

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

Injury No.: 01-160009

Employee: Cheryl Shargel
Employer: Daimler Chrysler Corporation
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: January 1, 2001

Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 15, 2005. The award and decision of Administrative Law Judge John Howard Percy, issued August 15, 2005, 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 February 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Cheryl Shargel

Injury No.: 01-160009

Dependents: N/A
Employer: Daimler Chrysler Corporation
Additional Party: Second Injury Fund
Insurer: Self-Insured
Hearing Date: May 3, 2005

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

Checked by: JHP:tr

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: January 1, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Mo.
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? Self-Insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Installing auto parts.
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: Right elbow
14. Nature and extent of any permanent disability: 20.5% permanent partial disability of right elbow
15. Compensation paid to-date for temporary disability: \$4,717.54
16. Value necessary medical aid paid to date by employer/insurer? \$5,894.24

Employee: Cheryl Shargel Injury No.: 01-160009

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$759.37
19. Weekly compensation rate: \$506.25 TTD/\$314.26
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Credit for overpayment of temporary total disability

<\$378.25>

43.05 weeks of permanent partial disability from Employer	\$13,528.89
Credit for advance payment on July 11, 2003 per Exhibit 3	<\$4,949.60>

22. Second Injury Fund liability: Yes

40 weeks of permanent partial disability from Second Injury Fund	\$12,570.40
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TOTAL:	\$20,771.44
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23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

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

Rick Barry

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Cheryl Shargel	Injury No.: 01-160009
Dependents:	N/A	Before the
Employer:	Daimler Chrysler Corporation	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Self-Insured	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: JHP

A hearing in this proceeding was held on May 3, 2005. All parties submitted proposed awards on July 18, 2005. Injury No. 02-154181 was also heard with this claim. The record comprises 150 pages of depositions of expert witnesses and 225 pages of medical records and reports. Claimant asserted permanent total disability in each case. Additional time was required in issuing this award due to the complexities of this case.

STIPULATIONS

The parties stipulated that on or about January 1, 2001:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was self-insured;

3. the employee's average weekly wage was \$759.37;
4. the rate of compensation for temporary total disability was \$506.25 and the rate of compensation for permanent partial disability was \$314.26; and
5. the employee sustained an injury as a result of an occupational disease arising out of and in the course of employee's employment in St. Louis County, Missouri.

The parties further stipulated that:

1. the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law;
2. compensation has been paid in the amount of \$4,717.54 representing 8-4/7 weeks of benefits covering the periods from January 4 through February 28, 2002 and from March 6 through March 11, 2002;
3. employer is entitled to reimbursement of \$378.25 due to compensation being paid at the rate of \$550.38 rather than \$506.25; and
4. employer has paid medical expenses in the amount of \$5,894.24.

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ISSUES

The issues to be resolved in this proceeding are:

1. whether the employee should be provided with any future medical treatment;
2. the nature and extent of any permanent disability sustained by the employee as a result of the work-related injury of January 1, 2001; and
3. whether and to what extent the employee sustained any additional permanent partial or permanent total disability for which the Second Injury Fund would be liable as a result of the combination of any preexisting disabilities with the primary injury.

FUTURE MEDICAL CARE

There is no dispute that Cheryl Shargel, employee herein, developed right cubital tunnel syndrome was a result of her work on the assembly line at DaimlerChrysler Corporation. Employee is requesting an award of future medical care for her right elbow.

Section 287.140 Mo. Rev. Stat. (2000) requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). It can be awarded even where permanent partial disability is determined. The employee must prove beyond speculation and by competent and substantial evidence that his or her work-related injury is in need of treatment. Williams v. A.B. Chance Co., 676 S.W.2d 1 (Mo. App. 1984). Conclusive evidence is not required. However, evidence which shows only a mere possibility of the need for future treatment will not support an award. It is sufficient if claimant shows by reasonable probability that he or she will need future medical treatment. Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997); Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996); Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823, 828 (Mo. App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Sifferman at 828.

Where the sole medical expert believes that it is "very likely" that the claimant will need future medical treatment, but is unable to say whether it is more likely than not that the claimant will need such treatment, that opinion, when combined with credible testimony from the claimant and the medical records in evidence, can be sufficient to support an award which leaves the future treatment issue open. This is particularly true where the medical expert states that the need for treatment will depend largely on the claimant's pain level in the future and how well the claimant tolerates that pain. Dean, supra at 604-06.

The amount of the award for future medical expenses may be indefinite. Section 287.140.1 does not require that the medical evidence identify particular procedures or treatments to be performed or administered. Dean, supra at 604; Talley v. Runny Meade Estates, Ltd., 831 S.W.2d 692, 695 (Mo. App. 1992); Bradshaw v. Brown Shoe Co., 660 S.W.2d 390, 393-394 (Mo. App. 1983). The award may extend for the duration of an employee's life. P.M. v. Metromedia Steakhouses Co., Inc., 931 S.W.2d 846, 849 (Mo. App. 1996). The award may require the employer to provide future medical treatment which the claimant may require to relieve the effects of an injury or occupational disease. Polavarapu v. General Motors Corporation, 897 S.W.2d 63 (Mo. App. 1995). It is not necessary that such treatment has been prescribed or recommended as of the date

of the hearing. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). Where future medical care and treatment is awarded, such care and treatment "must flow from the accident before the employer is to be held responsible." Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo. App. 1985); Talley v. Runny Meade Estates, Ltd. at 694. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. Hall v. Spot Martin, 304 S.W.2d 844, 854-55 (Mo. 1957). However, where preexisting conditions also require future medical care, the medical experts must testify to a reasonable medical certainty as to what treatment is required for the injuries attributable to the last accident. O'Donnell v. Guarantee Elec. Co., 690 S.W.2d 190, 191 (Mo. App. 1985).

Findings of Fact

Based on my observations of claimant's demeanor during her testimony, I find that she is a credible witness and that her testimony is generally credible. Based on the credible testimony of claimant and on the medical records, I make the following findings of fact.

Description of Work Activities

Mr. Shargel began working for the Employer on November 10, 1994. She was not then taking any medications for injuries. She began to experience problems with her right arm while repeatedly installing parts on the assembly line in January of 2001. She had to contort her body into a variety of positions in order to perform her duties. She reported her injury to her employer after dropping her gun. She was then 40 years old. (Claimant's Testimony)

Medical Treatment

Employer sent Ms. Shargel to Dr. Mitchell B. Rotman, an orthopedic surgeon, who had treated claimant for bilateral carpal tunnel syndrome in 1998-99. He examined employee on August 14, 2001. Claimant complained primarily of medial and lateral right elbow pain which began in January. She also reported occasional numbness and tingling in the elbow and right shoulder pain. She described her work duties, which required frequent pronation and supination. Ibuprofen had not helped and wearing a tennis elbow strap increased her pain. Examination revealed pain with wrist extension and flexion, but most of the medial elbow pain stemmed from resisted pronation. Dr. Rotman found tenderness over the flexor pronator origin and the cubital tunnel. He felt that her findings for cubital tunnel were equivocal and that she most likely had medial epicondylitis. He injected her right elbow with Lidocaine, Marcaine, and Kenalog and encouraged her to wear the elbow strap. He allowed claimant to continue working full duties. (Employer's Exhibit 1, depo ex B, pp 1-2)

During a follow-up visit on September 25, 2001, claimant reported that the effects of the injection had worn off. Dr. Rotman noted tenderness in the right elbow and administered a second injection. He told her to continue her regular activities at work and wear the elbow strap. (Employer's Exhibit 1, depo ex B, p. 3) On October 31, 2001, claimant advised Dr. Rotman that the numbness and tingling in her right hand had increased. Dr. Rotman indicated there was no clear evidence of medial epicondylitis and thought that the elbow pain might be coming from the ulnar nerve. Dr. Rotman recommended a heelbow pad and ulnar nerve studies. (Employer's Exhibit 1, depo ex B, p. 4)

Dr. Daniel Phillips, a neurologist, performed right upper extremity electrodiagnostic studies on November 8, 2001. He indicated that the findings were consistent with mild demyelinating right ulnar neuropathy across the cubital tunnel. (Employer's Exhibit 1, depo ex B, p. 5) On December 13, 2001 claimant told Dr. Rotman that she continued to have numbness and tingling. His exam showed tenderness over the cubital tunnel. Due to the significant changes on her nerve studies and continued symptoms for almost one year, Dr. Rotman recommended a sub-muscular ulnar nerve transposition. He allowed her to continue working. (Employer's Exhibit 1, depo ex B, p. 8)

On January 4, 2002, claimant underwent a right submuscular ulnar nerve transposition. (Employer's Exhibit 1, depo ex B, p. 9) On January 17, 2002, Dr. Rotman removed her sutures. He suggested that she wear a splint for two weeks and then wean out of it two weeks after that. He prescribed physical therapy. (Employer's Exhibit 1, depo ex A, p. 10) Claimant attended nine physical therapy sessions at HealthSouth from January 23, 2002 through February 15, 2002. (Employer's Exhibit 2, Pages 1-25)

The Chrysler plant physician apparently decided that claimant could fasten seat belts to the sides of cars beginning March 1. She used a torque gun which jerked her hand. (Claimant's Testimony)

On March 5, 2002 Ms. Shargel complained to Dr. Rotman of increased symptoms due to returning to work too soon.

Although she was under work restrictions, she still had trouble using the torque gun. She reported numbness and tingling when he attempted to extend her elbow fully. Dr. Rotman thought that she had irritated her arm too much and needed to rest for a week. He allowed her to return to full activities on March 11, 2002. On March 18, 2002, Dr. Rotman noted that employee's right elbow appeared to be improving. He indicated that it would take awhile for her ulnar nerve function to return. He released her to return to full duty. (Employer's Exhibit 1, depo ex A, pp 11-12)

Upon returning she was re-assigned to a position where she used a mallet with her right arm. This position required many similar movements of her arm as her previous jobs. She struggled to keep pace. (Claimant's Testimony)

Dr. Rotman re-examined employee on April 30, 2002. Claimant reported pain and sensitivity over the ulnar nerve when extending the right elbow. On examination she was able to hyperextend her left elbow to ten degrees; she lacked ten degrees of extension. She was able to fully flex it. Claimant was tender over the transposed ulnar nerve. Dr. Rotman indicated that claimant had not yet fully recovered from her transposition. He thought that she was overly sensitive at the transposed site. She had some adjustments on the job that may help. He thought that she could continue with full work activities. (Employer's Exhibit 1, depo ex A, p. 13)

On June 25, 2002, Dr. Rotman reexamined Ms. Shargel. He reported that most of her pain was gone and that overall she was happy with the results. She still had occasional numbness and tingling in her long, ring, and small fingers. She had changed her job and felt that this had a lot to do with the change in her symptoms. He found that her grip strength was 30 pounds on the right side and 34 pounds on the left side; pinch strength was 10 pounds on both side. Dr. Rotman felt that claimant was at maximum medical improvement with respect to her ulnar nerve transposition. He discharged her from his care. (Employer's Exhibit 1, depo ex A, p. 14)

Claimant stopped working on July 13, 2002 for reasons unrelated to her right elbow injury. She has not worked since then. (Claimant's Testimony)

Medical Opinions

Dr. Barry Feinberg, an anesthesiology and pain management specialist, testified by deposition on behalf of claimant on April 21, 2005. He examined employee on October 8, 2003 and reviewed the medical records. Ms. Shargel told him that she had pain in the right elbow and difficulty straightening it. Her grip was adequate, but it caused pain. She reported that the pain radiated up the ulnar aspect of the wrist and frequently woke her up. Weather changes caused achiness in the arm, with pain radiating from the hand to her shoulder. (Claimant's Exhibit A, Page 10)

Claimant reported prior problems with her right arm, due to bilateral carpal tunnel surgeries in 1997 and 1998. However, she claimed that she could distinguish the pain in her elbow from her carpal tunnel symptoms. (Claimant's Exhibit A, Pages 10-11)

While performing various tests on claimant's right arm, Dr. Feinberg noted trigger points, pain, tenderness, and reduced range of motion. (Claimant's Exhibit A, Pages 21-22)

Dr. Feinberg opined that claimant's continuing complaints of chronic right upper extremity pain radiating from the right hand and wrist up to the shoulder, while centered at the elbow, were causally related to elbow injury. (Claimant's Exhibit A, Pages 30-31& depo ex 2, p. 11)

Dr. Feinberg testified that claimant's right upper extremity pains would be amenable to ongoing treatment. He thought that she would benefit from physical therapies, as they had not been performed other than the physical therapy after the cubital tunnel surgery. On other hand he testified that claimant had reached maximum medical improvement from a functional standpoint and that further therapy would not change her ability to function. Nevertheless, he thought that claimant would benefit symptomatically and would have greater improvement in activities of daily life and overall function with reduced pain and improved range of motion if physical therapy techniques, possibly coupled with injection therapies were considered. Dr. Feinberg further opined that medication management would always be ongoing. (Claimant's Exhibit A, Pages 28-30 & depo ex 2, p. 10)

Dr. Thomas F. Musich examined claimant at the request of her attorney on September 16, 2003 and reviewed the medical records. He noted that there was paresthesia to light touch and pin prick over the ulnar nerve distribution of the right hand. There was a loss of 10 degrees of full extension of the right elbow due to pain and a loss of 12 degrees pronation. Though Dr. Musich rated claimant's permanent disability, he did not recommend any additional treatment. (Claimant's Exhibit B, depo ex A, pp 4-5)

Dr. Rotman testified by deposition on behalf of employer on December 14, 2004. Hedischarged claimant regarding her right elbow on June 25, 2002. He did not recommend any additional treatment. (Employer's Ex. 1, Page 12 & depo ex. B, p. 14)

Additional Findings

Although Dr. Feinberg thought that additional therapy might improve claimant's right elbow symptoms, he acknowledged that it would not change her functional use of her elbow. Dr. Rotman prescribed and claimant underwent three weeks of physical therapy following her surgery. When he last examined her he did not think that she required any more treatment. There was no evidence that claimant asked to see Dr. Rotman again. Dr. Musich also examined claimant and did not recommend any additional treatment. It is now 3 years since she last worked. On balance, I find the opinions of Drs. Rotman and Musich more persuasive than the opinion of Dr. Feinberg. Accordingly, I find that claimant does not need any additional therapy for her right elbow injury.

PERMANENT DISABILITY

The employee must prove the nature and extent of any disability by a reasonable degree of certainty. Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). The fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174 (Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986).

However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corp., 526 S.W.2d 886, 892 (Mo. App. 1975). The trier of facts may even base its findings solely on the testimony of the employee. Fogelsong at 892. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony is given. Hutchinson v. Tri-State Motor Transit Co., *supra* at 161-2; Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993); Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267, 269 (Mo. App. 1993).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 505 (Mo. App. 1989); Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, 238 (Mo. App. 1986); Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo. App. 1983); Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980); McAdams v. Seven-Up Bottling Works, 429 S.W.2d 284, 289 (Mo. App. 1968). The fact finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The finding of disability may exceed the percentage testified to by the medical experts. Quinlan v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. Gilley v. Raskas Dairy, 903 S.W.2d 656, 658 (Mo. App. 1995); Jones v. Jefferson City School Dist, 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

Claimant's Testimony

Claimant testified that she cannot carry her laundry basket down stairs because it is too heavy. She is unable to do any yard work. She stated that she has had to relearn how to do everything because of her right arm. She cannot get into the bathtub. She is not able to put her right arm down to the side. She has not noticed any improvement in her pain. Her right arm still clicks. She said that it is difficult putting on long sleeve shirts.

Medical Opinions

Dr. Feinberg opined that claimant's continuing complaints of chronic right upper extremity pain radiating from the right hand and wrist up to the shoulder, while centered at the elbow, were causally related to elbow injury. (Claimant's Exhibit A, Pages 30-31 & depo ex 2, p. 11) He opined that claimant sustained 55% permanent partial disability to the right shoulder as a result of the January, 2001 injury (Claimant's A, Pages 32-33 & 58 & depo ex 2, p. 11)

On cross-examination by the Second Injury Fund, Dr. Feinberg explained that he rated claimant's disability at the shoulder, rather than the elbow, because claimant had pain and tenderness in levels above the elbow, such as biceps, triceps, shoulder, and suprascapular regions; also, claimant's guarding of her right arm and chronic disuse indicated an effect on the total upper extremity, as opposed to the elbow only. (Claimant's A, Pages 60-61)

Dr. Musich opined that claimant's employment as an assembler was a significant factor in the development of her right cubital tunnel syndrome and that her persistent right upper extremity symptoms after the ulnar nerve transposition was causally related to her continued work as an assembler. (Claimant's Exhibit B, depo ex A, p. 5)

Dr. Rotman indicated that claimant had a loss of 10 degrees of full extension. She still had occasional numbness in the long, ring, and small fingers. He opined that employee had 10% permanent partial impairment of the elbow. (Employer's Exhibit 1, Page 13)

Findings

Taking into account all of the evidence, I find that claimant sustained 20-1/2% permanent partial disability of the right elbow due to her cubital tunnel syndrome.^[1]

SECOND INJURY FUND LIABILITY

Employee is also seeking an award of additional permanent partial disability from the Second Injury Fund pursuant to Section 287.220.1 Mo. Rev. Stat. (2000).^[2] Under that Section an employee who has a preexisting permanent partial disability and who subsequently sustains a compensable injury may recover from the Second Injury Fund any additional permanent disability caused by the combination of the preexisting disability and the disability from the subsequent injury. The employer is liable only for the disability caused by the work-related accident. The Second Injury Fund is liable for the difference between the sum of the two disabilities considered separately and independently and the disability resulting from their combination. Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985). In order to recover from the Second Injury Fund the employee must prove a prior permanent partial disability, whether from a compensable injury or not, a subsequent compensable injury, and a synergistic combination of the preexisting and subsequent disabilities.

Disability from Primary Injury

I previously found that claimant sustained 20-1/2% permanent partial disability of the right elbow as a result of the injury of January of 2001.

Thresholds

The 1993 amendment to Section 287.220.1 also established minimum threshold requirements with respect to the subsequent compensable injury of 50 weeks for a body as a whole injury or 15% of a major extremity.

As I found that claimant sustained 20-1/2% permanent partial disability of the right elbow as a result of the primary injury, I find that claimant has met the threshold requirements for the primary injury.

Disability from Prior Injuries or Conditions

The employee must next prove that he or she had a permanent partial disability or disabilities preexisting the present injury and the amount thereof which existed at the time of the compensable injury. Garcia v. St. Louis County, 916 S.W.2d 263, 267 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 577 (Mo. App. 1985). It is not necessary that the "previous disability" be due to an injury. Section 287.220.1 was amended in 1993 to define the nature of the preexisting disability as "of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed" The appellate courts have held that the portion of the 1993 amendment to Section 287.220.1 Mo. Rev. Stat. (1994) which modified the definition of preexisting disability was applicable to all pending cases without regard to the date of injury. Leutzinger v. Treasurer, 895 S.W.2d 591 (Mo. App. 1995); Lane v. Schreiber Foods, Inc., 903 S.W.2d 616 (Mo. App. 1995); Faulkner v. St. Luke's Hospital, 903 S.W.2d 588 (Mo. App. 1996). In Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo. App. 1995), the court of appeals stated in dicta that "a previously existing condition that a cautious employer could perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition" would constitute a hindrance or obstacle to employment or reemployment. Id. at 620. Being able to work, though in pain, following a previous injury is not incompatible with that injury being treated as a preexisting permanent partial disability. Hedrick v. Chrysler Corp., 900 S.W.2d 233, 236 (Mo. App. 1995).

The nature and extent of the preexisting disabilities are determined as of date of the primary injury. Garcia v. St. Louis County, 916 S.W.2d 263, 267 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 577 (Mo. App. 1985). The Second Injury Fund is not liable for any post-accident worsening of an employee's preexisting disabilities which are not caused or aggravated by the last work-related injury or for any conditions which arise after the last work-related injury. Garcia v. St. Louis County, supra; Frazier v. Treasurer of Missouri, 869 S.W.2d 152 (Mo. App. 1994); Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789 (Mo. App. 1992); see also Wilhite v. Hurd, 411 S.W.2d 72 (Mo. 1967).

The employee must prove the nature and extent of any disability by a reasonable degree of certainty. Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). The fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174 (Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986).

Employee claims that the following conditions constitute "previous disabilities" under Section 287.220.1: bilateral carpal tunnel syndrome, 1999 head injury involving left temporal epidural hematoma, hearing problems and migraine headaches, 1999 left ankle fracture, and pulmonary and cardiac problems.

Bilateral Carpal Tunnel Syndrome

Medical Treatment

Claimant began to experience problems with her hands in the late-1990's while working for Employer. Claimant was examined by Dr. David W. Strege on September 17, 1997, at which time she reported a greater than one year history of right hand and wrist pain with paresthesias. She had been treated for carpal tunnel syndrome with nonsteroidal anti-inflammatory medications and wrist cock-up splints, which provided only minimal relief. Dr. Strege felt that employee had signs and symptoms, as well as electrodiagnostic studies, consistent with mild right carpal tunnel syndrome. He administered an injection of Celestone and Lidocaine. On October 15 employee told him that the injection had not helped her symptoms. He prescribed Daypro. (Claimant's Exhibit I, Pages 2 & 8) Due to employee's continued complaints, Dr. Strege on December 15, 1997 recommended surgery. (Claimant's Exhibit I, Page 10)

Dr. Mitchell Rotman, an associate of Dr. Strege, examined claimant on August 11, 1998 and reported that nerve conduction studies indicated mild bilateral carpal tunnel. He recommended bilateral surgeries. (Claimant's Exhibit I, Page

12) He apparently performed the surgeries on August 20. He recommended that she begin physical therapy on September 3, 1998. (Claimant's Exhibit I, Page 16) Dr. Rotman allowed her to return to work at full duty on October 22, 1998. (Claimant's Exhibit I, Page 20) Claimant continued to have hand and wrist complaints for months afterwards. (Claimant's I, Pages 21-22)

Medical Opinions

Dr. Musich noted on examination that her Tinel signs and Phalen's tests were positive and there was paresthesia to light touch and pin prick over the median nerve distribution of both hands. Claimant told him that she continued to experience pain, numbness and tingling over the median nerve distribution of both hands. He opined claimant had 30% permanent partial disability of the each wrist due to her bilateral carpal syndrome. (Claimant's Exhibit B depo ex A, pp 6 & 8)

Settlement

On December 2, 1999 Ms. Shargel settled her claim for bilateral carpal tunnel syndrome against Employer for 17-1/2% of the right wrist and 15% of the left wrist, with a 10 % load and 2 weeks of disfigurement. (Employer's Exhibit 9)

Pulmonary And Cardiac Problems

Medical Treatment

Claimant was diagnosed when she was a child with mitral valve prolapse associated with a heart murmur. In 1988 claimant experienced several short scary episodes of rapid heart beat. Employee wore a Holter monitor for several days. Supraventricular tachycardia was diagnosed. She underwent a cardiac ablation in April of 1999 which cured the supraventricular tachycardia. (Claimant's Testimony)

Claimant saw Dr. Bassam Al-Joundi at Gateway Cardiology on March 22, 2001. According to the history, she had been diagnosed with atrial arrhythmias and mild pulmonary hypertension, but had done very well and had improved after being placed on Celexa. At the time she denied lightheadedness or any significant palpitations. She complained of some atypical chest symptoms. (Claimant's Exhibit H, Pages 1-2)

Dr. Al-Joundi performed an echocardiogram. It demonstrated normal left ventricular systolic function and normal right ventricular size and function. She had trivial mitral regurgitation and mild tricuspid regurgitation. He indicated that employee had mild pulmonary hypertension. Dr. Al-Joundi noted that she was taking Celexa, which had improved her clinical status. (Claimant's Exhibit H, Pages 1-2)

Claimant's Testimony

Ms. Shargel testified that she had a good result from the ablation procedure. She did not think that her heart condition posed a hindrance or obstacle to her employment.

Claimant also testified that she was diagnosed with asthma in approximately 1995. She takes medication daily. She felt that without these medications her job performance would be hindered.

Medical Opinions

Claimant told Dr. Feinberg that she had previously been diagnosed with asthma and gets wheezing. Her seasonal allergies worsen her asthma. She uses inhalers. (Claimant's Exhibit A, depo ex 2, p. 5) On examination of her chest, he heard a diffuse expiratory wheeze. He also detected a murmur consistent with a mitral valve. No arrhythmia was detected. (Claimant's Exhibit A, Page 25)

Dr. Feinberg testified that claimant's mitral valve prolapse and arrhythmias were fairly serious. He stated that her valve was not replaced; however, her arrhythmias were addressed with a surgical ablation. (Claimant's Exhibit A, Pages 69-70) According to Dr. Feinberg, claimant was hindered in her ability to work by the combination of the mitral valve prolapse, mitral regurgitation, and arrhythmias with claimant's pulmonary complications, including asthma. (Claimant's Exhibit A,

Dr. Feinberg opined that claimant had 15% permanent partial disability referable to the heart due to the mitral valve prolapse, mitral regurgitation, history of arrhythmias requiring ablation, and associated pulmonary hypertension which was most likely responsible for claimant's asthma. (Claimant's A, Page 33 & depo ex 2, p. 12)

Left Ankle Fracture

Medical Treatment

In August of 1999 claimant fractured her left ankle while doing a cartwheel. She was placed in a cast and walked on crutches. She took time off work. (Claimant's Testimony)

There were no medical records describing this injury other than x-rays taken of claimant's left foot and ankle at St. Anthony's Hospital on September 24, 1999. The films were inconclusive due to claimant's fiberglass cast. (Claimant's Exhibit E, Pages 6-7)

Medical Opinions

Dr. Feinberg indicated that claimant told him that she had chronic pain in her left ankle, but that it was relatively minor compared to her other complaints. He opined that claimant had a 5% permanent partial disability at the level of the ankle as a result of the fracture that she had suffered in 1999. (Claimant's Exhibit A, Page 33 & depo ex 2, pp 10 & 12)

Head Injuries

Medical Treatment

On September 21, 1999, claimant fell down approximately 11 concrete and metal steps "head over heels," striking her head numerous times. She was bleeding from her left nostril and ear and had difficulty remembering what happened and her name. (Claimant's Testimony & Claimant's Exhibit C, Page 34) She was taken to St. Anthony's Medical Center that day where she was admitted. While in the emergency room, she became more combative and confused. A CT scan of the head revealed a large temporal epidural hematoma. Surgery was recommended for this emergency situation. ^[3] (Claimant's Exhibit E, Pages 3-4) On September 22, 1999, Dr. Kong- Woo Peter Yoon performed a left temporal craniotomy with evacuation of the epidural hematoma. Dr. Woo also found a multiple complex fracture of the skull overlying the subtemporal parietal region which was reconstituted using a titanium mesh. (Claimant's Exhibit E, Pages 1-2 & 5)

Claimant followed-up with Dr. Yoon on October 1, 1999 complaining of headaches and lightheadedness. Except for these symptoms, Dr. Yoon felt that she was doing better. He explained that her neurological exam was essentially normal, but she had decreased hearing in the left ear and was referred to an otolaryngologist. (Claimant's Exhibit E, Page 8) On November 18, 1999 claimant complained of local tenderness where the cranioplasty was performed and tinnitus. Overall, Dr. Yoon felt her neurological exam was normal. He thought she had made a good recovery from her injury despite the relatively common complaints of fatigue following a serious head injury. Claimant indicated a desire to return to work because of financial concerns. (Claimant's Exhibit E, Page 11) Dr. Yoon allowed her to return to work as of the following Monday (November 22), and he did not plan to see her again unless her problems persisted. He indicated that they could then consider a revision cranioplasty. (Claimant's Exhibit E, Page 12)

Due to continuing migraine headaches, claimant returned to see Dr. Yoon on December 30, 1999. She told him that she experienced occasional migraines prior to her head injury, but they were occurring now daily and preceded by an occasional flashing light, mostly in her left orbit. As the pain was severe, she was taking a lot of Imitrex. Dr. Yoon suspected she was taking too much Imitrex and was experiencing rebound migraine attacks. He prescribed Percocet and Elavil and recommended that she limit her use of Imitrex. Dr. Yoon also referred her to a neurologist. (Claimant's Exhibit E, Pages 13-14) There is no record that she was examined by a neurologist at that time.

Dr. Jacques A. Herzog, an otolaryngologist examined claimant on April 7, 2000 for persistent hearing loss with tinnitus in her left ear. Her otolaryngologic examination was unremarkable. Her audiogram revealed normal hearing in the right ear with mild to profound, primarily conductive hearing loss in the left ear. (Claimant's Exhibit C, Pages 35-36) Dr. Herzog performed surgery on her middle ear on or about April 30, 2000. He found that she had a great deal of scar and adhesion along with a fracture between the head of the stapes and the crura. Her hearing was subjectively improved, but the tinnitus remained. He prescribed medication. On June 2, 2000, Dr. Herzog indicated that employee's hearing seemed

subjectively improved, but she was having difficulty secondary to allergic rhinitis. He advised her to resume normal activities, and he planned an audiogram in four weeks. (Claimant's Exhibit C, Page 37) There was no record of a subsequent audiogram.

On May 1, 2001, claimant was examined Dr. Brij Vaid, her internist. He diagnosed her with bronchitis, migraines, and allergic rhinitis. He prescribed an inhaler. (Claimant's Exhibit C, Page 6) On June 10, 2001, claimant presented to the St. Anthony's Medical Center emergency room. She complained of a headache which had lasted for three days. She was diagnosed with a severe vascular headache and given morphine sulfate. Vicodin was prescribed at the time of discharge. (Claimant's Exhibit G, Pages 5-6) Employee returned to Dr. Vaid on July 3, 2001 with complaints of shortness of breath, chest tightness, and a cough. He noted no seizure activity, and that her migraines improved after she obtained new glasses. His impression was exacerbation of asthma, migraines, and allergic rhinitis. (Claimant's Exhibit C, Page 8) Dr. Vaid reexamined claimant for alleged rhinitis on July 27, 2001 (Claimant's Exhibit C, Page 9)

Her headaches persisted upon her return and worsened over time. During work shifts for employer, claimant frequently went to the restroom during breaks to inject herself with Imitrex to relieve headaches. Bright lights and loud noise near her work station aggravated her headaches. She now feels that she returned to work too soon, but only did so because of money. (Claimant's Testimony)

On November 13, 2001, Dr. Vaid noted that claimant's asthma was stable, that she had some discomfort from dyspepsia, and that her depression was stable with Celexa. She complained that her migraines were worsening. He changed the medication for her headaches and recommended pain management. (Claimant's Exhibit C, Page 10) During visits with Dr. Vaid over the next 12 months, claimant consistently complained of headaches. (Claimant's Exhibit C, Pages 11-33)

Dr. Kevin Coleman at Pain Management Services examined claimant on December 20, 2001. She reported a long history of headaches.^[4] She indicated that they were occurring every day. Her headaches were relieved with ice packs and worsened by bright lights, emotional stress, or noise. They affected her sleep, appetite, work, finances, physical activity, emotions, and concentration. Dr. Coleman's impression was migraine headache and fibromyalgia. He prescribed Vicodin and gave her sample of Ultracet and Zanaflex. (Claimant's Exhibit D, Pages 1-2, 7 &, 11-12) She returned on January 18, 2002 complaining of migraine headaches and pain on the left side of her body. (Claimant's Exhibit D, Page 13) On February 8, 2002, an occipital nerve block was recommended. (Claimant's Exhibit D, Page 14) When claimant returned on February 13, 2002, she reported she was doing well and was given the bilateral occipital nerve injections. (Claimant's Exhibit D, Pages 15-16) On April 17, 2002, Dr. Coleman prescribed medication for her migraine headaches and myofascial pain. (Claimant's Exhibit D, Page 17)

On May 13, 2002, Dr. Vaid recorded a history of migraines and he recommended that claimant be seen by a neurosurgeon. (Claimant's Exhibit C, Page 15) Over the next several months, Claimant's headaches and myofascial pain persisted. (Claimant's Exhibit D, Pages 18-20) On July 19, 2002, Dr. Coleman recommended a neurological consultation with Dr. Head regarding her headaches. (Claimant's Exhibit D, Page 21) Due to ongoing headaches, Dr. Vaid recommended an MRI of claimant's brain on October 25, 2002. Several days later, an MRI of the brain was unremarkable without evidence of aneurysm or post-op change. (Claimant's Exhibit C, Pages 29-30)

On November, 14, 2002, Dr. Coleman reported continual "head pain." (Claimant's Exhibit D, Page 26)

Claimant's Testimony

Claimant testified that she continues to experience excruciating headaches on a daily basis. The average migraine pain is 8. She experiences nausea monthly, especially if she does not take her medications timely. She takes numerous prescriptions, such as Topamax, Zelmig, and Celexa, everyday. Bright lights, noise, emotional stress, and bending down or moving her head down aggravate her headaches. For relief, she retires to a dark room and puts a cold pack on her right eye. She described the pain in her right eye as dagger-like. Besides taking her medications, claimant testified that there is nothing she can do during these episodes. Her eyesight has also suffered, as her eyes occasionally become sensitive to bright lights or foggy.

Employee testified that she suffers from confusion and memory loss. She stated that she loses her words during conversations on a daily basis. Claimant testified that she never had such problems prior to the fall.

Claimant testified that she hears a constant "wind" noise in her left ear. She had no hearing problems prior to the fall.

Medical Opinions

Dr. Feinberg reviewed the medical records and opined that claimant had 40% permanent partial disability of the body as a referable to the head injury of September, 1999 and the resultant headaches, memory loss, confusion, and left ear problems. (Claimant's Exhibit A, Page 33 & depo ex 2, p. 12) On cross examination Dr. Feinberg explained that his rating took into account the craniotomy procedure, chronic migraine headaches with nausea that require medications, and lack of improvement of tinnitus and hearing loss. (Claimant's Exhibit A, Pages 72-73)

Dr. Musich reviewed the medical records and opined that prior to January, 2001 claimant was affected by severe headaches secondary to an epidural hematoma, which required a craniotomy. This condition continued to produce chronic residual symptoms, which have resulted in a permanent partial disability of 35% of the person as a whole secondary to a surgically decompressed epidural hematoma and chronic migraine headaches. (Claimant's Exhibit B, depo ex A, pp 6-8)

Additional Findings

It is clear from the medical records that claimant's migraine headaches worsened in November of 2001. She complained of daily headaches and was referred to a pain management clinic. Both Drs. Musich and Feinberg rated her disability pertaining to the head injury and migraine headaches as of the dates of their evaluations rather than as of January, 2001, the date of the primary injury.^[5] (Claimant's Exhibit A, Page 64)

Taking into account the medical records through December of 2000, claimant's testimony, and the medical opinions, I find that employee had the following disabilities which were "of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed" immediately prior to the January of 2001 injury to her right elbow: 10% permanent partial disability of the body referable to her cardiovascular and pulmonary conditions, 30% permanent partial disability of the body referable to the 1999 skull fracture and epidural hematoma, and subsequent worsening of her migraine headaches, 17-1/2% permanent partial disability of the right wrist and 15% permanent partial disability of the left wrist due to bilateral carpal tunnel syndrome. I find based on the rating of Dr. Feinberg that claimant's preexisting disability in her left ankle was not of such seriousness as to constitute a hindrance or obstacle to employment.

Thresholds

The 1993 amendments also established minimum threshold requirements with respect to the disability caused by the preexisting injury of 50 weeks for a body as a whole injury or 15% of a major extremity. The appellate courts have held that these requirements are not to be applied retroactively. Smart v. Missouri State Treasurer, 916 Mo. App. 367 (Mo. App. 1996); Fletcher v. Treasurer, 922 S.W.2d 402 (Mo. App. 1996); Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Suarez v. Treasurer of Mo., 924 S.W.2d 602, 604 (Mo. App. 1996); Faulkner v. Chrysler Corporation, 924 S.W.2d 866 (Mo. App. 1996).

As I have found that prior to the January of 2001 injury to her right elbow, claimant had 10% permanent partial disability of the body referable to her cardiovascular and pulmonary conditions, 30% permanent partial disability of the body referable to the 1999 skull fracture and epidural hematoma, and subsequent worsening of her migraine headaches, 17-1/2% permanent partial disability of the right wrist and 15% permanent partial disability of the left wrist due to bilateral carpal tunnel syndrome, I find that claimant's preexisting disabilities meet the threshold requirements for the preexisting injury.

Combination of Preexisting and Primary Disabilities

The employee must next prove a combination effect. The employee must show that his or her present compensable injury combines with the preexisting permanent partial disability to cause a greater overall disability than the sum of the disabilities considered independently. A determination must be made as to whether the employee's work-related injury combines with his or her preexisting disability so as to result in a greater disability than the sum of the two disabilities considered separately, and if so to what extent. Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985). The 1993 amendment also added the word "substantially" in describing the greater overall disability. Unless this word has no meaning, it clearly constitutes a substantive change. Given the recent decisions of the appellate courts holding that the threshold requirements for the primary and preexisting disabilities are substantive changes and consequently are not applied retrospectively, it is likely that the addition of the word "substantially" will also be held to not apply retrospectively.

Additional Findings

Dr. Musich opined that the combination of claimant's past and present disabilities is significantly greater than their simple sum and will continue to produce a chronic hindrance in her routine activities of daily living. (Claimant's Exhibit B, depo ex A, p. 8)

Given the nature of the disabilities in claimant's right elbow, both wrists, and due to her head injury, migraine headaches, and her heart and lung problems, and based on Dr. Musich's opinion, I find that that there is a combination effect between the prior disability in claimant's wrists, head, heart and lungs with the January of 2001 injury to claimant's right elbow which produces a substantially greater overall disability.

It is next necessary to determine "the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained."^[6] Based on the medical evidence and the testimony of the employee, I find that the employee is 75% disabled with respect to the body as a whole as a result of "all of the injuries and conditions existing at the time the last injury was sustained."

Having previously determined that the employee's disabilities which existed prior to the last injury is 30% of the body referable to the head, 10% of the body referable to the heart and lungs, and 17-1/2% of the right wrist and 15% of the left wrist (which are equivalent to 14.2% of the body as a whole) and that the disability which resulted from the last injury is 20-1/2% of the right wrist (which is equivalent to 10.8% of the body as a whole), I hereby find that the Second Injury Fund is liable for the balance of the combined disability (75% less 65%), to wit: 10% of the body as a whole.

ATTORNEY'S FEES

This award is subject to a lien in the amount of 25% of the additional payments hereunder in favor of the employee's attorney, Rick Barry, for necessary legal services rendered to the employee.

Date: _____

Made by: _____

John Howard Percy
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-154181

Employee: Cheryl Shargel
Employer: Daimler Chrysler Corporation
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: Alleged April 17, 2002

Place and County of Accident: Alleged St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 15, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John Howard Percy, issued August 15, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 7th day of February 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Cheryl Shargel

Injury No.: 02-154181

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Daimler Chrysler Corporation

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Self-Insured

Hearing Date: May 3, 2005

Checked by: JHP:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
3. Was the injury or occupational disease compensable under Chapter 287? No

3. Was there an accident or incident of occupational disease under the Law? No
6. Date of accident or onset of occupational disease: N/A
7. State location where accident occurred or occupational disease was contracted: N/A
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? No
10. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Self-Insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted: N/A
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: N/A
15. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Cheryl Shargel Injury No.: 02-154181

17. Value necessary medical aid not furnished by employer/insurer? None
19. Employee's average weekly wages: \$685.54
19. Weekly compensation rate: \$457.03 PTD/TTD; \$329.42 PPD
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

TOTAL: NONE

23. Future requirements awarded: None

Said payments to begin N/A and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Cheryl Shargel	Injury No.: 02-154181
Dependents:	N/A	Before the
Employer:	Daimler Chrysler Corporation	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Self-Insured	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: JHP

A hearing in this proceeding was held on May 3, 2005. All parties submitted proposed awards on July 18, 2005. Injury No. 01-160009 was also heard with this claim. The record comprises 150 pages of depositions of expert witnesses and 225 pages of medical records and reports. Claimant asserted permanent total disability in each case. Additional time was required in issuing this award due to the complexities of this case.

STIPULATIONS

The parties stipulated that on or about April 17, 2002:

6. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
7. the employer's liability was self-insured;
8. the employee's average weekly wage was \$685.54; and
9. the rate of compensation for temporary total disability and permanent total disability was \$457.03 and the rate of compensation for permanent partial disability was \$329.42.

The parties further stipulated that:

1. the employer had notice of the alleged injury and a claim for compensation was filed within the time prescribed by law;
5. no compensation has been paid; and
6. employer has not paid any medical expenses.

ISSUES

The issues to be resolved in this proceeding are:

1. whether the employee sustained any injury as a result of an occupational disease or exposure to repetitive trauma which arose out of and in the course of claimant's employment;
2. if the employee sustained a compensable injury, whether she should be provided with any future medical treatment for the injury;
3. if the employee sustained a compensable injury, whether she is entitled pursuant to Section 287.170 Mo. Rev. Stat. (2000) to compensation for temporary total disability for any periods of time subsequent to April 17, 2002;

- 4 if the employee sustained a compensable injury, whether and to what extent employee sustained any permanent disability which would entitle her to an award of compensation; and
5. if the employee sustained a compensable injury, whether and to what extent the employee sustained any additional permanent partial or permanent total disability for which the Second Injury Fund would be liable as a result of the combination of any preexisting disabilities with the primary injury.

OCCUPATIONAL DISEASE MEDICAL CAUSATION

Cheryl Shargel, employee herein, claims that her work activities at DaimlerChrysler Corporation on the assembly line, particularly the repetitive nature thereof, was a substantial factor in causing her chronic low back and lower extremity pain. Employer contends that if claimant does have such conditions, her work activities were not substantial factor in causing them.

An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067 Mo. Rev. Stat. (2000). It defines occupational disease as:

an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. (1993 additions underlined)

Section 287.067.2, which was added in 1993, provides that an occupational disease is compensable "if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor." Subsection 2 of section 287.020 provides that an injury is clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability."^[7]

Subsection 3(1) of section 287.020 provides that an injury must arise out of and in the course of the employment and be incidental to and not independent of the employment relationship and that "ordinary, gradual deterioration or progressive degeneration of the body caused by aging" is not compensable unless it "follows as an incident of employment."

Subsection 3(2) of section 287.020 provides that an injury arises out of and in the course of the employment "only if (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and (b) It can be seen to have followed as a natural incident of the work; and (c) It can be fairly traced to the employment as a proximate cause; and (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life[.]"

Much of new subsection 3(2) of section 287.020 was contained in the prior definition of an occupational disease set forth in Section 287.067. Section 287.020.3(2)(b), (c), and (d) were part of the former occupational disease statute. Section 287.020.3(2)(a) is a revision of the prior requirement of a direct causal connection between the conditions under which the work was performed and the occupational disease. Direct causal connection is now defined as "a substantial factor in causing the injury." The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. A substantial factor does not have to be the primary or most significant causative factor. Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo. App. 2000); Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998). The additional language in section 287.020.3(1) concerning deterioration or degeneration of the body due to aging probably does not overturn any prior court decisions.

Since the 1993 amendments pertaining to occupational diseases have largely readopted the prior statute, caselaw interpreting the prior statute is of some significance. In repetitive motion cases,^[8] as practically all movements of the human body done during the course of employment are also replicated in nonworking environments and as most occupationally induced diseases also sometimes occur in the public at large, the courts have focused on a particular risk or hazard to which an employee's exposure is greater or different than the public at large. Collins v. Neevel Luggage Manufacturing Co., 481 S.W.2d 548, 552-54 (Mo. App. 1972); Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988); Hayes v. Hudson Foods, Inc., 818 S.W.2d 296, 299-300 (Mo. App. 1991). Claimant must present substantial and competent evidence that he

or she has contracted an occupationally induced disease rather than an ordinary disease of life. The Courts have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort". Id. at 300; Dawson v. Associated Elec., 885 S.W.2d 712, 716 (Mo. App. 1994); Prater at 230; Jackson v. Risby Pallet and Lumber Co., 736 S.W.2d 575, 578 (Mo. App. 1987); Polavarapu v. General Motors Corp., 897 S.W.2d 63, 65 (Mo. App. 1995); Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 415 (Mo. App. 1988).

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Dawson at 716; Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 223 (Mo. App. 1992); Brundige v. Boehringer, 812 S.W.2d 200, 202 (Mo. App. 1991). Claimant must prove that work was "a substantial factor" in causing "the resulting medical condition or disability." Section 287.020.2. Moreover, "an occupational disease is not compensable merely because work was a triggering or precipitating factor." Section 287.067.2 Mo. Rev. Stat. (1994). The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. On the other hand, injuries which are triggered or precipitated by work may nevertheless be compensable if the work is found to be the "substantial factor" in causing the injury. Kasl, supra.

A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. Dawson at 716; Sellers v. Trans World Airlines Inc., 776 S.W.2d 502, 504 (Mo. App. 1989); Sheehan at 797. The opinion may be based on a doctor's written report alone. Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988). "A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. George v. Shop 'N Save Warehouse Foods, 855 S.W.2d 460 (Mo. App. 1993); Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986). An administrative law judge may not constitute himself or herself as an expert witness and substitute his or her personal opinion of medical causation of a complicated medical question for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. 1994); Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Eubanks v. Poindexter Mechanical, 901 S.W.2d 246, 249-50 (Mo. App. 1995). However, even uncontradicted medical evidence may be disbelieved. Massey v. Missouri Butcher & Cafe Supply, 890 S.W.2d 761, 763 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490 (Mo. App. 1990).

Injuries caused by repetitive trauma have been treated as occupational diseases. Prater v. Thorngate, Ltd., 761 S.W.2d 226 (Mo. App. 1988); Jackson v. Risby Pallet and Lumber Co., 736 S.W.2d 575 (Mo. App. 1987); Collins v. Neevel Luggage Manufacturing Co., 481 S.W.2d 548 (Mo. App. 1972).

Findings of Fact

Based on my observations of claimant's demeanor during her testimony, I find that she is a credible witness and that her testimony is generally credible. Based on the credible testimony of claimant and on the medical records, I make the following findings of fact.

Description of Work Activities

Mr. Shargel began working for the Employer on November 10, 1994. She often worked significant amounts of overtime and did so for many years. She installed carpets until she developed bilateral carpal tunnel syndrome and underwent bilateral releases in August of 1998. She subsequently installed strips on luggage racks for a year. Claimant was off work from August of 1999 through November 22, 1999 due to sustaining a left ankle fracture and skull fracture and epidural hematoma. (Claimant's Testimony and Exhibit E, Page 12) When she returned to work she became a floater. Employee's daily work activities included lifting, bending, stooping, and working in odd or awkward positions. She often carried heavy objects and regularly had to rush in order keep up with the assembly line flow, all the time jumping into vans and automobiles. (Claimant's Testimony)

During 2000 and 2001, employee worked on the assembly line installing the B and C posts on a van. Her job was to install a plastic plate on the interior of the door post and secure it with screws. She was required jump in and out of the vans while carrying parts and her gear and twist and reach to install screws for the posts. At times claimant found it hard to keep up because of migraine headaches, back pain and leg pain. She installed parts on about 80 vans a day. (Claimant's Testimony)

Claimant underwent right cubital tunnel surgery on January 4, 2002. She was off work until March 1, 2002. After the surgery employee lost mobility in her right arm and was required to change the way she worked, using her left arm more. Initially after returning to work, she installed seatbelts with a torque gun which had a kickback. She performed this job for a few days and then the surgeon took her off work for another week. When she returned to work on March 6, 2002 she used a mallet to install escutcheons and floor rails. She found it hard to keep up. The bending, twisting and jumping in and out of the vans caused her pain. She also found it hard to bend and reach into the parts bins. (Claimant's Testimony)

In response to a question by this ALJ, claimant testified that her low back pain started in 2001.

Medical Treatment

Claimant first sought treatment for her back pain on April 17, 2002 from Dr. Kevin Coleman, a pain management specialist who had been treating employee for migraine headaches since December 20, 2001. She complained of low back pain radiating into both legs and spasms in both legs. She had a positive right straight leg raise test at 30 degrees. His impression was myofascial pain. He prescribed Ultracet and Vicodin and ordered an MRI of the lumbar spine. (Claimant's Exhibit D, Page 17)

Claimant underwent an MRI of the lumbar spine at St. Anthony's Medical Center later that afternoon. It was essentially a normal scan, except for a slight diffuse bulge at L3-4. (Claimant's Exhibit G, Page 9)

On May 13, 2002 claimant was examined by Dr. Brig Vaid, her internist. She complained of low back pain and numbness and tingling into the right leg. She told him that Ultracet made her break out in hives. He prescribed Celebrex and Neurontin and suggested referral to a neurosurgeon. (Claimant's Exhibit C, Pages 14-15)

On May 21, 2002, Dr. Coleman reexamined claimant. She indicated that her condition was the same. Her back exam was normal. He scheduled an epidural steroid injection and refilled her Vicodin. (Claimant's Exhibit D, Page 18) On May 24, 2002, Dr. Coleman administered a midline L3-4 epidural steroid injection consisting of Celestone, Lidocaine and Omnipaque. (Claimant's Exhibit D, Page 19) On June 20, 2002 Dr. Coleman noted that claimant gave a history of continuing pain and no relief from the epidural steroid injection. Dr. Coleman's impression was continuing lumbar pain. He prescribed physical therapy. (Claimant's Exhibit D, Page 20) There is no record of claimant receiving any physical therapy for her back.

Ms. Shargel stopped working on or about July 13, 2002.^[9] She took 6 Vicodin tablets while at work because of pain. She told her boss that she could not keep up with her work. (Claimant's Testimony)

On July 19, 2002 Dr. Coleman noted employee's complaints of lumbar pain and leg cramps. He increased the Neurontin dosage and continued the Vicodin. Dr. Coleman suggested a neurological consult with Dr. Head. (Claimant's Exhibit D, Page 21)

On July 26, 2002, claimant returned to Dr. Vaid who noted her complaints of bilateral leg pain with numbness in the lower extremities. Dr. Vaid's assessment was right lower extremity neuropathy and back pain. The Neurontin dosage was increased and some physical therapy was ordered. There is no record of it being performed. (Claimant's Exhibit C, Page 16) Dr. Vaid ordered a battery of blood tests, including a rheumatoid factor, on July 26, 2002, all of which were normal. (Claimant's Exhibit G, Pages 10-14)

Dr. Vaid reexamined employee on August 2, 2002. He noted that she had muscle spasms, back pain, and left hip pain. (Claimant's Exhibit C, Page 17)

Dr. Peter Mirkin, an orthopedic surgeon, examined Ms. Shargel on August 2, 2002. She listed as medications: Neurontin, Celebrex, Zanaflex, Topamax, Zomig spray, and Oxycodone. She completed a pain diagram indicating that she had stabbing pain and pressure in the low back and right leg. Claimant told him that her "low back pain that has been present for many years" and that the pain down her legs made it difficult to walk. Dr. Merkin noted that she walked with a

nonantalgic gait, that lumbar range of motion was 80% of normal, straight leg raise was negative, and motor and sensory exam were intact. He noted the bulging disk on the MRI. Dr. Mirkin indicated that her exam was relatively normal and that he could not account for her symptoms. He saw no reason for any work restrictions. He suggested a myelogram to make sure that he was not missing anything. (Employer's Exhibit 5, Pages 1, 3 & 5)

Claimant underwent a myelogram and post myelogram CT scan at St. Anthony's Medical Center on August 8, 2002. On physical examination prior to the myelogram employee had left hip pain. The CT scan showed prominent annulus or generalized disk bulges at L3-4 and L5-S1 without any protrusion or extrusion. (Claimant's Exhibit G, Pages 16 & 26-27)

Dr. Richard Head, a neurologist, performed an EMG and nerve conduction study on claimant's lower extremities on August 12, 2002. He indicated that the studies were normal in both legs. He found no evidence of any neuropathy or nerve root lesions. (Employer's Exhibit 6)

On August 16 employee complained to Dr. Vaid of a severe headache, back pain and morning stiffness. (Claimant's Exhibit C, Page 33)

Dr. Mirkin reexamined claimant and reviewed the myelogram films on August 19, 2002. He indicated that her exam was unchanged and that the films were normal. (Employer's Exhibit 5, Page 6)

On August 19, 2002 Dr. Coleman also examined claimant. Lumbar pain was noted. Medications were continued and an epidural steroid injection was prescribed. (Claimant's Exhibit D, Page 22)

On August 23, 2002 claimant returned to Dr. Vaid who noted depression, anxiety, migraines, back pain and bilateral lower extremity pain. On August 30, 2002 Dr. Vaid referred employee to Dr. David Kennedy, a neurosurgeon, for evaluation. (Claimant's Exhibit C, Pages 19 & 21-22)

Dr. David Kenney examined Ms. Shargel on September 10, 2002. Dr. Kennedy noted a two year history of low back pain with no specific onset. She complained of persistent lower back pain with intermittent numbness and tingling in her legs and intermittent spasms. He noted that she had received physical therapy^[10] and epidural steroid injections without relief. Claimant was not able to work. Claimant indicated that the pain was worse after prolonged sitting or driving. On examination her range of motion was significantly reduced. She had numerous trigger areas of trigger point tenderness. Her straight leg raising test was negative. He reviewed the August 8 myelogram. Dr. Kennedy indicated that claimant had findings compatible with fibromyalgia. He referred her to Dr. Barry Feinberg, a pain management specialist, for treatment.^[11] (Claimant's Exhibit F)

Claimant returned to Dr. Vaid on September 13, 2002. Claimant reported movement limitations, muscle pain, and morning stiffness. Someone at his office attempted to contact Dr. Rachel Feinberg. (Claimant's Exhibit C, Pages 23-24) Dr. Vaid reexamined employee on September 27, 2002. She complained of back pain, leg pain, hip pain and joint/muscle pain. He recommended epidural steroid injections. Claimant was excused from work with Chrysler until October 11, 2002. (Claimant's Exhibit C, Pages 25-26)

Dr. Jack Tippett evaluated claimant as part of Employer's Extended Disability Program on September 30, 2002. She told him that she was experiencing pain in her low back extending down into both legs. Her back symptoms had been present for about two years and were getting much more serious. She indicated that sometimes her feet tingled. On examination she had mild discomfort in the midline of the low back. She had difficulty internally and externally rotating her left hip with severe pain on external rotation. He noted claimant's other medical conditions and agreed that she was unable to work. (Employer's Exhibit 7)

Dr. Coleman administered a midline L3-4 epidural steroid injection on October 8. (Claimant's Exhibit D, Page 22) On October 11, 2002 claimant told Dr. Vaid that her back pain felt a little better. Claimant was kept off work until October 25, 2002. (Claimant's Exhibit C, Pages 27-28)

Dr. Coleman administered another midline L3-4 epidural steroid injection on October 22, 2002. On November 1, 2002 Dr. Coleman administered an epidural steroid injection at the L4-5 level. (Claimant's Exhibit D, Pages 24-25)

On November 8, 2002 Dr. Vaid noted that employee complained of movement limitation, back pain, and morning stiffness and headache. He suggested fibromyositis and ordered a series of blood tests, the results of which were normal. (Claimant's Exhibit C, Pages 1-2 & 31)

On November 14, 2002 Dr. Coleman re-examined claimant and again noted low back pain. Dr. Coleman apparently prescribed oxy IR and recommended a follow-up with a workers' compensation physician. (Claimant's Exhibit D, Page 26)

On November 15, 2002 Dr. Vaid noted that she complained of movement limitation, back pain, and morning stiffness and headache. His assessment was headache and bipolar disorder. (Claimant's Exhibit C, Page 32)

Dr. H. R. Raza evaluated claimant as part of Employer's Extended Disability Program on November 21, 2002. He noted that she complained of having back pain for over two years associated with cramping in her legs and pins and needles sensation. She also reported left buttock pain. He observed that she was anxious and constantly pacing the room. He thought that she could not sit or stand still. She told him that she was in chronic pain. Straight leg raise revealed mild discomfort in her left buttock. Bending forward caused some discomfort in her lower back. He opined that she could return to work with a 10 pound lifting restriction. (Employer's Exhibit 8)

Apparently, claimant's health insurance declined to pay for any treatment by Dr. Feinberg.^[12] Claimant filed her Claim for Compensation on or about August 6, 2003.

Medical Opinions

Dr. Thomas Musich examined Ms. Shargel at the request of her attorney on September 16, 2003. Claimant told Dr. Musich that she had experienced chronic back pain since 2000. She did not remember any specific single event affecting her back. Claimant told Dr. Musich that she was treated conservatively, including one week of rest off, work by her primary care physician in 2000. Dr. Musich noted that Dr. Coleman diagnosed her with fibromyalgia in December of 2001. She continued to treat aggressively in pain management for complaints of pain, stiffness, and various paresthesias; she was taking numerous drugs. Dr. Musich indicated that she did not give any history or complaints compatible with dermatomal paresthesia or radiculopathy in any extremity. (Claimant's Exhibit B, depo ex 2, p. 3)

On review of the medical records Dr. Musich noted that employee complained of severe low back pain in April, 2002 and an MRI was performed which demonstrated a disc bulge at L3-4, with no evidence of herniation or spinal stenosis. The myelogram and post myelogram CT scan reports indicated a prominent annulus, or generalized disc bulge at L4-5 and at L3-4. Dr. Musich noted that the nerve conduction studies performed on August 12, 2002 were normal. He noted that employee also complained to Dr. Kennedy of low back pain for two years and gave no history of a single event injury affecting her low back. Dr. Kennedy diagnosed claimant with fibromyalgia and referred her to Dr. Feinberg for pain management. (Claimant's Exhibit B, depo ex 2, pp 2-3)

Dr. Musich indicated that he would refrain from opining on causation and/or permanent disability referable to her low back until he received additional medical records regarding her on-going complaints over the two preceding years. (Claimant's Exhibit B, depo ex 2, p. 5)

Dr. Barry Feinberg, an anesthesiologist and pain management specialist, testified by deposition on behalf of employee on April 21, 2005. He evaluated Ms. Shargel on October 8, 2003 and reviewed the medical records.^[13] Dr. Feinberg testified that claimant told him that as early as 1999 she was developing pain in the lower back. She stated that the work that she was performing at Chrysler required her to constantly place her body into a position which required twisting and bending. She had to place herself into positions which when lifting, her body would not be straight or square to the object that she was lifting and she had to squat repetitively. As a result, she developed pain. (Claimant's Exhibit A, Page 11)

Dr. Feinberg testified that employee told him that the pains were intermittent and eventually became horrible after her right cubital tunnel surgery (January 4, 2002). She recalled that on one occasion in 1999 or 2000 something popped in her back while she was using tools in a van. He acknowledged that he reviewed no medical records which supported the history of a pop. She stated that the low back pain increased after she returned to work following her elbow surgery (March 6, 2002). Eventually the pain started to go down her leg. She was referred to Dr. David Kennedy, who referred her for pain management. She indicated that she received a questionable diagnosis of fibromyalgia. Dr. Kevin Coleman provided several epidural steroid injections, with occasional relief. She did not remember any physical therapy. (Claimant's Exhibit A, Pages 12-13 & 42)

On physical examination Dr. Feinberg observed that she was in some distress, manifested by constant shifting of positions and grimacing when she moved. She was able to answer questions. She moved to the examination table without assistance, but with some difficulty. Dr. Feinberg testified he found subluxations at L2-3. Left lumbar paravertebral muscle dysfunction was noted and radiating pain was recreated in the left hip. He testified that he found positive provocative testing over the right sacroiliac joint, left pelvis elevated one-and-a quarter inches, positive Gaenslen's maneuver and Patrick's

maneuver on the right side and tenderness over the dorsal sacroiliac ligaments. Dr. Feinberg testified that he observed trigger points on the right gluteal muscles which reproduced typical pain into the buttocks, down the leg on the right side. There was tenderness in standing, greater than sitting position, over the right sacroiliac joint. Dr. Feinberg further testified that he took x-rays which showed mild degenerative changes in the lower lumbar spine. (Claimant's Exhibit A, Pages 23-25)

Based on the medical records, the history, his own knowledge, training and experience, and his physical exam, Dr. Feinberg opined that claimant suffered from low back pain, bilateral leg pain, sacroiliitis, and myofascial pain syndrome involving the low back and disc degeneration with bulging at L3-4 and L5-S1, per MRI and myelogram, and chronic pain syndrome as a result of her cumulative injuries. (Claimant's Exhibit A, Pages 26-27)

Dr. Feinberg testified also that he did not believe that claimant suffered from fibromyalgia. His findings were specific and could be related to specific diagnoses and therefore there was no reason to diagnose a diffuse disease such as fibromyalgia. (Claimant's Exhibit A, Pages 65-66) He also testified that the lumbar disc bulges were a preexisting condition. (Claimant's Exhibit A, Page 50)

Dr. Feinberg opined that claimant's low back pain and lower extremity pain were causally related to her work where she repetitively performed lifting, twisting and bending over the years, reporting significant pain that began somewhere around 2000 and worsened up until April, 2002, when she reported the pain. She was treated with pain management from that time with epidural steroid injections and medication management. Claimant was diagnosed with disc degeneration, which was mild and not considered to be the contributing factor by Dr. Kennedy, and not considered a surgical factor. (Claimant's Exhibit A, Pages 31-32)

On cross examination Dr. Feinberg stated that he did not ask claimant to demonstrate the specific movements that allegedly caused her symptoms. He admitted that he was not aware of how frequently claimant twisted, bent, squatted or lifted items. He testified that he did not know what she lifted or the weight of what was lifted. Dr. Feinberg was not aware how many hours a day claimant worked or if she performed the same job duties on a daily basis. (Claimant's Exhibit A, Pages 40-41)

On cross examination by the Second Injury Fund, Dr. Feinberg agreed that claimant's preexisting degenerative changes in her lumbar spine could have been made symptomatic by the (September of 1999) fall down the flight of stairs. He agreed that any back complaints which she might have had following the fall may have been overlooked given the serious nature of her head injuries. Though he agreed that claimant's back complaints could have resulted from the fall, he stated that she told him that they did not begin until after she had returned to work. On further cross-examination Dr. Feinberg stated that following a fall symptoms might develop right away or it could take months for the body to go through all of the compensatory changes which would then result in symptoms. (Claimant's Exhibit A, Pages 67-69)

Dr. James Coyle, an orthopedic surgeon, testified by deposition on behalf of employer on April 22, 2005. Dr. Coyle evaluated claimant on December 8, 2004 and reviewed the medical records. Claimant gave Dr. Coyle a history of intractable pain and bilateral lower extremity pain. She complained of leg spasm, neck pain and pain that was worse with any activity. Claimant also stated that she had pain radiating along with pins and needles to the toes when sitting. Claimant filled out a pain diagram that showed diffuse body pain, including facial pain, neck pain, mid-back pain, low back pain, and sacroiliac joint pain. Dr. Coyle testified that employee's description of her pain on the pain diagram did not follow a sensory nerve pattern or a typical musculoskeletal pattern. (Employer's Exhibit 4, Page 6)

Claimant told Dr. Coyle that her job was initially as a floater, but that her back pain began when she was installing escutcheons. She described and demonstrated her job duties, but was unable to give a specific history of a mechanism of injury. She demonstrated stretching forward, but Dr. Coyle felt there was nothing unusual or contorted about the position she demonstrated. (Employer's Exhibit 4, Page 7)

Dr. Coyle reviewed the MRI films and the post myelogram CT scan films. He testified that claimant's MRI showed a "physiologic disc bulge at L3-4", but it was a normal MRI in all respects. Dr. Coyle explained that he determined that the L3-4 disc bulge was not clinically relevant. He testified that the myelogram showed prominent annuluses at L3-4 and L4-5; but it was a normal study. (Employer's Exhibit 4, Pages 8 & 10)

On physical examination Dr. Coyle observed that claimant was not suffering acute discomfort. Employee had minimal range of motion on requested extension, flexion and lateral bending. Dr. Coyle requested that claimant perform certain tests, but "she just wouldn't do it." He asked her to bend and she would not bend. He asked her to heel walk and toe walk and she would not do that as well. Her reflexes were symmetrical and normal; there was no muscular atrophy or motor or sensory deficits. Dr. Coyle found no additional objective findings, but claimant had subjective complaints of non-

dermatomal pain. (Employer's Exhibit 4, Page 11-12)

Dr. Coyle explained that her degree of subjective complaints of pain without any objective sensory deficits or motor findings was not consistent with either musculoskeletal pain or radiculopathy. With regard to his finding of no atrophy, Dr. Coyle testified that "her history is consistent with several years of debilitating pain, yet her body habitus is not consistent with somebody who is very inactive." (Employer's Exhibit 4, Pages 12-13)

Dr. Coyle opined that that she had symptoms of back and lower extremity pain, but there was no corresponding diagnosis to accompany it. He indicated that Dr. Kennedy suggested fibromyalgia. Dr. Coyle did not see any musculoskeletal symptoms with an objective basis. (Employer's Exhibit 4, Page 13)

Dr. Coyle opined that that claimant's work activities were not a substantial contributing factor to claimant's symptoms. He saw no injury mechanism, no radiographic evidence of abnormality or pathology, no clinical evidence of abnormality on examination and no correlation between work activities and her complaints. (Employer's Exhibit 4, Page 14)

On cross-examination, Dr. Coyle testified that he had no problem with people who are not able to localize a point in time when their pain started in repetitive injury cases. He also admitted that patients' symptoms often increase and decrease over time and that patients often, in repetitive type cases, do not go to a doctor or seek medical attention even though they are suffering pain. (Employer's Exhibit 4, Page 17) He further stated that he did not consider it particularly relevant that claimant was not able to exactly tell him when the pain actually started. He agreed that it was possible that claimant's pain just finally got bad enough for claimant to go to a doctor. (Employer's Exhibit 4, Page 17)

Dr. Coyle testified that he did not believe claimant had sacroiliac dysfunction or sacroiliitis. (Employer's Exhibit 4, Page 18)

On further cross examination Dr. Coyle outlined three possibilities to explain claimant's symptomatology: (1) she was not telling the truth; (2) she believes she hurts but there is no objective basis for it; and (3) she has a subtle obscure diagnosis that none of the varied specialty physicians were able to find. He thought the third possibility was the least likely. (Employer's Exhibit 4, Pages 19-20)

Dr. Coyle testified that claimant did not have degenerative disc disease and that the L3-L4 disc bulge was normal and age appropriate. Dr. Coyle testified that the epidural steroid injections were given simply because claimant voiced complaints of pain. It is an exclusionary procedure; it did not mean that she had pathology. He indicated that steroids have a systemic effect and usually make patients feel better. (Employer's Exhibit 4, Pages 20-21)

Dr. Coyle testified that he looked for objective evidence of pathology in employee from a musculoskeletal standpoint and found no objective correlation, either radiographically or on physical examination. (Employer's Exhibit 4, Page 23)

On cross examination Dr. Coyle testified that he asked claimant to demonstrate how she performed her job and he did not see anything unusual, just that claimant leaned forward stretched on her toes. (Employer's Exhibit 4, Page 24) Dr. Coyle testified that he understood that her claim was for repetitive activity. He indicated that he attempted to get as much information as he could. He stated that he previously worked at assembly plants building cars and trucks when he was in college. He toured the Chrysler van and truck plant. He asked Ms. Shargel what was she doing at work that caused her injury. He asked her to physically demonstrate it. Dr. Coyle was unable to discern any injury mechanism either acutely or repetitively. (Employer's Exhibit 4, Page 25)

Dr. Coyle testified that he told claimant that he found it "remarkable" that she had not had any physical therapy. He would have prescribed it. (Employer's Exhibit 4, Pages 25-26)

Dr. Coyle further testified that he believes narcotics are "a terrible way to treat chronic pain." He spoke about many alternatives and testified that the side-effects from narcotics, such as habituation and tolerance, are unacceptable. (Employer's Exhibit 4, Page 27)

Dr. Coyle stated that he did not know whether claimant suffers back pain, but he found no objective evidence for her pain. (Employer's Exhibit 4, Pages 29-30)

Additional Findings

Proof of causation in this case is not within the realm of lay understanding nor, in the absence of expert opinion, is

the finding of medical causation within the competency of this administrative body. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo. App. 1994); Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 704 (Mo. App. 1974); Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970) (herniated disc); Jackson v. H.D. Lee Co., Inc., 772 S.W.2d 742, 747 (Mo. App. 1989) (stroke).

"A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990); see Gilley Raskas Dairy, 903 S.W.2d 656, 657 (Mo. App. 1995).

Dr. Feinberg is the only physician who opined that claimant has an occupational disease, namely myofascial pain syndrome involving the low back and legs and sacroiliitis. He indicated that employee's pain began in 2000 and worsened in April of 2002 and was caused by claimant's repetitive lifting, twisting, and bending over the years at DaimlerChrysler. Beyond that Dr. Feinberg knew almost nothing about claimant's activities. His understanding of her work activities was vague at best. He did not ask her to demonstrate any specific movements which claimant thought were the cause of her pain. He was not aware of how frequently employee twisted or bent her back, squatted, or lifted items. He did not know the weight of the items which she lifted. Based on so little specific evidence Dr. Feinberg's opinion amounts to little more than speculation. I find that Dr. Feinberg's opinion is not supported by sufficient facts and reason that give his opinion sufficient probative force to be substantive evidence.

Dr. Coyle asked claimant to describe the activities which she thought had caused her back and leg pain. She had difficulty describing them to him as well. Dr. Coyle then asked her to demonstrate the particular activities. She leaned forward and stretched on her toes. Dr. Coyle did not believe that the position demonstrated would cause any injury either acutely or repetitively. In addition, Dr. Coyle toured the DaimlerChrysler van and truck plant and was personally familiar with assembly plants, having worked in one when he was in college. Dr. Coyle did not think that claimant's work activities were a substantial factor in causing her low back and leg pain. He disagree with the diagnosis of sacroiliitis. I find Dr. Coyle's opinions regarding causation to be far more persuasive than the opinions of Dr. Feinberg. [\[14\]](#)

Assuming that claimant does in fact have myofascial pain syndrome, there is no evidence that this syndrome is an occupational disease. There is no evidence that the incidence of this syndrome is greater in automobile assembly plants than in nonemployment life. There is no evidence that the incidence of myofascial pain syndrome among assembly line workers is greater at the DaimlerChrysler plant where employee used to work, than in the St. Louis community at large. There is no evidence in this case that the work at the DaimlerChrysler plant where employee used to work exposes the workers to myofascial pain syndrome. Myofascial pain syndrome is an ordinary disease of life which affects people in all walks of life. There are a many suspected causes.

While Dr. Kennedy suspected fibromyalgia, which is similar to myofascial pain syndrome, he did not suggest that this condition was caused by claimant's work activities. Dr. Coleman also diagnosed her with fibromyalgia on December 20, 2001, even before employee first sought treatment for her back pain. (Claimant's Exhibit D, Pages 11-12)

None of the numerous other physicians who treated and examined claimant suggested that her back and leg pains were related to her work activities at DaimlerChrysler.

There is another likely explanation for claimant's diffuse chronic pain syndrome. On September 21, 1999, claimant fell down approximately 11 concrete and metal steps "head over heels," striking her head numerous times. (Claimant's Testimony & Claimant's Exhibit C, Page 34) She fractured her skull and suffered an epidural hematoma. (Claimant's Exhibit E, Pages 3-4) She also damaged some of the bones in her left middle ear. She has chronic tinnitus and severe chronic migraine headaches. (Claimant's Exhibit C, Pages 35-37) By December of 2001 her headaches were occurring every day. (Claimant's Exhibit D, Pages 1-2 & 11-12)

On cross examination by the Second Injury Fund, Dr. Feinberg agreed that claimant's preexisting degenerative changes in her lumbar spine could have been made symptomatic by the (September of 1999) fall down the flight of stairs. He agreed that any back complaints which she might have had following the fall may have been overlooked given the serious nature of her head injuries. Though he agreed that claimant's back complaints could have resulted from the fall, he stated that she told him that they did not begin until after she had returned to work. On further cross-examination Dr. Feinberg stated that following a fall symptoms might develop right away or it could take months for the body to go through all of the compensatory changes which would then result in symptoms. (Claimant's Exhibit A, Pages 67-69)

Though claimant testified at the hearing that her back symptoms did not begin until 2001, she told several physicians,

including Drs. Musich, Raza, Tippet that they developed in 2000. She told Dr. Merkin that they had been present for many years. She told Dr. Feinberg that it began in 1999 and became severe in 2002. Thus claimant's history to most of the physicians is that her back pain began in 1999 or 2000. Dr. Feinberg testified that they could take several months following a fall for the body to go through all of the compensatory changes which could result in symptoms. Those several months would extend into 2000.

Based on the credible opinions of Dr. Coyle, I find that claimant's work activities at DaimlerChrysler were not a substantial factor in causing employee's chronic low back and leg pain. Accordingly, the claim is denied.

SECOND INJURY FUND LIABILITY

Employee is also seeking an award of permanent total disability from the Second Injury Fund pursuant to Section 287.220.1 Mo. Rev. Stat. (2000). Under that section where a previous partial disability or disabilities, whether from a compensable injury or otherwise, and the last injury combine to result in total and permanent disability, the employer at the time of the last injury is liable only for the disability which results from the last injury considered by itself^[4,5] and the Second Injury Fund shall pay the remainder of the compensation that would be due for permanent total disability under Section 287.200. Grant v. Neal, 381 S.W.2d 838, 840 (Mo. 1964); Wuebbeling v. West County Drywall, 898 S.W.2d 615, 617-18 (Mo. App. 1995); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990). The employee must prove that a prior permanent partial disability, whether from a compensable injury or not, combined with the subsequent compensable injury to result in total and permanent disability.

As I have previously found that claimant failed to prove a compensable injury against the employer, the claim against the Second Injury Fund is denied.

Date: _____

Made by: _____

John Howard Percy
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[1] Claimant already had 17.5% permanent partial disability of the right wrist due to carpal tunnel syndrome. I have taken that preexisting disability into account in assessing permanent disability of the elbow. See Page 18 infra.

The combination of the disabilities from the right carpal tunnel and right cubital tunnel yields an overall disability of 35% of the right elbow.

[2] At the beginning of the hearing claimant indicated that she was seeking an award of Permanent Total Disability against the Second Injury Fund in this claim. That position appears to have been abandoned in her proposed award. In any event, there was no evidence that the combination of her right cubital tunnel syndrome and preexisting disabilities caused her to become permanently and totally disabled.

[3] Dr. Feinberg speculate that claimant's fall backwards down a flight of stairs may have been due to a syncopal episode related to her arrhythmias. (Claimant's Exhibit A, depo ex 2, pp. 10-11) I find this highly unlikely as she had undergone a successful cardiac ablation in April of 1999.

[4] Dr. Coleman got the history of her head injury a little confused.

[5] See Page 11 supra.

[6] Section 287.220.1 Mo. Rev. Stat. (2000); Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995); Frazier v. Treasurer of Missouri, 869 S.W.2d 152 (Mo. App. 1994); Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789 (Mo. App. 1992).

[7] Subsection 2 of Section 287.020 repeats the exclusion of injuries where work was merely a triggering or precipitating factor.

[8] The 1993 addition of section 287.067.7, which modifies the last exposure rule with respect to occupational diseases due to repetitive motion, could be construed as a legislative recognition that injuries caused by repetitive activities may be viewed as due to an occupational disease.

[9] See Page 8 of Claimant's proposed award. Dr. Thomas Musich noted that she last worked on July 29, 2002. (Claimant's Exhibit B, depo ex A, p.3) His evaluation is discussed on Page 11 infra.

[10] It is unclear whether Dr. Kennedy assumed from Dr. Vaid's records that physical therapy was in fact performed or whether claimant told him that she received it.

[11] Apparently, claimant's health insurance did not cover trigger point injections. (Claimant's Exhibit F, Page 3)

[12] See page 11 of claimant's proposed award.

[13] He did not have the reports from Drs. Mirkin, Raza, and Tippett. (Claimant's Exhibit A, Pages 43-45)

[14] It might have been helpful had Dr. Coyle been asked to review the specific examination findings in Dr. Feinberg's report and to comment on the diagnosis of myofascial pain syndrome.

[15] The employer's liability for permanent partial disability compensation is determined under Section 287.190. Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966).