Glasco had her aortic and mitral valves replaced at North Kansas City Hospital.

On June 11, 2008, Dr. Drisko performed a redo of the right L3-L4 laminectomy for stenosis and a herniated disk. Dr. Drisko performed a posterolateral fusion at L3-L4 with the placement of a bone growth stimulator.

Expert Testimony:

Dr. Daniel Zimmerman testified via deposition. Dr. Zimmerman testified that he conducted an independent medical examination of Claimant on July 22, 2013. Dr. Zimmerman opined that when the Claimant's pre-existing disabilities are combined with the disability from the primary injury, Claimant is totally disabled (Exhibit C).

Michael Dreiling, a vocational rehabilitation counselor, testified by deposition (Exhibit G). Mr. Dreiling's narrative report is dated November 6, 2013. Mr. Dreiling opined that Ms. Glasco's age, education and back problems were a hindrance and obstacle to employment or reemployment should she lose his employment (Exhibit F, p. 21). Based upon Ms. Glasco's presentation, Mr. Dreiling opined that Claimant was totally vocationally disabled (Exhibit F, p.25-26).

RULINGS OF LAW:

The parties requested the Division determine the following issues:

1. Whether Ms. Glasco has a compensable injury that resulted in permanent partial disability;
2. Whether Ms. Glasco suffered any pre-existing disability that was a hindrance or obstacle to her employment or to her reemployment should she become unemployed;
3. Whether the Second Injury Fund is liable to Ms. Glasco for any disability compensation; and
4. What is Ms. Glasco's average weekly wage and benefit rate.

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim. *Fisher v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990). Proof is made only by competent and substantial evidence and may not rest on speculation. *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974). Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.E.2d 596, 600 (Mo. banc 1994). When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder. *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

In addition, the fact finder may accept only part of the testimony of the medical expert and reject the remainder. *Cole v. Best Motor Lines*, 303 S.W.2d. 170, 174 (Mo. App. 1957). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Webber v. Chrysler Corp.*, 826 S.W.2d 170, 174 (Mo. App. 1992).

The fact finder is encumbered with determining the credibility of witnesses. *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo. App. E.D. 2008). It is free to disregard that testimony which it does not hold credible. *Id* at 908.

The determination of the specific amount of disability to be awarded to an employee is a finding of fact within the unique province of ALJ. *Hawthorne v. Lester E. Cox Medical Center*, 165 S.W.2d 587 (Mo. App. S.D. 2005). The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated. *Rana v. Land Star TLC*, 46 S.W.3d 614 (Mo. App. W.D. 2001). A determination of the percentage of disability arising from a work-related injury is to be made from the evidence as a whole. *Landers v. Chrysler*, 963 S.W.2d 275 (Mo. App. E.D. 1998). It is the duty of the ALJ to weigh the medical evidence, as well as other testimony in evidence, in reaching his or her own conclusion as to the percentage of disability sustained. *Rana* at 626.

Section 287.020.6, RSMo., provides that "total disability" is the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. The main factor in this determination is whether, in the

ordinary course of business, any employer would reasonably be expected to employ the employee in his present physical condition and reasonably expect him to perform the duties of work for which he was hired. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363 (Mo. App. 1992). The test for permanent and total disability is whether the claimant would be able to compete in the open labor market. *Id.* When the claimant is disabled by a combination of the work-related event and pre-existing disabilities, the responsibility for permanent total benefits lies with the Second Injury Fund. *Section 287.200.1, RSMo.* If the last injury in and of itself renders a claimant permanently and totally disabled, the Second Injury Fund has no liability and the employer is responsible for the entire compensation. *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo. App. W.D. 2003).

Lewis v. Treasurer of Missouri, 435 SW3d 144 (Mo. App E.D., 2014), recently clarified the proper analysis of a permanent total disability claim against the Second Injury Fund. The *Lewis* court explained that to prevail on a claim for permanent total disability benefits from the Fund, an injured worker must prove 1) he had a permanent partial disability or disabilities of such seriousness as to constitute a hindrance or obstacle to employment as of the time he sustained the work injury; and, 2) he is permanently and totally disabled as a result of the work injury and the pre-existing disability or disabilities.

It is well-settled in Missouri that the appropriate time to evaluate the nature and extent of an injured employee's permanent disability is the point at which the employee reaches maximum medical improvement following treatment for the work injury. See *Cardwell v. Treasurer of Mo.*, 249 S.W.3d 902, 910 (Mo. App. 2008).

Various factors have been considered by courts in attempting to determine whether an employee is permanently and totally disabled. It is not necessary that an injured employee be rendered, or remain, wholly or completely inactive, inert, or helpless in order to be entitled to receive compensation for permanent total disability. *Maddux v. Kansas City Public Service Co.*, 100 S.W.2d 535 (Mo. 1936). An employee's ability or inability to perform simple physical tasks such as sitting, bending, twisting, and walking may prove that the employee is permanently totally disabled. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479 (Mo. App. E.D. 1990). An employee's age may also be taken into consideration. *Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo. App. S.D. 1997).

The issue to be determined in this matter is whether the Second Injury Fund is liable to Ms. Glasco for any disability compensation. In order to establish Second Injury Fund liability, Ms. Glasco must prove that he suffered a permanent disability resulting from a compensable work-related injury. See, §287.210.1 RSMo (2004).

1. Whether Ms. Glasco has a compensable injury that resulted in permanent partial disability.

The uncontroverted evidence established that Ms. Glasco injured her left knee at work on April 27, 2011, which resulted in permanent disability to her. Dr. Zimmerman rated Ms. Glasco's knee injury at 35% and the physician for the employer/insurer, Dr. Daryl Thomas, rated her knee injury at 10% of the knee.

Ms. Glasco settled her claim for compensation for 15% permanent partial disability to the left knee in the amount of \$10,045.92.

This Court finds that Ms. Glasco has a compensable work-related injury resulting in a 15 percent permanent partial disability to the left knee at the 160 week level.

2. Whether Ms. Glasco suffered any pre-existing disability that was a hindrance or obstacle to his employment or to his re-employment should she become unemployed.

There is no dispute that Ms. Glasco had significant and debilitating pre-existing low back problems that affected her employment and employability. Dr. Drisko testified that her disability is mainly attributable to her low back but that her knee is a contributing factor (Ex. 2, p. 24).

Dr. Daniel Zimmerman has rated Ms. Glasco's back condition at 50% permanent partial disability as the bodies of whole is applying that 20% of the disability predated the accident. Dr. Zimmerman has rated Mrs. Glasco's right knee at 30% PPD and he has rated her heart condition at 15% body as a whole. Dr. Zimmerman stated in his report that based upon all of Ms. Glasco's disabilities, she is permanently totally disabled against the Second Injury Fund.

3. Whether the Second Injury Fund is liable to Ms. Glasco for any disability compensation.

The final element that Ms. Glasco must establish to successfully claim permanent total disability benefits from the Second Injury Fund is that the combined effect of the disability resulting from the April 27, 2011 injury and the disability attributable to all pre-existing conditions results in permanent, total disability.

Ms. Glasco testified that prior to April 2011 she had no problems with her left knee; although, she did have radicular symptoms in her left leg. She testified that she was working from mid-March to the date of accident on April 27, 2011 and despite some slight aches on the day of the accident she did not need medication on the day of the accident. Following the accident, Ms. Glasco continued to work while going to therapy three days per week. She stopped working in July 2011 due to the pain. Since the accident, Ms. Glasco states that has severe pain and swelling in her left knee on her left by the left side of her low back. She struggles with walking and sleeping. Ms. Glasco also takes prescription pain medicine which affects her ability to function.

Dr. Drisko testified that her disability is mainly attributable to her low back but that her knee is a contributing factor. (Ex. 2, p. 24)

Based upon the uncontroverted and credible expert testimony of Dr. Zimmerman, Dr. Drisko and Mr. Dreiling, and Ms. Glasco's credible direct testimony that the combined effects of the April 27, 2011 injury and her pre-existing back injury and her age and training, no employer would reasonably be expected to employ her in the open labor market.

4. Wage Rate

The wage rate in this case has been disputed. Ms. Glasco did not work the full thirteen weeks prior to the accident and very little information about her wages was presented at the hearing. Ms. Glasco testified that she earned roughly \$16.00 per hour and received monthly bonuses. She also testified that she earned \$48,000.00 per year. During the deposition of Mr.

Dreiling, the Second Injury Fund elicited that Ms. Glasco had pay records indicating that she worked 74.75 hours and that actual earnings were \$1,225.10. (Exhibit F, p. 36) Accordingly, it appears Ms. Glasco was earning \$16.39 per hour or an average weekly wage of \$655.60. Two-thirds of this would equate to a permanent total disability rate of \$437.29. The settlement with the employer lists the permanent partial disability rate at the maximum rate of \$418.58 which would equate to an average weekly wage of \$627.87

Section 287.250. 4. RSMo states:

If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.

Based upon the facts of this case, it is determined that Ms. Glasco's average weekly wage was \$655.60 which corresponds to a permanent total disability rate of \$437.29.

CONCLUSION

On April 27, 2011, Ms. Glasco was permanently and totally disabled as a result of her primary and preexisting disabilities. The employer has not paid any temporary total disability benefits. Ms. Glasco has not worked since July 2011. As a result, Ms. Glasco is entitled to permanently totally disability benefits at the rate of \$437.29 per. The Second Injury Fund is ordered to pay \$437.29 per week to Ms. Glasco from August 1, 2011 for permanent total disability benefits for life or so long as she remains so disabled and is entitled to a credit of \$10,045.92 for PPD payments by the employer.

Claimant's counsel requested a fee equal to twenty-five percent (25%) of all amounts awarded. I find this fee request to be fair and reasonable. Therefore, this award shall be subject to a lien in favor of Mr. George Wheeler for reasonable and necessary attorney's fees pursuant to §287.260.1. RSMo.

Interest shall be provided as by law.

Made by: _____
Lawrence G. Rebman
Administrative Law Judge
Division of Workers' Compensation