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

Injury No.: 09-034298

Employee: Lucille Schoen

Employer: Mid Missouri Mental Health Center

Insurer: Self-Insured

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 briefs and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge (ALJ).

Preliminaries

At hearing, the ALJ cited the first issue to be decided as "[W]hether the work accident of May 8, 2009, is the prevailing factor in the cause of any or all of the injuries and/or conditions alleged in the evidence."[1]

In an award dated March 22, 2018, the ALJ found that employee was permanently and totally disabled due to her May 8, 2009, work injuries, including injuries sustained on May 22, 2009, in treating physician Dr. Runde's office; that employer was responsible for payment of weekly permanent total disability benefits; and that the Second Injury Fund (SIF) had no liability.

Employer filed a timely application for review alleging the ALJ's award was erroneous for the following reasons:

1) The weight of the evidence presented supports a finding the employee is not permanently totally disabled.
2) If employee is permanently totally disabled, the SIF is liable for those benefits;
3) The ALJ erred by including alleged injuries to employee's left knee, right knee, left shoulder, left hip, lumbar spine, and neck when assessing the nature and extent of her primary work-related injury; and
4) The ALJ erred in ordering employer/insurer to reimburse employee for past medical charges.

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

[1] *Transcript*, 6.

Findings of Fact

On May 8, 2009, employee complained of throat and eye irritation, coughing and wheezing after exposure to Cypermethrin sprayed around air conditioning units in her work place to control ants. Employee sought emergency room treatment on May 11, 2009. She thereafter returned to work immediately without limitations in regard to ant spray exposure.

In response to employee's continued complaints, employer sent her to occupational and environmental medicine specialist Dr. Eddie Runde for additional evaluation on May 22, 2009. In addition to employee, another person with a small dog was sitting in Dr. Runde's waiting room. While Dr. Runde's receptionist escorted employee from the waiting room to the patient area, in the process of attempting to divert the dog, Dr. Runde accidently kicked employee under her right knee, causing her to trip and fall on her knees. As part of his evaluation, prior to discharging employee that day, Dr. Runde examined employee's knees. He found that she had some mild erythema, full range of motion, and was able to walk with normal gate. Dr. Runde released her to regular duty with no restrictions, and noted that no permanent disability would be expected related to her May 8, 2009, Cypermethrin exposure.

In August 2009, employer sent employee to Dr. Thomas Hyers for an independent medical evaluation. Dr. Hyers opined that employee's work exposure to ant spray was not the prevailing factor for any current complaints regarding her pulmonary functions. Dr. Hyers diagnosed employee with transient bronchitis. He opined that her work caused merely a temporary irritation that would have resolved in a matter of days after the initial exposure.

Dr. Volarich evaluated employee at her attorney's request on July 21, 2014. Dr. Volarich provided the following disability ratings relating to employee's primary, May 8, 2009, injury:

- 5% PPD of the body as a whole due to pulmonary exposure to Cypermethrin
- 15% PPD of the body as a whole due to cervical strain/sprain with aggravation of headaches
- 25% PPD of the body as a whole rated at the lumbar spine due to irreversible aggravation of her lumbar syndrome
- 25% PPD of the left upper extremity rated at the shoulder due to adhesive capsulitis
- 45% PPD of the left lower extremity rated at the knee due to bicompartmental meniscal tears and chondral injuries

On June 3, 2015, orthopedist Dr. George Paletta evaluated employee and assessed the following:

- End stage osterarthritis left knee, moderately severely symptomatic; and
- Degenerative joint disease right knee, minimally symptomatic

Dr. Paletta ultimately concluded that employee's underlying chronic, progressive degenerative joint disease, not her May 8, 2009, injury was the prevailing factor in her need for future medical treatment.

Lastly, Dr. Michael Chabot evaluated employee on July 31, 2015. After reviewing the medical records and imaging studies, Dr. Chabot diagnosed the following conditions:

- History of trip and fall/back contusion;
- Back strain;
- History of chronic multi-level degeneration involving lumbar spine; and
- History of bilateral knee joint arthritis.

Dr. Chabot opined that symptoms relating to employee's strain injury had resolved, that she had reached maximum medical improvement, and that the employee's present complaints "are causally related to multiple pre-existing medical conditions to include multi-articular arthritis more specifically involving the knee joints, multi-level disc degeneration and facet degeneration involving the lumbar spine and degenerative spondylolisthesis unrelated to her work injury."[2]

The employee alleged disabilities relating to her May 8, 2009, ant spray exposure involving pulmonary issues, left knee pain, left shoulder pain, low back pain, and neck pain with headaches.

The ALJ found that the parties "appear[ed] to concede" that injuries employee claimed to sustain as a result of the May 22, 2009, incident in Dr. Runde's office were compensable as part of her May 8, 2009, Cypermethrin exposure.[3] Noting language in *Meinczinger v. Harrah's Casino*[4] to the effect that "Injuries sustained during authorized medical treatment of a prior compensable injury are the natural and probable consequence of the compensable injury," the ALJ found that injuries the employee sustained while she was seeking authorized treatment from Dr. Runde on May 22, 2009, were compensable as part of her May 8, 2009, Cypermethrin exposure. Considering medical records, medical opinions, employee's testimony and her advanced age the ALJ found employee permanently and totally disabled due to her May 8, 2009, work injuries considered in isolation, *including injuries employee sustained in the May 22, 2009, incident in Dr. Runde's office.*

Employer's application for review alleges "The ALJ erred by including alleged injuries to Employee's left knee, right knee, left shoulder, left hip, lumbar spine, and neck when assessing the nature and extent of her primary work-related injury." On appeal, all parties brief the issue of compensability of injuries allegedly sustained by employee on May 22, 2009, in the office of her authorized treating physician, two weeks after her work injury on May 8, 2009. No party disputes that this issue is properly before us for review.

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[2] *Transcript*, 1328.
[3] *Award,* p. 5, n.1.
[4] *Meinczinger v. Harrah's Casino*, 367 S.W.2d 666,669 (Mo. App. 2012), citing *Lahue v. Missouri State Treasurer*, 820 S.W.2d 561,563 (Mo. App. 1991).

Law

Section 287.020.3.1 provides, "An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability."

Conclusions of Law

We credit the expert opinions of Dr. Runde and Dr. Hyers that employee's exposure to Cypermethrin at work on May 8, 2009, was not the prevailing factor for any current complaints regarding her pulmonary functions. Dr. Volarich's de minimis evaluation of 5% PPD of the body as a whole due to employee's ant spray exposure on that occasion does not persuade us otherwise. We conclude that employee sustained no permanent partial disability to her pulmonary functions as a result of her May 8, 2009, Cypermethrin exposure.

The cases of *Meinczinger v Harrah's Casino* and *Lahue v. Treasurer, supra,* represent instances in which an employee is further injured as a direct result of the reasonable course of medical treatment and where the employee's initial injury **was aggravated by the medical treatment itself**. Those cases are dissimilar to the acts presented here. In this case, after employee's exposure to ant spray on May 8, 2009, while merely in Dr. Runde's office on May 22, 2009, employee slipped and fell after Dr. Runde accidently tripped her. This unfortunate mishap though taking place in the doctor's office, was not part of the course of any medical treatment employee was undergoing due to her ant spray exposure and did not arise out of any risk source inherent in her employment.

In *Bear v. Anson Implement, Inc.,*[5] the Court of Appeals cautioned against concluding, under Missouri law, that anything happening to an injured worker in the course of a visit to a doctor is compensable. The injuries employee allegedly sustained while visiting Dr. Runde's office were clearly not the direct result of any necessary medical treatment for her primary injury. We conclude there is no causal connection between alleged disabilities relating to employee's left knee pain, left shoulder pain, low back pain, and neck pain with headaches and her Cypermethrin exposure at work on May 8, 2009.[6]

Because we have found that employee sustained no PPD in connection with her primary injury, her SIF claim for disability attributable to the combination alleged pre-existing disabilities together with disability attributable to the primary injury is moot.

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[5] *Bear v. Anson Implement, Inc.*, 976 S.W.3d 553,555 (Mo. App. 1998).
[6] See also *Jennings v. Station Casino St. Charles*, 196 S.W.3d 552,557 (Mo. App. 2006); *Martin v. Town and Country Supermarkets*, 220 S.W.3d 836,847 (Mo. App. 2007).

Decision

We reverse the award of the administrative law judge.

Employee's claim is denied because she failed to meet her burden of proving that her May 8, 2009, work injury was the prevailing or primary factor causing any permanent disability.

The award and decision of Administrative Law Judge Robert J. Dierkes, issued March 22, 2018, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 10th day of October 2018.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

Robert W. Cornejo, Chairman

Reid K. Forrester, Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

DISSENTING OPINION

The pivotal issue in this case is whether the employee's work accident of May 8, 2009, is the prevailing factor causing the injuries and conditions alleged in her compensation claim.

The employee's exposure to Cypermethrin while at work on May 8, 2009, is not in dispute. On May 11, 2009, employee sought treatment for burning lungs, a persistent cough and wheezing at a hospital urgent care clinic. After discharge, she continued to have problems with her respiratory functions. In response to employee's complaints, employer referred her to Dr. Eddie Runde, an occupational medicine physician in Columbia, for evaluation on May 22, 2009. As the administrative law judge (ALJ) found:

> Dr. Runde sent Claimant "across the street" to get a chest x-ray. After obtaining the chest x-ray, Claimant returned to Dr. Runde's office and was sitting in the waiting room. Also in the waiting room was a person with a small dog. As Claimant was being escorted from the waiting room to the patient care area, the dog followed Claimant into the patient area. Dr. Runde attempted to kick the dog, but instead kicked Claimant violently under her right knee, knocking her to the floor.[7]

Based on the credible opinion of Dr. David Volarich, the ALJ awarded permanent total disability to the employee based on injuries incurred due to her May 8, 2009, work injury including injuries she sustained while seeking authorized treatment from Dr. Runde on May 22, 2009.

In *Meinczinger v. Harrah's Casino*, 367 S.W.2d 666 (Mo. App. 2012), the Eastern District Court of Appeals found that a 2007 injury to the employee's right knee and left hip, received while receiving physical therapy for a 2002 work-related injury to her left knee, flowed as a natural consequence of the employee's original, 2002 injury, and was therefore not separate from her compensable injury.

In *Lahue v. Missouri State Treasurer*, 820 S.W.2d 561 (Mo. App. 1991), decided over two decades earlier, the Western District found that an injury to the employee's right hip and low back sustained when she fell off a chair on which she was sitting while undergoing whirlpool therapy nine days after a work-related right ankle injury was compensable. The court stated "The ankle injury sustained while at work and the hip and low back injury sustained nine days later while receiving treatment for the ankle injury constituted a single injury in the workers compensation vocabulary." *Id.* 562. *Lahue* concluded, "Injuries sustained during authorized medical treatment of a prior compensable injury are the natural and probable consequence of the compensable injury **and the employer is liable for all resulting disability.**" (emphasis added)[8]

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[7] *Award*, p. 4-5.

[8] *Lahue v. Missouri State Treasurer*, 820 S.W.2d 561 (Mo. App. 1991) citing *Manley v. American Packing Co.*, 363 Mo. 744, 253 S.W.2d 165 (Mo. 1952), et al.

Employer cites the Western District case of *Bear v. Anson Implement* 976 S.W.2d 553 (Mo. App. 1998) in support of its argument that injuries employee sustained as a result of being kicked by Dr. Runde while visiting his office for treatment on May 22, 2009, are not compensable because they bear no relationship to her May 8, 2009, Cypermethrin exposure or any medical treatment Dr. Runde provided.

Bear, however, did not overrule *Lahue's* holding that injuries sustained *during authorized treatment for a work-related injury* are the natural and probable consequence of the compensable injury and therefore compensable. Furthermore, the instant case is factually distinct from *Bear. Bear* held that injuries sustained by an employee in a motor vehicle accident *while on the way home* from an employer-authorized doctor visit were not compensable. Here, the employee sustained additional injuries in the course of receiving authorized medical treatment for her work injury and as a direct result of her treating physician's actions in his medical office. As a matter of law, therefore, injuries the employee sustained on May 22, 2009, flowed as a natural consequence of her original, May 8, 2009, work injury.

The ALJ correctly found that disability assessed by Dr. Volarich to employee's pulmonary functions, as well as disability related to injuries she suffered as a result of the May 22, 2009, accident in Dr. Runde's office, rendered her permanently and totally disabled.

Because the majority finds otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

AWARD

Employee: Lucille Schoen

Dependents:

Employer: Mid Missouri Mental Health Center

Add'l Party: Second Injury Fund

Insurer: Self-Insured

Hearing Date: February 2, 2018

Injury No. 09-034298

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: RJD/cs

FINDINGS OF FACT AND RULINGS OF LAW

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: May 8, 2009.

5. State location where accident occurred or occupational disease was contracted: Columbia, Boone County, Missouri.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? Yes.

9. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? Employer is self-insured.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: On May 8, 2009, Employee was exposed to Cypermethrin, damaging her respiratory system. On May 22, 2009, while Employee was undergoing authorized treatment, Dr. Eddie Runde kicked Employee, causing Employee to fall and sustain additional injuries.

12. Did accident or occupational disease cause death? No. Date of death? N/A.

13. Part(s) of body injured by accident or occupational disease: Lungs, respiratory system, knees, left shoulder, left hip, lumbar spine, neck, body as a whole.

14. Nature and extent of any permanent disability: Employee is permanently and totally disabled.

15. Compensation paid to-date for temporary disability: None.

16. Value necessary medical aid paid to date by employer/insurer? $17,230.15.

17. Value necessary medical aid not furnished by employer/insurer? $40,233.93.

18. Employee's average weekly wages: $824.99.

19. Weekly compensation rate: $549.99 for permanent total disability benefits; $404.66 for permanent partial disability benefits.

20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

Employer is ordered to pay Claimant the sum of $40,233.93 for reimbursement of charges for necessary medical treatment.

Employer is also ordered to provide Claimant with all such future medical care and treatment reasonably necessary to cure and relieve Claimant from the effects of the work-related injury of May 8, 2009.

Employer is further ordered to pay Claimant permanent total disability benefits of $549.99 per week, beginning August 23, 2011, for Claimant's lifetime.

The claim against the Second Injury Fund is denied in full.

Claimant's attorney, Truman Allen, is allowed 25% of benefits awarded hereunder, including future installments of permanent total disability benefits, as and for necessary attorney's fees, and the amount of such fees shall constitute a lien on those benefits.

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

Employee: Lucille Schoen Injury No. 09-034298

FINDINGS OF FACT AND RULINGS OF LAW:

Employee: Lucille Schoen Injury No. 09-034298

Dependents:

Employer: Mid Missouri Mental Health Center

Add'l Party: Second Injury Fund

Insurer: Self-Insured

Hearing Date: February 2, 2018

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

ISSUES DECIDED

The evidentiary hearing in this case was held on February 2, 2018, in Columbia. Lucille Schoen ("Claimant") appeared personally and by counsel, Truman Allen and Tim Wilson. Mid-Missouri Mental Health Center ("Employer") appeared by counsel, Adam Herrmann and David McCain, Assistant Attorneys General. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, appeared by counsel, Maureen Shine, Assistant Attorney General. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on March 2, 2018.

The hearing was held to determine the following issues:

1. Whether the work accident of May 8, 2009, is the prevailing factor in the cause of any or all of the injuries and/or conditions alleged in the evidence;
2. Whether Employer shall be ordered to reimburse Claimant for past medical charges;
3. Whether Employer shall be ordered to provide future medical benefits pursuant to Section 287.140, RSMo;
4. Employer's liability, if any, for payment of permanent partial disability benefits or permanent total disability benefits; and
5. The liability, if any, of the Second Injury Fund, for payment of permanent partial disability benefits or permanent total disability benefits.

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this claim;
2. That venue for the evidentiary hearing is proper in Boone County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Claimant's average weekly wage is $824.99, with compensation rates of $549.99 for temporary total disability benefits and permanent total disability benefits, and $404.66 for permanent partial disability benefits;

6. That Claimant sustained an accident arising out of and in the course of her employment with Mid-Missouri Mental Health Center on May 8, 2009;
7. That the notice requirement of Section 287.420 does not serve as a bar to the claim for compensation;
8. That Employer has paid medical benefits in the amount of $17,230.15;
9. That Employer has paid no temporary disability benefits; and
10. That Mid-Missouri Mental Health Center was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, Lucille Schoen, as well as Claimant's deposition testimony; narrative report of Dr. Thomas Hyers dated August 3, 2009; narrative report of Dr. Lawrence Lampton dated June 10, 2009; narrative reports of Dr. Herbert Haupt dated September 10, 2009, September 30, 2009, and October 14, 2009; narrative report of Dr. David Volarich dated July 21, 2014; deposition testimony of Dr. David Volarich taken March 3, 2016; narrative report of Dr. George Paletta dated June 3, 2015; deposition testimony of Dr. George Paletta taken March 3, 2016; narrative report of Dr. Michael Chabot dated July 31, 2015; deposition testimony of Dr. Michael Chabot taken March 4, 2016; medical records; medical bills; pharmacy bills; records of Claimant's wages paid by Employer for the years 2010-2013; correspondence from Centers of Medicare and Medicaid Services; and settlement stipulations in Injury Nos. 96-084977 and 01-036493.

DISCUSSION

Lucille Schoen ("Claimant") was born May 23, 1941, and was almost 68 years of age at the time of the work-related accident of May 8, 2009. Claimant became a certified laboratory technician in 1960 and worked with her husband in his veterinary practice for a few years. Claimant later obtained a Bachelor of Science in Nursing degree and worked as a Registered Nurse. Claimant worked at the Harry S. Truman Veterans' Administration Hospital in Columbia in the nursing home care unit from 1986 to 1989. Claimant worked at Mid-Missouri Mental Health Center from 1989 to 1991, and at St. Mary's Hospital in Jefferson City from 1991 through July 2002. Claimant returned to work for Mid-Missouri Health Center ("Employer") in 2001 and worked for Employer until late 2013. (Claimant worked for both St. Mary's and for Employer during parts of 2001 and 2002.)

In May 2009, Claimant was working for Employer as a charge nurse. Claimant had no set schedule, but worked on an "as-needed" basis. Claimant testified that, prior to May 8, 2009, she was working without restrictions or limitations. On May 8, 2009, Claimant reported to work; Cypermethrin had been sprayed around the air conditioning units in Claimant's workplace, apparently to control ants. When Claimant became exposed to the chemical, she complained of throat and eye irritations, as well as coughing and wheezing. Claimant went to the emergency room on May 11, 2009. Employer set up an appointment for Claimant to see Dr. Eddie Runde, an occupational medicine physician in Columbia, on May 22, 2009. Dr. Runde sent Claimant

"across the street" to get a chest x-ray. After obtaining the chest x-ray, Claimant returned to Dr. Runde's office and was sitting in the waiting room. Also in the waiting room was a person with a small dog. As Claimant was being escorted from the waiting room to the patient care area, the dog followed Claimant into the patient area. Dr. Runde attempted to kick the dog, but instead kicked Claimant violently under her right knee, knocking her to the floor.[1]

On June 10, 2009, Claimant went to see Dr. Lawrence Lampton, a pulmonary specialist. (Dr. Lampton was not an authorized treating physician.) Dr. Lampton thought that Claimant's chronic cough and chronic sinusitis were allergy-related and that there was possibly some asthma which had not been previously recognized. Pulmonary function tests were recommended. Dr. Lampton placed Claimant on a regime of nasal saline washes and Nasacort and oral low-dose albuterol tablets. On June 23, 2009, Claimant again saw Dr. Lampton. Claimant's coughing and breathing were much improved. Dr. Lampton advised Claimant to continue her nasal hygiene, and suggested that she could discontinue the albuterol tablets.

On June 11, 2009, Claimant filed a Claim for Compensation with the Missouri Division of Workers' Compensation.

On July 14, 2009, Claimant saw her primary care provider, Dr. Robert Bynum, complaining of left shoulder, neck, and left knee pain from a fall.

On August 3, 2009, at the request of Employer, Claimant was evaluated by Dr. Thomas Hyers, a St. Louis-area pulmonary specialist. Dr. Hyers opined that Claimant suffered transient bronchitis and upper airway irritation as a result of exposure to insect spray. Dr. Hyers opined that these conditions are not chronic or permanent and that Claimant's condition had reached maximum medical improvement and no further medication or testing was needed.

On September 10, 2009, at the request of Employer, Claimant was evaluated by Dr. Herbert Haupt, a St. Louis-area orthopedic surgeon, for injuries Claimant allegedly received on May 22, 2009, when she was kicked by Dr. Runde and fell to the floor. Dr. Haupt evaluated Claimant's left and right knee as well as her left shoulder. Dr. Haupt felt that the May 22, 2009 incident was the prevailing factor resulting in left shoulder adhesive capsulitis. Dr. Haupt also considered the May 22, 2009 incident to be the prevailing factor resulting in contusions to both knees and likely resulting in worsening of, or the development of a left knee flexion contracture and weakness. Dr. Haupt recommended aggressive physical therapy and also prescribed Naprosyn.

On the initial physical therapy visit on September 15, 2009, Claimant complained of pain in her left back and sciatica with leg pain going down to the knee and also complained of left neck pain with headaches. Throughout the physical therapy notes there are complaints of low back pain with physical findings on testing of the SI joint.

[1] The parties have not briefed the issue as to whether the injuries Claimant may have sustained as a result of the May 22, 2009 incident are compensable as a part of the May 8, 2009 occupational exposure to Cypermethrin, and appear to concede that issue. "Injuries sustained during authorized medical treatment of a prior compensable injury are the natural and probable consequence of the compensable injury." *Meinczinger v. Harrah's Casino,* 367 S.W.3d 666, 669 (Mo. App. E.D. 2012), citing *Lahue v. Treasurer,* 820 S.W.2d 561, 563 (Mo. App. 1991).

On September 28, 2009, the physical therapist prepared a report for Dr. Haupt in advance of Claimant's scheduled appointment with Dr. Haupt two days later. The report contained the following statements made by Claimant to the therapist:

> 9/17/09: "I've got another headache today from muscle tension. It feels like I'm walking better, though. Yesterday I didn't wake with a headache, but did today."
> 9/21/09: "The back and shoulder are sore, I worked 14 hours yesterday."
> 9/23/09: "I'm feeling it this morning. Both my arms feel tired and sore during pulleys AAROM."
> 9/25/09: "Yesterday I had a headache from hell. I had to get up in the middle of the night for my lower back."

Claimant returned to see Dr. Haupt on September 30, 2009, and he prepared a report which stated:

> Ms. Schoen presents today with her major complaint today being just headaches. She complains of severe headaches that really started after she started therapy by her description although she admits to having a droopy eye on the right side intermittently by her observation. She denies having significant headaches after the injury that occurred at work. She does not recall hitting or striking her head. She only developed the onset of headaches within in the last month by her description. She does admit to improvement in her shoulder and her knees with the benefit of physical therapy. ...
>
> I am not able to offer any significant diagnosis regarding her headaches. It is conceivable that she may get a little bit of muscle tension irritation in the parascapular musculature as she is doing therapy but it is rare that it would result in significant headache. It would certainly not result in a drooping eye. My concern is there may be some medical condition contributing to this, and I recommend she be seen by her medical doctor to evaluate these headaches and the droopy right eye. On my examination today the eye does not appear to be drooping but again I am not able to provide any further insight beyond being seen by her medical doctor.
>
> Regarding her shoulder at this point I believe her motion is markedly improved as is her strength. Her knee range of motion is also improved. It is my opinion she is at a point of maximum medical improvement regarding the work related injury that was sustained on 5/22/09. She can be released from care. Reinforced the importance of maintaining all home exercises to maximize that range of motion and her strength. No further follow-up required. Released from care to full duties.

There was no mention of Claimant's back complaints in Dr. Haupt's report.

Despite being released from Dr. Haupt's care, Claimant attended additional physical therapy sessions on October 2, 5, 7 and 14, 2009. Throughout the physical therapy notes there are complaints of low back pain with physical findings on testing of the SI joint. On her last visit with the physical therapist on October 14, 2009, Claimant complained of left lower leg pain sufficient to prevent her from sleeping. The therapist noted that Claimant still had significant back and knee pain, and that her gait pattern had not returned to normal. The physical therapist

noted that Claimant "could benefit from continued therapy", but Claimant had already been released by Dr. Haupt.

Claimant returned to her primary care provider, Dr. Robert Bynum, on December 11, 2009, insisting that something was wrong with her left leg, that something had to be done for her low back and knee, and that no one would listen to her. She provided a history of the trip and fall. Dr. Bynum noted that Claimant was crying and complained that if she was on her legs a lot, she could not sleep.

Dr. Bynum ordered a left knee MRI on December 11, 2009, which showed moderate tri-compartment degeneration with underlying marrow edema and subchondral cysts, increased signal at the anterior cruciate ligament, which may be related to a small tear, increased signal along the MCL that could be related to MCL tear, tears in the bilateral menisci with meniscus partially extruded from meniscus compartment, baker's cyst, and loose bodies within the left knee joint. On December 18, 2009, Dr. Bynum referred Claimant to Dr. Thomas Aleto, Jr., an orthopedic surgeon.

On December 22, 2009, Claimant saw Dr. Aleto who believed Claimant needed treatment and opined that a total knee replacement was needed because it was a reliable long-term option and it was unrealistic to expect much gain with an arthroscopic evaluation. Claimant wanted to try a cortisone injection, which Dr. Aleto administered.

Claimant returned to Dr. Aleto on January 14, 2010, and reported she had a good response to the steroid injection. Dr. Aleto recognized the temporary nature of the injection and discussed again the need for a total knee arthroplasty. Another injection was administered. On March 2, 2010, Claimant saw Dr. Aleto complaining of hip pain in addition to the knee pain. A trochanteric injection was administered. After Claimant saw Dr. Aleto on April 6, 2010, he referred her to Dr. Ebby Varghese, a pain management physician, because of the low back and leg pain and wanted to determine if this was a significant pain generator in addition to the knee pain.

Dr. Varghese saw Claimant on May 3, 2010; he found that the low back was a pain generator. He gave Claimant a left sacroiliac joint injection and ordered a lumbar MRI. Dr. Varghese stated that the MRI did not show, in his opinion, a surgical back and concluded that only pain relief procedures were available to Claimant. He continued conservative care. During the following 7-year period, from early 2010 to the summer of 2017 and beyond, Claimant underwent periodic procedures for treatment of her low back, including nerve blocks, radiofrequency ablations, and epidural steroid injections. During this same period, Claimant received cortisone injections, Synvisc injections, and euflexxa injections to the left knee.

Dr. George Paletta performed an independent medical examination of Claimant on behalf of Employer on June 3, 2015. Dr. Paletta agreed with the diagnoses provided by Drs. Haupt, Bynum and Aleto. Dr. Paletta opined that Claimant was not at MMI for the left knee and that "the only realistic option for her is total [left] knee arthroplasty" because it provides predictable results, and that the results from a scope could not be reliably predicted. He recommended a total knee arthroplasty and provided restrictions precluding standing or walking for more than fifteen

minutes per hour and indicated he believed she would have difficulty with prolonged standing, climbing, kneeling or squatting. Dr. Paletta's diagnosis regarding the left knee was end stage osteoarthritis, moderately severely symptomatic. Regarding the right knee, Dr. Paletta's diagnosis was degenerative joint disease right knee, minimally symptomatic. Dr. Paletta stated that the work injury of May 2009 is not the prevailing factor in the condition of Claimant's knees and that the need for additional treatment is not related to the work injury. On cross-examination, Dr. Paletta testified that, based upon Claimant's reported lack of left knee symptoms prior to May 22, 2009, Claimant was not in need of left knee treatment prior to the May 22, 2009 incident.

Dr. Michael Chabot performed an independent medical examination of Claimant on July 31, 2015 and opined Claimant sustained a back contusion and strain. Dr. Chabot opined that Claimant's present complaints are not related to the May 22, 2009 injury, but are related to her pre-existing degenerative lumbar spine and degenerative spondylolisthesis. According to Dr. Chabot, any symptoms occurring as a consequence of the low back strain injury have resolved and that her current complaints merited consideration of back surgery. Dr. Chabot opined that any additional care would not be causally related to the "alleged work injury of May 9, 2009".

On July 21, 2014, Dr. David Volarich performed an evaluation of Claimant at the request of Claimant's attorney. Dr. Volarich authored a report bearing the same date, and also testified by deposition taken March 3, 2016. Dr. Volarich noted Claimant's exposure to Cypermethrin on May 8, 2009, and the May 22, 2009 fall at Dr. Runde's office. He outlined Claimant's job activities, summarized Claimant's subjective complaints, and noted Claimant's medical history prior to May 8, 2009. Dr. Volarich also summarized his physical examination of Claimant, and his review of Claimant's medical records after May 8, 2009.

Dr. Volarich provided the following "Diagnoses re the injury of 5/8/09":[2]

- Pulmonary exposure to Cypermethrin causing upper airways and pulmonary irritation with residual non-productive cough.
- Cervical strain/sprain with aggravation of headaches.
- Lumbar strain/sprain secondary to aggravation of disc osteophyte complex at L5-S1 – S/P extensive pain management.
- Left shoulder adhesive capsulitis.
- Left knee internal derangement (bicompartmental meniscal tears and chondral injuries) – S/P non-operative treatment with the development of accelerated post-traumatic arthropathy of the left knee.
- Resolved left hip trochanteric bursitis.

[2] Which also included injuries allegedly sustained as a result of the May 22, 2009 fall at Dr. Runde's office.

- Resolved right knee contusion.

Dr. Volarich also provided the following "Diagnoses preexisting 5/8/09":

- Chronic headaches
- Chronic lumbar syndrome secondary to left lateral disc protrusion at L5-S1 – S/P non-operative treatment.
- Right long finger chip fracture PIP – S/P debridement of fracture osteophytes, exploration of the proximal interphalangeal joint, and fixation.
- Accelerated post-traumatic arthropathy of the right long finger PIP – S/P joint replacement.

Regarding causation, Dr. Volarich opined as follows:

> It is my opinion the exposure that occurred on 5/8/09 to the bug spray (Cypermethrin) is the substantial contributing factor as well as the prevailing or primary factor causing the upper airways and pulmonary irritation that required treatment for a chemical bronchitis with medications. The work injury was the prevailing factor causing her symptoms, need for treatment, and resulting disabilities.
>
> During the course of treatment for her pulmonary exposure, she was accidentally tripped by her treating physician at his office, causing the fall onto her left side, striking her left shoulder, hit the knee, and causing a sideways type whiplash injury to the neck and low back, in turn causing left shoulder adhesive capsulitis, a bicompartmental left knee meniscal tear, and chondral injuries that subsequently developed accelerated post-traumatic arthropathy as well as causing a cervical strain/sprain and increase in headaches and significant irreversible aggravation of her lumbar syndrome due to spondylosis and prior disc osteophyte complex at L5-S1 that required extensive pain management. In this fall, she also developed left hip trochanteric bursitis anda right knee contusion, but those symptoms resolved. The work injury was the prevailing factor causing her symptoms, need for treatment, and resulting disabilities.

Dr. Volarich opined that the work injury of May 8, 2009, resulted in permanent partial disabilities of 5% of the body as a whole/pulmonary system, 15% of the body as a whole/cervical spine, 25% of the body as a whole/lumbar spine, 25% of the left shoulder, and 45% of the left knee. Dr. Volarich found no disability for the right knee or left hip as those conditions had resolved. Dr. Volarich further found that Claimant is permanently and totally disabled from the last injury alone; in that regard, his report states as follows:

> It is my opinion that Ms. Schoen is unable to engage in any substantial gainful activity, nor can she be expected to perform in an ongoing working capacity in the future. It is my opinion that she cannot be reasonably expected to perform in an ongoing basis 8 hours a day, 5 days a week throughout the work year. It is also my opinion that she is unable to

continue in her line of employment that she last held as an RN for Mid Missouri Mental Health Center nor can she be expected to work on a full time basis in a similar job.

Based on my medical assessment alone, it is my opinion that Ms. Schoen is permanently and totally disabled as a direct result of the work related injury of 5/8/09 standing alone. There is no question that she had some preexisting disability in her low back and right hand, but she was working full unrestricted duty prior to 5/8/09. I note that she is 73 years old (advanced age), has an education that includes graduation from high school as well as a bachelor's degree in nursing, has worked as a nurse the majority of her work career, and has been unable to get back to work since 10/13.

Regarding ongoing or additional medical care, Dr. Volarich stated:

In order to maintain her current state, she will require ongoing care for her pain syndrome using modalities including but not limited to narcotics and non-narcotic medications (NSAID's), muscle relaxants, physical therapy, and similar treatments as directed by the current standard of medical practice for symptomatic relief of her complaints.

Ms. Schoen requires ongoing care for her lumbar radicular pain syndrome including chronic pain management, but also treatments such as epidural steroid injections, foraminal nerve root blocks, trigger point injections, TENS units, radiofrequency ablation procedures, and similar treatments. She requires ongoing care for the accelerated post- traumatic arthropathy in the left knee that includes Synvisc injections and Cortisone injections as needed in addition to oral pain medications daily. She will eventually require left total knee joint replacement.

Based on today's examination, surgical repairs are not indicated at this time.

When her left knee pain symptoms become intractable, she will require left total knee joint replacement. The decision to perform this surgery should be made in conjunction with her wishes, progression of symptoms, and expert surgical opinion. It is my opinion the need for total knee joint replacement flows directly from the work related injury of 5/8/09 since she was asymptomatic in her knees prior to 5/8/09.

Dr. Volarich's deposition testimony was consistent with his report.

The majority of the testimony and medical evidence demonstrates that all of Claimant's current physical problems result from the May 8, 2009 injury. The only medical or vocational testimony submitted in evidence by Claimant is the report and deposition testimony of Dr. David Volarich, who opined that Claimant is unable to work and therefore, permanently totally disabled from the effects of the May 8, 2009 injury, considered in isolation. There is no medical or vocational evidence demonstrating that a combination of prior conditions and the effects of the May 8, 2009 primary injury have rendered Claimant unemployable. Claimant's own testimony at trial demonstrates that her pain complaints, functional limitations, need for narcotic pain medication, need for lumbar radiofrequency ablation procedures, need for numerous Synvisc and Effluxa knee

injections, poor sleep, and need to lie down at unpredictable times for unpredictable periods during the day due to pain, all result from the May 8, 2009 primary injury.

Dr. Volarich opined that it is the May 8, 2009 injury, considered in isolation, which takes Claimant out of the open labor market and renders her permanently and totally disabled. Dr. Volarich noted that there were never any restrictions imposed on Claimant's work prior to the May 8, 2009 injury, that Claimant was performing full duty floor nursing work for Employer prior to the May 8, 2009 injury without restriction, and that Claimant was not receiving any help or accommodation with her work due to any prior condition prior to the May 8, 2009 injury. In addition, Dr. Volarich testified that Claimant was not taking any prescribed pain or narcotic pain medication prior to May 8, 2009 (with the exception of Fioricet which Claimant took intermittently for headaches prior to May 8, 2009).

Further evidence supporting a finding of permanent total disability resulting solely from the May 2009 work injuries is Claimant's trial and deposition testimony. That testimony demonstrates that all of her physical complaints and pain result from the last accident/injury to her low back, neck, left shoulder and left knee. Claimant testified that, due to her pain, inability to stand, and functional limitations resulting from the May 2009 work injuries, she requested a lighter job in admissions, where she could have a seated position as opposed to her previous work as a floor nurse, standing all day, and engaging in take-downs of patients. Even with the lighter work, Claimant was unable to work as many shifts following the May 2009 work injuries due to her pain stemming from the injury, and she had to turn down shifts on several occasions for that reason. Following the May 2009 work injuries, she has been limited to short periods of sitting, standing, and walking; she walks with a cane so as not to fall; she has back pain as well as sciatic pain into her legs.

Claimant currently takes Norco, Tramadol, and Soma for her pain resulting from the May 2009 work injuries. During the day, she has to lie down to minimize her pain. Her neck is stiff and she has increased headaches which she termed "extreme migraines" which are more intense and more frequent than prior to the May 2009 work injuries; her left shoulder hurts, and she has muscle spasms in the left shoulder; she cannot raise her left arm up very high (only to chest height) and is unable to get items off of upper shelves; it hurts to exert or try to lift anything. Her neck hurts as well and she has muscle spasms in her neck which draw her head over to her left shoulder. Due to her knee pain, she has difficulty with walking and with stairs and has to go down stairs backwards one step at a time due to her left knee and low back pain. Going up the stairs, she has to take one step at a time, lead with her right, and pull herself up with her arms using the handrail. Claimant is unable to push a vacuum cleaner now. Due to the problems and pain resulting from the May 2009 work injuries, Claimant had to retire in October 2013, or face having to return to full duty floor nursing as required by Employer. Due to the effects of the May 2009 work injuries, Claimant is no longer able to show her dogs, garden, plant mulch, or ride on her John Deere riding mower to cut her lawn, or do the extensive baking she was able to do before the May 2009 work injuries. She is unable to do any yard work, does very little housework, she has to lean on a cart at the grocery store due to her pain (she described a trip to Walmart as "pure aggravation and pure torture"), and has experienced poor sleep since the May 2009 work injuries. Her back and left-side pain, and muscle spasms in the left leg wake her up

frequently throughout the night, and she is never able to get a good night's sleep currently. Due to her pain stemming from the May 2009 work injuries, she needs to lie down every day. She has difficulty driving due to her pain resulting from the May 2009 work injuries, and is not able to take long car trips. Her left knee gives way on her; she can only stand for 5 minutes at a time, she has problems with kneeling, bending and squatting, and any activity increases her pain. Since the May 2009 work injuries, she has left leg radiculopathy, she cannot lift anything with the left arm without intense pain, and has to lift with the right hand.

Claimant had none of these problems before the May 2009 work injuries; she was able to physically perform all of her daily tasks at work and at home without any problems, despite her prior conditions. She testified that she had no physical problems performing her job duties before the primary injury, she was never disciplined or demoted due to any problems stemming from any prior conditions prior to the primary, and, she always received good evaluations, and regular raises prior to the primary as well. There were no permanent restrictions placed on her work prior to the primary injury. When she was released at maximum medical improvement from the prior injuries, she was able to return to her regular full duty work with no restrictions on her work, she missed no time from work, and her employer never gave her any special accommodations. The prior conditions never prevented her from performing her work satisfactorily prior to the May 2009 work injuries.

Causation. There is no question that the May 8, 2009 exposure to Cypermethrin is the prevailing factor in the cause of the pulmonary and upper respiratory irritation that Claimant has experienced. The incident at Dr. Runde's office on May 22, 2009, resulting in a fall, is part and parcel of the May 8, 2009 work accident (see footnote 1). I find that the May 22, 2009 incident is the prevailing factor in the cause of Claimant's left shoulder adhesive capsulitis; Drs. Haupt and Volarich were the only physicians to opine upon the cause of the left shoulder adhesive capsulitis, and both stated unequivocally that the May 22, 2009 incident was the prevailing factor in its cause. I find that the May 22, 2009 incident is also the prevailing factor in the following: (1) cervical strain/sprain with aggravation of prior chronic headaches, (2) lumbar sprain/strain, (3) left knee internal derangement. Regarding the **left knee**, I find Dr. Volarich's analysis to be more persuasive than that of Dr. Paletta or Dr. Haupt. Dr. Haupt, who actually provided treatment to Claimant, stated that the May 22, 2009 incident was the prevailing factor in the cause of a left knee contusion, and was *likely* the cause of either the worsening of, or the development of a left knee flexion contracture and weakness. While Dr. Paletta found that the May 22, 2009 incident was the cause of a left knee contusion and sprain, he also stated that these conditions had resolved, and that Claimant's current symptoms were caused by prior degenerative conditions. Yet, Dr. Paletta agreed that Claimant's current symptoms could only be medically addressed by a total knee replacement, and he also agreed that Claimant had no such symptoms prior to May 22, 2009. While it is *possible* that Claimant's onset of severe left knee symptoms (so severe they can only be helped by a total knee replacement) immediately after the May 22, 2009 is the result of mere *coincidence,* Dr. Volarich's causation opinion seems to be more consistent with the evidence. Regarding the **low back,** while Claimant had preexisting low back symptomatology, there is very little question from the evidence that her low back was essentially asymptomatic immediately prior to May 22, 2009; considering the violent fall Claimant incurred on May 22, 2009 and the subsequent onset of severe low back pain, the diagnosis of a lumbar sprain/strain caused by the May 22, 2009 incident is quite consistent with the evidence. Regarding Claimant's **neck and headaches,** the evidence is abundantly clear that

Claimant injured her neck on May 22, 2009; while Dr. Haupt was "not able to offer any significant diagnosis regarding her headaches" (which headaches Dr. Haupt described as "severe"), Dr. Volarich testified credibly that the cervical strain/sprain was the cause of the exacerbation of Claimant's headaches.

The bottom line is that, prior to May 22, 2009, despite her advanced age, Claimant was performing a difficult job without problems, was extremely active in her non-employment life and was asymptomatic in her neck, left shoulder and left knee, only mildly symptomatic in her low back, and was controlling her headaches; after the May 22, 2009 incident, *all that changed for the worse.*

Reimbursement for past medical charges. Exhibits 18, 19, and 20 contain over 160 charges from Wal-Mart Pharmacy; Exhibits 21 and 22 contain over 500 charges from University of Missouri Healthcare. The majority of these charges are for services unrelated to Claimant's work injuries. Nevertheless, many of those charges are for services necessitated by Claimant's work injuries, as shown by the medical records in evidence. Employer is ordered to reimburse Claimant for the following medical charges:

(Prescriptions)

6/10/09	Prescribed by Dr. Lampton	$26.36
3/23/10	Prescribed by Dr. Aleto	$15.69
6/2/14	Prescribed by Dr. Aleto	$46.66
7/15/14	Prescribed by Dr. Aleto	$15.73
7/30/14	Prescribed by Dr. Aleto	$15.73
8/6/14	Prescribed by Dr. Aleto	$41.57
8/21/14	Prescribed by Dr. Aleto	$15.73
1/22/15	Prescribed by Dr. Aleto	$41.57

(University of Missouri Healthcare)

7/14/09	Shoulder x-ray	$312.00
7/14/09	Radiologist	$53.00
12/11/09	MRI	$1,135.00
12/11/09	Radiologist	$240.00
12/22/09	Dr. Aleto	$437.00
12/22/09	Hospital	$780.85
5/3/10	Lumbar x-rays	$426.00
9/14/10	Dr. Varghese	$171.00
9/14/10	Injections	$236.48
9/24/10	Dr. Varghese	$809.00
10/1/10	Dr. Varghese	$1,251.00
10/1/10	Injections	$428.82
10/8/10	Dr. Varghese	$1,251.00
10/1/10	Injections	$426.32
6/30/11	Dr. Varghese	$2,373.00
6/30/11	Injections, nerve ablations	$4,309.30

8/23/11	Dr. Varghese	$171.00
4/8/13	Dr. Aleto	$67.00
4/8/13	X-rays	$739.73
4/8/13	Radiologist	$114.00
8/21/13	Dr. Joel Jeffries	$171.00
8/21/13	MRI, x-rays	$2,855.80
8/21/13	Radiologist	$286.00
2/20/14	Dr. Aleto	$275.00
2/20/14	Injections	$374.35
3/19/14	Dr. Varghese	$171.00
4/8/14	Dr. Varghese	$700.00
4/8/14	Injections	$921.02
4/21/14	Dr. Varghese	$1,380.00
4/21/14	Injections, nerve ablations	$2,915.20
4/30/14	MRI	$1,716.00
10/14/15	Dr. Varghese	$1,323.00
10/14/15	Injections, nerve ablations	$2,902.02
11/16/16	Dr. Varghese	$1,296.00
11/16/16	Injections, nerve ablations	$3,024.00
7/6/17	MRIs, C-spine and L-spine	$2,260.00
7/6/17	Radiologist (C-spine)	$309.00
7/6/17	Radiologist (L-spine)	$290.00
7/11/17	X-rays, Ortho visit	$1,114.00
TOTAL		**$40,233.93**

Future medical benefits. Claimant has essentially been under doctors' care continuously for treatment of the injuries to her low back and left knee since the May 2009 work injuries. The physicians uniformly agree that Claimant will continue to need conservative care, including pain management. Claimant testified that there has been a diminishing benefit from the injections although they continue to provide relief to a lesser degree. The physicians also agree that Claimant is in need of a left total knee arthroplasty. As noted above, Dr. Volarich stated: "It is my opinion the need for total knee joint replacement flows directly from the work related injury of 5/8/09 since she was asymptomatic in her knees prior to 5/8/09." I find Dr. Volarich's assessment in this regard to be in accord with the evidence and case law.

"To receive an award of future medical benefits, a claimant need not show `conclusive evidence' of a need for future medical treatment." *Stevens v. Citizens Memorial Healthcare Foundation,* 244 S.W. 3d 234, 237 (Mo. App. S.D. 2008) quoting *ABB Power T&D Co. v. Kempker,* 236 S.W.3d 43, 52 (Mo. App. W.D. 2007). "Instead, a claimant need only show a `reasonable probability' that, because of her work-related injury, future medical treatment will be necessary. A claimant need not show evidence of the specific nature of the treatment required." *Id. See Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511 (Mo. App. W.D. 2011).

Claimant has clearly met her burden of proof regarding future medical benefits.

Disability issues. Claimant is seeking permanent total disability benefits from Employer. The Second Injury Fund is also a party to these proceedings.

Under section 287.020.7, "total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Fletcher v. Second Injury Fund,* 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The test for permanent and total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. *Knisley v. Charleswood Corp.,* 211 S.W.3d 629, 635 (Mo.App. E.D. 2007). The primary inquiry is whether an employer can reasonably be expected to hire the claimant, given his present physical condition, and reasonably expect the claimant to successfully perform the work. *Id.*

Second Injury Fund liability exists only if Employee suffers from a pre-existing permanent partial disability that constitutes a hindrance or obstacle to employment or re-employment that combines with a compensable injury to create a disability greater than the simple sums of disabilities. § 287.220.1 RSMo 2000; *Anderson v. Emerson Elec. Co.,* 698 S.W.2d 574, 576, (Mo.App.E.D. 1985). When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. *Brown v. Treasurer of Missouri,* 795 S.W.2d 479, 482 (Mo.App. 1990). In order to find permanent total disability against the Second Injury Fund, it is necessary that Employee suffer from a permanent partial disability as a result of the last compensable injury, and that disability has combined with prior permanent partial disability(ies) to result in total disability. 287.220.1 RSMo 1994, *Brown v. Treasurer of Missouri,* 795 S.W.2d 479, 482 (Mo.App. 1990), *Anderson v. Emerson Elec. Co.,* 698 S.W.2d 574, 576 (Mo.App. 1985). Where preexisting permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability **after** the employer has paid the compensation due the employee for the disability resulting from the work related injury. *Reiner v. Treasurer of State of Mo.,* 837 S.W.2d 363, 366 (Mo.App. 1992) (emphasis added). In determining the extent of disability attributable to the employer and the Second Injury Fund, an Administrative Law Judge must determine the extent of the compensable injury first. *Roller v. Treasurer of the State of Mo.,* 935 S.W.2d 739, 742-43 (Mo.App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* It is, therefore, necessary that the Employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury Fund liability.

In assessing Claimant's claim of permanent total disability, I note that Claimant continued to work for Employer for more than four years post-injury. However, the nature of Claimant's duties changed after the May 22, 2009 incident, as did the number of hours Claimant worked. Even before May 2009, Claimant worked on an "as-needed" basis. Nevertheless, Claimant's average weekly wage was $824.99, which would equate to annual earnings in excess of $42,000.00. In contrast, Claimant's annual earnings in 2010 were $8,077.14, in 2011 $8,942.41, in 2012 $9,298.93, and in 2013 $9,374.25. Claimant's work hours reduced by 80% after her work injury; Claimant averaged six hours a week from 2010-2013. The nature of

Claimant's work also changed. Prior to May 22, 2009, Claimant worked as a charge nurse; she was on her feet the vast majority of her shift, and engaging directly in patient care, including take-downs of unruly mental patients. After her work injury, Claimant worked in admissions; this was a sedentary position, dealing with taking medical histories and other paperwork. In admissions, Claimant did not work with patient care, nor did she participate in take-downs of unruly mental patients. Claimant quit working altogether in October 2013; the reason Claimant quit working at that time is that Employer promulgated a new policy that would have required her to return to direct patient care.

It is difficult to characterize Claimant's working an average six hours a week in a sedentary position as significant evidence of her ability to compete for work in the open labor market.

As noted above, Dr. Volarich opined that Claimant is permanently and totally disabled as a direct result of the work related injury of May 8, 2009 standing alone. The only other expert who has opined on Claimant's ability to work is Dr. Chabot. Dr. Chabot opined that Claimant could return to her prior nursing position as charge nurse, which he felt was in the light duty range. Dr. Chabot's opinion is suspect as he was considering only Claimant's low back condition, and was not considering the left knee, left shoulder, neck and headaches.

After careful consideration of all the evidence, including the medical records, medical opinions, Claimant's deposition testimony and hearing testimony, and also considering Claimant's advanced age, I find that Claimant is permanently and totally disabled.

I further find from the evidence that Claimant is permanently and totally disabled due to the May 8, 2009 work injuries considered in isolation.[3] Employer is responsible for payment of weekly permanent total disability benefits; the Second Injury Fund has no liability herein.

The next determination that must be made is *when* Employer's duty to provide weekly permanent total disability benefits began. *Greer v. SYSCO Food Services,* 475 S.W.3d 655, Mo. Banc 2015 (citing *Cardwell v. Treasurer,* 249 S.W.3d 902, Mo. App. E.D. 2008) states:

> Although the statutes involving temporary total disability and permanent disability do not set out a specific time line, there is an intended timing of benefits paid by employers. Temporary total disability benefits are due from the date of the injury through the date the condition has reached the point where further progress is not expected. One cannot determine the level of permanent disability associated with an injury until it reaches the point where it will no longer improve with medical treatment. Although the term "maximum medical improvement" is not included in the statute, the issue of whether any further medical progress can be reached is essential in determining when a disability becomes permanent and thus, when payments for permanent partial or permanent total disability should be calculated.

[3] Again, this would include the injuries Claimant sustained in the May 22, 2009 incident at Dr. Runde's office.

In Claimant's case, Employer paid no temporary total disability benefits (nor any temporary partial disability benefits), and Claimant has not raised Employer's liability for such temporary benefits as an issue in this case. Nevertheless, per *Greer*, a determination of whether (and when) any further medical progress can be reached for Claimant is "essential" in determining when Claimant's permanent total disability began (which would also be the date when Employer's liability for payment of weekly permanent total disability benefits began). Unfortunately, there is no bright line in this case; Claimant has been treated for multiple discrete injuries (left knee, left shoulder, low back, neck, headaches, pulmonary) by multiple physicians; most of those physicians were not authorized workers' compensation physicians, and thus made no pronouncements regarding "maximum medical improvement".

The first pronouncement of maximum medical improvement ("MMI") concerning **all** of Claimant's work-related conditions came in Dr. Volarich's report of July 21, 2014. The first pronouncement of permanent total disability ("PTD") likewise came in the same report. Although a thorough reading of that report strongly suggests that both the MMI date and the PTD date occurred prior to the date of the report, the report specifies neither a date nor time frame. (I also note here that Dr. Volarich was not asked in his deposition as to *when* MMI or PTD occurred.)

A review of Claimant's medical records reveals that Claimant was under active, and, indeed, frequent treatment through August 23, 2011. On that date, Claimant met with her pain management physician, Dr. Ebby Varghese. Dr. Varghese's note on that date states:

> (History) The patient returns for follow-up. Last time I saw her was on June 30, 2011. We did a left L3 to S1 medial branch radiofrequency ablation. *She is pain-free at this point and her leg pain is resolved as well.*
>
> (Impression) Ms. Lucille Schoen is a 70-year-old female with chronic mechanical low back pain and lumbar spondylosis and sacroiliac joint pain. She responded well to the left sacroiliac joint injection and left L3 to S1 medial branch radiofrequency ablation.
>
> (Plan) I did explain to her that pain relief can be from 4 to 18 months, averages about 9 months, we cannot re-lesion before 6. The combination between SI joint injection and the facet medial branch radiofrequency ablation has been very fruitful for her as far as pain relief wise. I will see her back *as needed.* I did explain to her that average is 9 months, and will see her back at that time *if necessary.* (Italics not in original.)

While Dr. Varghese's note of August 23, 2011 does not use the words "maximum medical improvement", the portions italicized above strongly indicate that Dr. Varghese was pleased with Claimant's response to his past treatment ("she is pain-free at this point") and was not reasonably contemplating additional treatment ("I will see her back as needed"; "I will see her back ... if necessary"). There is no similar office note at any time prior to August 23, 2011. While Claimant consulted with Dr. Aleto and Dr. Jeffries between August 23, 2011 and February 20, 2014, and continued to take prescription medications for her work-related injuries between August 23, 2011 and February 20, 2014, there was no active treatment during those thirty months. (Claimant had an injection on February 20, 2014, more injections on April 8, 2014, and injections and nerve ablation on April 21, 2014.)

I find, therefore, that Claimant's work-related injuries reached MMI on August 23, 2011. Per *Greer,* Claimant's disability became permanent on that date. Employer's liability for payment of weekly permanent total disability benefits at the stipulated rate of $549.99 began on August 23, 2011.

The Second Injury Fund has no liability.

FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties stipulated, I find the following:

1. On May 8, 2009, Claimant sustained an accident arising out of and in the course of her employment with Mid-Missouri Mental Health Center when she was exposed to Cypermethrin, causing injury to Claimant's lungs and upper respiratory system.
2. On May 22, 2009, while in the course of authorized medical treatment for the injuries she sustained in the May 8, 2009 work accident, Claimant was kicked by Dr. Eddie Runde, causing Claimant to fall, and sustain injury to both knees, left shoulder, left hip, lumbar spine and neck.
3. The injuries Claimant sustained in the May 22, 2009 incident are compensable as part of the May 8, 2009 work accident. "Injuries sustained during authorized medical treatment of a prior compensable injury are the natural and probable consequence of the compensable injury." *Meinczinger v. Harrah's Casino,* 367 S.W.3d 666, 669 (Mo. App. E.D. 2012), citing *Lahue v. Treasurer,* 820 S.W.2d 561, 563 (Mo. App. 1991).
4. After the May 22, 2009 incident, Employer allowed Claimant to work in a sedentary position. After the May 22, 2009 incident, Claimant's hours were reduced by approximately 80%.
5. Employer authorized treatment with Dr. Herbert Haupt for Claimant's orthopedic injuries, and also authorized physical therapy.
6. Dr. Haupt released Claimant at maximum medical improvement on September 30, 2009.
7. Despite being released from Dr. Haupt's care, Claimant attended additional physical therapy sessions on October 2, 5, 7 and 14, 2009. The physical therapist recommended additional physical therapy, but Employer did not authorize same.
8. No additional treatment was authorized by Employer after October 14, 2009.
9. Claimant continued medical treatment on her own with various health care providers, including Dr. Thomas Aleto, Jr., an orthopedic surgeon, Dr. Ebby Varghese, a pain management physician, and Dr. Joel Jeffries, a spine specialist.
10. Employer is responsible for reimbursing Claimant $40,233.93 for the charges for the medical treatment she received after being denied additional medical treatment by Employer.
11. The work accident of May 8, 2009, is the prevailing factor in the cause of pulmonary exposure to Cypermethrin causing upper airways and pulmonary irritation, cervical strain or sprain with aggravation of headaches, lumbar strain or sprain secondary to aggravation of disc osteophyte complex at L5-S1 status post extensive pain

management, left shoulder adhesive capsulitis, left knee internal derangement (bicompartmental meniscal tears and chondral injuries), left hip trochanteric bursitis (now resolved), and right knee contusion (now resolved).

12. As a direct and proximate result of the work-related injuries, Claimant is in need of additional and future medical treatment, including, but not limited to, pain management, prescription medications, medication management, and left total knee arthroplasty.
13. Claimant reached maximum medical improvement for her work-related injuries on August 23, 2011.
14. Claimant is unable to compete in the open market for employment.
15. Claimant is permanently and totally disabled.
16. Claimant's permanent total disability was caused by the injuries she sustained in the May 8, 2009 accident, considered alone, and without regard to any preexisting injuries or conditions.
17. Employer is responsible for payment of weekly permanent total disability benefits in the weekly amount of $549.99, beginning August 23, 2011.
18. The Second Injury Fund has no liability.

ORDER

Employer is ordered to pay Claimant the sum of $40,233.93 for reimbursement of charges for necessary medical treatment.

Employer is also ordered to provide Claimant with all such future medical care and treatment reasonably necessary to cure and relieve Claimant from the effects of the work-related injury of May 8, 2009.

Employer is further ordered to pay Claimant permanent total disability benefits of $549.99 per week, beginning August 23, 2011, for Claimant's lifetime.

The claim against the Second Injury Fund is denied in full.

Claimant's attorney, Truman Allen, is allowed 25% of benefits awarded hereunder, including future installments of permanent total disability benefits, as and for necessary attorney's fees, and the amount of such fees shall constitute a lien on those benefits.

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

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Lucille Schoen

Injury No. 09-034298

I certify that on March 22, 2018, I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

By MP

Made by

Robert J. Dierkes
Administrative Law Judge
Division of Workers' Compensation

DIVISION OF WORKERS' COMPENSATION
DEPARTMENT OF LABOR
INDUSTRIAL RELATIONS