

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

Injury No.: 03-127316

Employee: Connie D. Miles
Employer: Jefferson County R-7 School District (Settled)
Insurer: M U S I C (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge by separate opinion.

Preliminaries

The sole issue disputed at the hearing was the liability of the Second Injury Fund for permanent partial or permanent total disability benefits.

The administrative law judge concluded as follows: (1) employee's experts did not credibly testify that employee is permanently and totally disabled; (2) employee is permanently and totally disabled; (3) employee's permanent total disability results from the last injury considered in and of itself; (4) employee's permanent total disability results from the development of post-injury medical conditions; and (5) the Second Injury Fund is liable for permanent partial disability benefits.

The Second Injury Fund submitted a timely Application for Review with the Commission alleging the administrative law judge erred as a matter of law in awarding permanent partial disability benefits given that the administrative law judge found employee to be permanently and totally disabled due to the last injury considered alone.

Because we agree with the ultimate result reached by the administrative law judge, but cannot adopt any part of the award owing to conflicting findings and legal conclusions, the Commission affirms the award of the administrative law judge with this separate opinion.

Findings of Fact

Preexisting conditions of ill-being

Employee suffered work-related left knee injuries in 1993 and 1996 requiring surgical treatment. On January 14, 1997, the treating physician, Dr. Richard Johnston, released employee at maximum medical improvement with a rating of 12% permanent partial impairment of the left knee. Prior to the primary injury, employee suffered pain and muscle spasms in her left knee and had difficulty with squatting, kneeling, climbing

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stairs, and prolonged standing. If employee bumped the knee, she would suffer swelling and increased pain, and sometimes used a crutch until the swelling went down. Employee settled a claim arising from her 1993 left knee injury with her employer for 25% permanent partial disability of the left knee.

Employee presented expert medical testimony from Dr. Robert Poetz, who identified the following permanent and partially disabling conditions preexisting the primary injury: 40% of the left knee referable to the 1993 injury; 5% of the body as a whole referable to degenerative conditions of the lumbar spine; and 5% of the left shoulder. We note that employee, in her testimony at the hearing before the administrative law judge, did not identify any preexisting injuries or problems with either her low back or her left shoulder. Nor did she provide any medical records predating the primary injury that would substantiate any preexisting permanent partial disability referable to the lumbar spine or left shoulder.

We find unpersuasive Dr. Poetz's opinions and ratings identifying preexisting permanent partial disability of the low back and left shoulder. We do, however, find persuasive Dr. Poetz's opinion identifying preexisting permanent partial disability of the left knee, and find that employee suffered 25% permanent partial disability of the left knee at the time of the primary injury.

The primary injury

Employee worked for employer as a transportation director. On December 15, 2003, employee was walking through employer's parking lot when she slipped on ice and fell, suffering injuries. Employee received treatment at the Jefferson Memorial Hospital, where physicians diagnosed strains of the neck and lumbar spine and contusion of the left hip and knee, took employee off work, and prescribed Soma, Anaprox, and Lorcet.

Employee continued to suffer from unrelenting low back and radicular pain. Her complaints did not respond to an extensive course of conservative treatment, so treating physicians ordered MRIs of the lumbar spine which demonstrated a herniated disc at L4-5. On January 20, 2005, employee underwent a lumbar microdiscectomy and anterior lumbar interbody fusion surgery at L4-5. The parties stipulated that employee reached maximum medical improvement following this surgery on June 22, 2005. Dr. James Coyle, an authorized treating physician, rated employee's permanent partial disability resulting from the primary injury at 20% of the body as a whole referable to the low back. Employee settled her claim arising from the primary injury with employer for 42.5% permanent partial disability of the body as a whole referable to the low back. Employee continues to suffer low back pain which limits her ability to endure prolonged walking or sitting, makes housework difficult, and prevents her from picking up her grandchildren.

Dr. Poetz identified the following permanent partially disabling conditions resulting from the primary injury: 50% of the body as a whole referable to the lumbar spine; 15% of the body as a whole referable to the coccyx (tailbone); 20% of the left knee; and 20% of the body as a whole referable to depression (Dr. Poetz identified a subsequent 2005 injury as also contributing to this rating). We find Dr. Poetz's opinions persuasive to the extent he identifies permanent partial disability of the body as a whole referable to the tailbone and low back resulting from the primary injury, but we are not persuaded that the

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primary injury caused employee to suffer permanent partial disability referable to the left knee or depression.

Nature and extent of permanent disability

In addition to the testimony of Dr. Poetz, who opined that employee is permanently and totally disabled owing to a combination of her preexisting conditions, the primary injury, and a subsequent August 2005 left shoulder injury, employee presented the expert vocational testimony of Sherry Browning, who agreed that employee is unemployable in the open labor market. Ms. Browning identified problems with the left shoulder, low back, and left knee as contributing to employee's permanent and total disability. Ms. Browning opined that if employee had a need to lie down during the day referable to the primary low back injury, this would not render employee permanently and totally disabled due to the low back alone, and reiterated her belief that employee is permanently and totally disabled due to a combination of the low back, left knee, and left shoulder conditions.

It appears to us that employee's expert opinion evidence as to the issue of permanent total disability is not particularly relevant, in that both Dr. Poetz and Ms. Browning identify a subsequent left shoulder injury and surgery as contributing to employee's inability to compete in the open labor market. The August 2005 left shoulder injury is not before us. Rather, we are concerned with the question of employee's medical condition when she reached maximum medical improvement on June 22, 2005, and whether the primary injury considered alone or in combination with employee's disability preexisting December 15, 2003, renders her permanently and totally disabled.

The Second Injury Fund presented the expert vocational testimony of James England, who opined that employee is permanently and totally disabled as a result of the primary injury if one assumes employee has to lie down during the day and doesn't get adequate sleep owing to her low back pain. Mr. England alternatively opined that employee is not permanently and totally disabled and that she could handle at least sedentary work. We do not find Mr. England's testimony as supportive of a finding that employee is permanently and totally disabled as a result of the work injury considered in isolation, because we are not persuaded that employee has a need to lie down to relieve pain that is solely due to the work injury. We note that employee, at the hearing before the administrative law judge, merely testified that she began to lie down for pain relief after the primary injury, and did not specifically identify the effects of the primary injury as the reason she needs to lie down. Given employee's preexisting pain condition referable to the left knee, and the aforementioned subsequent August 2005 left shoulder injury, and in light of employee's failure to provide specific credible testimony to resolve this issue, we decline to make any finding that employee has a need to lie down referable to the primary injury considered in isolation, or due to any combination of conditions.

In light of the foregoing considerations, we are not persuaded that as of June 22, 2005, employee was rendered permanently and totally disabled by the primary injury, considered alone and in isolation. Rather, we find that the primary injury caused employee to suffer an overall 42.5% permanent partial disability of the body as a whole referable to her low back and tailbone injuries. Nor are we persuaded that as of June 22, 2005, employee was

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rendered permanently and totally disabled owing to a combination of the effects of the primary injury and her preexisting disability referable to the left knee.

We do, however, find persuasive Dr. Poetz's testimony to the extent he identified a synergistic interaction between employee's preexisting disabling condition of the left knee and employee's disability resulting from the primary injury. We find that employee's preexisting left knee disability combines with the effects of the primary injury in such a way as to produce more disability than the simple sum of disability referable to these conditions.

Conclusions of Law

Second Injury Fund liability

Section 287.220.1 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that she suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We have found that employee suffered from a 25% permanent partial disability of the left knee at the time of the primary injury. We are convinced that this condition was serious enough to constitute a hindrance or obstacle to employment. This is because we are convinced employee's preexisting left knee condition had the potential to combine with a future work injury to result in greater disability than would have resulted in the absence of the condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

We have credited Dr. Poetz's opinion that employee's primary injury combines synergistically with the preexisting left knee condition. We conclude that the Second Injury Fund is liable for permanent partial disability benefits. We calculate Second Injury Fund liability as follows.

Employee's primary injury resulted in 42.5% permanent partial disability of the body as a whole, or 170 weeks of permanent partial disability. Employee's preexisting 25% permanent partially disabling condition of the left knee amounts to 40 weeks of permanent partial disability. The sum of preexisting and primary permanent partial disability is 210 weeks. When we multiply this sum by a 10% load factor to account for the synergistic interaction between the conditions, the result is 21 weeks.

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The Second Injury Fund is liable for 21 weeks of permanent partial disability benefits at the stipulated rate of \$189.09, for a total of \$3,970.89.

Conclusion

The Second Injury Fund is liable for permanent partial disability benefits in the amount of \$3,970.89.

The award and decision of Administrative Law Judge Gary L. Robbins, issued July 1, 2013, is attached solely for reference and is not incorporated by this decision.

This award is subject to a lien in favor of William K. Meehan, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

Given at Jefferson City, State of Missouri, this 23rd day of January 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Connie D. Miles Injury No. 03-127316
Dependents: N/A
Employer: Jefferson County R-7 School District
Additional Party: Second Injury Fund
Insurer: MUSIC
Appearances: William K. Meehan, attorney for the employee.
Kevin Nelson, attorney for the Second Injury Fund.
Hearing Date: April 1, 2013 Checked by: GLR/rf

SUMMARY OF FINDINGS

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 15, 2003.
5. State location where accident occurred or occupational disease contracted: Jefferson 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 happened or occupational disease contracted: The employee injured herself in a slip and fall.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Back and body as a whole.
14. Nature and extent of any permanent disability: The employee settled the primary injury with the employer-insurer for 42 ½% permanent partial disability of the low back.
15. Compensation paid to date for temporary total disability: \$5,731.20
16. Value necessary medical aid paid to date by employer-insurer: \$64,220.12.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$300.00.
19. Weekly compensation rate: The employee's rate for temporary total and permanent total disability is \$200.00 per week. Her rate for permanent partial disability is \$189.09 per week.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See Award.
23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the employee 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 employee: William K. Meehan.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On April 1, 2013, the employee, Connie D. Miles, appeared in person and with her attorney, William K. Meehan for a hearing for a final award. The employer-insurer was not present at trial as they already settled their portion of the case with the employee. Assistant Attorney General Kevin Nelson represented the Second Injury Fund. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Jefferson County R-7 School District was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by MUSIC.
2. On December 15, 2003 Connie D. Miles was an employee of Jefferson County R-7 School District and was working under the Workers' Compensation Act.
3. On December 15, 2003 the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$\$300.00, resulting in a compensation rate of \$200.00 per week for temporary total and permanent total disability benefits and \$189.09 per week for permanent partial disability benefits.
7. The employee's injury was medically causally related to the accident or occupational disease.
8. The employer-insurer paid \$64,220.12 in medical aid.
9. The employer-insurer paid \$5,731.20 in temporary disability benefits.
10. The employee had no claim for previously incurred medical bills.
11. The employee had no claim for mileage.
12. The employee had no claim for future medical care.
13. The employee had no claim for any temporary disability benefits.
14. The employee had no claim for permanent partial or permanent total disability as to the employer-insurer.
15. The parties agreed that the employee reached maximum medial improvement as of June 22, 2005.

ISSUES:

Liability of the Second Injury Fund for permanent partial or permanent total disability.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee Exhibits:

- A. Stipulation for Compromise Settlement in Injury Number 03-127316.
- B. Medical report of Robert P. Poetz, D.O.
- C. Deposition of Robert P. Poetz, D.O.
- D. Vocational report of Sherry Browning.
- E. Deposition of Sherry Browning.
- F. Medical records of James J. Coyle, M.D.
- G. Medical records of Richard Johnston, M.D.
- H. Medical records of Richard C. Lehman, M.D.
- I. Stipulation for Compromise Settlement in Injury Number 93-159283.

Second Injury Fund exhibits:

- I. Deposition of James M. England Jr.
- II. Deposition of Connie D. Miles - April 2, 2008.
- III. Deposition of Connie D. Miles - January 9, 2006.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT:

The employee was the only witness to personally testify at trial. All other evidence was presented in the form of written reports, medical records or deposition testimony.

The employee testified that she was injured when she slipped and fell on snow and ice in her employer's bus parking lot on December 15, 2003. She indicated that she injured her tailbone, back, right knee, and left shoulder. Her job title was that of a bus driver at the time of her injury. Previously, she had been the Transportation Director for the employer. In that capacity she would hire and fire drivers, make up schedules, and perform other administrative duties.

The employee was initially seen at Jefferson Memorial Hospital on December 15, 2003 following her work injury. X-rays were taken. Diagnoses were acute cervical and lumbar strain, left hip contusion, and left knee contusion.

On December 18, 2003, the employee was seen by Dr. Krewet. He diagnosed substantial tenderness over the tip of the tailbone. He assessed a cervical/lumbar strain and contusion of the tailbone, with x-rays revealing a fracture of the sacrum. He returned her to work with the limitation of performing sit-down work only with the ability to move about as needed. A December 31, 2003 MRI showed a left lateral disc protrusion at L3-4 and posterior disc protrusion at L4-5 with left lateralization. On January 6, 2004, he released her from care, continued her restrictions, and referred her to a lumbar spine specialist.

The employee saw Dr. Suthar, a pain management specialist, on January 7, 2004. He performed several facet joint injections, recommended a home exercise program, and prescribed medications into March, 2004.

The employee saw Dr. Rende for an Independent Medical Examination on February 17, 2004. His opinion was that she was suffering from long-standing degenerative arthritis in her left knee. He recommended anti-inflammatory medications, use of cortisone, and predicted an eventual knee replacement.

The employee next saw Dr. Coyle, a spine specialist, on March 24, 2004. He diagnosed coccyx fracture with tailbone pain, chronic back sprain, and symptoms secondary to a disc protrusion at L4-5. A MRI that day showed a L4-5 transitional disc herniation compressing the L5 nerve root, with possible impingement on the L4 nerve root as well. He recommended deferral of lumbar surgery until her fracture healed. He referred the employee back to Dr. Suthar.

On June 16, 2004 the employee underwent a Functional Capacity Evaluation at ProRehab. The therapist noted that the employee failed 12 of 16 validity criteria indicative of submaximal effort. The therapist felt that the employee was capable of working on a full-time basis in at least the sedentary level, which matched her current job.

Dr. Schwarze saw the employee for an Independent Medical Examination at her attorney's request on November 17, 2004. He recommended a more extensive diagnostic work-up. He stated that despite the length of elapsed time since the injury that there was a reasonably good chance of diminishing or completely resolving her symptoms and returning her to employment.

Dr. Coyle saw the employee on December 6, 2004. He noted her lack of progress and discussed surgery with her. On January 20, 2005, Dr. Coyle performed a microscopic left L4-5 lumbar discectomy and partial facetectomy and foraminotomy, right posterior superior iliac crest autogenous bone graft, anterior lumbar interbody arthrodesis L4-5. She was referred to physical therapy and was continued on restrictions of no bending or lifting through April 13, 2005. Dr. Coyle placed her at maximum medical improvement on June 22, 2005 and released her without restrictions. On August 2, 2005, he rated her lumbar disability at 20% permanent partial disability of the body as a whole with none of it referable to her coccyx fracture.

On April 22, 2005, the employee was admitted to the emergency department at St. Anthony's Medical Center. She was complaining of chest pain. She was discharged four days later and advised to follow up for a stress test. On May 11, 2005, she underwent multiple heart procedures with Dr. Assi. She was diagnosed with severe single-vessel coronary artery disease.

Dr. Stansfield saw her on May 20, 2005 regarding complaints of left shoulder pain and weakness that had lingered since her work injury. He recommended bilateral x-rays, and physical therapy. A MRI on July 13, 2005 suggested a complete tear of the left supraspinatus tendon. Fluid in the subacromial/subdeltoid bursa suggested a complete left rotator cuff tear. He performed a subacromial decompression and distal clavicle excision on October 24, 2005, and saw her in follow up on November 1, 2005. He prescribed medications and referred her to physical therapy.

She continued to have problems and saw Dr. Maynard on February 2, 2006. He scheduled a MRI of her back and prescribed a TENS unit. Dr. Dusek saw her on February 27, 2006, and recommended surgery to repair a suspected small fenestration of the left rotator cuff. On March 15, 2006 the employee underwent a left shoulder manipulation by Dr. Dusek, with a post-operative diagnosis of rotator cuff tear with a frozen shoulder.

Dr. Nogaski saw the employee on September 6, 2006 for an Independent Medical Examination for her left knee. He reviewed medical records and performed a physical examination. His impression was that she had left shoulder pain with no clear documentation or physical finding that her injury occurred on December 15, 2003. Relative to the left knee, he stated that she had no permanent partial disability at the knee resulting from her work injury.

Sherry Browning performed an Independent Vocational Evaluation in April, 2006 at the employee's attorney's request. She reviewed medical records, performed testing, and conducted two interviews covering the employee's education, work history, family background, and current functional abilities. She concluded that the employee was not employable in the open labor market.

Ms. Browning testified by deposition taken on August 12, 2012. She repeated the conclusions from her report. On cross-examination she testified that the fact that the employee now has to lie down due to back pain would not disqualify her from the open labor market. Available jobs would be dependent upon the ability to work part-time or split shifts. She also included the employee's post 2003 injury depressive symptoms and heart problems into her opinion.

The employee saw Dr. Poetz for an Independent Medical Examination at her attorney's request on January 5, 2007 relative to injuries occurring in December 2003, and August 2005. The August claim (#05-088029) alleged permanent total disability due to repetitive motion involving the left shoulder as the primary injury. This claim was dismissed on June 16, 2009. Dr. Poetz performed a physical examination, took a medical history, and reviewed records. He rated 5% permanent partial disability of the lumbar spine pre-existing (no date provided); 50% permanent partial disability of the lumbar spine, 15% permanent partial disability of the coccyx, and 20% permanent partial disability of the left knee due to the December 2003 injury; 40% permanent partial disability of the left knee from 1993; 5% permanent partial disability of the left shoulder pre-existing (no date provided); 45% permanent partial disability due to the August 2005 injury; and 20% permanent partial disability of the body as a whole due to depression from both the December 2003 and August 2005 injuries. He suggested restrictions. He stated that the employee was permanently and totally disabled due to the December 2003 and August 2005 work injuries in combination with her prior injuries.

Dr. Poetz testified by deposition taken on June 28, 2010. He essentially repeated the contents of his report.

Mr. England performed an Independent Vocational Evaluation on May 21, 2008. He summarized the medical records, and took background histories relative to the employee's family and social life, education, and work history. He concluded that given her present functioning that

she was not unemployable due to the fact that her back condition alone resulted from the last injury.

Mr. England was deposed on November 3, 2010. He stood by the conclusions he made in his earlier report.

The employee testified that she previously had surgery on her left knee. The first was from a 1993 work injury performed by Dr. Johnston. He performed an arthroscopy of the left knee on April 26, 1995. He released her at maximum medical improvement on January 21, 1996 with a 12% permanent partial disability rating. She settled that claim with her employer for 25% permanent partial disability of the knee. The second surgery was performed by Dr. Lehman in 1996. The employee had no restrictions on her left knee leading up to her 2003 work injury.

The employee testified at trial regarding her current ability to function. She testified that her ability to function has declined significantly as a result of and since her last injury. She used to do all of the housework; now she has family members assist her. She testified that she cannot lift her grandchildren, and can lift no more than 15 pounds now. Her ability to drive has changed. She now has to stop, get out of her vehicle and stretch because of back pain before resuming her trip. She testified that she cannot drive for more than an hour now as sitting is now painful due to her low back and tailbone.

The employee indicated that she now has problems with personal care issues. Bending over is difficult. She needs help putting on shoes and socks. She either leaves her sneakers tied so she can slip into them or wears slip-on shoes. She cannot cut her toenails. She has her husband shave her legs. She prefers to wear loose fitting clothing. She has problems lifting her left arm above and behind herself.

Prior to her work injury, the employee led an active lifestyle. She used to walk five to seven miles at a time for fun and exercise two to three times a week. She testified that she can now walk for half an hour, uses a cane, and has fallen and broken her left arm. She used to ride a stationary bike but does not do so now. She testified that she used to ride a 4-wheeled ATV but has not done so since the last injury. She used to go fishing but has given up that activity. Before her last injury she used to bowl. She swims less. Prior to the last injury she liked to sew, play cards, read for fun and relaxation, and visit friends. She does less of each now because she cannot sit comfortably for as long as before.

The employee testified that prior to her December 2003 injury she had not injured her neck, tailbone, back, or left shoulder. She testified that she was not actively treating for these body parts and was not taking any prescription pain medications for them.

The employee testified that she had problems with her left knee that interfered with her ability to do her job leading up to December, 2003. She had previously injured her knee and introduced into evidence a Stipulation for Compromise Settlement from 1993 valued at 25% permanent partial disability. She had previously undergone surgery on her knee by Dr. Johnston and Dr. Lehman. On cross-examination, she was presented with her April 2, 2008 deposition testimony.

It was pointed out to her that she previously testified that leading up to her December 2003 injury she had no physical problems doing her job, and that she thought that her left knee did not affect her job performance.

The employee was also presented with her January 9, 2006 deposition. She acknowledged that she had previously testified that leading up to her injury that she was not actively treating for her knee, was not taking pain medications for it, was not on any physician-imposed restrictions, did not miss work, and did not have to ask for help doing her job due to the knee.

The employee testified that following being fired by her employer she applied for and received unemployment benefits. She acknowledged that to receive benefits that she had to certify to the State of Missouri that she was ready, willing, and able to work.

The employee testified that she developed heart problems in 2005. She was under the care of Dr. Assi and had two stent procedures. She testified that before December 2003 that she had no heart-related issues. She now takes medications.

The employee testified that before her December 2003 injury she had no psychological issues. She began seeing counselor Nancy Dougherty. In 2007, she began seeing Dr. Gunawardhana, a psychiatrist. He has prescribed Cymbalta for depression, and Seroquel, a sleep aid.

RULINGS OF LAW:

The starting point for determining Second Injury Fund liability is §287.220.1, RSMo. It provides that:

“if the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for body as a whole injury or major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the Second Injury Fund.”

Thus, to determine if Second Injury Fund liability exists, “the first determination is the degree of disability from the last injury considered alone.” **Landman v. Ice Cream Specialties**, 107 S.W.3d 240, 248 (Mo. banc 2003). For this reason, “pre-existing disabilities are irrelevant until the employer’s liability for the last injury is determined.” **Id.** If the employee’s last injury in and of itself rendered the employee permanently and totally disabled, the Second Injury Fund has no liability, and the employer is responsible for the entire amount of compensation.” **Id.**

For Second Injury Fund liability, a pre-existing disability must combine with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have resulted from the new injury alone and of itself; or (2) the pre-existing disability combined with the disability from the subsequent injury to create permanent total disability. **Uhlir v. Farmer**, 94 S.W.3d 441, 444 (Mo. App. E.D. 2003).

According to §287.020.7, “total disability is the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. **Fletcher v. Second Injury Fund**, 922 S.W.2d 402, 404 (Mo. App. W.D. 1996). An employee must prove that their pre-existing medical conditions were of such seriousness so as to constitute an obstacle or hindrance to employment or reemployment. **Lammert v. Vess Beverages, Inc.**, 968 S.W.2d at 724-25. The Second Injury Fund is not responsible for the subsequent deterioration of medical conditions unrelated to the last injury, or for the development of new conditions arising after the last injury. **Id.**; **Garcia v. St. Louis County**, 916 S.W.2d 263, 266 (Mo. App. E.D. 1995).

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, the Court finds that the employee is permanently and totally disabled from employment. However, this disability is due to the last injury in and of itself. This finding is also based upon the development of post-injury medical conditions. Under either scenario, there is no Second Injury Fund liability.

The employee’s work-related injury of December 15, 2003 is in itself sufficient to totally disable her. **Landman**, 107 S.W. 3d at 248. Prior medical conditions are not relevant until a “last injury alone” analysis is performed. The employee settled her primary claim with the employer-insurer for 42.5% permanent partial disability of the body as a whole. This indicates a substantial disability.

The employee testified that her ability to function has declined significantly as a result of her last injury. She used to do all of the housework; now she has family members assist her. She testified that she cannot lift her grandchildren, and can lift no more than 15 pounds now. Her ability to drive has changed. She now has to stop, get out of her vehicle and stretch because of back pain before resuming her trip. She testified that she cannot drive for more than an hour now.

The employee indicated that she now has problems with personal care issues. Bending over is difficult. She needs help putting on shoes and socks. She either leaves her sneakers tied so she can slip into them, or wears slip-on shoes. She cannot cut her toenails. She has her husband shave her legs. She prefers to wear loose fitting clothing.

Prior to her work injury, the employee led an active lifestyle. She used to walk five to seven miles at a time for fun and exercise two to three times a week. She testified that she can now walk for half an hour, uses a cane, and has fallen and broken her left arm. She used to ride a

stationary bike but does not do so now. The employee testified that she used to ride a 4-wheeled ATV but has not done so since the last injury. She used to go fishing but has given up that activity. Before her last injury she used to bowl. She swims less. Prior to the last injury she liked to sew, play cards, read for fun and relaxation, and visit friends. She does less of each now because she cannot sit comfortably for as long as before.

The employee testified that she has pain “all over,” and takes Hydrocodone in 500-milligram dosages as needed. She also takes medication to help her sleep. She has headaches now. Prior to her work injury, she took no prescription pain medications.

In addition to these medical issues, the employee has developed new conditions and disabilities subsequent to and unrelated to her work injury. She began seeing counselor Nancy Dougherty and psychiatrist Dr. Gunawardhana. Dr. Gunawardhana has prescribed Cymbalta for depression and Seroquel as a sleep aid.

The employee has also developed heart problems in 2005. She was at physical therapy for her back and experienced shortness of breath with low blood pressure. She was seen at St. Anthony’s Hospital and came under the care of Dr. Assi. Eventually she had two stents implanted. Prior to her work injury, she testified that she had no heart-related problems. She now takes medications for her heart. She has been advised to monitor her activity levels and avoid temperature extremes.

The Court does not find the employee’s testimony credible regarding the degree to which her pre-existing medical issues allegedly impaired her ability to perform her job duties or carry out daily living activities. Under cross-examination she admitted that prior to her 2003 work accident that she had not injured her neck, tailbone, back, or left shoulder. She was not treating for these body parts, and was not taking any prescription medications for them. She testified that prior to her last injury that she had no problems lifting and carrying, reaching above or behind her, or sitting. She did not have to lie down for relief of her pain symptoms.

The employee testified on direct examination that the major medical problem pre-existing her work injury was her left knee. On cross-examination, she was presented with her prior deposition testimony. This testimony demonstrated that before her 2003 injury that she had no problems performing her job, that her left knee did not affect her ability to do her job, or that she had to ask for help doing her job. She admitted that she had no restrictions on her left knee, was not actively treating with a doctor, and was taking no prescription pain medications. While she complained of problems, she admitted that she was walking five to seven miles a day several days a week. If this is truthful, it is incongruous with her claim of severe knee problems. In summary, her admissions and the deposition testimony is directly contradictory to her trial testimony, and therefore lacks credibility.

In addition, since her work injury, the employee applied for and received unemployment benefits. To do so she had to report her job search efforts, which included applications, resumes, and interviews attended. She had to certify to the State of Missouri that she was ready, willing, and

able to work. Such assertions are incompatible with a claim for permanent total disability, and undercut her credibility.

The Court finds the vocational analysis of Mr. England to be more credible than that of Ms. Browning. Mr. England concluded that the employee was not employable due to her back condition resulting from her December 2003 injury. He noted that if one were to believe the employee's subjective complaints, her claim that she has to lie down during the day and cannot get adequate sleep because of back pain; those factors would prevent her from sustaining work activity. Assuming this were the case, he stated that this would be due to her last injury and not due to a combination of this injury with her other medical issues, based upon her own description of her functional abilities.

The Court does not find Ms. Browning's vocational analysis to be credible. She was asked in her deposition, given that the employee has to lie down during the day, if there were jobs available in the open labor market. She stated that there were not jobs available as a general rule. When asked to clarify, she stated that there were jobs where one could lie down given certain limited conditions. These included part-time work or split shifts. These conditions, however, are incompatible with regular, sustained eight hours a day, five days a week employment that constitutes the majority of the open labor market.

In addition, Ms. Browning includes in her analysis the employee's post 2003 injury cardiac and psychological issues. This inclusion substantially affects her credibility and her opinion. The Second Injury Fund is not responsible for the worsening of pre-existing medical conditions unrelated to the last injury or the development of new conditions. **Garcia**, 916 S.W.2d at 266.

The Court also does not find Dr. Poetz's opinions credible. He testified that his total disability opinion was based upon the employee's December 2003 and August 2005 injuries in combination with her pre-existing injuries. The employee's August 23, 2005 claim (#05-088029) was for a repetitive motion injury to her left shoulder rotator cuff; this claim was dismissed in June 2009. The employee offered no proof of a 2005 left shoulder repetitive motion injury.

Dr. Poetz notes in his report that the employee told him that she injured her left shoulder at the time of her 2003 injury, not in 2005, and that her doctors decided to focus on her lumbar problems first. He reviewed medical records that showed that the employee saw Dr. Stansfield in May and July 2005, and Dr. Maynard in July and on August 11, 2005, for left shoulder complaints. Dr. Poetz's opinion is factually wrong based upon the employee's own history and the medical records he claimed he reviewed, and was never updated to exclude consideration of the August 2005 alleged injury.

Further, if Dr. Poetz's total disability opinion does include the 2005 injury, it is subsequent to the 2003 injury, and there would be no Second injury Fund liability under **Garcia**. Dr. Poetz rates 20% permanent partial disability due to depression from the 2003 and 2005 injuries. He is not a psychiatrist and he performed no diagnostic testing or mental status examination to substantiate that opinion. He notes only that the employee exhibited a depressive

facies and demeanor. This is not competent and substantial evidence of clinical depression. His opinion also fails due to the fact that the 2003 and 2005 claims alleged no depression either as a result of the injuries or pre-dating them; he is therefore rating disabilities that have not even been claimed.

Dr. Poetz rates 5% permanent partial disability of the lumbar spine and 5% permanent partial disability of the left shoulder as pre-existing. However, he does not state the date as to when they became pre-existing conditions, and the Court is left to wonder if they pre-existed December 2003 or August 2005. It is the employee's burden to prove all elements of her claim. Dr. Poetz's failure to specify the dates renders these particular disability ratings useless, and they must be excluded. Dr. Poetz's permanent total disability opinion rested upon inclusion of all of his ratings, and the exclusion of any of them adversely affects his overall credibility and opinions regarding disability.

Having concluded that the employee is permanently and totally disabled, but not eligible for permanent total disability, the remaining issue is liability of the Second Injury Fund for permanent partial disability. The employee introduced into evidence Exhibits A and I, which are Stipulations for Compromise Settlement for the 2003 and 1993 injuries. They reflect above threshold settlements of 42.5% permanent partial disability for the 2003 injury, and 25% permanent partial disability for the 1993 left knee injury. The Court finds that the employee does have the disabilities as indicated in the stipulations. The 2003 injury is valued at 170 weeks of disability of the body as a whole, and the 1993 injury at 40 weeks of the left knee. Adding them together and applying a 10% loading factor, the Court finds that the employee has a disability for Second Injury Fund purposes of 21 weeks of disability. Multiplied by her weekly permanent partial disability rate of \$189.09, the Court awards the employee \$3,970.89 in permanent partial benefits.

For the reasons stated above, I find that there is no Second Injury Fund liability for permanent and total disability. The employee is awarded \$3,970.89 in permanent partial disability benefits.

ATTORNEY'S FEE:

William K. Meehan, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

Employee: Connie D. Miles

Injury No. 03-127316

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation