

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

Injury No. 07-132751

Employee: Patricia Hulsey
Employer: Chrysler, LLC (Settled)
Insurer: Old Carco (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 15, 2015, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John K. Ottenad, issued May 15, 2015, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 25th day of September 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Patricia Hulsey

Injury No.: 07-132751

Dependents: N/A

Employer: Chrysler, LLC (Settled)

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: OLD CARCO, LLC C/O
Sedgwick Claims Management Services (Settled)

Hearing Dates: January 7, 2015 and February 3, 2015
Record Closed on February 6, 2015

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: (Alleged) December 31, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was employed working on the assembly line for Employer and allegedly injured her low back as a result of the work she performed for Employer.
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: (Alleged) Body as a Whole—Low Back
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Patricia Hulsey

Injury No.: 07-132751

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: N/A for TTD & N/A for PPD
- 20. Method wages computation: N/A

COMPENSATION PAYABLE

21. Amount of compensation payable:

Claim Denied	\$0.00
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22. Second Injury Fund liability:

Claim Denied	\$0.00
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TOTAL: \$0.00

23. Future requirements awarded: None

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. W. Edwin Roussin

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Patricia Hulsey	Injury No.:	07-132751
Dependents:	N/A		
Employer:	Chrysler, LLC (Settled)		
Additional Party:	Second Injury Fund		
Insurer:	OLD CARCO, LLC C/O Sedgwick Claims Management Services (Settled)		

Before the
**Division of Workers’
 Compensation**
 Department of Labor and Industrial
 Relations of Missouri
 Jefferson City, Missouri

On January 7, 2015, the employee, Patricia Hulsey, appeared in person and by her attorney, Mr. W. Edwin Roussin, for a hearing for a final award on her Claim against the Second Injury Fund. The employer, Chrysler, LLC, and its insurer, OLD CARCO, LLC C/O Sedgwick Claims Management Services, were not present or represented at the hearing since they had previously settled their risk of liability in this case. The Second Injury Fund was represented by Assistant Attorney General Kevin A. Nelson.

Following the conclusion of the hearing on January 7, 2015, the parties discovered an apparent error in one of the Exhibits that had been admitted into evidence. In an exchange of e-mail correspondence between the parties, it was understood that if the parties chose to correct the error, they had 30 days from the date the hearing began, during which time the record could be reopened and the evidentiary issue addressed. The parties again appeared at the Division in St. Louis on February 3, 2015 to admit an additional Exhibit to cure the apparent evidentiary error.

To allow the parties time to cure the evidentiary issue and to prepare and file their proposed awards or briefs in this matter, the record did not technically close until February 6, 2015. Although we did not go back on the record or take any further evidence in this matter after February 3, 2015, the record was, then, closed on that date and the briefs were submitted by the parties by February 9, 2015.

Along with this Claim [Injury Number 07-132751, with a date of injury of December 31, 2007, alleging injury to the low back], Claimant also tried her other open companion claims at the same time. Injury Number 06-135235, with a date of injury of July 31, 2006, alleges injury to the left foot and ankle. Injury Number 07-132641, with a date of injury of May 31, 2007, alleges injury to the right foot and ankle. Separate awards have been issued for each of these cases.

At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about December 31, 2007, Patricia Hulseley (Claimant) allegedly sustained an occupational disease injury.
- 2) Claimant was an employee of Chrysler, LLC (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) The Claim was filed within the time prescribed by the law.
- 5) Employer paid no benefits in this case prior to their settlement with Claimant.

ISSUES:

- 1) Did Claimant sustain an occupational disease?
- 2) Did the alleged occupational disease arise out of and in the course of Claimant's employment for Employer?
- 3) Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to her alleged occupational disease at work for Employer leading up to December 31, 2007?
- 4) Did Employer receive proper notice of the injury?
- 5) What is Claimant's appropriate average weekly wage and rates of compensation for the payment of benefits in this work injury Claim?
- 6) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this work injury on December 31, 2007?
- 7) What is the liability, if any, of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

1. Deposition of Dr. Robert Poetz, without attachments, taken on March 11, 2014
2. Deposition of Mr. Timothy Lalk, with attached report, taken on December 9, 2013
3. Deposition of Claimant taken on April 26, 2010
4. Medical report of Dr. Robert Poetz dated October 21, 2009
5. Vocational rehabilitation report of Mr. Timothy Lalk dated May 23, 2011

6. Medical report of Dr. Daniel Kitchens dated May 4, 2011
- 6-A. Supplemental report of Dr. Daniel Kitchens dated September 2, 2014
7. Medical report of Dr. John Krause dated September 27, 2010
8. Certified medical treatment records of Crestwood Medical Center
9. Additional certified medical treatment records of Crestwood Medical Center
10. Certified medical treatment records of Primary Care-Wildwood (Dr. Leo Warren)
11. Certified medical treatment records of Dr. Dennis Popp
12. Certified medical treatment records of Midwest Pain Center
13. Certified medical treatment records of General Surgery Associates, P.C.
14. Certified medical treatment records of Alabama Infectious Disease Center, P.C.
15. Certified medical treatment records of Dr. Richard Hull
16. Certified medical treatment records of St. Louis Foot & Ankle
17. Certified medical treatment records of Rheumatology Associates of North Alabama, P.C.
18. Certified medical treatment records of Rheumatology Associates of North Alabama, P.C.
19. Certified medical treatment records of The Orthopaedic Center
20. Certified medical treatment records of Chesterfield Orthopedics, P.C.
21. Certified medical treatment records of Dr. Frederick Peet
22. Deposition of Dr. John Krause, with attachments, dated November 26, 2014
23. Claim for Compensation in Injury Number 06-135235
24. Claim for Compensation in Injury Number 07-132641
25. Claim for Compensation in Injury Number 07-132751
26. Stipulation for Compromise Settlement in Injury Number 06-135235 between Claimant and Employer
27. Stipulation for Compromise Settlement in Injury Number 07-132641 between Claimant and Employer
28. Stipulation for Compromise Settlement in Injury Number 07-132751 between Claimant and Employer

Second Injury Fund Exhibits:

- I. Report of Injury filed by Employer for Injury Number 06-135235
- II. Report of Injury filed by Employer for Injury Number 07-132641
- III. Report of Injury filed by Employer for Injury Number 07-132751
- IV. Deposition of Dr. Daniel Kitchens, with attachments, dated October 1, 2014

Notes: 1) Some of the records submitted at hearing contain handwritten remarks or other marks on the Exhibits. All of these marks were on these records at the time they were admitted into evidence and no other marks have been added since their admission on January 7, 2015 or February 3, 2015.

2) Some of the deposition exhibits were admitted into evidence with objections contained in the record. Unless otherwise noted differently below, all of those objections are **OVERRULED** and the testimony fully admitted into evidence in this case.

3) The parties requested that I take judicial and/or administrative notice of the contents of the Missouri Division of Workers' Compensation files for these three claims. Without

objection, the record will reflect that I have taken judicial and/or administrative notice of those file contents, pursuant to their request.

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, the medical treatment records, the medical and vocational opinions and testimony, the other documentary evidence, and the Stipulation for Compromise Settlement between Claimant and Employer in this case, as well as based on my personal observations of Claimant at hearing, I find:

- 1) **Claimant** is a 57-year-old, currently unemployed individual, who testified that she was working for Chrysler, LLC (Employer) in St. Louis in July 2006 prior to her left foot/ankle surgery. She has not worked anywhere since 2008 (not even applied anywhere) and has been receiving Social Security disability benefits and retirement benefits, as well.
- 2) When Claimant exactly stopped working for Employer and when, if at all, she returned to work in between her alleged work injuries is somewhat confusing based on her conflicting testimony at hearing. Originally, she testified that she retired from Employer in December 2007, but then noted that she last worked on April 19, 2008, when she returned to St. Louis for an appointment with the plant doctor, even though she was residing in Alabama by then. Later, she testified that she was fired on April 17, 2008, when she stopped receiving "workmans' comp" (even though she never actually received any Workers' Compensation benefits in any of these cases) and she had to come to St. Louis for the April 19, 2008 visit. When discussing her outcome from the first left foot surgery in July 2006, she said she was off work for at least six months, returning back to work at the end of 2006 or beginning of 2007. However, later, on cross-examination, she admitted that her last actual work on the assembly line for Employer was on July 6, 2006 and she did no work from that point forward, including no work on the line at all in 2007. She, then, testified that she came back to work for three days in April 2008 and was on the payroll, but merely sat at a picnic table because Employer had no work that fit within her restrictions.
- 3) Claimant testified that she is a high school graduate and she took a couple of college courses in 1976. She said that she is state certified in soldering, but she never served in the military and has no office or computer training.
- 4) Claimant explained that she began her career with Employer in Huntsville, Alabama in August 1983. She worked for Employer in Huntsville until February 2005. She performed a number of jobs for Employer over those years, including inspecting circuit boards, running machinery, performing general assembly line work and working as a team leader too for a time. She said that none of the work was heavy and she worked eight hours per day, with some mandatory overtime, but not a lot. She testified that she was on her feet some, more as a team leader, but not a lot. She also had some sitting with running the machines.

- 5) Claimant described a number of pre-existing injuries/conditions that she had received treatment for over the years leading up to her employment in St. Louis for Employer. She testified to a cervical spine injury in 1994 that resulted in a C6-7 fusion surgery in October 1994 and a C5-6 fusion surgery with plates and screws in December 2004. Leading up to July 2006 and continuing to the current time, Claimant testified that she had problems turning her head, lost range of motion and pain in the neck, approximately two to three times per week. She said that she had a restriction of no overhead work, because of her neck condition, when she transferred to Employer's St. Louis plant.
- 6) There are absolutely no medical treatment records in evidence documenting any of the treatment (surgical or otherwise) that Claimant received for her cervical spine condition prior to July 2006.
- 7) Claimant testified that she has been diagnosed with and treated for type 2 diabetes mellitus for approximately 35 years. She said that she takes about five pills and two shots of insulin to treat it. She noted that she has been on insulin for the last 1 ½ years, but she has taken the pills for 35 years. She denied suffering from peripheral neuropathy prior to July 2006. Additionally, she has taken medication for high blood pressure prior to July 2006. She has also had a hysterectomy, gall bladder removal and LASIK surgery prior to July 2006.
- 8) Medical treatment records from **Rheumatology Associates** (Exhibit 17) show a diagnosis of underlying fibromyalgia on October 29, 2001, with complaints of diffuse pain in her neck, back, arms and legs.
- 9) Claimant transferred to Employer's St. Louis plant and started there on February 21, 2005. She said that she worked as a "gopher" on the assembly line putting on the windshield wipers. She said the job was all standing and no sitting. The jobs in St. Louis also required more physical exertion than she had been used to performing in the Huntsville plant. After a time, she became a driver and had to keep five repairmen busy by moving vehicles after they had been fixed. She would drive the vans outside after they were fixed, and, then, sometimes run to get the next vehicle that was ready to be moved because there was not enough room. She estimated that she moved approximately 30 vehicles per hour while she worked as a driver. Lastly, Claimant worked as a final inspector for the front passenger seat from June 2005, until she was unable to work anymore for Employer. She testified that she was on her feet constantly and that was where her back really started hurting. She had to manually push the seat up and back to check the carpet. She also had to check the glove compartment for the manual, and inspect the window, door and trim. She described that she was bending at a 90° angle into at least 1,000 vans per day while performing this job. She admitted that there was no lifting, but she was pushing the seats manually.
- 10) Claimant testified that she was paid \$33.00 per hour in 2006 while she was working for Employer. She said that she worked at least 40 hours per week plus some overtime. She indicated that she was paid at the same rate in 2007, as well.

- 11) For approximately four months leading up to July 2006, Claimant testified that she had constant pain in the rear part of her heel and cramps in her Achilles tendon. She said that she reported the problems over that time to the plant nurse and doctor, who gave her BioFreeze to address her complaints. She said that she was still running back and forth with the vans even while having these complaints in her left heel.
- 12) Claimant admitted that at or around the time these problems started in 2006 she was 5 foot 6 ½ inches tall and weighed 250 pounds.
- 13) Claimant testified that she treated on her own with Dr. Neil Snyder, who performed surgery on her left foot on July 7, 2006. She said that she also saw a Dr. Peet for her left foot condition.
- 14) In reviewing the extensive medical treatment records in evidence, I find no discreet medical treatment records or office notes from Employer's plant dispensary nor Dr. Neil Snyder. I did discover the July 7, 2006 operative note from Dr. Snyder contained in Dr. Raymond Abdo's records (Exhibit 16), which confirmed the performance of the excision of the retrocalcaneal exostosis of the left foot on that date. I also found the fitness to return to work evaluation report of **Dr. Frederick Peet** (Exhibit 21) dated August 11, 2006. At that time, Claimant was still noted to be in a CAM Walker and in a wheelchair, only able to walk five minutes at a time and unable to put any pressure on the foot. She was noted to have stiffness and a lack of movement following the surgery. Dr. Peet opined that she was only able to return to a sit-down job for the next two to three weeks as her recovery continued. I have no other medical treatment records documenting any specific medical treatment Claimant received for her left foot at or around that time, nor her outcome and release from care or continuing complaints from that time.
- 15) Regarding her second Claim, Claimant agreed that she was alleging right heel and right leg problems that became disabling for her in May 2007. She testified that her right heel complaints started about two months after she had the surgery on her left heel, and really got bad in about December 2006. She said that she reported the problems to Employer's plant nurse and doctor. She said that she was again given BioFreeze, which helped a bit, but was not long lasting. She said that she was having excruciating pain in the back of her heel in May 2007. She was referred by Dr. Snyder to Dr. Walentynowicz, and, eventually, had the surgery performed on her right heel by Dr. Morley in Alabama in 2008.
- 16) While I again have no medical treatment records from Dr. Snyder or Employer's plant dispensary, medical treatment records in evidence for Claimant's right foot condition begin with a visit to **Dr. Raymond Abdo** at **St. Louis Foot & Ankle** (Exhibit 16) on May 21, 2007. Dr. Abdo noted that Claimant had a painful right Achilles tendon at the insertion site and was scheduled for surgery by Dr. Snyder for excision of the bone spur, but her insurance changed. There was no mention of work, work activities or her prior left foot procedure as being the cause of her current complaints in the right foot. Dr. Abdo diagnosed her with insertional calcification of the right Achilles tendon, diabetes mellitus/diabetic neuropathy (which is indicated by mild xerosis), and a flatfoot deformity. He agreed with the need for the surgery on the right heel.

By September 4, 2007, Dr. Abdo was still recommending surgery for the right heel, but her blood sugar levels were too high to proceed.

- 17) Claimant was examined by **Dr. James Walentynowicz** at **Chesterfield Orthopedics, P.C.** (Exhibit 20) on May 7, 2008, but he did not issue his report until November 24, 2008. He noted that she had been referred by Dr. Snyder for a painful right heel. He found a large calcific spur at the insertion point of the tendo-Achilles, as well as a Haglund's deformity of the posterior aspect of the calcaneus. He diagnosed chronic calcific tendinopathy/impingement of the right tendo-Achilles. He believed that she would benefit from debridement of the calcific tendinitis and the Haglund's deformity, but noted that she should have the surgery in Alabama to enhance her recovery. He also noted that she works on the assembly line and is constantly on her feet, so she will likely miss eight to ten weeks of work following surgery.
- 18) While there are references in some of the medical records and reports to Claimant having the right heel surgery performed by Dr. Morley in Alabama on June 24, 2008, the record of evidence contains no discreet medical treatment records from Dr. Morley, or any other physician for that matter, documenting any specific medical treatment Claimant received for her right foot at or around that time, nor her outcome and release from care or continuing complaints from that time.
- 19) Regarding her third Claim, Claimant agreed that she was alleging low back problems that became disabling for her in December 2007. She testified that her low back started bothering her about two months after her left foot surgery, in roughly September 2006. She said that she was walking with the walking cast on her left foot and it put her back out of alignment. She said that she was still going into work and walking in the plant to see doctors or sit by the line, even though she was not working on the line anymore. She testified it was the altered gait from the walking cast that caused her low back issues. Claimant said that she reported her complaints to Employer's plant nurse and doctor, and, she was, once again, given BioFreeze, which helped a small amount.
- 20) Claimant testified that even after she was taken out of the walking cast for her left foot, she was, then, placed in a walking cast for her right foot for another six months, so she still had an altered gait and her spine was still out of alignment.
- 21) Medical treatment records from **Dr. Leo Warren** at **Primary Care-Wildwood** (Exhibit 10) begin on November 9, 2006 with a complaint from Claimant of low back and leg pain for eight weeks. She noted that she had foot surgery in July and thought that she was compensating for the foot issues, which precipitated her problems. She also reported pain down the right leg in the L4-5 distribution. Additionally, she had right shoulder pain going into her neck and down the right arm. She noted prior diagnoses and treatment for fibromyalgia, hypertension, diabetes mellitus and hypothyroidism. Among other things, Dr. Warren diagnosed Claimant with "Fibromyalgia. Low back pain." In fact, in the balance of these treatment records, I found a number of references to the back pain being connected to her fibromyalgia. In subsequent visits, she received treatment for her diabetes because the sugar levels were high and for angina vs. panic attacks. In a note dated February 6, 2007,

Claimant told the doctor that she was stressed because she has not been working for the last six months since her foot surgery. She was noted at that time to be having the same problems in her right foot, for which she needed surgery. There was also a reference to her pain complaints being complicated by her fibromyalgia. On May 29, 2007, Dr. Warren noted that Claimant was applying for disability from Employer based on her chronic complaints and he thought that was reasonable. Finally, in a note dated June 15, 2007, Claimant was requesting stronger pain medications, so Dr. Warren referred her to Dr. Smith at pain management for any stronger medications.

- 22) Claimant began treating with **Dr. Stephen Smith at Midwest Pain Center** (Exhibit 12) on June 8, 2007. She reported low back and right leg pain that started 1 ½ years prior. She again noted that it was possible that it started after limping from her foot surgery. Dr. Smith diagnosed Claimant with lumbar spondylosis and lumbar degenerative disc disease. He performed lumbar epidural steroid injections at L4-5 on June 8, 22 and 29, 2007. She reported 50% improvement in her pain by July 20, 2007 and also had a round of facet joint injections. On October 17, 2007, Claimant reported that her pain was initially worse after the injections, but improved with time, although she still had some continued low back pain, and, now, left shoulder pain, too. Because her blood sugars were found to be out of control on January 23, 2008, Dr. Smith noted that she could not have any more injections, but he recommended pain medications and an MRI. The low back MRI taken on January 24, 2008 revealed a degenerative disc at L4-5 with mild broad-based diffuse disc bulging without spinal or foraminal stenosis. A discogram performed on April 18, 2008 was positive for mild low back pain at L4-5, with nonconcordant left, but not right sided pain.
- 23) In between her treatment with Dr. Smith, Claimant saw **Dr. Craig Lincoln at The Orthopaedic Center** (Exhibit 19) on March 21, 2008. Claimant reported low back pain, right buttock pain and right posterior thigh pain for about two years, but worse in the last six months. She also reported heel spurs and aching in her legs. She denied any new trauma or injury. Dr. Lincoln diagnosed right buttock and thigh pain consistent with piriformis syndrome, with no evidence of radiculopathy or myelopathy. He noted that she had an intact neurologic exam and a “good looking” lumbar MRI. He also diagnosed her with a history of depression and fibromyalgia. Dr. Lincoln opined, “I don’t see significant medical objectivity to keep her from working.” He did limit her standing to no more than six hours in a shift and limited her lifting to 50 pounds, based on her complaints. He recommended a pelvic MRI to further evaluate the piriformis syndrome, as well as physical therapy and, perhaps, an injection. The pelvic MRI was read as normal. On April 15, 2008, Dr. Lincoln noted that Claimant was insisting she cannot stand on concrete floors, but he did not see a problem with that unless she had peripheral neuropathy. He also noted that heel spurs and knee complaints could make standing for prolonged periods difficult too, but not her back. He wrote, “I don’t see objective evidence of impairment at the current time.”
- 24) Subsequently, Claimant saw **Dr. Richard Hull at The Clinic for Neurology, P.A.** (Exhibit 15) on April 21, 2008 for an EMG and nerve conduction study because of pain, tingling, numbness and burning in her feet. The study revealed evidence of

peripheral neuropathy of the bilateral lower extremities consistent with her history of diabetic sensory neuropathy.

- 25) I have no further medical treatment records for discreet treatment to Claimant's low back following the final notes from Drs. Smith and Lincoln.
- 26) Claimant filed three separate Claims for Compensation on May 5, 2008, alleging three separate occupational disease injuries, which allegedly occurred during her employment for Employer in St. Louis. Her **first Claim for Compensation** (Exhibit 23) alleged injury to her left foot/heel and left leg (Achilles tendon) with an injury date of July 2006, from the "constant and repetitive standing and use on the job." Her **second Claim for Compensation** (Exhibit 24) alleged injury to her right heel and right leg with an injury date of May 2007, from the "constant and repetitive standing and use on the job." Her **third Claim for Compensation** (Exhibit 25) alleged injury to her back with an injury date of December 2007, from the "constant lifting, bending, stooping and standing" on the job. In each Claim, she also filed against the Second Injury Fund alleging permanent total disability based on the combination of that alleged work injury and her alleged pre-existing disabilities.
- 27) Following the filing of the Claims for Compensation in each case, Employer, then, filed **Reports of Injury** (Exhibits SIF I-III). In each case, the Reports indicate that Employer was first notified of the alleged injuries on May 28 or 29, 2008, which would presumably correspond to the time that they actually received the Claims for Compensation that Claimant had first filed earlier that month.
- 28) Concerning treatment Claimant was receiving for her other medical issues subsequent to her alleged work injuries, I found medical treatment records from **Dr. Dennis Popp** (Exhibit 11) that document Claimant's ongoing treatment for her diabetes from June 29, 2007 to March 17, 2008. The records reflect Claimant trying to get control of her diabetes, but there was also a reference to chronic low back pain and her treatment by Dr. Smith. Then, continued records from **Rheumatology Associates of North Alabama, P.C.** (Exhibit 17) show that Claimant returned on January 14, 2008 and she had gotten worse, with every bone, muscle and joint hurting her. The record from that date states, "She has had no injury, accident, trauma or fall." It notes that she has had progressive difficulty with her back and she was found to have some stable degenerative disease at her hips, knees and feet. She was diagnosed with underlying osteoarthritis and fibromyalgia. She continued to treat with **Dr. William Shergy** of the **Rheumatology Associates of North Alabama, P.C.** (Exhibit 18) on January 14, 2008, March 10, 2008 and August 8, 2008, for progression of her fibromyalgia versus chronic pain, with the bulk of her complaints centered around her back.
- 29) Claimant did place into evidence voluminous medical treatment records from **Crestwood Medical Center** (Exhibits 8 and 9), **Dr. Peter Wilson** at **General Surgery Associates, P.C.** (Exhibit 13) and **Dr. Richard Spera** at **Alabama Infectious Disease Center, P.C.** (Exhibit 14), which deal with hospital admissions and surgical procedures to address an acute abdominal wall abscess with cellulitis (August 2008), a pelvic wall abscess (November 2008) and a vulvar abscess

(September/October 2009). She was noted to have been dealing with intermittent bouts of MRSA infections in each of these hospitalizations. Given that these conditions are not really addressed by Claimant's rating and examining medical expert, I am at a bit of a loss to understand their import in this case, since all of these hospitalizations came after Claimant no longer was actually working for Employer.

- 30) Claimant entered into **Stipulations for Compromise Settlement** (Exhibits 26-28) to resolve all issues in each of her three cases with Employer on May 14, 2012. In Injury Number 06-135235 (Exhibit 26), Claimant and Employer resolved the case for the payment of \$2,918.26, or approximately 5% permanent partial disability of the left foot at the ankle. In Injury Number 07-132641 (Exhibit 27), Claimant and Employer resolved the case for the payment of \$8,754.79, or approximately 15% permanent partial disability of the right foot at the ankle. In Injury Number 07-132751 (Exhibit 28), Claimant and Employer resolved the case for the payment of \$11,671.20, or approximately 7.5% permanent partial disability of the body as a whole referable to the low back. In each case, Employer had paid no benefits for medical or temporary total disability and in each case, the Second Injury Fund Claim was left open.
- 31) In terms of her current complaints referable to her alleged work injuries, Claimant testified that her heels are still tender, so she mostly wears shoes with no back to them (no shoe material to rub the backs of the heels). She said that she still has some stiffness and weather produces pain, but she has no cramping and has not received any further treatment for her heels/feet since her original release by the doctors. Claimant testified that she has problems walking now because of the problems with both of her feet/ankles. She said that her husband does most things around the house, as well as the shopping because she really cannot walk that far. She said that she also has low back pain and problems walking or bending because of her back. She testified that she takes medications every day just to make it through the day.
- 32) Claimant denied having any depression prior to 2006, but she said that she had some depression between 2006 and 2007 because of all the problems she was having. She said that she would sit and cry because she was in so much pain and she could not get anyone to understand where the pain was coming from. She admitted that the depression is now somewhat worse than it was prior to her last alleged injury.
- 33) Regarding her fibromyalgia, Claimant said that it causes pain in all of her extremities now, which she noticed some prior to the 2007 alleged injuries, but not prior to the 2006 injury. She admitted that it is a little worse now than it was prior to her last alleged injury.
- 34) Claimant does not think that she could work now because she cannot walk for more than 5-10 minutes and her back is in excruciating pain. She said that her back hurts even if she is sitting.
- 35) The deposition of **Dr. Robert Poetz** (Exhibit 1) was taken by Claimant on March 11, 2014 to make his opinions in this case admissible at hearing. Dr. Poetz is an osteopathic physician, who is board certified in family practice. He examined

Claimant one time, on May 18, 2009, at the request of Claimant's attorney and he provided no medical treatment. Following his physical examination of Claimant and his review of the medical treatment records, Dr. Poetz issued his report dated October 21, 2009 (Exhibit 4). Claimant presented Dr. Poetz with a very general description of her work duties in St. Louis, as well as what she had done for Employer in Alabama. She gave no specific history of the onset of her complaints with her feet or low back. Dr. Poetz reviewed medical treatment records, a number of which were not admitted into evidence at that time of hearing, documenting the various treatments Claimant had received for her feet/ankles and low back. He took a past medical history from Claimant that included her diagnosis and treatment for hypertension, diabetes (with peripheral and diabetic neuropathy), hyperlipidemia, hypothyroidism and fibromyalgia, which caused fatigue and trigger points in her knees, back and hips. She reported prior mild depression, but noted that it had worsened since she came to St. Louis. She was taking a number of medications for diabetes, high blood pressure, cholesterol, anxiety/depression, hypothyroidism, muscle relaxers, pain relievers, GERD/reflux, and pernicious anemia.

- 36) Dr. Poetz opined that the injury on or about July 2006 was the substantial and prevailing factor in the development of left foot retrocalcaneal exostosis, calcaneal spurs and Achilles tendonitis, status post excision of retrocalcaneal exostosis of the left foot, which he opined resulted in 40% permanent partial disability of the left foot/ankle. Dr. Poetz opined that the injury on or about May 2007 was the substantial and prevailing factor in the development of right calcaneal spurs and Achilles tendonitis, status post debridement, advancement and augmentation of the right Achilles tendon, which he opined resulted in 40% permanent partial disability of the right foot/ankle. Dr. Poetz opined that the injury on or about December 2007 was the substantial and prevailing factor in the development of a lumbar strain with exacerbation of lumbar degenerative disc disease, which he opined resulted in 20% permanent partial disability of the body as a whole referable to the lumbar spine. As for her pre-existing conditions and disabilities, Dr. Poetz opined that Claimant had permanent partial disabilities of 5% of the body as a whole referable to the lumbar spine for lumbar degenerative disc disease; 45% of the body as a whole referable to the cervical spine for cervical degenerative disc disease, status post cervical fusion at C5-6 and C6-7; 20% of the body as a whole referable to diabetes; 15% of the body as a whole referable to the cardiovascular system for hypertension and hyperlipidemia; 15% of the body as a whole referable to peripheral neuropathy; 15% of the body as a whole due to fibromyalgia; and 15% of the body as a whole referable to depression/anxiety. He opined that the combination of the disabilities results in a total that exceeds the simple sum by 20%. He offered a number of recommendations for how her activities should be restricted/modified, and he also opined that Claimant is permanently and totally disabled as a result of the combination of her three work injuries and her pre-existing conditions.
- 37) On cross-examination, Dr. Poetz admitted that he did not know if Claimant was actually still working by the time of the first claimed injury on July 31, 2006, nor the second on May 31, 2007, nor the third on December 31, 2007. He also did not know when she stopped working for Employer. All he knew was that she worked for Employer in Missouri from at least February 2005 until July 2006, but he did not

know the last day she actually worked full duties. He explained that the bony growth or spurs on the backs of her heels could take months to form if there is a lot of activity and wear and tear (standing, walking on hard surfaces, stretching, leaning forward) or could take years to develop if there is little wear and tear. Dr. Poetz was unclear as to when Claimant's low back complaints started but thought it was "synergistically" tied to the left foot problems from her altered gait, as well as her excessive and repetitive use of her low back at work. He did not know how the lumbar degenerative disc disease affected her before she started working in Missouri and he was unaware of any diagnoses that Claimant had for her low back prior to Dr. Smith in 2007. At first, Dr. Poetz indicated that he was unsure if the pre-existing conditions got worse after the alleged work injuries, but later noted that because of the injuries, the pre-existing conditions would have all worsened, because as an organism, everything gets worse if one part gets worse. He had no information on her weight at the time of any of the claimed injuries and opined that fibromyalgia causes generalized, not localized, pain, so it would not cause low back pain. Dr. Poetz admitted that he did not know if Claimant had any permanent restrictions on her from the treating doctors for the bilateral feet or low back. He also opined that Claimant reached maximum medical improvement for her right and left foot conditions and finished treating on November 24, 2008, when she saw Dr. Walentynowicz.

- 38) The deposition of **Dr. John Krause** (Exhibit 22) was taken by the Second Injury Fund on November 26, 2014 to make his opinions in this case admissible at hearing. Dr. Krause is a board certified orthopedic surgeon, with extensive background and research in foot and ankle treatment. He examined Claimant one time, on September 27, 2010, at the request of Employer's attorney and he provided no medical treatment. Following his physical examination of Claimant and his review of the medical treatment records, Dr. Krause issued his report on that same date (Exhibit 7). According to the report, Claimant admitted that she did not have any trauma to her heels and she denied specific injuries to her heels. She said that she initially filed this under her private insurance, but was consulted by an attorney who recommended that she file a Workers' Compensation claim. Included in the medical records he reviewed were Employer's plant clinic notes, which contained 124 separate entries for treatment over 95 months, from July 2, 2001 through May 7, 2008. The first entry for heel treatment was August 14, 2006 when she was postop from heel surgery. Dr. Krause diagnosed a history of bilateral insertional calcific Achilles tendonitis, bilateral Haglund's deformity and status post heel surgery bilaterally. He explained that an exostosis is a bone spur that rubs the Achilles tendon and the Haglund's deformity is a prominent calcaneus bone that can also rub the Achilles tendon. He opined that while Claimant had surgical treatment for her heels, she did not have a sufficient amount of bony resection off the calcaneus or the calcific deposit, and she continued to have symptoms related to her Achilles tendonitis. Dr. Krause opined that her work activities for Employer were not causally related to her Achilles tendonitis or calcific deposits. He said that that is a chronic degenerative condition and the amount of walking she was required to perform for Employer was not enough to produce her signs and symptoms. In addition to believing that her bilateral heel condition was not related to her work for Employer, Dr. Krause also opined that Claimant needed no restrictions on account of this condition and suffered no

permanent partial disability related to her foot or ankle attributable to her work for Employer.

- 39) On cross-examination, Dr. Krause testified that he did not find that her heel conditions were work related, in part, because he found absolutely no medical record evidence to suggest that they are. He admitted that if the condition was work related, he would rate her disability at 5-10% of the ankle, but nowhere near the 40% of the foot that Dr. Poetz rated. He also admitted that he really did not examine her for her back claim, just the bilateral heels.
- 40) The deposition of **Dr. Daniel Kitchens** (Exhibit SIF IV) was taken by the Second Injury Fund on October 1, 2014 to make his opinions in this case admissible at hearing. Dr. Kitchens is a board certified neurosurgeon, who treats patients with disorders of the spine, peripheral nerves, brain injuries and spinal cord injuries. He examined Claimant one time, on May 4, 2011, at the request of Employer's attorney and he provided no medical treatment. Following his physical examination of Claimant and his review of the medical treatment records, Dr. Kitchens issued his report on that same date (Exhibits 6 and SIF IV). According to the report, Claimant described her work inspecting the vans in 2006 and admitted that her back pain worsened when she was off work in 2006 following her left foot surgery. She described an initial onset of back pain 18 years prior, while working in Alabama, pulling and jerking on a machine. Despite claiming an injury in December 2007, Claimant admitted that she was not actually working then, nor even any part of that year, since she had last worked prior to her left foot surgery in July 2006. On physical examination, Dr. Kitchens found a normal gait, normal strength in the upper and lower extremities, normal sensation, except for patchy sensory loss in the left hand and right foot in a non-dermatomal pattern, and a normal straight-leg raising test. Dr. Kitchens opined that Claimant had pre-existing mild lumbar degenerative disc disease and that her work for Employer was not the prevailing factor in the cause of the mild degenerative disc disease, disc changes or her lumbar back pain. He explained that one reason he could not attribute her condition to a December 2007 work injury, is because she was diagnosed with degenerative disc disease at least a year prior to December 2007, so it was present prior to the alleged injury. He wrote that the prevailing factor in the cause of Claimant's symptoms and diagnosis was the aging condition of the lumbar spine not associated with her work activities. He did not believe that she had any restrictions with regard to her lumbar spine and also did not have any permanent partial disability as a result of her work activities for Employer. Dr. Kitchens issued a supplemental report (Exhibits 6-A and SIF IV) dated September 2, 2014 after his review of additional records and evidence. None of his opinions were changed by the additional records he reviewed. He specifically disagreed with Dr. Poetz's diagnosis of a lumbar strain in December 2007, since Claimant provided no history of any incident anywhere around December 2007 to serve as a prevailing factor for that diagnosis.
- 41) On cross-examination, Dr. Kitchens was asked about acute injury versus repetitive trauma, because of the statements in his report specifying that Claimant was not working on December 31, 2007. He confirmed that his opinion was that Claimant did

not have any injury, either acute or repetitive, that would serve as the prevailing factor in her diagnosis of lumbar degenerative disc disease.

- 42) The deposition of **Mr. Timothy Lalk** (Exhibit 2) was taken by Claimant on December 9, 2013 to make his opinions in this case admissible at hearing. Mr. Lalk is a certified vocational rehabilitation counselor. He met with Claimant on May 5, 2011 and issued his report in this case on May 23, 2011 (Exhibit 5). He noted in his report that Claimant was open, cooperative, joked and laughed throughout the interview. Of particular interest in the medical record review section of Mr. Lalk's report, I found a notation about a report from Claimant's doctor, Dr. Mary Kay Toland, who wrote on May 14, 2007, that Claimant was permanently and totally disabled due to fibromyalgia, chronic pain, fatigue, arthritis, B12 deficiency and uncontrolled diabetes. The doctor noted her bilateral foot problems but also thought her fibromyalgia was getting worse. She thought the disability should begin as of July 2006 when Claimant had the left foot surgery. Dr. Toland followed up that report, with an insurance form for extended/long-term disability on August 3, 2007 based on fibromyalgia and uncontrolled diabetes. I also found a description of Dr. Snyder's records showing that Claimant actually started treating for left heel pain, which had been present for many months, on January 26, 2006. Claimant apparently told Mr. Lalk that her work injury occurred in June 2005 with all the walking and driving of the vans she had to perform for Employer. She was initially unable to recall if she returned to work after the left foot surgery, but believed that she did. She just could not remember when it was. She told Mr. Lalk that, after the left foot surgery, she returned to a final van inspector position, which involved bending at the waist, checking the carpet and pushing the seat back and forth. She said that was when she developed the low back pain and pain into both hips. She told him that she stopped working sometime in 2007. This history from Claimant is not accurate based on the rest of the evidence in this matter. Interestingly, he did not review or consider any reports or opinions from Dr. Kitchens or Dr. Poetz. Mr. Lalk did not administer vocational testing because of her ability to previously be admitted into a vocational program at the post-secondary level.
- 43) Based on his meeting with Claimant, his review of the medical records, Claimant's complaints and problems, the educational history, vocational history, and functional restrictions/limitations from the doctors, particularly the opinions of Dr. Toland, Mr. Lalk concluded that Claimant is not able to secure and maintain employment in the open labor market and is not able to compete for any position. He indicated that that was based on the accumulation of her various problems/conditions over the years.
- 44) On cross-examination, Mr. Lalk admitted that he did not observe any behaviors from Claimant that would indicate that she was in obvious pain. Mr. Lalk agreed that in the records he reviewed, he saw no medical opinions from a doctor that addressed causation. He admitted that he found a note from Dr. Hull attributing some of Claimant's complaints in the lower extremities to diabetic sensory neuropathy. He agreed that Dr. Toland's opinion on Claimant's inability to work was issued prior to Claimant finishing treatment for her right foot or her low back, allegedly related to the work injuries. Mr. Lalk also agreed that the opinion did not specifically include any of the alleged work injuries to the bilateral feet/heels or low back. He suggested

that the “last straw” that took her out of work was the low back complaints that arose when she was doing the van inspector job when she told him that she went back to work in 2007 after her left foot surgery, and, then, she was unable to work anymore. However, her timing for when she performed that work was inaccurate based on the rest of the evidence in this case.

- 45) I observed that while Claimant was in the courtroom testifying at this hearing, she sat fairly still in the witness chair without shifting and without any obvious or outward signs that she was in pain or uncomfortable, despite voicing complaints about her low back throughout her testimony.

RULINGS OF LAW:

Based on a comprehensive review of the evidence, including Claimant’s testimony, the medical treatment records, the medical and vocational opinions and testimony, the other documentary evidence, and the Stipulation for Compromise Settlement between Claimant and Employer in this case, as well as based on my personal observations of Claimant at hearing and the applicable laws of the State of Missouri, I find the following:

Considering the date of the alleged injury, it is important to note the statutory provisions that are in effect, including **Mo. Rev. Stat. § 287.800 (2005)**, which mandates that the Court “shall construe the provisions of this chapter strictly” and that “the division of workers’ compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.” Additionally, **Mo. Rev. Stat. § 287.808 (2005)** establishes the burden of proof that must be met to maintain a claim under this chapter. That section states, “In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.”

Claimant bears the burden of proof on all essential elements of her Workers’ Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

As the first three issues in this matter are inter-related, I will address all three of them in the same section of the Award.

Issue 1: Did Claimant sustain an occupational disease?

Issue 2: Did the alleged occupational disease arise out of and in the course of Claimant’s employment for Employer?

Issue 3: Are Claimant’s injuries and continuing complaints, as well as any resultant disability, medically causally connected to her alleged occupational disease at work for Employer leading up to December 31, 2007?

Under **Mo. Rev. Stat. § 287.067.1 (2005)**, occupational disease is defined as “an identifiable disease arising with or without human fault out of and in the course of the employment.” Additionally, under **Mo. Rev. Stat. § 287.067.3 (2005)**, “An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” That section then defines “prevailing factor” as “the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” It continues, “Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.”

The Court in *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43 (Mo. App. E.D. 1999), provided guidance on the proof the employee must provide in order to make an occupational disease claim compensable under the statute. The Court held that first, the employee must provide substantial and competent evidence that he contracted an occupationally-induced disease rather than an ordinary disease of life. There are two considerations to that inquiry: (1) Whether there was an exposure to the disease greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee’s job which is common to all jobs of that sort. The Court then held that the employee must also establish, usually with expert testimony, the probability that the claimed occupational disease was caused by the conditions in the workplace. More specifically, employee must prove “a direct causal connection between the conditions under which the work is performed and the occupational disease.” *Id.* at 48. Finally, the Court noted, “where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible.” *Id.*

Since the Second Injury Fund is involved in this case, it is also important to consider that under **Mo. Rev. Stat. § 287.220.1 (2005)**, in order to qualify for Second Injury Fund benefits, Claimant must prove the presence of pre-existing permanent partial disability, which combined with permanent partial disability from a *subsequent compensable injury* results in total and permanent disability (PTD) or a substantially greater disability from the combination of the disabilities than the simple sum (PPD). In other words, if the primary injury against Employer is not a compensable injury, then the Second Injury Fund Claim fails.

Based on my thorough review of the medical evidence and testimony in the record, I find that Claimant has failed to meet her burden of proving the presence of an occupational disease that arose out of and in the course of her employment for Employer. I further find that she has failed to meet her burden of proof to show that her low back condition is medically causally related to her employment for Employer.

As a threshold matter, I find it important to note that while the Second Injury Fund disputes the presence of a compensable occupational disease that arose out of and in the course of her employment, the parties essentially stipulated to an alleged date of injury of December 31, 2007 for this case, consistent with the date pled on the Claim for Compensation. In other words, neither party requested that the date of injury be listed as an issue for determination in this matter. That means that in order to meet her burden of proof in this matter, Claimant needed to show that she developed an occupational disease, involving the low back, that became disabling on or about December 31, 2007. However, I find that Claimant did not actually physically work

for Employer at all in 2007 leading up to December 31, and, in fact, did not physically work anymore for Employer after her left foot surgery, which was performed on July 7, 2006. Therefore, I find that Claimant could not have been exposed to the presence of an occupational disease at work (even if there was one) leading up to December 31, 2007, since she had not performed any work on the assembly line for Employer for over 17 months leading up to December 31, 2007.

In reviewing the extensive medical treatment records Claimant placed in evidence for a number of Claimant's various conditions, I found records prior to her employment for Employer in Missouri documenting a diagnosis of underlying fibromyalgia on October 29, 2001, with complaints of diffuse pain in her neck, back, arms and legs. Even after her transfer to the St. Louis plant, Claimant's primary care physician, Dr. Leo Warren, on November 9, 2006, diagnosed Claimant with "Fibromyalgia. Low back pain." In fact, in the balance of these treatment records, I found a number of references to the back pain being connected to her fibromyalgia. There was a suggestion by Claimant in these records that her back pain started after her left foot surgery, perhaps because she was compensating for the foot issues, but even then, Dr. Warren seemingly attributed it to her prior fibromyalgia based on the way he worded his diagnosis. When Claimant treated with Dr. Smith in 2007, she again suggested that her pain began after limping following her left foot surgery, but Dr. Smith diagnosed her with lumbar spondylosis and lumbar degenerative disc disease, without any explicit connection to her work or work activities for Employer. When Claimant was evaluated by Dr. Lincoln on March 21, 2008, she reported back pain for two years, worse in the last six months (when she, incidentally, was not even physically working for Employer at the plant). He diagnosed piriformis syndrome, but made no connection between her low back pathology/complaints and her work for Employer. Finally, I found treatment records from Dr. Shergy in 2008 that discussed the progression of her fibromyalgia versus chronic pain, with the bulk of her complaints centered around her back, but no explicit connection to her employment for Employer as the reason. In summary, while I found a number of treating doctors connecting her low back complaints to her previously diagnosed fibromyalgia, I found none who connected it to her work activities, even despite Claimant's suggestion, on a couple of occasions, that perhaps it was connected to her limping after the left foot surgery in 2006.

In terms of her description of her job activities for Employer, despite her conflicting and confusing statements in the record in this area, I find that she worked in the St. Louis plant for a little under 17 months (February 2005 to July 2006) prior to her left foot surgery, in three different jobs (windshield wiper assembly, driver and front seat inspector). I find that she was basically working on her feet (standing) for that period, with also walking and some running for the period she worked as a driver, moving vehicles for the repairmen. I find that the bulk of her time, approximately 13 months (June 2005 to July 2006), she worked as the front seat inspector, standing, bending and reaching, but not walking or running, as she had for the brief period of time she moved vehicles. It is interesting to me that despite her descriptions at trial of the bending, reaching and forcibly moving the seats back and forth to check them as a part of her job as an inspector, that description is really not contained in any of the treating doctors' records as the reason for her low back complaints. Even Claimant, herself, attributed it to the limping following the left foot surgery, which she suggested at trial was the origination of her low back complaints. However, I would note that even if the back complaints were attributed to the aftermath of the left foot surgery, it still would not amount to a compensable case, as the prior left foot condition was also previously found not to be a compensable work injury.

Claimant testified that her low back complaints started about two months after she had the surgery on her left heel, in roughly September 2006. She suggested that her back was out of alignment because of walking with a cast on her left foot. However, for the over 17 months that immediately preceded her low back claimed date of injury of December 31, 2007, I find that she was not even physically working in the plant for Employer at all. Therefore, during this substantial period of time leading up to December 31, 2007, including during the period that she claims that the low back became symptomatic, I find that she did not even have any standing, walking, reaching or bending in the plant on the assembly line, because she was not performing any of that work.

In order to meet her burden of proof, Claimant needed to offer competent, credible and persuasive medical testimony to support her contention that her work activities for Employer resulted in an occupational disease that caused her low back condition/injury and disability. To meet this burden of proof, Claimant offered the opinions and testimony of Dr. Robert Poetz, who opined that the injury on or about December 2007 was the substantial and prevailing factor in the development of a lumbar strain with exacerbation of lumbar degenerative disc disease. On the other hand, the Second Injury Fund offered the opinions and testimony of Employer's chosen physician, Dr. Daniel Kitchens, who opined that Claimant had pre-existing mild lumbar degenerative disc disease and that her work for Employer was not the prevailing factor in the cause of the mild degenerative disc disease, disc changes or her lumbar back pain.

Having had the chance to review both of these opinions in detail and compare them to the balance of the records and testimony in evidence in this case, I find that the opinions and testimony of Dr. Kitchens are more competent, credible and persuasive than the contrary opinion of Dr. Poetz.

I base this decision, first, on the difference in the relative expertise of each physician. Both physicians were examining, as opposed to treating, physicians who only saw Claimant one time, so I find that they are equal in that regard. However, while Dr. Poetz is a board certified osteopathic family physician, Dr. Kitchens is a board certified neurosurgeon, who actually treats patients with disorders of the spine, peripheral nerves, brain injuries and spinal cord injuries. In that respect, I find that Dr. Kitchens has the edge in terms of the persuasiveness of his opinions on the basis of his qualifications and experience in treating and evaluating low back injuries/conditions, such as are alleged in this case. Additionally, in terms of evaluating the strength of his opinion, I find that Dr. Poetz had only a very general description of her work duties in St. Louis, as well as what she had done for Employer in Alabama. She gave no specific history of the onset of her complaints with her low back. I find that he did not have a firm grasp of when she stopped working for Employer or even if she was still working at the time of any of the alleged dates of injury. He had no information on her weight at the time of any of the claimed injuries and admitted that he did not know if Claimant had any permanent restrictions on her from the treating doctors for the bilateral feet or low back. Dr. Poetz was unclear as to when Claimant's low back complaints started but thought it was "synergistically" tied to the left foot problems from her altered gait, as well as her excessive and repetitive use of her low back at work. Yet, he attributed the low back issues to an injury in December 2007, long after the left foot surgery had occurred and long after Claimant had stopped physically working on the line for Employer, not to mention, long after her treatment for the low back had already commenced. He did not know how the lumbar degenerative disc disease affected her before she started working

in Missouri and he was unaware of any diagnoses that Claimant had for her low back prior to Dr. Smith in 2007. Finally, Dr. Poetz diagnosed and rated conditions such as depression and peripheral neuropathy as being “pre-existing,” when it is completely unclear if they are actually “pre-existing” based on Claimant’s testimony and the medical treatment records.

Conversely, I find that Dr. Kitchens clearly explained that one reason he could not attribute her condition to a December 2007 work injury, is because she was diagnosed with degenerative disc disease at least a year prior to December 2007, so it was present prior to the alleged injury, and she was not even working in 2007 anyway. He wrote that the prevailing factor in the cause of Claimant’s symptoms and diagnosis was the aging condition of the lumbar spine not associated with her work activities. He specifically disagreed with Dr. Poetz’s diagnosis of a lumbar strain in December 2007, since Claimant provided no history of any incident anywhere around December 2007 to serve as a prevailing factor for that diagnosis. He also confirmed that his opinion was that Claimant did not have any injury, either acute or repetitive, that would serve as the prevailing factor in her diagnosis of lumbar degenerative disc disease. His clear and concise explanations, based on his expertise, the records and evidence in this case, are more compelling and persuasive than the opinions of Dr. Poetz, which I find are based on mere generalities, and incomplete or inaccurate histories.

Since I have determined that the opinions and testimony of Dr. Poetz are not as reliable and persuasive as those of Dr. Kitchens, I find that I cannot rely on them to support an award of compensation in this matter. As Dr. Poetz was the only physician to offer a medical opinion that supported Claimant’s allegation of an occupational disease that arose out of and in the course of her employment for Employer and which was medically causally related to it, I find that Claimant has, therefore, failed to meet her burden of proof in this regard on these initial three issues in this case.

More specifically, I find, based on the evidence in this matter and the competent, credible, reliable and persuasive medical opinions and testimony of Dr. Kitchens, that Claimant’s work for Employer was not the prevailing cause in the development of Claimant’s low back symptoms and diagnoses. I find that the prevailing factor in the cause of Claimant’s symptoms and diagnosis was the aging condition of the lumbar spine not associated with her work activities. I find this to be even more solidly supported by the fact that she performed absolutely no physical work for Employer for the 17 months leading up to the stipulated alleged date of injury of December 31, 2007, since she was not working during that time. I find that Claimant has failed to prove that any alleged occupational disease was caused by the conditions of her workplace. Finally, I find that Claimant’s low back condition was the result of ordinary, gradual deterioration or the progressive degeneration of the body caused by aging and/or normal activities of day-to-day living. For all of these reasons, I find that Claimant’s low back occupational disease Claim in this matter is properly denied on these bases.

Given Claimant’s failure to meet her burden of proof regarding an occupational disease that arose out of and in the course of her employment, and given her failure to offer any competent or persuasive medical testimony on the issue of medical causation, I find that she has failed to prove the presence of a *subsequent compensable injury* with which any pre-existing disabilities could combine. Since Claimant has failed to prove the presence of a compensable underlying primary injury in this case, Claimant’s Claim against the Second Injury Fund then fails for that lack of proof. The Second Injury Fund Claim here is denied.

As an aside, I would note that even if Claimant was successful in meeting her burden of proof on the initial three issues in this case, I find that she still has other profound problems with meeting her burden of proof against the Second Injury Fund and she would not be entitled to an award of permanent total disability in this case. In addition to Dr. Poetz, whose opinions I have already addressed above in terms of their lack of persuasiveness, the only other expert in the record who offered testimony on Claimant's behalf regarding her ability to work was Mr. Timothy Lalk, Claimant's vocational expert. However, I do not believe that an award of compensation in this matter could be based on Mr. Lalk's opinions, either, because his opinions were based on inaccurate or incomplete histories from Claimant, particularly involving when she worked and what jobs she performed at which time. Further, I find references in the record, and particularly in Mr. Lalk's report, of records he reviewed and relied on from Dr. Toland, who authored an insurance form for extended/long-term disability on August 3, 2007 based on Claimant's fibromyalgia and uncontrolled diabetes, without any mention of any of her alleged work conditions/injuries. Therefore, based on this note from Dr. Toland, it is clear to me that even if Claimant is incapable of working, it is based on long-standing, pre-existing, systematic conditions/illnesses themselves and not a combination of pre-existing disabilities and any disabilities from her alleged primary injuries.

Since this ruling on these first three issues is dispositive of this case, the other remaining issues in this case are moot and will not be ruled on in this award. Claim denied.

CONCLUSION:

Claimant has failed to prove that she sustained a compensable primary injury in this case. She failed to meet her burden of proving the presence of an occupational disease involving her low back that arose out of or in the course and scope of her employment for Employer, and, further, failed to provide competent, reliable and persuasive medical evidence on the issue of medical causation. Since Claimant has failed to prove the presence of a ***subsequent compensable injury*** (a compensable underlying primary injury in this case) with which any pre-existing disabilities could combine, Claimant's Claim against the Second Injury Fund then fails for that lack of proof. Therefore, for all of the above-stated reasons, Claimant's Claim against the Second Injury Fund is denied.

Made by: _____
JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation