

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

Injury No.: 05-084246

Employee: Stacey Blackshear
Employer: Adecco
Insurer: American Home Assurance 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.

Findings of Fact

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact as to the issues disputed at the hearing. We adopt and incorporate those findings to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings of fact pertinent to our modification herein.

Nature and extent of the primary injury

Dr. Stillings rated the total psychiatric disability employee sustained as a result of the work injury at 40% permanent partial disability of the body as a whole; Dr. Bassett, meanwhile, rated employee's psychiatric injury at 25% of the body as a whole.

Dr. Volarich rated employee's physical disability resulting from the work injury at 70% permanent partial disability of the body as a whole referable to the low back; Dr. Robson, meanwhile, rated the low back injury at 25% of the body as a whole.

We find that employee's disability resulting from the work injury amounts to 85% permanent partial disability of the body as a whole referable to employee's low back, radicular symptoms, and psychiatric complaints.

Preexisting psychiatric disability

The medical experts who testified in this matter agreed that employee suffered from some preexisting permanent and partially disabling psychiatric conditions, although they disagreed somewhat on the particular diagnoses and disabling extent of these conditions. The administrative law judge thoroughly summarized the findings of Drs. Bassett and

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Stillings in his award; there is no need to recount them here. There is, however, a need for affirmative findings as to what conditions employee actually suffered from as of the time of the primary injury.

We find most persuasive the diagnoses and opinions from Dr. Bassett with respect to employee's preexisting conditions. We find that, as of August 23, 2005, employee suffered from preexisting mood disorder; bipolar disorder; anxiety disorder with features of posttraumatic stress disorder, social phobia, panic attacks, and agoraphobia; and somatoform disorder. We adopt Dr. Bassett's opinion rating employee's preexisting psychiatric disability at 25% of the body as a whole.

Permanent total disability

Both vocational experts that testified in this matter agreed that employee's permanent total disability results from a combination of employee's preexisting limitations and the effects of the primary injury. Karen Kane-Thaler and Timothy Lalk each opined that employee's inability to compete for work in the open labor market is due to her psychiatric and physical disabilities prior to the work accident, in combination with the effects of the work injury. Dr. Bassett also opined that employee is permanently and totally disabled owing to the combination of employee's preexisting psychiatric problems and the effects of the work injury. Dr. Bassett explained that employee's symptoms and pain complaints following the work injury were enhanced by employee's pre-injury (and ongoing) somatoform disorder.

We find persuasive the opinions of Mr. Lalk, Ms. Kane-Thaler, and Dr. Bassett with respect to the cause of employee's permanent total disability.

Average weekly wage

Employee's first day working for employer was June 12, 2005. Her work injury occurred on August 23, 2005. Employee only worked for employer for 11 calendar weeks immediately preceding the week in which employee was injured. During those weeks, employee earned \$4,151.13.

Employee credibly testified that she missed some regularly scheduled days of work prior to August 23, 2005, due to migraine headaches; her medical records confirm this. We find that employee was absent for 6 regular or scheduled work days during the 11 weeks she worked for employer before the work injury.

Conclusions of Law

Average weekly wage and rate of compensation

Section 287.250.1 RSMo provides, in relevant part, as follows:

Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:

...

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(4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision; ...

Pursuant to the foregoing section, it is improper to include in the calculation of employee's average weekly wage the wages that she earned during the week that she was injured. We have found that employee's first day working for employer was June 12, 2005, and that her work injury occurred on August 23, 2005. Employee only worked for employer for 11 calendar weeks immediately preceding the week in which employee was injured. During those weeks, employee earned \$4,151.13.

We have found that employee was absent for 6 regular or scheduled work days during the 11 week time period at issue. Accordingly, we will divide the \$4,151.13 employee earned during the 11 week time period by 10. This yields an average weekly wage of \$415.11, which corresponds under §§ 287.170 and 287.190 RSMo to rates of \$276.74 for both permanent partial and temporary total disability benefits.

Employee worked 34 weeks for 4 hours per day at a rate of \$11.00 per hour, earning \$220.00 each week. The appropriate rate for temporary partial disability during this time period pursuant to § 287.180 RSMo was \$130.07.

Credit for overpayment TTD/TPD

Our conclusions with respect to the calculation of employee's average weekly wage and compensation rates necessarily affect the administrative law judge's award of a credit for employer's overpayment of temporary total and temporary partial disability benefits. As recounted in the administrative law judge's recitation of the parties' stipulations, employer paid employee temporary total disability benefits for 89 weeks at a rate of \$293.34 per week, and temporary partial disability benefits for 34 weeks at a rate of \$146.67.

The appropriate compensation rate for temporary total disability benefits was \$276.74, so employer overpaid employee \$16.60 in temporary total disability benefits for 89 weeks, for a total of \$1,477.40. The appropriate compensation rate for temporary partial disability benefits was \$130.07, so employer overpaid employee \$16.60 in temporary partial disability benefits for 34 weeks, for a total of \$564.40.

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In addition, the parties stipulated that employee received a \$209.55 overpayment of temporary total disability benefits during the time period of March 31, 2010, through April 4, 2010.

Employer's total overpayment credit is \$2,251.35.

Nature and extent of the primary injury

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with employee's compensable work injury. We have found that employee sustained an 85% permanent partial disability of the body as a whole as a result of the primary injury. This amounts to 340 weeks of permanent partial disability at the rate of \$276.74. We conclude, therefore, that employer is liable for \$94,091.60 in permanent partial disability benefits.

Second Injury Fund liability

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

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

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

We have found that employee suffered from preexisting permanent partially disabling psychiatric conditions at the time she sustained the work injury. We are convinced these conditions were serious enough to constitute hindrances or obstacles to employment. This is because we are convinced employee's preexisting psychiatric conditions had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of the conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Having found that employee suffered from preexisting permanent partially disabling conditions that amounted to hindrances or obstacles to employment, we turn to the question whether the Second Injury Fund is liable for permanent total disability benefits. In order to prove her entitlement to such an award, employee must establish that: (1) she suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App.

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2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have found employee sustained an 85% permanent partial disability of the body as a whole as a result of the primary injury, and credited the expert opinions from Mr. Lalk, Ms. Kane-Thaler, and Dr. Basset that employee's permanent total disability results from a combination of her preexisting psychiatric disability with the effects of the primary injury. We find that employee is not permanently and totally disabled as a result of the last injury considered in isolation.

We wish to note that there was enough substantial credible evidence on the record to support the administrative law judge's award of permanent total disability versus the employer. But given our findings, we conclude employee is permanently and totally disabled owing to a combination of her preexisting disabling conditions in combination with the effects of the work injury. The Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issues of employee's average weekly wage, employer's credit for overpayment of temporary total disability and temporary partial disability benefits, the nature and extent of disability resulting from the primary injury, and Second Injury Fund liability.

Employee's average weekly wage is \$415.11.

Employer is entitled to a total credit for overpayment of temporary total disability and temporary partial disability benefits in the amount of \$2,251.35.

Employer is liable for permanent partial disability benefits in the amount of \$94,091.60.

The parties stipulated that employee reached maximum medical improvement on March 30, 2010. The Second Injury Fund is liable for permanent total disability benefits beginning October 4, 2016, at the weekly rate of \$276.74. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued July 16, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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

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

Given at Jefferson City, State of Missouri, this 3rd day of July 2013.

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

Employee: Stacey Blackshear

DISSENTING IN PART

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge awarding permanent total disability benefits against the employer was correct, and should be affirmed.

The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*.

ABB Power T & D Co. v. Kempker, 236 S.W.3d 43, 50 (Mo. App. 2007)(citations omitted)(emphasis in original).

Although cited in the majority's decision, it appears that the foregoing principle has been overlooked in favor of focusing on employee's preexisting psychiatric conditions. The case law could not be clearer on this point: "Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined." *Id.* (emphasis added).

The only expert in this case to consider the medical impact of the primary injury in isolation testified that employee is permanently and totally disabled solely due to the effects of the work injury. Dr. Volarich opined that owing to the primary low back injury, employee needs to change positions frequently to maximize comfort and rest when needed, including resting in a recumbent fashion. Dr. Volarich explained that employee will need to lie down at certain times during the course of the day due to the effects of the primary injury.

I disagree with the majority's reasoning that the opinions from the vocational experts Timothy Lalk and Karen Kane-Thaler support an award of permanent total disability benefits against the Second Injury Fund. Mr. Lalk agreed that a need to recline during the day renders an individual unemployable; he specifically opined that this restriction alone results in permanent total disability. Ms. Kane-Thaler, meanwhile, testified that she would defer to Dr. Volarich's medical opinion regarding permanent total disability. As noted above, Dr. Volarich's medical opinion is that employee's permanent total disability results from the effects of the work injury considered in isolation.

For the foregoing reasons, I would affirm the award of the administrative law judge assessing liability against the employer for employee's permanent total disability. I respectfully dissent from that part of the majority's decision finding the Second Injury Fund, rather than the employer, liable for permanent total disability benefits.

Curtis E. Chick, Jr., Member

AWARD

Employee: Stacey Blackshear

Injury No. 05-084246

Dependents: None

Employer: Adecco

Additional Party: Second Injury Fund

Insurer: American Home Assurance Company

Hearing Date: April 12, 2012

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

Checked by: GCG/ln

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 23, 2005
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant injured her low back when she sat down on a chair which broke, causing Claimant to fall.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Body as a whole referable to the low back and psychiatric injury.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to-date for temporary disability: \$31,534.06
16. Value necessary medical aid paid to date by employer/insurer? \$235,048.86

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- 17. Value necessary medical aid not furnished by employer/insurer? \$0.00
- 18. Employee's average weekly wages: \$\$416.88
- 19. Weekly compensation rate: \$277.92 for PPD and TTD
- 20. Method wages computation: Statutory calculation

COMPENSATION PAYABLE

- 21. Amount of compensation payable: See Award

Unpaid medical expenses: \$0.00

Permanent total disability benefits of \$277.92 weekly from Employer, beginning March 31, 2010, for Claimant's lifetime, less a credit of \$1,844.07 for overpayment of TTD/TPD benefits.

- 22. Second Injury Fund liability: No

TOTAL: SEE AWARD

- 23. Future requirements awarded: See Award

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

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

Dean Christianson

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Stacey Blackshear

Injury No: 05-084246

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Adecco

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

Additional Party Second Injury Fund

Insurer: American Home Assurance Company

Checked by: GCG/ln

PRELIMINARY STATEMENT

Hearing on the above-referenced case was held before the undersigned Administrative Law Judge on April 12, 2012 at the Division of Workers' Compensation in St. Charles, Missouri. Stacey Blackshear (Claimant) was present, and represented by Dean Christianson. Rachel Brown represented Adecco (Employer) and American Home Assurance Company (Insurer). Assistant Attorney General Barbara Toepke represented the Second Injury Fund. Mr. Christianson requested a fee in the amount of 25%. The parties submitted post-trial briefs.

The parties entered into the following stipulations: Claimant sustained accidental injuries arising out of and in the course of employment on or about August 23, 2005 in St. Charles County, Missouri; Claimant was an employee of Employer; venue is proper in St. Charles County, Missouri; Employer received proper notice of injury; the claim was filed in a timely manner. Employer paid temporary total disability and temporary partial disability of several periods of time from August 23, 2005 through April 4, 2010, consisting of 89 weeks of temporary total disability at the rate of \$293.34 per week and 34 weeks of temporary partial disability at a rate of \$146.67, for an overall total of \$31,534.06. Employer paid medical expenses totaling \$235,048.86. Claimant reached maximum medical improvement on March 30, 2010. Employer is entitled to a credit of \$209.55 for overpayment of temporary total disability benefits.

The issues presented for resolution by this hearing are as follows:

1. Extent of permanent disability, whether partial or total
2. Average weekly wage/compensation rate
3. Employer's overpayment of temporary total disability benefits in the amount of \$3,376.26
4. Employer's liability for past medical bills in the amount of \$2,205.70
5. Employer's liability for future medical care

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6. Extent of Second Injury Fund liability, if any

SUMMARY OF THE EVIDENCE

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

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

- A. Deposition of Dr. Volarich
- B. Deposition of Dr. Stillings
- C. Deposition of Timothy Lalk
- D. medical records of Barnes-Jewish St. Peters Hospital (cert 1/28/11)
- E. medical records of St. Charles Psychiatric Associates (cert 10/6/10)
- F. medical records of St. Charles Psychiatric Associates (cert 8/31/11)
- G. medical records of Missouri Baptist Medical Center (cert 5/11/10)
- H. medical records of St. Louis Orthopedic (9/25/08)
- I. medical records of Central Dermatology
- J. medical records of Dr. Sill (cert 1/24/11)
- K. medical records of St. Joseph Health Center (cert 12/16/10)
- L. medical records of St. Mary's Health Center (cert 9/8/10)
- M. medical records of Laura Wagner (cert 4/21/10)
- N. medical records of St. Peters Bone and Joint Surgery (cert 11/20/07)
- O. medical records of A & A Pain Institute (cert 5/3/07)
- P. medical records of Dr. Suthar (4/18/07)
- Q. medical records of HealthSouth
- R. medical records of Dr. Graven
- S. medical records of St. Louis Spine Care Alliance (cert 10/1/08)
- T. medical records of St. Louis Spine Care Alliance (cert 4/5/10)
- U. medical records of Physicians Pain Clinic
- V. medical bill summary
- W. demand for medical care

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

- 1. Deposition of Dr. Robson
- 2. Deposition of Dr. Bassett
- 3. Deposition of Karen Kane
- 4. Report of Injury
- 5. Medical records of Concentra
- 6. Wage statement

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The Second Injury Fund offered no exhibits into evidence.

Testimony of Claimant

At the trial of this case Claimant testified that she was born on September 12, 1972. She is five feet three inches tall and weighs 170 pounds. She currently takes a number of medications. From a psychiatric standpoint, she takes Zoloft, Cymbalta, and Xanax. From a physical standpoint she takes Oxycontin and Percocet for pain. The psychiatric medications come from Dr. Mattingly, whereas the pain medications come from Dr. Sill. She also sees Dr. Marku and receives a pill for stomach problems. She takes Benadryl for itching. She is not married and does not have any children. She has a high school diploma and some college experience. She was able to obtain a real estate license at one point in the past, though she no longer holds this. She has never been in the military.

Claimant is not currently working. When her accident occurred she worked for Adecco, which is a temporary agency. They had placed her at the City Group, which is a financial institution dealing with second mortgages on private homes. She worked for them for a few months prior to the injury occurring. Her job title was a customer service representative and involved speaking to customers over the telephone about their loan applications. She worked for them on a full time basis, working 40 hours per week. Employer scheduled her for 40 hours of work each week.

After the work injury occurred, Claimant stopped working due to her complaints and received medical treatment. She then returned to work for approximately one year at Convergis before stopping because of the need for additional surgery. She has not worked since that additional surgery.

In the past Claimant has worked in other positions including that of a computer tech. She did real estate work for one year. She has also worked as a manager of a dry cleaning shop, and she has worked at fast food restaurants.

August 23, 2005 Accident

Claimant's accident occurred on August 23, 2005. She was in the process of sitting in a chair in the lunchroom when the chair broke and caused her to fall to the floor. She landed on a hard tile floor. Thereafter she had back pain and her co-workers helped her to get up. She was offered an ambulance, though she turned that down and instead sought medical treatment through Concentra. They examined her and provided her with medication and physical therapy. However, her symptoms did not improve so she was referred to Dr. Graven, an orthopedic surgeon. He evaluated her and ordered an injection into her lower back. When she continued to have complaints he performed a fusion at the L5-S1 level in her lumbar spine. In follow up treatment he provided her with medication and, when her complaints continued, he referred her to a pain management physician named Dr. Suthar. She felt that the treatment she received from Dr. Suthar actually made her worse, as he was lowering the amount of medication that she was taking.

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When Claimant's complaints continued she was referred to another surgeon, Dr. Robson. He performed a second surgery on her lumbar spine in which he approached the spine through her abdominal cavity to fuse her. Two or three days after that surgery he performed another surgery in which he approached her spine from the back, again performing a posterior fusion. At that time he also removed the old hardware that was in her back, and replaced it. Claimant continued to follow up with him after these surgeries but continued to have problems. Dr. Robson eventually admitted her into the hospital again and performed a fourth surgery, again in an attempt to fuse her lumbar spine. She stated that while she was in the hospital she was not provided with her Xanax, and because of this she underwent a seizure. After being discharged from the hospital she underwent physical therapy and continued to receive medication from Dr. Robson. The doctor eventually discharged her from his care in March of 2010.

Since being discharged by Dr. Robson, Claimant has been receiving medications from her family physician, Dr. Sill. She continues to receive psychiatric care through Dr. Mattingly. She has also gone to Dr. Wagner and Central Dermatology. Both of these facilities have treated her for her skin problems. She indicates that she has skin problems which break out all over her body and cause her a great deal of problems because of the itching. She also sees Dr. Marku for her stomach problems. She identified Exhibit V as the medical bills which she has received from Dr. Sill and Dr. Mattingly for her treatment since the work injury.

Claimant described her ongoing complaints as continuous back pain. She states that the pain is so bad that it causes her to shake. It is aggravated by a variety of things such as sleeping on a bad bed, lying on the couch or sitting in a poor chair. She is worse with walking. The pain is across her lower back and into her left leg. The left leg feels very weak and numb and gives out on her without warning. She has a tingling in the left leg as well. The only things which help her to feel better are medications and rest, though sometimes she uses massage.

Pre-existing Medical Conditions

In the past Claimant had a neck injury following an automobile accident. She was seen by Dr. Graven after that accident and he performed a two level fusion in her cervical spine. She was better after the surgery but continued to have headaches approximately three times per week. These would last from a few hours to a few days and were worsened by things such as stress and failure to eat. She occasionally missed time from work because of these headaches. On cross examination she indicated that she had some lower back pain prior to the work injury, though it was not something which had affected her over a long period of time. She also indicated that she had some numbness in her left leg before the work injury, which she felt was related to the neck injury. She said that her neck would get tired at work and she might have had a slight problem with holding her head up.

With regard to her headaches, before the work injury, she said that she did have a sensitivity to light and loud noises. She would miss work because of these, up to a few days. She was taking medication for the headaches, including Fiorecet from Dr. Mattingly. This was apparently in an attempt to prevent her from having migraine headaches. Her primary care physician also provided her with Imitrex to take when she did obtain a headache. She said that she has dealt with migraine headaches for more than 10 years.

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On cross examination from the Second Injury Fund she stated that her pain at trial was an eight out of a possible 10. She said normally her pain is approximately a seven, though sometimes it is a 10. She tries to deal with her pain by taking medication, stretching, walking and using icy hot patches. She said that her left leg gives way basically every day. There have been times when she has fallen. She said that she lays down every day due to her pain, sometimes for 30 minutes, sometimes for a few hours. Sometimes she lays down more than once per day.

Claimant has a past psychiatric history going back to age nineteen. She has treated with Dr. Mattingly since then. He was providing her with Zoloft and Cymbalta, and she felt that her mood was doing fairly well in the year leading up to the work accident. She believes that her mood is now different from what it was before the work injury. She says that she questions a lot of things and that her depression is “unbelievable”. She says that she has a very high level of stress and that her depression is always there. She continues to treat with Dr. Mattingly, and he provides her with medications. On one occasion since the injury she said that she was suffering from a lack of sleep due to the pain in her back. She therefore took too much Tylenol and was taken by an ambulance to St. Joseph’s Health Center. She was then transferred to the psychiatric center at St. Mary’s Hospital.

Current Complaints and Daily Activities

Claimant states that in a typical day she does very little. She says that she cries a lot. It is difficult for her to go out, though she does try to walk a bit. She felt that she could only walk comfortably for 10 to 30 feet. She does not do work around the home and states that she relies upon her father to do this. She does do some driving, though generally only locally. It is difficult for her to ride long distances in a car. She stated that her sleep is horrible and that she has nightmares and wakes up from itching and back pain. She said that she normally receives three to four hours of sleep per night. She can stand comfortably for ten minutes and then needs to change positions. She can sit for a while longer, though she has to move around in her chair. She says that she has to lie down during the day because of her back symptoms and that when she is active it takes a few days to recover. She states that she only bathes approximately once per week because of her symptoms.

Dr. Volarich

Dr. David Volarich testified on Claimant’s behalf, having evaluated Claimant on one occasion at her attorney’s request. The evaluation was on August 3, 2010. He found on examination that Claimant has many scars over her arms, legs and torso due to self-induced scratches. (Depo p. 12). Some of them were open and weeping. He attributed these scars to neurotic excoriation. (Depo p. 13). He found that Claimant had changes in the neurologic examination of her upper extremities, which he attributed to her prior cervical spine injury. In the lower extremities he also found abnormal neurologic findings, which he attributed to postlaminectomy syndrome involving the “scarring and such” in her back. (Depo p. 16). He found weakness in the left extensor hallucis longus, decreased cervical motion, a trigger point in the cervical spine, lost motion in the lumbar spine, and abnormal findings on the two-point discrimination testing. (Depo p. 16-19). There was atrophy in the right calf due to chronic

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radicular symptoms. (Depo p. 19).

Dr. Volarich testified that the work accident caused the following diagnoses: lumbar left leg radicular syndrome secondary to discogenic pain from the L5-S1 level due to disc herniation and annular tear, status post the posterior discectomy with fusion and instrumentation at L5-S1; postlaminectomy syndrome due to pseudoarthrosis and hardware failure at L5-S1; status post revision posterior laminectomy, facetectomy, foraminotomy and redo fusion with pedicle screw instrumentation followed by anterior discectomy with cage removal and anterior fusion revision with cages; pseudoarthrosis L5-S1 fusion with chronic L5 radiculopathy on EMG; status post posterior hardware removal; revision laminectomy at L5-S1; redo posterior fusion with bone grafting at L5-S1; persistent postlaminectomy syndrome. (Depo p. 19-20). He said that the accident at work was a substantial factor in causing these conditions. (Depo p. 22). He also testified that Claimant had pre-existing medical conditions including herniated discs at C5-6 and C6-7, status post anterior cervical discectomy with fusion and instrumentation and bone grafting at C5-6 and C6-7; and also multiple psychiatric disorders including bipolar disorder, depression and anxiety. (Depo p. 23). He found that Claimant has disability as follows: 70% of the body at the lumbar spine due to accident of August 23, 2005; 35% of the body at the cervical spine due to pre-existing causes. (Depo p. 24-25). He testified that these disabilities combine with each other to create a greater overall sum. (Depo p. 26). He stated that Claimant is permanently and totally disabled due to the effects of the August 23, 2005 accident alone. (Depo p. 27).

With regard to future medical care, Dr. Volarich testified that Claimant will need care due to the work injury. He said this care would include: medications, physical therapy, epidural steroid injections, foraminal nerve root blocks, trigger point injections, TENS units, and diagnostic studies. (Depo p. 28-29).

Dr. Stillings

Dr. Wayne Stillings, a board-certified psychiatrist, testified on Claimant's behalf, having evaluated Claimant on two occasions at her attorney's request. The initial evaluation was on October 20, 2008, and the second was on October 20, 2010. On both occasions he interviewed Claimant, performed diagnostic testing and reviewed medical records. He was able to reach a psychiatric diagnosis as follows:

- Bipolar II disorder, psychotic (pre-existing work injury):
- Social phobia (pre-existing)
- Posttraumatic Stress Disorder, chronic, due to being raped (pre-existing)
- Posttraumatic Stress Disorder due to life-threatening experiences and abuse by her first significant boyfriend (pre-existing)
- Mood Disorder with a major depressive-like episode due to a general medical condition (8/23/05 accident): 10% disability
- Anxiety Disorder due to a general medical condition (8/23/05 accident): 10% disability
- Pain Disorder associated with both psychological factors and a general medical condition (8/23/05 accident): 10% disability
- Personality Disorder, not otherwise specified, with depressive, passive-aggressive,

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- dependent, and borderline personality traits (pre-existing)
- Aggravation of Bipolar disorder (8/23/05 accident): 10% disability.

(Depo p. 10-12). Dr. Stillings also testified that Claimant will need psychiatric care due to the work injury of 8/23/05. He said this would include medications and management by a psychiatrist. (Depo p. 12). He felt that Claimant is permanently and totally disabled. (Depo p. 13).

Dr. Robson

Dr. David Robson, a physician board-certified in physical orthopedic surgery, testified on Employer's behalf. He testified that he was Claimant's treating surgeon, beginning in 2008. He stated that he placed permanent restrictions on Claimant of a twenty pound lifting limit, with no bending, stooping, twisting or awkward positions. (Depo p. 21). He stated that Claimant has permanent disability of 25% of the body due to the work injury. (Depo p. 20). He also stated that Claimant was at a point of maximum medical improvement. (Depo p. 21). Dr. Robson stated that Claimant had a seizure due to the fact that he told the hospital staff not to give her the Xanax she had been taking. (Depo p. 31).

Dr. Bassett

Dr. Gregg Bassett, a board-certified psychiatrist, testified on Employer's behalf. He said that he evaluated Claimant on one occasion and arrived at the following diagnoses:

- Mood Disorder (pre-existing)
- Bipolar Disorder not otherwise specified (pre-existing)
- Anxiety Disorder not otherwise specified with features of posttraumatic stress disorder, social phobia, panic attacks, and agoraphobia (pre-existing)
- Somatoform Disorder not otherwise specified (pre-existing)
- Psychotic Disorder not otherwise specified (accident of 8/23/05)
- Aggravation of Bipolar Disorder, Anxiety Disorder and Somatoform Disorder (accident of 8/23/05)
- Personality Disorder not otherwise specified with Cluster B histrionic and borderline traits, and Cluster C dependent traits (accident of 8/23/05).

(Depo p. 7-8). He stated that Claimant has permanent disability of 50% of the body as a whole from a psychiatric standpoint. (Depo p. 9-10). He stated that 25% was due to pre-existing causes, and the other 25% was due to the accident of August 23, 2005. (Depo p. 10). He stated that Claimant needs ongoing psychiatric care, but she also needed ongoing psychiatric care prior to the work accident. (Depo p. 11). He stated that Claimant is permanently and totally disabled from a psychiatric standpoint due to the combination of psychiatric problems from pre-existing causes and the accident of August 23, 2005. (Depo p. 11-12).

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Timothy Lalk

Mr. Timothy Lalk, a certified vocational rehabilitation counselor, testified on behalf of Claimant. He analyzed medical records and interviewed Claimant for a period of hours. He finally reached the conclusion that she was not employable in the open labor market. (Depo p. 18). He based his conclusion on the medical opinions of Dr. Volarich and Dr. Stillings. He said Claimant's back problems make it difficult for her to function at even a sedentary level. (Depo p. 19). And her psychiatric conditions further limit her such that she could not be expected to function in any type of employment on a routine basis. All in all, he said that no employer would consider hiring her based upon her presentation. (Depo p. 19-20).

Karen Kane-Thaler

Ms. Karen Kane-Thaler, a vocational consultant, testified on behalf of Employer. She testified that she was asked to meet with Claimant and perform a vocational evaluation. (Depo p. 6). She evaluated Claimant and reviewed medical records before finally reaching the conclusion that there are light duty jobs available, and that Claimant "could potentially obtain the position during an interview, but would have difficulty maintaining the position, given her work history, her reported absenteeisms from -- and how she reported her perception of her physical abilities and health issues during the initial -- our interview". (Depo p. 16-17). She said:

If I assume Dr. Volarich's or Dr. Robson's and the idea that Dr. Robson said early on giving her a part-time sedentary type work to light work employment, from a physical standpoint, she would be able to access jobs in the open labor market; however, if I look at what Dr. Bassett and Dr. Stillings gives as restrictions and their description for a diagnosis, she would have an inability to maintain employment or participate in the work force.

(Depo p. 17-18). She stated that when she takes into consideration Claimant's psychiatric disability and physical problems both prior to the August 23, 2005 accident, and from the August 23, 2005 accident, that Claimant is not employable. (Depo p. 22-23).

FINDINGS OF FACT AND RULINGS OF LAW

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

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

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223 (Mo.App. E.D.1996)). However, the employee must prove the nature and extent of any disability by a reasonable degree of certainty. **Downing v. Willamette Industries, Inc.**, 895 S.W.2d 650, 655 (Mo. App. 1995); **Griggs v. A. B. Chance Company**, 503 S.W.2d 697, 703 (Mo. App. 1974).

Average Weekly Wage/Compensation Rate

The parties dispute how Claimant’s average weekly wage is to be computed. Claimant testified that she was scheduled to work 40 hours per week by Employer. Employer’s wage statement confirms this, and shows that Claimant was earning \$10.00 per hour. (Exhibit 6).

Missouri law states that if an employee’s wages are fixed by the hour, then the average weekly wage shall be figured by dividing by thirteen the wages earned by the employee in each of the last thirteen weeks prior to the accident. Section 287.250.1(4) RSMo. (2005). In this matter, the wage statement shows that Claimant earned the following wages prior to her injury:

Week	Weekly Hours (and days missed)	Wages
8/28/05	39.5	434.50
8/21/05	24 (2)	264.00
8/14/05	40	440.00
8/7/05	38	418.00
7/31/05	32 (1)	352.00
7/24/05	39	429.00
7/17/05	40	440.00
7/10/05	30	330.00
7/3/05	40.25	444.13
6/26/05	32 (1)	352.00
6/19/05	38.5	423.50
6/12/05	23.5 (2)	258.50
Total weeks: 12	Total hours: 416.75 (6)	Total wages: \$4,585.63

Claimant did not work for Employer for 13 weeks prior to the date of accident, as she was only employed for 12 weeks before being injured. Further, the wage statement shows that there were days when Employee did not work at all, such that those days should be subtracted from the calculation. The total number of those days equals six (6). Therefore, pursuant to Section 287.250.1(4), it is found that the proper way to calculate Claimant’s average weekly wage is by dividing the total wages (\$4,585.63) by eleven (11) weeks, which yields an average weekly wage of \$416.88 and compensation rates of \$277.92 for both PPD and TTD benefits.

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Permanent Partial or Permanent Total Disability

Section 287.020.7 RSMo. (2000) defines total disability 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.” The words “inability to return to any employment” means “that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment.” **Kowalski v. M-G Metals and Sales, Inc.**, 631 S.W.2d 919, 922 (Mo. App. 1982). The words “any employment” mean “any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition.” **Id.** at 922; **Brown v. Treasurer of Missouri**, 795 S.W.2d 479, 483 (Mo. App. 1990). The primary determination for permanent total disability is whether the claimant is able to compete in the open labor market given his physical condition and situation. **Messex v. Sachs Elec. Co.**, 989 S.W.2d 206, 210 (Mo.App. E.D. 1999).

Since Claimant’s accident took place on August 23, 2005, it must be analyzed under the law which existed at the time. Section 287 RSMo. underwent significant changes through legislative amendments which took effect August 28, 2005. Therefore, it must be determined which law applies to injuries sustained prior to August 28, 2005. **Article I, §13 of the Missouri Constitution** provides: That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities can be enacted.

There are two exceptions to the rule that a statute shall not be applied retrospectively. First, where the statute is only procedural and does not affect any substantive right of the parties and, second, where the legislature manifests a clear intent for retrospective application. **Gershman Investment Corp. v. Duckett Creek Sewer Dist.**, 851 S.W.2d 765 (Mo.App.1993). Section 287, as amended, does not contain a manifestation of legislative intent for retroactive application. Therefore, for any provision of §287 to apply retroactively, it must only be procedural in scope, as the retroactive application of statutory provisions which affects substantive rights violates the constitution. **Fletcher v. Second Injury Fund**, 922 S.W.2d 402, 406 (Mo.App.1996).

The distinction between substantive and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used to effect the suit. **Wilkes v. Missouri Highway and Transp. Com'n**, 762 S.W.2d 27, (Mo. banc 1988). Substantive statutes take away or impair vested rights acquired under existing law, or create a new obligation or impose a new duty. **Brennecka v. Director of Revenue**, 855 S.W.2d 509, 511 (Mo.App.1993).

Prior to the 2005 amendments, §287.800 stated “All of the provisions of this chapter shall be liberally construed with a view to the public welfare, and a substantial compliance therewith shall be sufficient to give effect to rules, regulations, requirements, awards, orders or decisions of the division and the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto.” The appellate courts have construed this to mean all doubts be resolved in favor of a claimant. All doubts must be resolved in favor of the

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employee and in favor of coverage. **Johnson v. City of Kirksville**, 855 S.W.2d 396, 398 (Mo. App. W.D. 1993). All provisions of the Workers' Compensation Act must be liberally construed; accordingly we resolve all doubts in favor of employee. § 287.800 RSMo. **Hall v. Wagner Division-McGraw-Edison**, 755 S.W.2d 594, 596 (Mo.App.1988); **Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute**, 793 S.W.2d 195, 198 (Mo.App.1990). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. **Johnson** at 398.

A statutory provision which requires that doubts be resolved in favor of a particular party is a substantive statute, as the claim vests when the injury occurs. Applying the 2005 revision of § 287.800 would impair the cause of action itself, therefore, § 287.800 as it existed at the time of Claimant's injury applies to this case.

A. Analysis: Physical Disability

It is undisputed that Claimant suffered a work related injury on August 23, 2005. The injury to her back resulted in -- among other things -- a herniated disc at the L5-S1 level of the lumbar spine. Multiple surgeries were required in an attempt to repair/alleviate the condition. In addition, Dr. Volarich testified that Claimant had an ongoing left leg radicular syndrome secondary to discogenic pain from the L5-S1 level, and a persistent postlaminectomy syndrome. (Depo p. 19-20). He found that Claimant has disability from the work injury at 70% of the body at the lumbar spine. (Depo p. 24-25). And he stated that Claimant is permanently and totally disabled due to the effects of the August 23, 2005 accident alone. (Depo p. 27). He recommended restrictions for Claimant which severely limit her activities. The restrictions which pertain solely to the accident of August 23, 2005 are these: avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks to an as needed basis; handle no weights greater than ten pounds, and limit this to an occasional basis; handle no weight overhead or away from the body, nor carry any weight over long distances or uneven terrain; avoid remaining in a fixed position for any more than fifteen to twenty minutes at a time including sitting and standing; change positions frequently to maximize comfort and rest when needed, including resting in a recumbent fashion; pursue an appropriate stretching, strengthening, and range of motion exercise program in addition to non-aerobic conditioning such as walking, biking or swimming to tolerance daily.

Dr. Robson placed permanent restrictions on Claimant of a twenty pound lifting limit, with no bending, stooping, twisting or awkward positions. (Depo p. 21). He stated that Claimant has permanent disability of 25% of the body due to the work injury. (Depo p. 20).

B. Analysis: Psychiatric Disability

Dr. Stillings testified that Claimant has several conditions due to the accident of August 23, 2005. These include a Mood Disorder with a major depressive-like episode due to a general medical condition, with an associated 10% disability; an Anxiety Disorder due to a general medical condition, with an associated 10% disability; a Pain Disorder associated with both psychological factors and a general medical condition, with an associated 10% disability; and an Aggravation of Bipolar disorder, with an associated 10% disability. (Depo p. 10-12). He felt

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that Claimant is permanently and totally disabled. (Depo p. 13).

Dr. Bassett also testified that Claimant has several conditions due to the accident of August 23, 2005. These include a Psychotic Disorder not otherwise specified; an Aggravation of Bipolar Disorder, Anxiety Disorder and Somatoform Disorder; and a Personality Disorder not otherwise specified with Cluster B histrionic and borderline traits, and Cluster C dependent traits. (Depo p. 7-8). He stated that Claimant has permanent disability of 25% of the body as a whole due to the accident of August 23, 2005. (Depo p. 10). He stated that Claimant is permanently and totally disabled from a psychiatric standpoint due to the combination of psychiatric problems from pre-existing causes and the accident of August 23, 2005. (Depo p. 11-12).

C. Analysis: Vocational Opinions

Two vocational consultants testified, and both of them found Claimant to be unemployable in the open labor market. Mr. Timothy Lalk reached the conclusion that Claimant is not employable in the open labor market. (Depo p. 18). He said Claimant's back problems make it difficult for her to function at even a sedentary level. (Depo p. 19). And her psychiatric conditions further limit her such that she could not be expected to function in any type of employment on a routine basis. All in all, he said that no employer would consider hiring her based upon her presentation. (Depo p. 19-20).

Ms. Karen Kane-Thaler reached the conclusion that there are light duty jobs available for Claimant, and that Claimant "could potentially obtain the position during an interview, but would have difficulty maintaining the position, given her work history, her reported absenteeisms from - - and how she reported her perception of her physical abilities and health issues during the initial -- our interview". (Depo p. 16-17). She said:

If I assume Dr. Volarich's or Dr. Robson's and the idea that Dr. Robson said early on giving her a part-time sedentary type work to light work employment, from a physical standpoint, she would be able to access jobs in the open labor market; however, if I look at what Dr. Bassett and Dr. Stillings gives as restrictions and their description for a diagnosis, she would have an inability to maintain employment or participate in the work force.

(Depo p. 17-18). She stated that when she takes into consideration Claimant's psychiatric disability and physical problems both prior to the August 23, 2005 accident, and from the August 23, 2005 accident, that Claimant is not employable. (Depo p. 22-23).

D. Conclusions Regarding Permanent Disability

Claimant is found to be a credible witness, though it was obvious she is suffering badly from a physical and psychiatric standpoint. Claimant has presented a convincing case -- based not only upon her own expert witnesses, but also those of Employer -- that she is permanently and totally disabled. In fact, Employer does not dispute that Claimant is totally disabled, but rather, claims that the Second Injury Fund bears responsibility for the disability. The Second Injury Fund also does not dispute that Claimant is totally disabled, but claims that responsibility

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lies with Employer.

Dr. Robson limits his opinions to the diagnosis, treatment and prognosis of the primary injury. He does not offer any opinion regarding permanent total disability, either in combination with the pre-existing neck injury, or based on the combination of the back injury in combination with the psychiatric injury from the primary injury. Dr. Basset only provides an opinion regarding the effects of pre-existing and primary psychiatric injuries. He does not evaluate the combined effects of the primary back injury and the resultant primary psychiatric injury. Even Employer's vocational witness testified that Claimant is permanently and totally disabled.

Based solely upon the restrictions and opinions placed on Claimant by Dr. Robson and Dr. Bassett -- doctors chosen by Employer -- Claimant would be found to be unemployable in the open labor market. Claimant is unemployable in the open labor market due to the effects of the last injury alone.

I therefore find that Claimant became permanently and totally disabled as of March 30, 2010, the date at which the parties stipulated Claimant reached MMI. The obligation to pay permanent disability compensation commences on the date when the claimant's permanent disability begins. **Kramer v. Labor & Indus. Rel. Com'n**, 799 S.W.2d 142, 145 (Mo. App. 1990); **Hall v. Wagner Div.-McGraw-Edison**, 782 S.W.2d 441, 443-44 (Mo. App. 1989). The permanent total disability payments shall therefore commence effective March 30, 2010, and shall continue to be paid in accordance with the provisions of this award and Section 287.200 RSMo. The applicable weekly rate for permanent total disability benefits is \$277.92 as determined supra.

Future Medical Care

It is sufficient to show that the need for additional medical treatment by reason of a compensable accident is a reasonable probability. **Mathia v. Contract Freighters, Inc.**, 929 S.W.2d 271, 277 (Mo.App.1996). Future medical care must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible. **Mickey v. City Wide Maintenance**, 996 S.W.2d 144, 149 (Mo.App. W.D.1999). A claimant is not required to produce "conclusive" testimony or evidence to support a claim for future medical benefits; it is sufficient if the evidence shows by "reasonable probability" that he is in need of additional medical treatment by reason of the work-related accident. **Landers v. Chrysler Corp.**, 963 S.W.2d 275, 283 (Mo.App. E.D.1997). The type of treatment authorized can be for relief from the effects of the injury even if the condition is not expected to improve. **Landman v. Ice Cream Specialties, Inc.**, 107 S.W.3d 240, 248 (Mo. banc 2003).

Employer's authorized treating physician, Dr. Robson, discharged Claimant from his care on March 30, 2010, stating that Claimant had reached a point of "maximum medical improvement". (Exhibit T). But Dr. Robson did not say that Claimant needed no further treatment. To the contrary, he said that he would not provide Claimant with further care because he felt that she was non-compliant with his medical care. He also theorized at the time that the non-compliance was probably related to Claimant's pre-existing psychiatric condition, but he

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stated the psychiatric condition was not the problem of the workers' compensation insurance carrier as it was a pre-existing condition.

The flaw in Dr. Robson's conclusion regarding psychiatric care is that Claimant's psychiatric condition was not simply a pre-existing condition. Employer's psychiatric expert, Dr. Bassett, established that Claimant's psychiatric condition was at least partially caused by the work accident. So Dr. Robson's conclusion -- that a pre-existing psychiatric condition was driving Claimant's condition -- was given without performing any sort of psychiatric exam, and apparently without knowing the opinions of Dr. Bassett and Dr. Stillings. Also, on cross-examination, Dr. Robson testified Claimant continued to complain of radicular pain, there was evidence of a chronic nerve root injury at L-5, and that it probably occurred at the time of the primary work injury. (Depo p. 28-29). Based upon these findings, Dr. Robson's opinions are not found to be credible on the issue of future medical care regarding Claimant's back injury. Dr. Volarich testified that Claimant will need care due to the work injury. He said this care would include: medications, physical therapy, epidural steroid injections, foraminal nerve root blocks, trigger point injections, TENS units, and diagnostic studies. (Depo p. 28-29). It is found that Dr. Volarich's opinions concerning past and continuing medical care are credible, such that Employer is responsible for providing medical care to cure and relieve the effects of Claimant's back injury.

Dr. Stillings also testified that Claimant will need psychiatric care due to the work injury of August 23, 2005. He said this would include medications and management by a psychiatrist. (Depo p. 12). Dr. Bassett stated that Claimant needs ongoing psychiatric care, but she also needed ongoing psychiatric care prior to the work accident. (Depo p. 11). With regard to Dr. Bassett's opinion, Missouri law does not prevent an employee from receiving an award of ongoing medical care simply because the care may also benefit a pre-existing condition. **Hall v. Spot Martin**, 304 S.W.2d 844, 854-55 (Mo. 1957). An employer may be required, however, to provide future medical care where there is evidence to a reasonable degree of medical certainty that the need for treatment is caused by the work injury even if the treatment will also provide treatment for a non-compensable condition. **Bowers v. Hiland Dairy Company**, 132 S.W.3d 260, 270 (Mo.App. S.D.2004). Both psychiatric experts, Dr. Stillings and Dr. Bassett, diagnosed identifiable new psychiatric conditions as a result of the injury. It is therefore found that Claimant is also entitled to an award of future medical care to cure and relieve the effects of her psychiatric condition.

Past Medical

Claimant requests reimbursement of certain past medical treatment in the amount of \$2,205.70, as summarized in Exhibit V. Claimant contends that she was required to seek the medical treatment therein as a result of Employer's failure to provide adequate treatment to cure and relieve the effects of the primary injury.

The cases cited in the future medical section notwithstanding, there must be evidence that treatment already provided was to cure and relieve the effects of the primary injury. Claimant has not provided sufficient evidence regarding the causal connection between the primary injury and the treatment for which reimbursement is requested. The Claim for reimbursement of past

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medical expenses is denied.

Credit for TTD/TPD Overpayment

Employer requests credit for an overpayment of \$3,376.26 in TTD and TPD benefits. The parties stipulate Claimant received a TTD overpayment of \$209.55 for TTD paid from March 31, 2010 through April 4, 2010. The parties also stipulate Claimant received 89 weeks of TTD at a weekly rate of \$293.34; and 34 weeks of TPD in the amount of \$146.67.

The amount Employer requests in credit is based on the proposition that the proper weekly rate is \$259.51 as opposed to \$293.34. However, as previously determined, the proper rate is \$277.92. Based on this rate, Employer is entitled to a credit of \$1,844.07.

TTD overpayment of \$15.42 weekly x 89 weeks = \$1,372.38. TPD overpayment of \$7.71 weekly x 34 weeks = \$262.14. The stipulated overpayment after MMI on March 31, 2010 is \$209.55. The sum of these equals \$1,844.07, to which Employer is entitled to a credit.

Liability of Second Injury Fund

Since Claimant has been adjudicated to be permanently and totally disabled as a result of the accident of August 23, 2005, there is no Second Injury Fund liability.

Attorney Dean Christianson shall be entitled to an attorney fee of 25% of this award for necessary legal services provided.

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