

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

Injury No.: 06-088073

Employee: Mila Swearingin
Employer: Hickory County R-I School District
Insurer: Missouri United School Insurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to determine the following issues: (1) whether the injury was medically and causally related to the work for the employer; (2) nature and extent of disability; (3) temporary total disability from August 13, 2007, through November 8, 2007; (4) past medical expenses in the amount of \$155,581.24; (5) future medical treatment; and (6) Second Injury Fund liability.

The administrative law judge determined as follows: (1) the injury of August 28, 2006, was the prevailing factor in employee's development of an acute disk herniation at L5-S1 with resultant development of a left greater than right S1 radiculopathy on an ongoing basis; (2) employee is entitled to reimbursement of her accrued, but previously unauthorized medical bills totaling \$155,581.24; (3) employee is entitled to 12 and 3/7 weeks of temporary total disability benefits; (4) employee suffered 50% permanent partial disability of the body as a whole referable to the 2006 injury; (5) employee has demonstrated the need for ongoing treatment to relieve the effects of the August 28, 2006, work injury; and (6) the Second Injury Fund has no liability for permanent total or permanent partial disability benefits.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in concluding employee is able to find gainful employment; and (2) in disregarding employee's testimony regarding her need to lie down and recline unpredictably.

For the reasons stated below, we modify the award of the administrative law judge referable to the issues of: (1) the nature and extent of disability; and (2) the liability of the Second Injury Fund.

Discussion

Nature and extent of disability

After careful consideration, we deem reasonable, and hereby adopt as our own, the administrative law judge's determination that employee sustained 50% permanent partial disability of the body as a whole referable to the lumbar spine as a result of the work injury of August 28, 2006. The administrative law judge also determined that employee is not permanently and totally disabled. Although we acknowledge that this is a close case, and there

Employee: Mila Swearingin

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is considerable evidence on this record to support the administrative law judge's determination in this regard, we ultimately disagree, for the following reasons.

The administrative law judge expressly found employee to be a credible witness. However, she rejected employee's testimony that she has a need to lie down during the day to relieve her low back pain; based upon a legal conclusion that employee provided insufficient evidence establishing such need "within a reasonable degree of medical certainty." *Award*, page 14. The administrative law judge reached this conclusion based on a perceived failure on the part of employee's medical expert, Dr. Koprivica, to assign a medical "restriction" upon employee's activities in line with such complaint.¹

First, we disagree that there is a material distinction, for our purposes, between Dr. Koprivica's explicit endorsement (albeit phrased as a "limitation") of employee's complaint that she needs to lie down during the day to relieve her symptoms, versus a "restriction" that employee must do so for purely safety reasons.² Second, although evidence with regard to whether an accident *caused* any degree of permanent disability may, in some cases, be susceptible to the reasonable degree of medical certainty standard, see § 287.190.6(2) RSMo, we must disclaim any suggestion that issues regarding the *nature and extent* of disability must be so proven.

This is because, as the courts of this state have long held, the "degree of disability is not solely a medical question," and "[d]eciding the percentage or degree of disability to award a claimant is a finding of fact within the unique province of the Commission." *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo. App. 2007). Stated another way, if the administrative law judge generally believed (as appears to be the case) employee's testimony, she was not precluded as a matter of law from crediting her testimony regarding a need to lie down during the day merely because employee did not provide expert medical testimony describing such need as a "restriction." We adopt the administrative law judge's finding that employee's testimony is credible, as we discern no basis to determine otherwise. We find that employee has a need to lie down unpredictably throughout the day to control her low back pain.

Second, we note that the administrative law judge relied on a determination that employer's vocational expert, James England, provided the most persuasive opinion with regard to the issue of permanent total disability, because his was "the only vocational opinion setting forth the jobs [employee] is physically capable of doing, per the medical restrictions set forth." *Award*, page 19. But the question of permanent total disability does not turn solely on an analysis of what jobs employee might physically be capable of performing within the restrictions from her doctors, instead, as our courts have consistently declared:

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).

¹ Dr. Koprivica, notably, did endorse employee's need to lie down in his report, when he agreed that such is consistent with employee's presentation; however, at his deposition, he suggested this was perhaps better termed a "limitation" referable to employee's subjective complaints, rather than a "restriction" assigned from a purely safety standpoint. See *Transcript*, pages 200-01.

² It would seem that an injured worker's need to unpredictably lie down during the day would nearly always correlate to the relief of subjective symptoms, rather than some safety precaution.

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An employee may be, strictly speaking, capable of performing a particular job's duties without violating her doctors' restrictions, but this does not alone establish that the employee is capable of successfully *competing* for and securing such job in the open labor market. Accordingly, we look at the persuasive evidence as a whole, and ask whether a hypothetical employer might have been likely to hire employee as of July 22, 2010, the date she reached maximum medical improvement from the effects of the work injury.³

After a thorough review of the entire record, we find most persuasive the testimony from the vocational expert Terry Cordray with regard to this issue. Mr. Cordray believes it is unreasonable to expect any employer in the normal course of business to hire employee, given her age, history of back injuries requiring multiple surgeries, use of narcotics and other pain medications that affect her cognitive abilities, lack of transferable skills, and lack of education beyond securing her GED in 1983. Mr. Cordray also pointed out that employee lives in rural Hickory County, and that the potential labor market there is extremely limited in terms of the jobs employee might potentially qualify for given her vocational background and physical restrictions.

We acknowledge that employee continued to work for employer for several years after suffering the August 2006 work injury, which would tend to suggest that employer, at least, found her to be reasonably capable of performing her work duties. On the other hand, employee credibly testified that during her continued work for employer after the last injury, she had to take breaks to lie down on the floor or go sit in her car, and that she went home at night crying because of the extent of her pain. We are also mindful that employee was working for employer under the influence of multiple prescription pain medications, including narcotics. Employer's willingness to permit this longtime employee to remain employed after suffering a workers' compensation injury does not necessarily demonstrate that *another* employer would be willing to accept employee as a new hire, if she were forced to compete on the open labor market.

Especially when we examine the totality of the circumstances surrounding employee's leaving her work for employer, we are persuaded that, as Mr. Cordray credibly opined, employee would not be an attractive hire. The administrative law judge, in her findings, suggested employee left her work solely because she was personally offended when another coworker complained to supervisors that employee wasn't doing her fair share of the work. We view the evidence somewhat differently. Employee explained that she quit after her supervisor, Mr. Beam, called her into his office and asked if she was taking prescription medications at work. When employee admitted that she was, Mr. Beam told her that she probably shouldn't be "working under the influence," and advised her to apply for disability. *Transcript*, page 65. This evidence, in our view, critically undermines any argument that employee's continued work for employer demonstrates an ability to compete in the open labor market.

In sum, we find Mr. Cordray's vocational analysis most persuasive with respect to this issue. We find that employee is permanently and totally disabled. Mr. Cordray expressly found the combination of employee's 2006 and 2005 low back work injuries to result in her inability to compete for work in the open labor market. We credit that opinion. We find that employee is permanently and totally disabled owing to the combination of the primary injury and employee's preexisting disability referable to the low back.

³ At the hearing in this matter, the parties placed in dispute the issue when employee reached maximum medical improvement. The administrative law judge did not make a specific finding, in her award, with regard to this issue. We find that employee reached maximum medical improvement on July 22, 2010, the last date that employee saw Dr. Salim Rahman for follow-up treatment in connection with his June 30, 2010, T9-10 laminotomy with implantation of a dorsal column stimulator.

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Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that she suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

At the time of the August 2006 injury, employee suffered a 10% preexisting permanent partial disability of the body as a whole referable to the low back. After careful consideration, we are convinced that employee's preexisting low back disability was serious enough to constitute a hindrance or obstacle to employment. This is because we are convinced employee's preexisting low back disability had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of this preexisting condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Fund liability for PTD under Section 287.220.1 occurs when [the employee] establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. For [the employee] to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD.

Lewis v. Treasurer of Mo., 435 S.W.3d 144, 157 (Mo. App. 2014).

Section 287.220 requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Id.*

We have adopted the administrative law judge's determination that the last injury resulted in a 50% permanent partial disability of the body as a whole referable to the lumbar spine; we find that this injury did not render employee permanently and totally disabled in isolation. We have credited the expert vocational opinion from Terry Cordray that employee is unable to compete for work in the open labor market as a result of the primary injury in combination with her preexisting disability. We conclude, therefore, that the Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issues of (1) nature and extent of disability; and (2) the liability of the Second Injury Fund.

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The Second Injury Fund is liable for weekly permanent total disability benefits beginning 200 weeks after July 22, 2010, at the weekly permanent total disability rate of \$181.13. The weekly payments shall continue for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued October 20, 2015, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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 September 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: Mila Swearingin

Injury No. 06-088073

Dependents: Not applicable

Employer: Hickory County R-I School District

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

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

Insurer: Missouri United School Insurance

Hearing Date: August 18, 2015

Checked by: VRM/ps

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: August 28, 2006.
5. State location where accident occurred or occupational disease was contracted: Hickory County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant slipped on water while carrying a rack of silverware.
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: Low back.
14. Nature and extent of any permanent disability: 50 percent permanent partial disability to the body as a whole referable to the low back.

- 15. Compensation paid to-date for temporary disability: \$801.42.
- 16. Value necessary medical aid paid to date by employer/insurer? \$8,405.25.
- 17. Value necessary medical aid not furnished by employer/insurer? \$155,581.24.
- 18. Employee's average weekly wages: \$271.69.
- 19. Weekly compensation rate: \$181.13.
- 20. Method wages computation: By agreement.

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

For permanent partial disability – 50 percent to the body as a whole referable to the low back; 50 x 400 weeks (body as a whole = 200 weeks); 200 weeks x. \$181.13 =	\$ 36,226.00.
For temporary total disability – For 12 and 3/7 weeks x \$181.13 =	\$ 2,251.19
For past medical benefits =	<u>\$155,581.24</u>
TOTAL:	\$194,058.43

- 22. Second Injury Fund liability: None.

- 23. Future requirements awarded:

Employer/Insurer shall be liable for future medical care to cure and relieve the effects of the work injury.

Compensation awarded to Claimant shall be subject to a lien of 25 percent in favor of the following attorney for necessary legal services rendered to Claimant: Brianne Thomas.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Mila Swearingin

Injury No. 06-088073

Dependents: Not applicable

Employer: Hickory County R-I School District

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

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

Insurer: Missouri United School Insurance

Hearing Date: August 18, 2015

Checked by: VRM/ps

INTRODUCTION

The undersigned Administrative Law Judge conducted a final hearing to determine the liability of Employer and its Insurer. This case was tried in conjunction with Injury Number 05-091810. The Second Injury Fund is a party only to Injury Number 06-088073. Assistant Attorney General Skyler Burks represented the Second Injury Fund. Attorney Brienne Thomas represented Claimant Mila Swearingin. She seeks a 25 percent fee of any amounts awarded. Attorney Karen Johnson appeared on behalf of the employer the Hickory County R-I School District, and its insurer, Missouri United School Insurance. The parties stipulated to the following facts and issues.

STIPULATIONS

1. On April 26, 2005, and again on August 28, 2006, Mila Swearingin (Claimant) sustained an injury by accident while working for Hickory County R-I School District (Employer). These injuries arose out of and in the course of Claimant's employment with Employer.
2. At the time of these injuries, Claimant was an employee of Employer, which was fully insured with Missouri United School Insurance. Both Claimant and Employer were subject to the provisions of the Missouri Workers' Compensation Law at all relevant times.
3. The parties agree to venue in Springfield, Greene County, Missouri. Jurisdiction is proper in Springfield, Greene County, Missouri.
4. There is no challenge to the statute of limitations or notice.
5. On April 26, 2005, Claimant's average weekly wage was \$261.85, yielding a compensation rate of \$174.57 for all purposes.
6. On August 28, 2006, Claimant's average weekly wage was \$271.69, yielding a compensation rate of \$181.13 for all purposes.

7. For the 2005 injury, Employer/Insurer paid \$4,544.30 in medical benefits. It paid no temporary total disability. There is no claim for back temporary total disability or additional medical benefits with respect to Injury Number 05-091810.
8. For the 2006 injury, Employer/Insurer paid \$8,405.25 in medical benefits and \$801.43 in temporary total disability.

ISSUES

Issues as to Injury Number 05-091810

1. What, if any, permanent disability did Claimant sustained from the accident on April 26, 2005?
2. Are the certified chiropractic treatment records, marked as Exhibit C, admissible?

Issues as to Injury Number 06-088073

1. Are Claimant's injuries medically and causally related to the work accident on August 28, 2006?
2. If yes, what is the nature and extent of any permanent disability?
3. Is Claimant entitled to additional temporary total disability?
4. Is Claimant entitled to reimbursement of past medical bills?
5. Is Claimant entitled to future medical treatment?
6. Does the Second Injury Fund have any liability?
7. Are the certified chiropractic treatment records, marked as Exhibit C, admissible?

EXHIBITS

Claimant offered the following exhibits. Exhibits 6 and 11 were withdrawn. The remainder were admitted:

1. Deposition – Dr. P. Brent Koprivica (with exhibits)
2. Deposition – Terry Cordray taken February 3, 2012 (with exhibits)
3. Deposition Terry Cordray taken August 27, 2013 (with exhibits)
4. Medical Report – Dr. John A. Pazell
5. Supplemental Medical Report – Dr. P. Brent Koprivica
6. Application for Direct Payment from Lester E. Cox – **withdrawn**
7. Billing records
8. 2005 Claim
9. 2006 Claim
10. Correspondence to Attorney Karen Johnson dated April 17, 2007
11. March 24, 2008 – “60-day” letter regarding Dr. Pazell – **withdrawn**
12. 2005 Report of Injury
13. 2006 Report of Injury

Employer/Insurer offered the following exhibits. All are admitted:

- A. Deposition – James England
- B. Medical Report – Dr. Ted Lennard

C. Chiropractic Records – Brian Hackleman, D.C.¹

The Second Injury Fund offered the following exhibits, all of which were admitted without objection:

- I. Deposition – Mila Swearingin taken June 3, 2008
- II. Deposition – Mila Swearingin taken April 12, 2012
- III. Curriculum Vitae – Wilbur Swearingin
- IV. Vocational Report – Wilbur Swearingin
- V. Deposition – Wilbur Swearingin

The Administrative Law Judge also included in the record, with the consent of all parties, Court Exhibit I, which is the Order of Dismissal of the Medical Fee Dispute that previously had been filed.

FINDINGS OF FACT²

Claimant is 63 years old, having been born on January 3, 1952. She completed the 11th grade, but quit school to get married. She received her GED in 1983. She does not have a diagnosed learning disability and never was placed in special education classes while in school.

Claimant's past employment included work as a sewing machine operator at Brown Shoe Company, a CNA at Marceline Nursing Home, a proofreader for a publishing company on a seasonal basis, and a load broker for a trucking company. Claimant also obtained a cosmetology license for hair and nails. She owned and operated a styling salon in her home known as His & Hers Hairstyling for about 20 years. She still has her cosmetology license. Claimant also had a bookkeeping business at one point in her adult working career.

In 2000, Claimant began working for the Hickory County R-I School District at the Skyline schools. She first started as a substitute janitor, then as a substitute cook, and eventually as a full-time cook. As a janitor, Claimant would lift and carry a floor buffer. Her job required that she constantly stand, twist, and turn to operate a floor buffer. She also would sweep, mop, and empty trash weighing 25-30 pounds. As a cook, Claimant lifted pots and pans weighing 40 pounds, sugar in 50-pound bags, and cases of canned goods weighing 20-25 pounds. She also helped unload and stack food.

2005 INJURY

Claimant arrived at school at 5:30 a.m. to walk the halls with co-worker Karen Crawford for exercise. At 6:00 a.m., Claimant unlocked the kitchen, reviewed the menus, and began preparing the day's meals for approximately 350 students. After meals, Claimant wiped the tables and counters, cleaned the floors, and washed dishes. Her shift ended at 1:30 p.m.

Claimant had no difficulty performing her job duties prior to April 26, 2005. She conceded that she had been seen by *several* chiropractors in the past, beginning in 1973. These included Bolivar Family Chiropractic, Hermitage Chiropractic, Tweedie Chiropractic, as well as chiropractors in Osceola, Camdenton, and Nevada.

¹ Claimant objected to Exhibit C. It was received provisionally. Having fully considered the parties' arguments on this evidentiary issue, the objections are overruled and the exhibit is received into evidence. This issue is more fully addressed in the Conclusions of Law, *infra*.

² Any marks or highlighting in the exhibits were present at the time of admission. The Administrative Law Judge made no markings.

These chiropractic treatments were mostly for Claimant's neck, but also for back adjustments. She denied any prior physical therapy or injections.

On April 26, 2005, Claimant was carrying a heavy container of mashed potatoes when she strained her back. She reported the incident the same day, but did not ask for medical treatment. Claimant sought treatment from Hermitage Chiropractic and obtained no relief. She then saw her personal physician, Dr. G. Reed Wouters beginning July 8, 2005. He found negative straight leg raise, equal deep tendon reflexes, good range of motion in the hips without pain, and no SI involvement. He prescribed Cataflam and Flexeril. When her symptoms failed to resolve, she obtained a referral from her employer to see a physician for her work injury.

Dr. Spurlock at the Dallas County Family Medical Center saw Claimant in September 2005. He diagnosed low back pain with left leg radiculopathy. An MRI performed on September 24, 2005, revealed degenerative disk disease with loss of disk signal at the L5-S1 level. There was a left paracentral annular tear. No significant central canal, lateral recess or neural foraminal narrowing was noted. The doctor prescribed medications, physical therapy, and a TENS unit. Dr. Spurlock reported that the TENS unit was providing some improvement in Claimant's symptoms. Dr. Spurlock released Claimant on October 18, 2005, citing no work restrictions.

Claimant again saw her personal physician, Dr. Wouters, on January 5, 2006 for an unrelated physical problem. At that time, Dr. Wouters reported that Claimant previously had back pain but had not been having problems for the past month and a half. Even though Dr. Wouters indicated that Claimant's back problems had resolved, Claimant's rating physician, Dr. P. Brent Koprivica, stated in his report that Claimant had continued to obtain treatment at Hermitage Chiropractic in early 2006.

Despite receiving some ongoing chiropractic care, Claimant continued to work both as a cook and janitor for the remainder of the school year through May 2006. In her June 3, 2008 deposition, Claimant was asked about the condition of her back following her release in October 2005 through May 2006. Claimant responded:

- A. I didn't have any trouble with it.
- Q. Okay. You had recovered from that incident?
- A. I felt like I had.
- Q. Okay. Was it causing you any problems in some of these things, like daily activities that we've talked about?
- A. I didn't notice it.
- Q. Okay. Were you having to – were you having to ask Karen and Debbie to help you with lifting as you do now?
- A. No.
- Q. Okay. You were able to do all of that lifting?
- A. I mean, if I had something really, really heavy, I'd probably ask, but I usually just done it myself.
- Q. Okay. No interference with your job because of ongoing back problems or back pain?
- A. No.

(Fund Exhibit I, pg. 62).

2006 WORK INJURY

Claimant did not work during the summer of 2006. She returned for the 2006-2007 school year as a cook in the elementary school. On August 28, 2006, while at work, Claimant slipped on some water by a floor drain as she was carrying a silverware rack. She did not fall to the ground, but she yanked to stay upright and felt pain in

her back. Claimant reported the incident to her supervisor and was referred again to Dr. Spurlock. She advised Dr. Spurlock that she had pain in her low back and in her left buttock. She stated sometimes it felt as though she had pain coming out of her heel.

A subsequent lumbar MRI revealed 1) mild spondylosis at L4-5 without spinal canal or neural foraminal stenosis, 2) a broad ligamentous protrusion at L5-S1 without spinal canal stenosis, as well as a left paracentral annular fissure, and 3) transitional lumbosacral junction. Claimant was thereafter referred to Dr. Ted Lennard who recommended physical therapy, medication, and performed a number of injections. Claimant reported that the injections were of little benefit. Dr. Lennard then recommended that Claimant see Dr. Workman for evaluation of a possible nucleoplasty. In the interim, Claimant was released to work full duty.

On April 2, 2007, Claimant saw Dr. James T. Doll, an orthopedist in St. Louis. He reported that Claimant suffered mechanical low back pain with sporadic radiation greater on the left, lumbar spondylosis including an L5-S1 annular tear with a small broad subligamentous central protrusion without mass effect on the thecal sac or S1 nerve roots, and a history of low back pain and lower extremity pain with prior MRI evidence of lumbar spondylosis/annular tear at L5-S1. He concluded as follows:

Ms. Swearingin's work activities on 8/28/06 were not the prevailing factor in the medical causation of her current constellation of symptoms but rather her ongoing mechanical low back pain and underlying lumbar spondylosis. Subsequently no further diagnostic testing, formal therapeutic intervention, work restrictions, or permanency are assignable in relation to the 8/28/06 work injury. Ms. Swearingin would therefore be directed to her primary care physician or a spine specialist for evaluation and treatment of her symptoms and underlying conditions outside the scope of this work injury. She is therefore considered to be at maximum medical improvement in relation to the 8/28/06 work injury (MMI).

(Exhibit 3, pp. 173-174). Employer/Insurer then stopped providing medical care and Claimant began paying for her own treatment.

Dr. Wade Ceola then began treating Claimant. He ordered a CT myelogram that was performed July 10, 2007. It revealed a broad-based disk protrusion at the L5-S1 level, which prompted Dr. Ceola to perform a left-sided partial hemilaminectomy with discectomy at L5-S1 on August 13, 2007. At the time of surgery, Dr. Ceola noted a disk herniation below the nerve root at L5-S1 on the left.

When Dr. Ceola examined Claimant on September 11, 2007, about one month after the surgery, Claimant reported good relief and improvement of leg symptoms. Dr. Ceola reported that Claimant had no radicular pain. Dr. Ceola initially restricted Claimant from driving or lifting, bending, pushing, or pulling in excess of seven pounds. Claimant subsequently participated in therapy through Hermitage Physical Therapy. A repeat MRI scan with and without gadolinium showed epidural fibrosis involving the left lateral recess at L5-S1, but no evidence of recurrent disk herniation. Claimant was off work until November 8, 2007. She returned to work with a 25 pound lifting restriction, relying on her coworkers to assist with lifting. Claimant occasionally took breaks in her car and elevated her feet at work to ease her back discomfort.

In March 2008, Claimant returned to Dr. Ceola who prescribed Cymbalta for depression, but returned Claimant to work without restrictions. A CT myelogram obtained March 12, 2008, was negative for any recurrent disk herniation or segment instability. In April, Dr. Ceola prescribed Lexapro. Dr. Ceola suggested that Claimant have a formal psychological evaluation and referral for spinal cord stimulator placement.

On August 31, 2009, Claimant saw a chiropractor, Dr. Tweedies, for low back pain with left sided pain radiating into her left posterior thigh and lateral calf, as well as constant neck pain and right posterior shoulder pain. The chiropractor performed mechanical traction on November 20, 2009, but noted that the pain was unchanged.

Claimant saw Dr. Salim Rahman. After repeat diagnostic evaluations, Dr. Rahman concluded there was no evidence of recurrent or new disk herniation on the MRI scan. A psychological evaluation was completed on May 10, 2010, and Dr. Rahman implanted a spinal cord stimulator on June 30, 2010. At a July 22, 2010 follow-up visit, Dr. Rahman reported that Claimant was doing well.

Claimant's Job Loss

In 2008, Claimant transferred from the elementary to the high school building. Claimant believed her job duties at the high school were a little harder, but she continued to perform all of her work duties as a cook, except for lifting. She explained that rather than carrying big boxes, she would take individual items from the boxes and place them where they were stored. She also used a cart to transport items. In her June 3, 2008 deposition, Claimant said that she had a constant pain in her low back, which sometimes ran down her left leg. Still, she was able to work during summer school from May 28, 2008 to June 27, 2008, and worked the entire 2008–2009 school year, performing her normal duties as a school cook. She missed no time from work because of any problems with her back during the 2008-2009 school year.

Claimant returned again to work the entire 2009-2010 school year, again performing her normal duties as a cook without missing time from work because of any problems with her back. Claimant returned again to work in August 2010 to work the 2010-2011 school year. This was **four years** after the work accident on August 28, 2006. Claimant missed no work because of her back from August 2010 through September 17, 2010, which was the date she resigned.

Claimant had intended to continue working because she needed health insurance and wanted to build a better retirement. Claimant's supervisor, however, advised her that another employee in the elementary school kitchen had complained about Claimant not performing her job well. Claimant took offense to the accusations. Other than obtaining help with the heavy lifting, she believed she was performing her duties as a cook without problems. Up to this time, Claimant never had any formal reprimands. Claimant missed no work time from November 2007 to September 2010 because of her back. Claimant quit. She admitted her resignation was voluntary.

Testimony of Karen Crawford

Karen Crawford was employed as a cook for Hickory County Schools. She was one of two co-workers at the high-school kitchen. She substantiated much of Claimant's testimony. She was present when the initial accident of April 26, 2005 occurred. She noted that Claimant thereafter had some difficulty performing heavy lifting. She said after Claimant's 2006 injury, Claimant not only needed help with lifting, but occasionally needed a break to stretch her back, elevate her feet, or rest in her car. Still, Ms. Crawford believed Claimant pulled her own weight performing her job duties. Ms. Crawford did not know the specifics of Claimant's medical treatment.

Current Condition

Claimant has some pain in her back every day which starts at her buttocks and runs down her left leg down to her left ankle. She seldom has pain down her right leg. The spinal cord stimulator implanted in June 2010 helped initially, but now provides little relief. She still takes medications for depression and has some difficulty sleeping.

Claimant is able to perform laundry, cooking, cleaning, dusting, and mopping for her household. She cleans the bathroom, changes the bed linens, and mows the yard with a riding lawnmower, although she does not weed-eat the yard. Claimant does most of the grocery shopping, which includes carrying the groceries in from the car. Claimant can stand at least 20 to 30 minutes, and on a good day she can stand 60 to 90 minutes at a time. Claimant and her husband spend the winters in Florida where they own a second home. While in Florida, Claimant volunteers a couple of mornings each week at a youth center unless she is having a "bad day." Claimant admitted that while she has a prescription for Hydrocodone, a narcotic pain reliever, she uses it only sparingly.

Claimant enjoys camping and riding motorcycles. Claimant now rides a motorized trike, but she also rides with her husband on his bike. She and her husband take dinner rides, and until 2015 took overnight group rides. Claimant now limits the distance and rides no more than an hour at a time. She uses a "donut" pillow to cushion the ride. Claimant and her spouse travel to Sturgis, North Dakota, every year for a motorcycle rally, but they transport their bikes to that location and stay in a fifth-wheel camper.

Medical Bills

Claimant submitted a number of medical bills, some of which were paid by her health insurance. She submits she is entitled to \$155,751.24 for past medical care, as detailed in Exhibit 6. While she also claims more than \$9,000 in out-of-pocket expenses, Claimant testified at trial that she had no idea whether the out-of-pocket figure was included in the \$155,751.24. Moreover, Dr. Koprivica, who testified regarding the reasonableness and necessity of Claimant's medical treatment, found a number of items that would not have been related to Claimant's back treatment. His review of the bills reduces the claimed amount to \$155,581.24.

Additional Expert Opinions

1. Dr. P. Brent Koprivica

Dr. Koprivica is board certified in preventative and occupational medicine, as well as in emergency medicine. His practice is limited to performing approximately 25 Independent Medical Examinations each week. He frequently testifies on behalf of Claimants. He evaluated Claimant on September 1, 2011.

Dr. Koprivica said while Claimant had numerous episodes of neck and back pain prior to the 2005 work injury, he found that none of the symptoms were ongoing. He believed that Claimant responded positively to the chiropractic interventions with resolution of her symptoms. He found no preexisting hindrance or limitations in Claimant's work prior to the 2005 work injury.

Dr. Koprivica found that the April 26, 2005 work injury was the direct, proximate and prevailing factor in Claimant's development of chronic low back pain of a chronic lumbosacral strain/sprain type of injury. Clinically, he found no evidence of lumbar radiculopathy attributable to the 2005 accident. He believed Claimant was at maximum medical improvement for that injury and rated it at 10 percent to the whole body.

Dr. Koprivica opined the August 28, 2006 injury was the prevailing factor in Claimant's development of an acute disk herniation at L5-S1 with resultant development of a left greater than right S1 radiculopathy on an ongoing basis. He believed the August 28, 2006 injury was the prevailing factor necessitating the left L5-S1 hemilaminectomy and discectomy. Dr. Koprivica opined that the post-laminectomy syndrome, which was caused by the August 28, 2006 injury, necessitated the placement of the spinal cord stimulator.

Dr. Koprivica indicated that the medical care Claimant received following the August 28, 2006 injury (as summarized in his deposition and appended exhibits) was medically reasonable and a direct necessity in an attempt to cure and relieve Claimant's permanent injuries sustained on August 28, 2006. He said the August 2006 accident and resulting injury, considered in isolation, rendered Claimant permanently and totally disabled. He also found that Claimant was temporarily and totally disabled from the date of surgery on August 13, 2007, until November 8, 2007.

Dr. Koprivica placed restrictions on Claimant. On cross-examination, he differentiated which of his restrictions are truly medical restrictions as opposed to the subjective limitations. From a strictly medical standpoint, Dr. Koprivica opined that Claimant should avoid frequent or constant bending at the waist, pushing, pulling, or twisting. She should avoid sustained awkward postures of the lumbar spine. She should rarely squat, crawl, or kneel, and avoid climbing, whole body vibration or jarring. She also should avoid lifting from the floor, only occasionally lift or carry, and as a "guideline," lift less than 20 pounds.

Whether Claimant needs to recline during the day is not a restriction Dr. Koprivica imposed from a medical standpoint. Dr. Koprivica said the postural "limitations," as opposed to "restrictions" were based on Claimant's *subjective* complaints to him and were not based upon medical certainty (Exhibit 1, p. 72).

Dr. Koprivica said if the trier of fact would determine that Claimant was not permanently and totally disabled from the last injury, he would assign a 50 percent permanent partial disability to the whole body as a result of the August 28, 2006 injury in isolation.

At the time of the evaluation with Dr. Koprivica, Claimant was also taking a number of medications related to the August 2006 accident: Tramadol, Gabapentin, Celexa, ibuprofen, Cymbalta, and Flexeril. Dr. Koprivica noted that Claimant was taking Cymbalta—and at one time Lexapro—to cope with the depression and psychological issues stemming from the August 2006 accident, though he did not feel that those issues warranted a separate disability rating.

On cross-examination, Dr. Koprivica agreed that Claimant underwent only a one level discectomy and not a fusion. He agreed that his diagnosis of a failed laminectomy syndrome is based on a collection of symptoms that includes Claimant's post-surgery subjective complaints and limitations. He agreed that a normal response to a one level discectomy was to return to work, and that a lifting capacity of 30 or more pounds is typical following such surgery.

2. Dr. John Pazell

Dr. Pazell is an orthopedic surgeon. He performed an IME on February 29, 2008. Dr. Pazell found that Claimant had no permanent partial disability prior to the April 26, 2005 and August 28, 2006 injuries, noting there was no lost time and only symptomatic treatment for minor aches and discomfort. He also found no synergistic effect between the April 26, 2005 and August 28, 2006 injuries. He stated:

Diagnosis: Ms. Swearingin has lumbosacral arthrosis at L5-S1 with herniated intervertebral disc at L5-S1 with persistent S1 and L5 radiculopathy on the left.

Causation: The cause of her symptoms are the injuries which occurred on April 26, 2005 and August 28, 2006. Initially she sustained an injury which *showed* an annular tear. Subsequently an additional MRI showed extrusion of disc. A subsequent myelogram confirms this.

Impairments: Her impairment is 30% (thirty percent) to the whole person on a operated spine, one level.

Future Medical Treatment: She may require a [sic] additional surgery. Stabilization surgery could be a possibility should the disc space collapse. An additional laminectomy could be possible on the opposite side. If additional disc material extrudes more surgery would be necessary. I might comment on the fact that there was evidence of epidural fibrosis which could be either due to scar or additional disc disease.

(Exhibit 4, pp. 13-14).

Dr. Pazell did not believe Claimant was permanently and totally disabled at the time of his examination. He also did not believe there was any synergism between the 2005 and 2006 work accidents. He believed Claimant was at maximum medical improvement. He refrained from imposing medical restrictions absent a functional capacity examination. He said Claimant sustained a reasonable period of temporary total disability from August 13, 2007 and November 8, 2007.

Dr. Pazell also reviewed medical bills for the laminectomy, facet blocks, the spinal cord stimulator and a back brace. The bills given to him to review totaled \$66,650.00. He said, "The charges appear to be reasonable to the extent that I have been able to review these charges." (Exhibit 4).

3. Dr. Robert Bernardi

Dr. Bernardi is a spinal neurosurgeon from St. Louis. He saw Claimant for an IME on May 19, 2009. Dr. Bernardi opined that the pain Claimant was exhibiting was in all ways identical to the pain she was having prior to the surgery by Dr. Ceola. The pain is exacerbated by standing in one position for extended periods of time, long car rides, and repetitive lifting. While Dr. Bernardi found Claimant was forthright and not malingering, he could not uncover any anatomical explanation as to why Claimant continued to have persistent pain. He said Ms. Swearingin did not have positive nerve root tension signs, her neurologic exam was entirely normal, and "none of her imaging studies has suggested the presence of significant nerve root compression." (Exhibit 4, p. 403).

Dr. Bernardi explained that the presence of an annular tear represents a fissuring in the annulus fibrosis and is a degenerative phenomenon, and extremely common in the asymptomatic adult population. He also did not believe the presence of scar tissue would cause the pain of which Claimant complains. Dr. Bernardi did not believe that the surgery Claimant underwent with Dr. Ceola was due to the work accident; instead, he believed that Claimant's preexisting lumbar degenerative disk disease was the prevailing factor in her current condition. He said, at most, the work accidents in 2005 and 2006 represented a triggering or aggravating factor. He said Claimant's need for activity modification would be related to her preexisting degenerative changes and not her August 28, 2006 work accident. As a result of the work accident, Dr. Bernardi assigned a four percent permanent partial disability to the whole person for a sprain/strain.

4. Dr. Ted Lennard

Dr. Lennard is board certified in Physical Medicine and Rehabilitation. He performed an IME on March 7, 2012. He found that Claimant had complaints of constant pain in the lower lumbar spine with frequent left posterior thigh and leg pain. She denied lower extremity paresthesias. At the time Claimant saw Dr. Lennard, she was taking Gabapentin, Tramadol, Citalopram, Cyclobenzaprine, Nortriptyline, and Hydrocodone, as needed.

Dr. Lennard noted that Claimant demonstrated a normal tandem gait. She was able to squat fully and walk on heels and toes. She was able to transfer off the exam table quickly and easily and pivot without difficulty while ambulating.

Dr. Lennard concluded that Claimant's back injury would require indefinite use of pain medications. He said the dorsal column stimulator would require evaluations by her physician but he recommended no additional surgical treatment. He imposed the following restrictions: avoid prolonged bending and squatting, and lifting more than 30 pounds. Dr. Lennard opined that within these restrictions Claimant could be gainfully employed. He found that these restrictions would have been effective three months post-operatively, or November 13, 2007. He encouraged Claimant to exercise her low back.

5. Terry Cordray

Vocational expert Terry Cordray evaluated Claimant and rendered vocational opinions. He issued two reports and testified regarding Claimant's ability to obtain employment, given her current condition. After reviewing Claimant's medical records, discussing her employment and educational background, and administering vocational assessments, Mr. Cordray concluded that no employer in the open labor market could reasonably be expected to hire her. Mr. Cordray relied upon the restrictions *and limitations* noted by Dr. Koprivica. He reasoned that the vast majority of Claimant's employment history involved unskilled jobs. Maintaining a job as a hairstylist was her only skilled employment. But, as Mr. Cordray explained, because she has not worked as a hairstylist for the past 15 years, the skill is no longer applicable. Thus, he testified that she did not acquire any transferable skills through her employment. Moreover, the results of the vocational tests Mr. Cordray administered showed that she is not a candidate for further training.

Mr. Cordray issued a supplemental report dated July 11, 2013 (Exhibit 3) after receiving Dr. Lennard's March 8, 2012 IME and Jim England's July 18, 2012 vocational report. (Exhibit 3, pg. 1 of report). Mr. Cordray stated, "As an unskilled worker within the 30 pound lifting restrictions advised by Dr. Lennard, Ms. Swearingin is capable of working at sedentary and light unskilled jobs such as retail sales work or cashier." (Exhibit 3, pg. 2 of report). He did not believe, however, that Claimant could be placed in the labor market, and thus, did not change his previous conclusion that Claimant was totally vocationally disabled.

In his deposition testimony, Mr. Cordray explained that he searched for sedentary jobs within a 30 mile radius of Claimant's home to determine if there were any jobs in the open labor market that Claimant could perform within her restrictions. He concluded there were none, given that Claimant had no transferable job skills, and was not a candidate for further vocational or academic training.

There are some troubling aspects of Mr. Cordray's opinions. For instance, when he administered the WRAT-4 test, he found that despite Claimant's limited education, she scored beyond the 12th grade in both spelling and arithmetic. While he determined that Claimant's prior work as a hairstylist was too remote to provide a transferable job skill, the fact remains that Claimant has maintained her licensure. That licensure allows

Claimant to work not just as a hairstylist, but also as a manicurist. Moreover, when it came to Claimant's postural limitations, he ignored Dr. Ceola's record of March 11, 2008 which had stated that Claimant could return to work without restrictions. (Exhibit 2, pg. 38-41 of deposition). Further, his functional limitations assessment incorporated *limitations* based on Claimant's *subjective* complaints in addition to the *restrictions* Dr. Koprivica had imposed.

Q. In coming to your conclusions as to her functional limitations, you considered not only the weight restrictions that you gleaned from the medical records given by the doctors and possibly their postural limitations, but you also took into account Ms. Swearingin's subjective complaints and information she gave you about what she is and is not able to do; is that correct?

A. No. I use the doctor's restrictions. I always include the subjective information to see if it is consistent with what the doctors are saying. The comments about her needing to lie down is subjective but it's consistent with Dr. Koprivica. And I will just take Dr. Koprivica's comments to keep it objective.

Q. You would agree with me that no medical physician has given her the medical restriction of needing to lie down during the day?

A. Dr. Koprivica is a medical physician.

Q. But he did not give the restriction to her of needing to lie down during the day?

A. The way I read it. Let me read it to you.

Q. I know this is a little unfair because you didn't have his deposition to review. But your understanding is that from a medical standpoint Dr. Koprivica is telling her that she must lie down during the day?

A. I think he said recline.

(Exhibit 2, pgs. 45-46 of deposition).

Mr. Cordray then testified:

Q. I think I'm almost done here. As you testified, it's your opinion that she's not capable of employment and that is based upon a combination of both of the work-related injuries that she sustained; is that correct?

A. Yes, ma'am.

Q. That remains your opinion even after reviewing the report from Dr. Koprivica?

A. Well, I certainly see the significance of the restrictions by Dr. Koprivica. I would note that the lady was pretty credible to me in the fact that she did request assistance. She couldn't do the heavier lifting. As a vocationalist, when someone says there are two or three things in that job I can't do and I need help, to me that is an impairment to employment or an impairment to re-employment.

(Exhibit 2, pgs. 49-50 of deposition).

6. James England

James England, a vocational rehabilitation counselor, saw Claimant on March 23, 2012 for a vocational evaluation. Mr. England issued an initial report, and later an addendum report dated July 18, 2012. He concluded that even with Claimant's restrictions, she could perform sedentary jobs or light duty. During his deposition testimony, Mr. England opined that, given Claimant's current condition, she would be able to find a job in the open labor market. He based this conclusion on the restrictions set forth by Dr. Lennard. He believed even considering Dr. Koprivica's restrictions, Claimant was employable on the open labor market. Mr. England opined the only scenario rendering Employee unemployable is her subjective complaints, which he believes the doctors' reports did not substantiate. He conceded that no employer would accommodate a need to lie down unpredictably.

7. Wilbur Swearingin

Vocational expert Wilbur Swearingin provided an opinion based on a records review. Comparing Claimant's vocational skills and aptitudes, he found two sedentary occupations to which Claimant's vocational skills would transfer assuming she could perform sedentary work. These were as a fingernail former and as a manicurist. In his report, Mr. Swearingin was unaware that Claimant held the appropriate license to work as a manicurist.

Mr. Swearingin ultimately concluded that given Claimant's medical restrictions, her limited education background, advanced age, and history of school cook/cosmetology work, Claimant would not be competitively employable in the open labor market. He determined that claimant was permanently and totally disabled as a result of the last injury of August 28, 2006 in isolation.

Mr. Swearingin testified by deposition on August 22, 2013. Asked why he believed Claimant was permanently and totally disabled due to the August 28, 2006 injury, in isolation, Mr. Swearingin testified:

We look at the severity of that injury, the restrictions, and Dr. Koprivica was very clear in saying that the restrictions he assigned were based on that injury by itself, and that would include *the restriction* that she lie down during the day and that she also have the opportunity to frequently change positions; sitting, standing, walking or reclining.

So I think if we look on those restrictions based on that injury, it would be very clear in my mind that this lady would be totally disabled based on that injury alone.

(Exhibit V, pg. 27) (emphasis added). Mr. Swearingin testified the need to lie down during the day would take Claimant out of the labor market. In his testimony, Mr. Swearingin agreed that if Dr. Lennard's restrictions were considered, Claimant is capable of sedentary or light work

Credibility Assessment

Based on the *medical restrictions* that had been imposed by Dr. Ceola, Dr. Lennard, and Dr. Koprivica, there is no objective, or other evidence within a reasonable degree of medical certainty, that Claimant must recline during the day or frequently alter her posture from sitting or standing. While I generally find Claimant credible, I do not find her subjective testimony on this issue persuasive.

I generally find Dr. Koprivica credible, but I do not find persuasive his opinion that Claimant is permanently and totally disabled from the last injury in isolation. Considering the whole record, including the opinions of other physicians, including Dr. Lennard and Dr. Pazell, I accept as accurate Dr. Koprivica's alternative rating

that Claimant has a 50 percent permanent partial disability to the body as a whole attributable to the last accident in isolation.

For reasons discussed below, I find no liability against the Second Injury Fund.

I accept the opinion of Mr. England as more persuasive than the opinions of other vocational experts.

I accept as credible and persuasive that Claimant's surgery with Dr. Ceola and the implantation of the spinal cord stimulator by Dr. Rahman, and related treatments and medications, were medically and causally related to Claimant's work injury in 2006, for which Claimant is due reimbursement. Moreover, I find particularly persuasive the opinions of Dr. Lennard and Dr. Koprivica that Claimant will need future medical care.

CONCLUSIONS OF LAW

1. Evidentiary Issue

Claimant objected to the admission of Employer/Insurer's Exhibit C. It consists of the certified chiropractic treatment records of Brian G. Hackleman, D.C. Claimant contends the records are inadmissible pursuant to § 287.210.7 RSMo, because Employer/Insurer failed to provide 60 days notice of its intent to rely on such records, and because Claimant did not have at least seven days before the hearing to cross examine Dr. Hackleman. The statutory provision reads in applicable part, as follows:

7. The testimony of a treating or examining physician may be submitted in evidence on the issues in controversy **by a complete medical report** and shall be admissible without other foundational evidence subject to compliance with the following procedures. The party intending to submit a **complete medical report** in evidence shall give notice at least sixty days prior to the hearing to all parties and shall provide reasonable opportunity to all parties to obtain cross-examination testimony of the physician by deposition. The notice shall include a copy of the report and all the clinical and treatment records of the physician including copies of all records and reports received by the physician from other health care providers. The party offering the report must make the physician available for cross-examination testimony by deposition not later than seven days before the matter is set for hearing, and each cross-examiner shall compensate the physician for the portion of testimony obtained in an amount not to exceed a rate of reasonable compensation taking into consideration the specialty practiced by the physician. Cross-examination testimony shall not bind the cross-examining party. Any testimony obtained by the offering party shall be at that party's expense on a proportional basis, including the deposition fee of the physician. Upon request of any party, the party offering a complete medical report in evidence must also make available copies of X rays or other diagnostic studies obtained by or relied upon by the physician.

§ 287.210.7 RSMo 2000 (emphasis added). In support of her position, Claimant's counsel cites *Burchfield v. Renard Paper Co., Inc.*, 405 S.W.3d 589, 591 (Mo. App. E.D. 2013).

The above statute pertains to the admission of a "complete medical report" as that term specifically is defined in § 287.210.5 RSMo 2000. A "complete medical report" is a term of art in the workers' compensation law and is defined as follows:

As used in this chapter the term "**complete medical report**" means the report of a physician giving the physician's qualifications, and the patient's history, complaints, details of the findings of any and all laboratory, X-ray and all other technical examinations, diagnosis, prognosis, nature of disability, if any,

and an estimate of the percentage of permanent partial disability, if any. An element or elements of a complete medical report may be met by the physician's records.

§ 287.210.5 RSMo. Exhibit C – the records of Dr. Hackleman – are not a **complete medical report** as that term is defined above, and Employer/Insurer did not submit Exhibit C in lieu of opinion testimony from Dr. Hackleman. Exhibit C is nothing more than a compilation of Dr. Hackleman's clinical chiropractic treatment records that have been certified. Section 287.140.7 RSMo, clearly provides that certified copies of treatment records shall be admissible in any proceeding before the Division or the Commission.

Claimant's reliance on *Burchfield v. Renard Paper Co.*, does not aid her position. In that case, the employee sought to submit medical records as an element of a complete medical report, but failed to comply with the notice requirements of § 287.210.7 RSMo. As the Court of Appeals explained, "a claimant's failure to comply with Section 287.210.7 RSMo, subjects medical records to the foundational requirements for the introduction of the documentary evidence as business records, as well as objections such as relevancy or an inadequate source of information." 405 S.W.3d at 592. Here, however, the chiropractic records were certified. Claimant testified that she had received extensive chiropractic treatment for her neck and back for years. Considering that the injuries in both 2005 and 2006 involved the spine, the records were relevant, the foundational requirement was met, and the records are not objectionable as hearsay.

Claimant also alleges that Exhibit C is inadmissible because medical records can constitute "statements" and Employer/Insurer failed to comply with Claimant's request for statements pursuant to § 287.215 RSMo. Much of the history Claimant provided to Dr. Hackleman, such as having obtained chiropractic treatment for her back and neck over several years, is repetitious of similar history Claimant gave to other healthcare providers, and in Claimant's own testimony. The portion of Dr. Hackleman's records which appear to be the true crux of the dispute is a notation made on October 22, 2004, indicating that Claimant had complaints of pain in her leg, as well as in her back. This differs with other evidence in the record that Claimant never had radiculopathy in the leg prior to the work accidents in this case.³

Even *if* such medical record is construed to be a "statement" within the meaning § 287.215 RSMo, the statute contemplates statements made by an "*injured employee*" and not statements made prior to the work injury. *See e.g., Parsons v. Steelman Transp., Inc.*, 335 S.W.3d 6, 14-15 (Mo. App. S.D. 2011). The references in the 2004 chiropractic records were made *prior to* any work injury at issue in this case. Any references to back complaints made after the work injuries in 2005 and 2006 are superfluous to statements already in evidence. Claimant's objections to Exhibit C are overruled.

2. April 26, 2005 Injury

Claimant has the burden of proving all elements of her claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo. App. E.D. 2008). Under the law in effect at the time of Claimant's alleged injury, before the statutory changes to the Workers' Compensation Law in 2005, § 287.800 RSMo 2000, prescribed that all relevant statutory provisions must be liberally construed with a view to the public welfare. Section 287.020.2 RSMo 2000, states:

³ Even if Claimant had a complaint of radicular symptoms in the past, the record still supports a finding that Claimant's chiropractic treatments were successful in resolving isolated incidents of back pain. I do not find this record particularly significant in determining the degree of disability from either the 2005 or 2006 work injuries.

An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

Adhering to the standard in the above referenced statute, and giving the statutory provisions a liberal construction, I find and conclude that Claimant established entitlement to permanent partial disability for the work injury sustained on April 26, 2005. The 2005 injury was in the nature of a sprain or strain. Having reviewed the entire record, and giving credibility to Dr. Koprivica's opinion, I find and conclude that Claimant suffered a 10 percent permanent partial disability to the body as a whole from the 2005 injury. At the stipulated permanent disability rate of \$174.57, Claimant is entitled to \$6,982.80 from Employer/Insurer in the claim denominated as Injury Number 05-091810.

3. August 28, 2006 Injury

Claimant's 2006 injury occurred after the statutory change. Section 287.800 RSMo Cum Supp. 2005, now requires that statutory provisions be strictly constructed and that all evidence is considered without giving the benefit of the doubt to any party.

a. Medical Causation

I find credible the opinion of Dr. Koprivica that the injury on August 28, 2006 was the prevailing factor in Claimant's development of an acute disk herniation at L5-S1 with resultant development of a left greater than right S1 radiculopathy on an ongoing basis.

b. Past Medical Treatment

Section 287.140 RSMo, requires an employer to provide medical treatment as reasonably may be required to cure or relieve an employee from the effects of a work-related injury. "Cure or relieve" means treatment that will give comfort, even though restoration or soundness is beyond avail. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. banc 2003).

Claimant notified Employer she needed treatment to cure and relieve her from the effects of her August 2006 low back injury, but Employer refused to provide such treatment after receiving the opinion of Dr. Doll. I do not accept as credible and persuasive Dr. Doll's causation opinion. I have accepted the causation opinion of Dr. Koprivica. I also accept Dr. Koprivica's opinion that the work injury of August 28, 2006, necessitated the left L5-S1 hemilaminectomy and discectomy, and related treatment modalities such as the spinal cord stimulator. I also accept Dr. Koprivica's testimony identifying those bills that were reasonable and necessary medical expenses. Based on the bills submitted to Dr. Koprivica for his review, minus those bills he found unrelated, Claimant is entitled to reimbursement of her accrued, but previously unauthorized medical bills totaling \$155,581.24.

Claimant also has alleged that she is entitled to \$9,201.31 in co-pays and out-of-pocket expenses. Having reviewed deposition exhibit 6 appended to Dr. Koprivica's deposition, and Exhibit 7, I am unable to discern how Claimant calculated the additional \$9,201.31. Claimant was unable to state in her testimony whether the bills summarized in deposition exhibit 6 included her out-of-pocket expenses. Therefore, I find and conclude that Claimant has failed in her burden of proving that she is entitled to the additional \$9,201.31.

c. Temporary Total Disability

Pursuant to § 287.170 RSMo 2000, an injured employee is entitled to temporary total disability during her period of healing when she is unable to work, not to exceed 400 weeks. This means any reasonable or normal employment. *Reeves v. Midwestern Mrtg. Co.*, 929 S.W.2d 293 (Mo. App. E.D. 1996). Claimant seeks temporary total disability from the date of her surgery on August 13, 2007 through November 8, 2007, after which she was released to return to work, a total of 12 and 3/7 weeks. Claimant testified she was unable to work during this time period. Her testimony is substantiated by Dr. Pazell. Claimant is entitled to 12 and 3/7 weeks of temporary total disability, at the stipulated rate of \$181.13, which totals \$2,251.19.

d. Degree of Disability – Last Injury

Claimant alleges she is permanently and totally disabled from the last injury, alone. Alternatively, she contends she is permanently and totally disabled due to a combination of the last injury and the preexisting disability. Claimant is not permanently and totally disabled from the last injury in isolation. She is permanently and partially disabled.

Permanent total disability means an employee is unable to compete in the open labor market. *Forshee v. Landmark Excavating and Equip.*, 165 S.W.3d 533, 537 (Mo. App. E.D. 2005). This means the inability to perform the usual duties of the employment in a manner that such duties are customarily performed by the average person engaged in such employment. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849 (Mo. App. S.D. 1995). While “total disability” does not require that the Claimant 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 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 his last employment. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo. App. S.D. 2001), *overruled on other grounds Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003). It is within the province of the Administrative Law Judge to determine the extent of any permanent disability. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo. App. E.D. 1998).

Claimant underwent surgery with Dr. Ceola in August of 2007. Once she was released to return to work by Dr. Ceola in November of that same year, Claimant worked as a school cook until she voluntarily left that job on September 17, 2010. Claimant admitted in her testimony that she was not fired but quit.

When Dr. Ceola lifted Claimant’s temporary restriction, he allowed Claimant to return to work with no limitations. In hindsight, Dr. Lennard indicated Claimant would have had a 30 pound lifting restriction. By Claimant’s own testimony, and that of her co-workers, Claimant continued to work her job, pulling her weight in relation to her coworkers. While she needed an occasional break and help lifting heavier items, she performed all other aspects of her job for more than three school years and a portion of a fourth year.

Both vocational experts Mr. Cordray and Mr. Swearingin based their opinions on Claimant’s current subjective complaints, and not just Dr. Koprivica’s *restrictions*. There is no medical restriction with regard to Claimant’s need to recline or her ability to drive. Furthermore, the postural limitations set forth are subjective as well and not restrictions that she must follow from a medical standpoint.

Claimant is 63 years old and is essentially retired, but she is not permanently and totally disabled. She holds a GED, has operated her own business, holds a cosmetology license and could do nails. She continues to take regular trips to Sturgis to ride motorcycles and camp, spends half of the year in Florida, and volunteers while

there. She also mows the lawn and does all of the laundry, cooking, cleaning, dusting, mopping, and shopping. While Claimant appears to have a significant disability, she is not incapable of work on the open labor market.

Dr. Lennard's opinion as to her current capability is persuasive as it takes into consideration her medical condition alone and the medical restrictions required. The opinion of James England is likewise the most persuasive as it is based on medical restrictions set forth by the physicians without undue influence as to Claimant's complaints. Dr. Koprivica was very clear in his deposition testimony those restrictions that were from a medical standpoint as opposed to subjective limitations (such as the need to recline). Mr. England considered this distinction in his evaluation; however, Mr. Corday and Mr. Swearingin both indicated they considered not only the medical restrictions but also the subjective limitations. As such, the opinion from Mr. England is the only vocational opinion setting forth the jobs Claimant is physically capable of doing, per the medical restrictions set forth.

Using Dr. Koprivica's alternative rating, I find and conclude that Claimant is permanently and partially disabled from the last accident (2006 injury) in isolation. Claimant is entitled to a 50 percent permanent partial disability (200 weeks). At the stipulated rate of \$181.13, Claimant is entitled to \$36,226.00 in permanent partial disability from Employer/Insurer.

e. Future Medical Treatment

To obtain future medical benefits, Claimant must show by a reasonable degree of medical certainty that the need for medical care flows from the accident. *Sickmiller v. Timberland Forest Products, Inc.*, 407 S.W.3d 109 (Mo. App. S.D. 2013). Claimant, through the opinions of her experts, as well as through the opinion of Dr. Lennard, has demonstrated the need for ongoing treatment to relieve the effects of the August 28, 2006 work injury. Employer/Insurer shall provide future medical care.

f. Second Injury Fund

To recover against the Second Injury Fund, Claimant must prove she sustained a compensable injury, referred to as "the last injury." § 287.220.1 RSMo. She must prove she had a preexisting permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15 percent for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo. App. E.D. 2008). "Once the threshold is met, all of [Claimant's] disabilities should be considered in calculating the extent of the fund's liability." *Treasurer v. Witte*, 414 S.W.3d 455, 468 (Mo. banc 2013). "By its plain and ordinary language, section 287.220.1 does not require a disability from the last injury to meet a numerical threshold to trigger liability." *Witte*, 414 S.W.3d at 466.

When a claimant alleges permanent total disability, as in the instant case, the Administrative Law Judge first must consider the liability of the employer in isolation by determining the degree of disability due to the last injury. *APAC Kansas, Inc. v. Smith*, 227 S.W.3d 1, 4 (Mo. App. W.D. 2007), and *Hughey v. Chrysler Corp.* 34 S.W.3d 845, 847 (Mo. App. E.D. 2000). If Claimant's last injury in and of itself rendered Claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. *Feld v. Treasurer of Missouri as Custodian of Second Injury Fund*, 203 S.W.3d 230, 233 (Mo. App. E.D. 2006).

As noted above, the credible evidence substantiates a finding that Claimant is not permanently and totally disabled from the last accident, alone. Rather, Claimant suffered a permanent partial disability equal to 50 percent of the body as a whole.

The Second Injury Fund also has no liability for permanent total or permanent partial disability. Dr. Koprivica opined that his restrictions were necessitated by the August 28, 2006 injury, in isolation (Exhibit 1, p. 21 of report; Exhibit 1, p. 60 deposition). Dr. Pazell explicitly stated in his report that there was no synergistic effect between the 2005 and 2006 injuries. I find and conclude based on the whole record that the 2006 injury was much more significant and did not combine synergistically with the 2005 injury, a sprain/strain type injury.

SUMMARY

For the 2005 injury, Employer is liable for \$6,892.80, representing 10 percent permanent partial disability to the body as a whole.

For the 2006 injury, Employer is liable for \$36,226.00, representing 50 percent permanent partial disability, \$2,251.19 in temporary total disability benefits, and \$155,581.24 in medical benefits. These amounts total \$194,058.43. Additionally, Employer/Insurer shall be responsible for future medical benefits that flow from the work injury on August 28, 2006. The Second Injury Fund has no liability.

Attorney Lien

The compensation awarded to Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of Brianne Thomas for necessary and reasonable legal services rendered to the Claimant.

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