

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

Injury No.: 97-432101

Employee: Judith Long  
Employer: General Motors Corporation  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: September 22, 1997  
Place and County of Accident: St. Charles County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 13, 2007. The award and decision of Administrative Law Judge Kevin Dinwiddie, issued December 13, 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 30th day of September 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

DISSENTING OPINION FILED

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Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

## DISSENTING OPINION

After a review of the entire record, as well as considering the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. While I agree that employee was permanently and totally disabled, the greater portion of her disabilities pre-existed the September 22, 1997, work injury connected with employer. Therefore, such greater portion should have been attributed to the Second Injury Fund. Accordingly, the administrative law judge erred in assessing 100% of the liability for employee's injuries against employer.

Section 287.220.1, RSMo reads, in part:

If the previous disability or disabilities . . . and the last injury together result in total and permanent disability, . . . the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself. . . .

In *Vaught v. Vaughns, Inc./Southern Mo. Constr.*, 938 S.W.2d 931, 939 (Mo. App. S.D. 1997) (citations omitted) (reversed on other grounds in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)), the court stated as follows:

[W]here 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. The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). 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.

Thus, to place 100% liability on employer, the administrative law judge in this case had to determine that employee's last injury on September 22, 1997, alone and of itself, caused employee's permanent total disability. The best evidence shows otherwise.

Employee suffered from known, preexisting, permanent, diagnosed, and measurable disabilities. It was clearly established that employee had preexisting permanent disabilities in her shoulders, arms, and hands. Prior to 1997, she had been involved in multiple, serious automobile and other accidents. Dr. Volarich, who testified on behalf of employee, noted the following pre-existing injuries and complaints:

In 1972 Ms. Long was involved in a motor vehicle accident. She was a passenger riding in the front, not wearing a seatbelt. She was involved in a head on collision. She was flung forward and her head hit the windshield. She tells me she had about 60 sutures in her face. She sustained a fracture of the left humerus. She was admitted to the hospital for a period of 2 weeks and her left arm was in a sling for 2 months.

. . . .

In 1989 Ms. Long was the driver of her vehicle when she was involved in a motor vehicle accident. She rear-ended another vehicle. She was flung forward, sustaining injury to her neck and bilateral shoulders. She underwent an extensive physical therapy program for 3 to 4 months and she was off work for several years. [Emphasis added.]

. . . . [L]eading up to 9/97 she had continuing difficulties with both shoulders. She tells me that she could not work overhead because of fatigue. She had occasional numbness and tingling in the left arm radiating from the shoulder down in toward the hand. She tells me that she did not use her arms away from her body or overhead. She was able to pick jobs that allowed her to keep her arms dependant when working. The shoulder injuries slowed her down and caused her pain leading up to 9/97.

In 1985 Ms. Long stepped into a hole in her yard. She twisted her right ankle and fell to the ground. She sustained a right ankle fracture. . . .

In 1992 or thereabout, . . . she slipped going down a flight of steps and twisted her left ankle. She was placed into an air cast for a period of 4 to 6 weeks.

In the mid 1990's, [employee] reports that she developed bilateral elbow tendonitis due to repetitive use of torque guns and air guns . . . . She reports that she would fell [sic] a pulling and tearing sensation in her elbows. . . .

Ms. Long reports that leading up to 9/97 she had ongoing pain in the elbows with repetitive activities. The pain would also wake her up about once a week as best she can recall. Her arms were weak . . . . Repetitive use of the arms caused weakness and pain as well. The elbow injury slowed her down leading up to 9/97.

1994 [employee] reports that she began to experience numbness and tingling in both hands and wrists. . . . She also developed a right wrist ganglion cyst, which was untreated.

During her automobile accidents, employee had struck her head against the windshield of her car, knocking her unconscious and causing memory loss. She also told Dr. Edwin Wolfgang that she had glass in her eyes and still has glass in her head.

She received psychiatric care during the period 1989 to 1992. "She was hospitalized for three weeks at the St. Joseph's Stress Center. She saw Dr. Suarez for a year after her discharge. A diagnosis of major depressive disorder and anxiety was established. She was treated unsuccessfully with anti-depressant medication. The medications were not helpful and caused many side effects. Her multiple medical and psychiatric problems kept her off work for three years." Following that, for the next two years, employer was laying off workers for business reasons. When employee finally returned to work, as noted above, she had to pick the work she could physically perform. She registered numerous complaints at employer's dispensary, including shoulder, wrist, and lumbar problems.

These disabilities "exist[ed] at the time the work-related injury was sustained and [were] of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed." *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo. App. E.D. 1999).

Probably the single most incapacitating component of employee's disabilities is her continuing psychiatric problems. Dr. Wolfgang, a board certified psychiatrist with many years experience, was the most credible witness concerning employee's psychiatric disabilities. He and Dr. Randolph both testified that employee's major depression pre-dated the September 1997 injury, was not work-related, and was probably caused by a chemical imbalance or the serious head injuries incurred in the two earlier automobile accidents. Employee also suffers from histrionic personality and dependent personality disorders.

Thus, once employee's pre-existing psychiatric and extremity disabilities are isolated from the September 1997 accident, it is clear that the injuries employee sustained in the September 22, 1997, work-related

accident, in and of itself, did not cause her to become permanently totally disabled.

The administrative law judge relied on the vague and somewhat contradictory responses that employee's vocational expert, Dolores Gonzalez, gave during her deposition to find to the contrary. During direct examination, employee's attorney asked Ms. Gonzalez the specific question of whether employee's being unemployable was "from her physical restrictions alone or [from a combination of both] her physical and her psychiatric limitations." Ms. Gonzalez' clear answer: "[I]t's from both." She acknowledged that many of the work restrictions that doctors have placed on employee relate to preexisting conditions.

During cross examination, Ms. Gonzalez was asked, "And in your evaluation, you're not making any determination as to what percentage or what part of her problems are preexisting and what are related to her most recent injury if I understand, correct?" She responded, "That's correct."

Nonetheless, during further questioning, she was asked a question full of hypotheticals and assumptions. She was asked to assume that employee could not stand for more than five or ten minutes (Dr. Volarich's report indicates only that employee should avoid remaining in a fixed position for more than about 30 minutes). She was also asked to assume that employee had to lie down throughout the work day (Dr. Volarich's report indicates only that employee should rest, which could include lying down, "when needed"). In response, Ms. Gonzalez speculated that these physical restrictions would render employee unemployable. Based on such response, the administrative law judge erroneously concluded that employee was unemployable "from the work related back injury alone."

Even claimant's witness, Dr. Volarich, found only a 30% disability related to employee's September 1997 back injury. Dr. Randolph found that a 13% disability related directly to employee's September 1997 injury. Accordingly, I am persuaded that 25% of employee's permanent disabilities (only her low back problems) are attributable to the September 1997 accident and, thus, attributable to employer. The balance of employee's permanent total disability is due to preexisting disabilities and, thus, attributable to the Second Injury Fund.

Consequently, because the Commission majority has affirmed the administrative law judge in placing all liability on employer, I must respectfully dissent.

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Alice A. Bartlett, Member

## **AWARD**

Employee: Judith Long

Injury No. 97-432101

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: n/a

Employer: General Motors Corporation

Additional Party :State Treasurer, as Custodian of  
Second Injury Fund

Insurer: Self-insured

Hearing Date: Thursday, April 12, 2007

Checked by: KD/lsn

### 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: 9/22/97
5. State location where accident occurred or occupational disease was contracted: St. Charles 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? Self-insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee injured her back and body as a whole when she manually lifted and flipped a tire when she was performing the wheel weight install job.
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: disc herniation posteriorly to the right at L5-S1 and mild degenerative disc disease with diffuse broad based bulge at L4-5
  - Nature and extent of any permanent disability: permanent and total disability payable by the employer
15. Compensation paid to-date for temporary disability: \$6,606.03
16. Value necessary medical aid paid to date by employer/insurer? \$4,000
17. Value necessary medical aid not furnished by employer/insurer? n/a

18. Employee's average weekly wages: Maximum rates of compensation

19. Weekly compensation rate: \$531.52/\$278.42

- Method wages computation: by agreement of the parties

### **COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses: n/a

12 and 3/7 weeks of temporary total disability previously paid

n/a weeks of disfigurement from Employer

Permanent and total disability benefits from Employer beginning 3/13/98, for so long as the condition of permanent and total disability should continue to subsist.

22. Second Injury Fund liability: No liability on behalf of the Second Injury Fund.

TOTAL: To be determined

23. Future requirements awarded: See Award

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

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

Diane L. Sandza

### **FINDINGS OF FACT AND RULINGS OF LAW:**

Employee: Judith Long

Injury No. 97-432101

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

Dependents: n/a

Employer: General Motors Corporation

Additional Party :State Treasurer, as Custodian of  
Second Injury Fund

Insurer: Self-insured

Hearing Date: Thursday, April 12, 2007

Checked by: KD/lsn

The claimant, Judith Long; the employer, General Motors Corporation, self-insured; and the State Treasurer, as custodian of the Second Injury Fund, appeared at hearing by and through their counsel and entered into certain stipulations and agreements as to the issues and evidence to be submitted in this claim for compensation. The parties agree that the issues to be resolved are medical causation as to a psyche component of the claim for compensation; future medical care; nature and extent of permanent disability; and as to the liability of the Second Injury Fund.

Ms. Long appeared at hearing and testified on her own behalf. The claimant further submitted the deposition testimony of Dr. David Volarich; Dr. Richard Anderson; and of vocational rehabilitation counselor Delores Gonzalez. The employer submitted the deposition testimony of Dr. Bernard C. Randolph, Jr., and of Edwin D. Wolfgram, M.D. The Second Injury Fund chose not to offer any exhibits.

### **EXHIBITS**

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The following exhibits are in evidence:

#### Claimants Exhibits

- Records of Dr. Peter Mirkin
- Records of SSM Rehab
- Records of Metropolitan Neurosurgery
- St. Joseph Health Center X-rays & MRI
- Records of Parkcrest Surgical
- Records of General Motors Plant Dispensary
- Records of Dr. David Galli
- Records of JHM Rehab Center
- Records of St. Joseph Hospital
- Records of Dr. John Canale
- Records of Dr. Gerald Cox
- Records of St. Joseph Health Center (Depression/Psych)
- Records of St. Anthony's Medical Center ER (Left ankle)
- Lincoln County Memorial Hospital (Neck)
- Barnes Hospital (Left ankle)
- Records of Professional Rehab (Shoulder)
- Deposition of Dr. David Volarich
- Deposition of Dr. Richard Anderson
- Deposition of Delores Gonzalez

## Employer/Insurer's Exhibits

- Deposition of Dr. Bernard C. Randolph
- Deposition of Edwin D. Wolfgram, M.D.
- Sick Leave List

Ms. Long was first employed at General Motors in 1985. In 1997 her job was to put a weight in the wheel as it came down the line and to hammer it in, making certain it balanced correctly. Claimant needed styrofoam to stand on to reach the job, and when the styrofoam was uneven it was causing her back pain. Ms. Long would sometimes manually lift and flip a tire, and she injured her back on 9/22/97 when she attempted to lift a tire, instead of letting equipment do the lifting and flipping. Claimant suffered a sharp, constant pain in the middle of her low back, with bad pain in her right leg and with tingling and pain all the way to her heel. The pain was so bad the claimant could hardly stand, and was taken to the medical department in a cart, where she received some heat treatments that helped temporarily. An X-ray of the lumbar spine on 9/26/97 revealed intervertebral disc space narrowing, L5-S1, with slight dextroscoliosis of the thoracolumbar spine and minor hypertrophic changes. An MRI performed on 10/6/97 (Claimant's Exhibit No. D) revealed a disc herniation posteriorly to the right at L5-S1 impressing upon the S1 nerve root within the canal. There was also an associated moderately advanced degenerative disc disease at this level, with mild degenerative disc disease with a diffuse broad based bulge at L4-5 without focal disc herniation.

Ms. Long chose not to have disc surgery, but rather had physical therapy at SSM Rehabilitation Institute at the direction of Dr. Paul Stohr. Claimant was returned to work by Dr. Stohr with a proscription against the use of power tools and against prolonged standing for more than 20 minutes at a time. Claimant was sent home because the employer had no work that would fit the restrictions, and claimant was convinced she could not return to work. In January of 1998 Dr. Castasus changed her restrictions to limited bending and stooping, and lifting no more than 15 pounds (Claimant's Exhibit No. C). Claimant attempted a light duty with those restrictions on 1/5/98, but was unable to tolerate it, and was advised by Dr. Stohr to refuse the work. From January to March of 1998 claimant attempted to return to work and do a job about 5 times. Claimant's last date of employment with General Motors Corporation was 3/13/98.

Ms. Long had an evaluation by Dr. Sandra Tate on 4/14/98 and again on 2/16/99 (Claimant's Exhibit No. E). Dr. Tate found no evidence of neck injury, and no evidence of impairment to either ankle or the shoulder. On 4/14/98 she recommended physical therapy with spine stabilization exercises, and provided work restrictions of limited hours to 4 hours walking up to 15 minutes at a time, no lifting greater than 30 pounds, and no excessive bending/twisting at the waist.

On 2/16/99 Dr. Tate performed another evaluation, and limited claimant from walking or standing more than 15 minutes at a time for a total of 2 hours daily; sitting for up to 30 minutes at a time for a total of two hours daily; and lifting up to 20 pounds with no excessive bending/twisting at the waist.

Claimant then used her own insurance to see Dr. Peter Mirkin on 5/24/99. Dr. Mirkin prescribed physical therapy at the claimant's request at JMH Rehab Center (Claimant's Exhibit Nos. A and H). By July of 1999 Ms. Long had achieved all goals in therapy, which was subsequently discontinued.

Records from General Motors plant dispensary (Claimant's Exhibit No. F) document the claimant's history of complaint as to her neck, shoulder, wrists, and left hand. They include an evaluation by Dr. Simowitz on 10/23/89 that restricts the claimant for ninety days as follows; no lifting over ten pounds; no work with arms overhead; and no sudden jerking, stopping, or starting.

Claimant has a history of taking medication and having adverse reactions that caused her to seek to avoid antidepressants. Claimant at various times was on Zoloft; Prozac; Paxil; Effexor; Wellbutrin; Valium; Serzone; Luvox; Pamelor; and Lexapro.

Drs. Wolfgram and Anderson both specialize and are board certified in psychiatry. Both come to the conclusion that Ms. Long is permanently and totally disabled. Dr. Anderson comes to that conclusion by finding the claimant to suffer a major depression and a 50% permanent and partial disability that pre-existed the work injury in September of 1997, and a 50% permanent and partial disability related to a major depression that was exacerbated by the 1997 work related injury, causing the claimant to suffer a 100 % disability and to be permanently and totally disabled.

Dr. Wolfram, on the contrary, does not believe the claimant's major depression to be work related. He believes the claimant suffers a mood disorder related to brain injury from her two automobile accidents. He also believes the claimant to suffer from psychological stressor related to a histrionic personality disorder, and a dependent personality disorder. He concludes that the claimant is permanently and totally disabled, and does not believe the work injury to be significant.

Drs. Randolph and Volarich, medical doctors, performed independent medical evaluations. Dr. Randolph concluded that the claimant had a likely disc herniation at L5/S1 and moderately advanced degenerative disc disease at L5/S1 and milder degenerative changes at L4-5. He concluded that the claimant suffered a 17% permanent partial disability to the low back, of which he attributes 4% to preexisting lumbar degenerative disc disease, and 13% to the work injury in September of 1997. Dr. Randolph also noted that depression can be caused by physical disabilities such as strokes or head injuries, but notes that major depression is a chemical imbalance in the brain and is not going to be caused by slipping and falling and hurting your back. He notes that a back injury causing a significant amount of pain may cause a situational or episodic blue mood or state, but not a major depression that is much more profound.

Dr. Volarich concludes that the work accident was the substantial contributing factor causing the disc herniation at L5-S1 with right leg radiculopathy and a bulge at L4-5 without true radiculopathy. He concludes that there is a 30% permanent partial disability of the body as a whole rated at the lumbosacral spine, and also finds a 15% permanent partial disability at the shoulder, the elbow, and the wrist. Dr. Volarich recommends a vocational evaluation to determine whether claimant is employable on the open labor market. He further believes the claimant needs ongoing care for her pain syndrome in the form of anti-inflammatory drugs, muscle relaxants, physical therapy, and complimentary medical modalities.

Dr. Volarich further notes that the claimant suffers a major depression, but does not attempt to comment on causation or to rate disability. Both Doctors Randolph and Volarich agree that the claimant is not at the point where her symptoms warrant a back surgery.

Delores E. Gonzalez, a vocational rehabilitation counselor, met with Ms. Long on 2/1/03 to assess her potential for vocational rehabilitation. Ms. Gonzalez notes that sedentary is the least demanding classification of work in terms of exertional level, noting that it requires lifting no more than ten pounds at a time; occasionally lifting articles up to 20 pounds; the ability to sit six hours out of an eight hour workday; and to stand and walk up to two hours in a workday out of eight hours.

In order to determine the ability to work on the open labor market, Ms. Gonzalez looks for the person's residual functional capacity, defined as what a person is able to do physically or mentally, exertionally, and skill level wise. Ms. Gonzalez concludes that the claimant is not employable, concluding that her residual functional capacity is less than sedentary work, and that claimant has severe psychiatric disability, according to Doctors Wolfram and Anderson, that render her disabled. Ms. Gonzalez further concludes that the claimant is not a candidate for vocational rehabilitation.

Ms. Gonzalez acknowledges that she considers both physical and psychiatric limitations when assessing residual functional capacity, and relies on the treating physicians or evaluators when assessing physical limitations. She acknowledges that it is both physical and psychiatric limitations that lead her to conclude the claimant is not employable on the open labor market. She also notes that the claimant has no transferable skills.

Ms. Gonzalez further acknowledges that if you take away the depression, the emotional or psychological complaints, and look simply at the fact that from what the claimant reported she can't stand for more than five or ten minutes, has to lie down throughout the day, can't sleep straight through the night because she has to reposition herself or she's able to take some of the pressure off her back when she lies down, then she could not perform any job if you just took those restrictions into account (Claimant's Exhibit No. S, at pp 36-37).

## **FINDINGS OF FACT AND RULINGS OF LAW**

### **MEDICAL CAUSATION/PERMANENT DISABILITY/LIABILITY OF THE SECOND INJURY FUND**

The claimant has the burden of proving all the essential elements of the claim for compensation. Proof as to medical causation need not be by absolute certainty, but rather by reasonable probability. "Probable" means founded on reason and experience which inclines the mind to believe but leaves room for doubt. Tate v. Southwestern Bell

Telephone Co., 715 S.W. 2d 326, 329 (Mo.App 1986).

Holding in abeyance the issue as to causation with respect to a psychiatric disability, as to any physical disability “medical causation” not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. Brundige v. Boehringer Ingelheim, 812 S.W. 2d 200, 202 (Mo.App. 1991); McGrath v. Satellite Sprinkler Systems Inc., 877 S.W. 2d 704, 708 (Mo App E.D. 1994). The ultimate importance of expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Choate v. Lily Tulip, Inc., 809 S.W. 2d 102, 105 (Mo App. 1991).

The relevant provisions of Subsections 2 and 3 of Section 287.020 RSMO provide:

2. The word “accident” as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related . An injury is clearly work related if was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

3. (1) In this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

(2) An injury shall be deemed to arise out of and in the course of employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and

(b) It can be seen to have followed as a natural incident of the work; and

(c) It can be fairly traced to the employment as a proximate cause; and

(d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life;

Dr. Volarich opines that the work accident in September 1997 is the substantial contributing factor causing the disc herniation at L5-S1 with right leg radiculopathy and the bulge at L4-5 without radiculopathy that required conservative care (Claimants Exhibit No. Q, at pp. 16-17). Dr. Randolph also acknowledges a work related accident in September of 1997 resulting in back pain radiating into the right lower extremity, with likely disc herniation at L5-S1. While the history provided by the claimant suggests that any prior back pain resolved, Dr. Randolph found permanent partial disability related to preexisting lumbar degenerative disc disease, while Dr. Volarich attributed all of the disability to the work injury, noting the claimant to be previously asymptomatic (Claimant’s Exhibit Mo. Q, at page 18). In any case, the expert medical in the matter leads to the conclusion that claimant suffered a compensable work injury to her low back per Section 287.020 RSMO.

Ms. Gonzalez, the vocational rehabilitation counselor, states that her opinion as to Ms. Long not being employable on the open labor market is premised on both physical and psychiatric limitations. However, on two different occasions she opines that if you consider just the physical limitations alone, the claimant is unable to perform at even a sedentary level, and for that reason is unable to perform a job. During cross examination by the Second Injury Fund, the following exchange was had:

“So, if you take away, if you can, try to take away Ms. Long’s depression, her emotional or I guess psychological complaints and look at simply the fact that from what she told you she can’t stand for more than five or ten minutes, she has to lie down throughout the day, she can’t sleep straight through the night because she has to reposition herself, or she’s able to take some of the pressure off her back when she lies down. When you take those things into account only, what kind of job could she do?”

- “If you just take those restrictions into account?”
- “Just looking at those, uh-huh.”

- “Then she can’t perform any job.” (Claimant’s Exhibit No. S, at pp. 36-37).

Then again, during redirect examination by Ms. Sandza, the following exchange was had:

Q: “And when you talk about she would -- or they would require her to stay on task and she would have difficulty doing that, are you talking about from a physical standpoint that she’d have problems staying on task, a mental standpoint or both?”

- “Well I think at this point both. But if you take away the psychological problems and just consider the physical restrictions, employers require that a person be able to stay on task to do the job, to be able to do something to be able to be paid for just like everybody else in a competitive basis, and if she’s not able to do that then she’ll be gotten rid of” (Claimant’s Exhibit No S, at p. 39).

The issue as to medical causation with respect to a psychological disability notwithstanding, the expert vocational rehabilitation opinion of Ms. Gonzalez persuades that it is the limitations from the work related back injury alone that renders the claimant unemployable on the open labor market. The employer, General Motors Corporation, is found liable for permanent and total disability as a result of the physical limitations related to claimant’s work related back injury. The employer is liable for a payment of \$531.52 per week beginning on 3/13/98, the last day of employment, and for so long as the condition of permanent and total disability should continue to subsist. The Second Injury Fund is found to have no liability in this matter with respect to the combination of preexisting disabilities with a work related disability.

#### FUTURE MEDICAL CARE

Section 287.140 RSMO provides that “...the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.” Dr. Volarich provided uncontradicted medical testimony to the effect that in order to maintain her current state of pain syndrome she needed ongoing treatment including medicines such as narcotics and non-narcotics, muscle relaxants, physical therapy, and other similar treatments as directed by the current standard of medical practice. (Claimant’s Exhibit No Q, at p. 21).

The employee must prove beyond speculation and by competent and substantial evidence that her work related injury is in need of treatment. Williams v. A.B. Chance Co., 676 S.W. 2d 1 (Mo.App.1984). It is sufficient if claimant shows by a reasonable probability that she will need future medical treatment Dean v. St. Luke’s Hospital, 936 S.W.2d 601, 603 (Mo.App. 1997).

Dr. Volarich has persuaded by a reasonable probability that the involved work injury to the low back will require ongoing treatment. The employer is to provide the necessary future medical care, consistent with the opinion of Dr. Volarich.

This award is subject to a lien in favor of Diane L. Sandza , Attorney at Law, in the amount of 25% thereof for necessary legal services rendered.

This award is subject to interest as provided by law.

Date: December 13, 2007

Made by: /s/ KEVIN DINWIDDIE  
KEVIN DINWIDDIE  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker  
Jeffrey W. Buker  
Director  
Division of Workers' Compensation