

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

Injury No. 99-151099

Employee: Linda Brown  
Employer: Chrysler Corporation  
Insurer: Old Carco, LLC  
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. Having read the briefs, heard the parties' arguments, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

*Permanent total disability*

We agree with the ultimate result reached by the administrative law judge in his well-written decision. The administrative law judge thoroughly considered employee's complex medical history, rendered clear and affirmative factual findings, and provided a cogent analysis of the issues before him. We wish to make clear that we appreciate both his efforts and his insight, and that we write this supplemental decision solely to clarify a particular aspect of our own analysis, rather than to criticize his approach.

The parties asked the administrative law judge to resolve the issues of the nature and extent of disability resulting from the primary injury, and the liability of the Second Injury Fund, with employee seeking an award of permanent total disability benefits. We note that at page 24 of his decision, the administrative law judge indicated that the first question to be answered in such a case is whether employee is permanently and totally disabled. The language of § 287.220.1 RSMo and the relevant case law, however, require that we first address the question of the nature and extent of disability employee suffered as a result of the primary injury. See, e.g., *Palmentere Bros. Cartage Serv. v. Wright*, 410 S.W.3d 685, 691 (Mo. App. 2013); *Pursley v. Christian Hosp. Northeast/Northwest*, 355 S.W.3d 508, 513 (Mo. App. 2011); and *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). If we find that the primary injury did not render employee permanently and totally disabled, the next question is whether employee's permanent partial disability from the primary injury combined with any preexisting permanent partially disabling conditions to result in total and permanent disability. *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144, 157 (Mo. App. 2014). If the answer to the second question is no, our analysis with regard to the question of permanent total disability is complete.

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The administrative law judge first found that employee is permanently and totally disabled based on the totality of employee's condition, which includes injuries and disabling conditions that arose subsequent to the date that employee reached maximum medical improvement from the effects of the primary injury. The administrative law judge then determined that neither the primary injury considered alone, nor the primary injury considered in combination with employee's preexisting conditions of ill-being, render employee permanently and totally disabled. Finally, the administrative law judge sought to identify an alternative cause for employee's permanent total disability, and determined that employee is permanently and totally disabled owing to the subsequent development or worsening of various conditions unrelated to the primary injury.<sup>1</sup> Notably, the administrative law judge did not identify or specifically rely upon any expert medical opinion that employee is permanently and totally disabled owing to these subsequent injuries or disabling conditions.

We are of the opinion that once the fact-finder has determined that (1) the primary injury considered alone does not render employee permanently and totally disabled; and (2) the primary injury in combination with employee's preexisting conditions of ill-being does not render employee permanently and totally disabled, the question whether employee is permanently and totally disabled owing to some other cause becomes irrelevant. This is because the courts have indicated that going a step further and attempting to identify alternative theories why an employee cannot work is not only unnecessary, but may undermine our analysis.<sup>2</sup>

Again, we recognize the administrative law judge's attention to detail in this matter and his careful explanations for each of his factual findings. We defer to the administrative law judge's assessment of the weight to be given to employee's testimony, the medical evidence, and the various expert opinions; for this reason we will not disturb his ultimate conclusions that neither the employer nor the Second Injury Fund are liable for permanent total disability benefits in this case. But we must disclaim his additional finding that employee is permanently and totally disabled owing to the subsequent development or worsening of various conditions unrelated to the primary injury. Rather, we simply find that the primary injury did not render employee permanently and totally disabled, and that employee's permanent partial disability resulting from the last injury does not combine with employee's prior disability to result in total and permanent disability, and conclude therefore that neither the employer nor the Second Injury Fund are liable for permanent total disability benefits.

## **Conclusion**

We affirm and adopt the award of the administrative law judge, as supplemented herein.

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<sup>1</sup> Along with employee's neurological complaints or "attacks," the administrative law judge cited increased problems with diabetes since 2002; an appendectomy, diagnosis of depression, and hospitalization for chronic obstructive pulmonary disease in 2004; a cervical spine fusion, right carpal tunnel release surgery, and left ankle tendon tear in 2008; a left carpal tunnel release in 2009; and a left hip replacement surgery in 2013.

<sup>2</sup> See, e.g., *Abt v. Miss. Lime Co.*, 388 S.W.3d 571 (Mo. App. 2012), where the Commission affirmed an administrative law judge's award rejecting expert opinion evidence regarding the cause of an employee's permanent total disability in favor of the administrative law judge's theory that the employee was permanently and totally disabled owing to subsequent deterioration. In reversing the Commission, the *Abt* court noted that "[r]ather than choosing one of the medical opinions, the Commission made a finding that is not consistent with any medical opinion in the record." *Id.* at 581.

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The award and decision of Administrative Law Judge John K. Ottenad, issued August 11, 2014, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

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 \_\_\_\_1<sup>st</sup>\_\_\_\_ day of April 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

# AWARD

Employee: Linda Brown

Injury No.: 99-151099

Dependents: N/A

Employer: Chrysler Corporation

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

Additional Party: Second Injury Fund

Insurer: OLD CARCO, LLC  
C/O Sedgwick Claims Management Services

Hearing Date: March 10, 2014  
Record Closed April 9, 2014

Checked by: JKO

## 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: September 3, 1999
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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 worked as an assembler for Employer and injured her right shoulder and neck, when she lifted a dashboard to turn it and her shoulder popped, with pain up into her neck and down her whole right arm into her hand.
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: Right Shoulder and Neck
14. Nature and extent of any permanent disability: 30% of the Right Shoulder and  
12.5% of the Body as a Whole—Cervical Spine
15. Compensation paid to-date for temporary disability: \$5,146.52
16. Value necessary medical aid paid to date by employer/insurer? \$9,100.35

Employee: Linda Brown

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- 17. Value necessary medical aid not furnished by employer/insurer? \$1,382.03
- 18. Employee's average weekly wages: \$725.64
- 19. Weekly compensation rate: \$483.76 for TTD/ \$303.01 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

119.6 weeks of permanent partial disability \$36,239.99

22. Second Injury Fund liability:

43.92 weeks of permanent partial disability \$13,308.19

**TOTAL: \$49,548.18**

23. Future requirements awarded: None

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: Andrew J. Gregory.

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

Employee:	Linda Brown	Injury No.: 99-151099
Dependents:	N/A	Before the
Employer:	Chrysler Corporation	<b>Division of Workers'</b>
Additional Party:	Second Injury Fund	<b>Compensation</b>
Insurer:	OLD CARCO, LLC	Department of Labor and Industrial
	C/O Sedgwick Claims Management Services	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JKO

On March 10, 2014, the employee, Linda Brown, appeared in person and by her attorney, Mr. Andrew J. Gregory, for a hearing for a final award on her claim against the employer, Chrysler Corporation, and its insurer, OLD CARCO, LLC C/O Sedgwick Claims Management Services, as well as the Second Injury Fund. The employer, Chrysler Corporation, and its insurer, OLD CARCO, LLC C/O Sedgwick Claims Management Services, were represented at the hearing by their attorney, Ms. Betsy J. Levitt. The Second Injury Fund was represented at the hearing by Assistant Attorney General Timothy Maurer.

To allow the parties time to prepare and file their proposed awards or briefs in this matter, the record did not technically close until April 9, 2014. Although we did not go back on the record or take any further evidence in this matter after the initial hearing date, the record was, then, closed on that date and the briefs were submitted by the parties by April 25, 2014, after extensions beyond the initial due date for the briefs were requested and granted.

At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

**STIPULATIONS:**

- 1) On or about September 3, 1999, Linda Brown (Claimant) sustained an accidental injury arising out of and in the course of employment.
- 2) Claimant was an employee of Chrysler Corporation (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.

- 6) At the relevant time, Claimant earned an average weekly wage of \$725.64, resulting in applicable rates of compensation of \$483.76 for total disability benefits and \$303.01 for permanent partial disability benefits.
- 7) Employer paid temporary total disability (TTD) benefits in the amount of \$5,146.52, representing periods of time from November 17, 1999 to December 5, 1999, February 22, 2000 to June 22, 2000 and July 31, 2000 to September 20, 2000.
- 8) Employer paid medical benefits totaling \$9,100.35.
- 9) Claimant worked for Employer until February 25, 2002.

**ISSUES:**

- 1) Are all of Claimant's claimed injuries and continuing complaints, as well as any resultant disability, medically casually related to her accident at work for Employer on September 3, 1999?
- 2) Is Claimant entitled to payment for past medical expenses in the stipulated amount of \$1,382.03, pursuant to the CMS filing?
- 3) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this injury?
- 4) What is the liability of the Second Injury Fund?

**EXHIBITS:**

The following exhibits were admitted into evidence:

***Employee Exhibits:***

- A. Certified medical treatment records of Orthopedic and Sports Medicine, Inc.
- B. Medical treatment records of St. Louis University Hospital
- C. Certified medical treatment records of Concentra Medical Centers
- D. Medical treatment records of SSM St. Joseph Hospital of Kirkwood
- E. Certified medical treatment records of the Center for Interventional Pain Management
- F. Certified medical treatment records of Dr. Ted Vargas
- G. Medical treatment records of SSM Rehab
- H. Certified medical treatment records of Dr. Michael Chabot
- I. Certified medical treatment records of Metropolitan Neurology, Ltd. (Dr. Gary Myers)
- J. Certified medical treatment records of the Department of Neurology at Washington University School of Medicine
- K. Certified medical treatment records of Orthopedic and Sports Medicine, Inc.
- L. Deposition of Dr. David Volarich, with attachments, dated August 6, 2012

- M. Deposition of Ms. Delores Gonzalez, with attachments, dated October 12, 2012
- N. Marriage Certificate of Claimant and Bryan Brown dated February 17, 1977
- O. Claimant's current list of medications

***Employer/Insurer Exhibits:***

- 1. Medical treatment records of St. Louis University Health Sciences Center
- 2. Deposition of Dr. James Burke, with attachments, dated October 15, 2012
- 3. Deposition of Ms. Donna Abram, with attachments, dated October 23, 2012
- 4. Deposition of Dr. Michael Chabot, with attachments, dated April 19, 2013
- 5. Correspondence from GENEX dated September 11, 2013 regarding CMS payments

***Second Injury Fund Exhibits:***

- I. Excerpts from Claimant's deposition taken on October 21, 2002
- II. Excerpts from Claimant's deposition taken on November 3, 2010

***Notes:*** 1) *Some of the deposition exhibits were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence.*

2) *Any stray markings or writing on the Exhibits in evidence in this case were present on those Exhibits when they were admitted into evidence on March 10, 2014. No additional markings have been made since their admission on that date.*

**FINDINGS OF FACT:**

Based on a comprehensive review of the substantial evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational opinions and depositions, the medical records and bills, and the other documentary evidence, as well as my personal observations of Claimant at hearing, I find:

- 1) **Claimant** is a 57-year-old, currently unemployed individual, who last worked for Chrysler Corporation (Employer) as an assembler on the line on February 25, 2002. Claimant had worked for Employer since 1996. Her job duties included spot welding, painting, maintenance and repair, driving a forklift and working in the body shop and trim and chassis departments. She began her employment for Employer as a TPT (temporary part-time employee) without any difficulties performing all of her job duties, but developed difficulties as she continued to work for Employer. Following her work injury on September 3, 1999, Claimant continued to work for Employer off and on until 2002, when they were able to accommodate her restrictions. Claimant testified that she collects Social Security disability to support herself.

- 2) Claimant testified that she graduated from Berkeley High School in 1974 and took an art class at East Central Community College in approximately 1984. She also went to cosmetology school from 1972-1974 and obtained a cosmetology license, which she still maintains at the current time. She noted, however, that she had not used the license for a long time prior to starting to work for Employer.
- 3) In terms of work history prior to her work for Employer, Claimant worked in a beauty shop (salon) for one to two years doing hair, nails and facials, but she left for a better paying job. She worked at various restaurants, including Jack In The Box, Ed's Smokehouse and Wendy's. She also worked as a CNA at a nursing home, taking vitals for patients and providing general patient care. Finally, then, Claimant obtained the job with Employer in 1996.
- 4) Regarding any medical conditions/disabilities that pre-existed the September 3, 1999 work injury, Claimant testified that she fell on ice and injured her low back, resulting in surgery in 1989. **Dr. Sherwyn Wayne** (Exhibit K) took Claimant to surgery on February 28, 1989. He performed an L5-S1 arthrodesis to treat her L5-S1 spondylolisthesis. She did well following surgery, with increased function and decreased complaints in her back. Dr. Wayne released her from care on March 1, 1990, noting a solid fusion and no major complaints.
- 5) Claimant also had a right elbow surgery performed by Dr. Wayne (Exhibit K) on September 3, 1997. She had a mild fascial release and partial epicondylectomy to treat her chronic right lateral epicondylitis. By October 13, 1997, Claimant was noted to be totally asymptomatic and released from care to return to work with the suggested use of a tennis elbow support with strenuous activity.
- 6) Claimant testified that as a result of the prior low back injury and surgery, she was off work for about a year. She testified that she still gets pain, stiffness and spasms up to the current time in her low back, and had those same kinds of complaints prior to her 1999 work injury. She said that when she first started at Employer, she had restrictions, including no bending, stooping, or lifting over 40 pounds, but she had the doctors lift the restrictions in order for her to be able to keep her job with Employer. Claimant described no real problems with the right elbow now, as a result of that prior surgery. Claimant denied having any neck or right shoulder problems prior to September 3, 1999.
- 7) Claimant testified that on September 3, 1999, she was working on the line building up the dashboards, which involved spot welding parts onto the dashboard, and, then, lifting and turning the dashboard with a co-worker to complete the job. She said that as she lifted the dashboard out of the station to turn it, her whole right arm popped from her shoulder and she developed pain from the right shoulder up into her neck and down the whole arm into her hand. She said that her whole right arm from the top of her shoulder, by her neck, down to her hand swelled up immediately. Claimant testified that she went to plant medical, where they wrapped her arm from below her shoulder to her hand. She did not go back to that same job, but was placed on a

- different, lighter job, working with only her left arm. She said that eventually, she was referred by plant medical to Dr. Rotman for further care.
- 8) I do not find any of the records from the Chrysler plant medical department in evidence documenting the initial treatment Claimant received following this accidental injury. The first medical treatment record in evidence is dated September 13, 1999 from **Dr. Mitchell Rotman at St. Louis University Health Sciences Center** (Exhibit 1). Claimant provided a history of lifting a heavy object and feeling a pop and burning sensation in the right arm on September 3, 1999 at work. She complained of shoulder pain, neck pain, weakness and decreased strength in the right arm. Following his physical examination, he found no evidence of impingement instability, shoulder arthritis or any kind of tendon ruptures. He believed she sustained a slight muscle strain about the deltoid region, recommended over-the-counter medications for discomfort, and released her from care to full, unrestricted work. He did not believe there was any evidence of impairment.
- 9) When she continued to have problems and complaints, she sought treatment on her own with **Dr. Sherwyn Wayne at Orthopedic and Sports Medicine, Inc.** (Exhibit A). Dr. Wayne examined Claimant on October 8, 1999. She had complaints of forearm and right shoulder pain after lifting at work. Dr. Wayne diagnosed a right biceps strain, but wanted to get an MRI to rule out a rupture of the proximal biceps tendon. She followed up with **Dr. Lyndon Gross** (Exhibit A) on October 18, 1999 after her MRI, with continued complaints in her right shoulder. Dr. Gross diagnosed right shoulder impingement and a probable tear of the proximal biceps, in addition to rotator cuff tendinitis. He recommended a steroid injection in the shoulder and physical therapy.
- 10) At that point, Claimant was returned to Dr. Rotman (Exhibit 1) for further evaluation. He examined her on November 2, 1999. At the time of this examination, Dr. Rotman now found a positive impingement sign and clinical evidence of a biceps rupture. He injected her shoulder, which improved her function, and diagnosed impingement. He ordered physical therapy, which was conducted at **Concentra Medical Centers** (Exhibit C) from November 5, 1999 through November 17, 1999. Of note in the physical therapy records, I found references to both right arm/shoulder and neck complaints that got worse as the day progressed, according to Claimant's report. When Claimant returned to Dr. Rotman on December 6, 1999, he was unsure "what is going on with her" because she had continued pain and weakness, but no crepitus and full motion. He ordered a new MRI arthrogram of the right shoulder, which was taken at **St. Louis University Hospital** (Exhibit B) on December 17, 1999. It showed a partial tear of the subscapularis musculotendinous junction, a Type III capsular insertion anteriorly and a slightly irregular anterior labrum without a definite tear. When Claimant returned to Dr. Rotman on December 27, 1999, he noted that it showed no evidence of tendinitis of the supraspinatus or impingement, but perhaps a partial tear more proximal than the rotator cuff. Based on his review of the MRI and the clinical examination, he said that he had no other treatment to offer her and saw no reason why she could not return to full-duty work for Employer.

- 11) While she was treating with Dr. Rotman, Claimant continued to see Dr. Gross (Exhibit A), who, on December 2, 1999, suggested a possible arthroscopic subacromial decompression to treat her continued complaints and her diagnosed right shoulder impingement and rotator cuff tendinitis. When she returned to Dr. Gross' office on February 17, 2000, she was examined by **Dr. Chris Kostman** (Exhibit A). Dr. Kostman agreed with the need for right shoulder surgery. Dr. Kostman took Claimant to surgery on February 25, 2000 at **St. Joseph Hospital** (Exhibit D). He performed a right rotator cuff repair and subacromial decompression, to treat Claimant's impingement and rotator cuff tear. Claimant continued to follow up with Dr. Kostman after surgery and also had more physical therapy. She seemed to be improving functionally, but had continued weakness in the arm. In a note dated July 26, 2000, Claimant reported a frank increase in right shoulder pain and stiffness, while working at Employer moving 2-pound objects across a conveyor belt. She did not report a discrete injury, just increased complaints with this activity. Dr. Kostman recommended more therapy to address her weakness and decreased motion. When she also reported increased complaints in the shoulder while cooking bacon, Dr. Kostman ordered a new MRI on August 16, 2000, which showed no evidence of a frank tear. She was given an injection, continued in therapy, and also continued on work restrictions of no overhead lifting or lifting greater than 25 pounds. By October 11, 2000, Dr. Kostman thought that perhaps an interscalene block would be of benefit to her and he referred her to a pain management physician for that purpose.
- 12) In connection with this injury, Employer paid \$9,100.35 in medical benefits. Employer also paid Claimant temporary total disability (TTD) benefits in the amount of \$5,146.52, representing periods of time from November 17, 1999 to December 5, 1999, February 22, 2000 to June 22, 2000 and July 31, 2000 to September 20, 2000.
- 13) Claimant began treating with the **Center for Interventional Pain Management** (Exhibit E) and received her first injection from **Dr. Gurpreet Padda** at St. Joseph Hospital (Exhibit D) on October 19, 2000. She continued to see Dr. Padda into early 2002 and received a number of various injections and other treatment, both for her shoulder complaints and for what would be diagnosed during this time as cervical radiculopathy. In a note dated January 24, 2001, Dr. Padda records Claimant's continued difficulties with her right shoulder. He notes that she is working full duty but still has burning pain in the shoulder. He believes the majority of her pain was created by her inability to do surgical rehabilitation. During this time, Claimant apparently developed neck pain that radiated to her right arm and Dr. Padda ordered a cervical MRI, which was performed on June 15, 2001. It showed a central and right-sided disc protrusion at C5-6 that resulted in encroachment on the ventral cord and right C6 foramen. Based on this finding, he diagnosed cervical radiculopathy and performed a series of cervical epidural steroid injections. In a note dated August 31, 2001, Dr. Padda noted that Claimant's radicular symptoms have resolved since the injections, but she has very significant osteoarthritic changes in the cervical facets and hyperspasm of the muscle is recreated by cervical facet joint immobilization. If her symptoms persisted, he recommended rhizolysis of her cervical facets. On January 7, 2002, Dr. Padda performed a rhizolysis of the cervical facets on the right side from C2-C6 at St. Joseph Hospital (Exhibit D), to treat her cervical facetitis.

- 14) Claimant returned to St. Joseph Hospital on February 26, 2002 (Exhibit E) for a complaint of intermittent numbness on the whole right side of her body. She was thought to have had a transient ischemic attack. Scans and studies of her heart, carotid arteries and brain were all negative.
- 15) In his final note, Dr. Padda wrote that Claimant had been under his care for the treatment of cervical radiculopathy and unable to work from February 27, 2002 through April 4, 2002. He opined that she could return to work on April 5, 2002 with the restriction of no over-the-shoulder lifting greater than 15 pounds.
- 16) During her treatment for the shoulder with these various physicians, Claimant testified that she was working off and on when her restrictions could be accommodated. She described her restrictions at that time of no lifting more than 5 pounds because of the shoulder, no reaching and no bending or stooping because of her neck. Claimant testified that she eventually stopped working altogether because of the tremors that were occurring and the pain.
- 17) Throughout this whole period of time, Claimant was continuing to see her primary care physician, **Dr. Ted Vargas** (Exhibit F) for various complaints and problems, including some of the issues described above, for which she was also treating with other physicians. The records confirm that Claimant began having “episodes” or “attacks” in December 2001 and which have been increasing in frequency and severity such that, by April 6, 2002, she wanted to talk to the doctor about taking medical leave from her job for Employer due to safety reasons.
- 18) In her **deposition testimony from October 21, 2002** (Exhibit SIF I), Claimant testified that the first “attack” she had was in December 2001, and, then, she had another significant “attack” in February 2002, for which she was sent to the hospital. She described it as being “like a stroke,” with severe pressure in the right arm with everything on her right side going numb, including her face, right arm and right leg. She said that she was being seen by a number of different doctors, who are running tests to try to determine what is wrong. She also testified that the pain goes between her shoulder blades, into her left arm, down her spine and into her legs, sometimes so bad, that she cannot get up and move. She explained that these additional problems with the left arm and down her spine began after the “attack” in February 2002, and they have continued to worsen in the four months following that February “attack.”
- 19) Dr. Vargas referred Claimant to **Dr. Gary Myers at Metropolitan Neurology, Ltd.** (Exhibit I). Dr. Myers first examined Claimant on March 25, 2002 and took a history from her of an onset of periodic right arm pain and numbness on December 20, 2001. She had the second such episode on February 15, 2002 and has been having them daily since then, sometimes multiple times per day, with some numbness in her right leg and foot and on the right side of her face. She was continuing to work for Employer and “denies trauma as a cause of her current symptoms.” He wanted to rule out a herniated disc in the neck and rule out multiple sclerosis as possible causes of

her complaints. The CT scan of the brain was negative and the carotid ultrasound study was also negative.

- 20) Dr. Vargas also referred Claimant to **Dr. Michael Chabot** (Exhibit H) on April 10, 2002. She described pressure in the neck and radiating pain into the right shoulder and arm that had increased in the last four to five months. She also complained of low back pain with some radiation into the right leg, which had been present for years. He diagnosed a cervical disc herniation, cervical radiculopathy and shoulder bursitis/tendonitis by history. He recommended a cervical myelogram and CT scan, as well as an EMG/nerve conduction study to better delineate the etiology of her symptoms. **Dr. Andrew Wayne** (Exhibit A) performed the EMG/nerve conduction study on April 26, 2002. The only positive finding was a minimal amount of left sensory motor carpal tunnel syndrome, which is her less symptomatic side. He found no evidence of any ulnar neuropathy, peripheral polyneuropathy, cervical radiculopathy or brachial plexopathy. When she returned to Dr. Chabot on April 29, 2002 after all the testing had been conducted, Dr. Chabot opined that she had disc bulging and disc degeneration, but the degree of neural compression is limited. He believed a large portion of her symptoms were associated with anxiety and not a neural compression because her neurologic examination remained inconsistent and the EMG showed nothing on the right side. He suggested she continue with conservative treatment measures and released her from care.
- 21) Additionally, Dr. Vargas referred Claimant to **Dr. Glenn Lopate** at the **Washington University Neuromuscular Disorders Clinic** (Exhibit J) on October 31, 2002 for evaluation of her right arm pain. She described having “attacks” starting in December 2001 of sharp, throbbing pain in the whole right arm, which, since then, have also included her right leg and now the left side of her body. She also described dizziness, mild nausea and blurred vision during some of the “attacks,” as well as a right hand tremor. It was suggested that perhaps she had a complex regional pain syndrome involving the right upper extremity, but more testing and evaluation was recommended. When she returned on May 15, 2003, Dr. Lopate now recorded that her complaints included pain “over her whole body.” He again diagnosed a complex regional pain syndrome with mild improvement on Neurontin. He increased her Neurontin dosage to see if that would eliminate more complaints. When she was next examined on January 15, 2004, she continued to report episodes of right-sided body “attacks,” for which she has gone to the emergency room, without clear diagnosis since the testing is normal. Claimant apparently told the doctor that she believed this was all related to her right shoulder injury, and she became tearful when he suggested instead that this may be some migraine-like phenomenon. Dr. Lopate concluded that she had episodic right-sided symptoms, which although not typical, “may be a migraine equivalent.” He recommended treating her with a migraine prophylactic agent. Dr. Lopate last examined Claimant on October 20, 2005. At that time, she was complaining of left big toe and bilateral hand numbness, as well as an episode of “burning all over.” She continued to have her “attacks” and right hand tremor, which were not improved. She had a basically normal neurological examination and became tearful at a discussion of psychiatric issues. He noted that Claimant has a variety of complaints that are not clearly neuromuscular and suggested that she see a general

neurologist or perhaps seek psychiatric treatment, since he apparently had no further treatment to offer her.

- 22) Dr. Vargas also asked Dr. Kostman (Exhibit A) to evaluate Claimant's right arm pain, shaking sensation and tremors, since he had previously performed the surgery on her right shoulder. Dr. Kostman examined her on January 22, 2003. Claimant reported "stroke-like attacks" of shaking and pain that occurred two to five times a day, sometimes more. She basically reported that any activity, even lying down, exacerbates her symptoms. Dr. Kostman found full range of motion in her arms and shoulders bilaterally, with a visible tremor in the right arm. He found full, equal strength and a negative impingement sign. He diagnosed her as having good strength and full range of motion, status post rotator cuff tear repair. He found no correlation between her current symptoms and her prior shoulder surgery.
- 23) In light of these opinions, Dr. Vargas sent Claimant for a course of physical therapy for her right arm, shoulder and neck pain at **SSM Rehab** (Exhibit G). Claimant attended therapy from July 1, 2003 through October 20, 2003. There are numerous references to her "attacks" and episodes of pain and numbness in the right arm, as well as, now, tremors in the right arm. There are references to Claimant perhaps having fibromyalgia and reflex sympathetic dystrophy (RSD), in both these physical therapy records and the records of Dr. Vargas (Exhibit F).
- 24) Claimant was once again referred to **Dr. Michael Chabot** (Exhibit H) by Dr. Vargas on September 5, 2008. She complained of neck pain radiating into both shoulders, right worse than left, and numbness involving her hands. She said the symptoms have been present for years, but have worsened in the last 1 ½ years. She also complained of low back pain radiating into her lower extremities that has progressively worsened over the last six months. Following some additional diagnostic testing that confirmed cervical spinal stenosis and disc degeneration, as well as carpal tunnel syndrome, surgery was recommended. On October 16, 2008, Dr. Chabot performed anterior cervical discectomies, spondylectomies and a cervical fusion at C5-6 and C6-7, with implants and plating at those levels, as well as a right carpal tunnel release. By January 7, 2009, she was doing very well with no complaints. He released her from care to continue her home exercises and use the external bone stimulator for another month. Subsequently, on November 3, 2009, he performed a left carpal tunnel release on Claimant.
- 25) **Correspondence from GENEX dated September 11, 2013 regarding CMS payments** (Exhibit 5) document \$1,382.03 in medical bills paid for by Medicare, for which Medicare now seeks reimbursement as a part of this case. The dates of treatment are all in 2011 and 2012 at Des Peres Hospital, SSM Rehab and with Drs. Vargas, Kayser and Schwarze. Claimant testified that this treatment was related to right knee issues and had nothing to do with her 1999 work injury. She confirmed that none of the charges were related at all to her work accident on September 3, 1999.

- 26) The deposition of **Dr. David Volarich** (Exhibit L) was taken on August 6, 2012 by Claimant to make his opinions in this case admissible at trial. Dr. Volarich is an osteopathic physician, board certified in occupational medicine, nuclear medicine and as an independent medical examiner. He examined Claimant on two occasions, November 1, 2004 and October 6, 2009, at the request of her attorney and provided no medical treatment. In addition to performing physical examinations of Claimant, he also reviewed her medical treatment records. Claimant provided a history of the injury at work on September 3, 1999 and of her continued complaints in her right shoulder, right arm and neck, as well as the “attacks” she gets that cause numbness on the right side of her body and tremors. The physical examination on November 1, 2004 showed symmetric bulk in the upper and lower extremities; decreased strength in the right arm; slightly decreased strength in the right leg because of numbness throughout the whole leg; normal sensation in the left upper and bilateral lower extremities, with diminished pinprick sensation throughout the right arm; symmetric reflexes; trigger points and lost range of motion in the cervical spine; some lost range of motion in the lumbar spine; lost range of motion, crepitus, atrophy and a mildly positive impingement test in the right shoulder; and a cyclic tremor involving the right forearm, wrist and hand that worsens with intention, such as resisted motion in the upper extremity.
- 27) Medically causally related to the September 3, 1999 work injury, Dr. Volarich diagnosed internal derangement of the right shoulder (impingement and rotator cuff tear), status post surgical repair (subacromial decompression and rotator cuff repair) and aggravation of her cervical spondylosis at C5-6 with associated disc bulge, causing right upper extremity radicular symptoms, chronic regional pain syndrome and right arm tremor. On account of the September 3, 1999 work injury, Dr. Volarich rated Claimant as having permanent partial disabilities of 35% of the right shoulder and 35% of the body as a whole referable to the neck. He rated pre-existing disability of 25% of the body as a whole referable to the lumbosacral spine due to her prior L5-S1 fusion and L4-5 disc bulge, which he also opined was a hindrance or obstacle to employment. Despite her prior right elbow surgery, he did not believe there was quantifiable disability, since she was reportedly asymptomatic. He opined that the combination of her disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness, and, so a loading factor should be added. Dr. Volarich placed a number of restrictions on Claimant regarding her right shoulder and spine. He recommended a vocational assessment to determine her ability to return to work, but opined that if a suitable job was not able to be identified, then he believed her to be permanently and totally disabled as a result of the combination of her work accident in 1999 and her pre-existing medical conditions.
- 28) When Dr. Volarich next examined Claimant on October 6, 2009, the main difference was that Claimant had now had a cervical fusion surgery performed by Dr. Chabot. Despite some changes on the physical examination, Dr. Volarich offered no new additions to his diagnoses or his ratings of disability that he attributed to the September 3, 1999 injury. He opined that the cervical fusion surgery was needed as a result of the progression of her cervical spondylosis over the four years since he last examined her in 2004. He further opined that if no jobs are identified for her, she was

permanently and totally disabled prior to the progression of her cervical spine condition and fusion surgery, as well as prior to her right carpal tunnel syndrome and surgery.

- 29) On cross-examination, Dr. Volarich agreed that Claimant's numbness and weakness in the right leg, as well as her inability to stand on the right leg and loss of motion in the lumbar spine, were most likely the result of her prior low back condition and fusion surgery. However, he admitted that she did not complain to him of any numbness in her legs prior to the September 3, 1999 injury. He confirmed that the cervical spine CT scan dated April 29, 2002, showed no disc herniation, but an osteophyte, which is a bone spur that takes time to develop, like any other arthritic change. He agreed that the osteophyte was there prior to September 3, 1999. He confirmed that the cervical fusion surgery was not related to the September 3, 1999 injury.
- 30) The deposition of **Dr. James Burke** (Exhibit 2) was taken on October 15, 2012 by Employer to make his opinions in this case admissible at trial. Dr. Burke is a board certified orthopedic surgeon. He examined Claimant on December 6, 2007 at the request of Employer's attorney and provided no medical treatment. He issued his report that same date, following his physical examination of Claimant and his review of the medical treatment records. Claimant provided a consistent history of the work injury on September 3, 1999 and of her continued complaints in the right shoulder and neck, as well as a right arm tremor, left shoulder pain and weakness and numbness into the right leg. Physical examination revealed an obvious resting tremor in the right upper extremity and a very mild tremor in the right lower extremity, very mild weakness in the right arm, full passive range of motion with negative impingement testing on the right shoulder, no spasm and no instability noted. Dr. Burke diagnosed the following: 1) Status post right shoulder injury with operative findings consistent with rotator cuff tear and subsequent repair; 2) Degenerative cervical spondylosis and degenerative disc disease; and 3) Poorly defined neurologic syndrome.
- 31) Dr. Burke opined that the shoulder injury and surgery was medically causally related to her work injury on September 3, 1999 and that she has 10% permanent partial disability of the right shoulder as a result of it. He opined that her cervical spine condition was clearly pre-existing based on the presence of the bone spur at C5-6 that is degenerative in nature, with no significant disc herniations or protrusions. He did not believe that her shoulder symptoms had anything to do with her degenerative disc disease at C5-6 or that her neck findings were related at all to her described work activity. He rated her as having 7.5% permanent partial disability of the body as a whole referable to the cervical spine, due to her pre-existing cervical spondylosis, not related to her work injury. With regard to her neurologic syndrome, Dr. Burke noted that complex regional pain syndrome or RSD generally relates only to the affected extremity and not globally throughout the body, such as is the case with Claimant, with the right lower extremity, back and left shoulder involved as well. He noted that she has been thoroughly evaluated with various testing without any positive findings and also has been unresponsive to conservative care. Dr. Burke was unable to causally relate her global somewhat body-wide pain syndrome to her work injury. In

terms of her ability to work, Dr. Burke did not believe she needed any specific restrictions with respect to the right shoulder portion of her case, but he was skeptical that she would ever be able to return to any gainful employment as a result of her neurologic status, "which is poorly defined and impossible to relate to either her described work activity or subsequent treatment thereof."

- 32) The deposition of **Dr. Michael Chabot** (Exhibit 4) was taken on April 19, 2013 by Employer to make his opinions in this case admissible at trial. Dr. Chabot is a board certified orthopedic spine surgeon. He examined and treated Claimant, including performing surgeries on Claimant for her neck and hands, and also issued an independent medical examination report at the request of Employer's attorney dated April 18, 2011. Dr. Chabot reviewed extensive medical treatment records in this case and also relied on his treatment and physical examinations of Claimant in reaching his conclusions in this matter. He diagnosed Claimant as having chronic neck pain and disc degeneration, status post anterior cervical discectomies and fusions from C5 to C7. He did not believe the need for the cervical spine surgery was caused by the work injury or subsequent rehab of the shoulder. He opined that it was caused by the progression of her cervical degenerative changes in the years following his initial examination of her. He opined that the degeneration at the C5-6 level pre-existed the September 3, 1999 injury, that she had no permanent partial disability in the neck as a result of that injury, and that she could return to limited work duties with no lifting in excess of 25 pounds. Essentially, he did not believe that she sustained any injury to her neck or cervical spine as a result of the September 3, 1999 injury. In addition to the opinions contained in his April 18, 2011 report, Dr. Chabot also testified consistently with the opinions expressed in his other reports and treatment records summarized above. He indicated that during the time he was treating Claimant, he did not see any evidence of a chronic regional pain syndrome. On cross-examination, Dr. Chabot admitted that he had few details about the mechanism of injury involving the dashboard from September 3, 1999, including the dimensions, weight or level at which she was carrying/turning it. He also acknowledged that the lifting restriction he placed on Claimant was as a result of all of her conditions taken together including the neck, low back and shoulder surgeries, her asthma, shortness of breath, pain, bleeding problems, arthritis, depression, diabetes, COPD and fibromyalgia. Given her age and all of these issues, he felt she would be better able to function in the light-to-medium range for work.
- 33) The deposition of **Ms. Delores Gonzalez** (Exhibit M) was taken on October 12, 2012 by Claimant to make her opinions in this case admissible at trial. Ms. Gonzalez is a certified vocational rehabilitation counselor. She interviewed Claimant on April 2, 2005, at the request of Claimant's attorney, and reviewed extensive medical treatment records and reports. She prepared a report dated June 29, 2005, as well as a supplemental report dated August 27, 2010, that contained her findings and conclusions in this matter. Ms. Gonzalez concluded that Claimant's impairments have produced severe pain, including severe pain with sitting, standing or walking for more than a few minutes, that affects her ability to perform basic work-related functions and some activities of daily living. She concluded that Claimant was not a candidate for vocational rehabilitation and was incapable of competitive work in the

open labor market. She confirmed that it was the combination of her pre-existing and primary injury disabilities that preclude her from competitive employment.

- 34) On cross-examination, Ms. Gonzalez admitted that she took Claimant's complaints and descriptions of her abilities/limitations as being accurate and not exaggerated. She further admitted that if they were found to be exaggerated, then her opinions could change in this case. She knew Claimant returned to work for Employer after her shoulder surgery, but she did not know for how long and she characterized it as failed work attempts because of her pain. She admitted that the restrictions from Dr. Kostman and Dr. Chabot would place Claimant in the light-to-medium range of work activities. She also noted that some of the medications Claimant has been taking since 1999 would have negative side effects in terms of being employed, such as drowsiness, inability to focus, and memory and concentration issues. Ms. Gonzalez confirmed that Claimant did not report "attacks" per se, but did report constant pain in her right shoulder that radiated down the arm to the hand and up into her neck, then down her spine into her right leg. She was aware of the prior lifting restriction after her low back fusion, but apparently unaware that it was lifted by the doctors so she could work for Employer.
- 35) The deposition of **Ms. Donna Kisslinger Abram** (Exhibit 3) was taken on October 23, 2012 by Employer to make her opinions in this case admissible at trial. Ms. Abram is a certified vocational rehabilitation counselor. She interviewed Claimant on July 11, 2011, at the request of Employer's attorney, and reviewed extensive medical treatment records and reports. She prepared a report dated August 16, 2011 that contained her findings and conclusions in this matter. Ms. Abram took an extensive history from Claimant, as well as her description of her ongoing complaints, including that she does not drive unless she has to and only drives for short distances because of her "attacks." Claimant apparently reported that she has not tried to locate a new job since 2002 because of the combination of her COPD, fibromyalgia, tremors and her "attacks." Ms. Abram performed a transferable skills analysis and determined that Claimant did have some transferable skills based on her prior actual work duties. She also administered a vocational test, the Raven's Standard Progressive Matrices, but found that Claimant performed in such an inconsistent manner on the test (internal discrepancy rate of +/- 4 on two of five subtests, when anything over +/- 2 is an invalid result), that she had to rely on Claimant's work history instead of the test for this evaluation. Taking all of this information into account and also taking into account the stated restrictions from the various physicians, Ms. Abram concluded that there were jobs in the open labor market that Claimant could perform. She found that Dr. Vargas' restrictions placed Claimant in the sedentary range of work and the restrictions from the other physicians (Drs. Chabot, Volarich, Brancato, Kostman and Padda) placed her in the light range of work, but in either category of work, there were jobs available in the open labor market that Claimant could perform. She acknowledged in the report that if Claimant's COPD, fibromyalgia, tremors, "attacks," and complex regional pain syndrome (RSD) make her unable to function, then she would not be able to work in the open labor market in any position.

- 36) On cross-examination, Ms. Abram acknowledged that she took Dr. Vargas' restrictions into account in formulating her opinions, and as stated above, believed those restrictions placed Claimant in the sedentary range of work, but I found no testimony explaining how she reached that conclusion when one of Dr. Vargas' notes indicated, "Patient is incapable of sedentary work (on a sustained and full-time basis)." She also acknowledged in her report and on cross that Claimant's reported need to lie down repeatedly throughout the day and the effect some of her medications have on her could have a negative effect on her ability to be employed.
- 37) In terms of her current complaints, Claimant testified that she has severe pain with spasms in the neck, right shoulder and right arm. She said that she has problems turning her head. She described a feeling that she is "knotted" up in the back of the neck to the right. She described swelling in the arm and neck area. She said that she still has the tremor in her right arm, which started after the surgery for her shoulder and is always present. She noted that sometimes she can write a little bit, despite the tremor. Claimant also testified that she continues to get "attacks," which start in her upper arm with tightness (like a blood pressure cuff being tightened), and, then, numbness in the arm, the right side of her face and neck and into her right leg. She said that the frequency with which she gets these "attacks" is about the same since the injury. She estimated that she gets them three to four times a month, or one to two times a week on average, and they can last from five minutes to one hour at a time. Claimant does not think that she could go back to work with these problems.
- 38) Claimant testified that she continues to treat with Dr. Vargas for complex regional pain syndrome and she still sees Dr. Chabot as a referral from Dr. Vargas. She noted that the cervical fusion surgery Dr. Chabot performed on her in 2008 helped decrease her neck pain, but she said that her pain is still aggravated when she does things every day and she still has pain, stiffness and spasms. Claimant testified that she continues to take an extensive **list of medications** (Exhibit O) for her various complaints, including hydrocodone, oxycodone and Neurontin, which she has been taking since her injury. She said that her husband has to take care of the medications for her because she gets forgetful. She also noted that the pain medications make her drowsy/loopy.
- 39) Claimant testified that she used to ride motorcycles, race go-carts, paint, draw, sew quilts, do outdoor activities with the Girl Scouts, and play sports (badminton, horseshoes, ball, etc.), but she has been completely unable to do any of this since her injury in 1999. She said that her neck, shoulder and back problems limit her to being able to do much of anything for more than ten minutes at a time. She is only able to do light chores around the house, like dusting or dishes, but she has to take breaks. Her husband takes care of the rest of the chores. She testified that even after five to six minutes, she is worn out and has to sit or lie down. She said that she also cannot sit or stand too long. She is not able to drive very often, perhaps one to two times per month, and even then it is only to go to the grocery store in town to occasionally pick something up. She is only able to sit in a car for 45 minutes to an hour, before she has increased pain in her low back, neck and arm. If they drive longer than that, she has to stop every hour or so to get out of the car and walk a few minutes. She testified

that she has to use a riding cart in the grocery store because if she stands for more than 10-15 minutes, her right leg goes numb and her low back hurts. She noted that this has been a problem since 1999. However, she also noted that sitting is a problem as well, since her injury. Claimant said that she has difficulty dressing herself and putting on a coat at times. She cannot wash her hair with her right arm, cannot put on her socks normally (pulls them on with her toes) and cannot bend to put shoes on (has to wear slip-ons). She said that her right leg going numb since her shoulder surgery makes it necessary for her to walk with a cane.

- 40) Claimant does not think she could work currently, because of her medications; her inability to sit, stand or lift a lot; and the pain she has in her low back, neck, shoulder and right arm.
- 41) On cross-examination, Claimant admitted that she had chronic back pain even prior to her fusion surgery in 1989, based on X-rays of the lumbar spine taken by Dr. Wayne in 1981. She admitted that she was looking for employment in the sedentary range of work after her fusion surgery and she even started at Employer with restrictions. Those restrictions were lifted by Dr. Wayne at her request on February 7, 2000, after her 1999 work injury. She agreed that leading up to 1999, she had occasional low back pain flare-ups and her back slowed her down. Despite her prior testimony that her elbow did not cause her problems after the 1997 surgery, she admitted that she occasionally went to Employer's plant medical for right arm and elbow pain, including three visits in May and June 1999. She also admitted that she did, in fact, have some prior right shoulder problems, going back to 1996. She admitted that she was diagnosed with asthma prior to September 3, 1999 and used an inhaler once in a great while, but it did affect some of the jobs she could do in the plant, since she had to avoid some fumes and chemicals.
- 42) Claimant admitted that she has had significant treatment/injuries/conditions, including surgery, to many parts of her body since she quit working in 2002. She had an appendectomy in 2004, hospitalization for COPD in 2004, left ankle tendon tear without surgery in 2008, neck fusion surgery and right carpal tunnel release in 2008, left carpal tunnel release in 2009, increased problems with diabetes since 2002 and a left hip replacement surgery in 2013. In addition to the medications listed above that she takes for pain, Claimant admitted that she also takes various medications for COPD, cholesterol, diabetes, stomach issues, allergies and her heart.
- 43) On further cross-examination, Claimant testified that she was getting the "attacks" more often in 2002 than she does now, because she was more active back then than she is now. She said that the more activity she does with the right arm, such as working or using the right arm in the shower, the more "attacks" she gets. She reported still having the right leg numbness, even without "attacks," ever since the right arm surgery. She said that she only gets 1½-2 hours of sleep at a time before having to get up. She said that this has only been a problem since her work injury, but it does cause sleepiness. She admitted that while working for Employer there was a powder-coating job she was unable to do because of her asthma, but at this point she would also be unable to accomplish that job because of her right shoulder and neck

anyway. Claimant admitted that she gets dizzy pretty often and has double (blurred) vision when she gets the "attacks," and sometimes with her neck pain. She said the right hand tremors have gotten worse since 2002, and, in fact, have gotten noticeably worse in the last couple months prior to hearing. She admitted being diagnosed with fibromyalgia since 1999, but said that she has so much pain in the neck, shoulder and right arm, that she really cannot feel the fibromyalgia pain (aching throughout her whole body). She also admitted receiving ongoing treatment for depression that was first diagnosed in 2004 when she went to court for Social Security. Claimant admitted that she has also noticed more difficulty breathing since 1999, and also admitted that her breathing medications have changed since that time.

44) While Claimant was present in the courtroom testifying during her hearing, I observed that she began shifting in the witness chair almost immediately, in an apparent attempt to get comfortable. She had to stand during her testimony after approximately 20 minutes. She walked with a cane and I noticed that her right hand was visibly shaking during the time she was testifying.

#### **RULINGS OF LAW:**

Based on a comprehensive review of the substantial evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational opinions and depositions, the medical records and bills, and the other documentary evidence, as well as my personal observations of Claimant at hearing, and based upon the applicable laws of the State of Missouri, I find:

The record of evidence is clear and the parties have also stipulated that Claimant sustained an accidental injury on September 3, 1999, arising out of and in the course of Claimant's employment for Employer. I find that Claimant was working on the assembly line for Employer, spot welding parts onto the dashboard, and, then, lifting and turning the dashboard with a co-worker to complete the job, when she sustained a pop and acute pain in the right shoulder, with pain running up into the neck and down the right arm into her hand. I find no real dispute in the medical records and opinions in evidence that Claimant sustained a right shoulder injury on account of this accident at work on September 3, 1999. I find that Claimant sustained internal derangement of the right shoulder (impingement and rotator cuff tear), status post surgical repair (subacromial decompression and rotator cuff repair), which was medically casually related to the September 3, 1999 work injury. These findings on Claimant's right shoulder condition are supported by the opinions and conclusions of Drs. Volarich, Kostman and Burke.

The threshold issue that needs to be addressed in this matter, is, which, if any, of Claimant's other conditions/problems/complaints, in addition to the right shoulder, are also medically causally related to the September 3, 1999 work injury.

Claimant bears the burden of proof on all essential elements of her Workers' Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*,

*121 S.W.3d 220 (Mo. 2003)*. The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

In reviewing and weighing the evidence in this case, it is important to remember that according to **Mo. Rev. Stat. § 287.800 (1998)**, “All of the provisions of this chapter shall be liberally construed with a view to the public welfare...” All reasonable doubts as to an employee’s right to compensation should be resolved in favor of the employee. *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 781, 783 (Mo. 1983). Additionally, the Court in *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43 (Mo. App. E.D. 1999) noted, “Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible.”

***Issue 1: Are all of Claimant’s claimed injuries and continuing complaints, as well as any resultant disability, medically casually related to her accident at work for Employer on September 3, 1999?***

Under **Mo. Rev. Stat. § 287.020.2 (1998)**, an injury by accident is compensable if it is clearly work-related, and it is clearly work-related if work was a substantial factor in the cause of the resulting medical condition or disability.

In a Workers’ Compensation case, expert medical testimony is not necessarily needed to establish the cause of the injury, if causation is a matter within the understanding of laypersons. *Knipp v. Nordyne, Inc.*, 969 S.W.2d 236 (Mo. App. W.D. 1998) *overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003)*. When the condition presented in a case is a sophisticated injury that requires surgical intervention or highly scientific technique for diagnosis, and especially when there is a serious question of pre-existing disability, then the proof of causation is not within the realm of lay understanding. *Id.* at 240.

In the case at bar, there is really no question regarding the right shoulder portion of the Claim, but there are significant disputes in the record of evidence regarding the cervical spine portion of the Claim, as well as the multitude of other complaints/problems/diagnoses that have all apparently arisen since the September 3, 1999 work injury. Therefore, the issue remains of whether those diagnoses, problems and complaints are related to the September 3, 1999 work injury or not. Claimant’s apparent contention, based on both her trial testimony and her statements to the various doctors or experts, is that not only her right shoulder, but also her neck, her “attacks” and her complex regional pain syndrome and/or RSD are all related to the work injury and surgery. Employer has offered medical evidence and testimony to dispute Claimant’s assertions in this regard.

Having thoroughly reviewed the extensive medical records, opinions and testimony in this case, I find that some of Claimant’s cervical spine issues/diagnoses/complaints are, in fact, related to the September 3, 1999 work injury, but the complaints and problems she associates with her “attacks” and the alleged complex regional pain syndrome and/or RSD are not related to that work injury.

First, with regard to the cervical spine complaints/problems/diagnoses, I find that there is clear and convincing medical evidence in the record to show that Claimant had significant, underlying degenerative changes in the cervical spine that certainly pre-existed the September 3, 1999 work injury. In reviewing the medical opinions and testimony of Dr. Burke, Dr. Chabot, and even Claimant's expert, Dr. Volarich, I find that all of them basically agree that the degenerative changes in the cervical spine, including the C5-6 osteophyte, were present prior to the September 3, 1999 work injury. However, the record of evidence is equally clear, that despite the presence of these degenerative changes in the cervical spine, Claimant had no complaints, diagnoses or treatment for her cervical spine until after the accepted September 3, 1999 work injury.

While I agree that the work injury did not cause the osteophyte or other degenerative changes in the cervical spine, and while I further agree that Claimant's ultimate need for the cervical fusion surgery was not related to the work injury (because it only became necessary following the subsequent deterioration of her cervical spine condition, after, and unrelated to, the September 3, 1999 work injury), I find that the record of evidence supports Claimant's proposition that the work injury aggravated her cervical spine condition and made a previously asymptomatic condition symptomatic. This finding is supported by the opinions and testimony of Dr. Volarich that as a result of the September 3, 1999 work injury, Claimant sustained an aggravation of her cervical spondylosis at C5-6 with associated disc bulge, causing right upper extremity radicular symptoms.

Employer disputes that any part of Claimant's cervical spine condition could be related to the September 3, 1999 work injury based on the alleged absence of cervical spine complaints in the initial medical treatment records following the work injury and based on the opinions and testimony of Drs. Chabot and Burke. Despite Employer's contention to the contrary, in my review of the medical treatment records following the September 3, 1999 work injury, I did find references to neck complaints and problems. For example, the September 13, 1999 record from Dr. Rotman contains a complaint of neck pain from Claimant, as do some of the physical therapy notes from Concentra Medical Centers in November 1999. In that respect, while the right shoulder condition was certainly the main focus of the doctors' attention following the work injury, there were also neck complaints recorded during that time. As for the opinions of Drs. Burke and Chabot, I find that both of them focus on the fact that the degenerative changes clearly pre-existed the work injury and so they were not caused by the work injury. I agree with them in that respect. The work injury did not cause the degenerative changes or the C5-6 osteophyte. However, with a previously asymptomatic neck condition, and an accepted mechanism of injury that involved lifting and turning heavy dashboards on the assembly line, I can certainly see how that type of injury could involve not only the right shoulder, but could also make the previously asymptomatic neck condition symptomatic.

Therefore, based on the medical treatment records and the opinion of Dr. Volarich with regard to the cervical spine condition, I find that Claimant sustained an aggravation of her cervical spondylosis at C5-6 with associated disc bulge, causing right upper extremity radicular symptoms, which are medically casually related to the September 3, 1999 work injury. In other words, I find that the work injury on September 3, 1999 was a substantial factor in the aggravation of her underlying cervical degenerative condition, resulting in it and some amount of permanent partial disability on account of it, to be connected to this work injury.

Next, it is necessary to address whether the complaints and problems Claimant associates with her “attacks” and the alleged complex regional pain syndrome and/or RSD are related to that work injury. Having thoroughly reviewed the extensive medical records, opinions and testimony in this case, as well as Claimant’s statements and testimony, I find that Claimant has failed to meet her burden of proving that these complaints/conditions are medically causally related to the September 3, 1999 work injury.

Claimant asserts that all of her complaints and problems with her tremors, “attacks” and alleged complex regional pain syndrome and/or RSD, are related to her work injury on September 3, 1999. She describes how she will feel a tight, squeezing pressure in her upper arm, and, then, numbness in the arm, the right side of her face and neck and into her right leg, when she gets an “attack.” The records also contained references from Claimant to these “attacks” causing problems into her left shoulder and down her spine, as well as dizziness, nausea and blurred vision, and how the pain and problems she associates with these “attacks” are somehow different from and overshadow the fibromyalgia complaints she has in her whole body. While she associates the “attacks” with increased use of the right arm, there are also references to the “attacks” happening multiple times per day for a period of time without any apparent precipitating event. I find the record of evidence is clear that she suffered her first “attack” in December 2001 and her second “attack” in February 2002, so significant that she went to the hospital thinking she was having a stroke. Therefore, while she relates these “attacks” and tremors to the September 3, 1999 injury and/or the shoulder surgery on February 25, 2000, in reality, she never had the “attacks” until over two years after her injury and over a year and a half after her shoulder surgery. I find that that significant gap in time makes it difficult to relate these “attacks” to the work injury and/or surgery.

It is also difficult to causally relate these “attacks” and this constellation of symptoms to the work injury and/or shoulder surgery, because I find no clear diagnosis for these symptoms nor any clear medical opinion explaining how these symptoms physiologically could occur or be related to the work injury. The medical treatment records in evidence are replete with medical opinions from orthopedists, neurologists and neuromuscular specialists, who ran extensive tests on Claimant to try to determine the cause of this constellation of symptoms, but were unable to determine any such cause. Dr. Kostman was unable to find any correlation between her current symptoms from her “stroke-like attacks” and her prior shoulder surgery. Dr. Lopate initially questioned whether she might have a complex regional pain syndrome, then suggested perhaps it was a migraine-like equivalent, but concluded that Claimant had a variety of complaints that are not clearly neuromuscular and suggested that she see a general neurologist or perhaps seek psychiatric treatment, since he apparently had no further treatment to offer her. Dr. Burke concluded that Claimant had a poorly defined neurologic syndrome, but noted that complex regional pain syndrome or RSD generally relates only to the affected extremity and not globally throughout the body, such as is the case with Claimant, with the right lower extremity, back and left shoulder involved as well. He was unable to causally relate her global somewhat body-wide pain syndrome to her work injury. Finally, Dr. Chabot testified that during the time he was treating Claimant, he did not see any evidence of a chronic regional pain syndrome. Based on the opinions of these experts, well-qualified in their various fields, there is no agreement on whether Claimant even has a complex regional pain syndrome (and/or RSD), much less what exact diagnosis she does have to explain this constellation of complaints. However, there is apparent

agreement on one point, and that is, that none of them directly connect these complaints/problems to her work injury on September 3, 1999.

The medical expert in the record who attempts to at least connect some of these complaints/problems/diagnoses to the work injury on September 3, 1999 is Claimant's rating physician, Dr. Volarich. Dr. Volarich opines that Claimant has a chronic regional pain syndrome as a result of the work injury on September 3, 1999. Of note, I find that although he causally relates a chronic regional pain syndrome to the work injury, I find no clear attempt to connect her "attacks" to the work injury, nor any clear or convincing explanation for how her described complaints, in so many other parts of her body, could be related to the work injury either. Other than stating his opinion that the chronic regional pain syndrome is related, I can find no explanation for why he reached such a conclusion or what complaints/problems would be related to such a chronic regional pain syndrome versus the "attacks" she described. I find no testimony explaining how it is physiologically possible for squeezing pressure that starts in the right upper arm, to not only travel as numbness down the arm into the hand, but also up the arm into the neck, and, then, down the spine, as numbness into the right leg, as well as over the spine to pain in the left shoulder and up the neck to cause right-sided facial numbness, dizziness, nausea and blurred vision. I was especially interested in such an explanation from Dr. Volarich, given the number of experts (physicians), who after extensive review and testing were unable to determine a diagnosis for this constellation of symptoms, much less a cause for them.

In terms of apparently trying to give some clarification on what symptoms might be related to the September 3, 1999 injury as opposed to other conditions or problems, Dr. Volarich did testify that Claimant's numbness and weakness in the right leg, as well as her inability to stand on the right leg and loss of motion in the lumbar spine, were most likely the result of her prior low back condition and fusion surgery. However, he admitted that she did not complain to him of any numbness in her legs prior to the September 3, 1999 injury. Further, Claimant clearly testified that the right leg numbness came on after September 3, 1999 as a consequence of her "attacks." This testimony from Dr. Volarich relating the right leg issues to the prior low back fusion and not the September 3, 1999 injury, despite Claimant's testimony to the contrary, tells me that even Dr. Volarich has no explanation for how a number of complaints and problems that she relates to her "attacks" could actually be related to the September 3, 1999 injury.

It is based on this record of evidence and Dr. Volarich's lack of any clear, convincing explanation for her "attacks," that I find I cannot rely on Dr. Volarich's opinions in this specific area of the case. Claimant has failed to meet her burden of proof to causally relate a chronic regional pain syndrome, RSD, or her "attacks" to the work injury on September 3, 1999.

***Issue 2: Is Claimant entitled to payment for past medical expenses in the stipulated amount of \$1,382.03, pursuant to the CMS filing?***

Under **Mo. Rev. Stat. § 287.140.1 (1998)**, "the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment...as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." **Mo.**

**Rev. Stat. § 287.140.3 (1998)** also states, “All fees and charges under this chapter shall be fair and reasonable...”

Correspondence from GENEX dated September 11, 2013 regarding CMS payments document \$1,382.03 in medical bills paid for by Medicare, for which Medicare now seeks reimbursement as a part of this case. The dates of treatment are all in 2011 and 2012 at Des Peres Hospital, SSM Rehab and with Drs. Vargas, Kayser and Schwarze. Claimant testified that this treatment was related to right knee issues and had nothing to do with her 1999 work injury. She confirmed that none of the charges were related at all to her work accident on September 3, 1999.

In addition to Claimant admitting that this right knee treatment was not related to her September 3, 1999 work injury, I also find that none of the medical experts who have testified in this case have medically causally related any right knee problems to the September 3, 1999 work injury. Other than references to generalized right leg numbness and weakness in the medical records, which I have also already found are not medically causally related to the September 3, 1999 work injury, I also find no specific complaints/problems/diagnoses to the right knee documented in the any of the extensive medical treatment records in evidence.

Based on my review of the extensive medical evidence and testimony, as well as Claimant’s testimony on this 2011 and 2012 treatment to her right knee, I find that these charges of \$1,382.03 are not medically causally related to the September 3, 1999 work injury. As such, I find that Employer has no responsibility under the Workers’ Compensation statute to pay them as a part of this Award. Claimant’s request for payment of these medical bills as a part of this Award is denied.

Given that the final two issues are so inter-related in this claim, and further given Claimant’s allegation that she is permanently and totally disabled, I will address these two issues together.

***Issue 3: What is the nature and extent of Claimant’s permanent partial and/or permanent total disability attributable to this injury?***

***Issue 4: What is the liability of the Second Injury Fund?***

Under **Mo. Rev. Stat. § 287.190.6 (1998)**, “‘permanent partial disability’ means a disability that is permanent in nature and partial in degree...” The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. ***Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund***, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. ***Griggs v. A.B. Chance Co.***, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert testimony may be required when there are complicated medical issues. ***Id.*** at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the

testimony of the Claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. *Fogelsong v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

Under **Mo. Rev. Stat. § 287.020.7 (1998)**, “total disability” is defined as an “inability to return to any employment and not merely...inability to return to the employment in which the employee was engaged at the time of the accident.” The test for permanent total disability is claimant’s ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in her present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173 (Mo. App. E.D. 1995) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

In cases such as this one where the Second Injury Fund is involved, we must also look to **Mo. Rev. Stat. § 287.220 (1998)** for the appropriate apportionment of benefits under the statute. In order to recover from the Fund, Claimant must prove that she had a pre-existing permanent partial disability that existed at the time of the primary injury. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo. App. E.D. 1999) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Then to have a valid Fund claim, that pre-existing permanent partial disability must combine with the primary disability in one of two ways. First, the disabilities combine to create permanent total disability, or second, the disabilities combine to create a greater overall disability than the simple sum of the disabilities when added together.

In the second (permanent partial disability) combination scenario, pursuant to **Mo. Rev. Stat. § 287.220.1 (1998)**, the disabilities must also meet certain thresholds before liability against the Second Injury Fund is invoked and they must have been of such seriousness so as to constitute a hindrance or obstacle to employment or re-employment should employee become unemployed. The pre-existing disability must result in a minimum of 12.5% permanent partial disability of the body as a whole (50 weeks) or 15% permanent partial disability of a major extremity. These thresholds are not applicable in permanent total disability cases.

When Employer and the Second Injury Fund are both involved in an alleged permanent total disability case, the analysis of the case essentially takes on a three-step process:

First, is Claimant permanently and totally disabled?;

Second, what is the extent of Employer’s liability for that disability from the last injury alone?; and

Finally, is the permanent total disability caused by a combination of the disability from the last injury and any pre-existing disabilities?

In determining this case, we will follow this three-step approach to award all appropriate benefits under the Statute.

Based on the competent and substantial evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational experts, as well as based on my personal observations of Claimant at hearing, I find that Claimant is permanently and totally disabled under the statute, when the totality of her condition, as she presented herself at hearing, is considered.

Without regard at this point to what the cause of her permanent total disability might be, I find that the opinions and testimony of a number of the experts in the record of evidence support this finding. Based on Ms. Gonzalez indicating that Claimant is incapable of performing any jobs in the open labor market, Dr. Volarich finds Claimant to be permanently and totally disabled. Dr. Vargas notes that, "Patient is incapable of sedentary work (on a sustained and full-time basis)." Dr. Burke was skeptical that she would ever be able to return to any gainful employment as a result of her neurologic status, "which is poorly defined and impossible to relate to either her described work activity or subsequent treatment thereof." Even Ms. Abram, Employer's vocational expert, acknowledged in the report that if Claimant's COPD, fibromyalgia, tremors, "attacks," and complex regional pain syndrome (RSD) make her unable to function, then she would not be able to work in the open labor market in any position.

In addition to these expert opinions, I also find that Claimant clearly testified she was unable to work in any capacity in the open labor market, when the totality of her condition and all of her various complaints and problems are considered. Her presentation at hearing leaves me to agree that an employer in the open labor market would probably not hire Claimant in her current physical condition.

Therefore, based on Claimant's testimony and presentation, the extensive functional restrictions from the physicians, and the doctors' and vocational experts' collective opinion that Claimant is permanently and totally disabled and unable to work in the open labor market when the totality of her condition is considered, I find that Claimant has met her burden of proof to show that she is permanently and totally disabled under the statute. I find that no reasonable employer in the usual course of business could reasonably be expected to employ Claimant in her present physical condition.

The next step in the analysis then, is determining the extent of Employer's liability from the last injury alone, and specifically determining if Employer is responsible for the permanent total disability. Having thoroughly reviewed the evidence in the record, I find that Claimant is not permanently and totally disabled as a result of the effects of the September 3, 1999 injury alone. I find absolutely no medical or vocational opinions or testimony in evidence to support the proposition that the September 3, 1999 injury alone was enough to render Claimant permanently and totally disabled. However, I find that Claimant has met her burden of proof to show that Employer is responsible for the payment of permanent partial disability on account of the September 3, 1999 work injury.

I have previously found that Claimant sustained internal derangement of the right shoulder (impingement and rotator cuff tear), status post surgical repair (subacromial decompression and rotator cuff repair) and aggravation of her cervical spondylosis at C5-6 with associated disc bulge, causing right upper extremity radicular symptoms, which is medically causally related to the September 3, 1999 work injury. Although they disagree on the extent of the permanent partial disability for these conditions, Drs. Burke and Volarich each offered opinions on the amount of permanent partial disability they believed that Claimant sustained on account of the work injury. The medical treatment records from the various physicians document the complaints, problems and diagnoses with her right shoulder and neck following the 1999 accident at work.

Based upon all of these findings, as well as based on Claimant's testimony and the medical evidence, I find that Claimant has 30% permanent partial disability of the right shoulder and 12.5% permanent partial disability of the body as a whole referable to the cervical spine, related to the September 3, 1999 injury at work.

The final step of the inquiry, then, is whether the permanent total disability is the result of the combination of the primary (last) injury and pre-existing disabilities so that the Second Injury Fund would have liability for the permanent total disability. In order to prevail against the Second Injury Fund for permanent total disability benefits, Claimant needs to prove that it is the effects/disability from the September 3, 1999 work injury combined with her disability from any pre-existing conditions/injuries that renders her permanently and totally disabled. If, instead, her permanent total disability is actually attributable to unrelated conditions/disabilities that arose subsequent to her September 3, 1999 injury or to the subsequent unrelated worsening of any pre-existing condition, then the Second Injury Fund would have no responsibility for permanent total disability payments in this case.

The determination of whether Claimant is permanently and totally disabled against the Second Injury Fund in this case is further complicated by the time that has passed since her 1999 injury and the conditions/injuries that have occurred in Claimant's life since that 1999 injury and her subsequent hearing in 2014. In order to attempt to collect permanent total disability benefits from the Second Injury Fund in this case, Claimant asserts that she has been permanently and totally disabled since February 25, 2002, as a result of the combination of her September 3, 1999 injury and her low back disability that pre-existed that 1999 work injury. However, it is important to remember that Claimant returned to work for Employer after her shoulder surgery and during her cervical spine treatment, performing assembly line work for Employer. By her own admission, it was not until she suffered her second significant "attack," for which she sought hospital treatment for her stroke-like symptoms, that she quit working. I find that it was on account of these worsening "attacks" that she talked to Dr. Vargas about taking her off work for safety reasons.

To the extent that I have already found that Claimant did not meet her burden of proof to show that these "attacks" are medically casually related to the September 3, 1999 injury, and to the extent that I believe these "attacks" (including the frequency and residual complaints Claimant associates with them) are primarily responsible for Claimant not working and not returning in any capacity to the work force since 2002, I find that Claimant is not entitled to Second Injury Fund permanent total disability benefits in this case, because the "attacks" clearly arose subsequent to the September 3, 1999 work injury and were not related to it. This finding is supported both by the treatment records of Dr. Vargas, as well as the credible medical opinion of Dr. Burke, wherein he stated that he was skeptical that she would ever be able to return to any gainful employment as a result of her neurologic status, "which is poorly defined and impossible to relate to either her described work activity or subsequent treatment thereof."

In addition to the profound effect the subsequent unrelated "attacks" have had on Claimant's ability to function, I also find that subsequent to her September 3, 1999 work injury, Claimant has also suffered from a myriad of other complaints and problems, which have necessitated a number of surgical treatments since that time that are completely unrelated to the 1999 work injury. Claimant admitted that she has had significant treatment/injuries/conditions,

including surgery, to many parts of her body since she quit working in 2002. She had an appendectomy in 2004, hospitalization for COPD in 2004, left ankle tendon tear without surgery in 2008, neck fusion surgery and right carpal tunnel release in 2008, left carpal tunnel release in 2009, increased problems with diabetes since 2002 and a left hip replacement surgery in 2013. Additionally, Claimant admitted being diagnosed with fibromyalgia since 1999. She admitted receiving ongoing treatment for depression that was first diagnosed in 2004 when she went to court for Social Security. Claimant admitted that she has also noticed more difficulty breathing since 1999, and also admitted that her breathing medications have changed since that time. All of these subsequent conditions have certainly had a negative effect, in addition to the effects of the work injury and prior back surgery, on her ability to be employed or compete in the open labor market for employment.

While I acknowledge that Dr. Volarich tried to separate out the subsequent deterioration of her cervical spine condition that necessitated the surgery in 2008 when rendering his opinion on the cause of her permanent total disability, I also find that he included her complaints referable to her "attacks" and included a diagnosis of chronic regional pain syndrome in reaching his opinion, both of which I have previously found are not actually related to the September 3, 1999 work injury. To the extent that he included these subsequent and/or unrelated conditions in reaching his opinion on permanent total disability in this case, I find that his opinion cannot be used as a basis for such an award of compensation (permanent total disability benefits) in this matter. Additionally, Dr. Volarich did not even address a number of the other conditions that developed or worsened subsequent to the 1999 work injury, thus, also negatively impacting the probative value of his reports and opinions.

Since I have found that Claimant's permanent total disability is actually attributable to the subsequent development or worsening of various conditions, unrelated to the September 3, 1999 work injury, I find that Claimant is not entitled to permanent total disability benefits from the Second Injury Fund in this case. The final issue for determination, then, is whether Claimant has met her burden of proving an entitlement to permanent partial disability benefits from the Second Injury Fund, based on the combination of the disability from her September 3, 1999 work injury and her pre-existing disability to her low back. I find that Claimant has met her burden of proof in this regard, and, therefore, the Second Injury Fund is responsible for the payment of permanent partial disability benefits to Claimant.

I previously found that Claimant sustained 30% permanent partial disability of the right shoulder and 12.5% permanent partial disability of the body as a whole referable to the cervical spine, related to the September 3, 1999 injury at work. Claimant has alleged pre-existing disability to the low back that potentially combines with the disability from the primary 1999 right shoulder and neck injury to trigger Second Injury Fund liability. In order for the alleged pre-existing disability to actually trigger Second Injury Fund liability, it must meet the appropriate threshold of 12.5% permanent partial disability of the body as a whole (50 weeks) or 15% permanent partial disability of a major extremity and it must be found to have been a hindrance or obstacle to employment or re-employment, should Claimant become unemployed.

With regard to Claimant's alleged pre-existing low back injury/condition, I found some medical treatment records and medical reports in evidence showing the diagnoses and treatment Claimant received for that injury/condition prior to the September 3, 1999 accidental injury at

work. I also found Claimant's testimony and her statements in the medical reports confirmed the presence of the alleged pre-existing injury/condition, her continued complaints and problems on account of it, and the effect the pre-existing condition had on her ability to work.

On the basis of all of this evidence in the record, I find that Claimant had pre-existing permanent partial disability of 25% of the body as a whole referable to the low back, which arose prior to the September 3, 1999 (primary) injury.

Given the applicable statutory thresholds of 15% of a major extremity or 12.5% of the body as a whole (50 weeks), I find that the pre-existing low back injury/condition meets the statutory thresholds to trigger Second Injury Fund liability. I further find that the pre-existing low back injury/condition was of such seriousness so as to constitute a hindrance or obstacle to employment or re-employment, should Claimant become unemployed. Finally, consistent with Claimant's testimony and Dr. Volarich's opinion on combination, I find that the pre-existing and primary injury disabilities combine to create disability that is substantially greater than the simple sum or total of each separate injury/illness, and so a loading factor should be added. I, therefore, find that Claimant is entitled to receive 43.92 weeks of compensation from the Second Injury Fund.

In order to calculate the amount of this award from the Second Injury Fund, I added together all of the qualifying disabilities and assessed a loading factor of 20% [30% of the right shoulder (69.6 weeks) + 12.5% of the body as a whole referable to the cervical spine (50 weeks) + 25% of the body as a whole referable to the low back (100 weeks) = 219.6 total weeks of compensation times the 20% load factor = 43.92 weeks from the Fund]. I arrived at the 20% loading factor for the various injuries based on the credible evidence submitted at trial, the extent of the disabilities to those body parts, and the combined impact of having a disabled low back in addition to a disabled neck and right upper extremity.

Accordingly, the Second Injury Fund is responsible for the payment of 43.92 weeks of permanent partial disability pursuant to this award.

**CONCLUSION:**

Claimant sustained an accidental injury on September 3, 1999, arising out of and in the course of Claimant’s employment for Employer. Claimant was working on the assembly line for Employer, spot welding parts onto the dashboard, and, then, lifting and turning the dashboard with a co-worker to complete the job, when she sustained a pop and acute pain in the right shoulder, with pain running up into the neck and down the right arm into her hand. Claimant sustained internal derangement of the right shoulder (impingement and rotator cuff tear), status post surgical repair (subacromial decompression and rotator cuff repair), and an aggravation of her cervical spondylosis at C5-6 with associated disc bulge, causing right upper extremity radicular symptoms, which are medically causally related to the September 3, 1999 work injury. Claimant has 30% permanent partial disability of the right shoulder and 12.5% permanent partial disability of the body as a whole referable to the cervical spine, related to the September 3, 1999 injury at work.

Claimant has failed to meet her burden of proving that the complaints and problems she associates with her “attacks” and the alleged complex regional pain syndrome and/or RSD are medically causally related to the September 3, 1999 work injury. Similarly, the charges of \$1,382.03 are not medically causally related to the September 3, 1999 work injury, and, as such, Employer has no responsibility under the Workers’ Compensation statute to pay them as a part of this Award.

Claimant is permanently and totally disabled under the statute, but that permanent total disability is actually attributable to the subsequent development or worsening of various conditions, unrelated to the September 3, 1999 work injury, and, therefore, Claimant is not entitled to permanent total disability benefits from the Second Injury Fund in this case. Claimant has met her burden of proof to show that the Second Injury Fund is responsible for the payment of permanent partial disability benefits to Claimant. Claimant had pre-existing permanent partial disability of 25% of the body as a whole referable to the low back, which arose prior to the September 3, 1999 (primary) injury. The pre-existing low back injury/condition meets the statutory thresholds to trigger Second Injury Fund liability and was of such seriousness so as to constitute a hindrance or obstacle to employment or re-employment, should Claimant become unemployed. Claimant is entitled to receive 43.92 weeks of compensation from the Second Injury Fund.

Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Mr. Andrew J. Gregory, for necessary legal services.

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

JOHN K. OTTENAD  
*Administrative Law Judge*  
*Division of Workers' Compensation*