

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

Injury No.: 09-022015

Employee: Marlene Stewart
Employer: Subway (Settled)
Insurer: Zurich American Insurance Company (Settled)
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, heard the parties' arguments, 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

Second Injury Fund liability

On appeal before this Commission, the Second Injury Fund argues that employee was permanently and totally disabled before she suffered the February 2009 primary injury in this matter. We disagree. Employee's work history shows that she was able to compete for and obtain a number of part-time positions in the open labor market before the primary injury. Employee did not obtain these positions through the help of family or friends, nor was she relegated to "make-work" while performing these jobs. We are convinced that this evidence demonstrates that employee, although limited to part-time work, was not permanently and totally disabled prior to the work injury. In the case of *Laturno v. Carnahan*, 640 S.W.2d 470 (Mo. App. 1982), the court rejected a similar argument from the Second Injury Fund by pointing to the inescapable fact of the employee's pre-injury employment:

Ability to compete in the labor market is a test for permanent total disability in that it measures the worker's prospects for returning to employment. But a test for probable future employment cannot change the fact of past employment.

Id. at 473 (citations omitted).

We find the holding of the *Laturno* court dispositive of the issue herein. We believe it is consistent with the purposes of the Second Injury Fund to award compensation to an employee who, at least up until her last injury, was tenacious enough to compete for and secure a number of part-time positions even though she was suffering from seriously limiting chronic conditions. Also, we note that employee's relatively low

Employee: Marlene Stewart

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weekly compensation rate for permanent total disability benefits reflects the fact that she was only able to work part-time jobs at the time of the primary injury.

Given the foregoing supplemental analysis, and because we otherwise agree with the administrative law judge's reasoning, we conclude that the Second Injury Fund is liable for permanent total disability benefits.

Preexisting vs. post-injury limitations

On appeal before this Commission, the Second Injury Fund argues the administrative law judge failed to understand the nature of employee's preexisting versus post-injury limitations. The Second Injury Fund points out that the administrative law judge found that employee had no trouble performing all of her job duties for employer, but that employee actually testified that she had aches and pain performing duties for employer such as kneeling, squatting, and reaching overhead.

We do not adopt the administrative law judge's finding that employee had no trouble performing her job duties for employer. We find, instead, that employee had aches and pains performing her duties. We note, however, that there is no evidence to suggest employee was not working to employer's satisfaction before the work injury.

Conclusion

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

The award and decision of Administrative Law Judge Victorine R. Mahon is attached and incorporated by this reference.

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 14th day of June 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Marlene Stewart

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge awarding permanent total disability benefits against the Second Injury Fund is in error, and should be reversed.

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." The Fund is liable for permanent total disability benefits only where the work injury combines with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

Before the primary injury in this case, this 47-year-old employee was relegated to part-time positions as a result of a preexisting history of seriously disabling chronic pain conditions including Fibromyalgia, arthritis, reflex sympathetic dystrophy, degenerative joint disease, and carpal tunnel syndrome. Employee also suffered from depression. Employee has been on Social Security disability benefits since the late 1990's. Since that time, employee has never worked more than 20 hours per week, and has never worked for any single employer longer than about 6 months. Before the work injury, employee would lie down one to two times per day for relief from her pain conditions. When employee worked, she was in pain. At the end of the day, she would go home, take a pain pill, and lie down for the rest of the night.

All of the foregoing are limitations that employee suffered *before* the primary injury; all of the foregoing are classic indicators for permanent total disability. I believe the vocational expert Wilbur Swearingin most credibly evaluated employee's preexisting condition when he opined that employee was permanently and totally disabled before the work injury. I believe the majority misreads Mr. Swearingin's opinion when they construe it as supportive of an award of permanent total disability benefits against the Second Injury Fund. I also note that employee's own medical expert opined that her work after 1997 did not represent work in the open labor market.

On a more fundamental level, I believe the majority's conclusion that this employee was not permanently and totally disabled prior to the work injury runs directly contrary to a long history of decisions from administrative law judges, this Commission, and from the courts awarding permanent total disability benefits to employees with similar, or even less limiting, disabilities. Far from dispositive, I consider *Laturno v. Carnahan*, 640 S.W.2d 470 (Mo. App. 1982) to be a case that speaks to the timing of payments from the Second Injury Fund. The dicta cited by the majority for abandoning the well-established test for permanent total disability cannot change the reality that if this employee were pointing to the same limitations and disabling conditions *after* a work injury, no reasonable person could seriously contend that she was capable of competing for work in the open labor market.

Employee: Marlene Stewart

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In sum, I find no support in the Missouri Workers' Compensation Law for the proposition that we should throw out the test for permanent total disability simply because the employee was able to eke out an extremely restricted employment history. I disagree with the majority's choice to credit Mr. England. I credit instead Mr. Swearingin and find that employee was permanently and totally disabled before the work injury of February 25, 2009. It follows that there is no Second Injury Fund liability, because there can be no "combination" of disabilities where employee was already permanently and totally disabled at the time of the primary injury. I would reverse the decision of the administrative law judge.

Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

AWARD

Employee: Marlene Stewart

Injury No. 09-022015

Dependents: Not applicable.

Employer: Subway (settled)

Additional Party: Treasurer of the State of Missouri, as
Custodian of the Second Injury Fund

Insurer: Zurich American Insurance Company (settled)

Hearing Date: January 27, 2012

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

Checked by: VRM/db

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: February 25, 2009.
5. State location where accident occurred or occupational disease was contracted:
West Plains, Howell County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within the 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 slipped and fell on water at work.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Body as a whole, including shoulder, back, and neck.

14. Nature and extent of any permanent disability: Settled as to Employer/Insurer; Permanent total disability as against the Second Injury Fund.
15. Compensation paid to-date for temporary disability: \$845.25.
16. Value necessary medical aid paid to date by employer/insurer? \$33,509.88.
17. Value necessary medical aid not paid by employer/insurer? Not applicable.
18. Employee's average weekly wages? \$180.00.
19. Weekly compensation rate: \$120.75.
20. Method of computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: Settled as to Employer/Insurer for 20 percent to the body as a whole.
22. Second Injury Fund liability: See below.
23. Future requirements:

For permanent total disability, the Second Injury Fund shall pay the permanent total disability rate of \$120.75 per week, beginning November 28, 2011, (which is 80 weeks after the date of maximum medical improvement), and continuing for the remainder of Claimant's lifetime, subject to review and modification as provided by law. Interest shall accrue as provided by law.

The compensation awarded shall be subject to a lien in the amount of 25 percent of all payments in favor of the following attorney for necessary legal services rendered to Claimant: Randy Alberhasky.

FINDINGS OF FACT AND RULINGS OF LAW

Employee: Marlene Stewart

Injury No. 09-022015

Dependents: Not applicable.

Employer: Subway (settled)

Additional Party: Treasurer of the State of Missouri, as
Custodian of the Second Injury Fund

Insurer: Zurich American Insurance Company (settled)

Hearing Date: January 27, 2012

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

Checked by: VRM/db

INTRODUCTION

The above-referenced Workers' Compensation claim was heard before the undersigned Administrative Law Judge on January 27, 2012. Marlene Stewart (Claimant) appeared with her attorney, Randy Alberhasky. Assistant Attorney General Cara Harris appeared on behalf of the Treasurer of the State of Missouri, as Custodian of the Second Injury Fund. Subway and Zurich American Insurance Company previously settled their liability with Claimant. Claimant proceeds against the Second Injury Fund for permanent total disability. The parties stipulated to the following facts and issues:

STIPULATIONS AND ISSUES

1. Claimant sustained an accidental injury in Howell County, Missouri. The injury arose out of and was within the course of her employment with Subway (Employer), an entity fully insured with Zurich American Insurance Company (Insurer).
2. Employer/Insurer provided \$33,509.88 in medical expenses and \$845.25 in temporary total disability.
3. Claimant was covered by, and Employer was subject to, the Missouri Workers' Compensation Law at the time of the injury.
4. There is no dispute as to jurisdiction, venue, statute of limitations, or notice.
5. Employer/Insurer settled their liability with Claimant.
6. The average weekly wage on the date of the injury was sufficient to yield a permanent total disability and permanent partial disability rate of \$120.75.

7. The sole issue for determination is whether the Second Injury Fund has liability for permanent total disability. Claimant's attorney also seeks a lien for a 25 percent fee.

EXHIBITS

The following exhibits were offered by Claimant and received into evidence:

Medical Records

- A. Burton Creek Rural Clinic, 100 pages certified 4/23/2009
- B. Burton Creek Rural Clinic, 199 pages certified 10/29/2009
- C. Ozarks Medical Center, 109 pages certified 4/30/2009
- D. Ozarks Medical Center, 74 pages certified 8/4/2010
- E. Ozarks Medical Center, 71 pages certified 6/30/2011
- F. Orthopaedic Specialists of Springfield, 2 pages certified 11/25/2009
- G. Orthopaedic Specialists of Springfield, 7 pages certified 5/25/2010
- H. Orthopaedic Specialists of Springfield miscellaneous records/office notes uncertified
- I. St. Johns Hospital-Springfield, 20 pages certified 4/21/2009
- J. Urgent Care Clinic, 5 pages certified 5/8/2009

Vocational Report

- K. Wilbur T. Swearingin, CRC, with exhibit

Documents

- L. Claim, 4/6/09
- M. Answer-Second Injury Fund, 4/16/2009
- N. RSMo. 287.210 letter, 10/14/2009
- O. RSMo. 287.210 letter, 12/17/2009
- P. RSMo. 287.210 letter, 8/12/2010
- Q. RSMo. 287.210 letter, 9/3/2010
- R. Disclosure of vocational report, 6/28/2011
- S. Disclosure of medical records, 7/19/2011
- T. Stipulation for Compromise Settlement with employer sent to SIF 11/3/11

Depositions

- U. Deposition - Dr. P. Brent Koprivica, with exhibits
- V. Deposition - Marlene Stewart Doyle Deposition of James England taken 10/11/201
- X. Deposition - James England, with exhibit

The following exhibits were offered by the Second Injury Fund and admitted:

- I. Deposition - James England, with exhibit

FINDINGS OF FACT

Claimant is 47 years of age and recently divorced from Mason Doyle, with whom she lived for more than seven years. She has four grown children. She is a high school graduate with average grades. Claimant seeks permanent total disability from the Second Injury Fund as a result of the combination of her disabilities, both preexisting and from the last work accident at Subway.

Primary Injury

Claimant went to work at Subway on December 1, 2008. She worked part-time, approximately five hours per day, four days a week. She had hopes of becoming a manager. Her duties included making sandwiches and filling the food containers. She was required to stand most of the time, but could occasionally alter her position. Claimant said she had no trouble performing all of her job duties and she had no plans to leave the job. She believed the job was a pretty good fit.

On February 25, 2009, the day of her injury, a co-worker was spritzing water on bread. Water had fallen on the floor. Claimant slipped on the water, hit her head, and lost consciousness. Immediately after the incident, Claimant had left-sided pain. Within four to five days after the incident Claimant could not even do dishes and was unable to work.

On May 29, 2009, Dr. Christopher Miller diagnosed a tear of the superior labrum with an associated paralabral cyst. The cuff appeared to be intact, and she had a Type II acromion. She had mild acromioclavicular joint arthrosis. No anterior or posterior labral tear was seen, and the biceps tendon appeared to be intact. It was his impression that she had sustained injury to her left shoulder as a result of an alleged work injury. Because her shoulder did not respond to conservative care, Dr. Miller performed an arthroscopic repair of SLAP tear of the left shoulder on January 26, 2010. On May 17, 2010, Dr. Miller released Claimant from his care with no restrictions as to the shoulder.

Claimant had prior neck and shoulder pain as a result of a motor vehicle accident. While she is able to use her shoulder to some degree, her current condition is worse than before the accident at Subway. Claimant has not worked since leaving Subway and has continued problems daily performing almost any task. She testified credibly that she has less range of motion. She is unable to perform any repetitive tasks with her arms. She now is unable to hold a book to read, but looking down hurts her neck and causes headaches. Claimant is left-hand dominant. She doesn't think she can work, not even part-time anymore, and certainly not in any of her prior jobs. The pain is worse now than ever.

Prior Employment History and Physical Ability

Claimant obtained Social Security Disability in 1997. She thereafter worked only part-time positions to supplement her income. There is no contention that she was capable of full-time work after 1997. In the 12 years (144 months) prior to the work accident, Claimant had worked only 29 months. She obtained these jobs by answering advertisement and making applications. Her employment history, since obtaining Social Security Disability, is as follows:

	Length of Employment	Job Duties	Problems Performing Job
Hearing Aid Center	11 months	Check, clean, and ship hearing aids; open and close store; filing; cleaning;	Daily pain upon sitting, bending, squatting to get into files, and vacuuming. Employee was replaced due to inadequate computer skills. Claimant believed she could perform this job prior to the last accident.
Super 8 Hotel	1 month	Cleaned rooms	Pain upon lifting, kneeling, squatting, and vacuuming; Stairs also posed problems. Claimant did not believe she could perform this job prior to the last accident.
KIC (1st time)¹	4 – 6 months	Telephone sales/appointment setter	Claimant had no physical problem performing this job. She could wear a headset and alter her physical position from sitting to standing.
McDonalds	3 months	Lobby cleaner, sweep, mop, clean tables and trays, and make salads.	Bending and sweeping were difficult. She had pain with all activity. Claimant did not know why the job ended.
ALCO	4 months	Cashier; straighten store; pricing; no stocking.	Claimant had to stand for cashier work. She could sit while pricing. The job ended when she had to move due to financial rather than physical reasons.

It is undisputed that when Claimant was not working, she was tired and in pain from her fibromyalgia as well as neck and back conditions. Claimant's former husband, Mason Doyle, testified that working part-time was difficult for Claimant. Every day, after work, Claimant had to lie down and rest for an hour or two. She spent much of her nonworking hours resting and taking narcotic pain or depression medication. Mason Doyle performed the majority of the cooking and cleaning.

Carolyn Kristele, a friend of Claimant, was unsure whether she met Claimant prior to or after the work accident. She shared interests in crafts with Claimant. They often visited by phone. They had lived next to each other in low income apartments for a couple of years after the accident. Kristele knew that Claimant was in pain all of the time, and she often laid down when they visited. Kristele confirmed that Mason Doyle performed the housework and cooking when he and Claimant were married. Claimant had little social life.

Independent Medication Examination

P. Brent Koprivica, M.D., stated that the work-related fall of February 25, 2009, was the prevailing factor in the labral tear on the left, for which arthroscopic repair had been performed. The injury also was the prevailing factor in increased chronic neck and low back pain. He acknowledged that Claimant had significant disability in the cervical and lumbar regions prior to February 25, 2009, but the increase in chronic musculoskeletal pain in the cervical and lumbar

¹ Claimant tried to return to work at KIC distributing after the accident at Subway, but she was unable to do any writing because of her shoulder. She was forced to quit after a couple of days.

regions was a direct result of the last work accident. Dr. Koprivica said Claimant was temporarily totally disabled following the February 25, 2009 injury until her release by Dr. Miller on May 17, 2010, at which time she was at maximum medical improvement.

Dr. Koprivica imposed the following restrictions: no repetitive or sustained activities above shoulder level bilaterally; avoid sustained or awkward positions of the cervical and lumbar spine; change postures frequently; avoid overhead lifting activities and climbing; avoid frequent or constant bending at the waist; avoid pushing, pulling, twisting, squatting, crawling, and kneeling. Dr. Koprivica said Claimant is permanently and totally disabled from the combination of her disabilities both preexisting and from the last accident, and not from the last injury, alone.

Prior to February 25th, 2009, Dr. Koprivica said that Claimant "actually had profound disability." He assigned a 15 percent permanent partial disability to the body as a whole from fibromyalgia which restricted Claimant from any repetitive forceful task such as pushing, pulling, bending, or twisting. For the chronic neck pain, Dr. Koprivica assigned a 15 percent permanent partial disability to the whole body, finding objective evidence by an MRI of multilevel disc involvement with disc protrusions at C5-6 and C6-7 before February 25th, 2009. For the prior chronic back pain with evidence of lumbar spondylosis, he assigned a 15 percent permanent partial disability to the body as a whole. He found a preexisting prior chronic impingement in the shoulder, verified by a MRI, to which he assigned a 15 percent permanent partial disability of the left upper extremity at 232-week level. Dr. Koprivica said that Claimant now has the same *type* of physical restrictions as before the last work accident, but not to the same *extent* as they now exist:

- Q. Would you be able to break down what restrictions you would have placed on her for her previous conditions as of the date of the accident and then what you would assign as a result of the work injury itself and which would be a result of the accommodations thereof?
- A. I can't really do that. The restrictions, she suffered injury to the left shoulder where she already had contribution of the restrictions for overhead activities from the impingement that predated it. The restrictions are just worse in term of no activities above shoulder level now. In terms of the neck and the back there were restrictions on her abilities to bend, push, pull, lift, sustain awkward postures, those existed before. They're just worse because she's further injured it because she's more limited. So the restrictions I placed are a combination of those and they're not, I don't know how I could tell you specifically other than the relative percentages that I've apportioned for the separate conditions as to relative contribution.

(Exhibit U, p. 34-35).

Dr. Koprivica believed Claimant limited herself to part-time work prior to the last work injury at Subway because that was consistent with her prior disabilities. He said that now no ordinary employer would employ Claimant on either a part-time or full-time basis. "I don't think she'd be hired for any job." (Exhibit U, Tr. 60).

Vocational Evidence

Wilbur Swearingin is a vocational expert who personally interviewed and tested Claimant. He said Claimant had academic skills adequate for the needs of everyday living, most entry level, semi-skilled and some skilled occupations. She had, however, impairments which were vocationally disabling and sufficient to cause a hindrance or obstacle to employment prior to February 2009. He noted that at the time of the primary or last accident in February 2009, Claimant had been working part-time at Subway in work described in the Dictionary of Occupational Titles (DOT) as a sandwich maker, DOT 317.664-010. He identified two other part-time jobs that Claimant had held after 1996 and before February 2009 that were within the DOT: telephone solicitor and clerk, general. He noted that Claimant's preexisting impairments precluded her from any full-time competitive employment. Now, Claimant was incapable of the regular part-time employment that she previously had worked to supplement her Social Security Disability income. While there are a number of entry level jobs generally available in the community having a high turnover and pay low wages, Claimant's impairments, medical restrictions, education, and disability status, precluded her from performing these common jobs. He said it was unlikely an employer in the normal course of business is going to employ Claimant. He concluded:

Ms. Stewart has held three part time jobs for a few months each to supplement her disability income. It was while working at a Subway Store in February 2009, Ms. Stewart fell, sustained a SLAP tear of her left shoulder, which required operative repair and which aggravated and increased her chronic neck and low back pain. These injuries are additive and cumulative to Ms. Stewart's pre-existing permanent and total disability. Ms. Stewart is neither employable nor placeable in the open competitive labor market.

(Exhibit K, p. 18).

James England is a vocational expert who, at the request of the Second Injury Fund, evaluated Claimant by means of a records review. He determined that Claimant was employable in part-time work before the last accident, now was permanently and totally disabled. Mr. England opined:

I think she was employable in the open labor market on a part-time basis only, from what she testified to, that she didn't feel capable of doing anything beyond part-time work activity. I think the job she worked in would be considered competitive employment, because, you know, she was making normal wages and was hired for the job but I don't think that—from her own testimony, I don't think she has been able to do regular full-time work, going all the way to '97.

(Exhibit I, p. 18).

Mr. England explained that Claimant, while capable of working part-time prior to February 2009, already was having trouble with a lot of activities. He did not believe Claimant was employable on a full-time basis before the February 2009 accident; and, given Claimant's testimony that she now had to lie down during the day, he believed her no longer capable of even part-time regular work. As Mr. England explained:

- A. I think they have to lie down at unpredictable times and can't fit it in-- I have had some people that actually will go out during the lunch break and lie down for a while, that type of thing. I think if the person has to lie down, you know, at unpredictable times and you know, maybe various amounts of time that is going to preclude normal employment.

(Exhibit I, p. 25-26).

Settlement

Claimant compromised her claim against Employer/Insurer for her back, neck and left shoulder injuries based upon 20 percent disability to the body as a whole. I find that the settlement accurately reflects the degree of disability Claimant sustained in the last accident. Thus, I find that Claimant was not permanently and totally disabled as a result of the last accident, alone. That finding is consistent with Dr. Koprivica's testimony, and the overwhelming evidence in the record as a whole.

Credibility Assessment

I find Claimant, her two lay witnesses, and each of the expert witnesses to be credible.

CONCLUSIONS OF LAW

Section 287.220.1 provides that the Second Injury Fund's liability is determined by first measuring the degree of disability from the last injury, then the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of the special fund known as the second injury fund. As I have found, Claimant sustained a 20 percent permanent partial disability to the body from the last accident. Moreover, the evidence is quite clear that Claimant now is permanently and totally disabled. The issue remains whether Claimant was permanently and totally disabled *prior to* the last accident. The Second Injury Fund argues that unless Claimant was permanently and *partially* disabled prior to the last accident, it has no liability under § 287.220 RSMo.

As summarized in her own brief, Claimant has only worked sporadically in part-time positions since qualifying for Social Security Disability in 1997:

Prior to injuring her left shoulder, back and neck, Marlene Stewart was only marginally employable, at best. She hadn't worked more than 20 hours a week in the last 10 years and she drifted from part time job to part time job, in between periods of unemployment, often because she had trouble performing the job or because she was terminated due to her medical limitations. Even her ex-husband testified at the hearing that it took all she had for her to work 20 hours a week and when she did work, she paid the price at home by having to rest more. After work or on her days off she would lay down and take prescription pain medications and anti-depressants.

(Claimant's brief to Administrative Law Judge p. 41).

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.

Treasurer v. Cook, 323 S.W.3d 105, 110 (Mo. App. W.D. 2010) (citations and internal quotation marks omitted). While “total disability” does not require Claimant to be completely inactive or inert, *Sifferman v. Sears Roebuck and Co.*, 906 S.W.2d 823, 826 (Mo. App. S.D. 1996), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W. 2d 220 (Mo. banc 2003), it does require a finding that Claimant is unable to work in any employment in the open labor market, and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Sullivan v. Masters Jackson Paving CO.*, 35 S.W.3d 879, 884 (Mo. App. S.D. 2001), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003).

The simple fact is that § 287.020 RSMo, does not distinguish between full-time and part-time employment in the open labor market. A worker is not necessarily permanently and totally disabled within the context of the Missouri Workers' Compensation Law simply because she must work 20 hours or less per week, take medication, and/or observe physician-imposed restrictions to return to work. *See e.g., Rector v. Gary's Heating and Cooling*, 293 S.W.3d 143, 148 (Mo. App. S.D. 2009) (finding that an injured employee was not permanently and totally disabled upon returning to part-time supervisory work with the aid of medication and diligent observation of the restrictions placed on him by his doctors).

Conversely, “the ability to perform some work is relevant to th[e] [total disability] determination, but it is not dispositive. To the contrary, a number of cases have recognized that a claimant can be totally disabled even if able to perform sporadic or light duty work.” *Cooper v. Med. Ctr. of Independence*, 955 S.W.2d 570, 575 (Mo. App. W.D. 1997). For instance, in *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 238 (Mo. App. S.D. 2003), the Court held that the Commission was not automatically precluded from determining a Claimant permanently and totally disabled merely because Claimant had a job performing a variety of small tasks at an auto dealership. Similarly, the Eastern District held that a claimant who was found by the Commission to be “only able to work very limited hours at rudimentary tasks” was a totally disabled worker.” *Grgic v. P & G Const.*, 904 S.W.2d 464, 466 (Mo.App. E.D.1995). *See also Molder v. Missouri State Treasurer*, 342 S.W.3d 406 (Mo. App. W.D. 2011) (holding that light work, four hours per week, obtained through a friend, and which caused pain, was not work on the open labor market.)

In *Pavia*, *Grgic*, and *Molder*, the jobs in issue were not available on the open labor market. But the instant case is more akin to *Rector*, in which the employee had continued to work for the employer in a supervisory capacity on a part-time basis, with certain accommodations. In the instant case, Claimant demonstrated that she was physically capable of working about 20 hours per week as a telephone appointment setter for KIC, as a clerk for ALCO, and as a sandwich maker for Subway, even if she had to rest after work. Each of these jobs was obtained by conventional means. None were gratuitous positions obtained through a friend. I can only conclude that Claimant was capable of part-time employment in the open labor market.

Dr. Koprivica testified that the work injury had the effect of increasing Claimant's preexisting limitations to the point where she could not sustain gainful employment and was confined to a sedentary lifestyle. James England and Wilbur Swearingin agree. She has not worked but a day or two since the accident, and not at all since her surgery. Claimant is permanently and totally disabled as a result of her preexisting and work related disabilities.

The Second Injury Fund cites Mr. England's testimony that Claimant was permanently and totally disabled even prior to her injury of February 25, 2009. But, such testimony was in the context of full-time work. Mr. England clearly acknowledged that Claimant was capable of working part-time jobs in the open labor market prior to February 25, 2009.

Likewise, the Second Injury Fund highlights the report of Wilbur Swearingin wherein he indicated that Claimant's latest injuries were "additive and cumulative to Ms. Stewart's pre-existing permanent total disability." It appears, however, that Mr. Swearingin's comment was in reference to "permanent total disability" as determined by the Social Security Administration, and not under the standards used for Missouri Workers' Compensation. Mr. Swearingin certainly does not suggest that Claimant's last part-time employment was an accommodated job or was unavailable in the open labor market. To the contrary, he specifically identified at least three of Claimant's part-time jobs as being within the DOT. Thus, I am not persuaded that Claimant was permanently and totally disabled prior to February 25, 2009, as that term is used within the context of the Missouri Workers' Compensation Law.

Had Employer/Insurer not settled their liability, they would be responsible for the payment of 80 weeks of permanent partial disability beginning May 17, 2010, which is the date of maximum medical improvement. As the permanent total disability and permanent partial disability rates are identical, there is no differential due during the initial 80 weeks. The Second Injury Fund is liable for permanent total disability in the weekly amount of \$120.75 beginning November 28, 2011.

The Award is subject to modification and review as provided by law. Interest shall be paid as provided by law.

Claimant's attorney of record, Randy Alberhasky, shall have a lien of 25 percent on all compensation awarded as a reasonable fee for necessary legal services rendered.

Made by: _____
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation

