

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

Injury No.: 03-068460

Employee: Rosemary DePree

Employer: Timberlake Care Center

Insurer: Self by Health Care Facilities of Missouri

Date of Accident: July 13, 2003

Place and County of Accident: Kansas City, Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 19, 2006. The award and decision of Administrative Law Judge R. Carl Mueller, issued December 19, 2006, 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 29<sup>th</sup> day of October 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

**FINAL AWARD**

Employee: Rosemary DePree

Injury No: 03-068460

Dependents: N/A  
 Employer: Timberlake Care Center  
 Additional Party: N/A  
 Insurer: Self by Health Care Facilities of Missouri  
 Hearing Date: September 22, 2006  
 Briefs Filed: October 9, 2006 Checked by: RCM/cm

**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: July 13, 2003
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? N/A.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was transferring a non-ambulatory patient when she sustained injury to her neck and right shoulder
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: Body as a whole
14. Nature and extent of any permanent disability: Permanent and total disability
15. Compensation paid to-date for temporary disability: \$ 10,418.40.
16. Value necessary medical aid paid to date by employer/insurer? \$107,244.41
17. Value necessary medical aid not furnished by employer/insurer? \$0.00.
18. Employee's average weekly wages: \$446.48.
19. Weekly compensation rate: \$297.66.
20. Method wages computation: Stipulation by the Parties.
21. Amount of compensation payable: Indeterminate

Medical Expenses

Medical Already Incurred.....	\$107,244.41
Less credit for expenses already paid.....	(\$107,244.41)
Total Medical Owing.....	<u>\$0.00</u>

Temporary Disability

35 weeks (3/1/2004 to 10/31/2004).....	\$10,418.10
Less credit for benefits already paid.....	(\$10,418.10)

Total TTD Owing..... \$0.00

Permanent Total Disability

Past Due: November 1, 2004 through September 22, 2006 (hearing date)..... \$29,340.77

Ongoing..... Indeterminate

Total Award:..... Indeterminate

22. Second Injury Fund liability: N/A

23. Future requirements awarded: Future use of a TENS Unit and medications for pain management and depression with physician supervision

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

The compensation awarded to the claimant shall be subject to a twenty-five percent (25%) lien totaling \$7,335.19 of the past due disability benefits , and \$74.42 of each weekly disability benefit thereafter in favor of , Lisa R. McWilliams, for reasonable and necessary attorney’s fees pursuant to MO.REV.STAT. §287.260.1.

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

Employee: Rose DePree Injury No: 03-  
Dependents: N/A  
Employer: Timberlake Care Center  
Additional Party: N/A  
Insurer: Self Insured by Health Care Facilities Fund of Missouri  
Hearing Date: September 22, 2006  
Briefs Filed: October 9, 2006 Checked by:

On September 22, 2006, the employee and employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Ms. Rosemary DePree, appeared in person and with counsel, Lisa R. McWilliams. The self-insured employer appeared through Joseph R. Ebbert. The Second Injury Fund was not a party to the case. The primary issues the parties requested the Court to determine were the nature and extent of disability, payment of a Medicaid lien, and whether the Employer is responsible for ongoing medical care. For the reasons noted below, I find that Ms. DePree’s compensable injury resulted in her permanent and total disability, that the Employer is responsible for future medical care, and that the request for reimbursement by the Department of Social Services is denied.

**STIPULATIONS**

The parties stipulated that:

1. On or about July 13, 2003 (“the injury date”), Timberlake Care Center (“Timberlake”) was an employer operating subject to Missouri’s Workers’ Compensation law with its liability self-insured by Health Care Facilities Fund of

Missouri;

2. Ms. DePree was its employee working subject to the law in Kansas City, Jackson County, Missouri;
3. Ms. DePree notified Timberlake of her alleged injury and filed her claim within the time allowed by law and the claim was timely filed;
4. Timberlake provided Ms. DePree with medical care costing \$107,244.41;
5. Timberlake provided Ms. DePree with thirty five weeks of temporary total disability ("TTD") benefits from March 1, 2004 to October 31, 2004 totaling \$10,418.40; and,
6. Ms. DePree was injured in the scope and course of her employment with Timberlake.

## ISSUES

The parties requested the Division to determine:

1. Whether Ms. DePree suffered any disability and, if so, the nature and extent of her disability?
2. Whether Timberlake must provide Ms. DePree with additional medical care?
3. Whether the Missouri Department of Social Services should be reimbursed \$167.52 for medical care allegedly provided through Medicaid?

## FINDINGS

Ms. DePree testified on her own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

- Exhibit A – Deposition, P. Brent Koprivica, MD, September 8, 2006
- Exhibit B – Deposition, Michael Dreiling, August 15, 2006
- Exhibit C – Employment history.
- Exhibit D – Records, David G. Yingling, MD
- Exhibit E – Records, Orthopaedic Associates (Dr. Burns and Dr. Kapp)
- Exhibit F – Records, St. Francis Hospital (Cape Girardeau)
- Exhibit G – Records, Cape Radiology
- Exhibit H – Records, Employer Health Services
- Exhibit I – Records, St. Joseph Medical Center
- Exhibit J – Records, Darryl Green, MD
- Exhibit K – Prescription List

Although the employer did not call any live witnesses, it did present the following exhibits, all of which were admitted into evidence without objection:

- Exhibit 1 – Records, David G. Yingling, MD
- Exhibit 2 – Deposition, James M. England, M.Ed., August 30, 2006
- Exhibit 3 – Deposition, Bernard Burns, DO, September 19, 2006.

Based on the above exhibits and testimony of Ms. DePree, I make the following findings. Ms. DePree is a single 46 year old living in Cape Girardeau, Missouri. She grew up in Cape Girardeau and dropped out of high school in the 10<sup>th</sup> grade due to difficulty learning. She received below average grades in high school. After leaving school, Ms DePree went to work in a nursing home cleaning and helping with the patients. She continued to work in various settings doing cooking and cleaning until 1980 when her first son was born. Ms. DePree has

never obtained her GED but during her time off from employment she obtained her Certified Nurses Aide (CNA) certificate. She returned to the outside workforce in 1983 and has worked continuously as a CNA until the time of the July 13, 2003 accident. In fact, at times she worked contemporaneously both a full-time and part-time jobs in the CNA field (Exhibit C).

On July 13, 2003, while working as a CNA for Timberlake Care Center in Kansas City, Ms. DePree was attempting to transfer a large non-ambulatory patient from the wheelchair to the bed when the patient suddenly grabbed her around the neck causing a "pop" and a sharp shooting pain from the neck into the right shoulder, down the arm and into her hand. She immediately reported the injury but did not initially seek medical care. Over the next 5 days the pain gradually worsened and on July 19, 2003 she requested medical care from the employer and was referred to the emergency room at St. Joseph Medical Center. At St. Joseph, she complained of neck and right shoulder pain (Exhibit I, p. 3). She received follow-up care at Employer Health Services (EHS) on July 28, 2006 (Exhibit H, p.9). Dr. Morgan at EHS ordered therapy and placed her on work restrictions of 10 lbs. maximum lift, 25 lbs. maximum push/pull, no overhead reaching and no work requiring bending of the neck (Exhibit H, p. 6). Ms DePree's condition did not improve with therapy and Dr. Morgan ordered an MRI of the neck.

Prior to the July 13, 2003 accident, Ms. DePree had notified Timberlake of her intention to return to her hometown of Cape Girardeau to assist her sister in taking care of their mother. Ms. DePree returned to Cape Girardeau the first week of August 2003. While back in Cape Girardeau awaiting authorization of the MRI recommended by Dr. Morgan, Ms. DePree sought and obtained employment as a CNA for mentally disabled individuals at Habcare. Her duties at Habcare did not require heavy lifting or patient transfers. However, she acknowledged that she was only able to obtain that position because she did not tell the employer of her injury or restrictions. The MRI was finally authorized and performed on September 10, 2004 at Cape Radiology Group and revealed multi-level disc herniations from C2-3 – C6-7 with nerve impingement (Exhibit G, p. 5-6). The employer delayed in authorization of care following the MRI but eventually, on February 5, 2005, Ms. DePree was referred to Dr. David Yingling at Cape Neurosurgical Associates. Dr. Yingling noted complaints of right sided neck pain radiating down the right arm to the hand with numbness in the arm and hand as well. He examined Ms. DePree, reviewed the MRI and recommended surgery (Exhibit D, p. 14-15). On March 1, 2004 Ms. DePree underwent an anterior discectomy with allograft fusion using synthes ACF and DBX bone matrix and plating C3 through C6 at St Francis Medical Center (Exhibit D, p. 10).

During the months following surgery, Ms. DePree utilized a bone fusion stimulator, participated in physical therapy and trigger point injections and took medications prescribed by Dr Yingling to include Flexeril, Lorcet Plus, Vicodin, Valium, Neurontin and Ultracet in an attempt to increase range of motion and control her pain (Exhibit D and Exhibit F). Due to ongoing complaints of pain in the neck and shoulder, Dr. Yingling referred Ms. DePree to Dr. Kapp and Dr. Burns at Orthopedic Associates (Exhibit D). Dr. Kapp ordered an MRI of the right shoulder which revealed supraspinatus and infraspinatus tendinopathy with partial thickness, intra-substance tearing of the distal tendons but no discrete full thickness tear (Exhibit G, p. 3). Dr. Kapp and Dr. Burns diagnosed multiple level cervical disc rupture requiring fusion, co-existing cervical strain, shoulder impingement/chronic tendonitis and chronic pain syndrome all related to the July 13, 2003 accident. Per Dr. Kapp and Dr. Burns' orders, Ms. DePree underwent a subacromial injection, participated in additional physical therapy and use of a TENS unit. Dr. Burns prescribed pain medications and muscle relaxants, specifically, Skelaxin, Ultracet and Ibuprofen (Exhibit C) Dr Burns's final evaluation was October 28, 2004. At that final visit he noted Ms. DePree had continued problems with sleep and mood due to her level of pain (Exhibit 3 p. 34, l. 20-23)

Ms. DePree was off work receiving temporary total disability benefits from the time of her surgery March 1, 2004 through the time of her release by Dr. Burns on October 31, 2004.

Before releasing Ms. DePree, Dr. Burns ordered a functional capacity evaluation (FCE) (Exhibit F, p. 2-6). The FCE was completed on October 26, 2004. The therapist's summary states that "based on the evaluation, Ms. DePree was incapable of sustaining the sedentary level of work for an 8 hour day". The therapist noted, "No inconsistencies were noted during the testing. This self-limiting behavior influenced the outcome of the test. Patient's primary reason for self-limiting was due to pain in the cervical region and right upper extremity" (Exhibit F, p. 6). Ms. DePree testified that she felt she tried her best but would tell the therapist when she felt a particular activity was too painful and when she did so the therapist would have her stop that activity. Based on the therapy records, following the FCE Ms DePree's pain increased from 6 out of 10 to 9+ out of 10 (Exhibit F, p. 7; Exhibit 3, p. 43). She testified that due to the increased pain she spent most of the next week in bed. Dr. Burns testified that Ms. DePree "did try during therapy. There was no question that she was somehow malingering. That was never my intention to imply that". (Exhibit D, p. 51, l. 16-18). He also testified that he had no reason to believe Ms. DePree's pain complaints are not real and acknowledged that if a person is having pain doing a particular activity they would not be able to sustain that type of activity for a 40 hour work week (Exhibit 3, p. 43, l. 23-25; p. 44, l. 2-

6).

Dr. Burns indicated Ms. DePree was at MMI on October 28, 2004 but suggested she follow-up with her personal physician, Dr. Darryl Green, for pain medications in the future (Exhibit E, p. 3; Exhibit 3, p. 35). Dr. Burns believes if the TENS unit is providing some relief, Ms. DePree should be provided continued use of the unit (Exhibit 3, p.29, l. 14 - 19). Upon her release from Dr. Burns' care, Dr. Burns issued permanent work restrictions of sedentary work with sitting or standing a maximum of 3 hours at a time and no use of her right upper extremity (Exhibit E, p. 2; Exhibit 3, p. 39, l. 2-6). Ms. DePree is right hand dominant.

Ms. DePree took Dr Burn's work restrictions to HabCare, but they could not provide accommodated employment. Ms. DePree did apply for some other jobs at nursing homes, such as a medication aide or medication tech which is a position passing medications to the residents. While this is not a sedentary position she testified that the CNA field is all she has known and out of desperation to find work she felt she would give it a try. She was granted an interview by one potential employer, Sprigg Street Manor. However, she was not offered the position due to the fact she could not perform the necessary job duties within Dr. Burns' restrictions and due to concerns of her ability to think clearly enough while on the pain medication to pass the proper medications. Ms. DePree applied for vocational rehabilitation but was unable to complete the testing due to pain. She has not returned to work since the surgery of March 1, 2004.

While Dr. Burns indicated that it would be "therapeutic" for Ms DePree to return to work within his restrictions, he did not render an opinion as to whether any employer in the ordinary course would hire her. In fact, he had no knowledge as to claimant's educational background or employment history. (Exhibit E p 5; Exhibit 3 p.39, l. 14 – p 40, l. 20)

Per Dr. Burns' instruction, Ms. DePree has continued to follow-up with Dr. Darryl Green, her personal physician, for management of her pain medication. Per Ms. DePree's testimony, due to the ineffectiveness of the Ultracet and concerns of her stomach problems, Dr. Green has prescribed different pain medications. In addition, Dr. Green has prescribed an antidepressant, Lexapro, due to depression and suicidal thoughts which Ms. DePree testified stems from her ongoing pain and inability to work and do the things she used to do. (Exhibit J p. 14) Ms. DePree has no history of depression prior to her July 13, 2003 injuries. Dr Burns testified that it is not unusual for chronic pain patients to become depressed. In fact, he stated that it is not uncommon to recommend counseling but that he can "very rarely get that accomplished under the workers compensation system" (Exhibit 3 p. 30, l. 25 – p. 31, l. 2; p. 52, l. 1 – 10) As a result of the July 13, 2003 injuries, Ms. DePree is currently still utilizing the TENS unit prescribed by Dr. Burns and is currently on the Duragesic patch, Lidoderm, Skelaxin, Proponap (Darvocet), Ibuprofen, Amitriptyline and Lexapro (Exhibit K). These medications produce side effects of sleepiness and a feeling of mental unclarity. Per Ms. DePree's testimony, Dr. Green's attempts to adjust her medications to something with potentially less side effects have been unsuccessful. Ms. DePree testified that she has tried to take fewer medications but then her pain increases to a level she cannot tolerate. Dr. Burns testified that while they do have side effects, narcotic medication is "the primary mechanism for treating pain" and when prescribing medications for pain management a patient can develop a tolerance creating the need to switch up the medications (Exhibit 3, p. 52, l. 11-13, p. 36, l. 3-7). He testified that he would have to defer to Dr. Green's judgment as to the appropriate medications for Ms. DePree at this time (Exhibit 3, p. 36, l. 16-25, p. 37, l 1).

On March 29, 2005, Dr. Green issued work restrictions, indicating Ms. DePree cannot lift more than 10 lbs.; cannot stand or walk continuously for more than 15 minutes; cannot sit for more than 1 hour at a time; cannot sit for more than 3 hours total in an 8 hour day; should limit use of her right upper extremity and she should have the ability to lay down periodically throughout an 8 hour day (Exhibit J, p. 2-5).

Prior to July 13, 2003 Ms DePree was under no work restrictions and had no medical conditions that hindered her ability to perform her job duties. She had no prior injuries or problems involving her neck or shoulder. She sustained a low back injury in a 1985 motor vehicle accident but that did not result in any permanent restrictions or limit her ability to continue the lifting required of the CNA work for the next 18 years. She also had two minor low back strains at work resulting in minimal treatment and a few days off work with no permanent disability awarded and no limitations in her ability to work. She also acknowledged that she was diagnosed with carpal tunnel syndrome of the right wrist in October 2000. This did cause some numbness in her thumb and index fingers. She was given Celebrex and a wrist splint to wear at night for a few months. She never missed any time

from work due to that condition and had not seen a physician for carpal tunnel complaints since October 2000. She testified that since the July 13, 2003 injury involving multiple level disc ruptures in her cervical spine and shoulder impingement, the pain radiates down the arm into the hand with numbness in multiple fingers and a substantial increase in the pain, weakness and limitations with use of the right hand, including writing. Even with the use of medications, she has constant pain at some level in her neck and right shoulder every day. The level varies depending on the amount of activity she attempts. When she attempts to utilize the right arm she has a tearing sensation in her shoulder which increases the pain. Her daily activities include trying to do some limited cooking and limited cleaning but she cannot perform any laundry or yard work. She spends time visiting her grandchildren that live in Cape Girardeau but is unable to pick them up or play with them. Since her work injury and the development of chronic pain, she finds her tolerance around the children is very limited.

Dr. Koprivica evaluated claimant on March 31, 2005. He reviewed medical records, took a history and examined Ms. DePree. On examination he found significant loss in cervical range of motion, significant weakness of the rotator cuff and significant loss of grip strength of the right hand. (Exhibit A p. 46, l. 16 – p 48, l. 20; p 78-80) He diagnosed multi-level disc herniations with the development of cervical radiculopathy requiring cervical discectomy and fusion as well as impingement of the right shoulder and found the July 13, 2003 lifting accident to be the predominant factor resulting in these findings (Exhibit A, p. 99).

He opined that based on the distribution of the numbness a good portion of her current grip and hand complaints are due to ongoing cervical radiculopathy caused by the nerve damage in her cervical spine and a “double crush syndrome” resulting in a much greater disability in regard to her right hand/arm than she had from the carpal tunnel syndrome (Exhibit A, p. 30, l. 6-25; p. 31, l. 1-19; p 35, l. 24 – p. 36, l. 11). He opined that she will need ongoing medication management for pain and depression and felt the current prescriptions from Dr. Green were reasonable and necessary as a result of the July 13, 2003 injuries. (Exhibit A p. 84; p. 44, l. 11 – p 45, l. 10) He testified that it is not uncommon for the medications that were prescribed by Dr. Burns as well as the medication prescribed by Dr. Green to cause sedation, difficulty with concentration and difficulty with coordination (Exhibit A, p. 39-45).

Dr. Koprivica restricted Ms. DePree to sedentary work with the ability to change positions every 30-60 minutes with limited use of her right upper extremity. These restrictions were all the result of the July 13, 2003 injuries to Ms DePree’s neck and right shoulder.(Exhibit A p. 82, p. 45, l. 14 – p. 46, l. 15).

Dr. Koprivica acknowledged that based on his review of the prior records and the history given, Ms. DePree’s prior back and carpal tunnel problems had not affected her ability to perform her job duties (Exhibit A, p. 50, l. 4 – 14; p 59, l. 16 – p. 60, l. 4 ). However, he opined that had she lost her employment, the prior carpal tunnel syndrome would have limited her ability to do repetitive hand tasks including pinching, grasping, flexion/extension of the wrist or exposure to vibration which would limit her ability to do assembly work (Exhibit A, p.83). However, he opined that the restrictions from the July 13, 2003 injury in isolation would also preclude her from doing assembly work (Exhibit A, p. 50, l. 15 – p. 51, l. 19).

Dr. Koprivica recognized that as a result of the restrictions necessitated by the July 13, 2003 injuries, Ms DePree may be unemployable in the open labor market but deferred to the vocational experts in this regard. However, should it be determined that she was not employable in the open labor market thus rendering her permanently and totally disabled, Dr. Koprivica clearly believes that the permanent and total disability is due to the July 13, 2003 injuries in isolation (Exhibit A, p. 23, l. 14 – p. 25, l. ;p. 28, l. 16 – 25; p. 101, 102) If Ms. DePree was found to be employable in the open labor market, Dr. Koprivica opined that Ms DePree still had a 50% disability as a result of the July 13, 2003 injuries (Exhibit A p. 14 – 15).

Ms. DePree presented for vocational evaluation with Mike Dreiling, a board certified vocational counselor on June 8, 2005. Mr. Dreiling took an educational and employment history and administered a vocational test, the Wonderlic Test, to Ms. DePree. Ms DePree’s Wonderlic score was 14 which is well below the average score of 21 and consistent with an individual who had dropped out of high school in the 9<sup>th</sup> or 10<sup>th</sup> grade. (Exhibit B p. 105-110) Mr. Dreiling opined that whether you utilize the permanent restrictions given for the July 13, 2003 injury by Dr. Burns or whether you utilize the restriction given for the July 13, 2003 injury by Dr. Koprivica, Ms DePree is functioning at less than a sedentary level and no employer in the usual and ordinary course of business seeking persons to perform duties of employment in the usual and customary way would be expected to employ her. (Exhibit B p.25, l. 24 – p. 29, l. 20) Mr. Dreiling testified that based on the restrictions, Ms. DePree cannot return to the type of work she has performed throughout her lifetime. (Exhibit B, p. 20-21, l. 2) She has no transferable job skills and is not a realistic candidate for referral to the State Vocational Rehabilitation Agency for any type of academic or vocational training. (Exhibit B p. 111)

Mr. Dreiling testified that the medical restrictions of Dr Koprivica and Dr Burns were so overwhelming that even if she obtained her GED no employer in the open labor market looking to hire an employee to perform the

duties of employment in the usual and customary way would hire Ms. Depree. (Exhibit B p. 55, l. 25 – p. 56, l. 10) Mr. Dreiling acknowledged that her prior carpal tunnel could eliminate her ability to perform certain types of assembly or repetitive jobs but testified that Ms. DePree would be unable to access the open labor market based on the restrictions from the July 13, 2003 injury in isolation. (Exhibit B p. 51, l. 12 – p. 52, l. 11)

The employer submitted a report of Dr. Yingling dated December 23, 2004 in which he opined that Ms. DePree had a 28% impairment pursuant to the 5<sup>th</sup> Edition of the American Medical Association Guides to the Evaluation of Impairment (Exhibit I). It is noted that Dr. Yingling did not express an opinion on Ms. DePree's disability and impairment differs significantly from disability (Exhibit A, p. 52, l. 23 – p. 54, l. 24).

The employer presented testimony taken August 30, 2006 from Mr. James England, a board certified rehabilitation counselor. I do not find Mr. England's opinions credible or persuasive for several reasons.

First, Mr. England never met - or even spoke with - Ms. DePree. In fact, neither the Employer nor Mr. England requested Ms. DePree to present for a vocational evaluation. (Exhibit 2, p. 29, l. 11-18). Mr. England referred to the St. Louis Division of Workers' Compensation office policy to not allow Employer directed vocational exams for injuries that have occurred prior to August 28, 2005 (Exhibit 2, p. 29, l. 23 – p. 30, l. 9). However, this is a Kansas City - not St. Louis - venue case, and this judge routinely grants employer authorized vocational examinations as per MO.REV.STAT. §287.143 as I consider this provision of the law to be procedural, not substantive. In any event, the point is that neither the Employer nor Mr. England even requested the opportunity to examine Ms. DePree in person.

Second, I note that Mr. England was retained by counsel for the Employer on August 2, 2006 (Exhibit 2, p. 26, l. 25 – p. 27, l. 16) and did not author his report until August 25, 2006 (Exhibit 2, p. 72). However, his deposition notice was sent on August 8<sup>th</sup>, 2006 (Exhibit 2, p. 76). Therefore, Mr. England's deposition was scheduled before he even rendered any opinions in this matter. The fact finder is left wondering how objective Mr. England's opinions are given that the Employer sought his deposition testimony before he even had rendered any opinions.

Third, Mr. England was provided limited documentation prior to rendering his opinions but, he did render a written opinion on August 25, 2006 in which he opined that Ms. DePree was employable in the open labor market in such jobs as medication technician, home companion [per Mr. England, this is a home health aide that sits with an ambulatory elderly person to read to them, give them medication and take their vital signs (Exhibit 2, p. 20)], parking lot attendant and some limited security positions. However, on cross-examination he acknowledged that a medication technician is not ordinarily a sedentary position and thus would not fall within the medical restrictions. He also acknowledged that when he rendered his initial opinions he was not aware of Dr. Burns' restriction regarding "no use of the right upper extremity" (Exhibit 2, p. 25, l. 16-19; p. 34, l. 2 - 14). On cross-examination, he testified upon learning and considering the full restrictions given by Dr. Burns, Ms. DePree would not be able to work as a medication technician with the use of one arm but he still believed Ms. DePree would be employable as a home companion, parking booth attendant and in some limited security positions utilizing her left arm only. (Exhibit 2, p. 35, l. 10 – p. 36, l. 13; p. 56). On cross-examination, however, he acknowledged that he did not even know whether Ms. DePree was right or left handed when rendering this opinion (Exhibit 2, p. 56, l. 20 – 25). Mr. England also testified that he had never seen Dr. Green's restrictions but that based on Dr. Green's restrictions Ms. DePree would not be employable in the open labor market (Exhibit 3, p. 59, l. 16 – p. 50 l. 17). Finally, Mr. England testified that even without considering Dr. Green's restrictions, if Ms. DePree requires her current pain medications to manage her pain then she is not employable in the open labor market. (Exhibit 3 p. 55, l. 17 – p. 56, l. 8; p. 41, l. 21 – p. 42, l. 19; p. 45, l. 5 – 21).

## **RULINGS**

1. Whether Ms. DePree suffered any disability and, if so, the nature and extent of her disability.

From the competent and credible evidence, I find that claimant is permanently and totally disabled pursuant to MO.REV.STAT. §287.010.7.

Section 287.020.7 R.S. Mo. defines “total disability” as the “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 inability to return to any employment means the employee is unable to perform the usual duties of the employment after 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, 632 S.W. 2d 919, 922 (Mo. App. 1982). Any employment means any reasonable or normal employment or occupation and it is not necessary that the employee be completely inactive or inert. The central question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that physical condition. *Id.*; see also Ransburg v. Great Plains Drilling, 22 S.W. 3d, 726, 732 (Mo. App. 2000). The test for permanent total disability is whether given the employee’s condition he or she would be able to compete in the open labor market. Brown v. Treasurer of Missouri, 795 S.W. 2d 479 (Mo. App. 1990). A claimant who is “only able to work very limited hours at rudimentary tasks is a totally disabled worker”. Grgic v. P&G Constr., 904 S.W. 2d 464, 466 (Mo. App. 1995).

The workers’ compensation test for permanent total disability has two components: whether the claimant has the skills, abilities and education to perform any work in the work force and whether the work force would have her. I find Mr. Dreiling’s opinion more credible than Mr. England’s because Mr. Dreiling considered both of these components as well as more complete information regarding claimant’s work restrictions in reaching his opinion. Further, Mr. Dreiling personally evaluated claimant so was able to observe her demeanor, appearance, physical movements and speaking ability in order to assess truthfulness and employability including the type of impression she may make on a potential employer.

The medical experts agree that at best claimant is limited to less than sedentary employment or sedentary employment with no use or limited use of the right upper extremity. The medical and vocational experts agree that claimant is unable to return to the type of work she has done for the last 22 years. Claimant has never been employed in any type of sedentary position. Mr. Dreiling believes that considering her employment history and lack of transferable skills, whether you utilize Dr. Burns’ restrictions or Dr. Koprivica’s restrictions, an employer in the normal course of business is unlikely to hire claimant. Mr. Dreiling did not believe claimant was a realistic candidate for vocational rehabilitation. This was supported by claimant’s testimony that she applied for vocational assistance but was unable to complete the testing.

Mr. England was not provided complete documentation before being asked to render his opinions. He was not provided Dr. Burns’ restriction indicating “no use of the right upper extremity”. After being provided that documentation just prior to his deposition, he testified that he believes Claimant was still employable in the open labor market despite not knowing whether she was right or left hand dominant. Mr. England, however, did not locate specific jobs or specific employers willing to hire claimant with such limitations. I do not find it credible that an employer looking to hire an employee to perform the usual job duties of a parking booth attendant, security monitor or home companion “in the manner that such duties are customarily performed by the average person engaged in such employment” would hire claimant to perform those duties utilizing only her left non-dominant arm. Additionally, Dr. Green has continued to evaluate and treat claimant. If you utilize Dr. Green’s restrictions, Ms. DePree cannot sit for more than a total of 3 hours in an 8 hour day and would need the ability to recline periodically throughout the day. Mr. England acknowledged that claimant would not be employable based on Dr. Green’s restrictions nor would she be employable if she requires the narcotic pain medications prescribed by Dr. Green. There has been no evidence that she does not require the use of these medications. Medical evidence has been presented through both Dr. Koprivica and Dr. Burns that the use of these medications is reasonable and necessary as a result of the work injuries. Claimant has tried to change and/or reduce her medication but cannot tolerate the pain. The authorized treating physician, Dr. Burns, believes claimant’s pain complaints are legitimate and recommended that claimant continue prescription pain management through her primary care physician, Dr. Green. Dr. Burns acknowledged that the use of narcotics is the primary mechanism for treating pain and deferred to Dr. Green as to the appropriate ongoing medications to treat claimant. Claimant has simply followed the physicians’ instructions.

Although Ms DePree did have prior back injuries as well as a prior diagnosis of carpal tunnel syndrome, there has been no evidence presented that prior to July 13, 2003 any physician had placed any permanent work restrictions on claimant due to these conditions or that they effected her ability to perform her duties of employment. However, the first determination is the degree of disability from the last injury. If the last injury in and

of itself renders claimant permanently and totally disabled the employer is liable for the entire permanent total disability payment. Hughey v Chrysler Corp, 34 SW3d 845 (Mo App 2000); Fieldman v. Sterling Properties, 910 S.W. 2d 808, 810 (Mo. App. 1995); Mosehead v. Lismark Distributing, 884 S.W. 2d 416, 419 (Mo. App. 1994) Based on the credible evidence, regardless of any prior injuries or disabilities, the restrictions placed on Claimant due to the July 13, 2003 injuries in and of itself are what have caused claimant to be permanently and totally disabled.

**2. Whether Timberlake must provide Ms. DePree with additional medical care?**

The Employer shall provide ongoing medical treatment to cure and relieve the effects of the injuries. The right to medical aid is a component of the compensation due an injured worker. Mathia v. Contract Freighters, 292 S.W. 2d 271, 277 (Mo. App. 1996). Where future medical benefits are awarded the medical care must flow from the accident and injuries sustained in the accident. Medlin v. Sun Mark, Inc., 699 S.W. 2d, 5, 7 (Mo. App. 1985). Such future care should not be denied simply because claimant has achieved maximum medical improvement. Id. At 278. Claimant has established with reasonable probability that future medical treatment will be required to cure and relieve her from the effects of the injury. The evidence supports an award of future medical treatment to include the use of a TENS unit and supplies for the unit, prescription pain medication, muscle relaxants, sleep aids and medication to treat claimant's depression along with appropriate physician supervision while taking these prescriptions.

Employer shall provide future medical treatment to cure and relieve the effects of claimant's accidental injury as indicated in this Award and as provided by law.

**3. Whether the Missouri Department of Social Services should be reimbursed \$167.52 for medical care provided through Medicaid.**

There is insufficient evidence to show that the billings paid by Medicaid are related to treatment for the July 13,2003 injuries. I therefore find that The Missouri Department of Social Services is not entitled to reimbursement.

**SUMMARY**

The Claimant is awarded temporary total disability already paid from March 1, 2004 through October 31, 2004 at the stipulated compensation rate of \$297.66 Beginning November 1, 2004 claimant is awarded permanent total disability benefits at the weekly benefit rate of \$297.66 to be paid by the employer for the remainder of her life. As of the hearing date there are ninety eight and four-sevenths (98 4/7s) weeks past due benefits owing. Interest is to begin running pursuant to MO.REV.STAT. §287.160.3

The claimant is also awarded future medical benefits for her injuries to be paid by employer.

Claimant's counsel requested a fee equal to twenty-five percent (25%) of all amounts awarded. I find this fee request to be fair and reasonable. Therefore, this award shall be subject to a lien totaling \$7,335.19 of the past due disability benefits, and \$74.42 of each weekly disability benefit thereafter in favor of Lisa R. McWilliams for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1.

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

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

Carl Mueller  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secrest  
*Director*

