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

Injury No.: 06-124708

Employee: Kimberly Replogle

Employer: Mexico School District

Insurer: Missouri United School Insurance Company

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

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

Preliminaries
The parties asked the administrative law judge to determine the following issues: (1) whether the notice requirement of § 287.420 RSMo serves as a bar to compensation in this case; (2) whether the work accident of August 29, 2006, is the prevailing factor in the cause of any or all of the injuries and/or conditions alleged in the evidence; (3) employer's liability, if any, to reimburse employee for expenses for past medical treatment; (4) employer's liability, if any, for future medical benefits; (5) employer's liability, if any, for permanent partial disability benefits or permanent total disability benefits; and (6) the liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

The administrative law judge determined as follows: (1) employee's failure to comply with the written notice requirement of § 287.420 does not serve as a bar to the claim for compensation in this case; (2) the work accident of August 29, 2006, was the prevailing factor in causing injury to employee's lumbar spine, including L3-4 and L4-5 discogenic back pain; (3) the work injury to employee's lumbar spine necessitated medical treatment, including, but not limited to, injections, medication, multiple radiological and diagnostic testing, as well as surgery; (4) employee does not have post-laminectomy syndrome or failed back syndrome; (5) the work accident is not the prevailing factor in the cause of employee's pain complaints which began 14 to 19 months post-surgery; (6) employee is not permanently and totally disabled; (7) employee has sustained a 35% permanent partial disability of the body as a whole as a result of the work accident; (8) employer is liable for $4,533.95 in past medical expenses; (9) employer has a continuing duty, pursuant to § 287.140 RSMo, to provide employee with medical care and treatment to cure and relieve her from the effects of the work-related low back injury; and (10) the Second Injury Fund is liable for 26.5125 weeks of enhanced permanent partial disability benefits owing to the combination of the effects of the last injury and employee's preexisting permanent partial disability.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred in denying employee's claim for permanent total disability benefits from either employer or the Second Injury Fund.

The Second Injury Fund filed a timely application for review with the Commission alleging the administrative law judge erred in awarding employee permanent partial disability benefits from the Second Injury Fund.

For the reasons stated below, we modify the award of the administrative law judge referable to the issues of: (1) employer's liability for permanent partial disability benefits; and (2) the liability of the Second Injury Fund. Additionally, we supplement the administrative law judge's award with respect to the issue of medical causation.

Discussion

Medical causation

The administrative law judge concluded that employee's accident at work on August 29, 2006, was not the prevailing factor causing her current, debilitating lower back and radicular pain complaints, or the diagnosis of failed back syndrome. Instead, he found that the June 2009 fusion surgery successfully treated employee's low back and radicular pain referable to her work injury. In reaching these determinations, the administrative law judge expressly credited the opinion from the treating surgeon and employer's medical expert witness, Dr. James Coyle, over the opinion from employee's medical expert witness, Dr. David Volarich. As further discussed below, we discern no compelling reason to overturn the administrative law judge's choice to credit Dr. Coyle over Dr. Volarich with regard to the issue of the causation of employee's current complaints of ongoing, debilitating low back and radicular pain.

However, we do note that certain of the administrative law judge's comments are susceptible to a reading that suggests he relied, in part, upon his own administrative experience in resolving the issue of medical causation involved in this case:

> In my 21 years as an administrative law judge, I have not seen a case such as this where a back surgery has been unquestionably successful for over fourteen months, and then turns into a situation where, nineteen months post-surgery, the patient has 8/10 to 10/10 pain every day despite taking high doses of narcotics – *unless there has been a failure of the fusion*. (That is clearly not the case here; the fusion is solid.) What happened fourteen to nineteen months post-op to explain this extreme dramatic turn of events? There is nothing in the extensive testing to explain it.

Award, pages 10-11 (emphasis in original).

As much as we appreciate the administrative law judge's unquestionable expertise and his astute factual analysis in this case, the Missouri courts have long cautioned that an administrative law judge's own opinion (or ours) regarding a complex issue of medical causation (such as those involving lumbar spine pathology/symptomatology) does not constitute competent and substantial evidence upon which we may rely in rendering our award. See, e.g., *Wright v. Sports Associated*, 887 S.W.2d 596 (Mo. 1994). For this reason, we must disclaim the above-quoted commentary.

Again, we have carefully reviewed the opinions from both Drs. Coyle and Volarich. As noted by the administrative law judge, employee specifically stipulated that she is not seeking any compensation herein on the basis of any possible psychiatric diagnosis or condition. After careful consideration, we deem employee's preexisting depression to be as equally likely a source of the recurrent pain and radicular complaints employee first identified over a year after Dr. Coyle released her from his care, as any purely physical sequelae from the work injury itself. In other words, it appears to us that it is no more likely that employee's present symptoms are

related to her work injury than to other, non-compensable causes. For this reason, we will defer to the administrative law judge's choice to credit Dr. Coyle over Dr. Volarich.

Employer's liability for permanent partial disability benefits

The administrative law judge determined that employee is not permanently and totally disabled. After a thorough review of the record, we are not persuaded to disturb his finding in this regard. As employer's brief points out, employee's testimony recounting her June 2009 surgery, initial recovery, and subsequent recurrence of symptoms substantially (and materially) departs from the timeline of these events reflected by the medical records in evidence. Consequently, we find that we are unable to wholly rely upon employee's testimony in assessing the appropriate degree of permanent disability she experienced as a result of the work injury, considered alone.

Nor are we persuaded to adopt Dr. Volarich's revised opinion, issued for the first time in his second report of April 24, 2012, suggesting that employee had then become permanently and totally disabled owing to the effects of the work injury considered alone. Again, it appears equally likely to us that employee's recurrence of debilitating low back and radicular pain in 2011 was a product of her depression rather than the purely physical sequelae from the work injury and fusion surgery. Employee's ability to work two jobs for approximately two years following her June 2009 surgery is further evidence undermining the claim for permanent total disability benefits. For these reasons, we adopt the administrative law judge's finding that employee failed to meet her burden of proving that she is permanently and totally disabled owing to the effects of the work injury considered alone.

We do, however, deem the administrative law judge's permanent partial disability rating to be somewhat low. The administrative law judge determined that employer is liable under § 287.190 RSMo for 140 weeks of permanent partial disability benefits based on his finding that the accident was the prevailing factor causing employee to suffer a 35% permanent partial disability of the body as a whole referable to the lumbar spine. After a thorough review of the record, we deem a 40% rating more appropriate. Accordingly, we hereby modify the award of the administrative law judge on this point.

We find the accident was the prevailing factor causing employee to suffer a 40% permanent partial disability of the body as a whole referable to the lumbar spine. We conclude employer is liable for 160 weeks of permanent partial disability benefits, at the stipulated weekly rate of $234.42, for a total of $37,507.20.

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the Fund in all cases of permanent disability where there has been previous disability. The administrative law judge awarded permanent partial disability benefits to employee from the Second Injury Fund based upon a finding that her preexisting disability referable to the left elbow interacts synergistically with the disabling effects of her primary injury affecting the lumbar spine. This synergistic interaction as between an employee's preexisting disabling conditions and a subsequent compensable injury is a necessary showing in any claim for permanent partial disability benefits from the Second Injury Fund:

> [T]he claimant must establish that the present compensable injury and his preexisting permanent partial disability combined to cause a greater degree of disability than the simple sum of the disabilities viewed independently. This is referred to as the "synergistic effect." If a claimant establishes that the two disabilities combined result in a greater disability than that which would have occurred from the last injury alone, then the Fund is liable for the degree of

> the combined disability that exceeds the numerical sum of the preexisting disabilities and the disability from the last injury, or the "synergistic effect" of the combined disabilities. In other words, the Fund is liable only for the amount attributable to the synergistic combination. Thus, the failure to prove a synergistic combination between the primary injury and a preexisting disability is proper grounds for denying Fund liability.

Winingear v. Treasurer of State, 474 S.W.3d 203, 207-08 (Mo. App. 2015).

In making his award of permanent partial disability benefits from the Second Injury Fund, the administrative law judge did not specifically identify the evidence upon which he relied to find that employee's preexisting disability referable to the left elbow combines synergistically with the disability referable to employee's primary injury affecting the lumbar spine.[1] Dr. Volarich did, in both of his reports, provide the conclusory assertion that "[t]he combination of [employee's] disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness, and a loading factor should be added," but he did not further elaborate or explain this opinion. *Transcript*, page 1132. The Missouri courts and this Commission have long held that purely conclusory medical opinions, absent any explanation or identification of supporting facts, are generally insufficient to meet an employee's burden of proof. See, e.g., *Royal v. Advantica Rest. Group, Inc.*, 194 S.W.3d 371, 378 (Mo. App. 2006); *Noblin v. McBride and Sons Contractors, LLC*, Injury No. 09-095579 (LIRC, Dec. 1, 2015).

In her brief, employee does not discuss the issue of synergy, nor direct us to evidence in the record that might support an award from the Second Injury Fund in this matter. At the hearing, employee was not asked to identify or describe any new or increased limitations specifically referable to a synergistic interaction among her preexisting disabling condition(s) and her lumbar spine injury. Likewise, our review of the voluminous medical treatment records in evidence does not disclose evidence of synergy.

While it would certainly *seem* that employee's preexisting bilateral knee disability in particular might be susceptible to a synergistic interaction with employee's primary low back injury, we cannot render an award against the Second Injury Fund based purely on our own surmise or speculation. Ultimately, we agree with the Second Injury Fund's position with respect to this issue. We deem the evidence insufficient to support a factual finding that a synergistic interaction exists between the effects of employee's preexisting disabling condition(s) and the effects of the primary work injury. For this reason, we decline to make such a finding, and we conclude therefore that employee is not entitled to any permanent partial disability benefits from the Second Injury Fund in this case.

Conclusion

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

Employer is liable for a total of $37,507.20 in permanent partial disability benefits.

The Second Injury Fund is not liable for any compensation in this case.

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[1] Incidentally, we note that the administrative law judge declined to include any permanent partial disability referable to employee's preexisting bilateral knee pain in his award of permanent partial disability benefits from the Second Injury Fund; it is unclear whether he deemed these conditions to fall below the applicable thresholds under § 287.220, or whether he found no synergistic interaction between these conditions and the primary injury.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued March 22, 2016, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 4th day of January 2017.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

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

Attest:

Secretary

DISSENTING OPINION

After a review of the evidence, I am convinced that this employee is permanently and totally disabled as a result of her work injury. For this reason, I must disagree with the choice of the Commission majority to deny her claim for permanent total disability benefits. It appears to me that both the administrative law judge and the Commission majority have inappropriately applied a heightened burden of proof with regard to the issue of the nature and extent of disability employee suffered as a result of the work injury.

Some background discussion is in order. As noted by the Commission majority, the parties disputed the issue of medical causation. Issues of medical causation are governed by the statutory test under § 287.020.3(1) RSMo, which required employee to demonstrate that "the accident was the prevailing factor in causing both the resulting medical condition and disability." Employer's own expert, Dr. James Coyle, specifically conceded that the accident of August 26, 2006, was the prevailing factor causing employee to suffer the claimed lumbar spine injury, as well as permanent disability that he rated at 25% of the body as a whole. Meanwhile, employee's expert, Dr. David Volarich, agreed the accident was the prevailing factor causing employee to suffer the claimed injury and permanent disability, which he ultimately rated as a total inability to compete for work in the open labor market.[1] Consequently, the issue of medical causation in this case must be found in employee's favor, because "[t]he commission cannot find there is no causation if the uncontroverted medical evidence is otherwise." *Hayes v. Compton Ridge Campground, Inc.*, 135 S.W.3d 465, 470 (Mo. App. 2004).

The next issue for our determination is the nature and extent of disability employee suffers as a result of the work injury. Such questions are squarely within our own administrative discretion; as decades of Missouri cases have consistently made clear, "[t]he Commission is not bound by a medical expert's percentage estimates, because the degree of disability is not solely a medical question" and "[d]eciding the percentage or degree of disability to award a claimant is a finding of fact within the unique province of the Commission." *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo. App. 2007). For my part, I typically begin with a careful reading of the employee's testimony, in order to determine whether she appears to be credible regarding the complaints she attributes to the work injury. I will refer to the administrative law judge's award for any assistance in this regard, especially when the judge specifically records his or her own observations and impressions of the employee's testimony at the hearing.

Here, though, the administrative law judge declined to render any specific findings with regard to employee's credibility, and did not comment on her presentation at the hearing. Instead, it appears that he applied a prevailing factor standard to the issue of the nature and extent of disability he would attribute to the work injury employee (unquestionably) suffered. Indeed, the administrative law judge specifically stated, in his award, that "[t]he issues of medical causation and disability are so closely entwined in this case that I will discuss them simultaneously." *Award*, page 10. I disagree that these issues are capable of simultaneous discussion and resolution; as I have demonstrated above; the issues are distinct and turn on entirely different statutory and case law standards.

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[1] Dr. Volarich made clear that his diagnosis of "failed back syndrome" in this case describes the constellation of symptoms and complaints employee now experiences referable to the work injury, and is not tied to a specific pathological finding, demonstrable on MRI or otherwise. *Transcript*, page 1038-39. In other words, when Dr. Volarich says employee has failed back syndrome, he simply means that he believes her when she says she has considerable debilitating low back and radicular symptoms referable to the work injury.

It is evident, in his subsequent discussion of employee's disability, that the administrative law judge inappropriately applied the "prevailing factor" test for medical causation. First, the administrative law judge announced his own standard for medical causation, suggesting that a failed fusion is, in his view, a necessary showing to account for any recurrence of discogenic pain following an initially successful fusion surgery. Next, the administrative law judge suggested employee was required to present an MRI demonstrating the exact pathological source of her recurrent pain. The administrative law judge then similarly criticized Dr. Volarich for his inability to identify the specific source of employee's present experience of severe low back pain. Finally, he subtly criticized employee for declining the exploratory surgical procedure that Dr. Coyle recommended to further investigate employee's symptoms. The administrative law judge suggested that absent additional evidence from employee with regard to each of these points, he was precluded from a finding that she is permanently and totally disabled.

To my knowledge, Missouri law has <u>never</u> required that the medical experts in a workers' compensation case identify the exact source of an employee's pain complaints before an award of permanent disability benefits can be made in connection with such. Nor have the courts ever suggested that an employee should be punished for reasonably declining additional invasive medical procedures to investigate the source of lumbar spine complaints following a two-level fusion surgery. Instead, our courts have specifically and repeatedly cautioned that the issue of the nature and extent of disability referable to a work injury is a *separate* one to which the more exacting medical causation standards under § 287.020.3(1) do not apply:

> The Commission may consider all the evidence, including the testimony of the employee, and draw all reasonable inferences in arriving at the percentage of disability. This is a determination within the special province of the Commission. The Commission is also not bound by the percentage estimates of the medical experts and is free to find a disability rating higher or lower than that expressed in medical testimony. This is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.
>
> By finding that "absent any evidence to contradict the compensability of this accident, the Commission has no choice but to find that the accident on September 17, 1998 caused a permanent partial disability of 75% to the body as a whole," the Commission misconstrued the law. It appears from the Commission's decision that it believed it was required to accept [a medical expert's] assessment of Elliott's disability, and therefore it did not consider any of the other evidence presented or arrive at an independent conclusion as to Elliott's disability rating. This is contrary to Missouri law.

Elliott v. Kan. City School Dist., 71 S.W.3d 652, 657 (Mo. App. 2002).

Simply put, the administrative law judge and Commission majority fail to recognize that *pain itself* is one of the "resulting medical conditions" this employee suffered as a result of her injury for purposes of § 287.020.3(1), and because both of the medical experts in this case agree that the accident of August 26, 2006, was the prevailing factor causing employee to suffer (at least some) low back pain, discomfort, and resultant disability, there is no further issue of medical

causation involved here.[2] The sole remaining issue for our determination is whether the record as a whole credibly supports employee's position that her current pain and symptoms referable to the work injury are too severe to permit her to compete for work in the open labor market. Again, that question relies upon our own administrative discretion, and does *not* require that employee undergo additional surgeries or procure additional MRIs in order to satisfy some additional prevailing factor test with regard to the exact medical source of her pain. Instead, we examine the record as a whole and consider the likelihood that an employer in the open labor market would hire employee, in light of her age, education, work history, and present physical condition:

> The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

Molder v. Mo. State Treasurer, 342 S.W.3d 406, 411 (Mo. App. 2011).

My own analysis with regard to the nature and extent of permanent disability is as follows. Employee is 49 years of age with an educational history limited to high school and a vocational history devoted mostly to unskilled entry-level positions, such as working at Pizza Hut or performing data entry and answering phones for a bank. Absent accommodation, she is unable to perform the normal physical tasks required of her most recent line of work assisting special needs and developmentally disabled individuals.

There is no evidence on this record to support a finding that employee ever suffered from low back or radicular pain symptoms before the accident of August 29, 2006. Following that accident, employee experienced the onset of severe low back and radicular pain symptoms, prompting her to seek extensive medical treatment, including the two-level lumbar spine fusion surgery of June 2009. Following that surgery, she has hardware at two levels of her lumbar spine, and considerable scar tissue around the surgical site. Owing to ongoing pain and reduced range of motion, she is unable to bend, twist, or sit for prolonged periods of time, and can only comfortably lift about 5 to 10 pounds. She continues to take multiple prescription pain medications, including narcotics, to manage her symptoms referable to her low back.[3]

Employee presented the expert vocational opinion of Gary Weimholt, a certified disability management specialist, who believes employee will be unable to compete for work in the open labor market. As Mr. Weimholt persuasively explained, the physical restrictions identified by Dr. Volarich will prevent employee from performing, on a full-time, sustained basis, the normal duties of any of the positions for which she is qualified in light of her educational and vocational history. Mr. Weimholt does not believe employee has the necessary vocational skills and abilities to overcome her physical and pain barriers to employment. I agree with his opinion.

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[2] As noted above, Dr. Volarich's diagnosis of failed back syndrome simply refers to his assessment of the severity of employee's symptoms referable to the work injury; thus, the fact that Dr. Coyle and Dr. Volarich disagree with regard to this diagnosis does not require us to revisit the issue of medical causation, no more than the fact these experts disagree whether employee's permanent disability should be rated as total or merely 25% of the body as a whole.

[3] Although the Commission majority notes the obvious shortcomings in employee's hearing testimony with regard to the chronology of her medical treatment, they identify no basis for rejecting her testimony describing her actual complaints referable to the work injury. I find her testimony in this regard credible, and have relied upon it in making these findings.

In light of the foregoing, I am convinced that no employer could be reasonably expected to hire employee in the open labor market over virtually any other qualified candidate. I would modify the award of the administrative law judge and award permanent total disability benefits from the employer. Because the Commission majority has decided otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

AWARD

Employee: Kimberly Replogle

Dependents:

Employer: Mexico School District

Additional Party: Second Injury Fund

Insurer: Missouri United School Insurance Company

Hearing Date: January 6, 2016

Injury No. 06-124708

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

Checked by: RJD/cs

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 29, 2006.
5. State location where accident occurred or occupational disease was contracted: Audrain 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 was lifting a child into his wheelchair when she felt a pop in her back.
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: Lumbar spine.
14. Nature and extent of any permanent disability: 35% permanent partial disability of the body as a whole.
15. Compensation paid to-date for temporary disability: $1,741.48.
16. Value necessary medical aid paid to date by employer/insurer? Undetermined.
17. Value necessary medical aid not furnished by employer/insurer? $4,533.95.

Employee: Kimberly Replogle Injury No. 06-124708

18. Employee's average weekly wages: $351.62.

19. Weekly compensation rate: $234.42.

20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. From Employer:

140 weeks of permanent partial disability benefits =	$32,818.80
Reimbursement of medical expenses =	$4,533.95
TOTAL:	$37,352.75

Employer and Insurer are also ordered to provide Employee with future medical care as required by Section 287.140, RSMo.

22. Second Injury Fund liability:

26.5125 weeks of permanent partial disability benefits =	$6,215.06

Said payments to begin immediately 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:

Allen & Nelson, PC

Employee: Kimberly Replogle Injury No. 06-124708

FINDINGS OF FACT AND RULINGS OF LAW:

Employee: Kimberly Replogle Injury No. 06-124708

Dependents:

Employer: Mexico School District

Additional Party: Second Injury Fund

Insurer: Missouri United School Insurance Company

Hearing Date: January 6, 2016

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

PRELIMINARIES

The evidentiary hearing in this case was held on January 6 2016, in Mexico. Claimant, Kimberly Replogle, appeared personally and by counsel, Truman Allen; Employer, Curators of the Mexico School District, appeared by counsel, George Floros; the Second Injury Fund appeared by counsel, Assistant Attorney General Erin Smith. The parties requested leave to file post-hearing briefs, which leave was granted. The case was submitted on February 16, 2016.

ISSUES TO BE DECIDED

The parties agreed that the issues to be decided were:

1. Whether the notice requirement of Section 287.420 serves as a bar to the claim for compensation;

2. Whether the work accident of August 29, 2006, was the prevailing factor in causing any or all of the injuries and/or conditions alleged in the evidence;

3. Employer's liability, if any, to reimburse Claimant for expenses for past medical treatment;

4. Employer's liability, if any, for future medical benefits;

5. Employer's liability, if any, for permanent partial disability benefits or permanent total disability benefits; and

6. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over the case;

2. That venue for the hearing is proper in Audrain County;

3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430:

4. That both Employer and Employee were covered by the Missouri Workers' Compensation Law at all relevant times;

5. That Employee Kimberly Replogle sustained an accident or arising out of and in the course of her employment with Mexico School District on August 29, 2006;

6. That Claimant's average weekly wage is $351.62, and that the compensation rates were $234.42 for temporary total disability and permanent total disability, and $234.42 for permanent partial disability;

7. That Mexico School District was fully insured for Missouri Workers' Compensation purposes at all relevant times by Missouri United School Insurance; and

8. That Employer paid medical benefits in an undetermined amount and $1741.48 in temporary total disability benefits.

Additionally, it was stipulated that Employee was not seeking any benefits, including medical treatment, for alleged psychiatric injuries or conditions. At the commencement of the hearing, upon Employee's request, the word "psyche" was ordered stricken from paragraph 7 and paragraph 11A of the Amended Claim for Compensation filed January 18, 2012.

EVIDENCE

The evidence consisted of the testimony of Claimant, Kimberly K. Wooldridge Replogle; the testimony of Ondrea Clark; extensive medical records; the deposition testimony and narrative reports of Dr. David T. Volarich; the deposition testimony and narrative report of Dr. David Robson; the deposition testimony and narrative reports of Dr. James Coyle; the deposition testimony and narrative report of Gary Weimholt; deposition testimony and narrative report of James M. England, Jr.; copy of internal injury report; certified records of the Missouri Division of Workers' Compensation; copy of email correspondence; correspondence from BlueCross BlueShield of Illinois; and information regarding prescription costs.

DISCUSSION

Kimberly Replogle ("Claimant") was born on September 11, 1967, and is a high school graduate with minimal training in the banking business. Claimant began working for Mexico School District ("Employer") in 2006 as a paraprofessional, working one-on-one with special needs students in third, fourth or fifth grade. Claimant's prior employment history included work in restaurants, as a bank teller, receptionist, bookkeeper, and data entry. Immediately prior to starting work for Employer, Claimant worked for eight years at Audrain Handicapped Services, first providing assistance to residents in a day program and later as a supervisor in the sheltered workshop. After the work accident on August 29, 2006, Claimant also worked for several years at the YMCA in a receptionist/clerical role.

Prior to the August 29, 2006 work accident, Claimant had bilateral knee pain beginning in 1994, receiving injections and physical therapy. Claimant had a left elbow injury in 2005 and had lateral epicondylectomy surgery. Claimant also had a past history of treatment for depression (which is now irrelevant as Claimant has removed all references to "psyche" from her claim for compensation herein.) Claimant is 5'6" tall, and weighed approximately 290 pounds at the time of the August 29, 2006 accident.

As noted in more detail herein, Claimant worked full-time for Employer through June 30, 2011. After leaving work for Employer, Claimant continued to work up to 25 hours per week for the YMCA through early 2015. In early 2015, Claimant had gallbladder surgery and also had cervical discectomy/fusion surgery. While on leave for these surgeries, the YMCA hired someone else in her position. Claimant also had right knee surgery in 2013.

As stipulated, Claimant sustained a work accident on August 29, 2006. Claimant was lifting her assigned child back into his wheelchair after he had been laid down on the floor to rest. While she was lifting him, she felt a pop in her back. Claimant testified that she reported the accident promptly to her principal. Employer is asserting the lack of written statutory (Section 287.420) notice as an affirmative defense. Employer states in its brief that Claimant did not report the accident to Employer until September 29, 2006. I find this assertion in Employer's brief to be at odds with Employer's Exhibit F. Exhibit F is an email from a Patrick Holmes at Gallagher Bassett Services, Inc. (Employer's third-party administrator) to Employer's counsel. Exhibit F states, in part: "Employee also reported injury on 9/8/06 but told them she didn't want to file claim she would just have her insurance pay for treatment." Thus, even if Claimant indicated to Employer that she did not want to pursue this injury under the workers' compensation act (which Claimant denies), there is really no question that Employer was made aware of a work-related accident and injury within ten days of its occurrence. Missouri appellate courts have consistently held that Employer's actual notice of a potentially compensable accident/injury is *prima facie* proof that Employer was not prejudiced by lack of written statutory notice, *see, e.g., Seyler v. Spirtas Industrial*, 974 S.W.2d 536, 538 (Mo.App. E.D. 1998).

On September 9, 2006, Claimant was seen at Audrain Medical Center Emergency Department. Claimant was seen in follow-up by one of her primary care physicians, Dr. Jacobi, who ordered an MRI and referred her to Dr. C. Kuhns. Dr. Kuhns felt the MRI showed spondylosis and degenerative disc disease which was longstanding pathology. He felt Claimant

most likely developed further disc degeneration, an annular tear, or disc disruption from the lifting incident. He didn't see evidence of a significant disc herniation and recommended an epidural steroid injection.

Employer arranged for Claimant to be seen by Dr. James Doll. She was first seen by Dr. Doll on 2/21/07. He recommended medication and physical therapy for instruction in a home exercise program and spine stabilization techniques. When she returned on 3/13/07, she reported improvement. Dr. Doll felt she had a thoracolumbar strain superimposed on underlying degenerative disease. He felt she was in need of no further active treatment and discharged her from his care at the time of that visit.

Claimant's attorney arranged for an evaluation by Dr. David Robson, a spine surgeon, on 6/13/07. Although Claimant was continuing to work, she reported back and right posterior leg radicular pain when seen by Dr. Robson. He reviewed her MRI and opined that it showed disc dehydration at L3-4 and L4-5 with facet hypertrophy at L4-5 causing some stenosis. Throughout 2006 and 2007, Claimant was being seen by another personal physician, Dr. Ekern, to assess whether she was a viable candidate for bariatric surgery. In the midst of this workup Dr. Ekern ordered a lumbar MRI. The MRI was performed on 9/28/07 and was interpreted as showing a small central disc protrusion at L3-4 with associated disc dehydration. Disc dehydration without significant protrusion or significant bulging was also seen at L4-5. On 10/2/07, Claimant received an epidural steroid injection ("ESI"). She saw Dr. Ekern again on 1/17/08 and he referred her for a second ESI.

In May of 2008, Employer had Claimant seen by Dr. James Coyle. Dr. Coyle diagnosed L3-4 and L4-5 discogenic back pain. He recommended that she proceed with her scheduled gastric bypass and undergo a repeat lumbar MRI if she remained symptomatic after reaching her goal weight. He felt she could continue to work in the interim.

Claimant underwent the gastric bypass surgery on 6/16/08. When Claimant returned to Dr. Coyle on 10/8/08, she had lost 77 pounds. When she was re-evaluated by Dr. Coyle on 2/4/09, she had lost 107 pounds and was within 26 pounds of her goal weight. An MRI performed in conjunction with that exam was interpreted as showing disc prolapse and annular tears. Dr. Coyle advised Claimant that she was a candidate for a lumbar fusion once she reached her goal weight. She was continuing to work as a paraprofessional for Employer as of this date and Dr. Coyle felt she could continue to do so. On 5/26/09, Dr. Coyle re-examined Claimant, noted that she was down to 184 pounds, and offered to schedule her for back surgery. The surgery was performed on 6/29/09 and consisted of an L3-4, L4-5 laminotomy, diskectomy, and fusion with iliac bone graft and allograft spacers. Claimant was seen in follow-up by Dr. Coyle throughout 2009. She reported improvement in her lower extremity pain at the first postoperative visit and was advised to begin walking. When she was seen on 8/17/09, six weeks after the accident, her leg and back pain were significantly decreased and she was walking 1½ miles per day. She advised Dr. Coyle that she stopped taking pain medication two weeks after the surgery. She asked him to release her to return to work and he did so, although he advised her she was to do no bending, lifting, or twisting. Claimant was re-evaluated on 9/28/09. She was walking on a regular basis, had returned to work, was not taking medication, and was able to go up on her heels and toes. Dr. Coyle felt her x-rays looked very good and allowed her to

transition out of her brace. At the next office visit on 11/2/09, Claimant did report some residual back achiness. She was four months post-op at that point and reported that her leg pain, numbness, and tingling were gone. Dr. Coyle gave her a Celebrex prescription and sent her for lower extremity stretching exercises. On 12/14/09, Dr. Coyle placed Claimant at maximum medical improvement. She was nearly six months post-op at that time and reported that her leg symptoms were gone. Her surgical incision was well healed, she was not taking medication, she had excellent lower extremity strength, and x-rays showed solid fusion from L3 to L5. She had been back to work for four months and Dr. Coyle felt she needed no restrictions other than to observe normal safety precautions with the activities of daily living. On 3/23/10, Dr. Coyle provided a PPD rating of 25% of the body as a whole referable to the low back.

On 3/31/10, Claimant was evaluated by Dr. David Volarich at the request of her attorney. Dr. Volarich confirmed that Claimant was at maximum medical improvement, provided a rating of 45% of the body referable to the low back, and issued additional disability ratings with regard to her pre-existing knee and left elbow problems.

In August of 2010, Claimant returned to Dr. Coyle. Claimant reported that her back pain was significantly better, her leg pain was gone, and that she was not taking pain medication. She did, however, report left-sided buttock and hip pain in the area of the donor site for the bone graft. Dr. Coyle found no evidence of erythema or inflammation but ordered a CT scan to assess the integrity of the fusion and the donor site for the bone graft. The CT was done on 9/3/10 and showed a solid fusion from L3 to L5, well preserved SI joint, no evidence of infection or fracture at the iliac crest bone graft site to explain the pain symptoms. Dr. Coyle felt that Claimant might benefit from a trigger point injection.

On 11/8/10, Claimant was seen by Dr. N. Ahmad. He performed a trigger point injection and prescribed Flexeril and Lidoderm patches at the initial visit. Claimant reported significant improvement when seen in follow-up on 11/23/10 but still had some pain in the same area, i.e., the donor site. Dr. Ahmad repeated the injection. Claimant was to have been re-evaluated in 3-4 weeks but didn't return until 1/6/11. She contacted Dr. Ahmad to say that she had had a flare-up of back and hip pain. He provided trigger point injections in the hip and low back, scheduled Claimant for an SI injection, and gave her a trial prescription of Gabapentin. The SI injection was performed on 1/12/11. On 2/8/11, Claimant returned to Dr. Ahmad's office with complaints of incisional pain in the left low back and radicular leg pain. The SI injection was reported to have resulted in only short-term relief. Dr. Ahmad performed trigger point injections and injected the left iliac crest. Claimant returned on 3/17/11 and reported the injections provided nothing more than temporary relief. She denied radiating pain at the time of this visit and her physical exam was normal with the exception of local tenderness. Dr. Ahmad stated that it was difficult to determine what the cause of her pain would be and indicated he would follow-up with Dr. Coyle.

On 4/15/11, MRI scans of the low back and pelvis were performed at Dr. Ahmad's request. These studies showed a solid L3-5 fusion, some stenosis throughout the lumbosacral spine with no evidence of significant neuroforaminal narrowing, and mild fibrosis at the operative site. The MRI of the pelvis was normal.

On 6/13/11, Claimant's personal physician, Dr. Ekern, ordered a whole body bone scan. This showed no areas of abnormal uptake other than the right knee and the left great toe.

On 7/6/11, Dr. Coyle re-examined Claimant. Although she had worked through the end of the 2011 summer school session for the Mexico School District, she told Dr. Coyle she was now applying for disability. Claimant did not sign a contract for the 2011-2012 school year, even though Employer offered her a contract. Dr. Coyle was at a loss to explain Claimant's symptoms based on the 9/3/10 CT scan. Dr. Coyle spoke with a neuroradiologist about the case and asked him to meet Claimant before performing an MRI of the sacrum and medial ilium. This study was performed on 7/12/11. The neuroradiologist described the bone graft harvest site as appearing normal. At the incision site of the bone graft there was an area of subcutaneous granulation tissue. Following this testing, Dr. Coyle offered Claimant an epidural steroid injection to rule out referred pain from the operative site. Claimant chose not to proceed with this injection because of her history of gastric bypass. She also advised Dr. Coyle she was not interested in having the donor site re-explored to rule out the presence of a bone spicule, a neuroma, or wound dehiscence. On 8/16/11, Dr. Coyle indicated he had no further treatment recommendations.

In the late summer of 2011, Claimant began to see Dr. Sharon Carmignani for treatment of her pain complaints. Dr. Carmignani began to provide Percocet in response to Claimant's back and hip complaints. On 8/19/11, Claimant was sent for a functional capacity evaluation with Bret Derrick. He felt she was capable of performing sedentary work, but indicated that accommodations were required.

Claimant was seen by Dr. John Graham for a pain management consult on 10/25/11. He felt Claimant had subjective complaints without any objective correlation on physical exam. He felt further injections, therapy, and narcotic pain medication were not indicated. He felt Claimant's prescription medication should be discontinued and her symptoms should be managed with over-the-counter Tylenol.

Claimant continued to treat with Dr. Carmignani until the spring of 2013 when Dr. Carmignani told Claimant she would no longer prescribe narcotic pain medication. Claimant initiated treatment with Dr. Melinda Hecker in Columbia at that point and remains under Dr. Hecker's care as of the date of the hearing.

On 4/24/12, Claimant was re-evaluated by Dr. David Volarich. Dr. Volarich made two new diagnoses: Post-laminectomy syndrome and depression. Dr. Volarich recommended that a vocational evaluation be performed to determine how Claimant might best return to the open labor market.

On 11/12/12, Claimant was seen by Gary Weimholt for the purpose of performing a vocational assessment. Although Claimant was still working at the YMCA at the time of his evaluation, Mr. Weimholt concluded Claimant had a total loss of access to the open labor market and opined that there was no reasonable expectation that an employer would hire her for any position or that she would be able to perform the usual duties of any job she was qualified to perform.

Dr. Coyle re-examined Claimant on 2/20/13. He confirmed that Claimant had a solid fusion at L3-4 and L4-5, opined that the diagnostic testing ruled out any abnormality at the bone graft or fusion site, and rejected the diagnosis of post-laminectomy syndrome made by Dr. Volarich. Dr. Coyle felt Claimant had gained weight, was poorly conditioned, and had become habituated to the narcotic pain medication her personal physicians were prescribing. Dr. Coyle felt she was capable of continuing to work at the YMCA and recommended weight reduction accompanied by an exercise and conditioning program to improve her quality of life.

On 4/17/13, Claimant was evaluated by James England, a vocational rehabilitation counselor. Mr. England noted that Claimant had been working at least part-time for a number of years and felt that she would be eligible to perform a variety of entry level jobs based on the restrictions of Dr. Coyle and the FCE performed at Dr. Carmignani's direction.

In his deposition testimony, Gary Weimholt testified that, if Dr. Coyle was correct in his assessment of Claimant's physical condition, Claimant could compete in the open market for employment and is not permanently and totally disabled.

Claimant alleges that she is permanently and totally disabled, and is seeking permanent total disability benefits from Employer (or, alternatively, from the Second Injury Fund.)

Under section 287.020.7, "total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Fletcher v. Second Injury Fund,* 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The test for permanent and total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. *Knisley v. Charleswood Corp.,* 211 S.W.3d 629, 635 (Mo.App. E.D. 2007). The primary inquiry is whether an employer can reasonably be expected to hire the claimant, given his present physical condition, and reasonably expect the claimant to successfully perform the work. *Id.*

Second Injury Fund liability exists only if Employee suffers from a pre-existing permanent partial disability that constitutes a hindrance or obstacle to employment or re-employment, that combines with a compensable injury to create a disability greater than the simple sums of disabilities. Section 287.220.1 RSMo 2000; *Anderson v. Emerson Elec. Co.,* 698 S.W.2d 574, 576, (Mo.App.E.D. 1985). When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990). In order to find permanent total disability against the Second Injury Fund, it is necessary that Employee suffer from a permanent <u>partial</u> disability as a result of the last compensable injury, and that disability has combined with prior permanent <u>partial</u> disability(ies) to result in total disability. 287.220.1 RSMo 1994, *Brown v. Treasurer of Missouri,* 795 S.W.2d 479, 482 (Mo.App. 1990), *Anderson v. Emerson Elec. Co.,* 698 S.W.2d 574, 576 (Mo.App.1985). Where preexisting permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability **after** the employer has paid the compensation due the employee for the disability resulting from the work related injury. *Reiner v. Treasurer of State of Mo.,* 837

S.W.2d 363, 366 (Mo.App. 1992) (emphasis added). In determining the extent of disability attributable to the employer and the Second Injury Fund, an Administrative Law Judge must determine the extent of the compensable injury first. *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-43 (Mo.App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* It is, therefore, necessary that the Employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury Fund liability.

Medical causation and disability issues. The issues of medical causation and disability are so closely entwined in this case that I will discuss them simultaneously.

Claimant clearly sustained a work-related back injury on August 29, 2006. She was initially treated quite conservatively. Despite the injury and morbid obesity, Claimant continuously worked at two different jobs for almost three years prior to having back surgery. The back surgery was delayed for over a year in order for Claimant to have gastric by-pass surgery and lose weight. Dr. Coyle performed the surgery on June 29, 2009, and initially the surgery was unquestionably successful. The fusion has been and continues to be solid. Six months post-op, Claimant had no lower extremity symptoms, had excellent lower extremity strength, had been working full-time for four months, and had taken no pain medication for over five months. When Claimant was evaluated by Dr. Volarich nine months post-op, Dr. Volarich agreed that the fusion was solid, there were no lower extremity symptoms, that Claimant could work, and that Claimant was not then in need of pain medication.

When Claimant returned to Dr. Coyle fourteen months post-op with new complaints of pain at the donor bone site, Claimant reported that her back pain was significantly better, her leg pain was gone, and that she was not taking pain medication. It was not until January 2011 – more than eighteen months post-op – that Claimant began with complaints of back pain, and not until February 2011 – more than nineteen months post-op – that she began to complain of lower extremity symptoms.

In April, June and July 2011, more testing was done. Everything was normal. There was nothing on the testing to explain Claimant's symptoms. Claimant began taking narcotic medication, prescribed by Dr. Carmignani, in August 2011. These were prescribed not because of some new test findings, but because of Claimant's subjective complaints. Dr. Carmignani began to question the need for the narcotic medications; Claimant claimed to be in incredible pain despite high doses of narcotics, but Dr. Carmignani began noting that Claimant's clinical presentation was not consistent with her complaints. In early 2013, Dr. Carmignani refused to prescribe additional narcotic medication, and Claimant found another physician.

In my 21 years as an administrative law judge, I have not seen a case such as this where a back surgery has been unquestionably successful for over fourteen months, and then turns into a situation where, nineteen months post-surgery, the patient has 8/10 to 10/10 pain every day despite taking high doses of narcotics – *unless there has been a failure of the fusion*. (That is clearly not the case here; the fusion is solid.) What happened fourteen to nineteen months post-op to explain this extreme dramatic turn of events? There is nothing in the extensive testing to

explain it. Dr. Volarich *hypothesizes* several possibilities – scar tissue, adjacent level breakdown, retained disc fragment, a neuroma, something "tearing" – but these are all speculation. Another possibility (perhaps more likely than those hypothesized by Dr. Volarich) is depression and/or other psychiatric disorder; however, Claimant has abandoned any such claim in this case. Of course, an additional possibility for Claimant's pain is Claimant's significant post-surgical weight gain and deconditioning; Dr. Coyle testified that this is the most likely cause of Claimant's pain complaints.

I find Dr. Coyle's opinions regarding Claimant's pain complaints to be more consistent with the facts than those of Dr. Volarich. Thus, I find Dr. Coyle more credible on the issue of causation. Claimant states, in her brief, that Dr. Coyle's opinions are not credible because he understated or minimized Claimant's pain complaints. Quoting Claimant's brief: "Dr. Coyle spent his time trying to make Claimant appear as if nothing was wrong or there was not plausible explanation for her complaints after his surgery. … What it really shows is Dr. Coyle's inclination to understate patient's complaints." I believe this characterization to be unfair. Dr. Coyle *accurately* reported Claimant's lack of complaints post-surgery; this is confirmed by Dr. Volarich's March 31, 2010 evaluation. When Claimant's complaints changed 14-19 months post-op, Dr. Coyle not only acknowledged those complaints, he ordered multiple additional tests in an attempt to find a cause and cure. He also offered treatment options, which Claimant declined. Dr. Coyle did not *understate* Claimant's complaints; he acknowledged them, believed them, and pursued every avenue to try to relieve them, just as would be expected of a compassionate treating physician. Compare Dr. Coyle's actions to those of Dr. Carmignani, Claimant's personal physician. Dr. Carmignani acknowledged and believed Claimant's pain complaints, prescribing narcotic medication therefor. Later, Dr. Carmignani made a decision (with which Claimant obviously disagreed) to discontinue prescribing narcotic medication. Is Dr. Carmignani likewise guilty of "understating Claimant's complaints"?

I find that the work accident of August 29, 2006, was the prevailing factor in causing Claimant's L3-4 and L4-5 discogenic back pain, and the need for surgery. I find that Claimant does not have a "post-laminectomy syndrome" or "failed back syndrome". I find that the work accident of August 29, 2006, is not the prevailing factor in the cause of Claimant's pain complaints which began fourteen months post-surgery.

I find, therefore, that Claimant is not permanently and totally disabled. I find that Claimant can compete in the open market for employment. Claimant's vocational expert Gary Weimholt agreed that, if Dr. Coyle was correct in his assessment of Claimant's physical condition, Claimant could compete in the open market for employment and is not permanently and totally disabled. Dr. Coyle is correct.

I find that, as a result of the work accident of August 29, 2006, Claimant has sustained a permanent partial disability of 35% of the body as a whole.

Past medical expenses. Section 287.140, RSMo, requires Employer to provide all reasonable and necessary medical treatment. An employee has the right to employ his own physician at his own expense, but when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer

refuses or fails and neglects to provide needed treatment, the employer is held liable for the medical treatment procured by the employee. *Hawkins v. Emerson Electric Co.,* 676 S.W.2d 872, 879 (Mo. App. S.D. 1984). I find Employer liable for the following medical bills:

Medical Imaging of Mexico (DOS 9/9/06)	$40.00
Medical Imaging of Mexico (DOS 9/20/06)	$220.00
Audrain Medical Center (DOS 9/27/07)	$821.23
Audrain Medical Center (DOS 9/28/07)	$1483.21
Medical Imaging of Mexico (DOS 9/28/07)	$220.00
Audrain Medical Center (DOS 10/2/07)	$869.51
Audrain Anesthesia Services (DOS 10/2/07)	$400.00
Audrain Anesthesia Services (DOS 1/22/08)	$480.00

These bills total $4,533.95.

Future medical. Claimant has retained hardware in her back. She is clearly entitled to an award of future medical benefits.

Second Injury Fund liability. As Claimant is not permanently and totally disabled, the Second Injury Fund has no liability for permanent total disability benefits. Claimant has made a compensable case of permanent partial disability against the Fund for the combined synergistic effect of the August 29, 2006 back injury and the preexisting left elbow disability.

FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties stipulated, I find the following:

1. Claimant orally reported the August 29, 2006 accident to Employer on or before September 8, 2006.
2. Although Claimant failed to comply with the written notice requirement of Section 287.420, Employer was not prejudiced by lack of statutory notice, as Employer had actual knowledge of a potentially compensable accident and injury.
3. Claimant's failure to comply with the written notice requirement of Section 287.420 does not serve as a bar to the claim for compensation in this case.

4. The work accident of August 29, 2006 was the prevailing factor in causing injury to Claimant's lumbar spine, including L3-4 and L4-5 discogenic back pain.
5. The injury to Claimant's lumbar spine, caused by the work accident of August 29, 2006, necessitated medical treatment, including, but not limited to, injections, medication, multiple radiological and diagnostic testing, as well as surgery.
6. On June 29, 2009, Dr. Coyle performed surgery on Claimant's lumbar spine, including laminotomy and discectomy at L3-4 and L4-5 and noninstrumented posterior fusion and instrumented anterior fusion of L3 through L5.
7. The June 29, 2009 surgery successfully relieved Claimant's lumbar and lower extremity symptoms for at least fourteen months.
8. Fourteen months post-surgery Claimant began with complaints of pain at the right iliac crest donor bone graft site.
9. Eighteen months post-surgery Claimant began with complaints of extreme low back pain and lower extremity pain.
10. Extensive testing was done in an attempt to find a cause and cure for the pain.
11. The testing showed no physical cause for the pain.
12. The fusion was solid, and still is solid.
13. The work accident of August 29, 2006 is the prevailing factor in Claimant's L3-4 and L4-5 discogenic back pain which was successfully addressed by the August 29, 2006 surgery.
14. Claimant does not have "post-laminectomy syndrome" or "failed back syndrome".
15. The work accident of August 29, 2006 is not the prevailing factor in Claimant's pain complaints which began fourteen to nineteen months post-surgery.
16. Claimant is able to compete in the open market for employment.
17. Claimant is not permanently and totally disabled.
18. As a result of the August 29, 2006 work accident and injury, Claimant has sustained a 35% permanent partial disability of the body as a whole.
19. Claimant is entitled to 140 weeks of permanent partial disability benefits at the weekly rate of $234.42, totaling $32,818.80.
20. Employer is responsible for reimbursing Claimant for past medical charges of $4,533.95.
21. Employer has a continuing duty, pursuant to §287.140, RSMo, to provide Claimant with medical care and treatment to cure and relieve her from the effects of the work-related low back injury.
22. Claimant sustained a compensable last injury which resulted in permanent partial disability equivalent to 35% of the body as a whole/lumbar spine (140 weeks).
23. At the time the last injury was sustained, Claimant had a preexisting permanent partial disability of 17.5% of the left elbow (36.75 weeks) which exceeds the statutory threshold for second injury fund liability and which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment.
24. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disability, causes 15% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 140 weeks for last injury + 36.75 weeks for preexisting injuries = 176.75 weeks x 15% = 26.5125 weeks of overall greater disability.

ORDER

Employer and Insurer are ordered to pay Claimant the sum of $32,818.80 for permanent partial disability benefits and the sum of $4,533.95 for medical bill reimbursement. Employer and Insurer are also ordered to provide Claimant with future medical care as required by Section 287.140, RSMo.

The Treasurer of the State of Missouri, as custodian of the Second Injury Fund, is ordered to pay Claimant the sum of $6,215.06 for permanent partial disability benefits.

Made by _____
/s/Robert J. Dierkes-3/4/2016
Chief Administrative Law Judge
Division of Workers' Compensation