Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No. 09-065236

Employee: Althea Burlison

Employer: Department of Public Safety

Insurer: C A R O

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 24, 2014. The award and decision of Administrative Law Judge Robert House, issued July 24, 2014, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 6th day of February 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Althea Burlison

Dependents: N/A

Employer: Department of Public Safety

Additional Party: Second Injury Fund

Insurer: Missouri Office of Administration

Hearing Date: May 12, 2014

Injury No. 09-065236 & 10-051245

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

Checked by:

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: 8-14-2009 and 7-2-2010
5. State location where accident occurred or occupational disease was contracted:
   LAWRENCE COUNTY, MO
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:
    PERFROMING DUTIES AS A CERTIFIED MEDICAL TECHNICIAN
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: LEFT LEG / LEFT ARM
14. Nature and extent of any permanent disability: 5% BODY AS A WHOLE FOR LEFT LEG
    PERMANENT TOTAL DISABILITY FOR 2010 INJURY
15. Compensation paid to-date for temporary disability: $6,902.81 - 2010
    $0.00 - 2009
16. Value necessary medical aid paid to date by employer/insurer? $24,693.23
17. Value necessary medical aid not furnished by employer/insurer? -0-

Employee: Althea Burlison Injury No. 09-065236 & 10-051245

18. Employee's average weekly wages:

19. Weekly compensation rate: $330.00

20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:

weeks of temporary total disability (or temporary partial disability)

20 weeks of permanent partial disability from Employer for 2009 injury - 5% body as a whole
20 x $330 = $6,600.00

0 weeks of disfigurement from Employer

22. Second Injury Fund liability: None

TOTAL: $6,600.00

23. Future requirements awarded: Permanent total disability for 2010 injury for claimant's life beginning 3/2/2011

Said payments to begin 8-14-2009 for 2009 injury and 3-2-2011 for 2010 injury 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:

Patrick Platter

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Althea Burlison

Injury No. 09-065236 & 10-051245

Dependents: N/A

Employer: Department of Public Safety

Additional Party: Second Injury Fund

Insurer: Missouri Office of Administration

Hearing Date: May 12, 2014

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

AWARD

A hearing was held in this matter on May 12, 2014, involving two injury numbers. Claimant appeared in person and through her attorney, Patrick Platter. Employer/self-insured appeared through its attorney, Stephen Freeland. The Second Injury Fund appeared through its attorney, Laura Van Fleet. The record was left open for 30 days following the hearing.

An off-the-record discussion was held regarding the issues to be presented for determination. The following was the only issue in the 2009 case:

(1) The nature and extent of any disability with claimant alleging permanent partial disability for a left ankle injury.

For the 2010 injury:

(1) The nature and extent of disability with permanent total disability being alleged.

(2) The liability of the Second Injury Fund.

(3) The need for future medical care.

(4) Causation of any psychological injuries that claimant may have suffered and causation for reflex sympathetic dystrophy / complex regional pain syndrome.

(5) Whether this matter is subject to a penalty pursuant to §287.120.4, RSMo. for violation of §213.055.1(b).

The parties agree that the workers' compensation rate for both cases is $330.00 per week. The parties additionally agree that medical benefits were paid in the 2009 case in the amount of $3601.49. In the 2010 case the parties agree that medical benefits were paid in the amount of $24,693.23, and that temporary total disability benefits were paid in the amount of $6,902.81 at the rate of $320.00 per week for a total of 21 4/7 weeks.

Testifying at the hearing were claimant; Suzanne Hayward, a retired certified nurse assistant (CNA); Alice Brewer, a social worker; Joan Elwing, director of nursing; Diane

Huckeby, a registered nurse unit manager; and Nina Thompson, activity therapist. Also testifying by deposition were Dr. Lennard; Dr. Abrams; James England; Wilber Swearingin; James Dennis (superintendent of the Missouri Veterans Home); Dr. Jackson, a psychologist; and Dr. Halfaker, a neuropsychologist.

At hearing, employer/self-insurer offered into evidence Exhibit 6, a DVD containing surveillance video of claimant. Employer/self-insurer made an offer of proof with a private investigator identifying the DVD as a compilation of surveillance video taken by him on two separate dates. Claimant objected to the offer of proof of the testimony and admission of the video. Claimant argued that pursuant to the Notice of Deposition of James Dennis, superintendent of the Missouri Veterans Home employer/self-insurer should have given claimant a copy of any surveillance video. That notice included a request for statements and any video taken of claimant. No video existed at the time of either of Mr. Dennis' depositions. However, employer/self-insurer later obtained the video surveillance and failed to provide a copy to claimant. At hearing employer/self-insurer argue they had no duty to supplement claimant's deposition testimony and Request for Production and later argued in its brief that no discovery was required since no Subpoena Duces Tecum was presented to Mr. Dennis with the Notice of Deposition. I sustained claimant's objection at hearing and again sustain the objection following claimant's and employer/self-insured's post-hearing briefs. Section 287.560, RSMo., permits the Division to issue process, subpoena witnesses, administer oaths, examine books and papers and require the production thereof and to cause the deposition of any witness to be taken. It also entitles any party to process to compel the attendance of witnesses and the production of books and papers and the taking depositions in like manner as in civil cases. Those general discovery powers and rights are recognized by the Missouri Supreme Court in *State ex rel McConaha v. Allen, 979 SW2d, 188(Mo banc 1988).* Specifically in *McConaha* the right to discovery of surveillance video was allowed through the deposition process and a Subpoena Duces Tecum. That right was also recognized in *State ex rel Feltz v. Bob Sight Ford, 341 SW3d 863(Mo App SD 2011).* The Court in *Feltz* opined that Rule 56.01(b), the general rule on civil discovery, allows discovery of any books, documents, or other tangible things including statements. As noted in *Feltz* the general purpose of discovery is to facilitate settlement and avoid surprise, citing *Fisher v. Waste Mgmt. of Mo, 58 SW3d 523 (Mo banc 2001).* The Court recognized a requirement for parties to provide surveillance video tapes through the use of deposition and Subpoena Duces Tecum pursuant to the discovery provisions of §287.560, RSMo., and not via an informal request for statements pursuant to §287.215, RSMo. In this case, claimant did not by subpoena compel Mr. Dennis, a representative of the employer, to attend but simply noticed the deposition with Mr. Dennis including a Request for Production of any surveillance video and statements. I find and conclude that no Subpoena Duces Tecum was necessary since Mr. Dennis voluntarily appeared through the notice and had thereby a duty to supplement any deposition testimony and production of video or statements through claimant's Request for Production of those materials pursuant to Missouri Supreme Court Rule 56.01(e) which sets forth a duty to seasonably amend a prior response to Request for Production in this case for any video surveillance. As a result, I deny the admission into evidence the video surveillance DVD (Exhibit).

Claimant worked as a certified medical technician at the Missouri Veterans Home in Mt. Vernon, Missouri. She also was a certified nurse assistant and at times would have to assist other CNAs with their duties. She was born July 22, 1952, and was 61 years old at the date of the

hearing. She received education through the 10th grade and later obtained a GED. For many years she was a stay-at-home mother. She later worked at nursing homes and eventually at the Missouri Veterans Home.

On August 14, 2009, while working as a certified medical technician, claimant was injured when the wheelchair of a resident of the Missouri Veterans Home hit her left ankle with his wheelchair. She was treated for her left ankle injury, underwent an MRI, and was eventually placed in an air cast. Ultimately she was treated by Dr. David Hicks, an orthopedic surgeon, who diagnosed her condition as a soft tissue injury involving a left ankle contusion/strain and left posterior tibial strain. In addition to an air cast, claimant also used a CAM boot. Nevertheless, claimant continued to have problems with her left ankle following her release without restrictions by Dr. Hicks on November 17, 2009. Dr. Bernard Abrams, a neurologist, eventually examined claimant, finding that she had a restriction of no standing over 30 minutes and no walking over 20 minutes. He rated claimant's left ankle injury, (which involved ankle swelling and pain, her needing to take extra breaks and her needing to lean on her medication cart while walking) as resulting in a 5 percent permanent partial disability to the body as a whole.

Based upon claimant's testimony and the findings of Dr. Abrams, I find and conclude that claimant suffered a left ankle injury to the extent of 5 percent to the body as a whole. As a result, I order that employer/self-insurer pay claimant the sum of $6,600.00 representing 20 weeks of compensation at the agreed upon rate of $330.00 per week.

Claimant's more significant problems involve an injury that occurred on July 2, 2010, when a resident/patient at the Missouri Veterans Home grabbed her left arm and twisted it behind her back. She suffered immediate pain in her left arm and left shoulder that progressed over time, requiring her to use a sling and limit her activities with her left arm. Claimant was treated by Dr. Scott Galligos initially, underwent an MRI, and was diagnosed as having a left shoulder strain and subacromial bursitis with left upper extremity paraesthesia. Claimant did not improve and was ultimately referred to Dr. Christopher Miller, an orthopedic surgeon and shoulder specialist. After a left shoulder arthrogram and MRI, Dr. Miller noted no significant rotator cuff tearing or labral tearing. However, he diagnosed a left shoulder strain and was concerned about development of reflex sympathetic dystrophy. He sent claimant for stellate ganglion nerve blocks to Dr. Thomas Brooks. Claimant did not improve following three left stellate ganglion blocks performed by Dr. Brooks. Dr. Miller ultimately found that claimant was suffering from reflex sympathetic dystrophy or complex regional pain syndrome of the left shoulder and did not think that surgery would help her condition.

Claimant later was sent to Dr. Ted Lennard who questioned the diagnosis of complex regional pain syndrome and did not think that additional stellate ganglion blocks would improve her condition. Dr. Lennard ultimately concluded that claimant suffered from a left shoulder strain with an underlying supraspinatus tendinopathy.

Claimant was also sent to Dr. Scott Clark who ultimately opined that claimant was not suffering from complex regional pain syndrome. Nevertheless, following Dr. Clark's examination of November 7, 2011, Claimant received two injections at the intra-articular shoulder joint from Dr. Kimber Eubanks.

Claimant extensively testified in two depositions and at trial concerning her condition. Claimant continues to feel pain in her left arm, cannot lift her arm to her chest, cannot lift objects of any significant weight or hold them for any length of time. She believes that she can lift and hold no more than a loaf of bread. Dr. Christopher Miller, as of September 23, 2010, provided claimant with a weight restriction of one pound. Dr. Ted Lennard, on March 1, 2013, provided claimant with a 15-pound lifting restriction. Dr. Bernard Abrams, on January 13, 2012, opined that claimant should lift no more than five pounds including no lifting above the shoulder. He also opined that claimant should have no physical contact with the left arm due to pain. He opined that claimant's left arm was virtually unusable. Dr. Lennard rated claimant's left arm injury from her accident at work as 15 percent of the left upper extremity at the 232 week level. Dr. Abrams rated claimant's condition as 45 percent to the body as a whole for her left shoulder injury and included a 5 percent rating for emotional disturbance or adjustment reaction. Dr. Abrams ultimately found that claimant was permanently and totally disabled and could not work based upon her left shoulder injury alone, as noted in his answer to the last question he was asked at his deposition.

Claimant testified that she has had psychological problems since her last injury at work, based mainly upon her inability to perform the work that she enjoyed doing at Missouri Veterans Home and losing her career of being a certified medical technician.

Psychologist, Dr. James O. Jackson, PhD., assessed claimant as having a major depressive disorder and rated her total psychological disability of 35 percent to the body as a whole as a result of both the August 14, 2009, and July 2, 2010, injuries. In his deposition Dr. Jackson opined that claimant was permanently and totally disabled based upon her major depressive disorder from the 2010 shoulder injury after having assigned a 35 percent partial disability alone for her major depression. He also opined that claimant would benefit from a pain management program. He additionally found that her psychological disability was a result of her injury at work. Dr. Jackson's ultimate conclusion as shown in his deposition (on page 95) was that claimant was permanently and totally disabled based on the 2010 shoulder injury and the effects therefrom in isolation.

Dr. Dale Halfaker, a neuropsychologist, found that claimant was suffering from a pain disorder to the extent of 5 percent disability to the body as a whole and from major depression which he rated as 7 percent to the body as a whole for a total of 12 percent to the body as a whole. He opined that 5 percent of the 7 percent was definitive, but it possibly was a majority of the 7 percent disability from the July 2, 2010, alone.

Vocational rehabilitation counselor, Wilbur Swearingin, examined and tested claimant upon referral by her attorney, Patrick Platter. Mr. Swearingin's ultimate conclusion was that claimant was neither employable nor placeable for employment. He believed that the restrictions given by all of the physicians would limit her work, with the fewest restrictions being provided by Dr. Lennard and the greatest by Dr. Miller. He found that claimant's physical and psychological impairments in combination of the 2009 and 2010 injuries resulted in her being permanently and totally disabled. James England, a vocational rehabilitation counselor, hired by employer/self-insured opined that there were jobs of a light nature that claimant could perform

based upon the restrictions provided by Dr. Lennard and the lack of restrictions from Dr. Hicks. He believed that Dr. Abrams' restrictions limited her to sedentary work, but that there were jobs in the marketplace that she could perform. He found that if Dr. Jackson's psychological findings were to be used she would not be employable, but if he used Dr. Halfaker's findings, claimant would be able to return to work from a psychological standpoint.

Claimant has sought permanent total disability benefits. Total disability, as defined in Section 287.020, ". . . shall mean inability to return to any employment and not merely mean inability to return to employment in which the employee was engaged at the time of the accident." As stated in *Gordon v. Tri-State Motor Transit Co.*, 908 S.W. 2d 849, 853 (Mo.App. S.D. 1995):

> The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App.S.D.1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.E.D.1992). Total disability means the "inability to return to any reasonable or normal employment." *Brown v. Treasurer of Mo.*, 795 S.W.2d 479, 483 (Mo.App.E.D.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id*. The pivotal question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d at 367. See also *Thornton v. Haas Bakery*, 858 S.W.2d 831, 834 (Mo.App.E.D.1993); *Kowalski v. M-G Metals and Sales*, 631 S.W.2d at 922.

A claimant's ability to return to any reasonable or normal employment or occupation does not mean claimant's returning to a demeaning and undignified occupation such as selling peanuts, pencils or shoestrings on the street. *Vogle v. Hall Implement Company*, 551 S.W.2d 922 (Mo.App. 1977).

Section 287.220, RSMo, determines the liability of the Second Injury Fund for disability. Applying that statute, I must first determine claimant's disability from the last injury alone and of itself. The court in *Vaught v. Vaughts, Incorporated*, 938 S.W.2d 931 (Mo.App. S.D. 1997) stated:

> As explained in *Stewart* [*v. Johnson*, 398 S.W.2d 850, 854 (Mo.1966),] . . . §287.220.1 contemplates that where a partially disabled employee is injured anew and sustains additional disability, the liability of the employer for the new injury "may be at least equal to that provided for permanent total disability." Consequently, teaches *Stewart*, where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining

> whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Id*. The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). *Id.* If the compensation to which the employee is entitled for the new injury is less than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. §287.220.1.

Based on the totality of the evidence in this case, I find that claimant is permanently and totally disabled as a result of the July 2, 2010, injury alone. That is ultimately the conclusion of Dr. Abrams, whose opinion I find to be more persuasive than that of Dr. Lennard. Based upon Dr. Abrams' specific findings of a frozen left shoulder, left rotator cuff syndrome without demonstrated tear, posterior tibial strain, and complex regional pain syndrome, I believe that claimant is unable to work and that any employer could not be expected to hire her in the normal course of employment. I find that the opinions of Dr. Miller, Dr. Brooks, and Dr. Abrams are more persuasive that claimant is suffering from complex regional pain syndrome / reflex sympathetic dystrophy caused by her injury at work on July 2, 2010. As noted by Dr. Lennard and Dr. Abrams, the diagnosis of complex regional pain syndrome or reflex sympathetic dystrophy is problematic. However, claimant's condition has continued to be painful and limiting. It must also be noted that Dr. Lennard opined that claimant had components of sympathetic problems but was uncomfortable in diagnosing complex regional pain syndrome or reflex sympathetic dystrophy and was reluctant to make a diagnosis of a "full-blown syndrome" (Page 81 of his deposition). He also believed that claimant's left arm was usable.

I additionally find that claimant is permanently and totally disabled from her July 2, 2010, physical injury alone as opined by Dr. Abrams. Nevertheless, I find and conclude that claimant is suffering from chronic pain and a major depressive disorder as noted by Dr. Jackson and is suffering from disability to the extent of 25 percent to the body as a whole for that psychological condition alone when considering the opinions of Dr. Jackson and Dr. Halfaker. Nevertheless, that finding is not needed for me to conclude that claimant is permanently and totally disabled from the physical condition of the left arm alone, which I find and conclude as based upon Dr. Abrams's opinions that claimant's arm is unusable.

As a result, I order employer/self-insurer to pay to claimant permanent total disability benefits of $330.00 per week beginning March 2, 2011, the date upon which the parties agreed permanent total disability benefits would begin should I make such a finding. Since I have found that claimant is permanently and totally disabled from the last injury of July 2, 2010, alone, I find that the Second Injury Fund has no liability in this case.

Based upon the foregoing it is clear that claimant's psychological condition (based upon both the opinions of Dr. Jackson and Dr. Halfaker) was caused by her injury at work, of July 2, 2010. Since I have found that claimant is suffering from complex regional pain syndrome from her work injury, I find and conclude that claimant (based upon the opinions of Dr. Miller, Dr. Brook, and Dr. Abrams) is suffering from that condition as a result of the July 2, 2010, injury.

Consequently, I find and conclude that claimant's psychological and physical injuries were caused by her accidental injury at work.

Claimant has sought future medical care in this case. It is clear that future medical care may be awarded in workers' compensation cases. *Gill v. Massman Construction Company,* 458 S.W.2d 878 (Mo.App. 1970). The general proof required for future medical care is the same standard required in workers' compensation cases generally…. *Modlin v. Sun Mark, Inc.,* 699 S.W.2d 659 (Mo.App. 1985); *Bradshaw v. Brown Shoe Company,* 660 S.W.2d 390 (Mo.App. 1983); *Barr v. Vickers, Inc.,* 648 S.W.2d 577 (Mo.App. 1983); *Smith v. Terminal Transfer Company,* 372 S.W.2d 659 (Mo.App. 1963). As stated in *Tillotson v. St. Joseph Medical Center,* 347 SW3d 511, 518 (Mo.App. W.D. 2011): § 287.140.1 provides that "in addition to all other compensation paid to the employee, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, **as may reasonably be required after the injury or disability, to cure and relieve the effects of the injury."** (Emphasis added.) Thus, "the clear and unambiguous terms of section 287.140.1 require nothing more than a demonstration that certain medical care and treatment is reasonably required to cure and relieve the effects of an injury." *Tillotson,* 347 SW3d at 520.

Dr. Lennard opined that claimant did not need additional treatment as noted in his report of January 22, 2014. In his deposition Dr. Lennard opined that claimant would benefit from a home exercise program. Dr. Abrams opined that claimant might benefit from the trial of a spinal cord stimulator. He believed that that was the only potential treatment that might benefit claimant. Dr. Jackson opined that claimant should be referred to a psychologist for evaluation of antidepressant medication and that she would benefit from a group treatment program for pain management. Based upon claimant's condition of complex regional pain syndrome / reflex sympathetic dystrophy, I find that there is sufficient evidence that additional treatment including consideration as a trial of a spinal cord stimulator. Therefore, I order employer/self-insurer to provide claimant with such medical care as may reasonably be necessary to cure and relieve her from the effects of her injury at work including her condition of complex regional pain syndrome and depression.

Claimant has also sought a penalty pursuant to §287.120.4. §287.120.4 provides that "where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the Division or the Commission, the compensation and death benefit provided for under this Chapter shall be increased 15 percent." Claimant alleges that claimant's July 2, 2010, injury was caused by a violation of §213.055.1(b) which states the following:

> It shall be an unlawful employment practice:
>
> (b) To limit, segregate, or classify his employees or his employment applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, national origin, sex, ancestry, age or disability.

Claimant has testified that her work conditions subjected her to the unwanted attentions of a resident/patient at the facility who she believed touched her inappropriately on the arm and leg as well as reaching around her waist and indicating he wanted to marry her. She also indicated that the patient would email her with unwanted emails and that he would drive by her home. Claimant stated that she reported those problems to her employer, but the superintendent of the facility, the director of nursing, the registered nurse unit manager, and the activity director do not recall receiving any reports by claimant of any unwanted physical contact or otherwise of a sexual nature prior to July 2, 2010, or thereafter. Additionally, there is nothing in any of the records provided by the facility and placed in evidence or any reports provided by claimant that would indicate any specific action of a sexual nature against claimant by the resident/patient. There are records that indicate that the resident/patient's personality and sense of humor may have been disruptive, and there is evidence that he may have had altercations with other residents. However, only one specific incident of a problem with another patient that occurred prior to the July 2, 2010, injury was noted in the records. That incident was not reported until July 6, 2010, four days after the claimant's injury. Within that same report by the social worker, there was an indication that the social worker had her wrist grabbed against her will at an earlier date by that resident. Thus, there was nothing in the records prior to July 6, 2010, noting any events. A coworker of claimant, Suzanne Hayward, a retired CNA who worked with claimant, also noted the problems with what she described as the resident/patient saying inappropriate things to claimant. Ms. Hayward simply noted that she told claimant something needed to be done, but she did not report any problem to the facility on her own. Additionally, she did not describe what words were said that she deemed inappropriate or how what the resident said to claimant that was inappropriate. Thus, there is nothing in the record other than claimant's testimony regarding any inappropriate sexual conduct or contact by a resident at the facility against her. As a result, I find and conclude that claimant has not met her burden of proof that there was any action by the employer to limit, segregate, or classify claimant in any way that would deprive or tend to deprive her of employment opportunities or adversely affected her status as an employee because of her "race, color, religion, national origin, sex, ancestry, age or disability." I also find and conclude that claimant's injury was not caused by failure of the employer to comply with §213.055.1(b). As a result, I deny claimant's request for a penalty pursuant to §287.120.4 for violation of §213.055.1(b).

Claimant's attorney has requested a 25 percent attorney's fee, which I find to be reasonable. As a result, I allow claimant's attorney, Patrick Platter, an attorney's fee of 25 percent of all amounts awarded herein, which shall constitute a lien upon this award.

Made by: /s/ Robert H. House 7-18-14
Robert H. House
Administrative Law Judge
Division of Workers' Compensation

FINAL AWARD ALLOWING COMPENSATION

Injury No. 10-051245

Employee: Althea Burlison

Employer: Department of Public Safety/Missouri Veterans Home

Insurer: C A R O

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.[1] We have read the briefs, reviewed the evidence, and considered the whole record. We find that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge by this supplemental opinion.

Discussion

Employer's Exhibit 6

We write separately to explain why we agree with the administrative law judge's ruling to deny admissibility to Employer's Exhibit 6.

On July 23, 2013, claimant sent employer an "Amended Notice of Deposition of Representative Pursuant to Rule 57.03(b)(4)."[2] In this notice, claimant requested that employer's representative "produce documentation identified in Exhibit A to this Notice of Deposition." Exhibit A included "14. All Matters that have recorded surveillance activities of the Claimant as defined in Rule 56.01 et. seq." Employer appointed James Dennis as its representative and the deposition took place on August 23, 2013. Employer did not produce any video surveillance at the time of the deposition. When asked if employer had conducted any surveillance of claimant, Mr. Dennis testified "not to my knowledge."

Employer had an investigator conduct surveillance of claimant on November 29, 2013, and December 9, 2013. At no point did employer supplement its answers to the request for production or otherwise inform claimant of the existence of surveillance video. At the hearing, employer attempted to introduce videos from these surveillance sessions into evidence as Employer's Exhibit 6. The administrative law judge ruled the videos were inadmissible because employer had a duty to supplement its responses to requests for production under Rule 56.01(e) and failed to do so. While we largely agree with his analysis, we do wish to make the following observations.

Employer concedes that surveillance videos are discoverable under § 287.560 RSMo, but maintains that section only authorizes requests for production for books or papers. Employer asserts that since a video is neither of these things, surveillance video is not discoverable through a request for production. Instead, employer argues that surveillance videos are only discoverable by using a *subpoena duces tecum*. Employer's argument concludes that since claimant could not compel production of the

[1] All statutory references are to the Revised Statutes of Missouri (2013), unless otherwise indicated.
[2] In this award, all references to rules are to the Supreme Court Rules.

video through a request for production, employer was under no duty to supplement its responses under Rule 56.01(e) and the video should have been admitted into evidence.

We disagree. Under § 287.560, parties are entitled to take and use depositions in like manner as in civil cases in the circuit court.

In *State ex. rel McConaha v. Allen,* the Missouri supreme court held that since § 287.560 authorized parties to use depositions in "like manner as in civil cases," a party could use a *subpoena duces tecum* under Rule 57.09(b), "in exactly the same manner that such a subpoena would be appropriate in a deposition in a civil matter in a circuit court." 979 S.W.2d 188, 189 (Mo. 1998). The court went on to say: "[w]e hold only the rules of civil procedure governing depositions in civil actions also govern, as the statute authorizes, depositions pursuant to section 287.560." 979 S.W.2d 188, 189 (Mo. 1998).

Rule 57.03, "Depositions Upon Oral Examination," is, like Rule 57.09(b), a rule governing depositions in civil actions. Under Rule 57.03(a), the attendance of a party to a deposition is compelled by notice meeting the requirements of Rule 57.03(b), while a subpoena must be served on other witnesses. *State ex rel. Common v. Darnold,* 120 S.W.3d 788, 791 (Mo. App. S.D. 2003).[3] And under Rule 57.03(b)(3), a request for production may be served to a party deponent in conjunction with a notice for deposition. Since this rule also governs depositions under § 287.560, claimant was authorized to use a request for production in exactly the same manner a request for production would be appropriate in a deposition in a civil matter in a circuit court.

A party in a civil proceeding is able to rely on the accuracy of a party deponent's answers to a request for production served with the notice of deposition because Rule 56.01(e) creates a duty to supplement answers that become incomplete or incorrect. Because we have concluded § 287.560 authorizes a party to use a request for production in exactly the same manner it would be appropriate in a civil case, a party proceeding under that § 287.560 is entitled to the same assurance of accuracy Rule 56.01(e) creates.

Employer relies on *Fisher v. Waste Management of Missouri,* 58 S.W.3d 523 (Mo. 2001). In dicta, the court stated that in workers compensation cases, "[t]here are two possible avenues for discovering the surveillance videotape. The first, not involved here, is to take a deposition of the employer … and use a subpoena duces tecum…" *Id.* at 525. The court went on to note that the claimant in that case did not use a *subpoena duces tecum,* "but rather a request for any and all statements, as authorized by section 287.215 …." *Id.* Section 287.215 has since been amended to exclude videos from the definition of statements.[4] Given the holding in *McConaha* that "the rules of civil procedure governing depositions in civil actions also govern…depositions pursuant to section 287.560," we do not believe the dicta in *Fisher* constrains workers' compensation claimants to *only* the single remaining method identified in that case, at the exclusion of any other rule of civil procedure governing depositions.

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[3] In dicta, The Court of Appeals for the Southern District has questioned the use of a *subpoena duces tecum* instead of a request for production when deposing a party deponent. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Keet*, 601 S.W.2d 669, 671 (Mo. Ct. App. 1980)("No question is raised by relator regarding the propriety of a party attempting to require the production of material at a deposition by use of a *subpoena duces tecum* rather than proceeding as provided in Rule 57.03(b) (3), so we do not decide that question.").

[4] *State ex. rel. Feltz v. Bob Sight Ford, Inc.,* 341 S.W.3d 863, 868 (Mo. App. 2011).

Adopting employer's argument would mean surveillance video would only be discoverable if a claimant followed a process that is more complicated, formal, and technical than the procedure required by a circuit court to discover the exact same material. This is in direct conflict with § 287.550 RSMo, which dictates that these proceedings are to be "simple, informal, and summary, and without regard to the technical rules of evidence." Additionally, Missouri courts have consistently held that the purpose of discovery is to take the surprise out of trials*. St. Louis County v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 133 (Mo. 2013)(internal citations omitted); *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927 (Mo. banc 1992) ("[R]ules relating to discovery were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits."). If a party has no duty to supplement answers to a properly served request for production when that party intentionally takes steps it knows will make those answers untrue, the result is to encourage concealment and surprise, and to turn § 287.560 proceedings into trials by ambush.

Because the rules of civil procedure governing depositions also govern depositions pursuant to § 287.560, a party proceeding under § 287.560 may attach a request for production to a notice of deposition served to a party deponent. And because Rule 56.01(e) creates a duty for a party deponent to supplement answers to requests for production when they become aware their answers are no longer accurate, employer was required to supplement its answers regarding the existence of the surveillance video. Since employer did not do so, the administrative law judge did not err when he ruled Employer's Exhibit 6 was inadmissible.

Award

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

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

The award and decision of Administrative Law Judge Robert H. House, issued July 24, 2014, is attached hereto. We affirm and adopt the administrative law judge's findings, conclusions, award and decision to the extent they are not inconsistent with our discussion herein.

Given at Jefferson City, State of Missouri, this 6th day of February 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____

John J. Larsen, Jr., Chairman

_____

James G. Avery, Jr., Member

_____

Curtis E. Chick, Jr., Member

Attest:

_____

Secretary

AWARD

Employee: Althea Burlison

Dependents: N/A

Employer: Department of Public Safety

Additional Party: Second Injury Fund

Insurer: Missouri Office of Administration

Hearing Date: May 12, 2014

Injury No. 09-065236 & 10-051245

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

Checked by:

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: 8-14-2009 and 7-2-2010
5. State location where accident occurred or occupational disease was contracted:
   LAWRENCE COUNTY, MO
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:
    PERFROMING DUTIES AS A CERTIFIED MEDICAL TECHNICIAN
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: LEFT LEG / LEFT ARM
14. Nature and extent of any permanent disability: 5% BODY AS A WHOLE FOR LEFT LEG
    PERMANENT TOTAL DISABILITY FOR 2010 INJURY
15. Compensation paid to-date for temporary disability: $6,902.81 - 2010
    $0.00 - 2009
16. Value necessary medical aid paid to date by employer/insurer? $24,693.23
17. Value necessary medical aid not furnished by employer/insurer? -0-

Employee: Althea Burlison Injury No. 09-065236 & 10-051245

18. Employee's average weekly wages:

19. Weekly compensation rate: $330.00

20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:

weeks of temporary total disability (or temporary partial disability)

20 weeks of permanent partial disability from Employer for 2009 injury - 5% body as a whole
20 x $330 = $6,600.00

0 weeks of disfigurement from Employer

22. Second Injury Fund liability: None

TOTAL: $6,600.00

23. Future requirements awarded: Permanent total disability for 2010 injury for claimant's life beginning 3/2/2011

Said payments to begin 8-14-2009 for 2009 injury and 3-2-2011 for 2010 injury 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:

Patrick Platter

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Althea Burlison

Injury No. 09-065236 & 10-051245

Dependents: N/A

Employer: Department of Public Safety

Additional Party: Second Injury Fund

Insurer: Missouri Office of Administration

Hearing Date: May 12, 2014

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

AWARD

A hearing was held in this matter on May 12, 2014, involving two injury numbers. Claimant appeared in person and through her attorney, Patrick Platter. Employer/self-insured appeared through its attorney, Stephen Freeland. The Second Injury Fund appeared through its attorney, Laura Van Fleet. The record was left open for 30 days following the hearing.

An off-the-record discussion was held regarding the issues to be presented for determination. The following was the only issue in the 2009 case:

(1) The nature and extent of any disability with claimant alleging permanent partial disability for a left ankle injury.

For the 2010 injury:

(1) The nature and extent of disability with permanent total disability being alleged.

(2) The liability of the Second Injury Fund.

(3) The need for future medical care.

(4) Causation of any psychological injuries that claimant may have suffered and causation for reflex sympathetic dystrophy / complex regional pain syndrome.

(5) Whether this matter is subject to a penalty pursuant to §287.120.4, RSMo. for violation of §213.055.1(b).

The parties agree that the workers' compensation rate for both cases is $330.00 per week. The parties additionally agree that medical benefits were paid in the 2009 case in the amount of $3601.49. In the 2010 case the parties agree that medical benefits were paid in the amount of $24,693.23, and that temporary total disability benefits were paid in the amount of $6,902.81 at the rate of $320.00 per week for a total of 21 4/7 weeks.

Testifying at the hearing were claimant; Suzanne Hayward, a retired certified nurse assistant (CNA); Alice Brewer, a social worker; Joan Elwing, director of nursing; Diane

Huckeby, a registered nurse unit manager; and Nina Thompson, activity therapist. Also testifying by deposition were Dr. Lennard; Dr. Abrams; James England; Wilber Swearingin; James Dennis (superintendent of the Missouri Veterans Home); Dr. Jackson, a psychologist; and Dr. Halfaker, a neuropsychologist.

At hearing, employer/self-insurer offered into evidence Exhibit 6, a DVD containing surveillance video of claimant. Employer/self-insurer made an offer of proof with a private investigator identifying the DVD as a compilation of surveillance video taken by him on two separate dates. Claimant objected to the offer of proof of the testimony and admission of the video. Claimant argued that pursuant to the Notice of Deposition of James Dennis, superintendent of the Missouri Veterans Home employer/self-insurer should have given claimant a copy of any surveillance video. That notice included a request for statements and any video taken of claimant. No video existed at the time of either of Mr. Dennis' depositions. However, employer/self-insurer later obtained the video surveillance and failed to provide a copy to claimant. At hearing employer/self-insurer argue they had no duty to supplement claimant's deposition testimony and Request for Production and later argued in its brief that no discovery was required since no Subpoena Duces Tecum was presented to Mr. Dennis with the Notice of Deposition. I sustained claimant's objection at hearing and again sustain the objection following claimant's and employer/self-insured's post-hearing briefs. Section 287.560, RSMo., permits the Division to issue process, subpoena witnesses, administer oaths, examine books and papers and require the production thereof and to cause the deposition of any witness to be taken. It also entitles any party to process to compel the attendance of witnesses and the production of books and papers and the taking depositions in like manner as in civil cases. Those general discovery powers and rights are recognized by the Missouri Supreme Court in *State ex rel McConaha v. Allen, 979 SW2d, 188(Mo banc 1988).* Specifically in *McConaha* the right to discovery of surveillance video was allowed through the deposition process and a Subpoena Duces Tecum. That right was also recognized in *State ex rel Feltz v. Bob Sight Ford, 341 SW3d 863(Mo App SD 2011).* The Court in *Feltz* opined that Rule 56.01(b), the general rule on civil discovery, allows discovery of any books, documents, or other tangible things including statements. As noted in *Feltz* the general purpose of discovery is to facilitate settlement and avoid surprise, citing *Fisher v. Waste Mgmt. of Mo, 58 SW3d 523 (Mo banc 2001).* The Court recognized a requirement for parties to provide surveillance video tapes through the use of deposition and Subpoena Duces Tecum pursuant to the discovery provisions of §287.560, RSMo., and not via an informal request for statements pursuant to §287.215, RSMo. In this case, claimant did not by subpoena compel Mr. Dennis, a representative of the employer, to attend but simply noticed the deposition with Mr. Dennis including a Request for Production of any surveillance video and statements. I find and conclude that no Subpoena Duces Tecum was necessary since Mr. Dennis voluntarily appeared through the notice and had thereby a duty to supplement any deposition testimony and production of video or statements through claimant's Request for Production of those materials pursuant to Missouri Supreme Court Rule 56.01(e) which sets forth a duty to seasonably amend a prior response to Request for Production in this case for any video surveillance. As a result, I deny the admission into evidence the video surveillance DVD (Exhibit).

Claimant worked as a certified medical technician at the Missouri Veterans Home in Mt. Vernon, Missouri. She also was a certified nurse assistant and at times would have to assist other CNAs with their duties. She was born July 22, 1952, and was 61 years old at the date of the

hearing. She received education through the 10th grade and later obtained a GED. For many years she was a stay-at-home mother. She later worked at nursing homes and eventually at the Missouri Veterans Home.

On August 14, 2009, while working as a certified medical technician, claimant was injured when the wheelchair of a resident of the Missouri Veterans Home hit her left ankle with his wheelchair. She was treated for her left ankle injury, underwent an MRI, and was eventually placed in an air cast. Ultimately she was treated by Dr. David Hicks, an orthopedic surgeon, who diagnosed her condition as a soft tissue injury involving a left ankle contusion/strain and left posterior tibial strain. In addition to an air cast, claimant also used a CAM boot. Nevertheless, claimant continued to have problems with her left ankle following her release without restrictions by Dr. Hicks on November 17, 2009. Dr. Bernard Abrams, a neurologist, eventually examined claimant, finding that she had a restriction of no standing over 30 minutes and no walking over 20 minutes. He rated claimant's left ankle injury, (which involved ankle swelling and pain, her needing to take extra breaks and her needing to lean on her medication cart while walking) as resulting in a 5 percent permanent partial disability to the body as a whole.

Based upon claimant's testimony and the findings of Dr. Abrams, I find and conclude that claimant suffered a left ankle injury to the extent of 5 percent to the body as a whole. As a result, I order that employer/self-insurer pay claimant the sum of $6,600.00 representing 20 weeks of compensation at the agreed upon rate of $330.00 per week.

Claimant's more significant problems involve an injury that occurred on July 2, 2010, when a resident/patient at the Missouri Veterans Home grabbed her left arm and twisted it behind her back. She suffered immediate pain in her left arm and left shoulder that progressed over time, requiring her to use a sling and limit her activities with her left arm. Claimant was treated by Dr. Scott Galligos initially, underwent an MRI, and was diagnosed as having a left shoulder strain and subacromial bursitis with left upper extremity paraesthesia. Claimant did not improve and was ultimately referred to Dr. Christopher Miller, an orthopedic surgeon and shoulder specialist. After a left shoulder arthrogram and MRI, Dr. Miller noted no significant rotator cuff tearing or labral tearing. However, he diagnosed a left shoulder strain and was concerned about development of reflex sympathetic dystrophy. He sent claimant for stellate ganglion nerve blocks to Dr. Thomas Brooks. Claimant did not improve following three left stellate ganglion blocks performed by Dr. Brooks. Dr. Miller ultimately found that claimant was suffering from reflex sympathetic dystrophy or complex regional pain syndrome of the left shoulder and did not think that surgery would help her condition.

Claimant later was sent to Dr. Ted Lennard who questioned the diagnosis of complex regional pain syndrome and did not think that additional stellate ganglion blocks would improve her condition. Dr. Lennard ultimately concluded that claimant suffered from a left shoulder strain with an underlying supraspinatus tendinopathy.

Claimant was also sent to Dr. Scott Clark who ultimately opined that claimant was not suffering from complex regional pain syndrome. Nevertheless, following Dr. Clark's examination of November 7, 2011, Claimant received two injections at the intra-articular shoulder joint from Dr. Kimber Eubanks.

Claimant extensively testified in two depositions and at trial concerning her condition. Claimant continues to feel pain in her left arm, cannot lift her arm to her chest, cannot lift objects of any significant weight or hold them for any length of time. She believes that she can lift and hold no more than a loaf of bread. Dr. Christopher Miller, as of September 23, 2010, provided claimant with a weight restriction of one pound. Dr. Ted Lennard, on March 1, 2013, provided claimant with a 15-pound lifting restriction. Dr. Bernard Abrams, on January 13, 2012, opined that claimant should lift no more than five pounds including no lifting above the shoulder. He also opined that claimant should have no physical contact with the left arm due to pain. He opined that claimant's left arm was virtually unusable. Dr. Lennard rated claimant's left arm injury from her accident at work as 15 percent of the left upper extremity at the 232 week level. Dr. Abrams rated claimant's condition as 45 percent to the body as a whole for her left shoulder injury and included a 5 percent rating for emotional disturbance or adjustment reaction. Dr. Abrams ultimately found that claimant was permanently and totally disabled and could not work based upon her left shoulder injury alone, as noted in his answer to the last question he was asked at his deposition.

Claimant testified that she has had psychological problems since her last injury at work, based mainly upon her inability to perform the work that she enjoyed doing at Missouri Veterans Home and losing her career of being a certified medical technician.

Psychologist, Dr. James O. Jackson, PhD., assessed claimant as having a major depressive disorder and rated her total psychological disability of 35 percent to the body as a whole as a result of both the August 14, 2009, and July 2, 2010, injuries. In his deposition Dr. Jackson opined that claimant was permanently and totally disabled based upon her major depressive disorder from the 2010 shoulder injury after having assigned a 35 percent partial disability alone for her major depression. He also opined that claimant would benefit from a pain management program. He additionally found that her psychological disability was a result of her injury at work. Dr. Jackson's ultimate conclusion as shown in his deposition (on page 95) was that claimant was permanently and totally disabled based on the 2010 shoulder injury and the effects therefrom in isolation.

Dr. Dale Halfaker, a neuropsychologist, found that claimant was suffering from a pain disorder to the extent of 5 percent disability to the body as a whole and from major depression which he rated as 7 percent to the body as a whole for a total of 12 percent to the body as a whole. He opined that 5 percent of the 7 percent was definitive, but it possibly was a majority of the 7 percent disability from the July 2, 2010, alone.

Vocational rehabilitation counselor, Wilbur Swearingin, examined and tested claimant upon referral by her attorney, Patrick Platter. Mr. Swearingin's ultimate conclusion was that claimant was neither employable nor placeable for employment. He believed that the restrictions given by all of the physicians would limit her work, with the fewest restrictions being provided by Dr. Lennard and the greatest by Dr. Miller. He found that claimant's physical and psychological impairments in combination of the 2009 and 2010 injuries resulted in her being permanently and totally disabled. James England, a vocational rehabilitation counselor, hired by employer/self-insured opined that there were jobs of a light nature that claimant could perform

based upon the restrictions provided by Dr. Lennard and the lack of restrictions from Dr. Hicks. He believed that Dr. Abrams' restrictions limited her to sedentary work, but that there were jobs in the marketplace that she could perform. He found that if Dr. Jackson's psychological findings were to be used she would not be employable, but if he used Dr. Halfaker's findings, claimant would be able to return to work from a psychological standpoint.

Claimant has sought permanent total disability benefits. Total disability, as defined in Section 287.020, ". . . shall mean inability to return to any employment and not merely mean inability to return to employment in which the employee was engaged at the time of the accident." As stated in *Gordon v. Tri-State Motor Transit Co.*, 908 S.W. 2d 849, 853 (Mo.App. S.D. 1995):

> The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App.S.D.1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.E.D.1992). Total disability means the "inability to return to any reasonable or normal employment." *Brown v. Treasurer of Mo.*, 795 S.W.2d 479, 483 (Mo.App.E.D.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id*. The pivotal question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d at 367. See also *Thornton v. Haas Bakery*, 858 S.W.2d 831, 834 (Mo.App.E.D.1993); *Kowalski v. M-G Metals and Sales*, 631 S.W.2d at 922.

A claimant's ability to return to any reasonable or normal employment or occupation does not mean claimant's returning to a demeaning and undignified occupation such as selling peanuts, pencils or shoestrings on the street. *Vogle v. Hall Implement Company*, 551 S.W.2d 922 (Mo.App. 1977).

Section 287.220, RSMo, determines the liability of the Second Injury Fund for disability. Applying that statute, I must first determine claimant's disability from the last injury alone and of itself. The court in *Vaught v. Vaughts, Incorporated*, 938 S.W.2d 931 (Mo.App. S.D. 1997) stated:

> As explained in *Stewart* [*v. Johnson*, 398 S.W.2d 850, 854 (Mo.1966),] . . . §287.220.1 contemplates that where a partially disabled employee is injured anew and sustains additional disability, the liability of the employer for the new injury "may be at least equal to that provided for permanent total disability." Consequently, teaches *Stewart*, where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining

> whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Id*. The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). *Id.* If the compensation to which the employee is entitled for the new injury is less than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. §287.220.1.

Based on the totality of the evidence in this case, I find that claimant is permanently and totally disabled as a result of the July 2, 2010, injury alone. That is ultimately the conclusion of Dr. Abrams, whose opinion I find to be more persuasive than that of Dr. Lennard. Based upon Dr. Abrams' specific findings of a frozen left shoulder, left rotator cuff syndrome without demonstrated tear, posterior tibial strain, and complex regional pain syndrome, I believe that claimant is unable to work and that any employer could not be expected to hire her in the normal course of employment. I find that the opinions of Dr. Miller, Dr. Brooks, and Dr. Abrams are more persuasive that claimant is suffering from complex regional pain syndrome / reflex sympathetic dystrophy caused by her injury at work on July 2, 2010. As noted by Dr. Lennard and Dr. Abrams, the diagnosis of complex regional pain syndrome or reflex sympathetic dystrophy is problematic. However, claimant's condition has continued to be painful and limiting. It must also be noted that Dr. Lennard opined that claimant had components of sympathetic problems but was uncomfortable in diagnosing complex regional pain syndrome or reflex sympathetic dystrophy and was reluctant to make a diagnosis of a "full-blown syndrome" (Page 81 of his deposition). He also believed that claimant's left arm was usable.

I additionally find that claimant is permanently and totally disabled from her July 2, 2010, physical injury alone as opined by Dr. Abrams. Nevertheless, I find and conclude that claimant is suffering from chronic pain and a major depressive disorder as noted by Dr. Jackson and is suffering from disability to the extent of 25 percent to the body as a whole for that psychological condition alone when considering the opinions of Dr. Jackson and Dr. Halfaker. Nevertheless, that finding is not needed for me to conclude that claimant is permanently and totally disabled from the physical condition of the left arm alone, which I find and conclude as based upon Dr. Abrams's opinions that claimant's arm is unusable.

As a result, I order employer/self-insurer to pay to claimant permanent total disability benefits of $330.00 per week beginning March 2, 2011, the date upon which the parties agreed permanent total disability benefits would begin should I make such a finding. Since I have found that claimant is permanently and totally disabled from the last injury of July 2, 2010, alone, I find that the Second Injury Fund has no liability in this case.

Based upon the foregoing it is clear that claimant's psychological condition (based upon both the opinions of Dr. Jackson and Dr. Halfaker) was caused by her injury at work, of July 2, 2010. Since I have found that claimant is suffering from complex regional pain syndrome from her work injury, I find and conclude that claimant (based upon the opinions of Dr. Miller, Dr. Brook, and Dr. Abrams) is suffering from that condition as a result of the July 2, 2010, injury.

Consequently, I find and conclude that claimant's psychological and physical injuries were caused by her accidental injury at work.

Claimant has sought future medical care in this case. It is clear that future medical care may be awarded in workers' compensation cases. *Gill v. Massman Construction Company,* 458 S.W.2d 878 (Mo.App. 1970). The general proof required for future medical care is the same standard required in workers' compensation cases generally…. *Modlin v. Sun Mark, Inc.,* 699 S.W.2d 659 (Mo.App. 1985); *Bradshaw v. Brown Shoe Company,* 660 S.W.2d 390 (Mo.App. 1983); *Barr v. Vickers, Inc.,* 648 S.W.2d 577 (Mo.App. 1983); *Smith v. Terminal Transfer Company,* 372 S.W.2d 659 (Mo.App. 1963). As stated in *Tillotson v. St. Joseph Medical Center,* 347 SW3d 511, 518 (Mo.App. W.D. 2011): § 287.140.1 provides that "in addition to all other compensation paid to the employee, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, **as may reasonably be required after the injury or disability, to cure and relieve the effects of the injury."** (Emphasis added.) Thus, "the clear and unambiguous terms of section 287.140.1 require nothing more than a demonstration that certain medical care and treatment is reasonably required to cure and relieve the effects of an injury." *Tillotson,* 347 SW3d at 520.

Dr. Lennard opined that claimant did not need additional treatment as noted in his report of January 22, 2014. In his deposition Dr. Lennard opined that claimant would benefit from a home exercise program. Dr. Abrams opined that claimant might benefit from the trial of a spinal cord stimulator. He believed that that was the only potential treatment that might benefit claimant. Dr. Jackson opined that claimant should be referred to a psychologist for evaluation of antidepressant medication and that she would benefit from a group treatment program for pain management. Based upon claimant's condition of complex regional pain syndrome / reflex sympathetic dystrophy, I find that there is sufficient evidence that additional treatment including consideration as a trial of a spinal cord stimulator. Therefore, I order employer/self-insurer to provide claimant with such medical care as may reasonably be necessary to cure and relieve her from the effects of her injury at work including her condition of complex regional pain syndrome and depression.

Claimant has also sought a penalty pursuant to §287.120.4. §287.120.4 provides that "where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the Division or the Commission, the compensation and death benefit provided for under this Chapter shall be increased 15 percent." Claimant alleges that claimant's July 2, 2010, injury was caused by a violation of §213.055.1(b) which states the following:

> It shall be an unlawful employment practice:
>
> (b) To limit, segregate, or classify his employees or his employment applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, national origin, sex, ancestry, age or disability.

Claimant has testified that her work conditions subjected her to the unwanted attentions of a resident/patient at the facility who she believed touched her inappropriately on the arm and leg as well as reaching around her waist and indicating he wanted to marry her. She also indicated that the patient would email her with unwanted emails and that he would drive by her home. Claimant stated that she reported those problems to her employer, but the superintendent of the facility, the director of nursing, the registered nurse unit manager, and the activity director do not recall receiving any reports by claimant of any unwanted physical contact or otherwise of a sexual nature prior to July 2, 2010, or thereafter. Additionally, there is nothing in any of the records provided by the facility and placed in evidence or any reports provided by claimant that would indicate any specific action of a sexual nature against claimant by the resident/patient. There are records that indicate that the resident/patient's personality and sense of humor may have been disruptive, and there is evidence that he may have had altercations with other residents. However, only one specific incident of a problem with another patient that occurred prior to the July 2, 2010, injury was noted in the records. That incident was not reported until July 6, 2010, four days after the claimant's injury. Within that same report by the social worker, there was an indication that the social worker had her wrist grabbed against her will at an earlier date by that resident. Thus, there was nothing in the records prior to July 6, 2010, noting any events. A coworker of claimant, Suzanne Hayward, a retired CNA who worked with claimant, also noted the problems with what she described as the resident/patient saying inappropriate things to claimant. Ms. Hayward simply noted that she told claimant something needed to be done, but she did not report any problem to the facility on her own. Additionally, she did not describe what words were said that she deemed inappropriate or how what the resident said to claimant that was inappropriate. Thus, there is nothing in the record other than claimant's testimony regarding any inappropriate sexual conduct or contact by a resident at the facility against her. As a result, I find and conclude that claimant has not met her burden of proof that there was any action by the employer to limit, segregate, or classify claimant in any way that would deprive or tend to deprive her of employment opportunities or adversely affected her status as an employee because of her "race, color, religion, national origin, sex, ancestry, age or disability." I also find and conclude that claimant's injury was not caused by failure of the employer to comply with §213.055.1(b). As a result, I deny claimant's request for a penalty pursuant to §287.120.4 for violation of §213.055.1(b).

Claimant's attorney has requested a 25 percent attorney's fee, which I find to be reasonable. As a result, I allow claimant's attorney, Patrick Platter, an attorney's fee of 25 percent of all amounts awarded herein, which shall constitute a lien upon this award.

Made by: /s/ Robert H. House 7-18-14
Robert H. House
Administrative Law Judge
Division of Workers' Compensation