

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

Injury No. 09-071549

Employee: Martha Robertson
Employer: Southwestern Bell Telephone Co. (Settled)
Insurer: Old Republic Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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

Introduction

The parties asked the administrative law judge to resolve the following issues: (1) whether the accident is the prevailing factor in causing employee's medical condition; (2) the nature and extent of employee's disability; and (3) Second Injury Fund liability.

The administrative law judge rendered the following findings and conclusions: (1) employee is permanently and totally disabled as of June 3, 2013; (2) employee's accident was not the prevailing factor in causing both the resulting medical condition and employee's total disability; (3) employee failed to prove the nature and extent of any disability attributable to the primary injury; (4) the extent of employee's preexisting disability is questionable as well; and (5) employee did not meet her burden of proof entitling her to recover any level of benefit from the Second Injury Fund.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in denying permanent total disability benefits from the Second Injury Fund; (2) in finding that the work accident was not the prevailing factor in causing employee's medical condition and total disability; (3) in faulting employee for failing to prove she was "essentially well" prior to the primary injury; (4) in finding there is no objective evidence of any changes in the physical structure of employee's body following the work accident; and (5) in finding the date of maximum medical improvement was June 3, 2013.

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

Findings of Fact

Preexisting conditions of ill-being

At some point in the mid-2000s, employee underwent a series of multiple low back surgeries performed by a Dr. Graven. Employee failed to provide any medical records in connection with this treatment, so we are unable to make any more specific findings

Employee: Martha Robertson

- 2 -

regarding the nature of the surgeries, or the diagnoses that prompted them. It is clear, however, that employee suffered from considerable pain and limitations affecting her low back before the September 17, 2009, primary injury.

Employee began working for employer at some point in 2000, and ultimately worked for employer for about 12 years. Employee's title was "DSL Technician," and she performed troubleshooting work from a desk, which involved answering phones and using a computer. Owing to employee's low back pain and limitations, employer at some point provided employee with a special desk that accommodated her need to frequently alternate between sitting and standing. Employer also provided employee with an extra-long headphone cord so that she could move around more freely, and moved her workstation from the third to the first floor so she wouldn't have to climb stairs.

On January 23, 2009, employee underwent yet another low back surgery performed by Dr. Timothy Kuklo. Dr. Kuklo performed a multi-level posterior spinal fusion from L3 through S1 to address a diagnosis of multilevel lumbar spondylosis and pseudoarthrosis. Following a course of physical therapy, Dr. Kuklo released employee on May 26, 2009, with restrictions of working half-days, no sitting or standing over 1.5 hours, and no lifting over 20 pounds. It appears that on the same day Dr. Kuklo released employee, she saw Dr. Brian Grus. Under "reason for visit," Dr. Grus's record indicates "[u]nable to work anymore." *Transcript*, page 263. The record suggests that employee continued to suffer from very severe low back pain. Under "impression/plan" Dr. Grus's record indicates "refer to SSA for disability." *Id.* page 264.

However, despite the suggestion in Dr. Grus's record that employee was unable to continue working, she ultimately did so. Although employee's testimony was somewhat equivocal as to whether or for how long she worked half-days following the surgery performed by Dr. Kuklo, she testified on direct examination that she returned to full-duty work with employer at some point in May 2009; we so find. At that point, employee was no longer taking prescription pain medications, but continued using over-the-counter medications and a TENS unit to manage her pain.

Employee presented expert medical testimony from Dr. Robert Margolis, who opined that employee's preexisting low back condition constituted a permanent partially disabling condition, as well as a hindrance and obstacle to employment; we credit these opinions. Dr. Margolis rated employee's preexisting low back condition at 40% permanent partial disability of the body as a whole referable to the lumbar spine. In the absence of any contrary rating on this record, and because employee clearly suffered extensive preexisting limitations referable to her low back, we credit Dr. Margolis's rating and adopt it as our own with respect to the nature and extent of disability referable to employee's preexisting low back conditions.

Primary injury

On September 17, 2009, employee slipped in a puddle of water in employer's break room, and fell. As a result, employee experienced an immediate increase in the pain in her low back, as well as pain radiating into both legs. Apparently, employee received emergency treatment at a nearby hospital, but owing to employee's failure to provide these medical

Employee: Martha Robertson

- 3 -

records, we are unable to make any findings as to what treating physicians may have diagnosed or the treatment they may have provided.

On September 22, 2009, employee saw Dr. Jacob Buchowski, who noted her complaints of increased pain and left leg radicular symptoms referable to the workplace fall, prescribed Percocet and Flexeril, and recommended employee continue normal daily activity but avoid excessive low back strain. On December 8, 2009, Dr. Buchowski reviewed the results of a CT myelogram; he found it difficult to tell from the results of the study whether employee's preexisting low back fusion instrumentation was solid or not. Dr. Buchowski determined that employee's pain exacerbation was likely causally related to the workplace fall on September 17, 2009. He continued her prescription for Percocet, referred her to pain management, and recommended that she return to work with a restriction of having a 5 minute standing/walking break every hour.

We acknowledge that employee agreed to her attorney's generalized question suggesting that she missed "a lot" of work following the September 2009 accident, but employee did not specifically identify how much or how often she missed work, and after a careful review of the medical records available to us, we find insufficient evidence to permit us to make any specific findings as to the amount of work employee missed after September 17, 2009, or even to support employee's generalized suggestion that she missed "a lot" of work during this time period. Instead, it appears to us (and we so find) that employee did not stop working for employer for any significant time period following the accident on September 17, 2009, until (as discussed below) August 2012, when she underwent a subsequent low back surgery.

Following treatment she received with Dr. Buchowski, employee next saw the pain management physician Dr. Bakul Dave from January through October 2010. Dr. Dave prescribed narcotic pain medications, including Morphine. Although Dr. Dave recommended the possibility of low back injections or a spinal cord stimulator, employee chose not to pursue these treatment options.

On May 30, 2012, employee came under the care of Dr. Dennis Abernathie, an orthopedic surgeon. Based on a determination that employee's fusion was essentially solid, Dr. Abernathie theorized that employee's ongoing pain may be stemming from the hardware in her back. So, on August 16, 2012, Dr. Abernathie performed low back surgery to remove the hardware from L3 to S1, and also performed a posterolateral re-fusion using Orthoform Matrix.

It appears from the treatment records (and we so find) that Dr. Abernathie's surgery initially had a good effect, as employee was "walking miles and miles" and reported that a lot of her pain was gone as of August 29, 2012. *Transcript*, page 410. It also appears that employee was able to make a sporadic return to her work for employer at some point in October 2012. However, Dr. Abernathie took employee off work again on November 30, 2012, owing to an apparent flare-up in her left low back pain. Thereafter, Dr. Abernathie continued to see employee, and we note that on June 3, 2013, he determined that the primary problem was not with employee's low back pathology, and that the pain instead was stemming from inflammation in the SI joints, and that "some of

Employee: Martha Robertson

- 4 -

[employee's] activity outside the workplace makes her less prepared to be inside the workplace." *Transcript*, page 462.

Employee has not worked since November 30, 2012. Other than to agree that Dr. Abernathie took her off work on that date, employee did not provide any testimony to specifically explain whether or why she felt unable to continue working for employer. Employee settled her claim against the employer for the primary injury consistent with an approximate disability of 17.5% permanent partial disability of the body as a whole referable to the low back.

Medical causation

Employee persuasively testified that she experienced a permanent increase in her pain and radicular complaints following the September 2009 accident; we so find. Employee's medical expert, Dr. Margolis, testified that the accident on September 17, 2009, was the prevailing factor causing employee to suffer a lumbar strain/sprain with exacerbation of pain related to employee's prior lumbar fusion. This opinion strikes us as reasonable and persuasive in light of the evidence that employee experienced a permanent increase of pain following the September 2009 injury.

We note that the record also contains an independent medical examination report from Dr. Donald DeGrange dated September 30, 2010, wherein he essentially agreed with Dr. Margolis that employee suffered a lumbar strain on September 17, 2009, but also provided the following observations:

The patient's work at [employer] is a factor for the development of her current condition but cannot be considered the prevailing factor given the extensive and complex history of six prior spine surgeries that have occurred over the last four years. ... These are by far the most significant factors in her current condition. The multiple surgeries that she has undergone have made the patient's back to [sic] susceptible to further injury and have to be considered the substantial factor in her current condition.

Transcript, page 271.

As seen above, Dr. DeGrange did not consider whether the accident was the prevailing factor in causing any new, identifiable medical condition; instead, he analyzed whether the accident was the prevailing factor causing employee's "current condition." We do not disagree that employee's disability referable to her low back is, overall, primarily related to conditions that pre-date her September 17, 2009, work accident. As will be discussed more fully below, however, we do not find Dr. DeGrange's credible analysis dispositive of the critical issue: Is this accident the prevailing factor in causing an identifiable medical condition and disability? We deem the relevant medical causation opinion from Dr. Margolis to be essentially un rebutted on this record, and we credit the opinion from Dr. Margolis on this point.

With regard to the nature and extent of permanent disability employee suffered as a result of the accident, Dr. Margolis testified that employee's low back strain resulted in a

Employee: Martha Robertson

- 5 -

30% permanent partial disability of the body as a whole referable to the lumbar spine. Dr. Margolis explained that he reached his 30% rating, in part, by relying on employee's history of an increase in her low back pain complaints. Notably, however, employee told Dr. Margolis that "all of her current complaints are related to the fall," and he agreed that employee was "a little bit inaccurate" as to that point. *Transcript*, pages 48 and 85. In light of the uncontested evidence of employee's significant and extensive preexisting low back problems, we agree.

At the hearing before the administrative law judge on May 6, 2015, employee testified that she was taking Percocet and Tizanidine, and using a Fentanyl patch to control her low back pain. Employee described trouble with walking, prolonged sitting and standing, and difficulty with sleeping as stemming from her overall low back condition. Employee did not, however, provide testimony to specifically identify any new limitations in her abilities following the primary injury.

Where Dr. Margolis agreed that employee exaggerated the extent to which the primary injury is responsible for her current low back pain and limitations, and where employee, in her testimony, did not specifically identify any new functional limitations but only a permanent increase in her pain, we are not persuaded by Dr. Margolis's rating of 30% permanent partial disability of the body as a whole. Rather, we find that employee suffered a 10% permanent partial disability of the body as a whole resulting from her low back sprain on September 17, 2009.

Dr. Margolis opined that employee should observe the following permanent restrictions in regard to her low back: no lifting over 20 pounds; and avoid repetitive bending, twisting, and stooping. We note the absence of any evidence on this record to suggest that the demands of employee's job with employer ever exceeded these restrictions. We find the restrictions issued by Dr. Margolis to be persuasive. We further find that these restrictions would not prevent employee from doing her job for employer.

Employee's date of birth is November 2, 1968. We note that she was only 40 years of age on the date of the primary injury, and 44 years of age when she quit working for employer.

Permanent total disability

As we have noted above, employee continued working for her employer for almost three years after the primary injury. Yet, she seeks permanent total disability benefits from the Second Injury Fund on a theory that the primary injury combined with her preexisting conditions of ill-being to render her permanently and totally disabled. As a result, there is a need to both critically examine the facts and circumstances of her continued employment after September 2009, and to determine the specific reasons why employee decided she was unable to continue working as of November 2012.

After a thorough review of the transcript, however, we find the evidence insufficient to resolve these important questions. For example it is unclear to us how (if at all) employer provided any additional accommodations following the September 2009 injury. As we have noted, there is insufficient evidence on this record to permit us to make any specific findings as to the amount of work employee missed after September 17, 2009,

Employee: Martha Robertson

- 6 -

other than her post-surgical recovery period from August 2012 to October 2012, while she was under Dr. Abernathie's care. Nor is it clear to us why employee ultimately quit working for employer, as employee did not provide any testimony to specifically address this essential question.

In fact, it appears that not even Dr. Margolis was aware of why employee stopped working. When asked whether employee explained to him why she stopped working, Dr. Margolis provided the following, essentially nonresponsive answer, "I think it was after the surgery, if I remember correctly." *Transcript*, page 63. The evidence is clear and uncontested that employee stopped working after her 2012 surgery; the question is whether Dr. Margolis knew *why* employee stopped working, not *when*. We find that Dr. Margolis did not know why employee stopped working. As a result, while we do not deem inherently unpersuasive Dr. Margolis's opinion that employee is unable to work, his lack of awareness as to why employee stopped working prevents us from relying on his opinion to reach a finding that employee is permanently and totally disabled owing to any combination of her work-related and preexisting conditions.

Meanwhile, as we have noted above, Dr. Abernathie believed as of June 2013 that employee's "activities outside the workplace" were making her less prepared to be inside the workplace. Employee was not asked to address or explain these notations, nor is there any other evidence to identify the non-work activities that were (apparently) having an adverse effect on employee's ability to maintain employment. While this isolated comment from Dr. Abernathie, standing alone, might not be fatal to employee's claim for permanent total disability benefits from the Second Injury Fund, it certainly does not lend any persuasive support to her position.

Turning to the expert vocational evidence, we note that although employee's expert James England relied upon employee's complaint of daytime drowsiness and a need to nap throughout the day as the primary limitations underlying his opinion that employee is unable to compete for work in the open labor market, employee did not, at the hearing before the administrative law judge, provide any testimony to specifically indicate that she was drowsy or needed to nap during the work day following the September 2009 injury, or that such complaints affected her duties with employer, or that such complaints played any role in her decision to stop working as of November 30, 2012. As a result, we deem Mr. England's opinion lacking adequate foundation and unpersuasive.

Ultimately, in light of the foregoing concerns and evidentiary deficiencies, we are not persuaded to render a finding that employee is permanently and totally disabled, whether as a result of the combined effects of the primary injury and her preexisting conditions of ill-being, or for any other reason. We are, however, persuaded by the testimony from Dr. Margolis that the primary injury combined synergistically with employee's preexisting low back disability to result in greater permanent partial disability than the simple sum of the conditions; we so find, and we deem a 10% synergy factor appropriate to account for this enhanced permanent partial disability.

Employee: Martha Robertson

- 7 -

Additional preexisting conditions of ill-being

Although Dr. Margolis opined that employee suffered from an additional preexisting hindrance and obstacle to employment in the form of deafness in the right ear, he did not explain how right ear deafness should be deemed to combine synergistically with a primary low back injury. Where employee did not provide testimony to specifically explain how or why this condition combined synergistically with the primary low back injury, we find insufficient evidence to make any finding of such, and for this reason we do not include these conditions in our analysis of Second Injury Fund liability set forth below. Likewise, with regard to employee's testimony regarding a preexisting diagnosis of ADHD, we find the evidence insufficient to support a finding that this condition combined synergistically with the low back injury.

Conclusions of Law*Medical causation*

Section 287.020.3(1) RSMo sets forth the statutory test for medical causation, and provides, in relevant part, as follows:

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability.

Both Drs. Margolis and DeGrange appear to have been in agreement at least as to the diagnosis to assign to the injury of September 17, 2009: a lumbar strain. But, as we have noted, only Dr. Margolis considered whether the accident was the prevailing factor causing a permanent and quantifiable increase in employee's low back disability, and we have credited his opinion as essentially unrebutted.

This is because, rather than consider whether the accident was the prevailing factor causing employee to sustain a lumbar strain and any identifiable increase in employee's low back disability, Dr. DeGrange considered whether the lumbar strain could be considered the prevailing factor causing employee's "current condition," i.e., everything that was wrong with employee's low back as of the date of his examination. Obviously, employee's extensive surgical history and low back pain constituted great preexisting disability; the evidence is uncontested on this point. But the relevant question for our purposes is whether—despite the preexisting low back condition—the accident of September 17, 2009, was the prevailing factor in causing any resulting medical condition and disability.

We conclude that the accident of September 17, 2009, was the prevailing factor causing employee to suffer the resulting medical condition of a low back strain and a 10% permanent partial disability of the body as a whole.

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and controls the assessment of Second Injury Fund liability in "all cases of permanent disability where there has been previous disability." Section 287.220 provides as follows with respect to Second Injury Fund liability for enhanced permanent partial disability benefits:

Employee: Martha Robertson

- 8 -

If any employee who has 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, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

We have credited Dr. Margolis's opinions that employee suffered from preexisting permanent partial disability referable to her low back; that this condition was serious enough to constitute a hindrance or obstacle to employment; and that there is a synergistic interaction between employee's preexisting disability affecting the low back and the primary injury of September 17, 2009. We have also found that employee's preexisting low back condition constituted a 40% permanent partial disability of the body as a whole; this satisfies the applicable 50-week threshold for Second Injury Fund liability. See *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, 414 S.W.3d 455 (Mo. 2013). We conclude that employee has satisfied each of the statutory requirements for proving Second Injury Fund liability for permanent partial disability benefits.

Accordingly, we calculate the Second Injury Fund's liability as follows: 160 weeks (40% preexisting permanent partial disability of the body as a whole referable to the low back) + 40 weeks (10% permanent partial disability of the body as a whole referable to the low back) = 200 weeks x the 10% load factor = 20 weeks of enhanced permanent partial disability. At the stipulated permanent partial disability rate of \$422.97 the Second Injury Fund is liable for \$8,459.40 permanent partial disability benefits.

Employee: Martha Robertson

- 9 -

Decision

We reverse the award of the administrative law judge.

The Second Injury Fund is liable to employee for enhanced permanent partial disability benefits in the amount of \$8,459.40.

The award and decision of Administrative Law Judge Karla Ogradnik Boresi, issued August 6, 2015, is attached solely for reference.

For necessary legal services rendered to employee, Nile Griffiths, Attorney at Law, is allowed a fee of 25% of the compensation awarded, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 15th day of March 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Martha Robertson	Injury No.: 09-071549
Dependents:	N/A	Before the
Employer:	Southwestern Bell Telephone Co. (Settled)	Division of Workers' Compensation Department of Labor and
Additional Party	Second Injury Fund	Industrial Relations Of Missouri
Insurer:	Old Republic Insurance Company (Settled)	Jefferson City, Missouri
Hearing Date:	May 6, 2015	Checked by: KOB

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: September 17, 2009
5. State location where accident occurred or occupational disease was contracted: Saint 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 slipped on some water and experienced a jarring, twisting motion to her low back, but did not fall.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: Not determined
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? \$15,547.75

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$732.92/\$422.97
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer previously settled.

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:

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Martha Robertson	Injury No.: 09-071549
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Southwestern Bell Telephone Co. (Settled)	Department of Labor and Industrial Relations Of Missouri
Additional Party	Second Injury Fund	Jefferson City, Missouri
Insurer:	Old Republic Insurance Company (Settled)	Checked by: KOB
Hearing Date:	May 6, 2015	

PRELIMINARIES

The matter of Martha Robertson (“Claimant”) proceeded to hearing to determine the liability of the Second Injury Fund for benefits under the Missouri Workers’ Compensation Act (“Act”). Attorney Nile Griffiths represented Claimant. Assistant Attorney General Maria Daugherty represented the Second Injury Fund. Southwestern Bell Telephone Co. (“Employer”) and Old Republic Insurance Company (“Insurer”) previously settled their liability.

The parties stipulated Claimant sustained an accidental injury arising out of and in the course of employment when she slipped on water on September 17, 2009. At the relevant time, Claimant was an employee of Employer who earned an average weekly wage sufficient for rates of compensation of \$732.92 for both temporary total disability (“TTD”) and permanent total disability (“PTD”) benefits, and \$422.97 for permanent partial disability (“PPD”) benefits. Venue, notice and timeliness of the claim were not at issue. Employer paid medical benefits of \$15,547.75, but no TTD.

The issues were: 1) is the accident the prevailing factor in Claimant’s medical condition; 2) what is the nature and extent of Claimant’s permanent disability, be it partial or total; and 3) what is the liability of the Second Injury Fund? Claimant seeks to recover PTD benefits.

All exhibits were received into evidence. Claimant’s exhibits¹ consisted of: 1) Deposition of Dr. Margolis; 2) Deposition of Mr. England; 3) Stipulation for Compromise Settlement with Employer; 4) Records of Dr. Kuklo; and 5) Records of Dr. Grus. The Second Injury Fund submitted exhibits as follows: I) the September 30, 2010 report of Dr. deGrange and the treating records on which he relied; II) Records of Dr. Abernathie; and III) Records of Dr. Gheith. Any marks on the exhibits were present when submitted and were not placed thereon by the undersigned.

¹ The records of Dr. Graven, who provided extensive treatment between 2005 and 2009, were not offered into evidence, nor did most of the experts appear to have had access to those critical treatment records. Therefore, references to the treatment Claimant received from Dr. Graven are based on subsequent treating doctors’ observations, Claimant’s recollection, or other second hand but otherwise credible sources. Also, the descriptions of the exhibits in this paragraph are taken directly from the parties’ exhibit lists. Upon review, it is clear that some exhibits contain other sets of certified records.

SUMMARY OF THE EVIDENCE

Claimant is a 47-year old woman who worked as a technician for Employer for fifteen years until November 30, 2012. She is a smoker. Her work involved network and DSL troubleshooting with customers and technicians, and required her to be on her phone and at her computer all shift long. She described it as more cerebral than physically demanding. Prior to working for Employer, Claimant earned her associate's degree, worked on the line for a shoe manufacturer, received retraining on computers, and worked as a technician building or repairing security systems, networks and similar electronics.

In the 1990's, Claimant sustained a number of minor injuries to her hands/fingers, abdomen and eye.² There is no evidence these injuries were disabling. She has been deaf in the right ear since birth, but had no problems at work due to this condition. In college, she was diagnosed and treated for ADD and ADHD, and did not notice any problems these learning disabilities caused at work. In the early 1990's, she had a lumbar strain while pushing a rack of outsoles.

In 2005, Claimant underwent the first of a series of at least five extensive spinal surgeries. The treatment records of her surgeon Dr. Graven were not in evidence, and were not made available to all of the doctors who subsequently treated or evaluated Claimant. Therefore, the symptoms and findings that lead Claimant to seek treatment with Dr. Graven are not in evidence, nor is there any evidence of the conservative treatment, if any, that predated the first surgery. It appears Claimant had chronic degenerative disc disease with no evidence of an injury or accident causing the need for the surgeries. In October 2005, Claimant underwent an Anterior Lumbar Interbody Fusion ("ALIF") procedure at L4-5. Within ten months, there apparently was some sort of hardware failure, and Dr. Graven performed a surgical repair. A year or two later, Claimant submitted to a third surgery with Dr. Graven which included fusion of L5-S1. In 2008, Dr. Graven performed a posterior spinal fusion at L4-5, and performed another surgery to remove a tumor on or near the spine.

On January 23, 2009, Claimant submitted to another spine surgery with a new doctor, Dr. Kuldo. This procedure was an attempt to fuse at L4-5 and L5-S1, which involved instrumentation removal and replacement with bone grafting. Operative findings included pseudoarthrosis. Claimant was discharged January 27, 2009. In March, Claimant reported she was still in a lot of pain, and throughout the records from aquatic therapy in April, Claimant reported no relief. In April, she experienced increased symptoms following a fall at home. In May, Dr. Kuklo encouraged Claimant to return to her sedentary job with further restrictions of ½ days only, no sitting/standing more than 1 ½ hours at a time, and no lifting over 20 pounds. These restrictions were on top of the prior modifications offered by Employer, including a sit/stand adjustable desk, move of office to ground floor and an extra long headset cord. Claimant testified half-day work was not provided, and when she returned to work after May, she worked all day. While she testified she weaned herself from narcotic medications, she still had pain, took over the counter medication, used a TENS unit and applied ice as needed.

Claimant saw Dr. Grus on May 26, 2009. The reason for her visit was to discuss disability - he noted Claimant had undergone "[m]ultiple spine surgeries and [was] impaired by

² Claimant was not asked about these events, but Mr. England documented the injuries in his report.

back pain. Unable to work anymore.” Dr. Grus assessed Claimant suffered from “disc degeneration NOS..., [w]orsening. No work sponsored disability – refer to SSA for disability.” Claimant did not apply for disability at that time and did not return to see Dr. Grus again until after the date of accident in this case.

On September 17, 2009, Claimant slipped and fell on a watery floor while at work. This is the accident that is the basis of the instant claim. She experienced pain in her knee and back, radiating to both heels. She was initially treated with medication and x-rays. According to Mr. England’s report, records and films from the Barnes-Jewish Hospital-St. Peters emergency room showed no appreciable change to the surgically repaired back, no abnormalities, and normal alignment. Claimant was discharged home in stable condition. Regarding her visit to Concentra Medical Center on the following day, Mr. England notes Claimant told Concentra she had been off medications “for approximately four months” but had been taking Vicodin and Flexeril regularly up until then. Diagnoses included low back strain and contusion of the left knee. Flexeril and Ibuprofen were prescribed, and she received a referral to orthopedics “in view of her previous multiple back surgeries.” She was allowed to return to work with restrictions.

Claimant came under the care of Dr. Buchowski’s office on September 22, 2009, and those treatment records are in evidence. The purpose of the initial visit was “to ensure that her instrumentation has not failed in any way after [the] fall.” On October 20, Dr. Buchowski found evidence of fusion at all relevant levels; no evidence of implant loosening or failure. He prescribed oral pain medication. After several follow up visits and phone calls, on December 8, 2009, Dr. Buchowski noted the review of a CT myelogram demonstrates fusion, with apparent integration of the interbody spacers at all levels; difficult to confirm solid fusion given hardware. He further noted: “I discussed with the patient that I am not sure what the etiology of her symptoms is given the overall good appearance of the CT myelogram.... I believe that her recent pain exacerbation is likely causally related to the work-related injury.” He provided prescription pain medication, referred Claimant to pain management and authorized her to return to work with the restriction of having a 5 minute stand/walk break every hour. Claimant’s call on February 17, 2010 prompted Dr. Buchowski’s office to tell her she has no further surgical options and to continue with pain management. Claimant continued to work³.

Claimant began seeing Dr. Dave for pain management in early January 2010⁴. The diagnosis was lumbar failed back surgery syndrome and chronic pain from the lumbar radiculopathy. Dr. Dave was uncomfortable writing her prescriptions for opioid medication because it appeared Claimant was overusing the medication and telling different stories to explain why she needed more pills. Dr. Dave recommended Claimant consider a spinal cord stimulator and see a psychologist to help her deal with her chronic pain, but Claimant rejected both ideas. Dr. Dave continued to provide various prescription medications, including Methadone, and Claimant continued to work.

³ Claimant missed some work after the 2009 accident, but the extent of the missed time is not documented and it did not affect her employment status, which continued to be full time.

⁴ Dr. Dave’s 1/21/2010 note indicates Claimant was referred to him in the past for initial evaluation and he wrote her a prescription for pain. As Dr. Dave’s records were submitted in evidence as part of the report of Dr. deGrange (and were not separately certified), there was no record of an earlier visit to Dr. Dave.

In mid-August 2010, Claimant made two visits to the Lincoln County Medical center complaining of back pain. Claimant complained she was “losing feeling from a fall last September at work. It is progressively getting worse.... Something is loose.” The diagnosis was low back pain. She received medication and was discharged. She continued to work.

On September 30, 2010, at the request of Employer/Insurer, Dr. deGrange conducted an IME of Claimant and issued a report. He considered a history that was consistent with the evidence presented at hearing. Claimant complained of constant diffuse low back pain with radiation into both legs. In the two months prior to her visit, Claimant began experiencing temporary paralysis at night, and her husband occasionally had to carry her from the truck. The symptoms got progressively worse over the prior several months, and Claimant thought something was loose in her back.

The mechanism of injury Claimant described to him that day lead Dr. deGrange to conclude she had a lumbar strain. After considering all the data at his disposal, including the history and physical examination which he obtained that day, and the review of the diagnostic studies and medical records, Dr. deGrange concluded:

It would appear, given the lack of any radiographic evidence of an obvious pseudarthrosis or hardware failure, as reported by Dr. Buchowski, that this incident has caused a flare-up of her pre-existing and longstanding degenerative lumbar spinal condition. There is no apparent or obvious objective basis for the patient’s continued subjective complaints and her diagnosis is best characterized as a failback surgery syndrome, as concluded by her pain management specialist, Dr. Dave.

He diagnosed Failback Surgery Syndrome, found Claimant to be at MMI, and concluded that, “[i]n the absence of any obvious hardware failure or pseudoarthrosis,...no further treatment regarding the work-related injury is indicated.” He found her existing sedentary restrictions adequate, and opined “that the vast majority of the treatment thus far has been as a result of her pre-existing condition and multiple surgeries.”

Dr. deGrange’s opinion on causation was clear, concise, and consistent with the evidence. He stated, with emphasis added:

The [Claimant’s] work at [Employer] is a factor for the development of her current condition but **cannot be considered the prevailing factor** given the extensive and complex history of six prior surgeries that have occurred over the last four years. These prior spine surgeries far outweigh the incident in question as described by the patient.

In response to the question asking what, if any, preexisting conditions have contributed to or caused [Claimant’s] current problem, Dr. deGrange wrote:

The significant⁵ factors (in Claimant’s current problems) are the patient’s pre-existing severe degenerative disc disease that was originally of a non-industrial nature, as well as

⁵ Although Dr. deGrange changes his word choice from “prevailing” factor, which comports to the current version of the Act, to “significant” factor, which was the standard prior to the 2005 changes to the Act, I find the distinction

the subsequent multiple attempts at fusion that finally resulted in a most recent surgery of January 23, 2009. As stated before, these are by far the most significant factors in her current condition. The multiple surgeries that she has undergone have made the patient's back susceptible to further injury and have to be considered the substantial factor in her current condition.

According to Dr. deGrange, Claimant's work accident is not the prevailing factor in her injury and disability.

On October 12, 2010, and again on February 8, 2011, Claimant visited Dr. Grus for her worsening back pain. Dr. Grus reiterated the diagnosis of failed back syndrome, severe and noted the problem was worsening. In light of her complex history and current treatment with pain management, he did not feel comfortable providing pain meds for Claimant; instead he referred her back to spine surgeon and pain management. He noted: "complex physical and psychiatric issues; will order lumbar CT but still doubt any benefit will come from this." Claimant continued to work.

In August of 2011, Claimant began to see Dr. Gheith, who added a diagnosis of Complex Regional Pain Syndrome of the bilateral lower extremities and provided a course of pain management treatment over the next eight months, to include medication, multiple sympathetic nerve blocks, and radiofrequency denervation. Any benefit from those modalities appears to have been short-lived. Dr. Gheith had discussions with Claimant regarding the implantation of a spinal cord stimulator and planned to start a trial once an MMPI was done, but Claimant did not return to see Dr. Gheith after April 2, 2012. Claimant continued to work.

Claimant was "reluctant" to get the stimulator, and on May 30, 2012, came under the care of Dr. Dennis Abernathie of the Columbia Orthopaedic Group. Dr. Abernathie ordered physical therapy⁶, and a bone scan, which was "really pretty negative." Following injections, he concluded Claimant's hardware was causing the problem. Despite his concerns over Claimant's continued smoking⁷, Dr. Abernathie admitted Claimant to Boone Hospital Center on August 16, 2012 for hardware removal of L3 to S1. Claimant had some relief following surgery, and was discharged the next day to follow up with her St. Louis doctors for pain control. Neurologically, she was "totally normal." Dr. Abernathie kept Claimant off work until October 30, 2012, at which time she released her to work half days, with the intention of returning her to full days later in November. Employer did not accommodate the half-day restriction, and Claimant worked full time for a few weeks, but she found it difficult.

irrelevant. Dr. deGrange uses the "prevailing" language when discussing causation, and when explaining the role of the preexisting injuries, he clearly compares factors, which is at the heart of the prevailing factor analysis. See *Leake v. City of Fulton*, 316 S.W.3d 528, 532 (Mo. Ct. App. 2010) (Where, as here, both a pre-existing ... condition and a work-related activity contribute to cause an employee's injury ..., the question is which of the contributing factors was "the primary factor, in relation to [the] other factor, causing ... the resulting" injury.... § 287.020.3(1)). There is nothing talismanic about the phrase in question. *Mayfield v. Brown Shoe Co.*, 941 S.W.2d 31, 36 (Mo. Ct. App. 1997). The words a medical expert uses when testifying are often important, not so much in and of themselves, but as a reflection of what impressions such witness wishes to impart. *Id*

⁶ Dr. Abernathie urged Claimant to combat her poor muscle tone with pre-surgery physical therapy, but "she did not want to hear too much of that."

⁷ Claimant continued to smoke at all relevant times, and refused to accept Dr. Abernathie's counsel that smoking slows down healing.

On November 30, 2012, instead of returning Claimant to work full days, Dr. Abernathie took Claimant off work, stating, "I don't know that she is going to be employable in the future." At this point, Claimant ended her employment relationship with Employer. Dr. Abernathie made the following statements regarding causation⁸:

There are questions I have in mind as to the causation of this and the work related factors of it. The fact that she was essentially well by her description between January of 2009 and September 2009 after her lumbosacral fusion until she had the fall at work would imply that potentially was an aggravation of the work related fall but there are some legal distinction in there that I don't feel comfortable making and I said that I don't want to make a statement further than that. On the other hand, I can say that it is reasonable that the fall caused the muscle about the rod to aggravate, the continuation of that rod aggravating the fascia was the reason that I ultimately saw her and did the surgery to remove that rod.

Claimant followed up with Dr. Abernathie three times in 2013, during which time Claimant continued to show a solid fusion, had more physical therapy, and tried to develop healthy habits with her activities. By June 3, 2013, Dr. Abernathie concluded Claimant had reached a plateau and it was now her responsibility to take care of herself, although he would see her if things changed. He issued a permanent restriction of being unable to work. She was at MMI.

At hearing, Claimant got emotional in describing her daily activities. On a typical day, she takes medication before getting out of bed. She is able to get dressed, let the dogs out, put away dishes, do laundry, make the bed and perform other light household tasks, but she must rest, recline and sometimes apply an icepack in between exertions. She can drive for a few miles at a time. Her sleep is disrupted. Further complaints were contained in Mr. England's report, to include low back pain going down the legs to the heels, numbness in buttocks and legs with too much sitting and trouble reaching up or out. Limitations include standing less than one hour, walking 30-40 feet at a time, and limited bending at waist, squatting and kneeling. She follows a 20 pound lifting restriction.

Dr. Robert Margolis saw Claimant on January 29, 2013 at her attorney's request for an Independent Medical Exam ("IME"). He took a history from Claimant, which he admitted at a point⁹ was "a little bit inaccurate," conducted an unremarkable exam, then reviewed medical records and finally issued a report. Although he listed Dr. Graven's notes in the records he reviewed, on cross examination by the Assistant Attorney General, it became clear that he did not have those critical records from 2005-2008, and therefore only had Claimant's description of the surgeries performed by Dr. Graven. Claimant told Dr. Margolis she quit smoking prior to her last surgery, which is inconsistent with the treatment records.

Among the several statements Dr. Margolis made with a reasonable degree of medical certainty are the following:

⁸ The "Work Related" section of every Return to Activity Form in her file has the "No" option selected (or no option selected at all).

⁹ Specifically, he would have anticipated Claimant had some discomfort prior to her September 2009 accident, and therefore questioned the accuracy of her attributing all her current symptom to that accident.

- The work accident of September 17, 2009 “was the substantial and prevailing factor in this patient suffering a lumbar strain-sprain with exacerbation of pain related to her prior lumbar fusion”...
- Claimant “has a permanent partial disability of 70 percent of her person as a whole. Of this 30 percent would be apportioned to the injury of 9/17/2009 and 40 percent preexisting”...
- Claimant’s disabilities combine to create a greater disability to the body as a whole when compared to the simple sum and therefore a loading factor should be added.
- Claimant “should avoid repetitive bending, twisting and stooping. She should limit lifting to 20 pounds maximum;” and
- Because of Claimant’s low back complaints, findings on exam and chronic use of pain medication, he considers “her to be totally and completely disabled in regard to her low back and [did] not believe that the average employer would hire her in the normal course of doing business.”

Dr. Margolis also testified that Claimant had 100% loss of hearing in the right ear, and that disability plus the prior low back were hindrances or obstacles to employment that combined synergistically with the present low back disability for total disability. He confirmed an x-ray from September 22, 2009, taken 5 days after her work injury, showed all of the instrumentation was in the appropriate position and there was no indication of misalignment. He also confirmed there were no acute changes to the spine.

James England, Vocational Rehabilitation Counselor, evaluated Claimant on July 16, 2013, and issued a report. Mr. England provided the most complete summary of Claimant’s medical treatment, but he too did not have the critical records of Dr. Graven from 2005-2008. He interviewed Claimant, although he did not administer any tests because he could safely assume a person who earned her associates’ degree had no learning difficulties. Considering the functional restrictions/limitations of Dr. Abrenathie and Dr. Margolis, Claimant’s typical day and her presentation, Mr. England concluded she would likely be unable to compete for or sustain employment in the long run. He mentioned her appearance, need to recline and inability to concentrate or focus due to lack of sleep as reasons why no employer would hire Claimant. The total disability is due to a combination of her current medical problems.

FINDINGS OF FACT AND RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above findings, the competent and substantial evidence presented, additional facts found below, and the applicable law of the State of Missouri, I find the following

1. Prevailing Factor.

The issue presented in this case is whether the accident the prevailing factor in Claimant’s medical condition and disability. The applicable law is well established. In a workers’ compensation case, the claimant bears the burden of proving all essential elements of her claim. *Bond v. Site Line Surveying*, 322 S.W.3d 165, 170 (Mo.App.W.D.2010). Under section 287.020.3(1), RSMo Cum.Supp.2013, “[a]n injury by accident is compensable only if the

accident was the prevailing factor in causing both the resulting medical condition and disability.” “The ‘prevailing factor’ is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” *Id.* The determination of whether an accident is the “prevailing factor” causing an employee's condition is inherently a factual one. *Maness v. City of De Soto*, 421 S.W.3d 532, 539 (Mo.App.E.D.2014). “Medical causation, which is not within common knowledge or experience, must be established by scientific or medical evidence showing the relationship between the complained of condition and the asserted cause.” *Bond*, 322 S.W.3d at 170 (internal quotes and citation omitted). “Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty.” § 287.190.6(2), RSMo Cum.Supp.2013. “Proper opinion testimony as to causal connection is competent and can constitute substantial evidence.” *Hulsey v. Hawthorne Rests., Inc.*, 239 S.W.3d 156, 161 (Mo.App.E.D.2007). “The weight afforded a medical expert's opinion is exclusively within the discretion of the [fact finder].” *Bond*, 322 S.W.3d at 170. “Furthermore, where the right to compensation depends on which of two medical theories should be accepted, the issue is peculiarly for the [factfinder’s] determination.” *Id.* (internal quotes and citation omitted).

While the facts may be more complex than the typical alleged permanent total claim, this case still comes down to the fact finder’s determination as to which of two competing medical experts gives the most persuasive, factually sound, and properly articulated opinion on the key issue of causation. Before addressing the reasons I am more strongly persuaded by one of the medical experts as compared to the others, it is important to clarify that the “medical condition and disability” for which Claimant seeks compensation is permanent and total disability due to the medical condition of her low back.

I find Claimant has presented sufficient competent evidence to support a finding that she is permanently and totally disabled as of June 3, 2013, the date Dr. Abernathie placed her at MMI from her last spinal surgery of August 16, 2012. I credit the testimony of Mr. England that as of the summer of 2013, Claimant’s appearance, need to recline and inability to concentrate or focus due to lack of sleep rendered her unable to compete in the open labor market. Prior to the 2012 surgery, Claimant was gainfully employed, which indicates the issues which now prevent Claimant from working were not present. It is only after the 2012 injury that Claimant can establish total disability. Thus, proof her 2009 work accident is the prevailing factor in Claimant’s 2012 surgery, or at least in Claimant’s condition following the surgery, is an essential element of Claimant’s burden in her quest for PTD benefits.

As will be more fully developed below, I find there are certain facts which support a finding for the SIF: 1) Claimant’s extensive preexisting and deteriorating back condition; 2) Claimant’s highly accommodated prior work experience, which continued for nearly three years after the work accident; 3) the lack of any evidence showing an objective, physical change following the work accident; and 4) Claimant’s unreliability as a historian. In light of those and other compelling facts, as well as the expert opinions, I find the evidence does not support a finding Claimant’s accident was the prevailing factor in causing both the resulting medical condition and her total disability.

One cannot ignore the significance of her preexisting low back condition. In just over three years beginning in October 2005, Claimant underwent no fewer than five (5) surgeries to the low back, including several fusions, bone grafting, adjustment/replacement of hardware, and one excision of a lipoma. She continued to have pain after the surgeries and her condition continued to deteriorate. Following her January 23, 2009 surgery, her symptoms increased when she fell at home, were not relieved by water therapy, and continued to require pain medications including narcotics – in mid-April she was still on Percocet. While there is conflicting evidence as to her ongoing complaints from Spring 2009 to the primary injury in September 2009 (see below), no evidence disputes the fact Claimant had a deteriorating, degenerative back condition which accounted for significant disability before her work incident.

In addition to Claimant's extensive prior back treatment, Claimant was highly accommodated at work prior to the primary accident. At the end of May 2009, Dr. Grus referred Claimant for social security disability because he thought her multiple spine surgeries and back pain prevented her from being able to work anymore. Despite this opinion, Claimant returned to work at or after the end of May. When Claimant returned to work, Employer continued to provide several special accommodations to her already sedentary job, including a work station on the first floor, a sit/stand desk, and an extra long cord. Claimant worked with the same accommodations for almost three years. The fact Claimant's prior disabilities required extensive accommodations and were found by at least one expert to have removed Claimant from the workforce further supports the existence of significant preexisting disability. In addition, that Claimant continued to work for years after the accident supports the conclusion there is no causal connection between the accident and Claimant's medical condition and disability.

There is no evidence of any structural change resulting from the work accident on September 16, 2009. Although Claimant was very concerned she had displaced hardware or otherwise harmed her new fusion, there is no evidence of any such failure. X-rays showed implants unchanged, and a CT myelogram demonstrated fusion with integration of the interbody spacers at all levels. Dr. Buchowski found no evidence of instrumentation fracture, no change in alignment of cages from previous studies, no irregularities of shape and contour of the vertebral body and normal alignment. Likewise, Dr. deGrange found there was no radiographic evidence of an obvious pseudarthrosis or hardware failure. Even Dr. Margolis confirmed the tests showed all of the instrumentation in the appropriate position, no indication of misalignment, and no acute changes to the spine. Thus, there is no objective evidence of any changes to the physical structure of the body following and because of the work accident.

Claimant's case is not helped by the fact she presented conflicting evidence on a key fact: the level of well being she reported immediately prior to her work accident. She described to Dr. Abernatie that she was "essentially well" between January and September 2009. She told Dr. Dave that after the 2009 surgery, she was "off the medication," and that the pain in her back and legs started after her work fall. At hearing, she testified she was off prescription medication and worked full days, but took OTC pain meds, used a TENS unit and applied ice. Even Dr. Margolis, her own expert, admits she is "a little bit inaccurate" when she reported to him her pre-work accident condition was perfectly fine and attributed all of her then current complaints to the fall at work. I do not believe Claimant was deceptive in any way, but I do not believe the evidence supports a finding that she was "essentially well" prior to the work accident such that all her current symptoms can be related to the fall at work.

In light of these factual findings, and based on the record as a whole, I find the opinion of Dr. deGrange to be the most persuasive on the issue of prevailing factor. Based on Claimant's personal description of the accident and the applicable medical evidence, Dr. deGrange found the primary injury amounted to a lumbar strain without any objective evidence of further derangement of the lumbar spine. Indeed, of the various diagnostic tests run after 2009, not one showed evidence that the preexisting spinal fusion and related hardware was misplaced, bent, broken or altered in any way. Claimant's fear that something broke or became loose after her 2009 accident was unfounded. I find Claimant suffered a soft tissue sprain and reached MMI from the September 2009 primary injury shortly after it occurred.

Based on her overall condition, Dr. deGrange diagnosed Claimant with failback surgery syndrome. I am persuaded all Dr. deGrange's conclusions in this case, particularly the following statement which accurately explains (with emphasis added) the relationship between Claimant's work accident and her current medical condition and disability (with emphasis added):

The [Claimant's] work at [Employer] is a factor for the development of her current condition but **cannot be considered the prevailing factor** given the extensive and complex history of six prior surgeries that have occurred over the last four years. These prior spine surgeries far outweigh the incident in question as described by the patient.

He ultimately did not feel that she needed any permanent work restrictions since she was employed in a sedentary position. He opined that the bulk of the treatment Claimant received was a result of her pre-existing back condition.

Dr. Margolis's opinion is insufficient to meet Claimant's burden. When he examined Claimant, she was five months post-surgery, still wearing a brace, and had not been placed at MMI by the treating physician. He recounted Claimant self-reported history, some of which he admitted was inaccurate as to important facts, conducted a limited exam, gave a cursory or no summary of the records he reviewed, and delivered a conclusion without any explanation. Nevertheless, his diagnosis of lumbar sprain-strain was consistent with the opinions of Dr. deGrange and the other experts in this case. While he stated the sprain resulted in exacerbation of pain related to her prior fusion, his basis for doing so was Claimant's self-reported and somewhat unreliable history. I find Dr. Margolis' opinion flawed and unpersuasive.

Dr. Abernathie¹⁰ specifically declined to address the issue of causation, but did make some comments that on their face might support Claimant's case (see quote above, page 8). However, because he 1) unequivocally states he is uncomfortable making statements regarding causation; 2) considered as crucial her discredited statement that she was essentially well between January of 2009 and September 2009; and 3) was not given a chance to explain the inconsistencies in a deposition, I do not feel Dr. Abernathie's speculation that the fall caused the muscle about the rod to aggravate, can form a sufficient basis to find in Claimant's favor. See *Malam v. State Dep't of Corr.*, No. SD 33620, 2015 WL 3896936, at 5 (Mo. Ct. App. June 24, 2015), *reh'g and/or transfer denied* (July 17, 2015)(Where an expert's conclusions stemmed from an incorrect understanding of the facts, the expert testimony is thus impeached, and the fact-finder is free to disregard it, even in the absence of other credible testimony). I further find

¹⁰ As with Dr. deGrange, Dr. Abernathie was not deposed, so we only have the plain language on which to rely.

Dr. Abernathie uses word “aggravate” as shorthand for “something less than a prevailing factor,” not to describe a *resulting medical condition*, a distinction made by the courts in *Johnson v. Ind. Western Express, Inc.*, 281 S.W.3d 885, 890- 93 (Mo. App. 2009) and *Gordon v. City of Ellisville*, 268 S.W.3d 454, 459-460 (Mo. App. 2008) and acknowledged by the LIRC in: BETTY SHACKLEFORD EMPLOYER: SAB OF THE TSD OF THE CITY OF ST. LOUIS INSURER: SELF-INSURED, 2015 WL 3856104, at 1.

The case at hand is very different from *Maness v. City of De Soto*, 421 S.W.3d 532, 539-40 (Mo. Ct. App. 2014), a case where the employee met his burden. Mr. Maness’ work accident was determined to be the prevailing factor in his neck condition, despite Dr. deGrange’s opinion that his preexisting degenerative condition was the prevailing factor. However, in *Maness*, the work accident aggravated a preexisting but asymptomatic degenerative condition, and caused a cervical disc herniation. In contrast, Claimant here had a history of being highly symptomatic due to multiple surgeries prior to her work injury. Furthermore, here there is no evidence of a disc herniation or any other change to the physical structure of the body as a result of the work event. These factual distinctions render *Maness* and its progeny inapplicable.

In sum, I find Claimant work accident of September 17, 2009 is not the prevailing factor in Claimant’s medical condition and total disability. Given the vast extent of her preexisting disability, the lack of evidence of any objective change to the physical structure of the body, and the relative strength and weakness of the expert opinions outlined above, I must credit as persuasive the opinion of Dr. deGrange. I find the work accident cannot be considered the prevailing factor in her medical condition and disability given the extensive and complex history of multiple surgeries which far outweigh the effect of the work accident. The Second Injury Fund is not liable for permanent total disability benefits.

2. Permanent Disability/Liability of the Second Injury Fund

Determining the Second Injury Fund is not liable for permanent total disability does not always end the analysis because the Fund might be responsible for permanent partial disability. See *Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund*, 138 S.W.3d 714, 718 (Mo. 2004) (Claimant produced sufficient competent evidence that she is entitled to benefits for permanent-partial disability, but not permanent-total disability). To establish permanent-partial disability against the Fund, a claimant must prove that her present compensable injury, combined with preexisting permanent-partial disabilities, causes greater overall disability than the sum of the disabilities independently. *Id* at 717. She must prove the nature and extent of any disability by a reasonable degree of certainty. *Id*.

Claimant has failed to prove the nature and extent of any disability attributable to the primary injury by a reasonable degree of certainty. Having found Claimant sustained a sprain/strain type injury as a result of the all at work, which injury resolved shortly after it occurred, it is necessary to have an expert opinion addressing the nature and extent of that 2009 disability. The only expert to provide a rating is Dr. Margolis, whose opinion is flawed because he considers Claimant’s disability as of 2013, which is four years after she reached MMI for the compensable injury and includes factors unrelated to the compensable injury. Without competent and substantial evidence of the nature and extent of the disability resulting from the sprain/strain of September 2009, it is not possible to establish Second Injury Fund liability for

permanent partial disability. To the extent Claimant's medical condition and disability are the result of the deterioration of her preexisting condition, the Second Injury Fund is not liable. *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo.App. E.D. 1995)(the Second Injury Fund is not liable for any progression of claimant's preexisting disabilities not caused by claimant's last injury).

I find Claimant has not established a right to recover permanent partial disability because she does not have competent evidence to establish the extent of disability associated with the primary injury; and because the primary and preexisting disabilities include the same body part, the extent of the preexisting disability is questionable as well. Claimant's evidence, that the extent of disability from the primary injury includes the disability attributed to the last surgery, is contrary to the facts found herein. To assign a primary and preexisting permanent disability would require speculation. Claimant has not established a right to recover permanent partial disability benefits from the Second injury Fund.

CONCLUSION

Although Claimant sustained an accidental injury, it was not the prevailing factor in causing her current medical condition and total disability. Claimant did not meet her burden of proof entitling her to recover any level of benefit from the Second Injury Fund. The claim against the Second Injury Fund is denied.

Made by: _____
KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation