

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

Injury No. 02-118249

Employee: Lydia Pace  
Employer: Jefferson City Country Club  
Insurer: Missouri Chamber of Commerce Group  
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. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

**Preliminaries**

The parties asked the administrative law judge to determine the following issues: (1) causation of the injury alleged; (2) nature and extent of permanent disability; (3) Second Injury Fund liability; (4) employer's liability for temporary total disability from November 17, 2005, through August 25, 2011; and (5) employer's liability for future medical care.

The administrative law judge rendered the following determinations: (1) employee sustained her burden of proof that she injured her neck and right shoulder in the October 4, 2002, accident and injury; (2) employee has sustained her burden of proof that she is permanently and totally disabled as the result of her neck and right shoulder injuries coupled with her depressive symptoms; (3) employee has failed to prove Second Injury Fund liability where there is no evidence of permanent disability preceding the October 4, 2002, accident and injury; (4) employee has sustained her burden of proof that she is entitled to past temporary disability benefits from January 3, 2011; and (5) employee has sustained her burden of proof that she is entitled to future medical treatment to treat her neck and right shoulder pain, as well as her depression.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred in denying temporary total disability benefits from November 17, 2005, through and including January 2, 2011.

Employer/insurer filed a timely application for review with the Commission alleging the administrative law judge erred with respect to the following issues: (1) medical causation of employee's depression; (2) permanent total disability; (3) future medical treatment; and (4) temporary total disability.

For the reasons stated below, we modify the award of the administrative law judge as to the issue of temporary total disability.

**Discussion**

Medical causation

Section 287.020.2 RSMo sets forth the standard for medical causation applicable to this claim and provides, in relevant part, as follows:

Employee: Lydia Pace

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An injury is compensable if it is clearly work related. An injury is clearly work related if work 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.

In both her temporary and final awards in this matter, the administrative law judge determined generally that employee “met her burden of proof” with respect to the issue of medical causation, but she did not specifically apply the statutory test set forth above. As a result, we must supplement the award to provide this necessary analysis.

We note that in its various briefs filed with the Commission in this matter, employer repeatedly urges that we cannot, “as a matter of law,” find for employee with respect to the issue of medical causation. In support of this contention, employer identifies various perceived shortcomings with respect to the testimony and findings from employee’s experts, and contrasts these with what employer believes are the superior opinions from its own experts. Employer’s very argument belies its contention that the issue of medical causation is one of law. Instead, as the courts have *consistently* declared, “questions regarding medical causation of an injury are issues of fact for the Commission.” *George v. City of St. Louis*, 162 S.W.3d 26, 30 (Mo. App. 2005). Stated simply, the issue of medical causation turns on which of the opinions from the parties’ experts are most persuasive.

After careful consideration, we discern no compelling reason to disturb the administrative law judge’s choice to credit employee’s experts with respect to the issue of medical causation. This is because employer fails to advance a *factual* argument why its experts are more persuasive. Instead, employer devotes its briefing in this matter to the assertion that its experts’ opinions “must” be accepted by this Commission, and that they “preclude” an award in favor of employee. Employer also repeatedly misstates the record by claiming that employee failed to present competent and substantial evidence in her favor.

Accordingly, we will defer to and hereby adopt as our own the administrative law judge’s express findings with regard to the relative persuasive force of the competing expert medical opinions. We additionally adopt her implied finding that Dr. Daniel more persuasively established causation of employee’s depression.<sup>1</sup> We conclude work was a substantial factor in causing the resulting medical conditions and disability of which employee complains affecting her cervical spine, right shoulder, and body as a whole referable to the psychiatric injury of depression.

#### Temporary total disability

Sections 287.149 and 287.170 RSMo provide for the payment of temporary total disability benefits while an employee is engaged in the rehabilitative process following a compensable work injury. *Greer v. Sysco Food Servs.*, SC94724 (Dec. 8, 2015). Employee claims she was temporarily and totally disabled during the entire period between November 17, 2005, when Dr. Theodore Rummel first released her from authorized treatment, to August 25, 2011, the date the parties stipulate employee reached maximum medical improvement upon her release by Dr. Michael Chabot.

In her temporary award of November 30, 2010, the administrative law judge denied employee’s claim for ongoing temporary total disability benefits, on the basis that some of employee’s described limitations in sitting, standing, and walking did not result from the work injury, and because

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<sup>1</sup> We are not persuaded by employer’s argument that Dr. Daniel both knew nothing of employee’s subsequent knee and low back complaints, and also necessarily included them in his causation opinions; employer’s cross-examination asked Dr. Daniel to speculate on these matters and we do not perceive any concession on the part of Dr. Daniel that would undermine his material opinions.

Employee: Lydia Pace

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employer presented surveillance video showing employee engaging in active use of her right arm. In her final award, the administrative law judge found employee was entitled to temporary total disability benefits from January 3, 2011, because Dr. Chabot then placed her under restrictions of no lifting over 10 pounds and no overhead work. The administrative law judge did not specifically address the time period following issuance of the November 30, 2010, temporary award through January 3, 2011, or identify any change with respect to employee's actual physical condition that occurred on January 3, 2011, to render employee then temporarily and totally disabled, if she was not so disabled before.

Relying on the decision in *Jennings v. Station Casino St. Charles*, 196 S.W.3d 552 (Mo. App. 2006), employer argues that employee did not present "additional significant evidence" at the hearing for a final award to support a different result with respect to the issue of temporary total disability after November 17, 2005. Employer ignores the voluminous evidence of additional evaluation and treatment employee sought and required after November 30, 2010, as a result of the effects of the work injury. Notably, in Dr. Chabot's record of January 3, 2011, he memorialized complaints and symptoms affecting employee that were essentially the same as when he evaluated her on October 19, 2009. Specifically, employee continued to experience pain affecting her neck and right shoulder, with numbness and tingling radiating into the right arm. Cf. *Transcript*, pages 865, 884. In our view, if employee's continuing complaints and symptoms referable to the work injury as of January 3, 2011, warranted the restrictions Dr. Chabot then imposed—as well as an attendant finding that she was then temporarily and totally disabled—Dr. Chabot's notes memorializing identical complaints and symptoms as of October 19, 2009, compel a finding that she was also (at the very least) temporarily and totally disabled from October 19, 2009.

Employer also ignores that employee testified at the hearing for the final award that she did not believe she was able to work between the time Dr. Rummel released her in November 2005 and her return to Dr. Chabot in January 2011. Employee explained that she tried to perform part-time work offered by a friend, but ultimately was fired from that job because she couldn't consistently perform her duties because of her severe and uncontrollable pain. It is well-settled in Missouri that "[a] claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of temporary total disability." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. 2003). It appears to us from her determinations with respect to the issue of permanent and total disability that the administrative law judge ultimately credited the testimony from employee with respect to her complaints and symptoms referable to the work injury; we adopt this (implicit) credibility determination.

Employee also persuasively testified that she continually sought additional help for her condition after Dr. Rummel released her on November 17, 2005.<sup>2</sup> Ultimately, we deem the evidence sufficient to demonstrate (and we so find) that employee continued in the rehabilitative process during the period from November 17, 2005, through August 24, 2011, and that her complaints and symptoms referable to the work injury remained consistent and unabated throughout that period. We further find that no employer would reasonably be expected to hire employee during this time period, given the physician-imposed restrictions and employee's ongoing and severely limiting complaints and symptoms referable to the work injury which affected her cervical spine, dominant right arm, and body as a whole in the form of depression.

We find that employee was temporarily and totally disabled from November 17, 2005, through August 24, 2011. Consequently, we conclude that employee is entitled to, and employer is

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<sup>2</sup> The parties' stipulation that employee did not reach maximum medical improvement until August 25, 2011, strikes us as an implicit acknowledgment that Dr. Rummel's release in November 2005 was premature, and that employee remained in need of additional and significant medical care as a result of the work injury.

Employee: Lydia Pace

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obligated to pay, weekly payments of temporary total disability benefits for 301 weeks at the stipulated temporary total disability benefit rate of \$294.16 for a total amount of \$88,542.16 in temporary total disability benefits.

**Conclusion**

We modify the award of the administrative law judge as to the issue of temporary total disability.

Employer is liable for temporary total disability benefits during the time period from November 17, 2005, through August 24, 2011, for a total of \$88,542.16.

The award and decision of Administrative Law Judge Hannelore Fischer, issued July 2, 2015, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an 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 7<sup>th</sup> day of January 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: Lydia Pace

Injury No. 02-118249

Dependents: N/A

Employer: Jefferson City Country Club

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: Cannon Cochran Management Service, Third Party  
Administrator for Missouri Chamber of Commerce

Hearing Date: April 17, 2015

Checked by: HDF/cs

### 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: October 4, 2002.
5. State location where accident occurred or occupational disease was contracted: Cole County, Missouri.
6. Was above employee in the employ of above employer at the time of the alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
See Award.
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: neck, right shoulder, psyche.
14. Nature and extent of any permanent disability: permanent total disability.
15. Compensation paid to-date for temporary disability: \$25,004.00.
16. Value necessary medical aid paid to date by employer/insurer? \$121,729.51.
17. Value necessary medical aid not furnished by employer/insurer? Unknown. Future medical awarded.

18. Employee's average weekly wages: ----
19. Weekly compensation rate: \$294.16 for all benefits.
20. Method of wages computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable from employer:

Temporary total disability as of January 3, 2011, through and including August 24, 2011, is 33 and 3/7 weeks or \$9,833.35.

Permanent total disability as of August 25, 2011, through and including June 30, 2015, is 201 weeks or \$59,126.16.

Permanent disability benefits (\$294.16 per week) are awarded for claimant's lifetime.

22. Second Injury Fund liability: No.
23. Future medical awarded: Future medical.

Said payments to begin immediately and to be payable and 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: Truman Allen.

Employee: Lydia Pace

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

Employee: Lydia Pace

Injury No. 02-118249

Dependents: N/A

Employer: Jefferson City Country Club

Additional Party: Second Injury Fund

Insurer: Cannon Cochran Management Service, Third Party  
Administrator for Missouri Chamber of Commerce

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

Hearing Date: April 17, 2015

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on April 17, 2015. An additional exhibit was offered into evidence on April 22, 2015, and admitted into evidence without objection. Memoranda were submitted by June 3 and 29, 2015.

The parties stipulated that on or about October 4, 2002, the claimant, Lydia Pace, was in the employment of the Jefferson City Country Club. Ms. Pace sustained an injury by accident; the accident arose out of and in the course of employment. The employer was operating under the provisions of Missouri's workers' compensation law; workers' compensation liability was insured by the Missouri Chamber of Commerce. The employer had notice of the injury; a claim for compensation was timely filed. The agreed upon rate of compensation is \$294.16 per week for all benefits. Temporary disability benefits have been paid in the amount of \$25,004.00; medical aid has been provided in the amount of \$121,729.51.

The issues to be resolved as the result of hearing include 1) the causation of the injuries alleged, 2) the nature and extent of permanent disability, 3) the liability of the Second Injury Fund, 4) the liability of the employer/insurer for past temporary total disability benefits from November 17, 2005, through and including January 3, 2011, January 4, 2011, through and including May 2, 2011, and May 3, 2011, through and including August 25, 2011, and 5) the liability of the employer/insurer for future medical treatment.

Counsel for Ms. Pace stated that the body parts affected by Ms. Pace's accident and injuries of October 4, 2002 are limited to the neck, right shoulder and psyche and do not include the low back, knee, heart or other body parts.

The parties stipulated to a date of maximum medical improvement of August 25, 2011. The transcript of a hearing held in this case on October 5, 2010, is incorporated into the evidence in this case. Likewise, the facts ascertained as part of the hearing and incorporated into the award on the 2010 case are incorporated herein and made a part of this award.

## **FACTS**

The prior award in this case outlines the circumstances of Ms. Pace's accident and her treatment and evaluations for her injuries through 2009. As noted, it should be read with and treated as part of this award. On May 2, 2011, Ms. Pace had surgery with Dr. Chabot who performed a two level fusion with anterior decompression and instrumentation at C5-6 and C6-7. Ms. Pace indicated that post surgery she can move her neck freely and without pain. However, Ms. Pace described ongoing right shoulder pain which she said was burning, sharp and heavy and causes her index finger to feel ice cold or bruised. Ms. Pace said that the shoulder pain goes from a level one or three to a level ten on a ten point scale daily and that pain medication as well as applied heat help alleviate the pain; after treating the pain for about 25 to 35 minutes the pain level goes back to about a level five. According to Ms. Pace any kind of repetitive movement causes the shoulder pain to flare up. Currently, according to Ms. Pace, she takes fioricet, meloxicam, neurontin and cyclobenzaprine for her neck and right shoulder while she takes Prozac for her depression. Ms. Pace can cook, clean, and mow her front yard "in spurts" or by taking a break.

Ms. Pace described her depression as anger triggered by a lack of communication with her workers' compensation carrier and what she perceived as shoddy treatment through the time of her treatment with Dr. Rummel.

Ms. Pace's employment history includes work in a turkey processing plant, clerical work, bartending, waitressing, cooking and work in a nursing home.

Ms. Pace testified that she was unable to work from January 3, 2011, through the date of her surgery on May 2, 2011, and that after the surgery she was unable to work until August 25, 2011, when she was released from Dr. Chabot's treatment. Ms. Pace testified that she has not been able to work since August 25, 2011, as the result of her pain and reliance on pain pills as well as her inability to consistently get up and attend work. Ms. Pace described only being able to consistently work at a task for 35 to 60 minutes and to walk for an hour before pain causes her to stop her activity.

With regard to preexisting disabilities, Ms. Pace described a right elbow injury treated with injections into the right arm and a neck strain as the result of a motor vehicle accident for which she was treated with a soft brace, neither of which caused any lasting restrictions, pain or need for permanent work accommodations. Since 2002, Ms. Pace has had both a meniscus repair in her right knee and has had treatment for her low back pain, including injections. Since 2007, Ms. Pace has only needed one injection into her back and that was in 2011 or 2012, and was administered by her primary care physician, Dr. Honeywell. Ms. Pace described sporadic pain in her low back caused by activity or standing or sitting for too long. Ms. Pace testified that she very seldom has issues with her right knee and that when she does have problems they are arthritic in nature just as they are with her back. Ms. Pace also acknowledged having high blood pressure, high cholesterol, and thyroid issues. Ms. Pace testified that prior to 2002 the only medication she was taking was for her thyroid condition.

Dr. Volarich, physician specializing in family and nuclear medicine, testified by deposition that he saw Ms. Pace a second time on July 20, 2012, and authored a report pertaining to that evaluation as well as a second report dated February 25, 2013. Dr. Volarich described Ms. Pace's neck surgery, addressing the C5-6 and C6-7 levels and improvement in her neck symptoms. Dr. Volarich noted that Ms. Pace actually had less range of neck motion after the second surgery. Dr. Volarich increased his assessment of permanent disability to 50 percent of the body referable to the neck when he saw Ms. Pace in 2012, based on her decreased range of motion, sensory losses in dermatomes in the right arm and reflex abnormalities. Dr. Volarich continued to opine to a permanent disability of 40 percent of the right shoulder after his 2012 evaluation. Dr. Volarich believed that Ms. Pace suffered from disabling depression. With regard to restrictions pertaining to the right shoulder, Dr. Volarich recommended that Ms. Pace avoid overhead or prolonged extended use of the right arm, minimizing pulling, pushing and traction maneuvers, lifting more than five to ten pounds generally and lifting more than one to three pounds overhead or extended. With regard to the neck, Dr. Volarich restricted Ms. Pace from lifting more than 15 pounds occasionally, from bending, twisting, lifting, pushing, pulling, carrying, and climbing, from handling weights overhead or away from the body, from carrying weight any long distance, and from remaining in a fixed position for more than 30 minutes. Dr. Volarich did not believe that Ms. Pace is capable of returning to gainful employment as a result of the injuries from the 2002 accident and injury alone without taking into account preexisting or subsequent disabilities. Dr. Volarich opined that Ms. Pace was taking Fioricet for her headaches. With regard to future medical treatment, Dr. Volarich specifically recommended treatment at a pain clinic for Ms. Pace's cervical spine and right shoulder girdle. Including epidural steroid injections, foraminal nerve root blocks, trigger point injections, and TENS units. He also recommended treatment for Ms. Pace's depression.

Dr. A. E. Daniel, physician specializing in psychiatry, testified by deposition that he evaluated Ms. Pace on November 26, 2012. Dr. Daniel described Ms. Pace as having a depressive disorder, rather than an adjustment disorder, and described the depressive disorder as longer in tenure and more disabling. Dr. Daniel opined that pain resulting from Ms. Pace's October 4, 2002 accident and injury is the prevailing factor in the development of her psychiatric disorder. Dr. Daniel admitted that Ms. Pace's other medical conditions could be the basis for Ms. Pace's chronic pain. Dr. Daniel found Ms. Pace to have a 30 percent permanent partial disability as the result of her depression and found Ms. Pace to be unable to compete in the open labor market.

Gary Weimholt, vocational expert, testified by deposition that he last saw Ms. Pace in 2008, but that he has authored a supplemental report dated February 15, 2013. Mr. Weimholt opined to Ms. Pace's total vocational disability since her work injury of October 4, 2002. Mr. Weimholt relied primarily on the findings of Dr. Volarich and Dr. Daniel.

Dr. Howard, whose letterhead indicates that he specializes in hand and upper extremity microsurgery, opined in a letter dated January 25, 2011, that he does not believe additional treatment for the shoulder is appropriate and that Ms. Pace is at maximum medical improvement with regard to the shoulder.

Dr. Chabot, orthopedic spine specialist, testified by deposition that he operated on Ms. Pace on May 2, 2011, revising the C6-7 fusion and extending the fusion to the C5-6 level. Prior to that

time, Dr. Chabot resumed treatment of Ms. Pace on January 3, 2011, when he began treating Ms. Pace for her pain complaints, injected her shoulder, continued pain medications of fioricet and vicodin and restricted her lifting to ten pounds and no overhead work with the right arm. Dr. Chabot also performed trigger point injections into the trapezius musculature and utilized anti-inflammatory patches to address soft tissue complaints. Dr. Chabot last saw Ms. Pace for treatment on August 25, 2011, and found her to have a reduction in pain complaints, a reduction in medication and improved motion. Dr. Chabot found Ms. Pace to be at maximum medical improvement, to have a 35 pound lifting restriction and to have a permanent disability of twelve percent of the body, with four percent of that disability preexisting as the result of degenerative disc disease at C5-6. Dr. Chabot testified that he did not have Ms. Pace taking any ongoing prescription medications when he released her from treatment on August 25, 2011. When asked about the extended length of time during which Ms. Pace received medical treatment, Dr. Chabot stated that Ms. Pace's tobacco dependency likely caused the initial surgery to fail as the result of "late-term resorption of graft in smokers with subsequent development of a nonunion". (Chabot depo p. 23).

Michael Jarvis, MD, PhD, testified by deposition that he had not seen Ms. Pace since his 2009 evaluation, but that he has issued a supplemental report dated June 27, 2014. Dr. Jarvis testified that his diagnosis of Ms. Pace's psychiatric condition continues to be that she has "an adjustment disorder with depressed mood relative to the litigation process." (Jarvis depo p.13). Dr. Jarvis distinguished his diagnosis from that of Dr. Daniel who diagnosed a depressive disorder not otherwise specified, saying that the adjustment disorder requires an identifiable stressor. Dr. Jarvis felt that Dr. Daniel should have diagnosed an adjustment disorder and identified pain as the stressor.

Phillip Eldred, vocational expert, testified by deposition that he had not seen Ms. Pace since his 2009 evaluation, but that he has issued supplemental reports dated June 21, 2014, and February 14, 2015. Mr. Eldred opined that Ms. Pace would be employable at a sedentary work level given Dr. Volarich's restrictions.

### **APPLICABLE LAW**

RSMo Section 287.140.1. In addition to all other compensation paid to the employee under this section, 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. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. Where the requirements are furnished by a public hospital or other institution, payment therefor shall be made to the proper authorities. Regardless of whether the health care provider is selected by the employer or is selected by the employee at the employee's expense, the health care provider shall have the affirmative duty to communicate fully with the employee regarding the nature of the employee's injury and recommended treatment exclusive of any evaluation for a permanent disability rating. Failure to perform such duty to communicate shall constitute a disciplinary violation by the provider subject to the provisions of chapter 620, RSMo. When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area

from the employee's principal place of [injury or the place of his residence] employment, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses; except that an injured employee who resides outside the state of Missouri and who is employed by an employer located in Missouri shall have the option of selecting the location of services provided in this section either at a location within one hundred miles of the injured employee's residence, place of injury or place of hire by the employer. The choice of provider within the location selected shall continue to be made by the employer. In case of a medical examination if a dispute arises as to what expenses shall be paid by the employer, the matter shall be presented to the legal advisor, the administrative law judge or the commission, who shall set the sum to be paid and same shall be paid by the employer prior to the medical examination. In no event, however, shall the employer or its insurer be required to pay transportation costs for a greater distance than two hundred fifty miles each way from place of treatment.

RSMo Section 287.020.7. The term "total disability" as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

RSMo Section 287.220.1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and 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; except that if the compensation for which the employer at the time of the last injury is liable is less than the

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compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

### **AWARD**

The claimant, Lydia Pace, has sustained her burden of proof that she injured her neck and right shoulder in the October 4, 2002 accident and injury. I refer to and incorporate the finding made in the award after hearing on October 5, 2010.

The claimant has sustained her burden of proof that she is permanently and totally disabled as the result of her neck and right shoulder injuries coupled with her depressive symptoms. Permanent total disability is established as of the time of maximum medical improvement, August 25, 2011. Since 2010, Ms. Pace has undergone another neck surgery involving an additional level fusion and has decreased range of motion in her neck. In addition, Ms. Pace has continued symptoms in her right shoulder for which no physician has recommended additional surgical intervention.

Both Dr. Daniel and Dr. Jarvis agree that Ms. Pace suffers from depression related to the accident and injury of October 4, 2002, although the doctors disagree on the exact diagnosis and the part that the October 4, 2002 accident plays in the depression. Ms. Pace's restrictions, lack of transferable work skills, and inability to engage in regular sustained activity combined to establish that Ms. Pace is unemployable in the open labor market.

The claimant has failed to prove Second Injury Fund liability where there is no evidence of permanent disability preceding the October 4, 2002 accident and injury.

The claimant has sustained her burden of proof that she is entitled to past temporary disability benefits from January 3, 2011, when Dr. Chabot placed her on the temporary restriction of 10 pounds lifting and no overhead work with the right arm. While Dr. Chabot was able to relieve some neck symptoms with the May 2, 2011 surgery, the condition of the right shoulder has not improved. Ms. Pace did not present other impediments to employment at the April 2015 hearing of this case.

The claimant has sustained her burden of proof that she is entitled to future medical treatment to treat her neck and right shoulder pain, as well as her depression. Dr. Volarich specifically recommended treatment for the shoulder and neck complaints consistent with the treatments Ms.

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Pace has had in the past from her treating physicians to alleviate her complaints in the neck and right shoulder. Given the finding of depression as caused by the work injury, treatment for the depression is warranted as well. It is clear from the medical records that Ms. Pace was, at times, obtaining prescription medications from physicians not authorized by the employer/insurer for pain resulting from the above-described work injuries, and that Ms. Pace will need treatment for the symptoms of these injuries in the future. Thus, future medical treatment by authorized physicians is awarded.

Made by: \_\_\_\_\_  
HANNELORE D. FISCHER  
*Administrative Law Judge*  
*Division of Workers' Compensation*