

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

Injury No.: 04-084192

Employee: Helen A. Trakas  
Employer: Angels On Duty (Settled)  
Insurer: Missouri Employers Mutual Insurance (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

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 reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 21, 2010. The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued December 21, 2010, 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 13<sup>th</sup> day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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

Attest:

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Secretary

Employee: Helen A. Trakas

### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be modified and employee should be awarded permanent total disability benefits against the Second Injury Fund.

First, there is no dispute that employee suffered an accident that arose out of and in the course of her employment on August 2, 2004, and that the injuries resulting from said accident combined with employee's preexisting disabilities to trigger Second Injury Fund liability. The issue is whether the combination of employee's primary injury and preexisting disabilities resulted in employee's permanent and total disability.

Permanent and total disability is defined by § 287.020.7 RSMo, as the "inability to return to any employment ...."

The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

*Gordon v. Tri-State Motor Transit Company*, 908 S.W.2d 849, 853 (Mo.App. 1995) (citations omitted).

The ALJ found that employee may be permanently and totally disabled, but not due to the combination of his primary injury with his preexisting disabilities. Instead, the ALJ found that if employee is permanently and totally disabled, it is due to post-accident degeneration of her preexisting conditions. Therefore, the ALJ only awarded enhanced permanent partial disability benefits against the Second Injury Fund and denied employee's claim for permanent total disability benefits. I find that the ALJ's conclusions are not supported by the competent and substantial evidence.

Employee had preexisting cervical spine problems dating back to the 1990s due to scoliosis and degenerative disc disease. Her cervical spine problems were exacerbated by a car accident. At times, employee's cervical spine problems prevented her from being able to move her head from side to side.

In addition to employee's preexisting cervical spine problems, employee also had preexisting lumbar spine problems dating back to the 1990s. In 2001, employee had a laminectomy and discectomy at L4-5 to address a disc herniation that was causing radiating pain and numbness. An MRI revealed that employee had a minimal disc bulge at L5-S1.

In 2004, the primary injury resulted in a new disc bulge at L4-5 and the L5-S1 bulge remained unchanged. Dr. Coyle performed a lumbar fusion at L4-5 and eventually released employee to return to work with light duty restrictions.

Employee: Helen A. Trakas

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Dr. Woiteshek opined that employee has failed back syndrome and imposed several restrictions, including no lifting over 3-5 pounds, no pushing, no pulling, and no climbing. Dr. Woiteshek also stated that employee cannot sit for very long and should rest in a recumbent position to alleviate her pain. Most of the restrictions given by Dr. Woiteshek are for employee's low back condition, but some are also for her neck. Dr. Woiteshek testified that the weight restrictions were attributable to her back and neck.

Employee's vocational expert, Ms. Gonzalez, relied on Dr. Woiteshek's opinions and believed that employee is permanently and totally disabled due to a combination of her preexisting disabilities and her disabilities flowing from the primary low back injury.

The Second Injury Fund's vocational expert, Mr. England, relied on Drs. Coyle and Berkin in concluding that employee could work a job in the sedentary category. I find that Mr. England's reliance on Dr. Coyle's opinions is misguided. Dr. Coyle's restrictions only considered employee's low back condition because he was never asked to offer an opinion considering employee's restrictions regarding his neck. In fact, Mr. England even conceded that if employee has to lie down during the day, as opined by Dr. Woiteshek, employee is probably unable to compete in the open labor market.

Ms. Gonzalez' opinion that employee is permanently and totally disabled due to a combination was based on Dr. Woiteshek's restrictions, which considered both employee's back and neck conditions.

The ALJ rendered Dr. Woiteshek's opinions not credible because his evaluation of employee considered her kidney disease and fibromyalgia. Although Dr. Woiteshek took into account employee's prior surgeries related to her kidney disease and prior diagnosis of fibromyalgia, the restrictions Dr. Woiteshek gave employee are only attributable to employee's preexisting neck and back conditions and the disability suffered in the primary injury. Therefore, I find that the ALJ erred in finding Dr. Woiteshek's opinions not credible.

The ALJ found that employee's preexisting cervical spine condition amounted to 15% permanent partial disability; but at the same time, the ALJ found that any restrictions relating to employee's neck are all due to post-accident degeneration. I find that the ALJ's reasoning is flawed and that the more credible medical and vocational evidence shows employee is permanently and totally disabled due to a combination of the restrictions related to her preexisting neck and back problems and the restrictions flowing from the primary back injury. As such, I would modify the award of the administrative law judge merely awarding employee permanent partial disability benefits and award employee permanent total disability benefits against the Second Injury Fund.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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Curtis E. Chick, Jr., Member

## AWARD

Employee: Helen A. Trakas

Injury No. 04-084192

Dependents: None

Employer: Angels On Duty (Settled)

Additional Party: Second Injury Fund

Insurer: Missouri Employers Mutual Insurance (Settled)

Hearing Date: September 15, 2010

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

Checked by: GCG/ch

### 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 2, 2004
5. State location where accident occurred or occupational disease was contracted: St. Charles 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 was lifting a wheelchair in the course and scope of her employment and injured her low back.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Lumbar spine at L4-5.
14. Nature and extent of any permanent disability: 40% of body as a whole at the lumbar spine.
15. Compensation paid to-date for temporary disability: \$4,540.46
16. Value necessary medical aid paid to date by employer/insurer? \$45,132.32

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$290.70
- 19. Weekly compensation rate: \$193.80 for PPD and total disability benefits
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable: (Settled)

22. Second Injury Fund liability: Yes

45 weeks of permanent partial disability from Second Injury Fund	\$8,721.00
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TOTAL:	\$8,721.00
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23. Future requirements awarded: None

Said payments to begin as of the date of this 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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Andrew Marty

Employee: Helen A. Trakas

Injury No. 04-084192

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Helen A. Trakas

Injury No: 04-084192

Dependents: None

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: Angels On Duty (Settled)

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party Second Injury Fund

Insurer: Missouri Employers Mutual Insurance (Settled)

Checked by: GCG/ch

### **PRELIMINARY STATEMENT**

Hearing on the above-referenced case was held before the undersigned Administrative Law Judge on September 15, 2010 at the Division of Workers' Compensation in St. Charles, Missouri. Helen A. Trakas (Claimant) was present, and represented by Andrew Marty. The liability of Angels on Duty (Employer) and Missouri Employers Mutual Ins. Co. (Insurer) was previously settled. Assistant Attorney General Tracey Cordia represented the Second Injury Fund. Mr. Marty requested a fee in the amount of 25%. The parties submitted post-trial briefs.

The parties entered into the following Stipulations:

1. On or about August 2, 2004, Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury to Claimant. The accident occurred in St. Charles County, Missouri.
2. Claimant was an employee of Employer, had an average weekly wage of \$290.70 that qualified Claimant for permanent partial disability (PPD) benefits at the rate of \$193.80 per week and temporary total disability (TTD) benefits at the rate of \$193.80.
3. Claimant filed her claim in a timely manner and Employer had received proper notice of Injury.
4. Employer has paid to date \$45,132.32 in medical expenses for care and treatment provided to Claimant.
5. Employer has paid to date \$4,540.46 in temporary total disability (TTD) benefits to Claimant in connection with this claim.
6. Venue is proper in St. Charles County.

The following issue was presented for resolution:

1. Liability of the Second Injury Fund (SIF).

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### **SUMMARY OF THE EVIDENCE**

Only evidence necessary to support this award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. Certain exhibits offered into evidence may contain handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were offered by the parties. Further, any such notes, markings and/or highlights had no impact on any ruling in this case.

Claimant offered the following exhibits, which were received into evidence without objection:

- Exhibit A: Deposition of Delores Gonzales;
- Exhibit B: Deposition of Dr. Dwight Woiteshek;
- Exhibit C: Division of Workers' Compensation records, certified;
- Exhibit D: Aquatic Fitness records;
- Exhibit E: Barnes Jewish Hospital;
- Exhibit F: Barnes Jewish Hospital records;
- Exhibit G: BJC – Washington University Pain Management Center records;
- Exhibit H: Dr. Srinivas Battula medical records;
- Exhibit I: Neurosurgery and Neurology medical records;
- Exhibit J: Dr. James Coyle, medical records;
- Exhibit K: Candice Grewing N.P., medical records;
- Exhibit L: Orthopedic & Sports Medicine, medical records;
- Exhibit M: Dr. Tatyana Petrosova, medical records;
- Exhibit N: Dr. Lisa Stanton, medical records;
- Exhibit O: Dr. Gary Vickar & Associates, medical records;
- Exhibit P: Tri-County Occupational, medical records;
- Exhibit Q: Medication list.

The Second Injury Fund offered the following exhibit which was received into evidence without objection:

- Exhibit Roman numeral I: Deposition of James England.

Claimant testified at the hearing. She testified she graduated high school in 1981 and completed a one-year degree in customer service public relations at Stephens College in 1983. She testified regarding her past and current medical condition, and her work injury of August 2, 2004.

Claimant gave a history of neck pain beginning in 1997 or 1998. She stated the pain became much worse after a car accident in 2001. She stated she had a bulging disc, reverse curvature of the cervical spine and bone spurs. She stated between the onset of pain in '97 or '98 and the accident, pain radiated from her neck, and sometime it would “lock up” causing her muscles to get tight and make it difficult to turn her head. Regarding her current complaints, she indicated she experiences pain in the center of her neck, with pain sometimes radiating into her

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right arm. She has decreased range of motion side to side, and cannot look up. She indicated the pain ranges from 2 to 7 on a scale of 0 – 10.

Claimant stated that she knew she had scoliosis. In 2000, Claimant was experiencing pain in her back which radiated down into her right leg mostly, but also into the left leg occasionally. She testified that sometimes her back would give out and she would fall. There was no traumatic event which caused the onset of her pain, it just happened over time. She was referred to Dr. Harry Cole, a neurosurgeon for treatment. She testified he diagnosed a herniated disk and advanced degenerative disk disease. In March 2000, Dr. Cole performed a laminectomy.

Claimant testified after recovery her back had improved for awhile, she still had pain, but it was better. The following Spring, she discovered she wasn't able to do the gardening or ride her bike like she had before the surgery. She also indicated other activities such as housework caused pain in her back. She was limited in doing certain chores around the house, and she couldn't bend over. Getting up also caused pain in her back.

In 2002, a friend recommended Angels on Duty to her, and she began working there. She testified she informed them about her back, and was told they would try to send her on jobs that did not require lifting. She described the job as "companionship", helping people change clothes, light housekeeping and preparing meals. Her first assignment was at the house of someone who had to be lifted, so she called the office, and they sent someone to help. During the course of her employment with Angels on Duty, she sometimes experienced pain in her back if she had to bend over to pick things up. She also testified that she would sometimes get sent to homes with patients who had to be lifted. She indicated that although it was against the rules, she would lie down during working hours two to three times a day if she had pain in her back.

On August 2, 2004 Claimant again injured her back lifting a wheelchair out of a car for a patient. She experienced pain in her back and down her right leg. She notified her employer, and was sent for medical treatment. She was referred to Dr. James Coyle for treatment. Dr. Coyle initially recommended conservative treatment and pain management, but ultimately performed surgery at L4-5. Claimant indicated this was the same level as her surgery in 2000, but Dr. Coyle performed a fusion.

After her surgery and period of recovery, she was released to return to light duty work. Claimant returned to work at Angels on Duty for a time, but felt they were "taking advantage" of her, and not giving her light duty, and left the employ of Angels on Duty.

In May 2006 Claimant began working at CitiMortgage as a mortgage processor. She testified that she sat in front of a computer and processed mortgages and verified that all the taxes were paid. She worked from 7:30 to 3:00. She stated that sitting caused pain in her back and into her leg, and the computer work would cause pain in her neck and into her shoulders. She testified when she got home after work, she would go straight to bed. She left that job in October 2006.

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Claimant testified she currently continues to have pain in her low back, which radiates into her legs, right more than left. Her pain, with medication, ranges from 3 to 6 on a scale of 0 – 10. She walks with a cane because sometimes her right leg or back gives out. She has limited range of motion in her back, and cannot bend over. She testified that on a good day she can walk around the block. She testified she can only sit 10 – 15 minutes before the onset of pain in her back and that driving more than 10 – 15 minutes also causes the onset of back pain.

After the August 2, 2004 work injury Claimant contacted Dr. Cole. Dr. Cole initially examined Claimant on August 11, 2004. Following examination, Dr. Cole felt her pattern of complaints suggested a disc herniation at L5-S1. An MRI performed on August 11, 2004 revealed a right paracentral disc herniation at L4-5 which was new since the 12/01 exam and MRI and the minimal disc bulge at L5-S1 remained unchanged. At a follow-up visit on August 16, 2004, Dr. Cole explained to Claimant that a right paracentral disc herniation at L4-5 was responsible for her current symptoms. He recommended surgery.

After Claimant's initial treatment with Dr. Cole, Employer/Insurer transferred authorized medical treatment to Dr. James Coyle. Dr. Coyle began to treat Claimant on August 30, 2004. Concerning Claimant's medical history, Dr. Coyle noted the prior bilateral L4-5 laminectomy and discectomy surgery in March of 2000. Post-operatively Claimant had some problems and a follow-up MRI in December 2001 revealed a disc bulge at L4-5 with no significant nerve root impingement. Review of the August 11, 2004 MRI showed a disc herniation that was not present on the December 2001 MRI. It was Dr. Coyle's opinion that Claimant's work activities on August 2, 2004 were a substantial contributing factor of her current symptoms.

Before considering a surgical solution, Dr. Coyle ordered physical therapy and steroid injections. Dr. Coyle felt if surgery was necessary he would recommend a fusion because of her prior bilateral laminectomy and subsequent recurrent disc herniation. Conservative treatment improved her condition somewhat so Dr. Coyle referred Claimant to physiatrist, Dr. James Doll.

Dr. James T. Doll provided Claimant with non-operative management of her symptoms in October 2004. His treatment consisted of a lumbar epidural steroid injection, a home exercise regimen, physical therapy and aquatic therapy. Dr. Doll's initial evaluation of Claimant on October 13, 2004 recounted the episode at Angels on Duty when she felt a sudden onset of increased low back pain, which radiated down her right leg. He noted that these symptoms were made worse by sitting, standing, bending, lifting, twisting, coughing and sneezing. Lying flat improved her symptoms. Following treatment with Dr. Doll, Claimant returned to Dr. Coyle reporting progressively worsening symptoms, including her leg giving out on her, and symptoms in the right lower extremity. At this point, Dr. Coyle recommended surgery.

Dr. Coyle admitted Claimant to St. John's Mercy Medical Center on December 1, 2004 with a history of a prior L4-5 bilateral laminectomy and discectomy in March of 2000 and a recurrent disc injury occurring on August 2, 2004. On December 2, 2004, Dr. Coyle noted a preoperative diagnosis of recurrent L4-5 lumbar disc herniation with instability. Dr. Coyle performed an anterior lumbar discectomy at L4-5 with anterior lumbar inter-body fusion using left posterior iliac crest autogenous bone graft.

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Six weeks post operatively, Dr. Coyle resumed physical therapy and Claimant participated in a total of twenty-five (25) physical therapy sessions at Aquatic Fitness, Inc. On August 23, 2005 Dr. Coyle assessed a permanent lifting restriction of 20 pounds and assessed her permanent disability at 20% of her lumbar spine with ten percent of that attributable to her prior lumbar surgery. Dr. Coyle did not address Claimant's neck or other medical conditions.

Dr. Shawn Berkin conducted an independent medical evaluation on September 16, 2005 at the request of her attorney at the time. Dr. Berkin took a history, performed a medical exam, and reviewed medical records regarding treatment of the primary back injury and the preexisting back and neck conditions. Following examination Dr. Berkin found 40% permanent partial disability to the lumbar spine in reference to the August 2004 injury with 25% preexisting, and 15% permanent partial disability to the cervical spine preexisting. Dr. Berkin recommended that Claimant avoid excessive squatting, kneeling, stooping, turning, twisting, lifting and climbing. He also recommended that she have a twenty (20) pound lifting restriction from the floor to her waist and a ten (10) pound lifting restriction from her waist to shoulder level. He believed that if she were required to perform exertional activities for an extended period of time that she is permitted frequent breaks.

Dr. Ronald Hoffman performed an independent medical evaluation on February 7, 2006 at the request of Claimant's attorney at the time. Dr. Hoffman took a history, performed a medical exam, and reviewed medical records regarding treatment of the primary back injury and the preexisting back and neck conditions. Dr. Hoffman assessed 60% permanent partial disability to the lumbar spine relative to the August 2, 2004 work related injury and with 25% of the lumbar spine and 15% of the cervical spine preexisting.

Dr. Coyle reevaluated her again on May 2, 2007. At that time Claimant complained of pain across her back with radiating pain into her right thigh. She reported that her complaints were a continuum of symptoms since the time of her original injury. Dr. Coyle ordered a CT myelogram.

Claimant returned to Dr. Coyle on May 22, 2007. Dr. Coyle informed Claimant that the CT myelogram did not show evidence of pseudoarthrosis or nerve root compression at the site of her fusion. However, it did show scoliosis and a disc protrusion at L5-S1. In a letter dated June 25, 2007, Dr. Coyle reported that the CT findings at L5-S1 were not related to her work injury. He felt she remained at MMI and needed no further medical treatment.

An MRI of the total spine performed on May 28, 2008 showed a posterior disc bulge present at C4-5, a small focal central disc protrusion with associated deformity of the spinal cord and a posterior disc bulge at L5-S1 as well as disc desiccation with annular tear.

Dr. Dwight Woiteshek evaluated claimant on one occasion on November 24, 2009. Medical conditions that Dr. Woiteshek diagnosed as preexisting the 2004 injury included the L4-L5 disc requiring surgery in 2000; the degenerative disc disease in the cervical spine; fibromyalgia; left flank pain from her congenital kidney disease known as hydronephrosis. Concerning disability opinions, Dr. Woiteshek testified that, based on a reasonable degree of medical certainty, Claimant suffered a 20% permanent partial disability to the lumbar spine due

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to the L4-L5 disc requiring surgery in 2000, 20% permanent partial disability to the cervical spine due to degenerative changes found on MRI; 20% permanent partial disability of the body as a whole in reference to fibromyalgia; and, 30% permanent partial disability to the body as a whole in reference to her chronic flank pain secondary to her congenital kidney disease.

Dr. Woiteshek testified that Claimant was permanently and totally disabled as the result of her last injury on August 2, 2004 in combination with her preexisting conditions. Restrictions Dr. Woiteshek imposed were to avoid all bending, twisting, lifting, pushing, pulling, carrying, and climbing. A weight restriction of three (3) to five (5) pounds and no weight overhead. She is to avoid remaining in a fixed position for longer than twenty (20) to thirty (30) minutes at a time, both sitting and standing. She should change her posture frequently to maximize comfort and rest in a recumbent fashion when needed.

Ms. Delores Gonzalez, a vocational rehabilitation counselor, testified on behalf of Claimant by deposition. Ms. Gonzalez interviewed Claimant, performed vocational testing, and reviewed medical records including the records and reports of Dr. Coyle, Dr. Berkin, Dr. Hoffman, and Dr. Woiteshek. Ms. Gonzalez opined Claimant is permanently and totally disabled, and unable to compete in the open labor market. In reaching this conclusion, Ms. Gonzalez adopts the restrictions and the ultimate assessment of permanent total disability provided by Dr. Woiteshek, specifically that Claimant be able to lay down whenever necessary.

Mr. James England, a vocational rehabilitation counselor, testified on behalf of SIF. Mr. England reviewed medical records and reports, the deposition testimony of Claimant, the deposition and report of Ms. Gonzalez, and the deposition of Dr. Woiteshek. Mr. England opined that taking into account the restrictions suggested by Dr. Coyle and Dr. Berkin, there would still be opportunities for employment. Alternatively, if you took into account Dr. Woiteshek's restriction that Claimant needs to lie down throughout the day, then she would be permanently and totally disabled.

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

Based on the competent and substantial evidence presented, including the testimony of Claimant, my personal observations, expert medical and vocational testimony, and all other exhibits received into evidence, I find:

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also *Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo.1968); *McCoy v. Simpson*, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing *Cook v. Sunnen Prods. Corp.*, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)). However, the employee must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995); *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1974).

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## PERMANENT TOTAL DISABILITY

Claimant suffered a work related injury on August 2, 2004. The injury resulted in a herniated disc at L4-5 which required a surgical fusion to cure and relieve the effects of the injury. Based on the testimony of Claimant, the medical evidence, and other evidence, including but not limited to the stipulation for compromise settlement, I find Claimant suffered a permanent partial disability of 40% of the body as a whole referable to the lumbar spine at L4-5 as a result of the injury of August 2, 2004. This injury is not totally disabling in and of itself.

In computing permanent and total disability in the situation where claimant suffers from a previous disability, the ALJ ... first determines the degree of disability as a result of the last injury. *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo.App. E.D. 1995). The ALJ ... then determines “the degree or percentage of employee's disability that is attributable to *all injuries or conditions existing at the time the last injury was sustained...*” § 287.220.1, RSMo. Cases have repeatedly held the nature and extent of the preexisting disability is measured as of the date of the primary injury. See, i.e. *Gassen v. Lienbengood* 134 S.W.3d 75, 80 -81 (Mo.App. W.D.,2004), citing *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo.App.1997); and § 287.220.1. (“In order to calculate Fund liability, the [fact finder] must determine the percentage of the disability that can be attributed solely to the preexisting condition *at the time of the last injury.*”) [T]he claimant must establish that an actual or measurable disability existed at this time. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App.1999 *Id*; see also *Tidwell v. Kloster Co.*, 8 S.W.3d 585, 589 (Mo.App. 1999).

Regarding Claimant’s kidney disease and treatment, Claimant did not offer any testimony at hearing regarding its symptoms or effects on her ability to work. Dr. Berkin and Dr. Hoffman, both of whom examined Claimant and offered opinions on her own behalf didn’t identify any disability pertaining to the kidney disease. Dr. Woiteshek, who did rate it as a preexisting disability, conceded on cross examination that at the time of his exam, the condition was just being monitored. Further, he did specifically designate how it affected her ability to work. There is no factual basis to determine the effect of the Claimant’s kidney disease.

Regarding the fibromyalgia, Claimant did not offer any testimony at hearing regarding its symptoms or effects on her ability to work. Further, the only medical evidence provided was Dr. Woiteshek’s rating. He did not indicate how it affected her in August, 2004. In fact, he indicated it was not diagnosed until 2009. In the absence of any evidence of how the fibromyalgia affected Claimant on August 2, 2004, there is not a sufficient factual basis to consider this condition in a disability determination.

The evidence demonstrates Claimant’s neck injury had worsened by the time of Dr. Woiteshek’s exam and rating in 2009 and the hearing in 2010. In March 2004, Dr. Cole opined Claimant had a degenerative condition in her neck. An MRI on March 9, 2004 showed no evidence of disc herniation, bulging, or protrusions according to the radiologist who read the study and wrote a report. Dr. Cole indicated he thought there was minimal bulging at the C5-6 level. However, an MRI performed on May 28, 2008 indicated there was again no bulge at C5-6, but that now a disc bulge existed at C4-5. This objective evidence indicates Claimant had

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minimal or no disc irregularity in the cervical spine at the time of the work injury, but that the degenerative condition progressed over time to worsen her condition at the time of Dr. Woiteshek's exam. Based on the competent and substantial evidence presented, I find that at the time of the August 2, 2004 work injury, Claimant had a 15% permanent partial disability to the cervical spine. This finding takes into account the testimony of Claimant, the medical records and objective tests in evidence, and the opinions of the rating physicians.

The evidence demonstrates that injury to Claimant's disc at L5-S1 arose after August 2, 2004 and is unrelated to the primary work injury. There are several MRI studies of the lumbar spine contained in the record. These studies show a slow progression from no abnormality in 2000, to a disc herniation at L5-S1 in November 2009. Dr. Woiteshek opines that the injury to L5-S1 is a result of the 2004 work injury. The objective evidence shows the deterioration from a disc bulge in 2004, to a disc protrusion in 2007, to an annular tear in 2008, and finally a disc herniation in 2009. Dr. Woiteshek himself concedes that the disc herniation is a new finding in November, 2009. This progression is more consistent with degenerative disc disease, and Dr. Coyle's opinion that the condition is unrelated to the work injury is more credible. Therefore the injury at L5-S1 is subsequent to the primary work injury of August 2, 2004. Additionally, it had progressively worsened from the time of diagnosis to the time of Dr. Woiteshek's exam and report in November 2009.

Claimant had a preexisting injury to the lumbar spine at L4-5. Based on the competent and substantial evidence presented, I find that at the time of the August 2, 2004 work injury, Claimant had a 20% permanent partial disability to the lumbar spine at L4-5. This finding takes into account the testimony of Claimant, the medical records and objective tests in evidence, and the opinions of the rating physicians.

Dr. Woiteshek, in his opinion that Claimant is permanently and totally disabled, takes into account the primary injury, but also includes kidney disease, fibromyalgia, the cervical spine and the disc herniation at L5-S1. Since he takes into account conditions that are not preexisting and the subsequent worsening of the cervical spine, his opinion that Claimant is permanently and totally disabled is not credible. Claimant may be permanently and totally disabled at the time of his examination in November 2009 based on the progressive worsening of her degenerative conditions and the additional injury to the disc at L5-S1, but the relevant inquiry is the nature and extent of Claimant's preexisting disability as of August 4, 2004, not as of any subsequent time, such as the date of hearing.

To the extent that Ms. Gonzalez' opinion is based primarily on the opinion of Dr. Woiteshek, her opinion is also not credible. Claimant did in fact return to light duty work in 2005 at Angels on Duty after the work injury, and left because she felt she was not being given light duty. A functional capacity exam in 2005 indicated she could perform light to medium work. Ms. Gonzalez based her opinion on Claimant's condition in 2009, not 2004, as she conceded it was based on the medical opinion of Dr. Woiteshek. The opinion of Mr. England is more credible.

Employee: Helen A. Trakas

Injury No. 04-084192

Claimant has failed to meet her burden of proof that she is permanently and totally disabled as a result of the combination of the August 4, 2004 work injury and her preexisting injuries.

### **SIF LIABILITY**

Claimant has met her burden of proof regarding SIF liability for permanent partial disability. Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

1. Claimant sustained a compensable last injury which resulted in permanent partial disability equivalent to 40% of the lumbar spine at L4-5 (160 weeks).
2. As of the time the last injury was sustained, Claimant had the following preexisting permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:
  - a. 15% of the cervical spine. (60 weeks).
  - b. 20% of the lumbar spine at L4-5. (80 weeks).

Although the preexisting lumbar spine and the primary work injury occurred at the same level, there is a synergistic effect since after the work injury Claimant began to experience increased radicular symptoms in the left leg and foot drop in the right foot.

Total weeks for preexisting disabilities: 140

3. The credible evidence establishes that the last injury, combined with the preexisting permanent partial disabilities, causes 15% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 160 weeks for last injury + 140 weeks for preexisting injuries = 300 weeks x 15% = 45 weeks of overall greater disability.

The Second Injury Fund is liable to Claimant for \$8,721.00 in permanent partial disability benefits.

Employee: Helen A. Trakas

Injury No. 04-084192

Attorney Andrew Marty is entitled to a lien in the amount of 25% of all sums recovered as and for attorney fees for necessary legal services provided.

Made by: /s/ GRANT C. GORMAN  
Grant C. Gorman  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

This award is dated and attested to this 21st day of December, 2010.

/s/ NAOMI PEARSON  
Naomi Pearson  
*Division of Workers' Compensation*