

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

Injury No.: 04-065242

Employee: Charlotte Rose
Employer: Centene Management
Insurer: Hartford Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: April 2, 2004

Place and County of Accident: St. Francois 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 June 27, 2007. The award and decision of Administrative Law Judge Jack H. Knowlan, Jr., issued June 27, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 7th day of January 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Charlotte Rose

Injury No. 04-065242

Dependents: Not Identified

Employer: Centene Managment

Additional Party: Second Injury Fund

Insurer: Hartford Insurance Company

Hearing Date: February 22, 2007
(Hearing concluded March 21, 2007)

Checked by: JK / KH

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease? April 2, 2004
5. State location where accident occurred or occupational disease contracted: St. Francois County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident/occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted:
Employee was working as a claims analyst and developed pain in her neck, shoulder and arms as a result of repetitive data entry and typing on a computer.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: cervical spine
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to date for temporary total disability: None
16. Value necessary medical aid paid to date by employer-insurer: \$1,514.99
17. Value necessary medical aid not furnished by employer-insurer: \$1,249.22.
18. Employee's average weekly wage: \$590.08
19. Weekly compensation rate: \$393.39 for temporary total disability and permanent total disability, and \$347.05 for permanent partial disability.
20. Method wages computation: By agreement
21. Amount of compensation payable:

Previously incurred medical expenses:	\$ 1,249.22
Temporary total disability:	<u>2,585.13</u>
Total payable by employer-insurer for temporary total disability and additional medical:	\$ 3,834.35

22. Second Injury Fund liability: Claim denied

23. Future requirements awarded:

Claim for future medical denied (See findings)

Employer-insurer is directed to pay to the employee the sum of \$393.39 per week commencing on November 18, 2004, and continuing for the lifetime of the employee pursuant to Section 287.200.1, unless said payments are suspended during a time in which the employee is restored to her regular work or its equivalent as provided in Section 287.200.2 (See findings).

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

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to claimant: Terry A. Bond

FINDINGS OF FACT AND RULINGS OF LAW

On February 22, 2007, the employee, Charlotte Rose, appeared in person and by her attorney, Mr. Terry A. Bond, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Mr. John P. Palombi. The Second Injury Fund was represented at the hearing by Assistant Attorney General, Greg Johnson.

Prior to the hearing, the Second Injury requested that the record be left open to allow the Second Injury Fund to complete the deposition of Dr. Jerome Levy. Neither the employee nor the employer-insurer objected. Based on that request, at the conclusion of the hearing on February 22, 2007, the record was left open and the hearing was continued for the limited purpose of allowing the Second Injury Fund to complete the Deposition of Dr. Jerome Levy. Dr. Levy's deposition was subsequently received on March 21, 2007, and the record was closed and the hearing completed as of that date.

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

UNDISPUTED FACTS

1. On or about April 2, 2004, Centene Management was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and was fully insured by Hartford Insurance Company.
2. On or about April 2, 2004, Charlotte Rose was an employee of Centene Management, and was working under the provisions of the Missouri Workers' Compensation Act.
3. On or about April 2, 2004, the employee sustained an accident or occupational disease that arose out of and in the course of her employment.
4. The employer had notice of the employee's accident or occupational disease.
5. The employee's claim for compensation was filed within the time allowed by law.
6. The employee's average weekly wage was \$590.08. The employee's rate of compensation for temporary total disability and permanent total disability is \$393.98, and her rate of compensation for permanent partial disability is \$347.05.
7. The employer furnished no medical aid.
8. The employer paid no temporary total disability benefits.

ISSUES

1. Additional medical aid – previously incurred medical expenses and future medical aid
2. Nature and extent of disability - permanent total or permanent partial disability
3. Liability of the Second Injury Fund

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Deposition of Samuel Bernstein, Ph.D.
- B. Resume of Samuel Bernstein, Ph.D.
- C. April 15, 2005 report of Samuel Bernstein, Ph.D
- D. Deposition of Dr. David T. Volarich
- E. Curriculum vitae of Dr. David T. Volarich
- F. May 17, 2005 report of Dr. David T. Volarich
- G. Report of Dr. George R. Schoedinger, III
- H. August 9, 2004 radiology report from St. Anthony's Medical Center
- I. August 10, 2004 radiology report from St. Anthony's Medical Center
- J. Supplemental report of Dr. George R. Schoedinger, III.
- K. Deposition of Dr. George R. Schoedinger, III.
- L. Curriculum Vitae of Dr. George R. Schoedinger, III.
- M. Medical records of Dr. George R. Schoedinger, III.
- N. Functional Abilities Evaluation

Employer's Exhibits

1. Deposition of Dr. Frank O. Petkovich
2. Deposition of June M. Blaine, MS, CRC, CDMS.

Second Injury Fund Exhibits

1. Deposition of Dr. Jerome F. Levy

FINDINGS OF FACT

Based on the employee's testimony, the medical records and the other evidence admitted, I find as follows:

Education and Work History

- Charlotte Rose ("employee") was 47 years old at the time of the hearing.
- Her education included graduating from high school and 6 weeks of additional night classes.
- The employee's work history included working in a factory, as a receptionist, a sales clerk, baby sitting, clerical work for an insurance company, and a number of jobs for insurance companies in which she worked with the processing or appeal of claims.

Pre-existing Condition

- In 1995 the employee had a motor vehicle accident that caused an injury to her cervical spine. As part of her treatment for that injury, Dr. George Schoedinger performed an anterior cervical discectomy and fusion at the C5-6 level.
- After she recovered from that accident and surgery, the employee had no symptoms or limitations related to her cervical spine. The employee was able to function at work and at home without any restrictions, and did not limit her activities in any way as a result of her prior cervical fusion.

Primary Injury

- In May of 2003 the employee started working for Centene Management as a claims analyst. Her job required her to take care of appeals after claims were denied, and she spent most of her time entering data and typing on her computer.
- In February of 2004 the employee started developing pain in the left side of her neck with numbness and tingling in her shoulder. She later developed swelling in her right arm and reported her symptoms her employer.
- After the doctors selected by the employer-insurer failed to correctly diagnose her condition or relieve her symptoms, the employee returned to see Dr. George Schoedinger. Her initial appointment was on June 28, 2004.
- An MRI and a myelogram confirmed the employee had left paracentral disc protrusions at both the C4-5 and

C6-7 levels. After conservative treatment failed to improve the employee's symptoms, Dr. Schoedinger ordered a discography at both levels. Based on the discography, Dr. Schoedinger recommended a fusion at the C4-5 level. After discussing the issue with the employee, Dr. Schoedinger decided not to fuse the C6-7 level because he wanted to avoid a 3-level fusion (employee's exhibit K, page 14).

- On September 9, 2004, Dr. Schoedinger performed an anterior discectomy and instrumented interbody fusion at the C4-5 level (employee's exhibit M).
- Prior to her surgery, the employee had changed employers, and was working for Hawthorne Billing Group from June 25, 2004 until the day before her surgery on September 8, 2004. Following her surgery, Dr. Schoedinger allowed the employee to return to work on October 25, 2004. The employee initially worked part time, and gradually tried to increase her hours. Within a few weeks the employee developed headaches and pain with numbness and tingling down both arms. On November 17, 2004, the employee called Dr. Schoedinger, and he advised her to stop working and scheduled her for an appointment on November 18, 2004. Dr. Schoedinger then recommended additional physical therapy.
- After the physical therapy increased her symptoms, Dr. Schoedinger saw the employee on December 6, 2004, and determined that she had reached her maximum level of medical improvement. Dr. Schoedinger suggested that the employee apply for social security disability, and released her on a "p.r.n." basis (employee's exhibit M). The employee applied for and received social security disability in April of 2005.
- In a follow-up letter dated January 4, 2005, Dr. Schoedinger gave the employee a 20% impairment rating, but deferred any opinion regarding her ability to work pending a functional capacity evaluation (employee's exhibit M).
- A Functional Abilities Evaluation performed February 10, 2005, concluded that although the employee displayed the physical ability to perform at a sedentary level, she "could not tolerate the required prolonged or frequent sitting or the prolonged cervical positioning and frequent cervical motion that would be required for most sedentary work" (employee's exhibit N).
- Based on his review of this report, Dr. Schoedinger concluded "the patient, based on functional capacity testing performed on 02-10-05, is incapable of performing sedentary work" (March 03, 2005 letter in employee's exhibit M).
- Dr. Schoedinger's last examination of the employee occurred on February 16, 2006, and he concluded that there was "no material change in her status" (employee's exhibit M).

Current Complaints and Limitations

- During the course of the hearing, the employee appeared to be suffering significant pain and discomfort in her cervical area that was very disabling. The employee was a credible witness.
- The employee's level of pain is affected by her level of activity. If she is up too long she develops headaches, numbness and tingling and a heavy sensation in her arms and shoulders. The employee has to lie down or sit in a recliner with her head resting to obtain relief. She is currently taking over-the-counter medication to relieve the pain.
- During a typical day the employee tries to do some housework, but has to take periodic breaks to rest her head in her chair. She noted that it takes several hours with breaks to vacuum or dust her house, and she can only do a little each day. The employee also tries to take walks, but can only go a short distance before her symptoms increase. The employee is able to do some laundry, but is limited to "light" loads. She also has difficulty going down stairs because she cannot look down to see the stairs. It is also painful for her to turn her head to the right. The employee is able to send E-mails on her computer, but cannot do more than 5 to 10 minutes before she has to stop due to an increase in her neck pain. She also has difficulty talking on the telephone for very long because when she is holding the phone she feels pressure and her arm starts to feel "like it is dead". The employee is able to drive short distances and go to the grocery store, but can only carry light items. If she needs anything heavier than a milk bottle, she has to get help from her family.
- Prior to her last neck injury the employee was very active. She enjoyed riding 4 wheelers, going to her son's baseball games and going to movies. She also had no problems lifting, and was working in excess of 40 hours per week. Since her last surgery, the employee is no longer able to participate in those activities because of neck and arm pain. Prior to April of 2004, the employee had no problems walking and typically walked several miles for exercise. She now has problems if she walks more than a block.
- The employee never has a time when she is free from pain, and almost any activity that requires her to use her neck, hands or arms increases her level of pain. The employee has problems writing by hand because it causes pressure and numbness in her arm and the side of her neck. She suffers similar symptoms if she tries to read, do puzzles or types for more than a few minutes.

Medical and Vocational Testimony

Samuel Bernstein, Ph.D.

Dr. Bernstein is a psychologist and vocational rehabilitation counselor. Dr. Bernstein interviewed the employee on April 15, 2005. Based on his interview, testing and review of medical records, Dr. Bernstein concluded the

employee was suffering from depression, and would not be capable of maintaining employment due to the problems she was having with her neck and upper extremities (employee's exhibit A, page 26). Dr. Bernstein felt the employee was unemployable in the open labor market and was permanently and totally disabled (employee's exhibit A, pages 28, 29 and 30).

David T. Volarich, D.O.

Dr. Volarich examined the employee on May 17, 2005. Based on his examination of the employee, her medical history and his review of the medical records, Dr. Volarich diagnosed the employee as having "cumulative trauma to the cervical spine causing disk protrusion/herniation at C4-5 with discogenic pain status post anterior cervical discectomy and fusion at C4-5" (employee's exhibit D, page 23). For the pre-existing injury, Dr. Volarich diagnosed a herniated nucleus pulposus at C5-6 status post anterior cervical discectomy and fusion. Dr. Volarich also diagnosed the employee as having depression (employee's exhibit D, page 24). Dr. Volarich concluded the employee was at MMI, and rated her with a 30% permanent partial disability for her last cervical injury and a 30% permanent partial disability for her pre-existing cervical injury (employee's exhibit D, page 26, 33, and 34). Although Dr. Volarich did not feel the employee would benefit from further surgery, he suggested that she might need further treatment to maintain her current status (employee's exhibit D, page 37, 38). Dr. Volarich further testified that he believed the employee was permanently and totally disabled as a result of a combination of her April 2004 injury with her pre-existing injury (employee's exhibit D, page 41).

During cross examination by the Second Injury Fund, Dr. Volarich agreed that he had based his opinion that the employee's permanent total disability was due to a combination of her two cervical fusions on his recorded history that she had similar problems after her first fusion. When confronted with the employee's deposition testimony that indicated that she was doing "absolutely fine" and had no difficulties with her first fusion until 2004, Dr. Volarich agreed that he might have to "reconsider my opinion" if that could be verified (employee's exhibit D, page 52).

George Schoedinger, III., M.D.

Dr. Schoedinger's deposition was taken on June 9, 2006. After reviewing his treatment records, Dr. Schoedinger reiterated his opinion that based on the functional ability evaluation, the employee was not capable of performing sedentary work (employee's exhibit K, page 10). He further agreed that he believed the employee was at MMI, and was permanently and totally disabled (employee's exhibit K, page 12).

During cross examination by the employer-insurer, Dr. Schoedinger agreed that "a case could be made" for the argument that the prior fusion at the C5-6 level may have weakened the levels above and below. He noted that there are clinical reports of degenerative changes that are accelerated above and below the level of a fusion (employee's exhibit K, page 14).

During additional cross examination by the Second Injury Fund, Dr. Schoedinger agreed that his records were consistent with a conclusion that after she was released for her 1995 fusion and prior to 2004, the employee was doing great and having no problems with her neck or arms (employee's exhibit K, page 18).

Frank O. Petkovich, M.D.

Dr. Frank Petkovich is an orthopedic surgeon, and examined the employee at the request of the employer-insurer on January 7, 2005. Based on his examination and his review of the medical records, Dr. Petkovich concluded the employee was at MMI, and he did not believe she needed any additional treatment (employer-insurer exhibit 1, page 7). Dr. Petkovich felt the employee had a 10% permanent partial disability related to her February, 2004 injury (employer-insurer's exhibit 1, page 13). Dr. Petkovich did not offer an opinion as to whether the employee could return to work, but indicated he would defer to the functional capacity evaluation (employer-insurer's exhibit 1, page 12). Dr. Petkovich also did not provide a rating for the employee's prior cervical disc fusion (employer-insurer's exhibit 1, page 14).

During cross examination by the Second Injury Fund, Dr. Petkovich agreed that the employee's prior cervical disc had "pretty much cooled down and became quiescent" and "really didn't bother her much until she states she injured herself again in 2004" (employer-insurer's exhibit 1, page 33).

June M. Blaine, MS, CRC, CDMS

Ms. June Blaine is a certified rehabilitation counselor. Ms. Blaine performed a vocational assessment of the employee on August 4, 2005. Based on Dr. Petkovich's conclusions, Ms. Blaine concluded "I did believe that she was employable, and there were other types of jobs that fell outside of what I would consider the repetitive, you know, continuous data-entry-type activities that you might do" (employer's exhibit 2, page 13). To reach this conclusion, Ms. Blaine had to rely on Dr. Petkovich's opinions. Ms. Blaine acknowledged that if she followed Dr. Schoedinger's conclusion that the employee is not able to work even at the sedentary level, "we would not recommend exploring work options" (page 5 of Vocational Assessment admitted as deposition exhibit 2, attached

to employer-insurer's exhibit 2).

Jerome F. Levy

Based on a review of the medical records and the employee's deposition, Dr. Levy prepared a report for the Second Injury Fund dated November 29, 2006. Dr. Levy concluded that prior to her injury in 2004, the employee had "very minimal ratable disability" from the prior fusion, and that was only because of the plates and screws in her neck (SIF exhibit 1, page 9). Dr. Levy further concluded that "as far as her function was concerned, she was able to function normally, and I do not think it significantly affected her ability to carry out work or work activities or activities of daily living". Dr. Levy therefore felt that the "vast majority of her disability and inability to work" is attributable to the work activities in 2004 (SIF exhibit 1, pages 9, 10).

During cross examination by the employer-insurer's attorney, Dr. Levy noted that there is not necessarily any loss of range of motion from a one-level cervical fusion (SIF exhibit 1, page 18). He did agree, however, that a cervical fusion at one level may put more strain on the levels above and below, and there is consequently more potential for a possible injury to those adjoining levels (SIF exhibit 1, page 19). Dr. Levy added that the increased risk of an injury to the levels above and below is "Not great, the increase, but slightly increased because of the stabilization of the one level" (SIF exhibit 1, page 19).

APPLICABLE LAW

- The standard of proof for entitlement to an allowance for future medical aid cannot be met simply by offering testimony that it is "possible" that the claimant will need future medical treatment. *Modlin v Sunmark, Inc.*, 699 S.W. 2d 5, 7 (Mo.App.1995). The cases establish, however, that it is not necessary for the claimant to present "conclusive evidence" of the need for future medical treatment. *Sifferman v Sears Roebuck and Company*, 906 S.W. 2d 823, 838 (Mo. App.1995). To the contrary, numerous cases have made it clear that in order to meet their burden, claimants are required to show by a "reasonable probability" that they will need future medical treatment. *Dean v St. Lukes Hospital*, 936 S.W. 2d 601 (Mo.App.1997). In addition, employees must establish through competent medical evidence that the medical care requested, "flows from the accident" before the employer is responsible. *Landers v Chrysler Corporation*, 963 S.W. 2d 275, (Mo.App.1997).
- Section 287.020.7 RSMo. provides as follows:

The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

- The phrase "the inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the "inability to return to any reasonable or normal employment". *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that persons physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).
- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

- Under Section 287.220.1 RSMo., the Second Injury Fund has no liability and the employer is responsible for full, permanent total disability benefits if the last injury "considered alone and of itself" results in permanent total disability. *Roller v Treasurer of the State of Missouri*, 935 S.W.2d 739 (Mo.App.1996) and *Maas v*

- *Treasurer of the State of Missouri*, 964 S.W.2d 541 (Mo.App.1998).
- The Second Injury is not liable for a disability where the employee had an asymptomatic pre-existing congenital deformity (a Kilppel-Fiel deformity) that was not an actual and measurable disability at the time of the last work injury. A pre-existing condition is not an actual and measurable disability where it does not interfere with the employee's work duties. An employer, not the Fund, is liable where an asymptomatic pre-existing condition that did not previously interfere with work duties becomes symptomatic and results in an overall disability only after being aggravated by a work injury. *Portwood v Treasurer of the State of Missouri – Custodian of the Second Injury Fund*, Case No. WD67140, (Mo.App.W.D. April 17, 2007).

RULINGS OF LAW:

Issue 1. Additional Medical Aid – Previously Incurred and Future Medical

Previously Incurred Medical

The employee's medical bills related to the treatment she received from Dr. Shoedinger were apparently paid through her health insurance. Prior to the hearing the parties submitted a "Stipulation", and under paragraph 9 of the agreement, the employer-insurer agreed to indemnify and hold the employee harmless if the health insurance company makes any claim for reimbursement for amounts paid for injuries related to the April 2, 2004 accident. At the time of the hearing, the employer-insurer further stipulated on the record that the employee is entitled to an award for medical expenses in the amount of \$789.22 that were paid by the employee, and \$460.00 that is still owed to St. Anthony's Hospital, for a total of \$1,249.22.

Based on this stipulation, the employer-insurer is directed to pay to the employee the sum of \$1,249.22 for previously incurred medical expenses. The employee's attorney advised that he would not be requesting an award of attorney's fees for the amount awarded for medical expenses.

Future Medical

Although the employee was clearly miserable during the hearing and has requested an award for additional medical treatment, there is no credible evidence to support an award for future medical aid.

The employee has not sought or received any medical treatment for her cervical spine since she was released by Dr. Schoedinger. No physician is suggesting the employee would benefit from further surgery, and she is not taking any prescription medication for her cervical spine. Dr. Volarich's statement that she would benefit from further treatment was a generic conclusion, and was not credible. Neither Dr. Schoedinger nor Dr. Petkovich provided any suggestions to justify an award of future medical aid, and their opinions on this issue were more credible than that of Dr. Volarich.

Based on these conclusions, the employee's request for an award of future medical is denied.

Issue 3. Nature and Extent of Disability

Temporary Total Disability

The employer-insurer stipulated at the hearing that the employee was temporarily totally disabled for 6 and 4/7ths weeks from September 9, 2004, through October 24, 2004, and is entitled to an award for temporary total disability in the amount of \$2,585.13. Based on this stipulation, the employer-insurer is directed to pay to the employee the sum of \$2,585.13 for temporary total disability.

Permanent Total Disability

The employee has alleged that she is permanently and totally disabled as a result of the April 2, 2004 accident or occupational disease, and the resulting injury to her cervical spine. The employer-insurer asserts that the employee is not permanently and totally disabled, and even if she is, the employer-insurer asserts that it is due to a combination of her last injury and her pre-existing cervical fusion.

On the issue of permanent total disability, I find that the employee, Dr. Schoedinger, Dr. Volarich and Samuel Bernstein were credible. The employee was in severe pain during the hearing, and her level of pain had a significant effect on her ability to function, both physically and mentally.

Given the employee's age, education, work history and her current physical complaints related to cervical spine, I find that the employee is not able to compete in the open labor market, and is therefore permanently and totally

disabled.

I further find that the employee's permanent total disability is causally related to her last injury alone rather than the combination of her last injury with her pre-existing cervical fusion. Both the employee's testimony and the medical evidence indicate that the employee's pre-existing cervical condition was asymptomatic, was not interfering with her work duties, and was not an actual or measurable disability that could trigger Second Injury Fund liability.

The employee was adamant that her 1995 cervical injury was "absolutely fine" and caused "absolutely no problems" before she started experiencing symptoms in 2004. The employee led a full and active life for approximately eight years (both at home and at work), and there is no evidence to indicate her neck was symptomatic or causing any limitations before 2004.

Dr. Volarich's history was ambiguous because he recorded that her current symptoms were similar to those she had with her first neck injury, but he did not specify whether he was referring to a time period before or after the first injury had been corrected by Dr. Schoedinger's surgery. There is not evidence to suggest that the employee had similar symptoms after Dr. Schoedinger performed the first fusion at the C5-6 level. It appears more likely that the employee was referring to the symptoms she had before Dr. Schoedinger's first surgery.

Based on this inaccurate history, I find that Dr. Volarich's opinion that the employee's permanent total disability was due to a combination of the last injury with the pre-existing injury is not credible. I further find that the opinion of Dr. Levy that the employee's inability to work is related to her last injury is more credible than the opinion of Dr. Volarich.

The employer-insurer also tried to create an anatomical or causal link between the first fusion and the last injury based on his cross examination of Dr. Schoedinger and Dr. Levy. While both acknowledged that it was possible that the prior fusion at C5-6 may have accelerated the degeneration or put additional strain on the adjoining levels, Dr. Levy felt this risk was "slight", and there is no convincing evidence to support a finding that the employee's last injury and her resulting disability had any causal nexus or interrelationship to her prior fusion.

After her last surgery for the C4-5 discectomy and fusion on September 9, 2004, the employee was off work until October 24, 2004. The employer-insurer has agreed that it owes temporary total disability benefits for this time period. The employee then made an unsuccessful attempt to return to work on October 25, 2004, until Dr. Schoedinger advised her to stop working on November 17, 2004. The employee has never returned to work since that date.

Based on this evidence, I find that the employee has been permanently and totally disabled from November 18, 2004 through the date of the hearing. The employer is therefore directed to pay to the employee the sum of \$393.39 per week commencing on November 18, 2004, and continuing for the lifetime of the employee pursuant to Section 287.200.1, unless said payments are suspended during a time in which the employee is restored to her regular work or its equivalent as provided in section 287.200.2.

Issue 3. Liability of the Second Injury Fund

As previously noted under Issue 3 above, the evidence supports a finding that the employee's permanent total disability was caused by the last injury alone, considered in and of itself. Therefore, the employer-insurer, and not the Second Injury Fund, is liable for permanent total disability benefits.

I therefore find that the employee has failed to satisfy her burden of proof as to her claim against the Second Injury Fund for either permanent total disability or permanent partial disability. The employee's claim against the Second Injury Fund is denied.

ATTORNEY'S FEE

Terry A. Bond, attorney at law, is allowed a fee of 25% of all sums awarded for temporary total and permanent total disability benefits under the provisions of this award for necessary legal services rendered to the employee. As stipulated by the employee's attorney, the 25% fee shall not apply to the amount awarded for previously incurred medical expenses. The amount of the attorney's fee shall constitute a lien on the temporary total and permanent total disability benefits awarded herein.

INTEREST

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

Date: _____

Made by:

Jack H. Knowlan, Jr.
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Lucas Boling
Acting Director
Division of Workers' Compensation