Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 08-008020

Employee: Linda Head

Employer: Curators of the University of Missouri

Insurer: Self-Insured

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 15, 2016, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued January 15, 2016, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 12th day of October 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Linda Head

Injury No. 08-008020

Dependents:

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

Employer: Curators of the University of Missouri

Additional Party: Second Injury Fund

Insurer: (Self-insured)

Hearing Date: August 5, 2015

Checked by: RJD/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No additional benefits are awarded.
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: January 31, 2008.
5. State location where accident occurred or occupational disease was contracted: Boone 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? Employer is self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee fell on ice melt.
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: none.
14. Nature and extent of any permanent disability: none.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? $919.43.
17. Value necessary medical aid not furnished by employer/insurer? Unknown.

Employee: Linda Head Injury No. 08-008020

18. Employee's average weekly wages: $1177.70

19. Weekly compensation rate: $742.72 for temporary total disability and permanent total disability; $389.04 for permanent partial disability.

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. From Employer:

The claim against Employer is denied in full.

22. Second Injury Fund liability:

None.

FINDINGS OF FACT AND RULINGS OF LAW:

Employee: Linda Head Injury No. 08-008020

Dependents:

Employer: Curators of the University of Missouri

Additional Party: Second Injury Fund

Insurer: (Self-insured)

Hearing Date: August 5, 2015

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

PRELIMINARIES

These two cases (Injury No. 03-029663 and Injury No. 08-008020) were consolidated for hearing. The evidentiary hearing was held on August 5, 2015 in Columbia. Claimant, Linda Head appeared personally and by counsel, Truman Allen; Employer, Curators of the University of Missouri, appeared by counsel, Rick Montgomery; the Second Injury Fund appeared by counsel, Assistant Attorney General Erin Smith. The parties requested leave to file post-hearing briefs, which leave was granted. The cases were submitted on September 25, 2015.

ISSUES TO BE DECIDED IN INJURY NO. 03-029663

In Injury No. 03-029663**,** the parties agreed that the issues to be decided were:

1. Whether the accident of February 7, 2003, was a substantial factor in causing any or all of the injuries and/or conditions alleged in evidence;

2. The employer's liability, if any, for future medical care;

3. The employer's liability, if any, for kitchen and bath remodeling in claimant's home;

4. The liability, if any, of the employer for permanent partial disability benefits or permanent total disability benefits; and

5. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

STIPULATIONS IN INJURY NO. 03-029663

In Injury No. 03-029663, the parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over the case;

2. That venue for the hearing is proper in Boone County;

3. That the claim for compensation was filed within the time allowed by the statute of limitations, §287.430:

4. That both Employer and Employee were covered by the Missouri Workers' Compensation Law at all relevant times;

5. That Employee Linda Head sustained an accident or occupational disease arising out of and in the course of her employment with the Curators of the University of Missouri on February 7, 2003;

6. That Claimant's average weekly wage is $961.59, and that the compensation rates were $641.06 for temporary total disability and permanent total disability, and $340.12 for permanent partial disability;

7. That the notice requirement of §287.420 is not a bar to the claim for compensation;

8. That the University of Missouri was an authorized self insured for Missouri Workers' Compensation purposes at all relevant times; and

9. That Employer paid $126,914.14 in medical benefits and $14,707.76 in temporary total disability benefits.

ISSUES TO BE DECIDED IN INJURY NO. 08-008020

In Injury No. 08-008020**,** the parties agreed that the issues to be decided were:

1. Whether the accident of January 31, 2008, was the prevailing factor in causing any or all of the injuries and/or conditions alleged in evidence;

2. The employer’s liability, if any, for future medical care;

3. The employer’s liability, if any, for kitchen and bath remodeling in claimant’s home;

4. The liability, if any, of the employer for permanent partial disability benefits or permanent total disability benefits; and

5. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

STIPULATIONS IN INJURY NO. 08-008020

In Injury No. 08-008020, the parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over the case;

2. That venue for the hearing is proper in Boone County;

3. That the claim for compensation was filed within the time allowed by the statute of limitations, §287.430:

4. That both Employer and Employee were covered by the Missouri Workers' Compensation Law at all relevant times;

5. That Employee Linda Head sustained an accident or occupational disease arising out of and in the course of her employment with the Curators of the University of Missouri on January 31, 2008;

6. That Claimant's average weekly wage is $1,177.70, and that the compensation rates were $742.72 for temporary total disability and permanent total disability, and $389.04 for permanent partial disability;

7. That the notice requirement of §287.420 is not a bar to the claim for compensation;

8. That the Curators of the University of Missouri was an authorized self insured for Missouri Workers' Compensation purposes at all relevant times; and

9. That Employer paid $919.43 in medical benefits and no temporary total disability benefits.

EVIDENCE

The evidence consisted of the testimony of Claimant, Linda Head; extensive medical records; the deposition testimony and narrative report of Dr. David T. Volarich; the deposition testimony and narrative report of Dr. Lyndon Gross; the deposition testimony and narrative report of Dr. Russell Cantrell.

DISCUSSION

Linda Head ("Claimant") is a 63 year old high school graduate who has completed approximately 20 hours of college course work, but never obtained a degree. She was employed for 32 years at the University of Missouri ("Employer") and was the Grant/Contract Manager for the Department of Medicine at the University of Missouri Hospital and Clinics and for the

medical schools in Columbia and at UMKC for the last 15 to 20 years of her tenure with Employer. This job involved working with research grants. Claimant was responsible for reviewing and approving budgets for research projects that were run by MDs, PhDs and Deans at the hospital and campus. She also worked with federal sponsors of research projects. She coordinated all the grant work of the research projects, and had supervisory responsibilities with five employees generally working under her supervision. Claimant worked with all the departments in the medical schools, approving and overseeing their research grant budgets. Prior to 2003, Claimant routinely worked over fifty hours per week. She often had to travel to meetings outside of Columbia, including an annual meeting in Washington, D.C.

Prior to her work for Employer, Claimant worked in the accounts department at MFA and at a garment factory.

Claimant's family life has had a number of stressors both before and after the 2003 injury. Her son has battled cancer since a young child and now as an adult is currently awaiting a bone marrow transplant. Her husband has post polio syndrome and at times is unable to walk, has memory lapses, hypertension, and kidney problems. Her daughter-in-law is schizophrenic. Her son and daughter-in-law live with Claimant and her husband, and Claimant has taken an active role in helping to raise her three grandchildren.

As stipulated, Claimant sustained compensable work accidents on February 7, 2003 and on January 31, 2008. It is clear from the evidence that the former accident was the more significant injury. Claimant's prior medical history is significant for orthopedic injuries and conditions. Claimant had an arthroscopy on her right knee in 1993. Claimant denied any ongoing problems with her right knee after the surgery and the medical records do not reveal any subsequent right knee complaints. Claimant had an arthroscopy on her left knee in 1995. She did see a physician for left knee pain several times, receiving physical therapy and medication. Claimant had seen a physician for left knee swelling as late as December 2002. Claimant also fractured her left ankle prior to 2003, and had right carpal tunnel release surgery prior to 2003. Claimant had episodic low back pain starting in 1989. Claimant testified that she did not recall missing work due to her low back prior to 2003. Claimant also has had migraines since age 16. These were well-controlled with medication and lighting modifications. Claimant also had been diagnosed with fibromyalgia prior to 2003 and was prescribed Celebrex. At a rheumatology visit in December 2002, it was noted that Claimant had remarkable improvement in her fibromyalgia to the point that her clinical manifestations of fibromyalgia were not evident.

On **February 7, 2003**, Claimant and some colleagues were leaving the University Hospital after a meeting. Shortly after exiting the back door of the hospital, they encountered a patch of solid ice; Claimant and others slipped and fell. Both of Claimant's knees struck the ice-covered sidewalk, and Claimant's back landed on a colleague's briefcase. Claimant's left knee began to ache and swell within an hour of the accident; Claimant also experienced pain going down the back of her left leg.

Claimant was seen by Dr. David Rispler on April 9, 2003 with complaints of ongoing left knee pain and low back pain. A left knee MRI on April 25, 2003 revealed degenerative changes in the knee as well as a meniscus tear. Employer had Claimant seen by Dr. Sonny Bal and left

knee arthroscopy was performed on May 30, 2003, consisting of debridement of the medial meniscus and chondroplasty of the patella. Claimant did not do well after the surgery, and on June 9, 2003, Dr. Bal recommended a total knee replacement. Employer approved the total knee replacement which was performed by Dr. Bal on August 28, 2003. After the total knee replacement, Claimant continued to complain of pain and instability as well as a foot drop; Dr. Bal recommended a revision of the total knee replacement, due to instability of the tibial component. Employer approved the revision surgery, which was done by Dr. Bal on January 6, 2004.

After the revision surgery, Claimant had swelling in her ankle and leg; the prosthesis, however, was stable. Because of continued left leg pain, a lumbar MRI was done on June 2, 2004. Conservative treatment for the low back was instituted. A lumbar epidural steroid injection was done on November 23, 2004. In April 2005, Dr. Bal noted pain and swelling in Claimant's left tibia. Bone scan and left ankle MRI showed problems with the left ankle and a T12 lesion. As Claimant was complaining of numbness and tingling in both legs, another lumbar MRI was done on June 28, 2005. The T12 lesion was found to be benign.

Subsequently, Employer had Claimant seen by Dr. Richard Evans. He noted increased pain and instability in Claimant's left knee causing altered gait and pain in the left hip. Dr. Evans diagnosed a failed revision of the left total knee replacement and recommended another total knee revision surgery. Employer authorized the surgery, which was performed by Dr. Evans on October 7, 2005; Dr. Evans noted failure of the biologic ingrowth. Dr. Evans noted improvement of Claimant's left knee pain on November 17, 2005, but noted some left ankle pain and low back pain; Dr. Evans recommended an ankle brace. On December 13, 2005, Dr. Evans noted sciatic pain and recommended an anti-inflammatory and additional physical therapy.

Dr. Robert Conway saw Claimant on December 19, 2005, and noted low back pain and SI joint pain radiating to her groin. He diagnosed bilateral SI joint and hip pain of questionable etiology; he also diagnosed a leg length discrepancy and recommended shoe inserts, which Claimant still uses on a daily basis.

On January 9, 2006, Dr. Paul Schoephoerster noted chronic progressive mid/low back pain and recommended a biopsy of the T12 lesion. A lumbar MRI on January 24, 2006, showed a stable but unusual signal at T12, thought to be of no pathological significance.

In early 2006, Claimant began seeing Dr. William Allen, a knee specialist, who diagnosed degenerative disc disease of the lumbar spine, aggravated by Claimant's altered gait, and recommended physical therapy. In August 2006, a referral to a pain specialist was recommended.

Pain specialist Dr. Donald J. Meyer evaluated Claimant in October 2006, and recommended nerve blocks and the use of Zanaflex and Lyrica. On February 6, 2007, Dr. Meyer noted that a right SI joint injection performed on January 5, 2007, helped for about a week and the medications decreased her spasms.

On April 11, 2007, Dr. Allen expressed concern for chronic infection and loosening of the knee prosthesis; a bone scan showed non-specific "uptake" at the distal femur and proximal tibia, and a probable compression fracture at T12.

In May, 2007, Dr. Joel Jeffries diagnosed Paget's disease of the thoracic spine. After much testing, Paget's disease was ruled out, as was connective tissue disease.

On **January 31, 2008**, Claimant stepped off of a step onto ice melt that had recently been spread, and again fell on her knees. Claimant said she was trying to grab the rail on the stairs, and twisted and landed on her back. She saw Dr. Allen who did not think there was any change in her condition. Claimant agreed that the 2008 accident did not cause any change in her condition.

After the January 31, 2008 accident, the majority of Claimant's treatment has been under her health insurance, where prior to the January 31, 2008 accident, Employer had directed Claimant's treatment under the workers' compensation law. In 2008, Claimant received facet injections for her back. Also in 2008, Claimant was taking Ultram and Celexa and Vicodin was added for breakthrough pain. In May 2008, Claimant was evaluated by Dr. Renee Stucky, a psychologist, for depression. Claimant has continued to see Dr. Stucky on a regular basis through the date of the hearing.

In August 2008, Dr. Ebby Varghese, a pain specialist, diagnosed chronic neuropathic pain and recommended a trial of a neurostimulator. On September 22, 2008, a trial spinal cord stimulator was implanted. On October 17, 2008, a permanent spinal cord stimulator was implanted. Dr. Varghese continued to treat Claimant with various pain-relief modalities. In May 2009, due to increased knee pain, Dr. Varghese referred Claimant to orthopedic surgeon Dr. Thomas Aleto.

Claimant continued to treat with Dr. Varghese, Dr. Stucky, Dr. Gavin Vaughn, a physiatrist, and Dr. Aleto. Claimant continued to work, reducing her hours from 50+ hours per week to 40 hours. She hired an additional employee to take some of the work from her. She held most of her meetings in the conference room in her office, rather than traveling all over campus to meetings. Claimant was using a wheelchair to get around campus, including the long trip from the parking garage to her office; Claimant was expending so much energy just getting to her office that it made it difficult to do her work. Therefore, she started using a motorize scooter to get from the parking garage to her office. She used a walker, cane or crutches to ambulate. Claimant eventually decided that she needed to retire. She began decreasing her hours at work, using accumulated sick leave. Claimant last actually worked in April 2010; Claimant used the remainder of her vacation and sick leave, eventually retiring in August 2010.

Dr. Aleto saw Claimant on March 7, 2011; she had complaints of left knee popping and pain. Dr. Aleto diagnosed loosening and instability of the knee prosthesis and ordered a bone scan. Dr. Aleto reviewed the bone scan and opined that the femoral component was small and distally advanced which caused a mismatch with flexion and extension, and recommended a revision surgery.

On May 10, 2011, Dr. Aleto performed yet another left total knee revision of both components. During surgery there was an injury to the left popliteal artery and vein and a vascular surgeon performed the repairs. Claimant then developed a deep vein thrombosis of the left leg, and a stent was placed in the popliteal artery. Claimant returned to surgery on May 24, 2011, for excision and drainage of a hematoma.

Dr. David Volarich performed an independent medical exam (IME) at Claimant's attorney's request on October 8, 2012. Dr. Volarich determined that Claimant's February 7, 2003 fall was a substantial factor causing her left knee injury that required multiple surgical repairs, her low back pain, and her left ankle pain.

Regarding Claimant's February 7, 2003 injury, Dr. Volarich provided the following disability ratings: 80% of the left knee, 25% of the left ankle, and 20% of the body as a whole for low back pain. For the January 31, 2008 fall, Dr. Volarich provided the following disability ratings: 10% of the body as a whole for aggravation of low back pain and 5% of the left knee for aggravation of her pain syndrome. Dr. Volarich also rated the following disabilities that preexisted February 7, 2003: 15% of the body as a whole for low back pain, 15% of the right knee, 15% of the left knee, and 10% of the body as a whole for chronic migraines.

Dr. Volarich opined that Claimant is permanently and totally disabled based on her February 7, 2003 injury alone.

Dr. Lyndon Gross performed an IME on May 9, 2013, at Employer's request. He stated that Claimant's fall on February 7, 2003, was a substantial factor in her medial meniscus tear. Dr. Gross provided a 7% permanently partial disability (PPD) rating due to the meniscus tear and repair. Dr. Gross did not believe that Claimant's February 7, 2003 fall caused the need for her total knee replacement and revisions. Dr. Gross assigned 30% PPD to Claimant's left knee due to her arthritis. Dr. Gross did not believe Claimant was totally disabled. He issued restrictions of no prolonged standing, squatting, kneeling, crawling, and climbing and stated that these restrictions were related to the condition of her knee after her multiple knee replacements, which he felt were not related to her fall at work.

Dr. Russell Cantrell performed an IME on June 17, 2013, at Employer's request. He stated that Claimant's February 7, 2003 fall was the substantial factor causing her left knee medial meniscus tear. Dr. Cantrell did not believe the 2003 fall was a substantial factor causing her arthritis that required a total knee replacement and revisions. He assigned an additional 40% PPD for her arthritis and subsequent surgeries. Dr. Cantrell also did not believe that Claimant's January 31, 2008 fall was a substantial factor in her current knee complaints. He did not assign any permanent partial disability as a result of her January 31, 2008 fall. Dr. Cantrell did not give restrictions as a result of either of her falls. He also opined that Claimant was not permanently and totally disabled as a result of either the February 7, 2003 or January 31, 2008 falls.

Causation. I will first address the causation question in Injury No. 08-008020. Claimant testified that the January 31, 2008 accident did not cause any change in her symptoms or course of treatment. The medical evidence very strongly suggests that Claimant is correct in her assessment. Dr. Volarich's suggestion that Claimant sustained a modest amount of additional

permanent disability from the January 31, 2008 fall due to "aggravation" of preexisting conditions is the ONLY evidence supporting a finding of causation in Injury No. 08-008020. The overwhelming evidence is clear that the accident of January 31, 2008 was NOT the prevailing factor in causing any of the injuries or conditions alleged in the evidence.

In Injury No. 03-029663, the issue of causation is: "whether the accident of February 7, 2003, was a substantial factor in causing any or all of the injuries and/or conditions alleged in the evidence". As a starting point, Drs. Volarich, Gross and Cantrell all agree that the February 7, 2003 accident was a substantial factor in the cause of a left knee meniscus tear, which necessitated Dr. Bal's first surgery. I must find, therefore, that the February 7, 2003 accident was a substantial factor in the cause of a left knee meniscus tear which required surgery by Dr. Bal. Regarding whether the February 7, 2003 accident was a substantial factor in the cause of any other or additional injuries or conditions, I must consider the following:

1. The issue of causation must be determined by the pre-2005 law in which the work accident must be found to have been "a substantial factor" in the cause of the injury or condition;
2. While Drs. Gross and Cantrell both opined that the February 7, 2003 accident was not a substantial factor in the need for Claimant's knee replacement surgeries, the test for whether a certain medical procedure should be provided by the employer under Section 287.140 is whether it "is reasonably required to cure and relieve the effects of the (work-related) injury"; see *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511 (Mo. App. W.D. 2011);
3. While Drs. Gross and Cantrell both opined that the February 7, 2003 accident was not a substantial factor in the need for Claimant's knee replacement surgeries, Employer did, in fact, provide the first three knee replacement surgeries under the Missouri Workers' Compensation Law;
4. "Injuries sustained during authorized medical treatment of a prior compensable injury are the natural and probable consequences of the compensable injury." *Meinczinger v. Harrah's Casino*, 367 S.W.3d 666, 669 (Mo. App. E.D. 2012);
5. "(O)nce the Commission found that Tillotson suffered a compensable injury, the Commission was required to award her compensation for medical care and treatment reasonably required to cure and relieve her compensable injury, *and for the disabilities and future medical care naturally flowing from the reasonably required medical treatment*. Because the uncontested medical evidence established that a total knee replacement was reasonably required to treat Tillotson's torn lateral meniscus, Tillotson is entitled to recover the cost of the total knee replacement surgery, for total disability during the recuperative period following the total knee replacement, for permanent partial disability resulting from the total knee replacement, and for future medical expenses necessitated by the total knee replacement." *Tillotson, supra, at 525*. (Italics added for emphasis.)

The evidence is clear that, despite the good intentions and best efforts of Dr. Bal, Dr. Evans, Dr. Aleto and others, the serial knee replacement surgeries have **not** benefitted Claimant, and, in fact, have resulted in substantial additional disabilities, far beyond what would be expected from a

meniscus tear. I find that Dr. Volarich is correct in his opinion that the February 7, 2003 accident (including the serial knee replacement surgeries) is a substantial factor in the cause of:

- Left medial meniscus tear
- Accelerated posttraumatic arthropathy with intractable left knee pain
- Failed left knee total joint replacement
- Neuropathic pain in left lower extremity, necessitating a spinal cord stimulator
- Left ankle pain and swelling secondary to abnormal weight bearing
- Popliteal vein and artery injuries requiring stent placement in the popliteal artery
- Left lower extremity deep vein thrombosis

(For purposes of clarity, I note here that popliteal vein and artery injuries and the left lower extremity deep vein thrombosis were directly caused by Dr. Aleto's May 10, 2011 left total knee revision surgery, which surgery was not authorized by Employer. I find that Employer is nonetheless responsible for additional disability caused by this surgery, as, once Employer provided the first knee replacement, Employer became responsible for that prosthesis, including any revisions thereof.)

In Employer's brief it is suggested that Dr. Volarich's opinions regarding causation should be given less weight than those of Dr. Gross and Dr. Cantrell, as they actually treat patients with orthopedic injuries, and Dr. Volarich does not. This suggestion carries no weight in this particular case, as Drs. Gross and Cantrell ignored the *sequelae* of the serial knee replacement surgeries, despite the statutory and case law to the contrary, cited above. Certainly, Dr. Gross agrees that the serial knee replacements did, indeed, cause additional disability, as demonstrated by his deposition testimony, as follows:

> Q. You got more nerve than I do but how did this lady end up with nine surgeries and cut arteries and perhaps some nerve damage from replacement? I mean isn't her knee basically sausage?
>
> A. Well, I think --
>
> Q. Which is two questions, sorry.
>
> A. -- I think that as -- as physicians, especially us surgeons, people come to us with problems and we try to fix those problems. Do I think it is unreasonable that she had a total knee arthrosplasty, no, I do not. I think that, you know, based on the degeneration of her knee she had an appropriate procedure by Dr. Bal.
>
> I think that she had pain afterwards and I think that there were multiple things that were done to try to figure out what her pain was. And as I said before, everybody is different in their -- in the way they treat patients, but sometimes you have a patient who you've done surgery on and you've done the appropriate procedure, the components are in the appropriate place, there's no early loosing or wear of the components and the patient has pain and you have no reason for the etiology of that pain and it's what it is.

And occasionally it's hard for people to say that. To say that I have nothing else to offer you. I think she had some further surgeries based on trying to improve her pain. She had a second surgery that Dr. Bal thought the components were slightly off or the tibial component was slightly off so he tried to modify that to make it more perfect. She had a surgery after that because there was some question of ligament laxity. She had another surgery after that which injured the arteries.

So I think that as she continued to have pain in her knee, physicians who treated her tried to find out what her pain was and tried to make it better by doing further surgical intervention.

Q. The revisions were to address the pain that she had following the February 2002 injury?

A. The revisions were to address the pain she had from the total knee arthroplasty. She had a total knee arthroplasty which Dr. Bal thought was functioning well and was not unstable but she continued to have pain. She was worked up for infection, which was negative. The components were not loose but he thought there is a potential that the components may be slightly mal positioned so he tried to correct that. And then from there other things stemmed from there because she continued to have pain. (Exhibit A, Dr. Gross deposition, pages 48-50.)

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(Mo.App.W.D.1996). The test for permanent and total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. *Knisley v. Charleswood Corp.,* 211 S.W.3d 629, 635 (Mo.App. E.D. 2007). The primary inquiry is whether an employer can reasonably be expected to hire the claimant, given his present physical condition, and reasonably expect the claimant to successfully perform the work. *Id.*

Second Injury Fund liability exists only if Employee suffers from a pre-existing permanent partial disability that constitutes a hindrance or obstacle to employment or re-employment that combines with a compensable injury to create a disability greater than the simple sums of disabilities. Section 287.220.1 RSMo 2000; *Anderson v. Emerson Elec. Co.,* 698 S.W.2d 574, 576, (Mo.App.E.D. 1985). When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. *Brown v. Treasurer of Missouri,* 795 S.W.2d 479, 482 (Mo.App. 1990). In order to find permanent total disability against the Second Injury Fund, it is necessary that Employee suffer from a permanent partial disability as a result of the last compensable injury, and that disability has combined with prior permanent partial disability(ies) to result in total disability. 287.220.1 RSMo 1994, *Brown v. Treasurer of Missouri,* 795 S.W.2d 479, 482 (Mo.App. 1990), *Anderson v. Emerson Elec. Co.,* 698 S.W.2d 574, 576 (Mo.App. 1985). Where preexisting permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability **after** the employer has paid the compensation due the employee for the disability resulting from the work related injury. *Reiner v. Treasurer of State of Mo.,* 837 S.W.2d 363, 366 (Mo.App. 1992) (emphasis added). In determining the extent of disability attributable to the employer and the Second Injury Fund, an Administrative Law Judge must determine the extent of the compensable injury first. *Roller v. Treasurer of the State of Mo.,* 935 S.W.2d 739, 742-43 (Mo.App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* It is, therefore, necessary that the Employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury Fund liability.

Claimant is clearly permanently and totally disabled. Claimant tried valiantly to work for years against overwhelming odds and eventually lost that fight. The only question is whether Claimant's total disability is caused by the "last injury only" (i.e., the February 7, 2003 injury, which, of course, includes disability naturally flowing from the serial knee replacements), as Dr. Volarich concluded, or whether it is from the February 7, 2003 injury in combination with her preexisting disabilities. Again, in this regard, I believe Dr. Volarich has correctly analyzed this case. While Claimant clearly had potentially disabling medical conditions prior to February 7, 2003, there is no question that Claimant was successfully working fifty hours a week (or more). Claimant was not missing work due to those potentially disabling conditions. She was able to ambulate well without assistance: she was able to walk from the parking garage to her office without problems, and she was able to walk to meetings all over campus. She was not taking narcotic pain medication. She did not have a spinal cord stimulator. The reasons that Claimant cannot now sustain employment are all due to the February 7, 2003 injuries and conditions.

Therefore, Employer is liable for the payment of permanent total disability benefits in Injury No. 03-029663, and the Second Injury Fund has no liability. Claimant worked through April 2010. Therefore, under the unusual facts of this case, I find that Employer's liability for permanent total disability benefits began on May 1, 2010.

Future medical treatment, generally. Another issue to be decided is whether Employer-Insurer shall be ordered to provide Claimant with ongoing and future medical treatment pursuant to Section 287.140. In *Dean v. St. Luke's Hospital*, 936 S.W.2d 601 (Mo.App. W.D. 1997), the Western District Court of Appeals stated (at 603):

> The standard for proof of entitlement to an allowance for future medical treatment cannot be met simply by offering testimony that it is "possible" that the claimant will need future medical treatment. (Citation omitted.) Neither is it necessary, however, that the claimant present conclusive evidence of the need for future medical treatment. (Citation omitted.) To the contrary, numerous workers' compensation cases have made clear that in order to meet their burden claimants such as Ms. Dean are required to show by a "reasonable probability" that they will need future medical treatment.

And, as noted hereinabove, the *Tillotson* court stated:

> Because the uncontested medical evidence established that a total knee replacement was reasonably required to treat Tillotson's torn lateral meniscus, Tillotson is entitled to recover the cost of the total knee replacement surgery, for total disability during the recuperative period following the total knee replacement, for permanent partial disability resulting from the total knee replacement, and for future medical expenses necessitated by the total knee replacement. *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 525 (Mo. App. W.D. 2011).

Dr. Volarich's report (Exhibit 25), states at page 21:

> **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 (NSAID's), muscle relaxants, physical therapy, and similar treatments as directed by the current standard of medical practice for symptomatic relief of her complaints.
>
> Ms. Head will require ongoing care for her neuropathic pain syndrome. She will require ongoing pain management, as well as surveillance of her spinal cord stimulator. It is noted the battery for the stimulator has a life expectancy of about 5 years, after which it will need to be removed and/or replaced. She will also require ongoing medications for her pain including narcotics, Lyrica and Flexeril, in addition to Lorazepam as needed for pain. Her wraps and forearm crutches will also need to be replaced as they wear out.

> **Surgical candidacy:** Based on today's examination, additional surgical repairs are not indicated at this time.
>
> It is noted the orthopedic hardware placed in the left knee can at times become infected, loosen or fail (as in the past) or become very painful and need to be removed or replaced. The decision to perform any additional surgeries on her left knee should be made in conjunction with her wishes, progressive symptoms and expert surgical opinion.
>
> Similarly, the spinal cord stimulator could fail and would need to be removed or replaced. 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.

Dr. Volarich's opinions in regard to Claimant's future medical needs clearly meet and exceed the standard of "reasonable probability" as set forth in *Dean.* Additionally, I find those opinions to be fully supported by the medical records in evidence. Future medical care is awarded.

Employer's responsibility for home modifications as part of Employer's duty to provide future medical benefits. Claimant has asked that the employer be ordered to pay for home improvements to her kitchen and bathroom to make both more handicapped accessible. *Hall v. Fru Con Construction Corporation*, 46 S.W.3d 30 (Mo. App. S.D. 2001) held that home modifications can be a component of "medical care" under Section 287.140. "Given that wheelchairs fall under the statute, it would logically follow that modifications to employee's home should be covered under the act to allow him to use his wheelchair." *Hall* at page 34. Dr. Volarich did not address the issue of home modifications.

It appears that the entirety of the medical evidence offered by Claimant in support of her request for home modifications comes from two addendums (both dated July 9, 2015) to an office noted of Dr. Varghese (originally dated May 14, 2015.) They state:

> **Addendum by Varghese MD, Ebby George on July 09, 2015 13:45**
> Patient has plans to update her kitchen and bath to make it handicap accessible. This may include a wheelchair accessible kitchen with updates to lower the kitchen workspace to accommodate the wheelchair and a bathroom that includes handrails, a shower chair, a wheelchair accessible shower and a shower bench to transfer, and vanities lowered to accommodate wheelchair height and be able to pull up to.
>
> **Addendum by Varghese MD, Ebby George on July 09, 2015 13:46**
> I would agree with these modifications given her chronic pain for the reasons listed under my impression.

This evidence does not appear sufficient to make a specific order for Employer to provide home improvements. And as Employer points out in its brief, Claimant testified that she generally ambulates in her house without the use of any assistive devices. Further, it was my impression from Claimant's testimony that she does not currently use her wheelchair around the house. Nevertheless, as Employer has a continuing duty to provide Claimant with medical care and treatment, and as *Hall v. Fru Con* has defined home modifications as medical care under Section 287.140, it may become incumbent upon Employer to provide home modifications in the future.

FINDINGS OF FACT AND RULINGS OF LAW IN INJURY NO. 08-008020

In Injury No. 08-008020, in addition to those facts and legal conclusions to which the parties stipulated, I find the following facts and make the following rulings of law:

1. The work related accident of January 31, 2008 did not result in any permanent injury or disability to Claimant;
2. Claimant's request for permanent partial disability benefits is denied;
3. Claimant's request for permanent total disability benefits is denied;
4. No additional benefits can be awarded in this case;
5. Claimant's claim against the Second Injury Fund is not viable.

ORDER IN INJURY NO. 08-008020

The claim against Employer is denied in full. The claim against the Second Injury Fund is denied in full.

Made by_____

/s/ Robert J. Dierkes 1-15=16
Chief Administrative Law Judge
Division of Workers' Compensation