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

Injury No.: 09-100903

Employee: Kristine Hilgart

Employer: Kabul Nursing Homes, Inc. (Settled)

Insurer: Missouri Nursing Home Insurance Trust (Settled)

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.[1] We have reviewed the evidence and briefs, and we have considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge (ALJ) dated January 3, 2012.

Preliminaries

On December 20, 2009, employee injured her low back at work while assisting another nurse moving a patient onto a bed. Employee settled her permanent partial disability claim against employer/insurer. Employee proceeded to final hearing of her claim against the Second Injury Fund.

The ALJ awarded enhanced permanent partial disability against the Second Injury Fund. Employee appealed to the Commission alleging that the ALJ erred in denying her claim for permanent total disability (PTD) benefits from the Second Injury Fund.

Findings of Fact

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are incorporated and adopted by the Commission herein.

Following employee's December 20, 2009, work injury, she was never released to return to work again. Employee testified that she is presently in constant pain that she rates as an 8 to 10 on a scale of 1 to 10. The constant pain that she had in her back before the December 20, 2009, work accident now also extends into her left hip and leg. Employee stated that she has pain if she sits in place for more than 15 minutes and she needs to frequently switch positions from sitting to standing.

Employee testified that prior to the December 20, 2009, work accident she would often have to lie down in the evening with a heated pad on her back to relieve her pain. Employee stated that immediately after the December 20, 2009, work accident she began having to lie down during the day. Employee testified that she currently has to lie down at least two or three times a day.

[1] Statutory references are to the Revised Statutes of Missouri 2009 unless otherwise indicated.

Dr. Dale began seeing employee on April 15, 2010. He testified that employee's December 20, 2009, work accident caused an annular tear and back pain. Dr. Dale further testified that employee's degenerative disc disease was probably preexisting.

During Dr. Dale's deposition he was asked to go through each of employee's restrictions and provide his opinion as to whether each restriction was the result of employee's back condition or fibromyalgia. Dr. Dale attributed employee's restrictions of no climbing, stooping, kneeling, crouching, crawling, and reaching to employee's back condition. Dr. Dale attributed employee's restrictions associated with handling, fingering, and feeling to employee's fibromyalgia. Dr. Dale then testified, **"the pain factors, the need to even lie down, essentially the fibromyalgia isn't causing that so much. And then the pain medication is pretty much for the back problem."** Dr. Dale attributed employee's lifting restriction of less than five pounds to both the back condition and the fibromyalgia. In clarification, Dr. Dale affirmatively testified that the lifting restriction of less than five pounds was independently caused by both the back condition and the fibromyalgia.

Dr. Dale testified that employee could only continuously walk for 15 minutes before she has an exacerbation of pain. He attributed this exacerbation of pain to both the back condition and the fibromyalgia, independently. With respect to this walking restriction, Dr. Dale further stated that if employee were to continuously walk for 15 minutes, day in and day out, he "would expect her to not be able to show up for work at least one day a week."

Dr. Dale also found that employee could not sit for more than 45 continuous minutes before experiencing an exacerbation of lumbar pain. Dr. Dale testified that employee could get away with more sitting if she lies down frequently, rests her back, and pays attention to her habits.

With respect to employee's pain factors, Dr. Dale testified that employee needs to lie down 15-20 minutes every 45 minutes during an eight-hour workday in order to prevent her from experiencing an exacerbation of pain that would preclude her from being able to go to work for the next several days. Dr. Dale listed in his Medical Source Statement that employee is only able to sit for two hours (total) throughout an eight-hour workday (with usual breaks) and only able to stand and/or walk for two hours (total) throughout an eight-hour workday (with usual breaks). Dr. Dale testified that without employee's fibromyalgia, her sitting, standing, and walking tolerances would be doubled to four hours during an eight-hour workday.

Dr. Swaim performed an independent medical evaluation of employee. Dr. Swaim never diagnosed employee with fibromyalgia or considered it in his reported limitations. During his deposition, however, Dr. Swaim did acknowledge that employee was diagnosed with fibromyalgia after the December 20, 2009, work injury.

Dr. Swaim testified that he believed "there are going to be times when [employee is] going to need to lie down in terms of treatment of her discomfort." Dr. Swaim noted in his report that he included that employee's "discomfort improved by changing positions, some limited improvement with Vicodin, and some limited improvement by lying down." Dr. Swaim went on to state that "there's going to be times when she may have to lie

down longer or more frequent based on a lot of things, the amount of stress she puts on her back, or sometimes weather changes would cause the necessity for more treatment. So it would be more up to her. I wouldn't say you have to lie down half an hour every three hours or anything like that." (emphasis added).

Mr. Swearingin performed a vocational examination and evaluation of employee, and opined that employee is permanently and totally disabled as a result of the governing permanent restrictions caused by the work injury of December 20, 2009, and her preexisting low back condition. Mr. Swearingin testified that employee is unemployable due to her need to lie down throughout the day. Specifically, Mr. Swearingin stated, "people who have to lie down at the job are not going to hold employment, and that goes whether you have to lay down 30 minutes every day or whether you have to have a day or two a week that you lay down for a while. That just doesn't … allow you to function in the labor market."

Lastly, Mr. Swearingin testified that it is employee's back pain that drives her need to periodically lie down throughout the day.

Employee settled her claim against employer/insurer. The settlement was based upon an approximate permanent partial disability of 12.5% of the body as a whole referable to the lumbar spine. We find that this approximation is supported by the opinions of Dr. Swaim.

We find that as a result of the work injury, employee sustained permanent partial disability of 12.5% of the body as a whole referable to the lumbar spine. We find employee reached maximum medical improvement on May 30, 2010, the date Dr. Swaim evaluated employee and opined the same in his independent medical evaluation report.

Discussion

The ALJ found that employee is permanently and totally disabled due to her need to lie down throughout the day. However, the ALJ denied employee's claim for PTD benefits against the Second Injury Fund because he found that "the restriction to lie down is causally related to, or at a minimum, requires consideration of the fibromyalgia/fibromyositis as a contributing medical condition causing such restrictions to be imposed upon [employee]." While we agree with the ALJ's finding that employee is permanently and totally disabled due to her need to lie down throughout the day, we disagree with the ALJ's finding that the restriction to lie down requires consideration of employee's fibromyalgia.

Based upon the medical expert opinions, vocational expert opinions, employee's testimony, and the record as a whole, we find that the prevailing factor in causing employee's need to lie down throughout the day is the combination of employee's December 20, 2009, work injury and the preexisting disability to her low back. While employee's subsequently diagnosed fibromyalgia may exacerbate her symptoms and contribute further to her need to lie down throughout the day, we find that the great weight of the evidence establishes that employee would need to lie down throughout the day without even considering her fibromyalgia.

Dr. Dale even testified that "essentially the fibromyalgia isn't causing [employee's need to lie down] so much." Dr. Swaim concluded that employee needed to lie down throughout the day, but did not even include fibromyalgia as part of his diagnoses in his independent medical evaluation report. Lastly, Mr. Swearingin specifically testified that employee's back pain, not her fibromyalgia, is what drives her need to lie down periodically throughout the day.

In *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003), the Court set out a step-by-step test for determining Second Injury Fund liability:

> Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) the employer's liability is considered in isolation – 'the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability'; (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund.

Kizior, 5 S.W.3d at 200.

In this case we have previously found employee's permanent disability from the work injury to be 12.5% of the body as a whole referable to the lumbar spine. Based upon the aforementioned, we conclude employee is permanently and totally disabled due to the combination of her December 20, 2009, work injury with her preexisting low back condition. Relying on the analysis provided in *Kizior*, there is no need to consider employee's subsequently diagnosed fibromyalgia. For the foregoing reasons, we find the Second Injury Fund liable to employee for permanent total disability benefits.

Award

We modify the award of the ALJ. Employee is permanently and totally disabled due to the combination of the disability from her December 20, 2009, work injury with her preexisting disability to her low back.

Beginning May 31, 2010, and continuing for 50 weeks[2], the Second Injury Fund shall be liable for the difference between employee's PTD rate and her PPD rate. Because both employee's PTD rate and PPD rate are $321.58, there is no difference for the Second Injury Fund to cover for the 50 weeks attributable to the last injury. However, after said 50 weeks, the Second Injury Fund shall be liable for employee's weekly PTD benefit of $321.58 for the remainder of employee's life, or until modified by law.

[2] The work injury resulted in permanent partial disability of 50 weeks (lumbar spine/body as a whole).

The award and decision of Administrative Law Judge L. Timothy Wilson issued January 3, 2012, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

The Commission further approves and affirms the ALJ's allowance of attorney's fee as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 25th day of July 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Kristine Hilgart Injury No. 09-100903

Dependents: N/A

Employer: Kabul Nursing Homes, Inc.

Insurer: Missouri Nursing Home Insurance Trust

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

Hearing Date: September 30, 2011 Checked by: LTW

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: December 20, 2009

5. State location where accident occurred or occupational disease was contracted: Texas 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: While engaged in employment with the Employer, Employee assisted another nurse in moving a patient up on the patient's bed by using a lift sheet. In the course of performing this activity Employee experienced a pop and sharp pain in her low back.. As a consequence of this work incident, Employee sustained an injury to her low back.

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: Low Back

14. Nature and extent of any permanent disability: 12.5% to BAW (Low Back)

15. Compensation paid to-date for temporary disability: $2,572.64

16. Value necessary medical aid paid to date by employer/insurer? $2,929.13

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: Not Identified

19. Weekly compensation rate: $321.58 (PPD /PTD)

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: N/A (Employee and Employer / Insurer entered into a Stipulation for Compromise Settlement.)

22. Second Injury Fund liability: Yes

18 weeks of permanent partial disability from Second Injury Fund:	$5,788.44
Uninsured medical/death benefits:	N/A
Permanent total disability benefits from Second Injury Fund:	Denied
TOTAL:	**$5,788.44**

23. Future requirements awarded: None

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Randy Alberhasky, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kristine Hilgart Injury No. 09-100903

Dependents: N/A

Employer: Kabul Nursing Homes, Inc.

Insurer: Missouri Nursing Home Insurance Trust

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on September 30, 2011. The record was left open for 30 days in order to afford the parties opportunity to submit additional evidence, resulting in the evidentiary record being closed on October 30, 2011. Further, the parties were afforded an opportunity to submit briefs or proposed awards, resulting in the case being submitted to the undersigned on or about November 14, 2011.

The employee appeared personally and through her attorney, Randy Alberhasky, Esq. The employer and insurer were not part of the evidentiary hearing, having previously entered into a stipulation for compromise settlement with the employee, resulting in approval by an administrative law judge on or about August 19, 2010. The Second Injury Fund appeared through its attorney, Cara Harris, Assistant Attorney General.

The parties entered into a stipulation of facts. The stipulation is as follows:

(1) On or about December 20, 2009, Kabul Nursing Homes was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Missouri Nursing Home Insurance Trust.

(2) On the alleged injury date of December 20, 2009, Kristine Hilgart was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.

(3) On or about December 20, 2009, the employee sustained an accident, which arose out of and in the course and scope of her employment with the employer.

(4) The above-referenced employment and accident occurred in Texas County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.

(5) The employee notified the employer of her injury as required by Section 287.420, RSMo.

(6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.

(7) At the time of the claimed accident the employee's average weekly wage was sufficient to allow a compensation rate of $321.58 for temporary total disability compensation, and a compensation rate of $321.58 for permanent partial disability compensation.

(8) Temporary disability benefits were provided to the employee in the amount of $2,572.64.

(9) The employer and insurer provided medical treatment to the employee, having paid $2,929.13 in medical expenses.

(10) The employee and employer / insurer entered into a stipulation for compromise lump sum settlement for $16,079.00 based on approximate disability of 12.5 percent to the body as a whole referable to the low back. An administrative law judge with the Division of Workers' Compensation approved this Stipulation for Compromise Settlement on or about August 19, 2010.

The sole issue to be resolved by hearing is as follows:

(1) Whether the claimant sustained any permanent disability as a consequence of the alleged accident of December 20, 2009; and if so, what is the nature and extent of the disability?

(2) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

EVIDENCE PRESENTED

The employee testified at the hearing in support of her claim. Also, the employee presented at the hearing of this case the testimony of an additional witness – Leigh Ann Sigman. In addition, the employee offered for admission the following exhibits:

Exhibit A.....Medical Records from Cabool Medical Clinic - TCMH

(Certified April 5, 2010)
Exhibit B .....Medical Records from Cabool Medical Clinic - TCMH
(Certified May 13, 2010)
Exhibit C ..... .Medical Records from Cox Medical Center-Springfield
Exhibit D..... Medical Records from Dale Family Medicine
(Certified May 17, 2010)
Exhibit E ..... Medical Records from Dale Family Medicine
(Certified July 27, 2010)
Exhibit F ..... Medical Records from Dale Family Medicine
(Certified September 16, 2011)
Exhibit G..... Medical Records from Dale Family Medicine
(Certified April 25, 2011)
Exhibit H.....Medical Records from Kabul Nursing Home, Inc.
Exhibit I ..... Medical Records from Marshfield Clinic (Wisconsin)
Exhibit J .....Medical Records from Pain Treatment Associated LLC
Exhibit k.....Medical Records from St. John's Clinic – Mountain Grove
(Certified March 10, 2010)
Exhibit L .....Medical Records from St. John's Clinic – Mountain Grove
(Certified August 17, 2011)
Exhibit M ..... Medical Records from St. John's Hospital-Springfield
Exhibit N.....Medical Records from Texas County Memorial Hospital
(Certified March 19, 2010)
Exhibit O.....Medical Records from Texas County Memorial Hospital
(Certified July 29, 2011)
Exhibit P ..... Medical Bills from Cabool Pharmacy
Exhibit Q..... Claim for Compensation
Exhibit R..... Answer of Second Injury Fund to Claim for Compensation
Exhibit S .....Letter Dated May 25, 2010
Exhibit T ..... Section 287.210, RSMo Letter Dated June 30, 2010
Exhibit U.....Letter Dated September 21, 2010
Exhibit V.....Section 287.210, RSMo Letter Dated October 1, 2010
Exhibit W.....Disclosure of Medical Records Letter Dated October 22, 2010
Exhibit X.....Disclosure of Medical Records Letter Dated April 28, 2011
Exhibit Y.....Disclosure of Medical Records Letter Dated June 14, 2011
Exhibit Z .....Disclosure of Medical Records Letter Dated August 3, 2011
Exhibit AA.....Disclosure of Medical Records Letter Dated August 24, 2011
Exhibit BB ..... Disclosure of Medical Records Letter Dated September 21, 2011
Exhibit CC .....Deposition of Truett Lee Swaim, M.D.
(Inclusive of Deposition Exhibits)
Exhibit DD..... Deposition of David W. Dale, D.O.
(Inclusive of Deposition Exhibits)
Exhibit EE.....Deposition of Wilbur Swearingin, CRC.
(Inclusive of Deposition Exhibits)
Exhibit FF ..... Stipulation for Compromise Settlement, Injury No. 09-100903
(Between Employee & Employer/Insurer)

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses at the hearing of this case. However, the Second Injury Fund offered for admission for admission the following exhibits:

Exhibit I ..... Deposition of Mary Titterington, M.S., C.D.M.S.
(Inclusive of Deposition Exhibits)

The exhibit was received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned administrative law judge took administrative or judicial notice of the documents contained in the Legal File, which include:

- Notice of Hearing
- Request for Hearing-Final Award
- Stipulation for Compromise Settlement with supporting documentation (B/T Employee & Employer / Insurer)
- Notice of Commencement / Termination of Compensation
- Answer of Second Injury Fund to Claim for Compensation
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

FINDINGS AND CONCLUSIONS

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

I.
Background

The employee, Kristine Hilgart, is 41 years of age, having been born on August 31, 1970. Ms. Hilgart resides in Cabool, Missouri.

Ms. Hilgart is a high school graduate. Additionally, she enjoys licensure as a Licensed Practical Nurse ("LPN"), which she obtained in 2005. Ms. Hilgart acknowledges that she does not have any difficulty in reading or writing, and obtained good grades in her nursing school education.

Ms. Hilgart's employment history is varied. This work history includes factory work, which occurred in the 1990s; daycare work, which occurred in Ms. Hilgart's own home during the period of approximately 1997 through November of 2003. From June of 2004 to June of 2005, Ms. Hilgart was in school at Texas County Vocational School getting her LPN degree.

Subsequent to obtaining her LPN license Ms. Hilgart began working at nursing homes. Initially, as an LPN, Ms. Hilgart secured employment with Autumn Oaks in Mountain Grove. In this employment Ms. Hilgart worked as an LPN, and worked the night shift. This employment continued for approximately 9 months. Thereafter, in or around May 2006, Ms. Hilgart secured employment with the employer, Kabul Nursing Homes, Inc., working as a nurse. (Ms. Hilgart terminated her employment with Autumn Oaks in order to secure employment with Kabul Nursing Homes, which allowed her to be closer to her home in Cabool, Missouri.)

Initially, upon securing employment with Kabul Nursing Homes Ms. Hilgart worked the night shift. Eventually, she was able to work the day shift. Ms. Hilgart continued in this employment until suffering the work injury of December 20, 2009. Notably, Ms. Hilgart has not worked since suffering this injury.

Ms. Hilgart testified that her employment as an LPN with both Autumn Oaks and Kabul Nursing Homes involved very similar work. She assisted others with transporting patients and moving them about in beds. Also, she was in charge of medication and charting. When she went to work on the day shift, while employed by Kabul Nursing Homes in approximately March 2008, she engaged in more strenuous work because the patients were more active during the day than they are at night. Ms. Hilgart further testified that throughout her employment at both nursing homes she attempted to secure assistance while performing activity that involved lifting. Additionally, she noted that she experienced difficulty pushing the wound care cart down the hall.

Prior Medical Conditions

Prior to sustaining the work injury of December 20, 2009, Ms. Hilgart presented with a preexisting disability referable to her low back. This medical condition includes consideration of the following:

- In 1994 Ms. Hilgart sustained an injury to her low back while working at a door factory. Treatment for the back injury at that time included medication, chiropractic treatments and physical therapy. She did not receive any workers' compensation

settlement; however, the medical treatment was provided to her at the expense of the employer and/or insurer, and she was paid or received temporary disability compensation for her time off from work. She testified she was off work a couple of weeks from that injury; however, she did not undergo surgery for this injury and none was recommended. She was never hospitalized and received no permanent restrictions from any doctor. Following the course of treatment for that injury, she had some occasional ongoing pain, and took prescription medications until 1994 or 1995.

- In 2000 Ms. Hilgart experienced a flare-up of back pain. She returned to the doctors because of this pain. She treated between 2000 and 2003 when she became pregnant with her 4th child. Treatment during this time period included epidural steroid injections and medication including Percocet then Oxycotin. She did not have any surgery during this treatment, was never hospitalized, and had no permanent restrictions placed upon her by a medical care provider.

  Ms. Hilgart testified that during her pregnancy, and even after her pregnancy, she continued to have low back complaints, and continued to treat herself at home including using the heating pad, taking hot baths, and applying icy/hot patches.

- Following the 2000 incident Ms. Hilgart experienced some pain in her left leg. However, the pain went down approximately to her knee. At the hearing, according to Ms. Hilgart, during the time she worked at Autumn Oaks and Kabul Nursing Homes before June 2008, she had a constant pain and was taking over-the-counter prescriptions every 6 hours while working. In contrast, during the taking of her deposition, Ms. Hilgart noted that pain she experienced during her employment at Autumn Oaks and Kabul prior to June of 2008 was only occasional and not daily.

- In June 2008, while working at Kabul Nursing Homes, Ms. Hilgart experienced an increase in low back pain over the course of the day. When she got home, her back was hurting very badly, and she had pain going down into her left leg and into her foot. She treated with her family doctor, Dr. Unger, first and was given prescriptions and had an MRI done and was referred to a surgeon, Dr. Sami.

  Dr. Sami recommended epidural steroid injections; however, Ms. Hilgart testified that she was unable to get those due to not having an ability to pay. She testified during the time she was not working she became eligible for Medicaid, which paid for the treatment provided by Dr. Unger and Dr. Sami, including the MRI. However, when she returned to work she was no longer eligible for Medicaid benefits, and therefore could not get the epidural steroid injections, which had been recommended by Dr. Sami.

  She continued to treat during the summer of 2008 with her primary care physician, Dr. Unger. She believed she was off work one week in August; she returned to work

following the June 2008 event at Kabul Nursing Homes doing her full duties, full time. However, according to Ms. Hilgart, in returning to her employment she had to modify or change the nature of her work duties. This change required her to sit down and take breaks. She changed how she lifted; she would have two people assist her with lifts even when the protocol called for only one person. Additionally, she experienced some difficulty pushing a large cart.

Ms. Hilgart further testified that upon returning to work following the June 2008 incident she did not feel as good as she did prior to the incident in June 2008. She testified she would go home and lie down, and if she did so it would relieve some of the pain in her leg. Ms. Hilgart indicated that she missed approximately 14 days of work between August of 2008 and December of 2009 because of back complaints. She testified she worked with pain because it was a necessity to work at that point.

Finally, Ms. Hilgart testified that she always had pain between the fall of 2008 and December of 2009, and that she was taking pain medication.

II.
Underlying Claim

On December 20, 2009, while engaged in employment and performing her work duties with Kabul Nursing Homes, Ms. Hilgart assisted another nurse in moving a patient up on the patient's bed by using a lift sheet. In the course of performing this activity, Ms. Hilgart experienced a pop and sharp pain in her low back. (Ms. Hilgart described the pain and pop in her low back to be situated in the middle of her back at her beltline.) According to Ms. Hilgart, the pain was so painful she had to sit down on the floor. After gathering herself, she received assistance in getting up and into a wheelchair; she was then rolled out to the charge nurse to file a Report of Injury. Thereafter, she presented to the emergency room.

Medical Treatment

She was given pain medication at the emergency room, and then referred to Dr. Hawkins. She was taken off work, returned to Dr. Hawkins, and was sent to physical therapy, which made her complaints worse. Another MRI was done, surgery was not recommended, and she was released from treatment.

Subsequent to being released from treatment provided by the employer and insurer, Ms. Hilgart began receiving treatment on her own, securing treatment with Dr. Dale in April of 2010. Dr. Dale diagnosed Ms. Hilgart with Fibromyalgia, a condition that had not previously been diagnosed by any physician. In treating Ms. Hilgart for this condition, Dr. Dale prescribed pain medication and referred Ms. Hilgart to a pain clinic in West Plains. (This health care provider is continuing to provide Ms. Hilgart with treatment.) She has undergone several "nerve burns" at the pain clinic, which have offered some relief on a short-term basis. She is currently taking Vicodin three times a day, which she testified makes her tired and a bit confused. According to Ms. Hilgart, she does not believe she is capable of performing her job duties as a nurse while taking her current medication.

Present Complaints

Ms. Hilgart testified that in the two months preceding the hearing, she has experienced much greater back pain than she has previously experienced. According to Ms. Hilgart, she must lie down a minimum of two times per day. She currently will get her kids off to school, and then she lies down. She does her housework, or runs some errands for a while; she then lies back down and waits for the kids to get home from school. She does go on errands, and drops her kids off at different activities. It came out in testimony by one of her friends that she is actually currently coaching her son's soccer team, and that she coached a T-ball team earlier in the year; however, according to her friend's testimony, she is a very verbal coach and not very active.

Ms. Hilgart testified she does the cooking, but not the laundry anymore. She goes to the grocery store as long as someone goes with her. She does not believe she can work during the day. It is Ms. Hilgart's belief that she could not make it through the day without lying down. She testified she currently can sit 10 to 15 minutes, stand 10 to 15 minutes, and walk 10 to 15 minutes. She further testified that prior to the December 2009 injury she could do all of those activities for a more extensive period of time.

Leigh Sigman testified on Ms. Hilgart's behalf. She is a communications supervisor at AirEvac, and is a basic EMT. She has been a friend of Ms. Hilgart for approximately 24 years. She testified she knew Ms. Hilgart suffered with back problems while Ms. Hilgart lived in Wisconsin 16 to 17 years ago. Additionally, Ms. Sigman testified that she has noticed Ms. Hilgart experiencing a change in her back pain. In this regard, Ms. Sigman noted that Ms. Hilgart's back pain got gradually worse after she moved to Missouri.

In 2007, according to Ms. Sigman, Ms. Hilgart complained she was having difficulty doing more things with her children, and she had to lie down. Ms. Sigman testified that in an attempt to help Ms. Hilgart, she has taken Ms. Hilgart's kids to different activities, such as helping with errand runs and at times fixing dinners for the family.

In addition, Ms. Sigman noted that after the December of 2009 injury Ms. Hilgart's back pain had become more constant. Ms. Sigman notes that she is still helping Ms. Hilgart with some of her activities and chores; however, since Ms. Hilgart is no longer working and is thus home more she is able to do more things for herself.

Ms. Sigman testified AirEvac, where she works, does have positions where they are currently hiring, which would utilize medical skills, and would be involved with dispatch of ambulances and helicopters, and offer sit/stand positions. Ms. Sigman testified she did not believe Ms. Hilgart could do one of these jobs on a full time basis due to her level of pain.

Medical Opinion

David W. Dale, D.O., a family physician, testified by deposition on behalf of Ms. Hilgart. Dr. Dale testified that Ms. Hilgart first presented to his office on April 15, 2010. Further, according to Dale, his nurse practitioner performed this examination, which did not produce "any

notable findings on the exam." Based on this examination, the nurse practitioner diagnosed Ms. Hilgart with a lumbar strain, spinal stenosis and depression.

Later, on April 29, 2010, Ms. Hilgart presented to Dr. Dale for additional examination and evaluation. In light of this examination and evaluation, Dr. Dale diagnosed Ms. Hilgart with fibromyalgia/fibromyitis finding that she was tender in 18 of 18 possible tender points. Additionally, Dr. Dale continued to diagnose Ms. Hilgart with anxiety/depression, acute strain/sprain of the thoracic area, spinal stenosis and degenerative disc disease. In discussing the nature of fibromyalgia/fibromyitis as a medical condition, Dr. Dale propounded the following testimony:

> Fibromysitis is a muscle tendon with arthritis. It occurs when the tendons and – or the tendon and the muscle connect and -- and become one with the integrate. We don't know exactly why it occurs. When I was in medical school, we were taught that it was supratentorial, all in your head; it was 75 percent woman and it's 25 percent men.
>
> Finally, though, in 1989, the American College of Rheumatology came – came up with the discovery that indeed, it was a disease and was labeled and numbered and treated – treatment and recommendations.
>
> Since then the treatment has advanced quite a little bit. It can be precipitated by psychological trauma. Often it can be – what predates it is childhood abuse: physical, emotional, sexual. However, traumatic events, ones like – such as a car accident or other trauma can then also set it off and be associated with it.

In discussing the cause of the fibromyalgia/fibromyitis Dr. Dale propounded the following testimony:

> Q. You diagnosed fibrositis. Do you have an opinion as to whether or not the fibrositis predated that or was caused by the incident or was unrelated to the incident?
>
> A. Well, I think that you can make the argument with the injury. The fibromyositis came as a result of that. It's not a substantial argument. It's not something that – that I would be willing to say absolutely, but I think the argument can be made. It has been in – research before.

In addition, Dr. Dale examined the cause of the stenosis, annular tear and degenerative disc disease. As to these medical conditions, Dr. Dale testified that he was of the opinion that the medical conditions of stenosis and annular tear occurred with the work injury. As to the degenerative disc disease Dr. Dale opined that he viewed this condition as preexisting, but asymptomatic prior to the work injury.

In rendering an opinion as to the nature and effect of the medical conditions upon Ms. Hilgart, Dr. Dale testified that in the course of providing Ms. Hilgart with treatment he noticed some slight improvement with the medication, but she was still having fatigue, numbness and tingling. Dr. Dale further noted that throughout his treatment of Ms. Hilgart her pain level was

the same, and he continued to treat her with Hydrocodone. In light of this presenting medical condition, according to Dr. Dale, Ms. Hilgart is governed by permanent restrictions and limitations, and he is of the opinion that she is permanently and totally disabled. In tendering a medical source statement, Dr. Dale issued the following restrictions:

- Ms. Hilgart can carry and lift less than 5 pounds, which he attributes to the fibromyitis, annular tear and stenosis.

- Ms. Hilgart can occasionally lift 10 pounds, which he attributes to the fibromyitis, annular tear and stenosis.

- Ms. Hilgart is limited to 15 minutes to standing and walking continuously throughout the day and 2 hours total, which he attributes to fibromyitis or back injury, or both.

- Ms. Hilgart can sit continuously for 45 minutes and entirely throughout the day for 2 hours, which he attributes to fibromyitis or back injury, or both.

- Ms. Hilgart needs to lie down for about 15-20 minutes every 4 minutes, which he attributes to fibromyitis. (Dr. Dale notes that if Ms. Hilgart did not have the fibromyalgia, that the times of her ability to sit and stand would be doubled, both for how long she could do such activity at a time continuously, and how long she could do those throughout the day.)

Finally, Dr. Dale testified that Ms. Hilgart has not undergone any lumbar surgery; and he has not referred her to a surgeon or recommended that she undergo a surgical consultation for her presenting medical condition. Rather, he is of the opinion that she should be referred to a pain specialist. Additionally, Dr. Dale acknowledged that the results of the MRI diagnostic study taken in January 2010 do not warrant a referral to an orthopedic surgeon or neurosurgeon.

Truett Lee Swaim, M.D., testified by deposition on behalf of Ms. Hilgart. Dr. Swaim performed an independent medical examination of Ms. Hilgart on May 3, 2010. At the time of this examination, Dr. Swaim took a history from Ms. Hilgart, reviewed various medical records, and performed a physical examination of her. In light of his examination and evaluation of Ms. Hilgart, Dr. Swaim opined that the work incident of December 20, 2009, was the prevailing factor in causing Ms. Hilgart to sustain an injury to the low back in the nature of increased disc protrusion of the lumbar region and left sacroiliac joint dysfunction.

In addition, Dr. Swaim opined that this work injury caused Ms. Hilgart to sustain a permanent partial disability of 12.5 percent to the body as a whole, referable to the low back. Dr. Dale further opined that prior to December 20, 2009, Ms. Hilgart presented with a preexisting permanent partial disability of 17.5 percent to the body as a whole, referable to her low back.

Further, Dr. Swaim opined that the disability attributable to the work injury of December 20, 2009, combines with the disability attributable to the prior low back condition, to result in an enhanced disability or additional permanent disability greater than the simple sum. Dr. Swaim opined that Ms. Hilgart's "overall disability is enhanced by 4.5 percent of the body as a whole or

18 weeks." In considering the permanent restrictions attributable to the work injury and the preexisting condition to Ms. Hilgart's low back, Dr. Swaim propounded the following testimony:

> Q. What would you assign to her presently as a result of her back injury and her preexisting conditions?
> A. I assigned a restriction to the light work level according to the U. S. Department of Labor and Dictionary of Occupational Titles, with the ability to exert up to 20 pounds of force occasionally, or up to 10 pounds of force frequently, or a negligible amount of force constantly.
>
> She should avoid repetitive bending, stooping, twisting, squatting, climbing, kneeling or crawling. She should avoid prolonged sitting, standing, or walking, avoid lifting from below calf level, lifting away from the body or above shoulder height.
>
> Q. Would she have had any of those limitations prior to December 20, 2009?
> A. She would have had some of the limitations.
>
> Q. Such as?
> A. Avoid repetitive bending and stooping and twisting and squatting and climbing, avoid lifting from below calf level, away from the body, or above shoulder. I think a real change in terms of the limitations would be the change in terms of the amount of force.
>
> * * *
>
> Q. Do you feel she will require a time during the day to lay down?
> A. Considering the findings by MRI scan and physical examination, I do believe within a reasonable degree of medical certainty there are going to be times when she's going to need to lie down in terms of treatment of her discomfort. And if you look on – under current status on Page, 6, it does state her discomfort improved by changing positions, some limited improvement with Vicodin, and some limited improvement by lying down.

On cross-examination, Dr. Swaim acknowledged that prior to December 20, 2009, Ms. Hilgart took narcotic prescription medication, including Vicodin and Oxycontin, for treatment of her low back; and the taking of such prescription medication does not necessarily prohibit an individual from engaging in employment activity.

In addition, on cross-examination, Dr. Swaim acknowledged that subsequent to suffering the work injury of December 20, 2009, Ms. Hilgart was diagnosed with fibromyalgia; and Ms. Hilgart had not been diagnosed with this condition prior to the work injury.

Vocational Opinion

Wilbur Swearingin, a vocational expert, testified by deposition on behalf of Ms. Hilgart. Mr. Swearingin performed a vocational examination and evaluation of Ms. Hilgart, and opined

that Ms. Hilgart is permanently and totally disabled as a consequence of the governing permanent restrictions caused by the work injury of December 20, 2009, and the preexisting low back condition. Notably, in rendering this opinion, Mr. Swearingin acknowledges that if Ms. Hilgart is not required to lie down during the day, she is employable in the open and competitive labor market.

In addition, Mr. Swearingin noted there were three jobs which are in the same field as Ms. Hilgart's past work, which match the profile he created for her based on her past work, education and current physical ability. These jobs include cardiac tech monitor, a medical job, which would closely relate to her recent employment, which would be sedentary in some things she should be able to do if she did not have to lie down during the day.

Also, Mr. Swearingin provided testimony relative to the work history form that Ms. Hilgart completed for him. This form indicates that Ms. Hilgart was working 40 plus hours at Kabul Nursing Homes, lifting in excess of 100 pounds; she was primarily on her feet 6 hours per day and seated for 2 to 4 hours per day. Additionally, Mr. Swearingin noted that he did not have any history on how the pain that Ms. Hilgart was having prior to December of 2009 was affecting her ability to do her job.

Further, Mr. Swearingin testified that Ms. Hilgart's educational background is an asset for her, and if she was physically capable she would be mentally capable of re-training. Mr. Swearingin's current ability profile found 194 jobs that fit the criteria of his profile for Ms. Hilgart. These jobs are all classified as sedentary by the DOT, and do not violate the restrictions of even Dr. Dale with the exception of her need to lie down during the day. Mr. Swearingin agreed that he if he assumed that Ms. Hilgart is capable of light duty, as Dr. Swaim found, she would have drastically higher numbers of jobs which would fit her profile.

Mary Titterington, a vocational expert, testified by deposition on behalf of the Second Injury Fund. Ms. Titterington is a vocational expert who evaluated records, including depositions and medical records regarding Ms. Hilgart. Ms. Titterington testified that she believes Ms. Hilgart is capable of working in the open labor market unless you assume as true Dr. Dale's restriction that she has to lie down 15 to 20 minutes basically out of every hour. Ms. Titterington found unskilled jobs, including desk clerk, gate tender, telephone marketer, self-service gas station attendant, which she believes Ms. Hilgart would be capable of doing. Additionally, Ms. Titterington found jobs related to Ms. Hilgart's past work history. These jobs include unit secretary or answering telephones in a physician's office. Ms. Titterington opined that Ms. Hilgart would be capable of performing these jobs.

III.
Nature & Extent of Permanent Disability

The evidence presented in this case is supportive of a finding that as a consequence of the December 20, 2009, accident, the employee, Kristine Hilgart, sustained an accident that arose out of and in the course of her employment with Kabul Nursing Homes, Inc. The evidence is further supportive of a finding that as a consequence of this accident, Ms. Hilgart sustained an injury to her low back, which is in the nature of increased disc protrusion of the lumbar region and left sacroiliac joint dysfunction.

Notably, the parties acknowledge and stipulate that the employee, Kristine Hilgart, sustained a compensable accident on December 20, 2009. Further, the employee and employer and insurer entered into a Stipulation for Compromise Settlement, agreeing to resolve the underlying claim for payment of a lump sum of $16,079.00 based upon, among other consideration, approximate disability of 12.5 percent of body as a whole referable to the low back.

After consideration and review of the evidence, I find and conclude that the work injury of December 20, 2009, caused Ms. Hilgart to be governed by certain restrictions and limitations, which constitute a hindrance or obstacle to employment. I further find and conclude that this work injury caused Ms. Hilgart to sustain a permanent partial disability of 12.5 percent to the body as a whole referable to the low back. In rendering this determination, I note that subsequent to suffering and receiving medical care for the December 20, 2009, work injury, and then being released from treatment, Ms. Hilgart was diagnosed with and began receiving treatment for fibromyalgia/fibromyitis.

Notably, in regard to Ms. Hilgart suffering from fibromyalgia/fibromyitis, the parties do not offer any medical opinion to the contrary that she does not suffer from this condition. Yet, the evidence is not supportive of a finding that the medical condition of fibromyalgia/fibromyitis is causally related to the work injury of December 20, 2009. At best, the relationship between the fibromyalgia/fibromyitis and the work injury is speculative. The burden of proof is on the claimant, and in applying a reasonable probability analysis, the claimant did not sustain her burden of proof that the fibromyalgia/fibromyitis is causally related to the work injury.

In light of the foregoing, I find and conclude that the work injury of December 20, 2009, considered alone and in isolation, does not render the employee, Kristine Hilgart, permanently and totally disabled.

IV.
Liability of Second Injury Fund

I find and conclude that the employee, Kristine Hilgart, sustained a work injury on December 20, 2009, which caused her to sustain a permanent partial disability of 12.5 percent to the body as a whole referable to the low back. Because of this injury, Ms. Hilgart suffers residual pain and discomfort, and is governed by limitations and restrictions. This injury presents a hindrance and obstacle to employment or potential employment.

Further, prior to December 20, 2009, Ms. Hilgart suffered from preexisting disability referable to her low back. This preexisting medical condition physically impacted Ms. Hilgart's ability to perform certain activities, and to be governed by limitations and restrictions. Prior to December 20, 2009, this preexisting medical condition caused Ms. Hilgart to present with a permanent partial disability of 17.5 percent to the body as a whole. I further find and conclude that this preexisting disability presented a hindrance and obstacle to employment or potential employment.

In considering the nature and extent of this preexisting disability referable to the low back, I find and conclude that the fibromyalgia/fibromyitis is not a preexisting medical condition or disability. Prior to December 20, 2009, Ms. Hilgart had not been diagnosed with or treated for fibromyalgia/fibromyitis; nor is there any evidence that this medical condition predated the work injury.

Accordingly, after consideration and review of the evidence, I find and conclude that the fibromyalgia/fibromyitis is a separate and independent medical condition occurring subsequent and unrelated to the December 20, 2009, work injury. Further, I find and conclude that many of the restrictions and limitations that govern Ms. Hilgart, including the need to lie down, relate to the fibromyalgia/fibromyitis. The need to lie down is not merely a self-imposed restriction. It is a restriction prescribed by Dr. Dale, and Dr. Swaim concurs with the imposition of this restriction. I thus accept as true that Ms. Hilgart is governed by this work restriction.

However, I find and conclude that the restriction to lie down is causally related to, or at a minimum, requires consideration of the fibromyalgia/fibromyitis as a contributing medical condition causing such restrictions to be imposed upon Ms. Hilgart. The need to lie down renders Ms. Hilgart unemployable in the open and competitive labor market. Yet, without inclusion of the fibromyalgia/fibromyitis as a preexisting medical condition, or as a condition caused by the work injury of December 20, 2009, Ms. Hilgart is not governed by restrictions that render her permanently and totally disabled and entitled to permanent total disability compensation under Chapter 287, RSMo. It is the combination of all of Ms. Hilgart's medical conditions, including the subsequent developing fibromyalgia/fibromyitis, unrelated to the accident of December 20, 2009, which rendered Ms. Hilgart permanently and totally disabled.

Notwithstanding, the evidence is supportive of a finding, and I find and conclude that a combination of the December 20, 2009, work injury to the low back and the preexisting disability referable to the low back caused Ms. Hilgart to sustain additional permanent partial disability greater than the simple sum. I further find and conclude that the combination of these injuries caused Ms. Hilgart to sustain additional permanent partial disability of 4.5 percent to the body as a whole (18 weeks). Therefore, the Second Injury Fund is ordered to pay to the employee, Kristine Hilgart, the sum of $5,788.44, which represents 18 weeks of permanent partial disability compensation, payable at the applicable compensation rate of $321.58 per week.

This award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be provided is hereby approved, in favor of Randy Alberhasky, Esq., and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Made by: _____

L. Timothy Wilson
Administrative Law Judge
Division of Workers' Compensation