

**FINAL AWARD ALLOWING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
with Supplemental Opinion)

Injury No.: 06-078015

Employee: Gracie Stevenson  
Employer: Laclede Gas Company  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

Medical causation

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

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

The parties dispute the particular medical condition(s) and disability that resulted from employee's accident of August 15, 2006, wherein she felt the sudden onset of increased neck pain while straining with a cheater wrench to change out a frozen propane valve.<sup>1</sup> The administrative law judge found that employee met her burden of proving that the accident was the prevailing factor in causing a temporary increase in neck pain that resolved spontaneously with pain medication, but that employee did not ultimately suffer an "injury," because she did not suffer any "disability."

The administrative law judge did award past medical expenses from the employer, citing *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511 (Mo. App. 2011), and finding that employee's need for medical treatment "flowed from" the work-related accident of August 15, 2006. We ultimately agree with the choice to award past medical expenses from the employer, but we wish to provide some clarification with regard to the issue of medical causation.<sup>2</sup>

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<sup>1</sup> The parties stipulated that "on or about August 15, 2006, [employee] sustained an accidental injury arising out of and in the course of her employment," *Transcript*, page 4, but did not stipulate the particular medical condition(s) or disability employee sustained in that accidental injury. Accordingly, we must resolve that issue herein.

<sup>2</sup> As an aside, we note that the administrative law judge might also have awarded employee's medical treatment following the August 15, 2006, accidental injury in her award in Injury No. 04-148423, as such treatment would seem to unquestionably flow both from the August 2006 accidental injury as well as from the effects of employee's prior June 2004 cervical spine injury.

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A compensable injury is a prerequisite to the recovery of benefits under the Missouri Workers' Compensation Law, including disputed medical expenses. See § 287.120.1 RSMo and *Armstrong v. Tetra Pak, Inc.*, 391 S.W.3d 466 (Mo. App. 2012). In the *Armstrong* case, the employee (relying on *Tillotson*) argued that the only prerequisite to an award of compensation was the existence of a work-related "accident." The *Armstrong* court rejected that argument as follows:

Based upon the plain language of [§ 287.020 RSMo], Claimant was not entitled to compensation unless he proved that: (1) he suffered an accidental work-related injury; and (2) the accident was the prevailing factor in causing both the resulting medical condition and disability. ... [T]here is a material distinction between determining whether a compensable injury has occurred and determining what medical treatment is required to treat a compensable injury. *Tillotson* addressed the latter, while Claimant's case involves the former. Thus, *Tillotson* does not support Claimant's argument.

*Armstrong*, 391 S.W.3d at 472-73 (citations omitted).

Here, employee is not entitled to any compensation unless the accident of August 15, 2006, was the prevailing factor causing **both** a resulting medical condition **and** disability.<sup>3</sup> It is not sufficient merely to show that employee suffered a work-related accident, or even that the accident was the prevailing factor causing employee to suffer a temporary neck strain (i.e. a resulting medical condition). Instead, a finding of resultant disability is a prerequisite to an award in favor of the employee.

Notably, however, the statute does not require that employee prove the accident was the prevailing factor causing any *permanent* disability. Instead, it is sufficient that some disability—of whatever nature, duration, or extent—resulted from the accident. After careful consideration, we ultimately agree with the administrative law judge's finding that employee did not sustain any identifiable *permanent* disability as a result of the accident of August 15, 2006. This is largely because employee, in her testimony, failed to identify any new symptom, limitation, or other permanent disability specifically attributable to the accident of August 15, 2006. Absent supporting testimony from the employee, given the lack of any contemporaneous medical treatment record substantiating any permanent increase in her symptomatology or other limitation, and in view of the purely conclusory opinion from employee's medical expert, Dr. Robert Poetz, we are not persuaded that any permanent disability is attributable to the August 15, 2006, accident.

We do find, however, that employee suffered some *temporary* disability after and directly attributable to the accident, in that employee suffered a contemporaneous increase in pain so severe that she required immediate medical intervention. Employee first went to Concentra, but was referred to the emergency room owing to the severity of her symptoms. There, she received emergency pain control in the form of intravenous morphine. Employee then saw Dr. Barry Samson on August 18, 2006, for a follow-up evaluation.

The record reflects that employee missed some work in the course of receiving this medical treatment and evaluation, and she credibly testified (and we so find) that she had to expend

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<sup>3</sup> The 2005 amendments to Chapter 287 heightened the employee's burden of proof with regard to issues of medical causation from a showing that "work" was "a substantial factor in the cause of the resulting medical condition or disability" (pre-2005) to a showing that "the accident" was "the prevailing factor in causing both the resulting medical condition and disability" (post-2005).

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some vacation time accrued with the employer to cover her absence(s). Accordingly, we find that the accident of August 15, 2006, was the prevailing factor causing employee to suffer a neck strain/sprain and some temporary disability.<sup>4</sup>

With the foregoing clarifications, we affirm the administrative law judge’s conclusion that employee met her burden of proof with regard to the issue of medical causation. Because we otherwise agree with the administrative law judge’s determination that employer is liable for the disputed past medical expenses employee incurred for treatment reasonably required to cure and relieve the effects of her injury, we affirm the award without further supplementation.

**Conclusion**

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued October 6, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

We approve and affirm 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 21<sup>st</sup> day of October 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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

Attest:

\_\_\_\_\_  
Secretary

<sup>4</sup> Employee did not ask the administrative law judge to consider whether employer is liable for any temporary total or temporary partial disability benefits in this case; instead, the parties only placed in dispute the issue of “the nature and extent of [employee’s] permanent partial or permanent total disability.” *Transcript*, page 5. As a result, any question of employer’s liability under §§ 287.170 or 287.180 RSMo is beyond the scope of our authority herein, so we make no finding or conclusion referable to such. See *Boyer v. Nat’l Express Co.*, 49 S.W.3d 700 (Mo. App. 2001).

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### **DISSENTING OPINION**

I concur in the majority's finding that employee suffered a compensable injury as a result of the accident on August 15, 2006, but I disagree with their decision to incorporate the administrative law judge's denial of Second Injury Fund liability in this case. The administrative law judge concluded that employee is not entitled to any compensation from the Second Injury Fund based on findings that employee did not suffer any permanent disability as a result of the August 2006 work injury, and was in any event already rendered permanently and totally disabled by the effects of a 2004 accidental injury in combination with her preexisting dyslexia.<sup>1</sup> I disagree. I find that employee was rendered permanently and totally disabled as a result of the effects of the August 2006 injury in combination with the 2004 injury, without regard to preexisting dyslexia.

Employee worked for employer for over 23 years as a gas supply laborer, performing very heavy physical work, such as digging ditches by hand, running a jackhammer to bust up concrete, balancing on scaffolding while working overhead, manually lifting and moving railroad ties, working with large wrenches and other hand tools, running a sandblaster, and regularly lifting over 100 pounds. Employee frequently worked at height over and under bridges, on lifts, and in swing seats. Employee went to work for employer straight out of Job Corps, where she received some instruction in cement masonry work; she has no other work history or vocational experience of any kind.

Although employee had some prior conservative medical treatment for low back and neck strains (as would be expected of anyone working such a heavy job), she was not under any medical restrictions, was not taking any prescription medications for pain, and was not missing work for any chronic medical condition as of June 2004. On or about June 16, 2004, employee was at work trimming tree branches for employer. While loading and securing trimmed branches in the bed of her work truck, employee's legs suddenly became tangled in the debris, and she fell out of the truck and onto the pavement below. Employee landed on her neck and left shoulder, and experienced immediate and severe pain in her neck, shoulder, and left wrist.

Employee received conservative treatment including medications, splints, and physical therapy, but continued to experience shooting pains going up and down her neck and shoulders, as well as neurological-type symptoms in her extremities, including numbness in both hands and difficulty controlling her legs. Notwithstanding these rather alarming symptoms, employee returned to her full duties for employer as early as October 2004, after employer's physicians decided she probably just had a temporary neck strain superimposed on preexisting carpal tunnel syndrome, unrelated in any way to falling out of a truck bed and onto her neck while working for employer. Employee refused the surgery for carpal tunnel syndrome, with the result that she was left to pursue treatment on her own.

Employee didn't even undergo an MRI until October 2005, more than a year after the June 2004 work injury, after telling her primary care physician that her right leg had gone numb while she was driving. The MRI revealed short pedicle cervical canal stenosis throughout employee's cervical spine, including disc bulging with moderate cord compression, cord signal changes, and atrophic cord at C3-4; moderate protrusion with cord compression and atrophic cord at C4-5; and a small protrusion without compression at C6-7. As explained by employee's medical expert witness, Dr. Poetz, the MRI demonstrated that employee was suffering the effects of a

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<sup>1</sup> As detailed in the award in Injury No. 04-148423 (which was heard together with this case), employee did not file a claim against the Second Injury Fund for the 2004 injury, so the administrative law judge's finding of permanent total disability resulting from a combination of the 2004 injury and employee's preexisting dyslexia is effectively moot, as no compensation can be awarded against the Second Injury Fund in the 2004 case.

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congenital condition that had been rendered severely symptomatic as a result of the trauma she sustained in the June 2004 injury; this was the cause of employee's neurological complaints affecting her hands and legs, as well as her ongoing neck and shoulder pain.

Employee ultimately underwent a three-level fusion surgery for the effects of the June 2004 work injury, after which the treating surgeon, Dr. Stewart, released her to return to modified-duty with the following *provisional* restrictions: no frequent lifting over 25 pounds; occasional carrying limited to 20 pounds; occasional pushing/pulling limited to 40 pounds; and no climbing, jumping, running, or balancing. Employer permitted employee to return to work, but violated the restrictions imposed by Dr. Stewart by requiring employee to perform the heavy labor task of replacing valves on propane tanks in employer's shop. The tanks themselves weighed 40 pounds, so employer was asking this long-term employee—who'd been so seriously injured at work as to require a three-level fusion surgery in her neck—to frequently lift and carry *twice* the amount she'd been limited by her surgeon. To make matters worse, many of the valves on the propane tanks were "frozen," or stuck to the point that employee had to use hand tools and exert significant force to remove and replace them.

Unsurprisingly, it was this very job duty that caused employee's subsequent injury of August 15, 2006. On that date, employee was using a "cheater" wrench to try and loosen a stuck valve. When the valve finally broke loose, employee experienced a sudden pop in her neck, accompanied by the onset of new and severe pain. As the Commission majority notes, employee's symptoms were so severe that Concentra declined to treat her and instead sent her straight to the emergency room, where she received intravenous morphine. Employee followed-up with Dr. Samson, who made Dr. Stewart's *provisional* restrictions *permanent* as of August 18, 2006.<sup>2</sup>

In an extraordinary show of tenacity, employee tried yet again to return to her work for employer. This time, employer permitted employee to perform a job within her (now permanent) restrictions: painting window seals. But employee's return to work was short-lived. In early October 2006, employer gave employee an ultimatum. Either she would return to her normal work duties, or lose the only job she'd ever had. Obviously, employee could not return to the extremely heavy work she'd once performed for employer without violating the express restrictions from Dr. Samson; the post-surgical medical records from both Dr. Stewart and Dr. Samson demonstrate that a return to employee's full-duty work for employer would place her at significant risk for additional serious injury. So, employee found herself unemployed as of December 29, 2006, owing to the combined effect of the June 2004 and August 2006 work injuries. The question is whether we should award permanent total disability benefits to her from the Second Injury Fund.

*Employee suffered permanent disability referable to the August 2006 work injury*

The administrative law judge and Commission majority have disregarded the expert medical testimony from Dr. Poetz rating 10% permanent partial disability of the body as a whole referable to the August 2006 work injury. In her award, the administrative law judge found that Dr. Samson provided the most persuasive analysis with regard to the August 2006 work injury, but Dr. Samson did not opine that employee did not suffer permanent disability referable to that injury, nor does the administrative law judge purport to credit any such opinion from Dr. Samson. Instead, the administrative law judge suggests that Dr. Samson did not impose any

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<sup>2</sup> As more fully discussed below, I disagree with the administrative law judge's and Commission majority's assumption that Dr. Stewart's restrictions would have become permanent, in any event, absent the August 2006 work injury.

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additional restrictions after the August 2006 work injury. But Dr. Samson **did** impose additional restrictions: he made Dr. Stewart's *provisional* restrictions *permanent* after the last injury.

Dr. Stewart's August 3, 2006, note on the subject made clear that he planned to *reassess* employee's physical abilities at a planned December 4, 2006, appointment, as she was still in the healing period following the extensive fusion surgery he had performed on her neck:

I discussed with her that I am still open to her being fully evaluated by an independent physician for review of her work status and ability to work. I continue to think that she would benefit from a formal functional capacity evaluation that would better assess all of her limitations. This would put objective measures on her work limitations. I plan to see her back in follow-up in December for her one-year follow-up. I have filled out a sick absence policy for Laclede on 06/05/06. This restricts her to 25 pounds of lifting, 20 pounds of carrying, 40 pounds of pushing, 40 pounds of pulling and no climbing, jumping, running or bouncing. These limitations will be in effect until my reassessment at her 12/04/06 appointment.

*Transcript, page 267.*

Dr. Stewart did not see employee again, however. Instead, employee saw Dr. Samson, who made the foregoing restrictions permanent only after employee suffered the August 2006 accident. Notably, Dr. Samson did not adopt Dr. Stewart's suggestion that employee needed to undergo an independent medical assessment or functional capacity evaluation before he could determine her appropriate activity level. Instead, Dr. Samson saw the immediate and compelling need for the placement of permanent restrictions on employee. Thus, employee had new restrictions after August 2006: permanent ones.

The Commission majority and administrative law judge have also completely overlooked the fact that employer did not assign employee to a lighter-duty work task until after the August 2006 injury had occurred. Specifically, employer saw fit to provide employee work that actually fell within her (now permanent) restrictions: painting window seals. Clearly, the employer viewed employee as less physically capable than she was before the August 2006 injury.

Granted, the direct testimony from employee could have been better developed with regard to the increased disability she suffered after the August 2006 injury. But we do have competent and substantial expert medical opinion testimony from Dr. Poetz assigning 10% permanent partial disability of the body as a whole. The only expert witness to offer an alternative theory is employer's Dr. Rende, who would have us believe that employee's permanent total disability is the product of a purely spontaneous degeneration in employee's congenital condition. In other words, Dr. Rende asks us to find that despite employee's unblemished 23-year work record with employer performing extraordinarily heavy work duties, the prevailing factor in her disability is the congenital cervical stenosis shown on her MRI. Dr. Rende assiduously ignores the fact that employee did not even obtain an MRI until after she *fell out of her work truck onto concrete, landing on her neck.*

The opinion from Dr. Rende is clearly biased and, quite simply, his testimony lacks any credibility in this case. The administrative law judge, in fact, expressly found as such in her award in the 2004 case. Yet, the administrative law judge contradicts herself and has now credited Dr. Rende over Dr. Poetz with regard to the issue whether any permanent disability resulted from the August 2006 injury. The Commission majority joins in this puzzling turn-around. The result is that this permanently and totally disabled worker is left out in the cold.

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Employee is permanently and totally disabled by the combination of her work injuries

The Missouri courts have consistently articulated the following test for determining whether an employee is permanently and totally disabled:

The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

*Molder v. Mo. State Treasurer*, 342 S.W.3d 406, 411 (Mo. App. 2011).

Consistent with the foregoing, let us now consider the prospects of a hypothetical employer hiring employee following the 2004 and 2006 work injuries. Owing to the combination of her work injuries affecting the cervical spine, employee now suffers constant pain in her neck, limited range of motion, numbness in both her hands, difficulty controlling both her legs, urinary incontinence, and she is unable to stand or walk for long before needing to recline to relieve her pain. When her pain is especially bad, employee is reliant upon prescription pain medications from her primary care physicians. Employee ambulates with a cane to steady her gait and to prevent falls owing to her difficulty controlling her legs.

Employee was 46 years of age when employer fired her. As I have noted above, she has no other skills or training. She invested more than two decades of back-breaking labor into a career with employer, before that work injured her to such an extent she was of no use to employer anymore. Dr. Poetz testified that employee is permanently and totally disabled owing to a combination of the effects of the August 2006 and June 2004 work injuries. I am persuaded by that opinion, because it best conforms to the facts of this case as I have outlined them above. I am convinced that no employer would hire employee in light of her physical condition following the August 2006 and June 2004 work injuries, without regard to employee's preexisting conditions of ill-being, such as her dyslexia.

I would modify the award of the administrative law judge and assess 10% permanent partial disability of the body as a whole against the employer, and permanent total disability against the Second Injury Fund. Because the Commission majority has decided otherwise, I respectfully dissent.

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Curtis E. Chick, Jr., Member

## AWARD

Employee:	Gracie Stevenson	Injury No.: 06-078015
Dependents:	N/A	Before the
Employer:	Laclede Gas	<b>Division of Workers' Compensation</b>
Additional Party	Second Injury Fund	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 (medical only)
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: August 15, 2006
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:  
Claimant was using a wrench to change a valve and felt a sudden pain in neck.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$2,482.30

Issued by DIVISION OF WORKERS' COMPENSATION

- 17. Value necessary medical aid not furnished by employer/insurer? \$463.50
- 18. Employee's average weekly wages: \$931.63,
- 19. Weekly compensation rate: \$621.09 /\$365.08
- 20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses: \$463.50

No weeks of permanent partial disability from Employer

22. Second Injury Fund liability: No

TOTAL: \$463.50

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: B. Michael Korte

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Gracie Stevenson	Injury No.: 06-078015
Dependents:	N/A	Before the <b>Division of Workers' Compensation</b>
Employer:	Laclede Gas	Department of Labor and Industrial Relations
Additional Party	Second Injury Fund	Of Missouri
Insurer:	Self	Jefferson City, Missouri
Hearing Date:	June 25, 2015	Checked by: KOB

### PRELIMINARIES

The matter of Gracie Stevenson (“Claimant”) proceeded to trial on June 25, 2015. Attorney B. Michael Korte represented Employee. Attorney Mark Anson represented Laclede Gas Company (“Employer”), which is self-insured. Assistant Attorney General Joye Hudson represented the Second Injury Fund. Three separate claims were tried concurrently: the instant claim (“2006 Case”), Injury No. 04-148423 (“2004 Case”), and Injury No. 05-055801 (“2005 Case”). Separate awards are issued in each Case. Claimant seeks to recover permanent total disability (“PTD”) compensation.

With respect to the 2006 Case, the parties stipulated Claimant was an employee of Employer subject to the Missouri Workers’ Compensation Act (“Act”) when, on or about August 15, 2006 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 \$931.63, with corresponding rates of compensation of \$621.09 for PTD and temporary total disability (“TTD”) benefits, and \$365.08 for permanent partial disability (“PPD”) benefits. Claimant provided proper notice and filed a timely claim. Employer paid \$2,482.30<sup>1</sup> in medical benefits, but no TTD. The parties agreed Claimant’s last day of employment was December 29, 2006.

The issues to be determined are: 1) is Employer liable for payment of the City of St. Louis Emergency Medical Services bill of \$463.50; 2) was work a prevailing factor in causing Claimant’s condition and disability; 3) what is the nature and extent of Claimant’s permanent disability; and 4) what is the liability of the Second Injury Fund?

The exhibits were admitted for all three Cases, with Claimant’s exhibits marked with numerals 1 to 17 and Employer’s marked with letters A to E. The Second Injury Fund offered no additional exhibits. Rather than list all the exhibits in this Award, reference is made to the Award in the 2004 Case, Injury No. 04-148423, and the list of exhibits set forth therein is incorporated into this Award by reference.

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<sup>1</sup> 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.

## **FINDINGS OF FACT**

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 talented athlete, she had the opportunity to attend college, but her lifelong dyslexia prevented her from succeeding in school, being able to read or having any computer skills. She trained for the heavy work she performed and worked in the highly physical job of Gas Supply Control Laborer until the end of 2006. Away from work, she enjoyed many activities such as playing basket ball and softball, skating and bike riding.

Prior to 2004, she had some injuries that did not cause Claimant lasting problems, such as right shoulder dislocations and a back strain. She had some complaints of neck pain beginning in 2000, which started with an altercation with the police and worsened with time. On or about June 16, 2004, Claimant had an accident that forms the basis of the 2004 Case, Injury No. 04-148423. As a result, Claimant had the treatment and suffered the disability detailed in the Award for the 2004 Case. She was also diagnosed with and was conservatively treated for carpal tunnel syndrome.

On June 15, 2005, while at work, Claimant experienced symptoms of pain for which she sought medical treatment. As determined in the 2005 Case, Claimant was experiencing an episode related to her high blood pressure, and did not have a compensable injury or any additional injury or disability. The Concentra note of June 21, 2005 indicated:

She feels the pattern of symptoms is better with no pain; Pt. states ...after receiving medication for her blood pressure...her neck pain resolved completely. Pt states that she was told that her pain was most likely a stress reaction or related to HNT; Pt denies any radicular pain...is ready to be released to regular duty

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" x1 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.

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 her 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 ("FCE").

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. Dr. Stewart did not what 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,<sup>2</sup> 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.

Other than the treatment she received on the day of the accident, and the evaluation by Dr. Samson, Claimant received no additional treatment related to the 2006 Case except the treatment she had been receiving through her PCP. 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.

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<sup>2</sup> 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."

The expert testimony is set forth in a more complete and detailed manner in the Award in the 2004 Case. The portions of the Award in the 2004 Case that deal with the testimony and findings of Dr. Poetz and Dr. Rende are incorporated herein by reference. But the most relevant portions are as follows. Dr. Poetz thought the August 15, 2006 wrench incident was the prevailing factor in causing cervical strain with exacerbation of cervical discogenic disease, and assigned PPD of 10% of the body as a whole. With respect to the 2006 Case, Dr. Rende thought the accident caused a temporary aggravation of a preexisting condition, and felt the injury was temporary because Claimant improved to baseline after the event. He thought Claimant had permanent disability as a result of the surgical intervention, which occurred before the events of the 2006 Case.

### **ADDITIONAL FINDINGS OF FACT AND RULINGS OF LAW**

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

#### **1. Medical Services Bill.**

Section 287.140.1 requires an employer to provide such care "as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Mo.Rev.Stat. § 287.140.1. A claimant seeking past medical expenses must prove "that the need for treatment and medication flow[s] from the work injury." *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 519 (Mo.App.W.D.2011). A sufficient factual basis exists for the Commission to award compensation for past medical expenses when: (1) the claimant introduces his medical bills into evidence; (2) the claimant testifies that the bills are related to and the product of his work injury; and (3) "the bills relate to the professional services rendered as shown by the medical records in evidence." *Maness v. City of De Soto*, 421 S.W.3d 532, 544 (Mo. Ct. App. 2014)  *citations omitted*.

Claimant was at work, performing job duties, when she experienced the onset of neck pain that was so debilitating at the time she required an ambulance to take her to the hospital. She testified credibly and provided the appropriate documentation. Employer is liable to Claimant for payment of the City of St. Louis Emergency Medical Services bill of \$463.50.

#### **2. Prevailing Factor.**

Of the three claims, the 2006 Case is the only one which arose after the 2005 statutory changes to the Act. Prior to the 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. Therefore, the employee's burden in establishing that the injury is compensable is now 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).

Under the stricter prevailing factor test, I find Claimant met her burden of showing the work-related accident is the prevailing or primary cause of a temporary neck strain. The strain caused a temporary increase in neck pain that resolved spontaneously with pain medication. Dr.

Samson's analysis is the most persuasive, compelling, and consistent with the credible evidence. He examined Claimant within three days of the accident – not only did he consider her history when it was the most fresh and accurate, but he also conducted a timely firsthand examination of the injury. He noted Claimant did not develop any upper extremity symptoms or leg symptoms. Rather, her symptoms were the same as they were before the August 15, 2006 event. Therefore, the problem she had was a temporary increase in neck pain.

There is additional evidence supportive of Dr. Samson's conclusion. There was no objective change in Claimant's medical condition. There was no additional treatment. Dr. Samson did not assign any additional restrictions to the restrictions that were already in place due to the 2004 Case and surgery.

Dr. Rende testified persuasively the injury in the 2006 Case caused a **temporary** aggravation of a preexisting condition. Unlike the 2004 Case, where I did not find his testimony persuasive, here his opinion is consistent with the facts and the law. In the 2006 Case, there is solid evidence from Dr. Samson and Claimant herself that the symptoms resolved. Furthermore, Dr. Rende's opinion is more consistent with the prevailing factor/strict construction analysis required by the post-2005 Act. Thus, Dr. Samson, Dr. Rende and Claimant all support a finding the 2006 case resulted in no permanent disability.

There is no objective evidence of any permanent aggravation of Claimant's underlying medical condition. I am completely unconvinced by Dr. Poetz's opinion the 2006 Case resulted in an aggravation of the underlying condition with corresponding permanent disability of 10%. His opinion is a conclusion unsupported by facts. He cannot point to any objective findings to suggest Claimant is any more disabled after the August 15, 2006 accident than she was before. Thus, on this point, I must discount Dr. Poetz suggestion Claimant has any demonstrable permanent disability associated with the 2006 Case.

### 3. Nature and Extent of Disability/Liability of the Second Injury Fund.

Having found the accident to be the prevailing cause in only a temporary aggravation of a severe underlying condition, it is axiomatic there is no permanent disability. The 2006 Case is one of those situations where the facts establish an accident occurred that was work-related, but no injury occurred. *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 604 (Mo. Ct. App. 1999)(One of two work-related accidents was "non-compensable" because there was no need for further compensation beyond that which was awarded for the other accident). As in *Sanderson*, all the permanent disability was associated with one (2004 Case) of two or more cases, rendering the non-disabling accident non-compensable.

It is particularly interesting, and supportive of the findings herein, that the 2006 accident occurred while Claimant was still recovering from, and temporarily restricted by, the 2004 accident and resultant surgery. Claimant reached MMI from the 2004 Case on August 18, 2006, three days after the 2006 occurred, and was found PTD in the context of the 2004 Case.

While it constitutes obiter dictum, since this 2006 Case is the last of three open claims in which Claimant seeks PTD, I would like to note the order in which the cases were considered. It is common practice in cases involving the Second Injury Fund to generally consider the effects of the last injury first. *See, i.e., Lewis v. Treasurer of State*, 435 S.W.3d 144, 158 (Mo. Ct. App.

2014)(LIRC correctly determined the employer's liability for the last injury alone first). However, in Claimant's situation, this does not mean starting with the 2006 Case. In *Sage v. Talbot Indus.*, 427 S.W.3d 906, 914 (Mo. Ct. App. 2014), a case involving open cases from 2004 and 2005, the court specified, "When multiple claims are involved, the "last injury" is evaluated within *each* claim, and each claim is considered in order of occurrence." *Citations omitted*. The first claim to occur here was the 2004 Case. Furthermore, in *Pace v. City of St. Joseph*, 367 S.W.3d 137, 148–50 (Mo.App.2012), the Court upheld the finding the claimant was PTD as a result of the first of four accidents alone. Since a compensable injury (2004 Case) occurring before another claimed compensable injury (2006 Case) can render an employee permanently and totally disabled without consideration of the later injury, the outcome of the PTD portion of these Cases would have been the same even if Claimant had suffered some permanent injury in the 2006 Case. Again, this analysis is moot because there is no disability associated with the 2006 Case.

### **CONCLUSION**

This is a case where an accident occurred that was work-related, but no injury occurred. Employer liable for payment of the City of St. Louis Emergency Medical Services bill of \$463.50, but is not liable for any permanent disability compensation. The claim against the Second Injury Fund is denied.

Made by: \_\_\_\_\_  
KARLA OGRODNIK BORESI  
*Administrative Law Judge*  
*Division of Workers' Compensation*