

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

Injury No. 10-101736

Employee: Tammy Normand Gonzalez  
Employer: Con-Way Truckload, Inc.  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

*Nature and extent of permanent disability - medical causation*

The parties asked the administrative law judge to determine the issue of the nature and extent of disability resulting from employee's primary injury and referable to each of her prior injuries. Because the parties did not stipulate that employee sustained permanent disability as a result of the accident, this issue thus necessarily involves a question of medical causation. Section 287.020.3(1) RSMo sets forth the standard of medical causation applicable to this claim, and provides, in relevant part, as follows:

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

As accurately recounted in the award by the administrative law judge, the parties presented competing expert medical testimony as to the issue whether the accident was the prevailing factor causing employee to suffer permanent disability. Specifically, employee advanced the opinions of Dr. David Volarich, who believes that the accident was the prevailing factor causing employee to suffer the following resulting medical conditions and permanent partial disabilities: a 2.5% permanent partial disability of the body as a whole referable to a cervical strain; 15% of the body as a whole referable to a lumbar strain and aggravation of preexisting lumbar syndrome; 35% of the right shoulder referable to impingement and a labral injury; and 20% of the right hip referable to hip pain. The Second Injury Fund, on the other hand, relied upon the opinions of employer's expert, Dr. John Graham, a pain management physician who believes the accident was not the prevailing factor causing employee to sustain any permanent

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partial disability, because (in his opinion) there is no objective evidence of any pathology directly related to the accident.

On page 10 of her award, the administrative law judge expressly stated that she credited the testimony and opinions of Dr. Graham over those of Dr. Volarich. We note, however, that she appears to have ultimately rejected Dr. Graham's medical causation opinion, because she found that employee's accident caused her to suffer permanent partial disability as follows: 2.5% of the body as a whole referable to the cervical spine; 5% of the body as a whole referable to the lumbar spine; 15% of the right shoulder; and 10% of the hip. We write to make clear that, after careful consideration of the conflicting expert medical opinions, we agree with the administrative law judge's (implied) rejection of the actual medical causation opinions from Dr. Graham.

For this reason, we must disclaim the suggestion in the administrative law judge's award that the opinions of Dr. Graham are more persuasive than those of Dr. Volarich. Instead, we find Dr. Volarich more persuasive with respect to the question whether employee suffered permanent partial disability as a result of the accident.

#### Second Injury Fund liability

Despite her finding that employee did not make a persuasive witness, the administrative law judge awarded to employee permanent partial disability benefits from both the employer and the Second Injury Fund. Employee appeals, seeking an award of permanent total disability benefits from the Second Injury Fund. While we agree with employee that the minor contradictions the administrative law judge identified as between employee's deposition and hearing testimony are not necessarily indicative of any intent on employee's part to deceive or mislead the finder of fact, we do share the administrative law judge's concern over employee's changing her testimony with regard to whether she thought she could perform a telemarketer or telephone customer service job or not.

While we are not convinced that employee was affirmatively attempting to be untruthful in her testimony, we also are not persuaded that we can completely rely upon her testimony with respect to the issue whether she is permanently and totally disabled, and if so, why. Notably, although he identified a number of physical restrictions under the section of his report labeled "Ability to Work," Dr. Volarich did not render a finding that employee is permanently and totally disabled.

Ultimately, after careful consideration, we are not persuaded to disturb the administrative law judge's determination with respect to the question whether employee suffered permanent total disability as a result of a combination of the effects of the primary injury and her preexisting conditions of ill-being. For this reason, we will affirm and adopt the award to the extent it is not inconsistent with our findings and analysis herein.

#### **Conclusion**

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

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The award and decision of Administrative Law Judge Karen Wells Fisher, issued May 20, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

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

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

Given at Jefferson City, State of Missouri, this 18<sup>th</sup> day of February 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Tammy Normand Gonzalez

Injury No. 10-101736

Dependents: N/A

Employer: Con-Way Truckload, Inc.

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: Con-Way Truckload, Inc.

Hearing Date: December 10, 2014

Checked by:

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are 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: 12/7/2010.
5. State location where the accident occurred or occupational disease was contracted: OHIO
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 was contracted: EMPLOYEE WAS RIDING AS A PASSENGER IN A SEMI TRUCK WHEN THE TRUCK LEFT THE ROADWAY CAUSING INJURY TO EMPLOYEE'S BACK, BILATERAL HIPS, BILATERAL SHOULDERS, BILATERAL LEGS AND BODY AS A WHOLE.
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: BACK, BILATERAL HIPS, BILATERAL SHOULDERS, BILATERAL LEGS AND BODY AS A WHOLE.
14. Nature and extent of any permanent disability: PERMANENT PARTIAL DISABILITY.
15. Compensation paid to date for temporary disability: \$15,068.24
16. Value necessary medical aid paid to date by employer/insurer? \$14,641.58
17. Value necessary medical aid not furnished by employer/insurer? N/A

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- 18. Employee's average weekly wages: \$1,257.48
- 19. Weekly compensation rate: \$799.11/\$418.58
- 20. Method wages computation: STIPULATION

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Unpaid medical expenses: N/A

0 weeks of temporary total disability (or temporary partial disability)

85.5 weeks of permanent partial disability from employer.

0 weeks of disfigurement from Employer.

Permanent partial disability benefits from Employer \$35,788.59.

- 22. Second Injury Fund liability: YES

48.83 weeks of permanent partial disability from the Second Injury Fund: \$20,439.27

Uninsured medical/death benefits: N/A

**TOTAL: SEE AWARD**

- 23. Future requirements awarded:

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: RYAN E. MURPHY.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Tammy Normand Gonzalez

Injury No.

Dependents: N/A

Employer: Con-Way Truckload, Inc.

Additional Party: Second Injury Fund

Insurer: Con-Way Truckload, Inc.

Hearing Date: December 10, 2014

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

Checked by:

### AWARD

#### Introduction

The parties appeared before the undersigned Administrative Law Judge on December 10, 2014, for a final hearing. The Claimant appeared in person represented by Ryan E. Murphy. Employer and insurer appeared through their legal counsel Ron Sparlin. The Second Injury Fund appeared represented by Catherine Goodnight.

#### Issues

1. The nature and extent of permanent disabilities; and,
2. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

#### Stipulations

1. On or about December 7, 2010, Con-Way Truckload, Inc. was an employer operating subject to Missouri Workers' Compensation Law. The employer's liability was fully insured by Con-Way Truckload, Inc.
2. On the injury date of December 7, 2010, Tammy Gonzalez was an employee of the employer and was working under and subject to the Missouri Workers' Compensation Law.
3. On the injury date of December 7, 2010, Tammy Gonzalez sustained an accidental injury which arose out of and in the course and scope of employment.
4. The above referenced accident occurred in the state of Ohio.
5. The Claimant notified the employer of her injury as required by § 287.420 RSMo.
6. The claim for compensation was filed within the time prescribed by § 287.430 RSMo.
7. At the time of the accident, the Claimant's average weekly wage was sufficient to allow a compensation rate of \$799.11 for temporary total disability and permanent total disability compensation and \$418.58 for permanent partial disability compensation.
8. The employer and insurer have paid \$15,068.24 in temporary disability benefits to the Claimant.
9. The employer and insurer have paid medical benefits in the amount of \$14,641.58.

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10. The attorney fee being sought is 25%.

### **Exhibits**

Employee offered the following exhibits, which were admitted:

Exhibit A..... IME Report – Dr. David Volarich; 10/15/12  
Exhibit B..... Deposition Transcript with Exhibits – Phil Eldred; 12/18/13  
Exhibit C..... Medical Records – Space Coast Orthopedic Center, Certified 11/23/11  
Exhibit D..... Medical Records – Concentra Medical Center, Certified 8/1/11  
Exhibit E..... Medical Records – Neurological & Electrodiagnostic Institute, Certified 10/11/11  
Exhibit F..... Medical Records – Wuesthoff Medical Center, DOS 5/23/03-5/27/03  
Exhibit G..... Division of Workers Compensation Records; 2007 Right Upper Extremity  
Exhibit H..... Wage Statement  
Exhibit I..... Notice of Commencement/Termination of Compensation

The employer/insurer offered the following exhibits which were admitted:

Exhibit 1..... Answer to Claim  
Exhibit 2..... Dr. Graham Notice of Intent to Submit Complete Medical Report

The Second Injury Fund offered the following exhibits which were admitted:

Exhibit I..... Deposition Transcript – James England; 6/23/14  
Exhibit II..... Deposition Transcript – Tammy Gonzalez; 7/31/13

### **Findings of Facts**

The Claimant testified at the hearing. I did not find Claimant to be a credible witness.

The Claimant was born on February 11, 1959. She is 55 years old as of the date of hearing. The Claimant spent her childhood in Florida, leaving school in the 10<sup>th</sup> grade to get married. Claimant never returned to obtain a high school diploma and never obtained a GED.

Claimant’s work history begins in 1994, when she worked at Publix Supermarket as a cashier. She performed that job for seven years, leaving to take a job at Cape Canaveral Tour and Travel, where her job duties included answering the telephone and booking vacations. She left Cape Canaveral Tour and Travel in August 2003 and obtained employment with Best Western Hotel, where her job duties were to check guests in and out of the hotel at the front desk, and make coffee for the guests. She worked there for approximately six months before obtaining employment at Holiday Inn Express, where she was responsible for checking guests in and out of the hotel. She left that position after five months and sought employment as a team driver for Conway Truckload. She maintained her employment as an over-the-road truck driver for Conway Truckload from October 2007 through May 2011. After her injury in December 2010,

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she worked from September 2011 through February 2012 at Western Freightways as a team driver. She has not worked since.

The Claimant alleges a history of preexisting disability in her low back that began in about 1995. At that time, she was working as a cashier for Publix Supermarket when she fell, injuring her low back. She received pain medication and epidural steroid injections. At trial, she claimed her issues stabilized, but never went away. At trial, she claimed to have continued to have difficulty with long term standing as her back would get sore and her legs and feet would begin to ache. She also alleged to have had difficult bending over due to pain in her lower back. However, in her deposition, she indicated that she had no residual symptoms from this injury, and even agreed that her injury had "resolved". When her deposition was read back to her at trial, noting that she had agreed twice during her deposition testimony that she had no ongoing back problems from this injury, she stated that she did not fully understand what she was being asked. When reminded that she was under oath at her deposition, as she was at trial, she stated that she did not understand that she was agreeing that her injury had "completely resolved 100%".

After leaving Publix, she was able to work at Dillard's, Straight A tours, a travel company making phone calls, and at a 7-11 store, all full time, with no problems due to any medical or physical problems. She did not leave any of these jobs due to pain or physical problems. She left each of these positions voluntarily.

In 2002, while working for Cape Canaveral Tour & Travel, she sought medical treatment for back and neck pain. Dr. Helmy diagnosed ongoing cervical spondylosis, degenerative disc disease with variable radiculopathy to her right upper extremity, more of a congenital small canal, a herniated disc at C4-5 central and paramedian to the left, and low back pain with variable sciatica and a history of a herniated disc at L5-S1 central paracentral to the left and associated degenerative disc facet arthrosis changes, severe in the facets at L5-S1, and prescribed Bextra and ordered an updated MRI of her lumbar spine.

On October 2, 2002, Dr. Helmy diagnosed a herniated disc at C4-5 to the right and took her to surgery and performed an anterior cervical discectomy and a fusion with allograft bone, and fixation using a cervical plate and screw. Postoperatively she was placed in a cervical collar, and Dr. Helmy noted ongoing low back pain likely due to a small herniated disc at L5-S1 to her right.

On May 27, 2003, Dr. Helmy took her to surgery and performed a lumbar laminectomy, foraminotomy and neurolysis of the S1 roots, posterior lumbar interbody fusion at L5-S1 with pedicle screws and rod fixation, and Synthes allograft bone plugs placed in the intervertebral disc spaces at L5-S1. At the end of August, 2003, Dr. Helmy notes that the patient reported by essentially pain free and was happy with the results of her surgery.

Dr. Helmy released her from treatment in September, 2005. She had already left her employment at Cape Canaveral Tour & Travel due to the 45 minute drive each way to work.

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She testified at trial to having numerous ongoing problems with her legs, sitting, and pain. However in her deposition, she stated that following her release in September, 2005, she was able to bend and squat, but her legs just got worn out at times.

She next worked at Best Western Hotel at the front desk full time. Her duties including handling money, making deposits, reservations, and the breakfast for guests. She had a stool behind her counter to help with issues she was having with long-term standing. She left this employment due to the company being bought. She next went to Holiday Inn Express, doing similar work, without problems, full-time, but still using a stool behind the counter to help with standing long-term. She left her employment as a front desk clerk in 2005 and joined her husband as a team driver.

She testified at trial to have continued having ongoing problems with her back and neck, but in her deposition she testified that she had no problem with truck driving school in 2005, and was able to pass her training without problems. She also passed her DOT physicals without problems. In her deposition, she stated that she had no range of motion problems with her neck because she was taught in her training how to properly use her mirrors. While driving over the road, she had no problems driving for long periods of time. She drove 60 to 65 hours a week at the most. She and her husband left Schneider, where they first began driving to work for Conway trucking. Prior to working at Conway, she had some limitations, but was under no formal restrictions by any doctor she had previously treated with for any prior injury.

On December 16, 2007, while performing a pre-trip inspection for Conway Truckload, Claimant fell on ice and broke her right wrist. She eventually required surgery to repair a broken tendon in the right wrist, and later a second surgery to repair nerve damage in the right forearm and right elbow area. After she was released from treatment, she continued to have residual problems, including extreme pain in the right wrist up to the elbow. She testified this injury resulted in a loss of strength in her right upper extremity and a loss of grip strength in her right hand. She also described the sensation of numbness in her right arm and wrist after moderate use, such as reading a book. Following this injury, she had to learn to drive her truck with her left arm only because the injury to the right upper extremity made it difficult to shift gears or grip the steering wheel. The right arm injury also limited her range of motion as her right arm no longer extended properly following the multiple surgeries. She testified that these symptoms in her right wrist and arm never went away.

The last work injury at Conway Truckload occurred on December 7, 2010. Ms. Gonzalez was asleep in the bunk of the semi-truck while her husband was driving. She explained the bunk was about 2½ feet higher than the floor of the cabin of the truck. Her husband was driving on the interstate and did not see an area of black ice. The truck slid and swerved off the road, through the median, back onto the road, and ended up stopping on the shoulder of the road. When the truck came to a stop, Ms. Gonzalez found herself on the floor of the truck cabin and noted immediate pain in her back, shoulders, hips and neck, as well as paresthesias in her right anterior thigh.

Dr. Boris Khariton evaluated her on January 19, 2011 and noted the injury and ongoing pain in her back, left shoulder, and bilateral hips, as well as paresthesia in her right anterior thigh. Dr.

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Khariton diagnosed low back pain, bilateral hip pain, right anterior thigh paresthesias and left shoulder pain per her complaints, ordered x-rays of her hips and shoulder, and prescribed a Medrol Dosepak, Flexeril, and Vicodin. Ms. Gonzalez returned on February 9, 2011 and noted her right leg gave way apparently one week before and she fell and struck her knee and hip. Dr. Khariton added occasional weakness in her right lower extremity and ordered a myelogram/CT.

Dr. Khariton noted on February 23, 2011 on that a CT scan of her lumbar spine without contrast revealed decreased interspinous distance between L2-3, L3-4 and L4-5 consistent with Baastrup disease, status post posterior spinal fusion from L5 through S1 with no evidence of instrumentation failure or foraminal narrowing, and degenerative disc and facet disease at L3-4 and L4-5. Dr. Khariton recommended a referral to a spine surgeon.

Dr. Barry Samson evaluated her on March 8, 2011 and noted the injury, treatment to date, and ongoing right anterior thigh pain worse than her low back pain. Dr. Samson diagnosed right sciatica and requested a CT/myelogram, and prescribed medications. Dr. Samson noted a myelogram/CT scan on April 12, 2011 revealed a T11-12 mild disc bulge and no osteoarthritis, at T12-L1 no extension and just beyond the endplate margin, at L1-2 the disc did not extend beyond the endplate margin, mild bulging at L2-3 with mild bilateral facet arthritis, mild bilateral neural foraminal stenosis and no canal stenosis, disc bulge at L3-4 with severe right and mild left joint osteoarthritis, hypertrophy of the ligamentum flavum, mild bilateral neural foraminal stenosis and mild canal stenosis, mild disc bulge at L4-5 with mild bilateral facet osteoarthritis, and at L5-S1 the disc did not extend beyond the endplate margin, mild facet joint hypertrophy, mild bilateral neural foraminal stenosis and no canal stenosis. Dr. Samson diagnosed right sciatica, status post solid fusion at L5-S1 and some degenerative changes at L3-4, and recommended physical therapy and work restrictions.

Claimant did not undergo surgery for any condition related to the last injury, as it was not recommended by the treating doctors.

Ms. Gonzalez continues to experience ongoing difficulties as a result of the injury of December 7, 2010. She reports ongoing right shoulder pain, weakness, and loss of motion in her right shoulder, as well as pain in her right trapezial area. As a consequence, she notes some difficulty with prolonged standing, stooping, and squatting, walking long distances or on uneven surfaces, and is unable to run or jump.

Employer/Insurer presented the reports of Dr. Graham, who also treated Claimant, did not find her reports of pain and difficulties with her last injury or with prior injuries to be consistent with her presentation. He remarked in his May 2, 2011 report that there was a lack of physical findings on examination and diagnostic testing to support a diagnosis of radiculopathy from the last injury. He noted that she was "jovial" and laughing while talking about her complaints and problems. He found her to be at maximum medical improvement as of April 27, 2011, and noted that she could return to her past relevant work. His diagnosis was a back strain with appropriate conservative care provided. He did not address restrictions other than to say that if she was put under restrictions follow her fusion surgeries, she should return to that same level of exertion. He did not further restrict her in any way. Dr. Graham opined: "There is no partial permanent

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impairment from the December 7, 2010, injury date and there is no objective evidence of any pathology directly related to the December 7, 2010, injury date.”

Dr. Volarich examined the Claimant on time, at the request of her attorney, on October 15, 2012. At that time, he opined that she has a 2.5% permanent partial disability of the body as a whole rated at the cervical spine, 15% permanent partial disability of the body as a whole rated at the lumbar spine, 35% permanent partial disability to the right shoulder due to the impingement and labral injury, and a 20% permanent partial disability of the right lower extremity rated at the hip. Dr. Volarich opined each of these were direct results of the injuries sustained on December 7, 2010 while in the employ of Conway Truckload.

Pertaining to her medical conditions preexisting December 7, 2010, Dr. Volarich opined that she has a 25% permanent partial disability of the body as a whole rated at the cervical spine due to the disc herniation at C4-5 that required anterior cervical discectomy with fusion instrumentation, a 25% permanent partial disability of the body as a whole rated at the lumbar spine due to the disc herniation at L5-S1 that required posterior lumbar interbody fusion with instrumentation, and a 20% permanent partial disability of the right upper extremity rated at the forearm due to the distal radius fracture that required immobilization, and the need for repair of the extensor tendon that ruptured post healing of the fracture as well as the need for decompression of the right pronator tunnel.

With regard to work and other activities referable to the spine after December 7, 2010, Dr. Volarich found she is advised to avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks to an as needed basis. She should not handle any weight greater than twenty-five pounds, and limit this task to an occasional basis assuming proper lifting techniques. She should not handle weight over her head or away from her body, nor should she carry weight over long distances or uneven terrain. She is advised to avoid remaining in a fixed position for any more than about forty-five minutes at a time including both sitting and standing. She should change positions frequently to maximize comfort and rest when needed. She is advised to pursue an appropriate stretching, strengthening, and range of motion exercise program in addition to non-impact aerobic conditioning such as walking, biking or swimming to tolerance daily.

With regard to work and other activities referable to her spine prior to December 7, 2010, Dr. Volarich opined that he would have advised her, in retrospect, to work and perform her job duties to tolerance.

With regard to work and other activities referable to the right shoulder after December 7, 2010, Dr. Volarich opined she should avoid all overhead use of the right arm and prolonged use of the right arm away from the body, especially above chest level. She should minimize pushing, pulling and particularly traction maneuvers with the right upper extremity. She is advised on the proper ergonomic use of the upper extremities. She should not handle weights greater than about three to five pounds with the right arm extended away from the body or overhead, and limit these tasks to an as needed or as tolerated. She can handle weight to tolerance with right arm dependent, assuming proper lifting techniques, recommending fifteen pounds with the right arm

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alone. She is advised to pursue an appropriate stretching, strengthening, and range of motion exercise program daily for the shoulders to tolerance.

With regard to work and other activities referable to the lower extremities after December 7, 2010, Dr. Volarich opined she is advised to avoid all stooping, squatting, crawling, kneeling, pivoting, climbing, and all impact maneuvers. She should be cautious navigating uneven terrain, slopes, steps, and ladders especially if she must handle weight. She can handle weight to tolerance. She should limit prolonged weight bearing including standing or walking to tolerance. Additionally, if she must be on her knees for any reason, she should appropriately pad the surface upon which she is kneeling. Dr. Volarich recommended the use of Glucosamine, a useful compound to maintain articular surface cartilage, as a daily supplement. She is advised to pursue an appropriate strengthening, stretching, and range of motion exercise program in addition to non-impact aerobic conditioning such as walking, biking, or swimming (aquatic therapy is an excellent conditioning option) to tolerance daily.

With regard to work and other activities referable to her right elbow, forearm, wrist and hand prior to December 7, 2010, Dr. Volarich opined, in retrospect, she would have been advised on proper ergonomic use of her right upper extremity, and to avoid using this extremity in an awkward or blind fashion. She would have been advised to minimize repetitive gripping, pinching, squeezing, pushing, pulling, twisting, rotary motions, and similar tasks to as tolerated. She would have been advised to avoid impact and vibratory trauma to her right hand, and she should use braces, anti-vibration gloves, support straps and other protective devices as needed. She would have been advised to handle weight to tolerance with her right arm extended away from her body, as well as with her arm dependent close to her body, assuming proper lifting techniques. She would have been advised to continue a strengthening, stretching, and range of motion exercise program for this extremity to tolerance daily.

The Claimant also saw Phillip Eldred, a vocational rehabilitation counselor, at the request of her attorney. Mr. Eldred found Claimant had preexisting conditions, including a neck injury that resulted in a fusion in 2002, low back injury that resulted in a fusion in 2003, and a broken wrist in 2007 that surgery. Mr. Eldred found that each of these preexisting conditions constituted a hindrance or obstacle to employment. He found Claimant is permanently and totally disabled as a result of her injury of December 7, 2010 combined with her preexisting injuries and medical conditions.

The Second Injury Fund offered the deposition testimony of James England, a certified rehabilitation counselor and vocational expert located in St. Louis, Missouri. He opined that she would be eligible to work a number of jobs in sedentary and some within the light range. Mr. England noted that in testing performed by Mr. Eldred, Claimant was reading at a level equivalent to a person at the end of the 11th grade, spelling at mid-11th grade, and math at a 5th grade level. She had also proven in her past relevant work that she was capable of reading, writing, recordkeeping, and being trained in a number of tasks. Mr. England also believed that Claimant would have the capabilities of returning to some of her past work. He opined that based on the lack of formal restrictions from the majority of the treating physicians for the last injury, Claimant could return to truck driving. However, even assuming the restrictions of Dr. Samson of no lifting over 15 pounds, push and pull limited to 25 pounds, and bending no more

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than 10 times an hour, these would not preclude her from returning to her prior work making reservations, doing receptionist work, being an admitting clerk, or even some cashiering positions. He also thought she could work as a night clerk at a motel or at an alarm security business. He noted that she remained working as a truck driver for 5 months following her last injury.

At the time of Claimant's deposition, she stated she was looking for work. She also stated in her deposition, she felt capable of returning to her past work as telemarketer or telephone customer service type work. However at trial, she told her attorney on direct that "upon further reflection" she no longer felt like she would be able to do that type of work due to her neck.

She also testified at trial that she was diagnosed as some point after the last injury with depression and fibromyalgia. She did not recall discussing the fibromyalgia in her deposition. No evidence was presented by Claimant regarding either of these conditions on the issues of diagnoses, treatment, or disability.

### **FINDINGS AND CONCLUSIONS**

Due to the inconsistencies in Claimant's testimony at trial and in her deposition regarding her functional abilities and her limitations both prior to and following the last injury, I cannot find her to be a credible witness. These inconsistencies were not only noted at trial, but there were also inconsistencies in reports of pain levels, limitations, and abilities reported to the treating physicians that were not support by the physical or diagnostic findings, and that also did not match her testimony.

I find the testimony and opinions of Dr. Graham and Mr. Jim England to be more credible than the opinions provided by Dr. Volarich and Mr. Eldred.

Permanent total disability is defined as the inability to return to employment in the open labor market. § 287.020.6 RSMo. The central question is whether any employer in the usual course of business could reasonably be expected to employ the employee in her present physical condition. *Searcy v. McDonald Douglas Aircraft Co.*, 894 S.W.2d 173-178 (Mo App. E.D. 1995), overruled on other grounds in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. Banc 2003).

However, due to the inconsistencies noted prior in this award and my inability to find Claimant's testimony credible, and based on the evidence presented I cannot find her to be permanently and totally disabled.

I do not find any disability and have awarded no benefits to due Claimant's alleged depression or fibromyalgia, as no evidence was presented on these issues.

I do find that Claimant sustained prior injuries that constituted a hindrance or obstacle to her employment. I find that her prior neck fusion, lumbar fusion, and forearm fracture all rise to the level of a prior hindrance or obstacle to employment. I also find that her last injury caused her to sustain disability.

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I find Claimant sustained a compensable last injury which resulted in permanent partial disability of 2.5% to the body as a whole at the cervical spine, 5% to the body as a whole at the lumbar spine, 15% to the right shoulder, and 10% to the hip. The total weeks of disability awarded from the primary injury is 85.5 weeks, or \$35,788.59, to be paid the Employer/Insurer.

I find Claimant's primary injuries to meet threshold to reach Fund liability. These injuries combined with preexisting low back injury requiring a fusion, cervical injury requiring a fusion, and forearm injury requiring two corrective surgeries, to cause a greater disability than the sum of those injuries combined.

At the time the last injury was sustained, Claimant had preexisting permanent partial disabilities including 25% of the body as a whole at the cervical spine, 25% of the body as a whole at the lumbar spine, and 20% of the right forearm. Total weeks for preexisting disability total 240 weeks. The combined disability resulting from the last injury and the preexisting injuries is greater than the sum of those combined. In consideration of the injuries, I find a load factor of 15% is appropriate. The Second Injury Fund is, therefore, liable for an additional 48.83 weeks of PPD, or \$20,439.27.

Attorney for the Claimant, Ryan Murphy, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

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

Karen Wells Fisher  
*Administrative Law Judge*  
*Division of Workers' Compensation*  
*Signed 5/13/15*