

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

Injury No.: 04-148423

Employee: Gracie Stevenson

Employer: Laclede Gas Company

Insurer: Self-Insured

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 6, 2015. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued October 6, 2015, 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 21st day of October 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Gracie Stevenson	Injury No.: 04-148423
Dependents:	N/A	Before the
Employer:	Laclede Gas	Division of Workers' Compensation
Additional Party	N/A	Department of Labor and Industrial Relations Of Missouri
Insurer:	Self	Jefferson City, Missouri
Hearing Date:	June 25, 2015	Checked by: KOB

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: on or about June 18, 2004 (see footnote 3)
5. State location where accident occurred or occupational disease was contracted: St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
While standing in the bed of a pickup truck, Claimant tripped on debris and fell.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Cervical spine/body as a whole
14. Nature and extent of any permanent disability: 40% PPD of the body as a whole
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$1,600.00

Issued by DIVISION OF WORKERS' COMPENSATION

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: of \$905.73
- 19. Weekly compensation rate: \$603.82/ \$347.05
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

160 weeks of permanent partial disability from Employer:	\$ 55,528.00
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22. Second Injury Fund liability: No

TOTAL:	<u>\$ 55,528.00</u>
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23. Future requirements awarded: N/A

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: B. Michael Korte

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Gracie Stevenson	Injury No.: 04-148423
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Laclede Gas	Department of Labor and Industrial Relations
Additional Party	N/A	Of Missouri
Insurer:	Self	Jefferson City, Missouri
Hearing Date:	June 25, 2015	Checked by: KOB

PRELIMINARIES

The matter of Gracie Stevenson (“Claimant”) proceeded to hearing on June 25, 2015. Attorney B. Michael Korte represented¹ Claimant. Attorney Mark Anson represented Laclede Gas Company (“Employer”), which is self-insured. Three separate claims² were tried concurrently: the instant claim (“2004 Case”), Injury No. 05-055801 (“2005 Case”), and Injury No. 06-078015 (“2006 Case”). Claimant seeks to recover permanent total disability (PTD) compensation.

With respect to the 2004 Case, the parties stipulated Claimant was an employee of Employer subject to the Missouri Workers’ Compensation Act (“Act”) when, on or about June 18³, 2004 in St. Louis City, she suffered an accident arising out of and in the course of employment. At the relevant time, Claimant earned an average weekly wage of \$905.73, with corresponding rates of compensation of \$603.82 for PTD and temporary total disability (“TTD”) benefits, and \$347.05 for permanent partial disability (“PPD”) benefits. Claimant provided proper notice and filed a timely claim. Employer paid \$1,600.00⁴ in medical, but no TTD.

The issues to be determined are: 1) was work a substantial factor⁵ in causing Claimant’s injury; and 2) what is the nature and extent of Claimant’s permanent disability? There is no claim against the Second Injury Fund in the 2004 Case.

¹ Administrative notice is taken of the fact Attorney Korte did not enter the case until May 5, 2011, and did not file the original claim

² Although it is not involved in the 2004 Case, the Second Injury Fund is a party to the 2005 Case and the 2006 Case, and Assistant Attorney General E. Joye Hudson participated in the hearing on behalf of the Second Injury Fund.

³ There is significant confusion in the record as to the exact date of Claimant’s 2004 injury. The parties stipulated to June 18, the DWC records/claim indicates June 16, and various doctors cite a June 14 date of injury. Because no party has placed the precise date of the accident at issue, I will assume all references to a June 2004 event are to the same day/event, regardless of the date.

⁴ In a post-trial communication to the Court, with notice to opposing counsels, Employer provided the specific amounts of TTD and medical Employer paid under each Injury Number.

⁵ Prior to the August 29, 2005 changes in the Workers' Compensation Law, an employee's work only had to be a “substantial factor” and not the “prevailing factor.” § 287.020.3(2)(a). The 2005 changes also required the Commission and the courts to construe the law “strictly” rather than liberally in favor of coverage the way it had been before the revisions. § 287.800.

The Exhibits were admitted for all three Cases as follows, with Claimant's exhibits marked with numerals and Employer's marked with letters:

1. CV of Dr. Poetz
 2. January 10, 2012 Dr. Poetz report
 3. July 8, 2013 Dr. Poetz deposition
 4. CV of Gary Weimholt
 5. December 2, 2013 Mr. Weimholt report
 6. February 19, 2015 Mr. Weimholt deposition
 7. records of St. Louis Spine Care Alliance
 8. abridged records of St. Louis Orthopedic Institute
 9. abridged records of Wash. U. Department of Neurological Surgery
 10. abridged records of St. Louis Primary Care (her primary care physician ("PCP"))
 11. abridged records of Concentra
 12. abridged records of Christian Hospital
 13. records of Barnes Jewish Hospital
 14. records of ProRehab, P.C.
 15. record of Mallinkrodt Institute of Radiology
 16. abridged certified records of ProRehab, P.C.
 17. City of St. Louis Emergency Medical Services bill
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- A. Deposition of Dr. Rende
 - B. Medical documentation portion of Claimant's Laclede Gas HR file
 - C. Laclede Gas employee sick absence policy
 - D. Certified records from two personal injury lawsuits
 - E. Union contract provisions on termination

The Second Injury Fund offered no additional exhibits.

SUMMARY OF THE EVIDENCE

Claimant's Testimony and Medical Records

Claimant is a 55 year old woman who worked for Employer primarily as a Gas Supply Control Laborer for over 20 years. She graduated from Soldan High School in 1980 and was Homecoming Queen. As a highly talented athlete, she had the opportunity to attend college, but she was unable to successfully complete the classes – she was diagnosed as dyslexic and reads at a 3rd grade level.⁶ After a year away at college, Claimant received instruction in cement mason work from Job Corps and earned her CDL license. However, she did not pass on the first attempt and needed a reader to complete the test. Claimant has always needed help; even when her daughter was a child she helped Claimant with reading. Claimant can do simple arithmetic but has no knowledge of or skills involving computers.

Claimant started working for Employer in 1983 as a laborer, and remained so employed until December 29, 2006. The job of Gas Supply Control Laborer is a very physical position.

⁶ Testing administered in this case revealed Claimant's reading is in the "deficient range" and her math is "low average." See Exhibit 5.

Among other duties, Claimant was required to dig ditches by hand, lift 100 pound material bags, move railroad ties and perform other heavy duties. She worked high above ground and several feet below ground, on man lifts, scaffolding, and pulley-operated swing seats. She operated jack hammers, used hand tools of all sizes, and painted.

Before June 2004, Claimant was able to perform all the tasks assigned to her. She was also active away from work, playing basketball and softball, riding her bike and skating. She was able to do this despite a history of hypertension, right shoulder dislocations with two surgical repairs, a sprained right wrist and lower extremity injuries which completely resolved. In 1988, Claimant strained her back while lifting a 100-lb sandbag. She received conservative treatment and continues to experience back pain.

In 2000, Claimant developed the gradual onset of neck pain. After an "altercation" with the police, the pain worsened and Claimant sought evaluation and treatment for a cervical strain. The x-ray revealed slight reversal of normal cervical curvature, and the physical therapy notes indicates the symptoms limited her activities of daily living.

On or about June 16, 2004, the accident which is the basis of this claim occurred. On that day, while at work as a laborer for Employer, Claimant was standing in the bed of a truck trimming tree branches. Her feet became caught up in the debris, and she fell out of the truck, landing on her neck on concrete pavement. She immediately felt pain in her neck, shoulder and wrist.

After her supervisor was notified, Claimant was taken to the company doctor, where she was advised that she had a sprained wrist. She received approximately six weeks of physical therapy and was placed on light duty work. These records were not in evidence. She developed symptoms in her bilateral upper extremities and it was believed that she had carpal tunnel syndrome ("CTS") versus an injury to her neck.

Claimant presented to her PCP on August 17, 2004, with complaints of stiffness in her neck and numbness in her right arm and the fingers of both hands. Claimant was diagnosed with possible right CTS and trapezius/neck pain. She was treated with a wrist splint and medication. An EMG nerve conduction study obtained on August 31, 2004, revealed left sensory motor CTS, right sensory CTS and evidence of entrapment of the ulnar nerves at the Guyon's canal bilaterally.

Dr. Robert Tucker performed independent medical evaluation regarding Claimant's bilateral upper extremity complaints on October 21, 2004. He felt Claimant's history was consistent with CTS, recommended she wear wrist splints at night and returned her full duties. On December 8, 2004, Dr. Tucker noted, "[t]he patient continues to complain of neck and shoulder pain, which she related to the hands. This is certainly possible although she may also have an unrelated condition in that area." When a diagnostic injection into the left carpal tunnel resulted in no improvement, Dr. Tucker concluded Claimant had a myofascial element or other proximal nerve compression in addition to mild CTS, and referred her to his colleague Dr. Randolph while still offering CTS surgery.

Dr. Randolph's consultation on December 20, 2004 was significant for positive cervical findings including discomfort with extreme movements, tenderness, and trigger points. He diagnosed muscular dysfunction in neck and proximal shoulder girdle region, L>R, and prescribed empiric therapy to address dysfunction. At her next and last visit with Dr. Randolph on January 13, 2005, Claimant reported therapy had not changed her complaints much. Dr. Randolph noted non-specific findings and diagnosed bilateral arm, shoulder and neck pain, which appeared to be non-occupational. He had no additional recommendation for workup or treatment, and released her from care to full duty status. When Claimant followed up with Dr. Tucker a few weeks later on January 26, 2005, he discussed treatment options, again stating that CTS surgery would be expected to improve her numbness but would not have a significant effect on the other nonspecific complaints. Claimant declined the surgery he offered. Dr. Tucker gave her new wrist gauntlets and released her to return to work in her regular capacity.⁷

On or about June 15, 2005, Claimant was at work digging a hole when she turned and felt pain in her neck and shoulder. This is the event which forms the basis of the 2005 Case, Injury No. 05-055801. Claimant was experiencing out of control hypertension, and did not have a compensable injury.

Later in 2005, Claimant started complaining of problems with her legs. On August 10, 2005, Claimant's PCP made the following notation:

c/o neck, L shoulder and arm pain. Muscles "sore"; stiffness in shoulders and neck; Ongoing "intermittently" x 1 year; Pain level 4/10; Monday –while standing up – legs "just gave out"- frequency 1-2 x 1 day x 2 weeks – prior to this 1-2 x/week – 6 to 7 mo hx. Recurrent numbness/tingling to feet.

In October 2005, Claimant told her PCP her legs were going numb when she was driving, which caused her to have an accident. An MRI taken October 19, 2005 showed congenial short pedicle cervical canal stenosis. Further, there was disc bulging with moderate cord compression, cord signal changes and atrophic cord at C-3-4, moderate protrusion with cord compression with atrophic cord at C4-5, and a small protrusion without compression C6-7.

On November 2, 2005, Claimant saw Dr. Hoffman for the problems she had been having with her arms and legs for 18 months following a "spontaneous" onset. Dr. Hoffman wrote:

The patient has some significant cervical spondylosis with a congenitally narrow spinal canal with short pedicles but at C3-4, and C4-5 there is disc bulging with compression and central stenosis with subtle cord changes. The patient was spoken with about this as a likely cause of her problems....I told her with spinal cord dysfunction the reason to consider surgery is to keep things from getting worse although frequently things do get better.

Although Dr. Hoffman was willing to admit Claimant for a cervical discectomy, fusion and plating, she declined and sought a second opinion.

⁷ On October 31, 2005, at her final visit to Dr. Tucker, Claimant reported worsening symptoms, but continued to decline the offer of CTS surgery.

On December 5, 2005, at her initial consultation with Dr. Stewart, Claimant reported numbness, tingling, difficulty walking, increased urgency and incontinence. She also said she had not been able to work for the last two months. Dr. Stewart diagnosed cervical stenosis with myelopathy, and slight cervical kyphosis. He recommended cervical decompression and fusion to keep her from getting worse, noting two out of three patients saw improvement. Dr. Stewart took Claimant off work pending surgery due to her severe cervical myelopathy. He noted she is at risk for spinal cord injury with even minor trauma, and that given her severely myelopathic status, she is fortunate to have been able to function as well as she had to this point.

Dr. Stewart admitted Claimant to Barnes-Jewish Hospital on January 13, 2006 to treat her diagnosed conditions of cervical stenosis, severe cervical myelopathy, and cervical kyphosis. The operative procedures included: 1) C3 to C6 laminectomies with partial C7 laminectomy for decompression; 2) Arthrodesis C3 to C4, C4 to C5, C5 to C6; 3) posterior segmental fixation C3 to C6; and 4) use of local autograph. Claimant was discharged on post-operative day four.

Claimant was off work recovering from her operation and followed up with Dr. Stewart in February, April and June. At those visits, Dr. Stewart noted Claimant was deconditioned and continued to have residual issues with her bladder and balance. She required a three-month handicapped permit. On April 10, Dr. Stewart, discussed work options, stating, "A labor intensive job would likely exacerbate her symptoms and put her at risk for tripping and falling." Therefore, she should not work at heights or with dangerous equipment. He prescribed work hardening and referred her to pain management. On June 5, 2005, Dr. Stewart thought Claimant showed marked improvement despite continued balance and incontinence problems. He released her to return to transitional duty work on July 5, 2006 with the following restrictions: Maximum weight limits of frequent lifting of 25 pounds, occasional carrying of 20 pounds, and occasional pushing/pulling of 40 pounds. She was to perform no climbing, jumping, running or balancing. Her next scheduled visit was December 4. He suggested a functional capacity evaluation.

Claimant returned early to see Dr. Stewart on August 3, 2006. She was "tearful and angry" because Employer was not giving her light duty - she was required to lift 40 pound propane tanks - and she felt her job was at risk. Dr. Stewart thought she would be able to perform light duty or desk jobs in the long term, but Claimant responded her dyslexia prevented her from performing sedentary duties. Dr. Stewart reiterated his restrictions and stated they would be in effect until reassessed at the 12/04/2006 appointment. Claimant raised her voice and wanted to hold Dr. Stewart responsible for a future injury at work, while Dr. Stewart did not want to get in the middle of an argument between Claimant and Employer and thought Claimant needed to take personal responsibility for following the restrictions he set out. Claimant never returned to see Dr. Stewart.

Less than two weeks after her confrontation with Dr. Stewart about her work restrictions, on August 15, 2006, Claimant was at work changing out a gas propane valve with a cheater wrench when she felt a pop in her neck and experienced shooting pain. This is the event that forms the basis of the 2006 Case, Injury No. 06-078015. Claimant presented to Concentra where she gave a history of the tank incident and her recent multilevel cervical fusion. Her blood pressure was 210/110. Due either to her complex history or Claimant's lack of cooperation,⁸

⁸ Concentra records note "patient wont[sic] move the neck" and "no detailed exam can be performed as patient wont [sic] get up from the wheel chair."

Concentra arranged for Claimant to be transported to Barnes Hospital by ambulance. The outstanding charge for the ambulance service is \$430.50. Claimant indicated she received intravenous pain medication at the emergency room.

On August 18, 2006, Dr. Samson evaluated Claimant. He recorded a history that Claimant related increased symptoms to the August 15 torque wrench event where she felt an increase in neck pain when loosening valve. She received pain medication, and in the three days between the incident and her exam, the symptoms improved. Dr. Samson noted:

The symptoms did not change on the Tuesday event in terms of developing upper extremity symptoms or leg symptoms. These were the same as they were before, the problem she had was a temporary increase in neck pain.

He concluded Claimant strained her neck on August 15, a problem to which she is especially susceptible given her C3-C7 posterior cervical fusion. However, he felt the strain was resolving spontaneously and did not require treatment.

Dr. Samson considered Claimant's involved history of neck pain, starting with a fall off a pickup truck about two years ago while at work (the 2004 Case), and eventually lead to surgery because of extremity issues and incontinence. Because of bad balance, it was difficult to test heel, toe and tandem gait. In addition to the diagnosis of cervical strain due to the use of the wrench at work, which was resolving spontaneously and did not require treatment, Dr. Samson diagnosed as preexisting and not work-related cervical spondylosis and stenosis with cervical myelopathy secondary to degenerative and congenital condition of the neck. He reiterated the temporary restrictions of 20 lbs lifting with occasional bending, pushing, pulling and reaching overhead, and no climbing ladder or working in high and dangerous places because of her myelopathy, spasticity and balance problems. He made those restrictions permanent as of August 18, 2006. I find Claimant reached MMI on the 2004 Case as of August 18, 2006, when a medical professional assigned permanent restrictions.

Claimant returned to work painting. Visits to her PCP in September and October of 2006 indicate Claimant was depressed, tearful and anxious regarding her work situation. Eventually, Employer let Claimant go. Her last day of employment was December 29, 2006. Claimant testified she has not received unemployment because she is not able to work: she cannot carry, stand for long, or climb ladders.

Currently, Claimant continues to experience pain in her neck, which worsens when it is cold and rainy. She has numbness in both hands; primarily in the thumb, index, and middle fingers. She has lost strength in her hands, drops things, and feels generally weak all over. She feels she has a high tolerance for pain but sometimes the pain will keep her in bed. Now, she sleeps most of the time and watches television when she is awake. She tires quickly when going outside, so she just does not bother. Her niece helps with cooking and cleans up. Claimant no longer participates in activities she use to regularly enjoy before the 2004 accident, like going to Six Flags, riding bikes, roller skating with her daughter, and playing softball.

Expert Opinion Evidence

Dr. Robert Poetz evaluated Claimant on September 19, 2011 at her attorney's request, issued a report dated January 10, 2012, and testified by deposition on July 8, 2013. He considered the facts surrounding all three claims, but only found the 2004 Case and the 2006 Case to have constituted actual work injuries.⁹ Dr. Poetz was asked to identify the objective findings on exam, which he defined as being findings that are reproducible and not controlled by the patient. Claimant's objective findings included: paresthesia, myelomalacia, edema, MRI finding of left paracentral protrusion at C6-7 without cord compression, x-ray evidence of straightening of the normal cervical lordosis, decreased pin prick sensation, crepidus of the right shoulder, decreased range of motion and palpable lumbar myospasm.

With respect to the primary injuries, Dr. Poetz diagnosed: 1) Cervical strain with cervical myelopathy and exacerbation of cervical stenosis and degenerative disc disease, 6/14/2004¹⁰; 2) Status post C3 to C6 laminectomies with partial C7 laminectomy for decompression; arthrodesis at C3 to C4, C4 to C5, and C5 to C6; and posterior segment fixation C3 to C6, 6/14/04; and 3) Cervical strain with exacerbation of cervical discogenic disease, 8/15/06. It was Dr. Poetz's opinion to a reasonable degree of medical certainty, that the June 14, 2004 accident was the prevailing factor in the cause of the above mentioned diagnoses and the need for her surgeries. He assigned PPD of 45% of the body measured at the cervical spine resultant from the 2004 Case, and found the disability serious enough to constitute a hindrance or obstacle to employment. He also felt that the event that formed the basis of the 2006 Case involving the loosening of a propane valve and a pop in the neck was the prevailing factor and the cause of her cervical strain with exacerbation of cervical discogenic disease. He assigned PPD of 10% of the body at the cervical spine.

With respect to the preexisting disabilities, Dr. Poetz diagnosed and rated: 1) cervical stenosis and degenerative disc disease - 5% PPD; 2) Dyslexia¹¹ - 20% PPD; 3) Right shoulder dislocation and reconstruction - 35% PPD; 4) Lumbar strain - 20%; 5) Carpal tunnel syndrome - 20% PPD of the right wrist and 15% PPD of the left wrist. Dr. Poetz wrote in his report "the combination of the present and prior disabilities results in a total which exceeds the simple sum by 15-20%." He further found:

...[Claimant] is **Permanently and Totally Disabled** as a direct result of her June 14, 2004 and August 15, 2006 work injuries and in addition to her prior injuries and conditions. It is my opinion that if she were absent her prior injuries and was only suffering from her June 14, 2004 and August 15, 2006 injuries alone she would still be permanently and totally disabled.

At deposition, Dr. Poetz testified that the combination of the 2004 and 2006 injuries is the prevailing factor and cause of Claimant's permanent total disability.

⁹ Dr. Poetz considered Claimant's reports that the pain following the 2005 Case had resolved completely, and noted she was told "her pain was most likely stress-related or secondary to hypertension." He did not provide a rating related to the 2005 Case.

¹⁰ The stipulated date of injury is June 16, 2004. Dr. Poetz appears to have mistakenly used the 6/14/2004 date to refer to the event that forms the basis of this claim.

¹¹ Dr. Poetz opined Claimant's self-reported dyslexia prevented her from working in sedentary types of employment, caused problems comprehending the written word and precluded her from pursuing further education.

Dr. Poetz confirmed none of Claimant's treating or evaluating surgeons diagnosed disc problems as a result of either the 2004 or 2006 injuries. He agreed Claimant did not have EMGs or NCVs to confirm her CTS diagnosis until after the June 2004 injury. He also agreed Claimant had not been returned to work full duty following her neck surgery until after the events of the 2006 Case. Claimant's counsel acknowledged several IME reports which Dr. Poetz considered may not, and were not, admitted into evidence at hearing.

Employer presented the deposition testimony of **Dr. Richard Rende**, an orthopedic surgeon who performs independent medical examinations. Dr. Rende examined Claimant on February 18, 2013, considered a history derived from Claimant's statements as well as all relevant medical records, and issued a written report. He diagnosed Claimant with a failed cervical decompression with secondary myelopathic changes and neurologic deficits. He explained, as have others in this case, that Claimant has congenitally short pedicles in her cervical spine, along with degenerative bulging of the disks and osteophytes, all of which can cause pain and limited range of motion with or without accident. Because of her congenital stenosis, she is more likely to experience symptoms after a slight trauma, but can also improve with conservative measures. He explained her myelopathy diagnosis as being a condition where the spinal nerves are so compressed they become nonfunctional. Positive objective findings for her chronic condition included hypertrophic neck muscles and a Hoffman flick test. He also observed her abnormal, ataxic gait.

Dr. Rende responded to Employer's questions. He felt Claimant's problems are related to her congenital abnormality. None of the alleged injuries in the 2004, 2005 or 2006 Cases were a substantial or the prevailing factor in her need for surgical decompression. Rather, they caused a temporary aggravation of a preexisting condition. Unlike if she had herniated a disk to cause a permanent aggravation, Dr. Rende felt the injuries here were temporary because he thought the patient showed signs of improvement after each event.

While he did not relate the disability to a work event, Dr. Rende conceded Claimant has significant disability as a result of her neurologic abnormality which appears to be the direct result of the surgical intervention, as it resulted in cervical myelopathy with signs of upper motor neuron disease. He felt such disability accounted for permanent partial disability of 25% of the body as a whole. Dr. Rende concurred with Claimant's counsel when he proposed Claimant's complaints of upper extremity symptoms as recorded by Dr. Tucker could be symptoms of Claimant's neck condition.

Mr. Gary Weimholt is a vocational rehabilitation practitioner who evaluated Claimant on July 30, 2013 to assess her access to the labor market, reviewed all relevant records and issued an extensive report. He found her to be an individual with deficient reading skills, no computer literacy, and a history of physical labor who has serious physical limitations following a neck injury and surgery. Regarding her physical limitations, Mr. Weimholt considered the impact of several sets of doctor-imposed restrictions, all of which restrict her from her past manual labor jobs, and many lighter jobs involving standing, walking, stocking or climbing stairs. Dr. Poetz's restrictions prohibit all laboring type activities.

Mr. Weimholt confirmed Claimant's learning disability and discussed its vocational impact. He identified several factors that were consistent with her dyslexia diagnosis, such as

Claimant's low reading score and her reliance on her daughter to read to her. He also found her word reading ability affects her ability to access and compete in the open competitive labor market. Such a learning disorder makes her unable to perform "office work" or to successfully retrain. In addition, Mr. Weimholt noted she has other physical conditions prior to the injuries in 2004 and 2006 that may as well be considered to be a hindrance for a person who likewise has a deficient reading level and whose labor market has consisted primarily of physically demanding occupations.

Mr. Weimholt concluded with a reasonable degree of certainty within his expertise that Claimant has a total loss of access to the open competitive labor market and no reasonable employer would employ her - with her "injury considerations as well as some of her past in terms of literacy and computer literacy she would have been very much at a disadvantage when competing against other workers." He observed she was able to maintain employment in a physically demanding occupation leading up to 6/16/2004, but it does not appear she was able to maintain her regular duties without additional problems and following the event of 8/15/2006 she was unable to maintain her employment at all. Despite her history of physical labor, Mr. Weimholt noted Claimant has other marketable skill sets for less physical occupations such as customer service, call center or general office work, but she has no demonstrable capabilities for these jobs and lacks the very basic reading ability that is essential for these sedentary jobs.

FINDINGS OF FACT AND RULINGS OF LAW

Based on the substantial competent evidence and pursuant to the Missouri Workers' Compensation Act (the "Act"), I make the following findings of fact and rulings of law:

1. Substantial Factor.

Initially, it must be noted it is necessary to apply the law in effect when the injury in the 2004 Case¹² occurred. *Sage v. Talbot Indus.*, 427 S.W.3d 906, 912 (Mo. Ct. App. 2014) *citing Pruett v. Federal Mogul Corp.*, 365 S.W.3d 296, 303-04 n. 4 (Mo.App.2012). In 2004, all provisions of the Workers' Compensation Act were liberally construed to extend benefits to the largest possible class and to resolve any doubts as to the right of compensation in the employee's favor. *Id.*; §287.800; *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo.App.2010).

Furthermore, the proper analysis is whether Claimant's work injury was a substantial factor in her medical condition, need for surgery, and disability, because in 2004, an injury was compensable if "work was a **substantial factor** in the cause of the resulting medical condition or disability." *Emphasis added*; See §287.020.2, RSMo 2000; *Dwyer v. Fed. Exp. Corp.*, 353 S.W.3d 392, 393-94 (Mo. Ct. App. 2011). There is no bright-line test or formula which sets out the requirements for what constitutes a substantial factor in determining causation in workers' compensation claims, but it is well-settled that "a causative factor may be substantial even if it is not the primary or most significant factor" in causing the injury. *Tangblade v. Lear Corp.*, 58

¹² In 2005, the Missouri Legislature changed the Act to require the courts to construe the law "strictly" rather than liberally. § 287.800. The 2005 changes also required that instead of employee's work only being a "substantial factor" it had to be "prevailing factor." § 287.020.3(2)(a). Therefore, the employee's burden in establishing that the injury is compensable is now (after 2005) higher than it was before the changes in the law. *Leake v. City of Fulton*, 316 S.W.3d 528, 532 (Mo. Ct. App. 2010).

S.W.3d 662, 669 (Mo. Ct. App. 2001).¹³ Application of the liberally construed substantial factor test compels an award in favor of Claimant on the issue of causation.

I find Claimant has presented sufficient competent evidence to establish her work accident of June 16, 2004, when she fell out of the bed of a pickup truck and landed on her neck on concrete, was a substantial factor in her medical condition and disability. For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. *Clark v. FAG Bearings Corp.*, 134 S.W.3d 730, 734 (Mo. Ct. App. 2004). Case law preceding the 2005 amendments to the Act permitted a claimant to recover benefits by establishing a direct causal link between job duties and an “aggravated condition.” *Johnson v. Indiana W. Exp., Inc.*, 281 S.W.3d 885, 891 (Mo. Ct. App. 2009), citing *Rono v. Famous Barr*, 91 S.W.3d 688, 691 (Mo.App. E.D.2002). Claimant has met her burden on this point though her own testimony, medical records, and the testimony of the experts.

Claimant’s history establishes her congenital condition did not become permanently disabling until the 2004 work accident. Despite what she now knows is a congenital spine condition which makes her more susceptible to injury than average, for over 20 years, Claimant was able to successfully carry out all the duties of a very physical job without restriction or accommodation. She also regularly participated in physical activities away from work. Before 2004, there is limited evidence of isolated incidents of neck pain, but nothing that lasted long or required extensive treatment. After June 2004, Claimant regularly complained of neck, shoulder and hand pain; she did not go more than 3 or 4 months without going to a doctor with complaints related to the neck.¹⁴ In refusing CTS surgery, Claimant insisted the problem was with her neck. I find the condition of Claimant’s cervical spine was demonstratively different after the 2004 accident that it was before based on Claimant’s testimony and the medical records, which supports the finding in favor on Claimant on causation.

In addition, the medical experts support the finding Claimant’s June 2004 work accident was a substantial factor in causing the disability which required surgery on January 13, 2006. Dr. Poetz provides the most direct evidence of the causal connection, testifying the June 2004 accident was the prevailing factor¹⁵ in the cause of the above mentioned diagnoses and the need for her surgery. He explained the fall from the pickup truck aggravated Claimant’s cervical spine condition and caused the need for the surgery. Dr. Samson, while stating the condition was non-work related, noted Claimant’s history of neck pain started with a fall off a pickup truck at work in 2004 and eventually led to surgery because of extremity issues and incontinence.

Dr. Rende agreed with Dr. Poetz that the fall aggravated Claimant’s cervical condition, but Dr. Rende labeled the 2004 injury “temporary” because he asserted the symptoms improved until the next event. I find Dr. Rende’s assertion to be incompatible the weight of the evidence which shows after the 2004 accident, Claimant was never truly symptom free, but her symptoms

¹³ Cases cited herein were among many overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32 (Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton's* effect thereon.

¹⁴ Although she was diagnosed and treated for CTS in the months following the 2004 accident, those treatment records are replete with doctor’s notations there was something else going on. Even Dr. Rende acknowledged those CTS symptoms treated by Dr. Tucker could be symptoms of her neck disability.

¹⁵ Because the prevailing factor standard is higher than that of the substantial factor (see footnote above), I find Claimant meets her burden with Dr. Potez’s testimony on this point despite his use of the more current terminology.

waxed and waned, trending worse until they compelled surgical intervention. I find Dr. Stewart's observation that Claimant "is at risk for spinal cord injury with even minor trauma" to support the conclusion that work is a substantial factor in Claimant's permanent medical condition, disability, and need for medical treatment. *See, i.e., Pruett v. Fed. Mogul Corp.*, 365 S.W.3d 296, 307 (Mo. Ct. App. 2012).

There is no dispute Claimant has a serious congenital condition that makes her susceptible to injury. It is possible the congenital condition could be the *prevailing* factor in her medical condition, need for surgery and disability. However, that is not the standard which applies, and that is not the issue addressed herein. The issue is whether Claimant's accident, one in which she fell from a pickup truck to a concrete surface and landed on her neck, is a substantial factor in causing her medical condition and disability. There is sufficient competent evidence to support that it is. Employer is liable to Claimant for the medical condition and disability associated with the accident and resultant surgery.

2. Nature and Extent

a. Primary Injury.

This 2004 case is the first of a series of claims in which Claimant is seeking to recover permanent total disability. Unlike the subsequent two claims which involve the Second Injury Fund, this 2004 Case is filed against the Employer/Insurer only. It is well established a claimant must show not only causation between the accident and the injury but also that a disability resulted and the extent of such disability. *Griggs v. A. B. Chance Co.*, 503 S.W.2d 697, 703 (Mo. Ct. App. 1973) *citing Smith v. National Lead Co.*, 228 S.W.2d 407, 412(4) (Mo.App.1955). The extent and percentage of disability is a finding of fact within the special province of the Industrial Commission. *Palmentere Bros. Cartage Serv. v. Wright*, 410 S.W.3d 685, 692 (Mo. Ct. App. 2013), *transfer denied* (Oct. 1, 2013)(citations omitted). As a result, in determining the degree of a claimant's disability, the [finder of fact] may consider all the evidence and the reasonable inferences drawn from that evidence. *Id.* An award of disability is intended to include the employee's permanent limitations resulting from a work injury and any restrictions that his limitations may impose on employment opportunities. *Phelps v. Jeff Work Construction Co.*, 803 S.W.2d 641 (Mo. App. 1991). The administrative law judge has discretion as to the amount of permanent partial disability awarded and how it is calculated. *Rana v. Land Star, TLC*, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001).

Having found in favor of Claimant under the substantial factor/liberal construction standards that apply to cases arising before August 2005, I also find Claimant has met her burden of establishing the extent of permanent partial disability associated with the primary injury.

Claimant testified persuasively to the extent of her disability. The testimony of the claimant ... can constitute substantial evidence of the nature...and extent of the disability, especially when taken in connection with, or where supported by, some medical evidence." *Grauberger v. Atlas Van Lines, Inc.*, 419 S.W.3d 795, 800-01 (Mo. Ct. App. 2013)(*citations omitted*). Claimant has pain in her neck, numbness in her extremities, weakness, and lethargy. She has balance problems, incontinence, an abnormal gate, and she cannot work at any height. These disabling symptoms are endorsed by all the medical experts.

The level of permanent partial disability associated with an injury cannot be determined until the injury “reaches a point where it will no longer improve with medical treatment” or, in other words, reaches maximum medical improvement. *Cardwell v. Treasurer of State*, 249 S.W.3d 902, 910 (Mo.App.2008). Although Dr. Stewart, the treating surgeon, never released Claimant at MMI, the temporary restrictions he assigned were made permanent by Dr. Samson on of August 18, 2006. Thus, the earliest date at which the permanency associated with the 2004 Case can be determined is August 18, 2006 – the date of MMI.

The medical experts have quantified the extent of Claimant’s disability. Dr. Poetz assigned PPD of 45% of the body as a whole measured at the cervical spine resultant from the 2004 Case, and found the 2004 accident to be a substantial cause of her surgical intervention. While he did not relate the disability to a work event, Dr. Rende conceded Claimant has significant disability as a result of her neurologic abnormality which appears to be the direct result of the surgical intervention, as it resulted in cervical myelopathy with signs of upper motor neuron disease. He felt such disability accounted for PPD of 25% of the body as a whole. Based on all the compelling and persuasive evidence, I find the work accident of June 18, 2004 and subsequent surgical intervention resulted in PPD of 40% of the body as a whole.

b. Permanent Total Disability.

Claimant is seeking permanent total disability benefits. Total disability is defined by statute as the “inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident.” § 287.020.6; *Mell v. Biebel Bros., Inc.*, 247 S.W.3d 26, 29 (Mo. Ct. App. 2008). “Any employment” means any reasonable or normal employment or occupation. *Id.*, citing *Reeves v. Midwestern Mortgage*, 929 S.W.2d 293, 296 (Mo.App. E.D.1996). Permanent total disability means that “no employer in the usual course of business would reasonably be expected to employ the Claimant in [his or] her present physical condition.” *Gassen v. Lienbengood*, 134 S.W.3d 75, 80 (Mo.App. W.D.2004) The burden of establishing permanent total disability lies with the claimant. *Schuster v.State, Division of Employment Security*, 972 S.W.2d 377, 381 (Mo.App. E.D.1998); see *Cardwell v. Treasurer of State*, 249 S.W.3d 902, 911 (Mo.App. E.D.2008)(the claimant has the burden to establish permanent total disability by introducing evidence to prove his claim); see also *Clark v. Harts Auto Repair*, 274 S.W.3d 612, 615-16 (Mo. Ct. App. 2009).

The most persuasive and compelling witness on the issue of Claimant’s ability to compete in the open labor market is the vocational expert, Gary Weimholt. He concluded with a reasonable degree of certainty that Claimant has a total loss of access to the open competitive labor market and no reasonable employer would employ her. He considered her serious physical limitation following her neck injury and surgery and the several sets of doctor-imposed restrictions that flowed from the injury and surgery. He also confirmed and considered the vocational impact of her life-long learning disability, noting that her inability to read, comprehend the written word or use computers put her at a disadvantage in the past and makes her unable to perform office work or retrain

Claimant herself has provided compelling evidence supporting Mr. Weimholt’s conclusion that she is totally disabled by the serious physical limitation following her neck injury and surgery and her life-long learning disability. Claimant has clearly and consistently described

the problems she has understanding the written word. When Dr. Stewart proposed she was able to perform light duty or desk jobs, Claimant responded her dyslexia prevented her from performing sedentary duties. Dr. Poetz opined Claimant's self-reported dyslexia prevented her from working in sedentary types of employment, caused problems comprehending the written word and precluded her from pursuing further education. Claimant's evidence is persuasive on the fact her learning disability prevents her from performing sedentary work, and hindered her throughout her life.

The only other evidence on Claimant's total disability comes from Dr. Poetz. While his conclusion Claimant is unable to compete in the open labor market is consistent with the persuasive evidence, I am not persuaded by his testimony the PTD is due to the combination of the 2004 and 2006 injuries. He acknowledged her prior injuries and conditions contribute to her PTD, but felt "absent her prior injuries and [if she] was only suffering from her June 14, 2004 [sic] and August 15, 2006 injuries alone she would still be permanently and totally disabled." Given the finding that there is no permanent disability associated with the 2006 case (see award in Injury No. 06-078015), Dr. Poetz's opinion suggests Employer would be liable for Claimant's PTD.

However, I do not find Dr. Poetz's conclusion persuasive. All the credible evidence establishes that the disability associated with Claimant's 2004 neck injury and surgery limit her to sedentary work, and is therefore partially disabling as determined above. Dr. Stewart felt Claimant would be able to perform light duty or desk jobs with the restrictions he provided, and Dr. Samson endorsed the same restrictions. Mr. Weimholt and Claimant persuasively testified it is her preexisting learning disability, not disability associated with the 2004 Case, that makes Claimant unable to perform less physical "office work" type jobs or be a candidate for other training. Dr. Poetz offers no explanation as to why he disagrees with these persuasive opinions. Further analysis of the combination of the primary 2004 injury and preexisting disabilities is irrelevant because there is no Second Injury Fund claim in the 2004 Case.

Employer is liable for permanent disability that resulted from the 2004 accident and surgery. While this disability is significant, it is not permanently and totally disabling in and of itself.

CONCLUSION

Claimant sustained an accidental injury in June 2004 which was a substantial factor in the cause of the resulting medical condition and disability. Employer is liable for permanent partial disability benefits as set forth herein.

Attorney B. Michael Korte shall have a lien of 25% of all benefits awarded.

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation