

FINAL AWARD ALLOWING COMPENSATION
(Setting Aside the June 7, 2005, Order of Dismissal and
Affirming the July 10, 2003, Award of the Administrative Law Judge)

Injury No.: 93-000804

Employee: Ann J. Talbert
Employer: AGCO Mfg. Group
Insurer: Firemans Fund Insurance Company
Date of Accident: January 4, 1993

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having considered the Application for Review, the Commission sets aside the June 7, 2005, Order of Dismissal of the administrative law judge. The Commission finds that the July 10, 2003 Award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 10, 2003.

Procedural History

This matter was tried before the administrative law judge on May 1, 2003. On July 10, 2003, the administrative law judge issued his final award finding that employee satisfied her burden of proving entitlement to future medical care but failed to prove her entitlement to past medical expenses or to establish the nature and extent of her permanent disability. Employee sought review of the July 10, 2003, award before the Commission. On June 29, 2004, the Commission modified the award of the administrative law judge to a temporary award allowing compensation. The Commission stated:

The Commission agrees that the Employee has established the need for further medical treatment to cure and relieve her of the effects of her injury. Until such time as the medical situation has been stabilized, the Employee is unable to establish the extent of her permanent disability and the relationship of that disability to each of her injuries. The matter shall be resubmitted to the Division of Workers' Compensation at such time as medical improvement shall allow.

We take administrative notice of the Division of Workers' Compensation (Division) file in this matter. The file reveals no request by employee asking the Division to schedule this matter for hearing after the issuance of the Commission's temporary award.

Order of Dismissal

On April 25, 2005, the Division mailed to all parties a Notice to Show Cause Why Claim Should Not Be Dismissed. The Notice informed the parties that the matter would be heard on May 27, 2005, at 9:00 a.m. We have reviewed the transcript of the May 27, 2005 hearing. Neither employee nor employee's counsel appeared at the hearing. Counsel for employer/insurer appeared and requested that the matter be dismissed for failure to prosecute. The administrative law judge granted the request and dismissed the claim.

On June 7, 2005, the administrative law judge issued an Order of Dismissal. On June 27, 2005, employee, through counsel, filed an Application for Review with the Commission alleging as follows:

Appellant alleges that the Administrative Law Judge's award was erroneous for the following specific reasons:

1. In finding that there was good cause for dismissing the claimant's claim based upon the claimant's failure to appear on the hearing date.

2. In finding that there was good cause for dismissing the claimant's claim for failure to prosecute.
3. In denying the claimant's Motion to Set Aside the Order of Dismissal upon the claimant's timely filing of a motion to set aside stating the facts and circumstances surrounding the reason(s) claimant failed to appear at the hearing and the status of the prosecution of the claimant's claim.

The Motion to Set Aside the Order of Dismissal was not attached to or incorporated in the Application for Review.

On July 5, 2005, employer/insurer filed its suggestions in opposition to set aside of the Order of Dismissal. The parties have submitted legal briefs.

Employee's case was dismissed for failure to appear at the scheduled show cause hearing. In her Application for Review, employee alleges no reason for her failure to appear at the show cause hearing. Employee's allegations, if true, will not support a finding of good cause for employee's failure to appear at the scheduled good cause hearing. As such, employee's allegations in the Application for Review do not state prima facie good cause for employee's failure to appear at the scheduled good cause hearing.

As noted above, the Motion to Set Aside Default Judgments of Dismissal were not attached to the Application for Review. Nonetheless, we have reviewed the allegations therein to determine whether they state a prima facie good cause. Employee alleges in the Motion that her counsel missed the show cause hearing because the hearing did not get docketed due to a Dictaphone malfunction. This allegation does not state prima facie good cause for missing the hearing. The failure of office docketing procedures is not good cause for missing a hearing. *Robinson v. Missouri Dep't of Corrections, Bd. of Probation & Parole*, 805 S.W.2d 688, 690 (Mo. App. 1991). Notably missing from employee's Motion are allegations regarding employee's failure to attend the hearing.

Because neither the Application for Review nor the Motion to Set Aside Default Judgments of Dismissal contain allegations stating prima facie good cause, no purpose would be served by remanding to determine the truth or falsity of the allegations. See *Ross v. Safeway Stores, Inc.*, 738 S.W.2d 611, 616 (Mo. App. 1987).

Because employee states no good cause for missing the show cause hearing, we agree with the administrative law judge's assessment that employee has failed to seize the opportunity afforded her by the Commission to further prosecute this claim. We also agree with the administrative law judge's assessment that this 12½ year-old claim must be brought to a conclusion. However, rather than dismissing the claim, we believe the proper method for concluding this matter is to issue a final award on the evidence submitted at the trial of this matter almost three years ago.

Order and Award

Based upon the foregoing, we set aside the Order of Dismissal dated June 7, 2005, and reinstate the claim.

We affirm the award and decision of the administrative law judge dated July 10, 2003. The award and decision of Chief Administrative Law Judge Kenneth J. Cain, issued July 10, 2003, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

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

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Ann Talbert Injury No. 93-000804

Dependents: N/A

Employer: AGCO Company, Inc.

Insurer: Fireman's Fund Insurance Co.

Additional Party: N/A

Hearing Date: May 1, 2003

Final Brief Received June 1, 2003

Checked by: KJC/lh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: January 4, 1993.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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: Employee, while in the course and scope of her employment, as a laborer for the AGCO Manufacturing Group sustained an injury when she slipped and fell on the ice in the employer's parking lot while walking to the entrance of the plant.
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: Head and back.
14. Nature and extent of any permanent disability: Aggravation of pre-existing spinal stenosis.

- 15. Compensation paid to-date for temporary disability: None.
- 16. Value necessary medical aid paid to date by employer/insurer? None.
- 17. Value necessary medical aid not furnished by employer/insurer? Undetermined.
- 18. Employee's average weekly wages: \$507.20.
- 19. Weekly compensation rate: \$338.13/\$235.61.
- 20. Method wages computation: \$287.250 and by agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

Unpaid medical expenses: Undetermined.

None weeks of temporary total disability (or temporary partial disability)

None weeks of permanent partial disability from Employer

N/A weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A for Claimant's lifetime

22. Second Injury Fund liability: N/A.

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:
 weekly differential payable by SIF for weeks beginning
 and, thereafter, for Claimant's lifetime

TOTAL: Undetermined

23. Future requirements awarded: Undetermined

Said payments to begin as of the date of the award and to be payable and be subject to modification and review as provided by law.

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Ann Talbert

Injury No: 93-184795

Dependents: N/A

Employer: AGCO Company, Inc.

Insurer: Fireman's Fund Insurance Co.

Additional Party: N/A

Checked by: KJC/lh

Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

- 1) the nature and extent of the disability sustained by the employee;
- 2) whether all the conditions complained of by the employee resulted from the accident; and
- 3) liability of the employer for additional medical benefits, past and future.

At the hearing, Ms. Ann Talbert (hereinafter referred to as Claimant) testified that she was born on July 16, 1933, in the state of Oklahoma. She stated that she graduated from high school in Oklahoma and moved to Kansas City, Missouri.

Claimant testified that she had worked on a number of jobs in the Kansas City area. She stated that her first job was floor girl at a suit and coat manufacturing plant. She also stated that she worked as a machine operator at the Lake City Ammunition plant, clean up person at Bendix and finally on the assembly line at Alis-Chalmers, which later became AGCO. She stated that she had worked at either Alis-Chalmers or AGCO since 1976 other than for a five-year lay off period during which she worked at Cook's Paint.

Claimant testified that her job at AGCO involved heavy manual labor. She stated that she sustained an injury at work on January 4, 1993, when she slipped and fell on ice while walking from the AGGO's guard shack to the door of the building to go to work. She indicated that during the incident her feet slipped out from under her and that her head, back and right hip landed on the ice and concrete.

Claimant testified that she received heat treatments and pain medications on the day of the accident. She stated that she missed the following day from work and that she could not recall whether she missed any more time from work. She did indicate, however, that her pain did not go away. She stated that her pain was still present on June 11, 1993, when she suffered another fall at work.

Claimant testified that the June 11, 1993 accident occurred when she tripped over a floor mat in front of her workstation. She stated that she fell backwards and landed on the concrete floor. She stated that her back, head and whole body struck the floor.

Claimant testified that she experienced immediate pain after the fall. She stated that her supervisor witnessed the fall and that her employer referred her to a doctor for treatment on the following day.

Claimant testified that she received treatment from several doctors. She stated that her right leg was never the same after the first fall. She stated that ever since the first fall she had noticed "a little limp in her walk." She stated after her first fall and the initial treatment she had continued to see Dr. Strauss, her family doctor, with complaints of hip and back problems.

Claimant testified that Dr. Strauss eventually referred her to Dr. Amundson at K.U. Medical Center. She stated that Dr. Amundson ordered an MRI and a CT scan and that afterwards on November 8, 1995 he performed surgery on her low back. She stated that the first surgery only provided a little improvement and that Dr. Amundson later did a fusion with the insertion of rods in her low back.

Claimant testified that the fusion resulted in a little improvement, but not to the extent where she "has a life." She stated that her pain level was still pretty high. She stated that she last worked around March 25, 1994 and that in May 1996 AGCO decided that she could not do her job and retired her. She complained that she had great difficulty in doing her job at the time due to problems in standing.

Finally, Claimant complained of constant pain. She stated that she did not do housework or cook. She stated she might have two or three good days per week. She stated that a typical day was spent lying down and sleeping. She stated that she was on various medications, including a TENS unit and a spinal stimulator. She also stated that she had intended to work until age 65.

On cross-examination Claimant testified that she had not experienced any back problems until the two slips and falls at work. She stated that, "The big one was January 1993". She stated that the January 1993 slip and fall on the ice was worse than the fall in June 1993. She stated that her pain never went away after her January 1993 fall. She alleged that she had to alter her gait after the January 1993 fall.

Claimant acknowledged that many of her family doctor's records subsequent to January 1993 showed that she complained of various problems other than back and hip pain. She acknowledged that many of his records referred to complaints of nervousness and anxiety. Claimant acknowledged that she began to seek medical treatment a lot more frequently after she stopped working at AGCO on April 22, 1994. She admitted that no one at the company ever told her that she could not go to the company doctor for treatment.

Claimant offered into evidence the reports and records of Drs. Amundson, Merys, Strauss, Glaser, and Grinder. She also offered various other reports and records. Dr. Glenn Amundson, M.D., an orthopaedic surgeon and a specialist in adult spine disorders, indicated in a report dated April 9, 1997, to Claimant's attorney that he had first evaluated Claimant on April 24, 1995. He stated that she provided a two-year history of low back and right hip pain. He also stated that Claimant had been evaluated by multiple previous physicians and had been "worked up" with an MRI, CT and bone scan, all of which were supposedly negative.

Dr. Amundson indicated that during his evaluation of Claimant he reviewed the results from her August 1994 MRI, which were consistent with L4-5 lateral recess stenosis. He stated that he also ordered an MRI, which revealed L4-5 stenosis and L3-4 stenosis to a lesser degree. He stated that on November 8, 1995, he performed a laminectomy with decompression at Claimant's L3-4 and L4-5 levels for bilateral lateral recess stenosis and bilateral L5 radiculopathy.

Dr. Amundson indicated that Claimant returned to the clinic on November 21, 1995 and reported that her leg pain had been relieved. He stated that on January 25, 1996, Claimant indicated that she was 98 percent improved from her pre-op condition.

Dr. Amundson indicated, however, that on April 23, 1996, Claimant informed him that her pain was a 9 on a 10-scale and that prior to the surgery it was a level 10. He stated that she complained of pain predominantly in the back and radiating into the hips. He stated that she denied leg pain.

Dr. Amundson ordered additional film studies in June 1996, which he interpreted to show a 2 mm shift at the L4-5 level. He stated that although such an amount of motion at L4-5 was in the physiologic range, it needed to be monitored for progression.

Later, in August 1996 Dr. Amundson referred Claimant to Dr. Horton in his office for an evaluation of her right hip complaints. He also ordered additional MRI and EMG studies. Dr. Amundson indicated that Dr. Horton did not find any significant hip pathology contributing to Claimant's buttock pain. He stated that the EMG results were negative and showed no evidence of acute or chronic radiculopathy.

Dr. Amundson stated that on January 29, 1997 based on the 2 mm subluxation or slip at L4-L5 on the right he performed a posterior segmental instrumentation from L3 to S1 with a reduction of the L4-5 slip. He stated that he last saw Claimant on February 27, 1997, at which time she was doing very well.

Finally, Dr. Amundson indicated in his April 9, 1997 report that Claimant's attorney had asked whether Claimant had sustained any permanent injury. He stated that Claimant continued to complain of normal post-operative back pain. He stated that there still remained some radiation of pain to her buttock. He stated that both conditions were expected approximately 4 weeks post surgery involving a lumbar fusion and bone graft.

Dr. Amundson further stated in his April 9, 1997 report that Claimant had clearly suffered permanent injury

that had resulted in two major lumbar surgeries. He related, however, that he believed that Claimant would require further follow-up, physical therapy, and rehabilitation and medications. He stated that Claimant was currently not capable of returning to work and that he expected her post-operative disability to approach one year. He stated that at the completion of rehabilitation, "I would expect if she returned to work, a sedentary to light category of ability. It is my opinion that at the present time, due to the patient's age, two previous major lumbar surgeries, and prolonged period of debility, that she will probably not return to any gainful employment."

In a May 27, 1997, addendum to his initial report Dr. Amundson indicated that he believed to a reasonable degree of medical certainty, that Claimant's on-the-job injuries initiated or aggravated her medical condition for which he had been treating her.

Claimant's Exhibit C contained the records of Carl Strauss, M.D., her family physician. On June 12, 1996, Dr. Strauss indicated that Claimant's back pain had improved since her surgery. His assessment was back pain due to chronic degenerative disease of the lumbosacral spine and osteoporosis prophylaxis. The remaining records of Dr. Strauss were essentially cumulative of the other evidence.

Claimant's Exhibit D contained the records of Dr. L.F. Glaser, M.D., an orthopaedic surgeon. Dr. Glaser indicated on September 20, 1994, that he had nothing further to offer orthopaedically and that he could not think of any other additional meaningful diagnostic tests. He suggested that Dr. Strauss consider referring Claimant to a rheumatologist. The remaining medical reports and records offered by Claimant were essentially cumulative of the other evidence.

Claimant's employer's medical evidence consisted of the deposition testimony of Dr. David Clymer, M.D., and various other records. Dr. Clymer testified that he was board certified in orthopaedic surgery and also a diplomat in the American Academy of Orthopaedic surgeons.

Dr. Clymer indicated that Claimant was 69-years old when he evaluated her. He stated that she provided a very complex history of back and leg discomfort which had evolved over a period of time and ultimately resulted in two surgeries. He stated that Claimant seemed to relate the development or progression of her complaints to the two falls she suffered at work.

Dr. Clymer commented that Claimant's medical records showed that following her January 4, 1993, slip and fall on ice she was examined by Dr. Merys who ordered left hip and elbow x-rays, both of which were negative and demonstrated no apparent abnormalities. He stated that Claimant returned to Dr. Merys following her June 11, 1993 fall at work. He noted that Dr. Merys records from June 1993 showed no apparent bruising, redness, inflammation, tenderness to palpation or muscle spasms in Claimant's low back. Dr. Clymer interpreted those findings to be evidence of a lack of injury.

Dr. Clymer testified that on physical examination, Claimant had a full range of motion of her back. He stated that such a finding suggested the absence of a recent injury. In addition, he noted that Claimant's family physician, Dr. Strauss, had indicated on July 28, 1993, that Claimant complained of CVA or costovertebral angle aching type pain. Dr. Clymer stated that costovertebral angle pain could be related to kidney problems or intra-abdominal or intra-pelvic problems, as well as muscular discomfort.

Dr. Clymer also found it significant that Dr. Strauss' records for nearly a year after the more recent accident were void of any complaints by Claimant of back or hip pain. He indicated that he would expect a person to have immediate complaints of back and hip pain after a slip and fall. He also acknowledged that although pain might sometimes be "masked by an injury" to a different part of the body, an injury significant enough to result in leg pain and surgery should result in complaints within a matter of weeks after the fall.

Dr. Clymer offered an alternative explanation for Claimant's back and hip pain. He related her back and hip pain to a gradual, progressive degenerative process in a 69 years old individual. He offered as proof of his argument, Claimant's August 1994 MRI, which he stated showed findings consistent with L4-L5 lateral recess stenosis, possibly affecting the L5 nerve root. He stated that it was common for lateral stenosis to develop with the passage of time and without trauma.

Dr. Clymer testified that he did not believe that Claimant's first surgery, the decompression of the L4-L5 lateral recess stenosis was caused or contributed to in any way by either the slip and fall in January or June 1993. He noted that Claimant's second surgery was more of a stabilization and fusion procedure. He stated that the second surgery was necessitated by the first procedure for the stenosis.

Finally, Dr. Clymer indicated that it was significant that Claimant complained of a gradual progressive discomfort in her back and hips in 1994 and 1995. He stated that discomfort associated with a traumatic injury tended to be more of a sudden onset of symptoms while those associated with a degenerative process were more gradual in nature. He stated that Claimant's falls in January and June 1993 in no way caused the degenerative process in her back. He stated that the degenerative process in Claimant's low back caused the need for her surgeries. He also concluded that Claimant had not sustained any permanent partial disability as a result of her two falls at work.

In addition, Dr. Clymer found it significant that Claimant had no atrophy in her lower extremities. He observed that the lack of any atrophy meant that she had remained reasonably active. He also noted that Claimant's subjective complaints outweighed the objective physical findings and that based on Claimant's significantly abnormal lumbar spine with an extensive fusion and that given her age, he would limit her to activities which required no repetitive bending or lifting and probably no lifting over an occasional 20 pounds.

On cross-examination by Claimant, Dr. Clymer admitted that there was nothing in Claimant's family doctor's records, which showed that she had a history of low back or leg complaints prior to her falls at work. He admitted that Claimant complained of low back pain immediately after both falls based on the notations in the treatment records.

Dr. Clymer admitted that Claimant's family physician's records from July 28, 1993, appeared to indicate that the primary diagnosis was back pain. He stated that the doctor's records were difficult to read. He admitted that records of Drs. Strauss and Legarda showed that Claimant complained of back and hip

Dr. Clymer reiterated that stenosis was generally not caused by a fall. He indicated that it could be caused by a fall if a fracture, a herniated disk or some instability of the spine resulted from the fall. He also admitted that he had observed in his written report that the work-related falls had resulted in some aggravation of the degenerative process in Claimant's back, which might have caused some increased discomfort and added to some of the ongoing lumbar disability in her back.

On redirect examination, Dr. Clymer indicated that Claimant's medical records showed that although she initially complained of back pain in June 1993, she shortly thereafter told Dr. Merys that her low back and left elbow were no longer uncomfortable. He was also asked to read the sentence following the one referred to on cross-examination wherein he indicated that the work-related falls had resulted in some aggravation of the degenerative process in Claimant's back. The subsequent sentence read as follows, "the medical records, however, did not support this hypothesis, as there is little evidence of any significant ongoing back discomfort following the work related falls on multiple physician visits over the subsequent year. Given these findings, I do not find evidence of any work related disability with regard to these problems."

LAW

After considering all the evidence, including Claimant's testimony, Dr. Clymer's deposition, the medical reports and records, including those of Dr. Amundson, the other exhibits, and observing Claimant's appearance and demeanor, I find and believe that Claimant met her burden of proving that both of her accidents at work on January 4, and June 11, 1993, were substantial contributing factors to her back impairments for which she received treatment and two surgeries. I also find that she proved her employer's liability for future medical treatment for the back injuries she sustained in the two accidents at work. She did not, however, prove her employer's liability for any past medical treatment.

Claimant also failed to prove the extent of any disability she sustained in either the January 4 or June 11, 1993 accidents at work. Thus, she did not prove her employer's liability for any permanent disability benefits.

Numerous cases have held that the employee has the burden of proving all material elements of her claim. Fischer v. Arch Diocese of St. Louis-Cardinal Ritter Inst., 793 S.W.2d 195 (Mo.App. E.D. 1990); Griggs vs. A.B. Chance Co., 503 S.W.2d 697 (Mo.App. W.D. 1973); Hall v. Country Kitchen Restaurant, 936 S.W.2d 917 (Mo.App. S.D. 1997). That includes the extent of any disability sustained in the accident at work. Griggs: Smith v. National Lead Co., 228 S.W. 2d 407 (Mo. App. 1955). Claimant, as set out above, met her burden of proving that her work-related falls were a substantial contributing factor to her back impairments, but she offered no credible, competent medical evidence on the issue of the extent of the disability she sustained in either accident.

The uncontroverted evidence showed that Claimant had two falls at work within a six-month period. On January 4, 1993, Claimant slipped and fell on ice in the parking lot and sustained an injury to her low back. On June 11, 1993, she tripped over a mat at her workstation and slipped and fell on the concrete floor and injured her low back. Dr. Amundson, an orthopaedic surgeon and a specialist in adult spine disorders, as well as Claimant's treating physician, concluded that, "Claimant's on-the-job injuries initiated or aggravated her medical condition, for which I have been treating her."

Dr. Clymer, the orthopaedic surgeon, who testified on Claimant's employer's behalf, noted that MRI findings showed that Claimant had spinal stenosis. He stated that spinal stenosis was generally a degenerative type condition. He essentially concluded that because spinal stenosis was primarily a degenerative type condition and based on Claimant's lack of any medical treatment for well over a year after the accidents that Claimant's back problems were not caused by either the January or June 1993 falls at work.

Missouri cases have clearly recognized that when conflicting medical evidence exists, it is in the province of the administrative law judge to decide which evidence is the more credible. Rose v. Ozark Pride Agribusiness, 510 S.W.2d 500 (Mo.App. 1974). In Claimant's case, the most credible, competent evidence supported Dr. Amundson's opinion that Claimant's on-the-job injuries initiated or aggravated her medical condition.

First, there was no credible evidence that Claimant had experienced any back problems prior to her January 4, 1993, fall at work. In both falls, she landed on a hard surface, the concrete in the parking lot and the concrete on the factory floor. In both cases, she immediately complained of back pain and sought immediate medical attention.

While the uncontroverted evidence showed that she had spinal stenosis, which probably existed prior to January 4, 1993, it was clearly asymptomatic until after her falls at work and based on the evidence, including Dr. Amundson's opinion Claimant clearly proved that the falls at work aggravated the asymptomatic condition causing it to become symptomatic. Missouri cases have recognized that a preexisting but non-disabling condition does not bar recovery of compensation if a job-related injury causes the condition to escalate to the level of disability. Miller v. Wefelmeyer and Wausau Insurance Co., 890 S.W. 2s 372 (Mo. App. E.D. 1994); Weinbauer v. Grey Eagle Distributors, 6661 S.W. 2d 652 (Mo. App. E.D. 1983).

In Claimant's case, Dr. Amundson performed the laminectomy and decompression of the L3-4 and L4-5 levels of Claimant's lumbar spine due to the bilateral lateral recess stenosis and bilateral L5 radiculopathy. He performed the subsequent fusion due to some motion at the site of the first surgery. He indicated that the treatment was initiated or aggravated by the falls at work. The evidence supported his opinion. Thus, Claimant proved that her work related injuries had aggravated her preexisting asymptomatic condition and that her employer was liable.

Claimant alleged that her employer was liable for past and future medical treatment. She admitted, however, that her employer provided treatment immediately after both accidents. She admitted that her employer never refused to provide any medical treatment. She admitted that she sought treatment on her own from her family physician for her back complaints and that her family doctor eventually referred her to Dr. Amundson who performed her surgeries.

Thus, Claimant chose to direct her own medical treatment. The statute allows the employee to select her own physician or treatment at her own expense. See §287.140.1 RSMo 1993. In addition, Missouri case law clearly provides that the employee has the right to employ her own physician at her own expense and that the

employer is only liable for such treatment chosen by the employee if the employer had notice that the employee needed treatment and refused to provide it, or if a demand was made on the employer to furnish medical treatment and the employer refused or failed to provide it. Anderson v. Parrish, 472 S.W.2d 452 (Mo. App. 1971). As noted above Claimant chose to direct her own medical treatment. She never made demand upon her employer to provide medical treatment and her employer never refused to provide any such treatment. Thus, Claimant failed to prove her employer's liability for any past medical treatment.

Claimant did prove her employer's liability for future medical treatment. Dr. Amundson concluded on April 9, 1997, that Claimant would need additional medical treatment due to the injuries she sustained in the falls at work. Dr. Amundson indicated that Claimant would need follow-up visits with the doctor, physical therapy, rehabilitation, and medications. No evidence was offered which contradicted Dr. Amundson's opinion that Claimant would need additional medical treatment. Moreover, at the hearing six years after Dr. Amundson wrote his report, Claimant was still on medications due to her back pain and problems.

Thus, based on the most credible, competent medical evidence, Claimant proved her need for future medical treatment needed to cure and relieve her of the effects of the injuries she sustained in the falls at work. Claimant's employer is ordered to provide such treatment to Claimant for so long as she is in need of it to cure and relieve her of the effects of the injuries she sustained in the falls at work.

Finally, Claimant argued that she was rendered permanently and totally disabled due to the injuries she sustained in the two accidents at work on January 4 and June 11, 1993. Not only did she fail to prove that she was rendered permanently and totally disabled, she failed to prove the extent of any disability she sustained due to either accident.

As noted earlier, Missouri courts have clearly recognized that the employee has the burden of proving the extent of the disability she sustained in the accident at work. Griggs; Smith. Claimant failed to do so. In Claimant's case, she clearly has substantial disability. Claimant, however, did not offer a competent disability rating upon which an award could be based. As noted earlier, Dr. Amundson performed surgery on Claimant's back on November 8, 1995, and subsequently on January 29, 1997, he performed a fusion on her low back. He last examined Claimant on February 27, 1997. That was less than a month after the fusion. Thus, based on when he last examined Claimant he could not have known how well she recovered from the surgery, whether any disability resulted or the extent of any such disability.

Also, his report was dated April 9, 1997. That was a little over two months after Claimant's last surgery. The last surgery, as noted above was major and involved the insertion of rods in her low back. The hearing was held in May 2003. No updated report was offered or any evidence showing that Dr. Amundson had been apprised of Claimant's condition since February 1997 when he last examined her.

Dr. Amundson's April 9, 1997 report clearly indicated that Claimant had not reached maximum medical improvement when he wrote his report, and therefore, any opinion pertaining to permanent disability if one could be ascertained from his report was based on speculation, conjecture and surmise and did not constitute credible evidence of the extent of disability Claimant sustained in either accident. On page 3 of his April 9, 1997 report, Dr. Amundson stated that Claimant was not currently capable of returning to work and I expect her post-operative debility to approach one year. Thus, his report showed that Claimant's condition was not permanent and that he did not expect it to become so permanent for about one year.

Moreover, Dr. Amundson indicated in the April 9, 1997 report that "at the completion of rehabilitation, I would expect, if she returned to work, a sedentary to light category of ability. It is my opinion that at the present time due to the patient's age, two previous major lumbar surgeries and prolonged period of debility that she will probably not return to any gainful employment." That further showed that Claimant was still rehabilitating from her surgery when he wrote the report. Again, it showed that Claimant's condition was not permanent when he wrote the report.

In addition, the language in the report showed that contrary to Claimant's allegation the doctor was not offering an opinion that Claimant was permanently and totally disabled. At most, the report showed that the doctor believed that if Claimant returned to work it would be at a sedentary to light job. That does not constitute

permanent total disability. Also, the report showed that the doctor believed that Claimant probably would not return to work based on her advanced age and the surgeries. Again, that did not mean that she could not return to work.

Furthermore, no testimony or statements were elicited from the doctor explaining what he meant by the statement that Claimant would probably not return to any gainful employment. Did he mean that although once her condition became permanent that she would probably be able to physically return to work but would probably choose not to do so due to her advanced age and injuries, or did he mean that she would probably physically be unable to return to work? Claimant chose not to get a clarification from the doctor as to what he meant by his statement made a little over two months after her major surgery.

Thus, the evidence clearly showed that Claimant failed to prove that she was rendered permanently and totally disabled. She also failed to prove the extent of any disability she may have sustained in either the January 4 or June 11, 1993 accidents. Claimant chose not to get a disability rating. No doctor concluded that she had sustained a certain amount of disability as a result of the injuries she sustained in the January 4, 1993 accident. No doctor concluded that she had sustained a certain amount of disability as a result of the injuries she sustained in the June 11, 1993 accident. Dr. Clymer who wrote the report for Claimant's employer concluded that she had not sustained any disability from either accident.

Claimant also had the preexisting spinal stenosis. Missouri courts have held that when two events, one compensable and one not compensable, contribute to the alleged disability, it is claimant's burden to prove the nature and extent of the disability attributed to the job-related injury. Miller; Bersett v. National Super Markets, Inc., 808 S.W. 2d 34 (Mo. App. E.D. 1991). Missouri courts have held that the employee must offer expert testimony as to the extent of a preexisting disability in order to determine what percentage of permanent partial disability was attributable to the compensable job-related disability. Plaster v. Dayco Corp., 760 S.W. 2d 911 (Mo. App. S.D. 1988). Missouri courts have held that the failure to offer expert testimony regarding the percentage of disability derived from the compensable injury bars the claimant from recovering permanent partial disability benefits. *Id*; Goleman v. MCI Transporters, 844 S.W. 2d 463 (Mo. App. W.D. 1992).

Claimant offered no expert testimony as to the percentage of disability she sustained in either the January 4 or June 11, 1993 accidents. Thus, Claimant offered no medical evidence of any degree of certainty that she had sustained a certain amount of disability attributable to either accident. Absent pure speculation, conjecture and surmise it would be impossible to find that she had sustained any percent of disability as a result of either the January 4 or June 11, 1993 accidents. As noted above, the failure to offer expert testimony regarding the percentage of disability derived from a compensable injury bars the claimant from recovering permanent partial disability benefits.

Also, as noted above Missouri law clearly provides that an employee must offer expert testimony as to the extent of a preexisting disability in order to determine what percentage of disability was attributable to the compensable job-related disability. That becomes even more of an issue in an alleged permanent total disability case and particularly where the employee has sustained two injuries on the job. If the permanent total results from the last injury considered alone, the employer is liable for the permanent total disability benefits. See §287.220 (1) RSMo (1993). Thus, if Claimant was rendered permanently and totally disabled based on the disability she sustained in the June 11, 1993 accident considered alone, her employer would be liable for the permanent total disability benefits. No doctor rendered such a rating or conclusion.

More importantly, however, if the permanent total disability resulted from a combination of the disability from the last accident, in Claimant's case the June 11, 1993 injuries, and any preexisting disability such as that from either the January 4, 1993 accident or the spinal stenosis, the Second Injury Fund would be liable for the permanent total disability benefits. *Id*. Thus, Claimant clearly needed to prove the amount of disability caused by the last accident and the amount which preexisted. She did not do so. See also Boring v. Treasurer, 947 S.W.2d 483 (Mo.App. 1997); Reiner v. Treasurer, 837 S.W.2d 152 (Mo.App. 1997) where the Courts recognized that if the employee became permanently and totally disabled due to a combination of the disability sustained in the last accident and any preexisting disability, the Second Injury Fund and not the employer was liable for the permanent total disability benefits.

Again, Claimant offered no evidence as to the amount of disability caused by the last accident on June 11, 1993, or by the January 4, 1993 accident or by the spinal stenosis. Her failure to do so was further evidence of the lack of proof needed to prove liability of her employer for permanent partial or permanent total disability benefits.

Thus, in conclusion, Claimant offered no doctor's opinion, which supported her allegation that she was permanently and totally disabled. She offered no doctor's opinion that the June 11, 1993 accident in and of itself rendered her permanently and totally disabled. She offered no doctor's opinion as to how much disability she sustained in either the June 11, 1993 or the January 4, 1993 accidents. She offered no evidence as to whether the preexisting spinal stenosis had resulted in any disability. Claimant despite her two back surgeries simply offered no evidence to support an award of any permanent disability benefits as provided under Missouri law. She did, however, prove that her employer was liable for future medical treatment.

Date: _____

Kenneth J. Cain
Chief Administrative Law Judge
Division of Workers' Compensation

Made by: _____

A true copy: Attest:

Renee T. Slusher
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD ALLOWING COMPENSATION
(Setting Aside the June 7, 2005, Order of Dismissal and
Affirming the July 10, 2003, Award of the Administrative Law Judge)

Injury No.: 93-184795

Employee: Ann J. Talbert

Employer: AGCO Mfg. Group

Insurer: Firemans Fund Insurance Company

Date of Accident: July 1, 1993

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having considered the Application for Review, the

Commission sets aside the June 7, 2005, Order of Dismissal of the administrative law judge. The Commission finds that the July 10, 2003 Award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 10, 2003.

Procedural History

This matter was tried before the administrative law judge on May 1, 2003. On July 10, 2003, the administrative law judge issued his final award finding that employee satisfied her burden of proving entitlement to future medical care but failed to prove her entitlement to past medical expenses or to establish the nature and extent of her permanent disability. Employee sought review of the July 10, 2003, award before the Commission. On June 29, 2004, the Commission modified the award of the administrative law judge to a temporary award allowing compensation. The Commission stated:

The Commission agrees that the Employee has established the need for further medical treatment to cure and relieve her of the effects of her injury. Until such time as the medical situation has been stabilized, the Employee is unable to establish the extent of her permanent disability and the relationship of that disability to each of her injuries. The matter shall be resubmitted to the Division of Workers' Compensation at such time as medical improvement shall allow.

We take administrative notice of the Division of Workers' Compensation (Division) file in this matter. The file reveals no request by employee asking the Division to schedule this matter for hearing after the issuance of the Commission's temporary award.

Order of Dismissal

On April 25, 2005, the Division mailed to all parties a Notice to Show Cause Why Claim Should Not Be Dismissed. The Notice informed the parties that the matter would be heard on May 27, 2005, at 9:00 a.m. We have reviewed the transcript of the May 27, 2005 hearing. Neither employee nor employee's counsel appeared at the hearing. Counsel for employer/insurer appeared and requested that the matter be dismissed for failure to prosecute. The administrative law judge granted the request and dismissed the claim.

On June 7, 2005, the administrative law judge issued an Order of Dismissal. On June 27, 2005, employee, through counsel, filed an Application for Review with the Commission alleging as follows:

Appellant alleges that the Administrative Law Judge's award was erroneous for the following specific reasons:

4. In finding that there was good cause for dismissing the claimant's claim based upon the claimant's failure to appear on the hearing date.
5. In finding that there was good cause for dismissing the claimant's claim for failure to prosecute.
6. In denying the claimant's Motion to Set Aside the Order of Dismissal upon the claimant's timely filing of a motion to set aside stating the facts and circumstances surrounding the reason(s) claimant failed to appear at the hearing and the status of the prosecution of the claimant's claim.

The Motion to Set Aside the Order of Dismissal was not attached to or incorporated in the Application for Review.

On July 5, 2005, employer/insurer filed its suggestions in opposition to set aside of the Order of Dismissal. The parties have submitted legal briefs.

Employee's case was dismissed for failure to appear at the scheduled show cause hearing. In her Application for Review, employee alleges no reason for her failure to appear at the show cause hearing. Employee's allegations, if true, will not support a finding of good cause for employee's failure to appear at the scheduled good cause hearing. As such, employee's allegations in the Application for Review do not state prima facie good cause for employee's failure to appear at the scheduled good cause hearing.

As noted above, the Motion to Set Aside Default Judgments of Dismissal were not attached to the Application for Review. Nonetheless, we have reviewed the allegations therein to determine whether they state a prima facie

good cause. Employee alleges in the Motion that her counsel missed the show cause hearing because the hearing did not get docketed due to a Dictaphone malfunction. This allegation does not state prima facie good cause for missing the hearing. The failure of office docketing procedures is not good cause for missing a hearing. *Robinson v. Missouri Dep't of Corrections, Bd. of Probation & Parole*, 805 S.W.2d 688, 690 (Mo. App. 1991). Notably missing from employee's Motion are allegations regarding employee's failure to attend the hearing.

Because neither the Application for Review nor the Motion to Set Aside Default Judgments of Dismissal contain allegations stating prima facie good cause, no purpose would be served by remanding to determine the truth or falsity of the allegations. See *Ross v. Safeway Stores, Inc.*, 738 S.W.2d 611, 616 (Mo. App. 1987).

Because employee states no good cause for missing the show cause hearing, we agree with the administrative law judge's assessment that employee has failed to seize the opportunity afforded her by the Commission to further prosecute this claim. We also agree with the administrative law judge's assessment that this 12½ year-old claim must be brought to a conclusion. However, rather than dismissing the claim, we believe the proper method for concluding this matter is to issue a final award on the evidence submitted at the trial of this matter almost three years ago.

Order and Award

Based upon the foregoing, we set aside the Order of Dismissal dated June 7, 2005, and reinstate the claim.

We affirm the award and decision of the administrative law judge dated July 10, 2003. The award and decision of Chief Administrative Law Judge Kenneth J. Cain, issued July 10, 2003, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

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

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Ann Talbert Injury No. 93-184795

Dependents: N/A

Employer: AGCO Company, Inc.

Insurer: Fireman's Fund Insurance Co.

Additional Party: N/A

Hearing Date: May 1, 2003

Final Brief Received: June 1, 2003

Checked by: KJC/lh

FINDINGS OF FACT AND RULINGS OF LAW

2. 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: June 11, 1993.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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: Employee, while in the course and scope of her employment, as a laborer for the AGCO Manufacturing Group sustained an injury when she slipped and fell over a floor mat and landed on her head, back and left knee.
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: Aggravation of pre-existing spinal stenosis.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? Undetermined.
18. Employee's average weekly wages: \$507.20 and by agreement.
19. Weekly compensation rate: \$338.13/\$235.61.
20. Method wages computation: \$287.250 and by agreement.

COMPENSATION PAYABLE

21.Amount of compensation payable: None.

Unpaid medical expenses: Undetermined.

None weeks of temporary total disability (or temporary partial disability)

None weeks of permanent partial disability from Employer

N/A weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A for Claimant's lifetime

22. Second Injury Fund liability: N/A.

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:
weekly differential payable by SIF for weeks beginning
and, thereafter, for Claimant's lifetime

TOTAL: None.

23. Future requirements awarded: None.

Said payments to begin as of the date of the award and to be payable and be subject to modification and review as provided by law.

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Ann Talbert Injury No: 93-184795

Dependents: N/A

Employer: AGCO Company, Inc.

Insurer: Fireman's Fund Insurance Co.

Additional Party: N/A Checked by: KJC/lh

Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

- 4) the nature and extent of the disability sustained by the employee;
- 5) whether all the conditions complained of by the employee resulted from the accident; and
- 6) liability of the employer for additional medical benefits, past and future.

At the hearing, Ms. Ann Talbert (hereinafter referred to as Claimant) testified that she was born on July 16, 1933, in the state of Oklahoma. She stated that she graduated from high school in Oklahoma and moved to Kansas City, Missouri.

Claimant testified that she had worked on a number of jobs in the Kansas City area. She stated that her first job was floor girl at a suit and coat manufacturing plant. She also stated that she worked as a machine operator at the Lake City Ammunition plant, clean up person at Bendix and finally on the assembly line at Alis-Chalmers, which later became AGCO. She stated that she had worked at either Alis-Chalmers or AGCO since 1976 other than for a five-year lay off period during which she worked at Cook's Paint.

Claimant testified that her job at AGCO involved heavy manual labor. She stated that she sustained an injury at work on January 4, 1993, when she slipped and fell on ice while walking from the AGCO's guard shack to the door of the building to go to work. She indicated that during the incident her feet slipped out from under her and that her head, back and right hip landed on the ice and concrete.

Claimant testified that she received heat treatments and pain medications on the day of the accident. She stated that she missed the following day from work and that she could not recall whether she missed any more time from work. She did indicate, however, that her pain did not go away. She stated that her pain was still present on June 11, 1993, when she suffered another fall at work.

Claimant testified that the June 11, 1993 accident occurred when she tripped over a floor mat in front of her workstation. She stated that she fell backwards and landed on the concrete floor. She stated that her back, head and whole body struck the floor.

Claimant testified that she experienced immediate pain after the fall. She stated that her supervisor witnessed the fall and that her employer referred her to a doctor for treatment on the following day.

Claimant testified that she received treatment from several doctors. She stated that her right leg was never the same after the first fall. She stated that ever since the first fall she had noticed "a little limp in her walk." She stated after her first fall and the initial treatment she had continued to see Dr. Strauss, her family doctor, with complaints of hip and back problems.

Claimant testified that Dr. Strauss eventually referred her to Dr. Amundson at K.U. Medical Center. She stated that Dr. Amundson ordered an MRI and a CT scan and that afterwards on November 8, 1995 he performed surgery on her low back. She stated that the first surgery only provided a little improvement and that Dr. Amundson later did a fusion with the insertion of rods in her low back.

Claimant testified that the fusion resulted in a little improvement, but not to the extent where she "has a life." She stated that her pain level was still pretty high. She stated that she last worked around March 25, 1994 and that in May 1996 AGCO decided that she could not do her job and retired her. She complained that she had great difficulty in doing her job at the time due to problems in standing.

Finally, Claimant complained of constant pain. She stated that she did not do housework or cook. She stated she might have two or three good days per week. She stated that a typical day was spent lying down and sleeping. She stated that she was on various medications, including a TENS unit and a spinal stimulator. She also stated that she had intended to work until age 65.

On cross-examination Claimant testified that she had not experienced any back problems until the two slips and falls at work. She stated that, "The big one was January 1993". She stated that the January 1993 slip and fall on the ice was worse than the fall in June 1993. She stated that her pain never went away after her January 1993 fall. She alleged that she had to alter her gait after the January 1993 fall.

Claimant acknowledged that many of her family doctor's records subsequent to January 1993 showed that she complained of various problems other than back and hip pain. She acknowledged that many of his records referred to complaints of nervousness and anxiety. Claimant acknowledged that she began to seek medical treatment a lot more frequently after she stopped working at AGCO on April 22, 1994. She admitted that no one at the company ever told her that she could not go to the company doctor for treatment.

Claimant offered into evidence the reports and records of Drs. Amundson, Merys, Strauss, Glaser, and Grinder. She also offered various other reports and records. Dr. Glenn Amundson, M.D., an orthopaedic surgeon

and a specialist in adult spine disorders, indicated in a report dated April 9, 1997, to Claimant's attorney that he had first evaluated Claimant on April 24, 1995. He stated that she provided a two-year history of low back and right hip pain. He also stated that Claimant had been evaluated by multiple previous physicians and had been "worked up" with an MRI, CT and bone scan, all of which were supposedly negative.

Dr. Amundson indicated that during his evaluation of Claimant he reviewed the results from her August 1994 MRI, which were consistent with L4-5 lateral recess stenosis. He stated that he also ordered an MRI, which revealed L4-5 stenosis and L3-4 stenosis to a lesser degree. He stated that on November 8, 1995, he performed a laminectomy with decompression at Claimant's L3-4 and L4-5 levels for bilateral lateral recess stenosis and bilateral L5 radiculopathy.

Dr. Amundson indicated that Claimant returned to the clinic on November 21, 1995 and reported that her leg pain had been relieved. He stated that on January 25, 1996, Claimant indicated that she was 98 percent improved from her pre-op condition.

Dr. Amundson indicated, however, that on April 23, 1996, Claimant informed him that her pain was a 9 on a 10-scale and that prior to the surgery it was a level 10. He stated that she complained of pain predominantly in the back and radiating into the hips. He stated that she denied leg pain.

Dr. Amundson ordered additional film studies in June 1996, which he interpreted to show a 2 mm shift at the L4-5 level. He stated that although such an amount of motion at L4-5 was in the physiologic range, it needed to be monitored for progression.

Later, in August 1996 Dr. Amundson referred Claimant to Dr. Horton in his office for an evaluation of her right hip complaints. He also ordered additional MRI and EMG studies. Dr. Amundson indicated that Dr. Horton did not find any significant hip pathology contributing to Claimant's buttock pain. He stated that the EMG results were negative and showed no evidence of acute or chronic radiculopathy.

Dr. Amundson stated that on January 29, 1997 based on the 2 mm subluxation or slip at L4-L5 on the right he performed a posterior segmental instrumentation from L3 to S1 with a reduction of the L4-5 slip. He stated that he last saw Claimant on February 27, 1997, at which time she was doing very well.

Finally, Dr. Amundson indicated in his April 9, 1997 report that Claimant's attorney had asked whether Claimant had sustained any permanent injury. He stated that Claimant continued to complain of normal post-operative back pain. He stated that there still remained some radiation of pain to her buttock. He stated that both conditions were expected approximately 4 weeks post surgery involving a lumbar fusion and bone graft.

Dr. Amundson further stated in his April 9, 1997 report that Claimant had clearly suffered permanent injury that had resulted in two major lumbar surgeries. He related, however, that he believed that Claimant would require further follow-up, physical therapy, and rehabilitation and medications. He stated that Claimant was currently not capable of returning to work and that he expected her post-operative disability to approach one year. He stated that at the completion of rehabilitation, "I would expect if she returned to work, a sedentary to light category of ability. It is my opinion that at the present time, due to the patient's age, two previous major lumbar surgeries, and prolonged period of debility, that she will probably not return to any gainful employment."

In a May 27, 1997, addendum to his initial report Dr. Amundson indicated that he believed to a reasonable degree of medical certainty, that Claimant's on-the-job injuries initiated or aggravated her medical condition for which he had been treating her.

Claimant's Exhibit C contained the records of Carl Strauss, M.D., her family physician. On June 12, 1996, Dr. Strauss indicated that Claimant's back pain had improved since her surgery. His assessment was back pain due to chronic degenerative disease of the lumbosacral spine and osteoporosis prophylaxis. The remaining records of Dr. Strauss were essentially cumulative of the other evidence.

Claimant's Exhibit D contained the records of Dr. L.F. Glaser, M.D., an orthopaedic surgeon. Dr. Glaser indicated on September 20, 1994, that he had nothing further to offer orthopaedically and that he could not think of

any other additional meaningful diagnostic tests. He suggested that Dr. Strauss consider referring Claimant to a rheumatologist. The remaining medical reports and records offered by Claimant were essentially cumulative of the other evidence.

Claimant's employer's medical evidence consisted of the deposition testimony of Dr. David Clymer, M.D., and various other records. Dr. Clymer testified that he was board certified in orthopaedic surgery and also a diplomat in the American Academy of Orthopaedic surgeons.

Dr. Clymer indicated that Claimant was 69-years old when he evaluated her. He stated that she provided a very complex history of back and leg discomfort which had evolved over a period of time and ultimately resulted in two surgeries. He stated that Claimant seemed to relate the development or progression of her complaints to the two falls she suffered at work.

Dr. Clymer commented that Claimant's medical records showed that following her January 4, 1993, slip and fall on ice she was examined by Dr. Merys who ordered left hip and elbow x-rays, both of which were negative and demonstrated no apparent abnormalities. He stated that Claimant returned to Dr. Merys following her June 11, 1993 fall at work. He noted that Dr. Merys records from June 1993 showed no apparent bruising, redness, inflammation, tenderness to palpation or muscle spasms in Claimant's low back. Dr. Clymer interpreted those findings to be evidence of a lack of injury.

Dr. Clymer testified that on physical examination, Claimant had a full range of motion of her back. He stated that such a finding suggested the absence of a recent injury. In addition, he noted that Claimant's family physician, Dr. Strauss, had indicated on July 28, 1993, that Claimant complained of CVA or costovertebral angle aching type pain. Dr. Clymer stated that costovertebral angle pain could be related to kidney problems or intra-abdominal or intra-pelvic problems, as well as muscular discomfort.

Dr. Clymer also found it significant that Dr. Strauss' records for nearly a year after the more recent accident were void of any complaints by Claimant of back or hip pain. He indicated that he would expect a person to have immediate complaints of back and hip pain after a slip and fall. He also acknowledged that although pain might sometimes be "masked by an injury" to a different part of the body, an injury significant enough to result in leg pain and surgery should result in complaints within a matter of weeks after the fall.

Dr. Clymer offered an alternative explanation for Claimant's back and hip pain. He related her back and hip pain to a gradual, progressive degenerative process in a 69 years old individual. He offered as proof of his argument, Claimant's August 1994 MRI, which he stated showed findings consistent with L4-L5 lateral recess stenosis, possibly affecting the L5 nerve root. He stated that it was common for lateral stenosis to develop with the passage of time and without trauma.

Dr. Clymer testified that he did not believe that Claimant's first surgery, the decompression of the L4-L5 lateral recess stenosis was caused or contributed to in any way by either the slip and fall in January or June 1993. He noted that Claimant's second surgery was more of a stabilization and fusion procedure. He stated that the second surgery was necessitated by the first procedure for the stenosis.

Finally, Dr. Clymer indicated that it was significant that Claimant complained of a gradual progressive discomfort in her back and hips in 1994 and 1995. He stated that discomfort associated with a traumatic injury tended to be more of a sudden onset of symptoms while those associated with a degenerative process were more gradual in nature. He stated that Claimant's falls in January and June 1993 in no way caused the degenerative process in her back. He stated that the degenerative process in Claimant's low back caused the need for her surgeries. He also concluded that Claimant had not sustained any permanent partial disability as a result of her two falls at work.

In addition, Dr. Clymer found it significant that Claimant had no atrophy in her lower extremities. He observed that the lack of any atrophy meant that she had remained reasonably active. He also noted that Claimant's subjective complaints outweighed the objective physical findings and that based on Claimant's significantly abnormal lumbar spine with an extensive fusion and that given her age, he would limit her to activities which required no repetitive bending or lifting and probably no lifting over an occasional 20 pounds.

On cross-examination by Claimant, Dr. Clymer admitted that there was nothing in Claimant's family doctor's records, which showed that she had a history of low back or leg complaints prior to her falls at work. He admitted that Claimant complained of low back pain immediately after both falls based on the notations in the treatment records.

Dr. Clymer admitted that Claimant's family physician's records from July 28, 1993, appeared to indicate that the primary diagnosis was back pain. He stated that the doctor's records were difficult to read. He admitted that records of Drs. Strauss and Legarda showed that Claimant complained of back and hip

Dr. Clymer reiterated that stenosis was generally not caused by a fall. He indicated that it could be caused by a fall if a fracture, a herniated disk or some instability of the spine resulted from the fall. He also admitted that he had observed in his written report that the work-related falls had resulted in some aggravation of the degenerative process in Claimant's back, which might have caused some increased discomfort and added to some of the ongoing lumbar disability in her back.

On redirect examination, Dr. Clymer indicated that Claimant's medical records showed that although she initially complained of back pain in June 1993, she shortly thereafter told Dr. Merys that her low back and left elbow were no longer uncomfortable. He was also asked to read the sentence following the one referred to on cross-examination wherein he indicated that the work-related falls had resulted in some aggravation of the degenerative process in Claimant's back. The subsequent sentence read as follows, "the medical records, however, did not support this hypothesis, as there is little evidence of any significant ongoing back discomfort following the work related falls on multiple physician visits over the subsequent year. Given these findings, I do not find evidence of any work related disability with regard to these problems."

LAW

After considering all the evidence, including Claimant's testimony, Dr. Clymer's deposition, the medical reports and records, including those of Dr. Amundson, the other exhibits, and observing Claimant's appearance and demeanor, I find and believe that Claimant met her burden of proving that both of her accidents at work on January 4, and June 11, 1993, were substantial contributing factors to her back impairments for which she received treatment and two surgeries. I also find that she proved her employer's liability for future medical treatment for the back injuries she sustained in the two accidents at work. She did not, however, prove her employer's liability for any past medical treatment.

Claimant also failed to prove the extent of any disability she sustained in either the January 4 or June 11, 1993 accidents at work. Thus, she did not prove her employer's liability for any permanent disability benefits.

Numerous cases have held that the employee has the burden of proving all material elements of her claim. Fischer v. Arch Diocese of St. Louis-Cardinal Ritter Inst., 793 S.W.2d 195 (Mo.App. E.D. 1990); Griggs vs. A.B. Chance Co., 503 S.W.2d 697 (Mo.App. W.D. 1973); Hall v. Country Kitchen Restaurant, 936 S.W.2d 917 (Mo.App. S.D. 1997). That includes the extent of any disability sustained in the accident at work. Griggs; Smith v. National Lead Co., 228 S.W. 2d 407 (Mo. App. 1955). Claimant, as set out above, met her burden of proving that her work-related falls were a substantial contributing factor to her back impairments, but she offered no credible, competent medical evidence on the issue of the extent of the disability she sustained in either accident.

The uncontroverted evidence showed that Claimant had two falls at work within a six-month period. On January 4, 1993, Claimant slipped and fell on ice in the parking lot and sustained an injury to her low back. On June 11, 1993, she tripped over a mat at her workstation and slipped and fell on the concrete floor and injured her low back. Dr. Amundson, an orthopaedic surgeon and a specialist in adult spine disorders, as well as Claimant's treating physician, concluded that, "Claimant's on-the-job injuries initiated or aggravated her medical condition, for which I have been treating her."

Dr. Clymer, the orthopaedic surgeon, who testified on Claimant's employer's behalf, noted that MRI findings showed that Claimant had spinal stenosis. He stated that spinal stenosis was generally a degenerative type condition. He essentially concluded that because spinal stenosis was primarily a degenerative type condition and

based on Claimant's lack of any medical treatment for well over a year after the accidents that Claimant's back problems were not caused by either the January or June 1993 falls at work.

Missouri cases have clearly recognized that when conflicting medical evidence exists, it is in the province of the administrative law judge to decide which evidence is the more credible. Rose v. Ozark Pride Agribusiness, 510 S.W.2d 500 (Mo.App. 1974). In Claimant's case, the most credible, competent evidence supported Dr. Amundson's opinion that Claimant's on-the-job injuries initiated or aggravated her medical condition.

First, there was no credible evidence that Claimant had experienced any back problems prior to her January 4, 1993, fall at work. In both falls, she landed on a hard surface, the concrete in the parking lot and the concrete on the factory floor. In both cases, she immediately complained of back pain and sought immediate medical attention.

While the uncontroverted evidence showed that she had spinal stenosis, which probably existed prior to January 4, 1993, it was clearly asymptomatic until after her falls at work and based on the evidence, including Dr. Amundson's opinion Claimant clearly proved that the falls at work aggravated the asymptomatic condition causing it to become symptomatic. Missouri cases have recognized that a preexisting but non-disabling condition does not bar recovery of compensation if a job-related injury causes the condition to escalate to the level of disability. Miller v. Wefelmeyer and Wausau Insurance Co., 890 S.W. 2s 372 (Mo. App. E.D. 1994); Weinbauer v. Grey Eagle Distributors, 6661 S.W. 2d 652 (Mo. App. E.D. 1983).

In Claimant's case, Dr. Amundson performed the laminectomy and decompression of the L3-4 and L4-5 levels of Claimant's lumbar spine due to the bilateral lateral recess stenosis and bilateral L5 radiculopathy. He performed the subsequent fusion due to some motion at the site of the first surgery. He indicated that the treatment was initiated or aggravated by the falls at work. The evidence supported his opinion. Thus, Claimant proved that her work related injuries had aggravated her preexisting asymptomatic condition and that her employer was liable.

Claimant alleged that her employer was liable for past and future medical treatment. She admitted, however, that her employer provided treatment immediately after both accidents. She admitted that her employer never refused to provide any medical treatment. She admitted that she sought treatment on her own from her family physician for her back complaints and that her family doctor eventually referred her to Dr. Amundson who performed her surgeries.

Thus, Claimant chose to direct her own medical treatment. The statute allows the employee to select her own physician or treatment at her own expense. See §287.140.1 RSMo 1993. In addition, Missouri case law clearly provides that the employee has the right to employ her own physician at her own expense and that the employer is only liable for such treatment chosen by the employee if the employer had notice that the employee needed treatment and refused to provide it, or if a demand was made on the employer to furnish medical treatment and the employer refused or failed to provide it. Anderson v. Parrish, 472 S.W.2d 452 (Mo. App. 1971). As noted above Claimant chose to direct her own medical treatment. She never made demand upon her employer to provide medical treatment and her employer never refused to provide any such treatment. Thus, Claimant failed to prove her employer's liability for any past medical treatment.

Claimant did prove her employer's liability for future medical treatment. Dr. Amundson concluded on April 9, 1997, that Claimant would need additional medical treatment due to the injuries she sustained in the falls at work. Dr. Amundson indicated that Claimant would need follow-up visits with the doctor, physical therapy, rehabilitation, and medications. No evidence was offered which contradicted Dr. Amundson's opinion that Claimant would need additional medical treatment. Moreover, at the hearing six years after Dr. Amundson wrote his report, Claimant was still on medications due to her back pain and problems.

Thus, based on the most credible, competent medical evidence, Claimant proved her need for future medical treatment needed to cure and relieve her of the effects of the injuries she sustained in the falls at work. Claimant's employer is ordered to provide such treatment to Claimant for so long as she is in need of it to cure and relieve her of the effects of the injuries she sustained in the falls at work.

Finally, Claimant argued that she was rendered permanently and totally disabled due to the injuries she sustained in the two accidents at work on January 4 and June 11, 1993. Not only did she fail to prove that she was rendered permanently and totally disabled, she failed to prove the extent of any disability she sustained due to either accident.

As noted earlier, Missouri courts have clearly recognized that the employee has the burden of proving the extent of the disability she sustained in the accident at work. Griggs; Smith. Claimant failed to do so. In Claimant's case, she clearly has substantial disability. Claimant, however, did not offer a competent disability rating upon which an award could be based. As noted earlier, Dr. Amundson performed surgery on Claimant's back on November 8, 1995, and subsequently on January 29, 1997, he performed a fusion on her low back. He last examined Claimant on February 27, 1997. That was less than a month after the fusion. Thus, based on when he last examined Claimant he could not have known how well she recovered from the surgery, whether any disability resulted or the extent of any such disability.

Also, his report was dated April 9, 1997. That was a little over two months after Claimant's last surgery. The last surgery, as noted above was major and involved the insertion of rods in her low back. The hearing was held in May 2003. No updated report was offered or any evidence showing that Dr. Amundson had been apprised of Claimant's condition since February 1997 when he last examined her.

Dr. Amundson's April 9, 1997 report clearly indicated that Claimant had not reached maximum medical improvement when he wrote his report, and therefore, any opinion pertaining to permanent disability if one could be ascertained from his report was based on speculation, conjecture and surmise and did not constitute credible evidence of the extent of disability Claimant sustained in either accident. On page 3 of his April 9, 1997 report, Dr. Amundson stated that Claimant was not currently capable of returning to work and I expect her post-operative debility to approach one year. Thus, his report showed that Claimant's condition was not permanent and that he did not expect it to become so permanent for about one year.

Moreover, Dr. Amundson indicated in the April 9, 1997 report that "at the completion of rehabilitation, I would expect, if she returned to work, a sedentary to light category of ability. It is my opinion that at the present time due to the patient's age, two previous major lumbar surgeries and prolonged period of debility that she will probably not return to any gainful employment." That further showed that Claimant was still rehabilitating from her surgery when she wrote the report. Again, it showed that Claimant's condition was not permanent when he wrote the report.

In addition, the language in the report showed that contrary to Claimant's allegation the doctor was not offering an opinion that Claimant was permanently and totally disabled. At most, the report showed that the doctor believed that if Claimant returned to work it would be at a sedentary to light job. That does not constitute permanent total disability. Also, the report showed that the doctor believed that Claimant probably would not return to work based on her advanced age and the surgeries. Again, that did not mean that she could not return to work.

Furthermore, no testimony or statements were elicited from the doctor explaining what he meant by the statement that Claimant would probably not return to any gainful employment. Did he mean that although once her condition became permanent that she would probably be able to physically return to work but would probably choose not to do so due to her advanced age and injuries, or did he mean that she would probably physically be unable to return to work? Claimant chose not to get a clarification from the doctor as to what he meant by his statement made a little over two months after her major surgery.

Thus, the evidence clearly showed that Claimant failed to prove that she was rendered permanently and totally disabled. She also failed to prove the extent of any disability she may have sustained in either the January 4 or June 11, 1993 accidents. Claimant chose not to get a disability rating. No doctor concluded that she had sustained a certain amount of disability as a result of the injuries she sustained in the January 4, 1993 accident. No doctor concluded that she had sustained a certain amount of disability as a result of the injuries she sustained in the June 11, 1993 accident. Dr. Clymer who wrote the report for Claimant's employer concluded that she had

not sustained any disability from either accident.

Claimant also had the preexisting spinal stenosis. Missouri courts have held that when two events, one compensable and one not compensable, contribute to the alleged disability, it is claimant's burden to prove the nature and extent of the disability attributed to the job-related injury. Miller; Bersett v. National Super Markets, Inc., 808 S.W. 2d 34 (Mo. App. E.D. 1991). Missouri courts have held that the employee must offer expert testimony as to the extent of a preexisting disability in order to determine what percentage of permanent partial disability was attributable to the compensable job-related disability. Plaster v. Dayco Corp., 760 S.W. 2d 911 (Mo. App. S.D. 1988). Missouri courts have held that the failure to offer expert testimony regarding the percentage of disability derived from the compensable injury bars the claimant from recovering permanent partial disability benefits. *Id*; Goleman v. MCI Transporters, 844 S.W. 2d 463 (Mo. App. W.D. 1992).

Claimant offered no expert testimony as to the percentage of disability she sustained in either the January 4 or June 11, 1993 accidents. Thus, Claimant offered no medical evidence of any degree of certainty that she had sustained a certain amount of disability attributable to either accident. Absent pure speculation, conjecture and surmise it would be impossible to find that she had sustained any percent of disability as a result of either the January 4 or June 11, 1993 accidents. As noted above, the failure to offer expert testimony regarding the percentage of disability derived from a compensable injury bars the claimant from recovering permanent partial disability benefits.

Also, as noted above Missouri law clearly provides that an employee must offer expert testimony as to the extent of a preexisting disability in order to determine what percentage of disability was attributable to the compensable job-related disability. That becomes even more of an issue in an alleged permanent total disability case and particularly where the employee has sustained two injuries on the job. If the permanent total results from the last injury considered alone, the employer is liable for the permanent total disability benefits. See §287.220 (1) RSMo (1993). Thus, if Claimant was rendered permanently and totally disabled based on the disability she sustained in the June 11, 1993 accident considered alone, her employer would be liable for the permanent total disability benefits. No doctor rendered such a rating or conclusion.

More importantly, however, if the permanent total disability resulted from a combination of the disability from the last accident, in Claimant's case the June 11, 1993 injuries, and any preexisting disability such as that from either the January 4, 1993 accident or the spinal stenosis, the Second Injury Fund would be liable for the permanent total disability benefits. *Id*. Thus, Claimant clearly needed to prove the amount of disability caused by the last accident and the amount which preexisted. She did not do so. See also Boring v. Treasurer, 947 S.W.2d 483 (Mo.App. 1997); Reiner v. Treasurer, 837 S.W.2d 152 (Mo.App. 1997) where the Courts recognized that if the employee became permanently and totally disabled due to a combination of the disability sustained in the last accident and any preexisting disability, the Second Injury Fund and not the employer was liable for the permanent total disability benefits.

Again, Claimant offered no evidence as to the amount of disability caused by the last accident on June 11, 1993, or by the January 4, 1993 accident or by the spinal stenosis. Her failure to do so was further evidence of the lack of proof needed to prove liability of her employer for permanent partial or permanent total disability benefits.

Thus, in conclusion, Claimant offered no doctor's opinion, which supported her allegation that she was permanently and totally disabled. She offered no doctor's opinion that the June 11, 1993 accident in and of itself rendered her permanently and totally disabled. She offered no doctor's opinion as to how much disability she sustained in either the June 11, 1993 or the January 4, 1993 accidents. She offered no evidence as to whether the preexisting spinal stenosis had resulted in any disability. Claimant despite her two back surgeries simply offered no evidence to support an award of any permanent disability benefits as provided under Missouri law. She did, however, prove that her employer was liable for future medical treatment.

Date: _____

Kenneth J. Cain
Chief Administrative Law Judge
Division of Workers' Compensation

Made by: _____

A true copy: Attest:

Renee T. Slusher
Director
Division of Workers' Compensation