

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

Injury No.: 83-002257

Employee: Wanda Farmer
Employer: Advanced Circuitry Division of Litton
Insurer: Constitution State Services
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: January 29, 1983
Place and County of Accident: Springfield, Greene 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 February 6, 2007. The award and decision of Administrative Law Judge Robert H. House, issued February 6, 2007, 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 19th day of September 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

SEPARATE OPINION FILED

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

SEPARATE OPINION
Concurring in Part and Dissenting in Part

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified to deny employee future medical care and treatment.

I agree with the administrative law judge's finding that employee is entitled to compensation in this claim. However, I disagree with the administrative law judge's finding that employee is entitled to an award of future medical care and treatment.

The administrative law judge found that employee was entitled to future medical care as employee met her burden of proof by reasonable probability that she was in need of such care based on Dr. Volarich's opinion regarding her need for future medical care. However, I don't believe employee has shown that any future medical care was reasonably required to cure and relieve the effects of her 1983 injury. Competent and substantial evidence shows that any treatment received subsequent to her 1983 injury was due to either separate injuries or to the 1975 injury. Employee was not able to show that her need for future medical care stemmed from her 1983 injury.

Employee had a prior injury in 1975 as well as several injuries following her 1983 injury. Dr. Volarich testified that employee experienced pre-existing disability as a result of her 1975 injury. The record shows that employee had ongoing complaints leading up to her 1983 injury with regard to her low back and lower extremity. She also avoided lifting heavy objects, repetitive bending, twisting, pushing, pulling and carrying; had trouble with fixed positions such as sitting and standing for extended periods of time; and took frequent breaks while performing household chores. Subsequent to her 1983 injury, the medical record shows that employee on three separate occasions fell due to ice and bad weather and experienced significant pain in her back as a result of the three distinct falls. She also had increased symptoms after being involved in an automobile accident. The record shows other aggravating events during the more than twenty year time span of employee's case.

Furthermore, I find that employee is not credible as she was not consistent in her testimony. Employee's statements and testimony varied with regard to her symptoms following her 1975 injury. She maintained during her 1995 deposition and in the history provided to Dr. Vale that she did not experience back pain or avoid activities after her 1975 injury. However, in the history taken by Dr. Volarich and testimony at trial, employee maintained that she did experience ongoing back pain following her 1975 injury. Employee completely contradicts her earlier sworn testimony and therefore, I find her to be lacking credibility.

Employee's need for future medical care must flow from her 1983 injury and not from any subsequent or prior injuries. Because employee was unable to show that any future medical care directly flowed from her 1983 injury, employee has failed to show that future medical care was reasonably required in her case.

Based upon my review of all the evidence, I find employee did not meet her burden of proof with regard to an award of future medical care and treatment. Accordingly, I would modify the decision of the administrative law judge and deny employee an award of future medical care and treatment for her 1983 injury.

For the foregoing reasons, I respectfully dissent from the portion of the majority's decision awarding future medical care and treatment.

Alice A. Bartlett, Member

AWARD

Employee: Wanda Farmer

Injury No. 83-002257

Dependents:

Before the

Employer: Advanced Circuitry Division of Litton

**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: Constitution State Services

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: 1-29-1983
5. State location where accident occurred or occupational disease was contracted: Advanced Circuitry Division of Litton -- Springfield, Greene County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Back
14. Nature and extent of any permanent disability: 35% body as a whole
15. Compensation paid to-date for temporary disability: \$24,922.43 -- 169 weeks
16. Value necessary medical aid paid to date by employer/insurer?
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages: \$221.20
19. Weekly compensation rate: \$147.47
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

The employer/insurer are ordered to provide claimant with such future medical care as is necessary to cure and relieve her from the effects of her injury.

23 weeks of permanent partial disability from Employer (140 weeks of permanent partial disability less credit of 117 weeks.)

22. Second Injury Fund liability: 0

TOTAL:	\$3,391.81
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23. Future requirements awarded: Future medical

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

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

necessary legal services rendered to the claimant: Gregory Groves

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Wanda Farmer

Injury No: 83-002257

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

Dependents:

Employer: Advanced Circuitry Division of Litton

Additional Party: Second Injury Fund

Insurer: Constitution State Services

Checked by: RHH/meb

AWARD ON HEARING

The parties presented evidence at a hearing on November 29, 2006. Appearing at that hearing were claimant and her attorney, Gregory Groves; Raymond Whiteaker and Kevin Rapp for employer/insurer; and Cara Harris for the Second Injury Fund. At that hearing the parties presented the following issues for determination:

1. Whether claimant is entitled to future medical benefits.
2. The nature and extent of claimant's disability, with claimant alleging permanent total disability.
3. The liability of the Second Injury Fund for any permanent disability.

The parties agree that the workers' compensation rate was \$147.47, and claimant's average weekly wage was \$221.20.

The parties additionally agree that employer/insurer have paid to claimant \$24,922.43, representing 169 weeks of compensation. The parties additionally agree that a 52-week healing period applies to this case which equates to \$7,668.44. The parties additionally agree that employer/insurer is entitled to a credit toward any permanent disability for the remainder of the payments made to claimant which total \$17,253.99.

Two witnesses testified at the hearing, claimant (whose deposition was also admitted into evidence) and Phillip Eldred, a certified rehabilitation counselor hired by claimant's attorney. The parties additionally presented into evidence claimant's medical records for her 1975 injury and her 1983 injury. In addition, the depositions of Dr. David Volarich, an occupational medicine specialist who is an examining and rating physician hired by claimant, and Michael Lala, a certified rehabilitation counselor, hired by the Second Injury Fund, were admitted into evidence.

Claimant's accidental injury occurred on January 21, 1983, when she slipped and fell while at work for Advanced Circuitry Division of Litton in Springfield, Greene County, Missouri. Claimant fell on her right hip, her back, and the back of her head. She began treatment almost immediately and has continued to treat for her condition through the date of the hearing. Claimant's treating doctors have provided her with conservative care (including prescriptive medications, injection therapy and blocks, and a chymopapain injection), a surgery on March 21, 1983, by Dr. Harmon, who performed a "[l]aminectomy L4-L5 interspace with removal of a herniated 4th lumbar disc and adhesiolysis of L5 interspace," and a second surgery, also performed by Dr. Harmon, on March 8, 1993, for "[b]ilateral decompressive laminectomy with foraminotomies, L4 and L5.

Claimant has been rated by Dr. Harmon, Dr. Janie Vale, and Dr. Volarich. On April 11, 1986, Dr. Harmon initially rated claimant as having a 20 percent disability to the body as a whole for her 1983 injury. On December 6, 1988, Dr. Harmon rated claimant as follows: "Please be advised that her over all disability, I think, is about 35 percent. In regards to after her first operation for disc removal it would have been in the neighborhood of 15 percent but having a resected herniated disc without significant sequela she now totals about 35 percent. I think this is not going to appreciably change with time." Later, on January 26, 1993, Dr. Harmon rated claimant's disability for the 1983 injury alone as follows: "The above named patient has been under my care due to a work related injury sustained on January 21, 1983, while employed with Litton Industries. Her overall disability as a result of this injury, is about 35% in regard to her first operation for disc removal. It would have been in the neighborhood of 15%, but having a resected disc without significant sequela, she now totals 35%. I do not think that this will change appreciably with time." He did not again rate claimant even though he later performed surgery on her back on March 8, 1993, and continued to treat claimant thereafter for several years (through April 12, 1999).

On March 29, 1988, Dr. Janie Vale assessed claimant's disability from the 1983 injury alone as being 25 percent to the body as a whole. Dr. Vale rated claimant's total condition on March 29, 1988, as being 40 percent permanent partial disability to the body as a whole which included an evaluation of claimant's 1975 injury. Claimant's 1975 injury resulted from an accident at work while working at Empire Foods in which she pushed turkeys onto a conveyor belt and experienced

back pain. She apparently settled her workers' compensation claim for the 1975 injury at \$5,000.00. Almost immediately thereafter claimant underwent a back surgery performed by Dr. Harmon which involved a "[r]ight hemilaminectomy at 5th and 4th lumbar interspaces; removal of herniated 5th lumbar disk and exploration of L4-disk space." Reviewing the 1975 injury and the 1975 surgery in her report, Dr. Vale noted "she states she did 'fantastic' after surgery and never had another problem. Patient, when directly asked, indicated that she had received no rating following this procedure, however, records provided would indicate that patient did obtain a Worker's Compensation settlement."

On March 9, 2004, Dr. Volarich examined claimant and, based upon that examination, claimant's medical records, and the history claimant presented to him, Dr. Volarich rated her disability from the 1983 injury as being 60 percent to the body as a whole. Dr. Volarich also opined that claimant was permanently and totally disabled as a result of the combination of the 1983 injury and her prior 1975 injury. He rated the preexisting condition of claimant's back as being 30 percent to the body as a whole, listing no other preexisting conditions which would combine with claimant's last injury at work in 1983.

At her September 15, 1995, deposition, claimant testified that she had a good recovery following her 1977 surgery without any continuing back problems until her 1983 injury. She stated that, following her 1977 surgery, she did not have any back pain, did not have any pain going down into her hips or legs, and did not have any back pain again until January 21, 1983. She also stated that prior to 1983 she did not avoid any activities because of her back and that she engaged in many activities including softball, volleyball, swimming, camping, and bike riding. Claimant also testified that, when she started working for Litton, there were no activities that she did not do because of her back. Nevertheless, claimant's testimony at trial, along with the history she gave to Dr. Volarich, were diametrically opposed to the history she gave to Dr. Vale and to her 1995 deposition testimony. Indeed, at the hearing claimant testified that, following her 1975 injury, she had continuing back problems and problems with pain going into her legs such that she could not continue with activities as before and that she had difficulty lifting, sitting, standing, stooping, and bending.

In his July 1, 1995, report, Phillip Eldred, a vocational rehabilitation counselor, hired by claimant to assess her vocationally, opined that claimant was permanently and totally disabled. It appears from that report that the assessment of permanent total disability was based upon claimant's January 21, 1983, injury alone. Mr. Eldred was aware of claimant's 1975 injury, but he also cited claimant's having reported to him that following the 1977 surgery that "...she had no more pain and that the surgery was completely successful. She was able to return to work without any further complications." Nevertheless, at trial, Mr. Eldred testified that claimant was permanently and totally disabled based upon a combination of events. Yet, Mr. Eldred admitted that, following her 1977 surgery, claimant had no restrictions, that claimant had reported to him that she went back to the work force successfully and could do all that she wanted to do, and that she had no problems with her back from 1977 until 1983. He also admitted that claimant had presented a history of no pain in her legs after the 1975 injury and that she did all of her prior outside activities until the 1983 injury. His ultimate conclusion was that claimant had no hindrance or obstacle to employment before 1983, even though he testified that he personally believed that claimant was hampered as a result of her 1977 back surgery because of the reluctance by some employers to hire people who

have had back surgery.

Michael Lala, a vocational rehabilitation counselor, testified on behalf of the Second Injury Fund. He opined that claimant was engaged in performing a job through her current childcare activities. Claimant and her husband keep children in their home both before and after school and during the day. She testified that her husband has to do all the lifting that is involved. She stated that on occasion she will change diapers on her own, but must do so by going onto the floor and having the child crawl onto a footstool. Mr. Lala opined that he could not identify any reason why Mrs. Farmer could not continue to perform the homecare for children on a weekly basis and classified those duties as light or medium work activity. He stated that he agreed with Mr. Eldred that any limitations Mrs. Farmer had were a result of the 1983 injury alone. He also opined that claimant does not experience a vocational handicap that would be considered a hindrance or obstacle "to all types of employment." In effect Mr. Lala opined that since claimant was keeping children in her home, and that her childcare activities were a recognized occupation or job, then claimant was capable of performing a job.

Claimant was found by Dr. Janie Vale on March 29, 1988, to be at maximum medical improvement. That is when Dr. Vale rated claimant, but also indicated that claimant could not return to her work at Litton on a full-time basis in her previous position or in other manufacturing positions. However, neither Dr. Vale, Dr. Harmon, nor any other of her treating physicians provided any restrictions for claimant in their medical records or reports. Nevertheless, claimant testified at trial that Dr. Harmon told her not to sit, stand, bend, stoop, or lift, qualifying that later in her testimony as Dr. Harmon telling her not to perform those activities "excessively." It was not until the March 29, 2004, report of Dr. Volarich that claimant was provided with restrictions for her injury. Dr. Volarich advised claimant to limit repetitive bending, twisting, lifting, pushing, pulling, carrying, climbing, and other similar tasks to an as-needed basis, avoiding handling of any weight over her head and away from her body, avoiding remaining in a fixed position for more than 20 or 30 minutes (following 1983) and 60 to 120 minutes (following 1977). He also advised that she should change positions frequently. He additionally advised her to pursue appropriate stretching, strengthening, and range of motion exercises including walking, biking, or swimming as she could tolerate them. He also opined that claimant should not lift any weight greater than 5 to 10 pounds after 1983 and only then on an occasional basis and no greater than 35 pounds prior to 1983. I again note that claimant testified in her 1995 deposition (corroborated by her medical records) that she was unlimited in any of her activities and had no back or leg pain following her 1977 surgery. That was different from the history claimant provided to Dr. Volarich and different from her testimony at trial in which she testified that she continued to have back and leg problems and limited her physical activities.

Clearly, claimant's condition has waxed and waned over time since her 1983 injury, worsening throughout the latter part of the 1990s. Claimant's medical records also show that claimant's condition has had marked improvement at times; yet, on several occasions she aggravated her condition by falling on ice, by shopping and walking a lot, by undergoing a chymopapain injection, and by being involved in a 1992 motor vehicle accident. Nevertheless, both Dr. Harmon and Dr. Volarich have opined that none of those incidents caused her any additional injury or exacerbated her physical problems. Dr. Harmon's rating opinion was rendered on March 19, 1990, prior to the 1992 motor vehicle accident, but he rated claimant's

1983 injury alone without consideration of any other problems or disabilities caused by other factors. Additionally, Dr. Harmon on August 24, 1992, noted that claimant was involved in a motor vehicle accident, but he opined that she had no increase in radicular pain and neurologically had not changed. Nevertheless, he noted that claimant continued to have some symptoms related to the truck wreck as of October 26, 1992.

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.

Moreover, 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.

It is now more than 23 years since claimant was initially injured. Dr. Vale released claimant as having reached maximum medical improvement on March 29, 1988. Dr. Vale on that date rated claimant as having a disability of 25 percent

to the body as a whole for her 1983 injury alone. Dr. Harmon also rated claimant as having a 35 percent disability to the body as a whole as a result of her 1983 injury alone. Dr. Volarich has rated claimant's disability from the 1983 as 60 percent to the body as a whole. Dr. Volarich's examination and rating of claimant came 21 years after the injury and additionally followed a 1997 recurrent L5-S1 herniation that has not been surgically repaired. Dr. Volarich obtained a history from claimant that coincided with her testimony at trial rather than her deposition testimony from 1995 and the history contained in her medical records following the 1975 injury and before the 1983 injury. If claimant truly had no problems following the 1975 injury until her 1983 injury, then it may well be concluded that all of her problems are a result of the 1983 injury and/or any other injuries thereafter.

However, based upon all of the evidence, I find that the opinion of Dr. Harmon, who treated claimant from 1977 until 1999, presents a better indication of claimant's disability than the other evidence in this case. Dr. Harmon was in a better position to understand claimant's complete condition and specifically her disability from the 1983 injury alone. Yet Dr. Harmon's opinions assessing claimant's disability are confusing at best. The language Dr. Harmon used in his 1988 rating letter is strikingly similar to the language he used in his 1993 letter. Both letters rate claimant as having a 35% overall disability and refer to two surgeries in discussing claimant's disability in spite of the fact that claimant had only one surgery as a result of the 1983 injury at the time of both letters. Reference to the first surgery in both letters could refer only to the 1977 surgery Dr. Harmon performed following claimant's 1975 accidental injury. The second surgery following the 1983 accidental injury took place a weeks after the January 26, 1993, rating letter (March 8, 1993). In both letters, Dr. Harmon opined that he expected claimant's disability not to "change appreciably with time," but of utmost importance is the language contained in the January 26, 1993, rating letter, that "[h]er overall disability as a result of this injury . . .," was about 35%. That language was not contained in the 1988 letter. Thus, Dr. Harmon in the 1988 letter appears to opine that claimant has the same 20% disability from the 1983 accidental injury that he first noted on April 11, 1986, while noting a 15% disability for her "first operation." It is only in the 1993 letter that Dr. Harmon seems to opine that claimant's disability of 35% is "as a result of this injury"--the 1983 accident. With the phrasing and punctuation differences in the two letters, especially with the addition of the language, "as a result of this injury," in the 1993 letter, Dr. Harmon's ultimate assessment of disability is somewhat in doubt. However, based upon all of the evidence, including the somewhat confusing ratings of Dr. Harmon and the ratings for the last injury alone by Dr. Vale (25%) and Dr. Volarich (60%), I find that claimant has sustained a permanent partial disability of 35 percent to the body as a whole. I order employer/insurer to pay claimant 35 percent of the body as a whole at 140 weeks of compensation at the agreed upon rate of \$147.46. The parties have agreed that employer/insurer are entitled to a credit for all amounts paid to claimant beyond the 52-week healing period. Employer/insurer paid claimant 169 weeks of disability prior to her being released at maximum medical improvement. Deducting the 52-week healing period, employer/insurer are entitled to a credit of 117 weeks of compensation. Consequently, employer/insurer are ordered to pay claimant 23 weeks of compensation (140 minus 117) at the agreed upon rate of \$147.47 for a total of \$3,391.81. My finding that claimant is not permanently and totally disabled from the last injury alone is in part based upon the fact that claimant is

performing childcare services in her home. Phillip Eldred does not find that that is a job or occupation because she can only perform those duties with her husband's help. However, from claimant's testimony it is clear that she began performing those duties prior to her husband's joining her after he left work because of a medical disability. Moreover, it is the opinion of Michael Lala that claimant is performing a job which constitutes employment in the open labor market. Claimant states that she must lie down during the day when needed. Mr. Lala opines that "It is one of the few jobs that one can actually lie down and do." My opinion is also based on the fact that although claimant has had significant back and at time leg pain since her injury in 1983, she also had periods of time in which her condition improved (including the period from October 21, 1993, until May 17, 1005, when she did not have to engage the services of Dr. Harmon).

My finding that claimant is not permanently and totally disabled from the last injury alone is in part based upon the fact that claimant is performing childcare services in her home. Phillip Eldred does not find that that is a job or occupation because she can only perform those duties with her husband's help. However, from claimant's testimony it is clear that she began performing those duties prior to her husband's joining her after he left work because of a medical disability. Moreover, it is the opinion of Michael Lala that claimant is performing a job which constitutes employment in the open labor market. Claimant states that she must lie down during the day when needed. Mr. Lala opines that "[i]t is one of the few jobs that one can actually lie down and do." My opinion is also based on the fact that although claimant has had significant back and at time leg pain since her injury in 1983, she also had periods of time in which her condition improved (including the period from October 21, 1993, until May 17, 1995, when she did not have to engage the services of Dr. Harmon).

Since I have found that claimant is not permanently and totally disabled from her last injury alone, my next consideration pursuant to §287.220 is to determine any Second Injury Fund liability. As stated in §287.220, "the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained . . . and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability . . ." to determine Second Injury Fund liability. For the Second Injury Fund to be liable, there must be enhanced or synergistically increased disability as a result of the combination of her disability from the last injury at work and her preexisting disabilities which must rise to the level of a hindrance or obstacle to employment. *Brown V. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App.E.D. 1990).

Dr. Volarich has found claimant permanently and totally disabled as a result of the combination of her 1975 and 1983 injuries. Dr. Volarich based that opinion upon the history claimant gave him that she had significant continuing back and leg pain following her 1975 injury and 1977 surgery. Dr. Volarich testified that it would be normal for people to have ongoing complaints following back surgery such as the surgery claimant had in 1977 and that it is rare for people to go back to normal without limitations following such surgery. Yet he testified that he has "had a couple of patients like that."

I find that claimant is just such a person. Claimant's many reports to her physicians following her 1977 surgery were that she had recovered completely, had no back or leg problems and was pain free. That medical history is consistent with claimant's testimony in her 1995 deposition that she could do anything that she wanted to do following her 1977 surgery and

that she had no difficulties whatsoever. Her testimony at trial was directly contrary to her medical history and her 1995 deposition testimony. Her testimony at trial was consistent with the history she gave Dr. Volarich. It is impossible to reconcile such markedly opposing versions of the facts with claimant being the primary source of each version. Claimant appears to be a credible person even though there are reports in earlier medical records which have reported a tendency to exaggerate or be more dramatic in her presentation of symptoms, as noted in the records of Dr. Bass and Dr. Issac. However, because claimant's medical history of no lingering back and leg problems (as contained in the medical records and reports of the treating and examining physicians following the 1977 surgery, and corroborated by claimant's 1995 deposition testimony and the history claimant provided to Philip Eldred) is of such longstanding duration and unvarying nature until first contradicted by her recitation of a different history to Dr. Volarich in 2004, I find that claimant had no back or leg problems following her 1977 surgery and that she had no disability prior to her 1983 injury at work. Therefore, I agree with the conclusions of Phillip Eldred and Michael Lala that claimant had no hindrance or obstacle to employment prior to her 1983 injury. As a result, I find that claimant had no preexisting disabilities with which to combine the disability from her 1983 injury to result in any liability by the Second Injury Fund pursuant to §287.220. I deny claimant's claim against the Second Injury Fund.

Claimant has sought future medical care in this case. It is clear from claimant's medical history that her 1983 injury has resulted in significant disability and limitations and has necessitated treatment for a significant period of time. Dr. Volarich has specifically opined that claimant is in need of future medical care. Dr. Vale in 1988 opined that claimant had reached maximum medical improvement. Dr. Vale at that time indicated that claimant was not a good surgical risk but did not indicate any other medical treatment that would assist claimant. Nevertheless, Dr. Vale's release, claimant continued to treat with Dr. Harmon and other physicians and has clearly needed additional medical care. There is no updated medical report provided by employer/insurer to counter the opinion of Dr. Volarich. I find that Dr. Volarich's opinion regarding the need for future medical care meets claimant's burden of proof by reasonable probability that she is in need of such care. Dr. Volarich has opined as follows:

EVALUATION AND TREATMENT CONSIDERATIONS: In order to maintain her current state, she will require ongoing care for her pain syndrome using modalities including but not limited to narcotics and non-narcotic medications (NSAIDS), muscle relaxants, physical therapy, and similar treatments as directed by the current standard of medical practice for symptomatic relief of her complaints.

Ms. Farmer requires continuing treatment through a pain clinic for her back pain syndrome. She requires narcotic medications, trigger point injections, epidural steroid injections, foraminal nerve root blocks, TENS units and similar treatments for symptomatic relief. A dorsal column stimulator may be needed in the future when she becomes refractory to these more conservative pain management procedures.

SURGICAL CANDIDACY: Based on today's examination, additional surgery is not indicated at this time. Should she develop instability in the low back, fusion will be needed. The decision to perform any additional surgery on her back should be made in conjunction with her wishes, change in symptoms, and expert surgical opinion.

As a result, I order employer/insurer to provide claimant such medical care as is necessary to cure and relieve her from the effects of her injury.

I allow Gregory Groves, claimant's attorney, an attorney's fee of 25 percent of all amounts awarded herein which shall constitute a lien upon this award.

Date: February 5, 2007

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

A true copy: Attest:

/s/ Patricia "Pat" Secret
Patricia "Pat" Secret
Director
Division of Workers' Compensation