

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

Injury No.: 02-055824

Employee: Linda Tubb  
Employer: Daimler Chrysler Corporation (Settled)  
Insurer: Self-Insured (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: May 28, 2002  
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs of the parties, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated December 28, 2004. The award and decision of Administrative Law Judge Matthew D. Vacca is attached hereto solely for reference.

#### Preliminaries

Employee, now 56 years old, began working on the assembly line at Chrysler in 1995. On May 28, 2002, employee experienced a burning sensation in her back while working, which she alleges has resulted in chronic, permanent thoracic pain. Employee worked for employer until August 16, 2002, on which date she resigned. Employee has not worked since that time. Employee alleges she is permanently and totally disabled.

Employee filed claims against the employer and the Second Injury Fund. Employee and employer entered into a Stipulation for Compromise Settlement to resolve their disputes regarding the primary injury, compromising the matter for payment of 12.5% permanent partial disability of the body as a whole. The case proceeded to trial against the Second Injury Fund.

The administrative law judge determined that employee did not sustain an occupational disease that arose out of and in the course of her employment with employer. He concluded employee suffered from ordinary diseases of life -- rheumatoid arthritis, fibromyalgia, and a severely osteoarthritic and degenerated spine -- that were not caused by work and from which many people suffer in their non-work lives.

#### Issue Presented

The only issue in dispute is the nature and extent of Second Injury Fund liability.

#### Findings of Fact

##### Accident and Treatment

Employee described the mechanism of her primary injury. On May 28, 2002, she was working as a floater. In the morning, she was working on a tow-bar job, which involved lifting heavy tow bars from a rack with a co-worker. Employee experienced a grinding sensation in her back followed by a burning sensation. In the afternoon, employee was performing tailpipe assembly, which also involved lifting. By the end of her shift, employee was experiencing muscle spasms in her back, difficulty breathing, and a burning pain in her mid-back unlike any pain she had experienced before.

On June 7, 2002, employee began treatment with Howard Berman, M.D. During this same period, she received chiropractic care. Dr. Berman is now deceased. Dr. Berman requested an MRI, which revealed a disc protrusion at T7-8. Dr. Berman originally took employee off work. On June 19, 2002, he released employee to work with limitations of restricted bending and lifting. Dr. Berman treated employee with trigger point injections and pain

medication. While still under the care of Dr. Berman, employee stopped working August 16, 2002, because she was no longer able to physically tolerate her work.

In March 2003, employee presented to Heidi Prather, D.O., with complaints of mid-thoracic pain. An April 3, 2003, MRI revealed multi-level disc degeneration and very small disc protrusions at T5-6, T7-8, T9-10 and T10-11. Dr. Prater treated employee with injections.

Employee currently suffers from constant mid-back pain at a level of five to 10 on a scale from zero to 10. Her mid-back complaints worsen when she performs activities with her arms extended from her torso such as playing the piano, cooking, sweeping, mopping or driving. Employee has difficulty sleeping. She is unable to efficiently perform household chores. After performing any activity, employee must recline for a time to recover. Employee must descend stairs backwards and she is unable to walk up an incline.

#### Preexisting Conditions

In 1999, employee suffered a torn medial meniscus in her left knee stepping off a ladder at home. After conservative care failed, employee had knee surgery in April 2001. Employee continued to have pain in her knee post-surgery. In particular, as her work shift wore on, employee's knee became increasingly more painful and she experienced significant pain going up and down steps. Walking and standing at work caused employee problems and she was unable to kneel or crawl. Employee attempted to manage her pain with Ibuprofen. Dr. Ritchie identified standing on a concrete floor during work as a factor in employee's knee pain and he noted that employee's knee pain subsided when she was not working. Dr. Ritchie, her treating surgeon, recommended job modification to ease her symptoms. Dr. Ritchie continued to treat employee's knee pain with injections at least into 2004. He believes employee will ultimately need a total knee replacement.

Claimant developed carpal tunnel syndrome in late 1999, for which employer provided treatment including surgical releases. At the conclusion of her treatment, her treating surgeon, Dr. Kendall, believed that employee suffered permanent partial disability of each wrist. He released employee to work with a recommendation that she wear padded gloves. Employee testified regarding her residual upper extremity problems after the releases. She experienced stiffness and loss of grip strength in her hands. She wore wrist braces at work but still had difficulty gripping items. Employee used her break periods to stretch and treat her hands. Employee is unable to perform activities requiring gripping such as lifting a skillet with one hand or opening a jar.

#### Expert Opinions

Thomas F. Musich, M.D., reviewed an extensive collection of employee's medical records. He examined employee on May 10, 2004, taking a complete history and recording employee's medical complaints. Dr. Musich believes that employee developed a significant mid thoracic pain in May 2002, during the course and scope of her employment as a floater for employer. After reviewing employee's history and medical records, Dr. Musich is of the medical opinion that employee's work for employer in May 2002 is a substantial factor in employee's development of mid thoracic pain, which has resulted in constant pain due to multilevel disc protrusions, chronic myofascial pain, and neurogenic pain. Dr. Musich is of the opinion that employee suffers a permanent partial disability of 40% of the body as a whole referable to her mid thoracic pain (160 weeks). He is also of the opinion that employee suffered preexisting permanent partial disabilities of 30% of the left knee (48 weeks) and 30% of each wrist at the level of the wrist (52.5 weeks each). Dr. Musich believes that the combination of employee's past and present disabilities is significantly greater than their simple sum.

Dr. Musich would impose restrictions of occasional lifting of no more than 15 pounds, occasional bending and stooping; no squatting and climbing; no repetitive gripping, grasping, or holding objects with either hand; no prolonged sitting; standing a total of six hours daily if she is allowed frequent rest periods and the ability to frequently move or walk at her discretion in order to relieve her chronic pain symptoms. Dr. Musich believes it would be very difficult for employee to obtain and maintain any gainful employment in the open job market.

Dr. Berman evaluated employee and issued a disability report on February 20, 2003. His disability report was admitted without objection. Dr. Berman believed that employee suffered a work injury to her thoracic spine by repetitive trauma in her work as a floater for employer. Dr. Berman believed employee suffers a 25% permanent partial disability of the body as a whole at the level of the thoracic spine, of which he apportioned 20% to the primary injury and 5% to preexisting spinal degeneration. Dr. Berman also believed employee suffered a 10%

permanent partial disability of the body as a whole referable to the lumbar spine and apportioned 7.5% to the primary injury and 2.5% to preexisting spinal degeneration. Dr. Berman opined employee suffered a preexisting 15% permanent partial disability at the level of each wrist with a 10% load factor due to the bilateral nature of the wrist disabilities. Dr. Berman determined that the combination of employee's past and present disabilities is significantly greater than their simple sum.

Michael O'Day, D.O., evaluated employee for Social Security purposes on November 3, 2003. His report was admitted without objection. Dr. O'Day recommended restrictions for employee on lifting (15 to 20 pound occasional), standing, walking, sitting, bending, and stooping. He recommended no crouching or squatting for employee. He noted a decrement in grip strength.

James England, vocational expert, evaluated employee on March 31, 2004, after reviewing her medical records. Mr. England summarized employee's vocational history noting that most of her jobs required significant use of her upper extremities. He also noted that her most recent employment involved being on her feet all day and lifting 20-40 pounds. Mr. England considered the physical restrictions imposed by Drs. Musich and O'Day. Mr. England believed that the lifting restrictions would eliminate employee from most light duty jobs. Mr. England believed the restriction on repetitive upper extremity work would limit employee to less than a full range of even sedentary work. In light of her advanced age, extremity-intensive work history, obesity, and physical restrictions, Mr. England does not believe employee is employable in the open labor market.

## Conclusions of Law

### Accident

The administrative law judge ruled that employee "did not sustain an occupational disease that arose out of and in the course of employment at Chrysler." However, the occurrence or non-occurrence of an occupational disease was not stipulated as an issue for trial. Rather, the parties stipulated to the occurrence of an accident arising out of and in the course of employment on May 28, 2002. The Second Injury Fund concedes accident in its brief.

Workers' compensation hearings are conducted in accord with 8 CSR 50-2.010 (14), which provides, in relevant part:

Hearings before the division shall be simple, informal proceedings. The rules of evidence for civil cases in the state of Missouri shall apply. Prior to hearing, the parties shall stipulate uncontested facts and present evidence only on contested issues.

The question of the scope of an award was addressed by our appellate courts in *Boyer v. National Express Company*, 49 S.W.3d 700 (Mo. App. 2001). The *Boyer* court:

[T]he administrative law judge should confine the evidence during the hearing to the stated contested issues...Stipulations are controlling and conclusive, and the courts are bound to enforce them...A stipulation should be interpreted in view of the result, which the parties were attempting to accomplish...In *Lawson*, our colleagues in the Southern District concluded that the Commission acted in excess of its powers in making its award on grounds not in issue. *Lawson v. Emerson Electric Company*, 809 S.W.2d at 126.

*Boyer*, 49 S.W.3d at 705.

Pursuant to the foregoing authority, the administrative law judge erred in issuing a ruling contrary to the stipulation of the parties. As stipulated by the parties, employee sustained an accident arising out of and in the course of her employment on May 28, 2002. We note the stipulation is consistent both with Dr. Berman's opinion that employee's condition was caused by repetitive trauma and with controlling case law. <sup>[1]</sup>

### Causation

Both the testimony of Dr. Musich and the report of Dr. Berman causally connect employee's thoracic spine pain to her work as a floater for employer on May 28, 2002. The Second Injury Fund offered no evidence to the contrary. The Commission may not substitute an administrative law judge's personal opinion on the question of medical causation for the uncontradicted testimony of qualified medical experts. *Wright v. Sports Associated*, 887 S.W.2d

596, 600 (Mo. banc 1994).

The evidence of preexisting disc degeneration in employee's spine does not preclude a finding of medical causation. "As a general rule, disability sustained by the aggravation of a preexisting nondisabling condition or disease caused by a work-related accident is compensable..." *Kelley v. Banta & Stude Constr. Co.*, 1 S.W.3d 43, 48 (Mo. App. 1999).

Based upon the uncontradicted opinions of the medical experts, we conclude that the accident of May 28, 2002, caused employee's thoracic spine condition.

### Second Injury Fund Liability

#### *Generally*

"Section 287.220 creates the Second Injury Fund and sets forth when and the amount of compensation that shall be paid from the fund in 'all cases of permanent disability where there has been previous disability.'" *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000) (citations omitted). "In order to be entitled to Fund liability, the claimant must establish either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself." *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo. App. 2004) citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo. App. 2001).

#### *Preexisting measurable permanent disability*

"Liability of the Second Injury Fund is triggered only 'by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.'" *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo. App. 2002), citing *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 215 (Mo. App. 1999). Both medical experts who evaluated employee, Drs. Musich and Berman, concluded employee suffered preexisting measurable permanent partial disabilities as set forth above. Dr. Musich found permanent partial disability of 30% of the left knee and 30% of each wrist. Dr. Berman found permanent partial disability of 5% of the body as a whole referable to the thoracic spine, 2.5% of the body as a whole referable to the lumbar spine, 15% at the level of each wrist with a multiplicity.

We find that employee has proven preexisting measurable disabilities.

#### *Hindrance or Obstacle*

To trigger Second Injury Fund liability, the preexisting disability must also be of such seriousness as to constitute a hindrance or obstacle to employment. *Section 287.220.1 RSMo*. "To determine whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, 'the Commission should focus on the potential that the pre-existing injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there was no such prior condition.'" *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo. App. 2002), citing *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997).

Employee described the ways in which her preexisting knee and wrist problems affected her work. Dr. Musich concluded that the preexisting disabilities were a hindrance or obstacle to employment or re-employment. Drs. Berman, Musich, Kendall, and O'Day all confirmed employee's complaints of a loss of grip strength. Dr. Ritchie believed a job modification would ease employee's knee problems. Mr. England specifically highlighted employee's upper extremity limitations as an obstacle to her reemployment as most of her employment history involved upper extremity intensive work. Mr. England described how employee's knee and wrist problems combine with her thoracic condition to eliminate her from consideration for all levels of work exertion.

The Second Injury Fund simply offered no testimony to rebut the above body of evidence. We find that employee has proven her preexisting knee and wrist problems were a hindrance or obstacle to her employment or re-employment.

#### *Determination of Liability*

Sec. 287.220.1 RSMo and the case of *Kizior v. TWA*, 5 S.W.3d 195, 200 (Mo. App. 1999), set forth the proper method for determining the compensation due employee and from what source:

1. We determine the employer's liability in isolation (*disability from the last injury alone*).
2. We determine the employee's overall disability (*combined total disability*).
3. We determine employee's preexisting disability (*preexisting disability*) and add it to the disability from the last injury alone to determine the *simple sum disability*.
4. We subtract the *simple sum disability* from the *combined total disability* and the resulting difference is the responsibility of the Second Injury Fund.

#### Step One -- Last Injury Alone

[W]here a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). If the compensation to which the employee is entitled for the new injury is less than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. § 287.220.1.

*Vaught v. Vaughns, Inc./Southern Mo. Constr.*, 938 S.W.2d 931, 939 (Mo. App. 1997) (citations omitted).

The Second Injury Fund argues that the primary injury alone rendered employee permanently and totally disabled. The Second Injury Fund asserts that employee was able to work full-time without restriction due to her preexisting conditions. We find credible employee's testimony that she had to modify the manner in which she performed her job duties due to the preexisting conditions. Although employee was operating under no explicit physician restrictions, she modified the way she worked to accommodate her knee and wrist conditions.

No witness offered an opinion that employee was rendered permanently and totally disabled by the last injury alone. Dr. Musich testified employee was unable to compete in the open labor market due to a combination of her disability from the primary injury and her preexisting disability. The report of Dr. Berman is in accord. The Second Injury Fund offered no expert medical evidence to contradict or impeach the expert medical opinions of Drs. Musich and Berman. We conclude that employee was rendered permanently and totally disabled by the combination of her disability from the primary injury with her preexisting disabilities.

We are persuaded by Dr. Musich's opinion that employee suffered a 40% permanent partial disability of the body as a whole referable to her lumbar and thoracic spines. Pursuant to § 287.190 RSMo, 160 weeks of permanent partial disability (400 X 40%) is attributable to the primary back injury.

#### Step Two -- Combined Total Disability

As discussed above, employee is permanently and totally disabled. Employee was last able to work on August 16, 2002. Her permanent total disability began August 17, 2002.

#### Step Three -- Preexisting Disability

"The nature and extent of the permanent-partial preexisting condition must be proven by a reasonable degree of certainty. Expert opinion evidence is necessary to prove the extent of the preexisting disability." *Messex*, 989 S.W.2d at 215 (citations omitted). We find credible the testimony of Dr. Musich, based upon a reasonable degree of medical certainty, that employee suffered a preexisting disability of 30% permanent partial disability of the left knee due to the medial meniscus tear and a preexisting disability of 30% of each upper extremity at the level of the wrist.

#### Step Four -- Second Injury Fund Liability

Claimant's combined total disability is permanent total disability. This significantly exceeds 313 weeks, which is the sum of the preexisting disabilities (153 weeks) and the disability from the last injury alone (160 weeks). The Second Injury Fund is liable for the balance of the employee's disability -- permanent total disability -- after the expiration of the permanent partial disability period attributable to the last injury alone.

Accordingly, the Second Injury Fund is liable to employee for \$299.48 per week -- the difference between the

permanent total disability rate of \$628.90 and the permanent partial disability rate of \$329.42 -- for 160 weeks beginning August 17, 2002. Thereafter, the Second Injury Fund is liable to employee for \$628.90 weekly for her lifetime, or until modified by law. [2]

#### Award

We reverse the award of the administrative law judge on the issue of accident/occupational disease. As stipulated, employee sustained an accident arising out of and in the course of her employment.

We reverse the award of the administrative law judge denying the claim against the Second Injury Fund. The Second Injury Fund is liable for permanent total disability benefits as set forth above.

Mr. Todd Muchnick, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 30<sup>th</sup> day of March 2006.

#### LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

#### DISSENTING OPINION FILED

Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

#### DISSENTING OPINION

I must respectfully dissent from the award and decision of the majority of this Commission reversing the award and decision of the administrative law judge. I would modify the award and decision of the administrative law judge.

I concur with the majority of the Commission that the administrative law judge erred in failing to find that an accident occurred on May 28, 2002. The Second Injury Fund concedes this point. The Second Injury Fund argues that employee has failed to prove that the accident caused her disability. "A claimant must not only show causation between the accident and the injury but also that a disability resulted and the extent of such disability." *Goleman v. MCI Transporters*, 844 S.W.2d 463, 465 (Mo. App. 1992), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).

I agree with the administrative law judge's finding that employee suffers from multiple ordinary diseases of life including obesity, fibromyalgia, osteoarthritis, and degeneration of her spine. I agree with the administrative law judge that these conditions are causing employee's chronic thoracic pain, and the resultant disability. Based upon the foregoing, I conclude that employee has not proven a causal connection between the accident of May 28, 2002, and her ongoing back complaints. I would modify the award and decision of the administrative law judge as explained above and deny compensation in this matter.

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

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Alice A. Bartlett, Member

## AWARD

Employee: Linda Tubb Injury No.: 02-055824  
Dependents: N/A Before the  
Employer: Daimler Chrysler Corporation (Settled) Division of Workers'  
Additional Party: Department of Labor and Industrial Compensation  
Insurer: Self-Insured (Settled) Second Injury Fund Relations of Missouri  
Hearing Date: September 28, 2004 Jefferson City, Missouri  
Checked by: MDV:tr

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
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? No
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: N/A
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: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Linda Tubb Injury No.: 02-055824

- 17. Value necessary medical aid not furnished by employer/insurer? -0-
- 18. Employee's average weekly wages: \$1,020.54
- 19. Weekly compensation rate: Maximum
- 20. Method wages computation: Agreed

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: None

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Linda Tubb

Injury No.: 02-055824

Dependents: N/A

Employer: Daimler Chrysler Corporation (Settled)

Before the  
Division of Workers'  
Compensation  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Self-Insured (Settled)

Checked by: MDV:tr

### PREFACE

Claimant quit her job on the Chrysler assembly line and applied for social security disability benefits, which were granted. She also filed a workers' compensation claim against Chrysler for a diseased spine. No benefits were paid but the claim was eventually compromised for a payment of \$16,500.00. She also filed a claim against the Second Injury Fund for \$628.90 per week for life. She is 53 years old.

### FINDINGS OF FACT

1. Claimant worked on the assembly line at Chrysler, the last five years as a floater. As a floater, she would perform the jobs of people who were on vacation or called in sick. Thus, Claimant did a lot of different jobs there, not one repetitious job.
2. Claimant alleges her thoracic spine became diseased as a result of and while working at Chrysler on the assembly line.
3. Claimant does have a small arthritic disc bulge at T7-8, not operable and several other degenerative changes. Claimant alleges these were caused by her Chrysler job. Employer did not pay any time off or medical treatment for the arthritic back. Claimant settled her primary claim against Daimler Chrysler for 12 ½% of the thoracic spine.
4. Preexisting this claim she had bilateral carpal tunnel syndrome that she settled against Chrysler for 15% of each upper extremity and a loading factor of 10%.
5. Claimant has suffered from longstanding and continuous arthritic upper back pain and a severely degenerated spine. Injections to reduce the arthritis at the thoracic level have been unsuccessful.
6. Prior to this claim Claimant had a left knee injury involving arthroscopic surgery. Claimant had torn her medial meniscus and it was repaired. Claimant returned to work very quickly following the March 2001 left knee torn meniscus surgery.
7. Claimant is morbidly obese and suffers from hypertension.
8. Dr. Musich rates Claimant at 40% of the body as a whole for thoracic pain and bulging discs, 30% of the left knee due to the medial meniscus tear and 30% of each upper extremity at the wrist levels. Dr. Musich found synergistic disability greater than the simple sum total.
9. Dr. Musich thought that Claimant's morbid obesity would get worse or deteriorate over time.
10. Dr. Musich thinks it would be difficult for Claimant to maintain employment in the job market although he doesn't specifically say that she is permanently and totally disabled from competing for employment.
11. Dr. Musich agrees that Claimant's major complaint at Daimler Chrysler in May-June of 2002 was her arthritic back pain. He agrees Claimant's knee injury was not causing her any restrictions in her ability to work in 2002 at Chrysler and that there were no medical restrictions placed on her as a result of that knee injury.
12. Dr. Berman, now deceased, rated Claimant's disability at 25% of the thoracic spine attributing 20% to repetitive trauma sustained while working at Chrysler on or around May 28 and 5% due to preexisting spinal degeneration. Dr. Berman also diagnosed a 10% permanent partial disability at the level of the lumbar spine which he breaks down at 7 ½% due to repetitive trauma suffered while working at Daimler Chrysler and 2 ½% attributable to preexisting spinal degeneration. Dr. Berman also rated a 15% permanent partial disability of the right and left wrists with a 10% loading factor. Dr. Berman diagnosed a synergistic disability but did not quantify what that synergistic disability was.

13. Dr. Berman specifically noted that the conditions in Claimant's lumbar and thoracic spine were not the result of an acute injury or trauma. Dr. Berman opined it was impossible to determine whether the bulges or herniations at T4-5 and T7-8 occurred as a result of work or over time.
14. Dr. Berman's testimony regarding apportionment of disability is not credible because it assigns 75-80% of the disability to work when Claimant's condition is clearly degenerative and has continued to worsen while away from work suggesting a systemic condition. This is especially true since he admits it is impossible to determine whether the bulges happened over time.
15. Claimant is receiving approximately \$1,400.00 a month from the Social Security Administration for disability.
16. Claimant has worked in the past on an egg farm, in sales at JC Penney and also in a candy factory.
17. Claimant was working 9 to 10 hours a day, 6 days a week at the time of her back arthritis claim against Daimler Chrysler.
18. Mr. England, a vocational expert, believes that Claimant is permanently and totally disabled from competing in the open labor market placing heavy emphasis on her obesity.
19. Claimant underwent a breast reduction surgery in August of 1999 because of back pain, neck pain, and grooving in her bra strap lines. Since then, she continued thereafter to suffer arthritic back and neck pain, knee pain, and fibromyalgia. Fibromyalgia is a medical term for chronic pain with no objective explanation.
20. Dr. Brewer's notes in August of 2003 indicate Claimant was previously diagnosed by Dr. Speiser with rheumatoid arthritis. She admitted to low back pain at the time and bilateral hip pain which she thought was related to rheumatoid arthritis. (Exhibit J, August 26, 2003 entry).
21. Notes also indicate Claimant was having problems with fibromyalgia and episodes of thoracic pain and discomfort on June 2, 2002 when she was moving a dresser. Her claim for back disease with Chrysler alleges a May 28, 2002 onset. There is no mention of a work-related pathology.
22. Dr. Brewer prescribed Claimant Nortriptyline and discovered she is positive for lupus anti-coagulant. Claimant also suffers from stomach ulcers.
23. Claimant has treated with Dr. Edmiston in the past for chiropractic back manipulations.
24. In 2003 Claimant filled out a medical questionnaire that indicated she suffered from depression, stomach ulcers, neuropathy in the feet, bone problems with possible rheumatoid arthritis, and that her legs hurt all the time sometimes with her feet having no feeling and that her legs ache. She was getting worse.
25. Dr. Williams, a radiologist, described Claimant's MRI examination as "very small disc herniations at T5-6, T10-11, T9-10 and T7-8. However, nerve root compression appears unlikely at these levels."
26. Dr. Emily Smith reviewed some March 7 diagnostic films and determined there was minimal compression deformity at T11 coupled with diffuse degenerative spurring anteriorly and flowing osteophytes bridging multiple vertebral bodies consistent with idiopathic skeletal hypertosis. This means Claimant has developed bone spurs that bridge intervertebral spaces.
27. Dr. Boodram, in June of 2002, reviewed MRIs of Claimant's back on referral from Dr. Berman and diagnosed osteoarthritic changes at L4 and L5-S1 and a wedge compression at L1. A nerve conduction study done on both lower extremities on June 12, 2002 was abnormal, consistent with bilateral peroneal nerve neuropathy and right tibial neuropathy.
28. Claimant resigned from work in August of 2002. She says that she couldn't work any longer at Chrysler. Claimant was not fired. Claimant was not disciplined or demoted in any way.

### **RULINGS OF LAW**

1. Claimant resigned from Chrysler voluntarily.
2. Claimant may, in fact, not have been able to work. That inability to work, however, was not related to the work itself.

3. Claimant did not sustain an occupational disease that arose out of and in the course of her employment at Chrysler.
4. Claimant suffered from an ordinary disease of life, rheumatoid arthritis, fibromyalgia, and a severely osteoarthritic and degenerated spine which were not caused by work and from which many people suffer in their non-work lives.
5. Chrysler did not pay Claimant any temporary total disability benefits or medical benefits arising out of the alleged back disease. The lump sum settlement was not a confession of liability or medical causation and I am not bound by it.
6. Social Security is the appropriate agency responsible for Claimant's disability.
7. The medical conditions are not related to work and the workers' compensation system is not responsible for conditions not reasonably traceable to employment.
8. Claimant voluntarily retired.
9. Claimant is entitled to whatever retirement benefits she may have acquired and her social security benefits, but not an additional \$628.90 per week from the workers' compensation system.

### DISCUSSION

Claimant has progressively become more disabled. Unfortunately, she has an ordinary disease of life. Her obesity, fibromyalgia, and degenerative arthritis are the causes of her back pain, not the work at Chrysler. Absent a work related primary injury, this is no Fund liability.

It is reasonable to expect pain to relent at least slightly when away from work if it is actually caused or exacerbated by the work. Dr. Berman admits the back problem is not from trauma. She experienced such bad back pain in the past she underwent surgical reduction of her anatomy in an attempt to get relief. I cannot find credible evidence of work being a substantial factor in Claimant's condition.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Matthew D. Vacca  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
 Gary J. Estenson  
*Acting Director*  
*Division of Workers' Compensation*

[1] Gradual and progressive injuries resulting from repeated exposure to on-the-job hazards are properly considered either compensable accidents or compensable occupational diseases. *Smith v. Climate Engineering*, 939 S.W.2d 429, 436 (Mo. App. 1996).

[2] The following cases cited herein were overruled in part by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003) which clarified the standard for reviewing Commission decisions: *Lawson, Smith, Wright, Karoutzos, E.W., Messex, Carlson, Kizior, Vaught, and Elliott*.