

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

Injury No.: 96-441933

Employee: Diane Parker  
Employer: Daimler Chrysler Corporation (Settled)  
Insurer: Self-Insured (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: November 18, 1996  
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 18, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued October 18, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26<sup>th</sup> day of May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

Attest: \_\_\_\_\_  
John J. Hickey, Member

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Diane Parker

Injury No.: 96-441933

Dependents: N/A  
Employer: Daimler Chrysler Corporation (settled)  
Additional Party: Second Injury Fund  
Insurer: Self-Insured  
Hearing Date: July 22, 2004

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

Checked by: KOB:tr

### 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? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: November 18, 1996
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? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was knocked to the ground by a forklift.
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: Back
14. Nature and extent of any permanent disability: Not determined.
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$1,200.00

Employee: Diane Parker Injury No.: 96-441933

17. Value necessary medical aid not furnished by employer/insurer? \$0
18. Employee's average weekly wages: Qualifies for maximum rates.
19. Weekly compensation rate: \$513.01 / \$268.02
20. Method wages computation: By agreement

### COMPENSATION PAYABLE

21. Amount of compensation payable:  
Claimant previously settled with Employer.
22. Second Injury Fund liability: No

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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Susan Roach

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Diane Parker	Injury No.: 96-441933
Dependents:	N/A	Before the
Employer:	Daimler Chrysler Corporation (settled)	<b>Division of Workers'</b>
Additional Party:	Second Injury Fund	<b>Compensation</b>
Insurer:	Self-Insured	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: KOB:tr

### PRELIMINARIES

The matter of Diane Parker ("Claimant") proceeded to hearing in the City of St. Louis to determine whether Claimant is entitled to recover benefits from the Second Injury Fund. Attorney Susan Roach represented Claimant. Assistant Attorney General Carol Barnard represented the Second Injury Fund. Daimler Chrysler Corp. ("Employer") previously settled its risk of liability.

The parties agreed that on or about November 18, 1996, Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury to Claimant's body. At that time, Claimant earned an average weekly wage that qualified her for the maximum rates of compensation of \$513.01 for total disability benefits and \$268.02 for permanent partial disability benefits. Employer paid no temporary total disability benefits, but did pay medical benefits totaling \$1,200.00. Employment, venue, notice, and timeliness of the claim were not at issue.

The sole issue to be determined is the liability of the Second Injury Fund. Claimant seeks permanent total disability benefits.

### SUMMARY OF THE EVIDENCE

#### *Claimant's Testimony*

Claimant was employed full time with Employer beginning in 1995. She worked a "hard and heavy" job as an assembler through June 2000, except for the last few months of her employment when she also worked a lighter job as an inspector. Her most recent assembly job involved mounting power steering brackets and units on the assembly line. Previously, Claimant was self-employed in an antique reproduction wholesale business, which was a full time job she held for about ten years. She also drove a bus part time. Prior the 1980s, Claimant worked as an ad manager for media outlets and in sales and marketing. She is a high school graduate.

On November 18, 1996, Claimant was thrown to the ground when a forklift operator knocked a bin onto her. Following this incident, Claimant continued to work but she said she had trouble bending and went to lots of doctors.

Claimant testified that believed she missed six months or more off and on due to her back. [\[1\]](#)

Following the forklift incident, Claimant said she had spasms and pain in her back, but thought it was her Graves' disease at first. However, the problems continued when the Graves' disease came under control. Claimant testified that Employer continually put her on jobs that damaged her back, which continually worsened. Claimant went to the finish line working with tailgate applications, which purported to be less physically demanding. However, Claimant testified she had problems with the machine that performed the tailgate application. The plant medical records show Claimant was complaining about significant problems with such a machine throughout 1999, although Claimant testified she was injured with the tailgate application machine in 1997. She said she took sick leave because the machine threw her back out.

Claimant testified that she was able to work after 1997 because the doctors were continually experimenting with pain medication. She used ice packs on the job, while leaving work, and at home. She testified that she has used a TENS unit since 1997. Claimant stopped working in June of 2000 because her back pain escalated. However, she missed a good amount of time in 1999 for heart surgery.

Currently Claimant takes multiple medications for arthritis and muscle relaxing, including Oxycontin on bad days. When she is able, she takes aquatic treatment for her multiple complaints but can only do so two or three times a month. She has discontinued chiropractic treatment because it makes things worse. She uses arch supports for her feet. She has not sought employment since June 2000 because of her fibromyalgia, which affects her thinking and pain.

Claimant testified she had preexisting disabilities. In the early 1990s, Claimant underwent bilateral bunion surgery. Employer allowed her to take extra breaks for a few days, but after that she was on regular duty. She had trouble with jobs involving continuous walking, had foot cramping and pain radiating up her calves, did hot/cold therapy to relieve the pain, and took over the counter medications. She testified that her husband, who was a supervisor in her area, would relieve her so she could have extra breaks in addition to her regular breaks. She testified she continues to have sharp pains throughout the day and wears arch braces in all her shoes. Contrary to her hearing testimony, at her deposition taken in April 2004 by the Second Injury Fund, Claimant denied she had problems with her feet after the bunion surgery. (Exhibit Roman Numeral I).

Claimant also testified to preexisting problems with her upper extremities. In 1989 and the early 1990s, Claimant underwent bilateral carpal tunnel surgeries. She wore arm braces bilaterally at work and at home, and dropped things. Claimant went to the medical unit in November 1995 with complaints of right biceps pain. She testified that she received help from a coworker and her husband, took a steroid for a brief period of time, took over the counter medications, and wore a brace. Claimant also testified that she had restrictions regarding lifting overhead and twisting the arms with regards to her elbows. She had tendon soreness but worked around it. Claimant also testified that she switched jobs several times to try to find a job where her hands did not hurt so much. Current complaints include weakness and tingling. Contrary to her hearing testimony, at her deposition taken in April 2004 by the Second Injury Fund, Claimant indicated that leading up to 1996, her grip was in pretty good shape and here were no things she could not do because of hand problems (Exhibit Roman Numeral I).

#### *Medical Records, Opinion and Other Evidence*

Claimant submitted several sets of medical records into evidence. The evidence is identified and briefly summarized in this section, with additional details presented in the Findings of Fact and Rulings of Law sections below.

Records that dealt specifically and exclusively with treatment for her back include the two November 1997 visits to Dr. Sertl wherein the doctor diagnosed degenerative lumbar arthritis, but found the MRI was normal (Exhibit L). When she saw Dr. Mannis on February 8, 1999, Claimant complained that pulling on a machine at work aggravated her back. Dr. Mannis diagnosed chronic lumbar syndrome with probable radiculopathy, suggested physical therapy and a back brace, and suggested a reexamination, which apparently did not occur (Exhibit J). Claimant saw Dr. Krettek on March 22, 1999 with complaints of low back pain related to the use of a machine at work – she attributed recent flare-ups in back pain to work activities. In July 2000, Dr. Krettek found Claimant had complete resolution of a small herniated disc, and felt no surgical intervention would be appropriate (Exhibit I).

The BJC Union Clinic records (Exhibits G and H) and the Chrysler Plant medical records (Exhibit F) cover many different medical issues, including spinal complaints, cardiac/blood flow problems, Graves' disease, vertigo, eye problems, depression and anxiety, minor burns or splinters, and diseases of ordinary life such a viral infections. The records of Dr. Moore, a rheumatologist, confirm Claimant's diagnosis of fibromyalgia as of the fall of 2001, but make no causal connection between the condition and either work injury (Exhibit K).

There were several treatment records that were notable for their absence from the court record. There were no treatment records regarding the prior bunionectomies or carpal tunnel surgeries. Claimant reported she saw a chiropractor for her back, but did not submit any records. The file of Dr. Popp, who apparently followed Claimant's Graves' disease, is not of record.

Claimant submitted two medical reports by and the deposition of Dr. Poetz (Exhibits B, D & E). He took a history of a specific accident on November 18, 1996 and an occupational exposure in approximately July 1997. Based on Claimant's

history, the medical records given him by Claimant's attorney, and his examinations of November 9, 2000 and August 14, 2003, Dr. Poetz made the diagnoses, attributed the diagnosis to specific event or date, and assigned permanent partial disability as follows:

- 1) Degenerative joint disease with discogenic disease thoracic-lumbar spine • preexisting • no permanent partial disability ("PPD") assigned;
- 2) Lumbar strain with exacerbation of lumbar degenerative joint disease and discogenic disease • 11/18/96 and 7/97 • 40% PPD to the body as a whole at the lumbar spine directly resultant from the November 18, 1996 and July 1997 work related injury;
- 3) Bilateral lower extremity radiculitis left greater than right • 11/18/96 and 7/97 • No separate PPD assigned;
- 4) Small T9-10 herniated nucleus pulposus • 11/18/96 and 7/97 • No separate PPD assigned;
- 5) Bilateral carpal tunnel syndromes with surgical releases • 1989 and 1992 • 35% PPD at the bilateral hands and wrists; 6) Status post bilateral bunionectomy • 1992 • 15% PPD at the bilateral feet;
- 6) Artherosclerotic cardiovascular disease • No date of disability assigned • No PPD assigned;
- 7) Fibromyalgia • 11/18/96 and 7/97 • 30% PPD to the body as a whole due to fibromyalgia directly resultant from the November 18, 1996 work related injury. [\[2\]](#)

Although he did not find her totally disabled in 2000, by his October 2003 exam, Dr. Poetz was of the opinion that Claimant was permanently and totally disabled as a direct result of her November 16, 1996 and July 1997 injuries, in addition to her preexisting injuries.

Mr. Timothy Lalk is a vocational expert who met with Claimant on December 15, 2003 and testified by deposition on behalf of Claimant (Exhibit A). He considered various physical restrictions imposed on Claimant after she stopped working, Claimant's educational and vocational history, vocational testing, and the medical records in reaching the conclusion that Claimant was permanently and totally disabled and unable to compete in the open labor market based on the pain she experiences with her back and fibromyalgia.

Claimant submitted a settlement document reflecting she settled the November 18, 1996 accidental injury (Injury No 96-441933), for 12 ½ % PPD of the body as a whole, leaving the Second Injury Fund claim open, on January 6, 2003 (Exhibit C). Administrative notice is taken of the files of the Division of Workers' Compensation with respect to Injury No. 97-498380, which show that the 1997 case is an occupational disease claim filed against Employer and the Second Injury Fund on March 12, 1999. Claimant settled the 1997 claim for \$100.00 with Employer at the same time she settled the 1996 injury, and dismissed the Second Injury Fund.

### **FINDINGS OF FACT**

Based on the substantial and competent evidence of record, including Claimant's testimony, which I had the opportunity to observe first hand at hearing, the deposition testimony, and the medical records, I make the following findings of fact:

1. On November 18, 1996, Claimant sustained an accidental injury arising out of and in the course of employment when she was knocked to the ground by a forklift. She sought medical care in the plant for complaints to her right hip and thigh, left deltoid, and right lower back. There is no evidence of any additional treatment following this accident. Claimant returned to work without missing any time on account of this accidental injury.
2. Following her 1996 accident, Claimant engaged in work activities that, over time, caused additional disability to her spine, and constitute an occupational disease. In April 1997, Claimant complained to plant medical personnel of upper back pain into the neck that started when she bent over to pick up a screwdriver. In the fall of 1997, Claimant complained to Dr. Sertl that she noticed a recent increase of back pain. In February 1999, she told Dr. Mannis that she had to "pull on a machine regularly," which increases her back pain. In March 1999, Claimant complained to the medical department that the "apps machine" she used to install tailgates had been malfunctioning, causing her low back pain. Claimant's plant medical record reveals that in August 1999, she was complaining of upper back pain from manipulating a malfunctioning tailgate appliqué machine. There are multiple entries regarding the malfunctioning machine and its apparent harmful effect on Claimant's spine. Claimant testified that she repetitively injured herself further using a machine after 1996.
3. Following her November 18, 1996 accidental injury, Claimant was diagnosed with and treated for several disabling conditions. In the spring of 1997, she began a series of cardiac workups to monitor what was then described as mild to moderate artery disease. In 1998, Claimant started to experience dizziness, vertigo and heart palpitations, and ultimately underwent a surgical procedure to address an 80 to 90 percent arterial blockage (the treatment records were not offered as evidence). At times, Claimant was under work restrictions for her heart condition. In August 1998, medical records indicate that Claimant was admitted to the stress unit for depression, and thereafter complained intermittently of anxiety attacks, some of which required her to be placed on medical leave. In 2000, Claimant began complaining of generalized muscle and joint pain, which was definitively diagnosed as fibromyalgia by a specialist in late 2001. In the summer of 2002, Claimant's personal physician recorded and began treating Claimant's complaints of bilateral knee pain. In 2003, Claimant fell from a ladder and hurt her left wrist – she suspected she had a panic attack.

4. Claimant worked full time for Employer following her November 18, 1996 accident, up until June 2000. She missed some time from work for other medical conditions, such as her Graves' disease and her heart condition, but kept her full time status for over three and one-half years after her accident.
5. Claimant has been treated for Graves' disease, a thyroid condition. She testified that she was diagnosed with the disease before her November 1996 accident, but the first entry shown in the medical records is on May 30, 1997. This condition was disabling, caused her to miss significant periods of time from work, and resulted in work restrictions. However, it was brought under control with proper medical management.
6. Prior to her November 1997 accidental injury, Claimant had bilateral bunion surgeries and carpal tunnel surgery on both hands. The treatment records for these conditions were not made a part of the record. Claimant testified she had trouble at work with both her hands and feet.
7. Claimant suffers from a degenerative condition at multiple levels of the lumbar spine. Although at one time there may have been positive findings reflected in an MRI (i.e. suspected herniated discs), by June of 2000, the MRI scan was normal, the L4-5 disc protrusion had completely resolved as had her radicular symptoms, and there was no evidence of intrusion upon the spinal canal. Claimant's degenerative back condition at multiple levels of the spine causes her back pain, and no surgical intervention is appropriate to address such problems.
8. Claimant also suffers from preexisting disabilities related to her upper extremities and feet, and subsequent disabilities related to fibromyalgia and heart disease.
9. Claimant's fibromyalgia is not caused by or related to her November 18, 1996 accidental injury. Her doctors first suspected she had the disease in December 2000. The records of Dr. Moore, a rheumatologist, confirm Claimant's diagnosis of fibromyalgia as of the fall of 2001, but make no causal connection between the condition and either work injury. Dr. Poetz's confusing report and testimony (see footnote 2) does not credibly establish a connection between the fibromyalgia and the November 18, 1996 injury.
10. Claimant filed two workers compensation claims regarding her low back complaints. The first is the instant claim for an accidental injury on November 18, 1996, which she settled with Employer for 12 ½ % permanent partial disability of the body as a whole referable to the back. The Second Injury Fund was not a party to the settlement. The second claim regarding her back was an occupational disease claim filed on March 12, 1999 (Injury No. 97-498380), alleging she developed disability in her back "from constant and repetitive lifting, bending and stooping." She settled that claim with Employer for \$100.00 and dismissed her claim against the Second Injury Fund. Neither the claims nor the settlement documents mentioned fibromyalgia as a work-related disability.
11. The evidence establishes that Claimant had an accidental injury on November 18, 1996. She also suffered from an occupational disease caused by repetitive bending and twisting over the entire course of her employment, and in particular from the operation of the tailgate application machine in 1999. The occupational disease arose after, and is distinct from, her accidental injury.
12. I find that Claimant is experiencing real and disabling pain of various causes, including back pain. I believe that she did not have back pain before her November 18, 1996 accident, and that she frequently injured her back at work after 1996 – her testimony on these issues is completely consistent with the medical and other evidence. However, I question the accuracy of her testimony on other issues. For example, her testimony at hearing regarding the extensive problems she had after foot surgery and carpal tunnel surgery is inconsistent with her deposition testimony that she did not have such problems, and with the medical and plant records, which do not reflect extensive problems. I noted that when I asked for clarification regarding the help Claimant's husband provided for her foot problems, Claimant could not answer without looking to her attorney for guidance. She admitted she was unsure of certain dates, and because the attorneys neglected to ask her detailed questions about her heart disease, anxiety or depression, and other conditions, her testimony regarding her medical history was incomplete. I find credible and agree with the following observation made by Mr. Lalk regarding Claimant: "I found that she had a poor memory of her medical treatment and she tended to emphasize her symptoms, over reporting on her treatment and diagnosis." (Exhibit A, p. 9).
13. I find that Claimant was employed and able to compete in the open market up to the summer of 2000. I further find that given Claimant's current condition, and the disabilities that have befallen her since her 1996 accidental injury including but not limited to her occupational lumbar disease, fibromyalgia, cardiac disease, depressive episodes, and lack of concentration, it is unreasonable to expect an employer to hire Claimant to perform any job for which she is otherwise qualified. Claimant did not establish that her permanent total disability began until October 2003, when Dr. Poetz reevaluated Claimant and added the total disability opinion.

#### **RULINGS OF LAW**

Based on the substantial and competent evidence of record, the findings of fact made herein, and the application of the Missouri Workers' Compensation Law, I find that Claimant has failed to establish she is entitled to receive disability

benefits from the Second Injury Fund.

I. Claimant is barred from recovering benefits from the Second Injury Fund because she did not establish the percentage of disability derived from the compensable injury.

Claimant has the burden of establishing all of the essential elements of her claim. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 241 (Mo.App.2003); *Gassen v. Lienbengood*, 134 S.W.3d 75, 81 (Mo.App. W.D. 2004). A claimant must not only show causation between the accident and the injury but also that a disability resulted and the extent of such disability. *Smith v. National Lead Co.*, 228 S.W.2d 407, 412[4] (Mo.App.1950); *Goleman v. MCI Transporters*, 844 S.W.2d 463, 465 (Mo.App. W.D.1992). Where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Kizior v. Trans World Airlines*, 5 S.W.3d 195, 201 (Mo.App. W.D.1999), citing *Stewart v. Johnson*, 398 S.W.2d 850, 854 (Mo. 1966). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury. *Bersett v. National Super Markets, Inc.*, 808 S.W.2d 34,35 (Mo.App.1991); *Bruflat v. Mister Guy, Inc.*, 933 S.W.2d 829, 835 (Mo.App. W.D. 1996). Expert opinion evidence is necessary to prove the extent of the preexisting disability. See *Reeves v. Midwestern Mortgage Co.*, 929 S.W.2d 293, 296 (Mo.App. E.D.1996); *Plaster v. Dayco Corp.*, 760 S.W.2d 911, 913 (Mo.App.1988).

Claimant has failed to meet her burden of establishing the disability associated with her accidental injury on November 18, 1996. The only evidence<sup>[3]</sup> with respect to permanent partial disability comes from Claimant's expert, Dr. Berkin, who opined that Claimant had permanent partial disability equal to 40% of the body as a whole at the lumbar spine "directly resultant from the November 18, 1996 and July 1997 work related injury." He was not asked, and he did not testify, as to how much of the combined disability is attributable to each injury. By failing to offer evidence as to the separate disability associated with each injury, Claimant has failed to meet her burden of proof.

The evidence in this case is similar to that of *Moriarty v. Treasurer of State of Missouri*, 141 S.W.3d 69 (Mo.App. E.D.2004). In *Moriarty*, the employee had two pending 2001 claims to the same body part, and his expert testified, "the overall fifty percent disability rating ... is due to the combination of those two [exposures]," and that it is "impossible to break those [two exposures] out." As such, Moriarty failed to prove the nature and extent of each separate pending disability claim, and he failed to meet his burden on the earlier of the two claims. However, because the evidence conclusively established that Moriarty was permanently and totally disabled on account of both his 2001 exposures and his preexisting disabilities, he did recover permanent total benefits on the second of the two 2001 claims.

Unlike the situation in *Moriarty* where there were two open claims, the second of which resulted in total disability, in the instant case the second of the two claims has been dismissed against the Second Injury Fund. After a voluntary dismissal is entered, the trial court may take no further action. See *Freeman v. Leader Nat'l Ins. Co.*, 58 S.W.3d 590, 595 (Mo.App. E.D.2001). "In other words, the trial court loses jurisdiction as of the date of dismissal." *Id.*; *Shelter Mut. Ins. Co. v. Vulgamott*, 96 S.W.3d 96, 104 (Mo.App. W.D.2003). Even if Claimant's evidence, like Moriarty's, established that she was permanently and totally disabled on account of her last work related injury and her preexisting disabilities,<sup>[4]</sup> because she dismissed her last work related injury claim, she cannot recover permanent total disability benefits from the Second Injury Fund.

For the same reasons, Claimant cannot recover permanent partial disability benefits. "Failure to offer expert testimony regarding the percentage of disability derived from the compensable injury bars the claimant from recovering permanent partial disability benefits." *Miller v. Wefelmeyer*, 890 S.W.2d 372, 376 (Mo.App. E.D.1994) (overruled on other grounds, *Hampton*, 121 S.W.3d 220 (Mo. 2003)); see also, *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. W.D.1992) (overruled on other grounds, *Hampton*, 121 S.W.3d 220) (finding it was claimant's burden to prove the extent of the pre-existing injury if he was to receive permanent partial disability benefits for the additional injury); *Moriarty v. Treasurer of State of Missouri*, 141 S.W.3d 69, 73 (Mo.App. E.D. 2004).

II. Claimant did not establish that she is unable to compete in the open labor market on account of her November 18, 1996 accidental injury in combination with preexisting disabilities.

Apart from the lack of evidence as to the percentage of disability derived from the compensable injury, Claimant's evidence does not establish she is permanently and totally disabled due to the preexisting disabilities in combination with her primary claim of November 18, 1996. Even if the primary claim were proven with competent evidence, Claimant would not recover permanent total disability benefits because she incurred additional disability from a subsequent injury as she

continued to work for nearly four years after her primary accidental injury, and she has other subsequent disabilities unrelated to her primary injury.

In order to recover permanent disability compensation from the Second Injury Fund, claimant had the burden to prove that he had a preexisting permanent partial disability of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment. §287.220.1 RSMo; *Leutzinger v. Treasurer*, 895 S.W.2d 591, 593 (Mo. App. 1995). The preexisting disability necessary to trigger Second Injury Fund liability is permanent partial disability existing at the time the work-related injury was sustained. § 287.220.1 RSMo; *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo. App. 1995); *Tidwell v. Kloster Co.*, 8 S.W.3d 585, 589 (Mo. App. 1999). The Second Injury Fund is not liable for any conditions which arise after the last work-related injury, or for any post-accident worsening of an employee's preexisting disabilities which is not caused or aggravated by the last work-related injury. *Garcia v. St. Louis County*, 916 S.W.2d 263 (Mo. App. 1996); *Frazier v. Treasurer of Missouri*, 869 S.W.2d 152 (Mo. App. 1994); *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789 (Mo. App. 1992).

The evidence present in this case establishes that Claimant incurred additional disability to her back after her November 18, 1996 injury. She continued to work for nearly four years, and in that time contracted an occupational disease due to heavy work, especially with a malfunctioning machine. The occupational disease claim has been dismissed against the Second Injury Fund. Thus, the disability associated with the occupational disease is subsequent to the primary injury. Furthermore, Claimant's fibromyalgia is a subsequent, unrelated condition, which Claimant's experts considered in finding her totally disabled. The Second Injury Fund is not responsible for new conditions that develop after and unrelated to the work injury. *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo.App.1995); *Lammert v. Vess Beverages, Inc.*, 968 S.W.2d 720, 725 (Mo.App. E.D.1998).

In addition to the new disabilities arising subsequent to her primary injury, Claimant's preexisting conditions deteriorated. The Second Injury Fund is not liable for any post-accident worsening of an employee's preexisting disabilities not caused or aggravated by the last work-related injury. *Id.* There is evidence that in the four or more years between her accidental work injury and the time she stopped working and/or saw her experts, Claimant's arguably preexisting heart condition deteriorated. [5] Although not mentioned by the evaluating trial experts, Claimant's depression and anxiety attacks became more disabling after her injury.

### CONCLUSION

Claimant claim is denied because she has not met her burden of proof. She did not establish the permanent partial disability attributable to the primary injury, nor did she establish her permanent total disability is due to the combination of injuries exclusive of all disability arising subsequent to her primary injury. Claimant shall not recover any benefits from the Second Injury Fund.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Karla Ogrodnik Boresi  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

\_\_\_\_\_  
Reneé T. Slusher

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- [1] There is no credible evidence that Claimant missed any work on account of this incident. Employer paid no TTD, and the plant medical history shows no time lost at that time.
- [2] Dr. Poetz is inconsistent with respect to fibromyalgia. The fibromyalgia diagnosis did not occur until the 2003 report. On one page (Exhibit D, p.3) he indicates the fibromyalgia diagnosis is due to the "11/18/96 and 7/97" work injuries, but on the next page, he attributed the fibromyalgia directly to the November 18, 1996 injury. This is the only place Dr. Poetz attributes disability to one injury and not both. The attorneys asked no useful questions to clarify the discrepancy.
- [3] The compromise stipulation between Claimant and Employer (Exhibit C) does not establish the Claimant's disability. The mere admission of the settlement agreement as evidence does not bind the Fund to the terms of the settlement agreement to which it was not a party. *Totten v. Treasurer of State*, 116 S.W.3d 624, 628 (Mo.App. E.D. 2003).
- [4] As discussed in subsequent sections, there are other reasons Claimant has failed to meet her burden regarding permanent total disability.
- [5] It is hard to determine when the cardiac condition became disabling because there are few if any records prior to the 1996 injury. However, there is a documented cardiac workup as early as April 25, 1997.