

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

Injury No.: 06-082041

Employee: Daphne Pennewell  
Employer: Hannibal Regional Hospital  
Insurer: Self-Insured

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 October 5, 2011. The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued October 5, 2011, 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 18<sup>th</sup> day of June 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

\_\_\_\_\_  
James Avery, Member

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Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Daphne Pennewell

Injury No. 06-082041

Employer: Hannibal Regional Hospital

Insurer: Self-Insured

Add'l Party:

Hearing Date: July 20, 2011

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

Checked by: RJD/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: July 14, 2006.
5. State location where accident occurred or occupational disease was contracted: Monroe City, Monroe 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 was leading a program for female high school athletes and injured her back while jumping over cones.
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: Low back.
14. Nature and extent of any permanent disability: Employee is permanently and totally disabled.
15. Compensation paid to-date for temporary disability: \$73,380.30 in temporary total disability benefits; \$20,916.65 in temporary partial disability benefits..
16. Value necessary medical aid paid to date by employer/insurer? \$177,300.65.

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17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: \$1,096.52.
19. Weekly compensation rate: \$718.87/\$376.55.
20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

20. Amount of compensation payable from Employer:

Permanent total disability benefits of \$718.87 per week, beginning March 7, 2011, for Employee's lifetime.

22. Future Requirements Awarded:

Future and ongoing medical care and treatment pursuant to Section 287.140, RSMo.

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

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

John Morthland

Employee: Daphne Pennewell

Injury No. 06-082041

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

Employee: Daphne Pennewell

Injury No: 06-082041

Employer: Hannibal Regional Hospital

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Insurer: Self-Insured

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

Add'l Party: N/A

Checked by: RJD/cs

### **ISSUES DECIDED**

The evidentiary hearing in this case was held on July 20, 2011 in Hannibal. The hearing was held to determine the liability of Employer, if any, for permanent partial disability benefits or permanent total disability benefits, and Employer's liability for future medical care.

### **STIPULATIONS**

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over the case;
2. That venue for the evidentiary hearing is proper in Marion County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Claimant's average weekly wage was \$1,096.52 resulting in a rate of \$718.87 for temporary total disability benefits and permanent total disability benefits and a rate of \$376.55 for permanent partial disability benefits;
6. That Claimant, Daphne Pennewell, sustained an occupational disease arising out of and in the course of her employment with Hannibal Regional Hospital on or about July 14, 2006 in Monroe County, Missouri;
7. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation;

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8. That Employer was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times; and
9. That temporary total disability payments have been made in full through March 6, 2011 and that no disability payments have been made since that time.

### **EVIDENCE**

The evidence consisted of the testimony of Claimant, Daphne Pennewell; the testimony of Ruth Rosenkrans; the deposition testimony and medical report of Dr. David Kennedy; the deposition testimony and report of Dr. Barry Feinberg; the deposition testimony and report of Dr. Russell Cantrell; the January 31, 2011 report of June Blaine, a rehabilitation counselor; medical records; list of current medications; job description, and other correspondence.

### **DISCUSSION**

Claimant, Daphne Pennewell, was born on October 18, 1970. Claimant is a 1989 high school graduate, has a bachelor of health sciences degree from Southwest Baptist University, and a masters degree in physical therapy from the University of Indianapolis. Claimant began working full-time for Employer in January 1994 as a staff physical therapist at Employer's hospital in Hannibal. In 2003, Employer opened an outpatient clinic in Monroe City, and Claimant was promoted to become the supervisor at that facility. Claimant continued to work some weekend rotations at the hospital in Hannibal.

As stipulated, Claimant sustained an accident arising out of and in the course of her employment with Hannibal Regional Hospital on July 14, 2006. While leading a Sports Enhancement Program for female high school athletes, she injured her back while jumping over a six inch cone with her right leg; her right knee started to cave or buckle, and Claimant twisted awkwardly to avoid falling. Claimant immediately knew that she had sustained the injury which was witnessed by her co-employee, Jane Cline. The physical therapy clinic in Monroe City, Missouri shared the building with the medical clinic of Dr. Dale Zimmerman. Claimant was treated that day by Dr. Zimmerman with a medrol dose pack, flexeril and vicodin.

Claimant testified that on July 26, 2006 she began noticing radiating pain and symptoms into her right leg. She saw Dr. Zimmerman two days later. He ordered her initial MRI which revealed a central disc protrusion at L5-S1 which was encroaching upon the S1 nerve root. Employer eventually referred her to Dr. Dennis Abernathie who is an orthopedic surgeon with Columbia Orthopedic Group. Claimant saw Dr. Abernathie on August 1, 2006 and August 15, 2006. He treated her conservatively. On both occasions he gave Claimant an epidural injection in her lumbar spine. These injections met with limited success.

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On September 8, 2006 Dr. Abernathie ordered a diskogram. The result of this diskogram was that Claimant was scheduled for a discectomy at the level of L5-S1. On September 11, 2006, Dr. Abernathie performed a microdiscectomy at the level of L5-S1. This procedure was carried out at Columbia Regional Hospital. Claimant continued to be a patient of the hospital. On the very next day, September 12, 2006, Claimant noticed progressive weakness in both of her legs. This weakness continued to progress throughout the day. Based upon Claimant's symptomatology, Dr. Abernathie returned Claimant to the operating room on September 13, 2006. At that time, another microdiscectomy at the level of L5-S1 was performed together with a laminectomy. It is the opinion of Dr. David Kennedy, neurosurgeon, that somehow during the initial surgical procedure, a nerve or nerve roots were scarred or "kinked." Claimant was discharged from Columbia Regional Hospital on September 15, 2006.

Claimant continued to be followed by Dr. Dennis Abernathie. She also underwent physical therapy through Hannibal Regional Hospital. Her primary therapist was her supervisor, Ruth Rosenkrans. Claimant saw Dr. Abernathie in the office on November 27, 2006. Her low back complaints and bilateral lower extremity symptoms had worsened following some of her physical therapy treatments. On December 8, 2006, Dr. Abernathie ordered a myelogram. At the January 8, 2007 appointment Dr. Abernathie suspected the possible instability of Claimant's lumbar spine. He ordered another diskogram which was carried out on January 11, 2007. This resulted in another surgical procedure being scheduled for January 18, 2007. This surgery was canceled by Employer's workers' compensation administrator as they wanted a second opinion before proceeding with surgery. While awaiting the second opinion, Claimant noted symptoms consistent with "saddle paresthesia". As a physical therapist Claimant knew that saddle paresthesia can result in permanent bladder injury and other serious complications. Once these symptoms were related to Employer, another surgical procedure was authorized.

Claimant was admitted to Columbia Regional Hospital on January 24, 2007. On that date, she underwent an L5-S1 anterior lumbar interbody fusion with the placement of a cadaver bone, a metal plate and four screws. She continued to be followed by Dr. Dennis Abernathie. Between her second and third surgeries, Claimant had returned to limited work and duties. She also returned to limited work and duties after the third surgical procedure. She never again worked more than portions of three days during the work week. She also had extensive restrictions on lifting and other activities. Claimant's condition generally improved. However, on September 7, 2007 while at work and moving sideways in her office chair, Claimant felt a sharp catching pain in her low back. This resulted in increased pain and discomfort and the renewal of her prior symptoms.

Employer requested that Claimant see Dr. Ann Roberson. Dr. Roberson was a new occupational therapy physician hired by Employer. Claimant saw Dr. Roberson on numerous occasions. Claimant had difficulty dealing with Dr. Roberson. Ultimately, Dr. Roberson told Claimant that she could see another physician for a second opinion in regard to her continuing difficulties. Dr. Roberson eventually referred Employee to Dr. David Kennedy, a St. Louis neurosurgeon.

Claimant initially saw Dr. Kennedy on December 12, 2007. Dr. Kennedy reviewed the extensive medical records and examined Claimant. Dr. Kennedy ordered a lumbar myelogram which was performed on January 30, 2008. The lumbar myelogram disclosed degenerative

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changes and scarring but did not disclose anything that warranted further surgery. It was at this time that Claimant was referred to Dr. Barry Feinberg of Injury Specialists, Inc. in St. Louis.

Dr. Feinberg is a board certified in anesthesia and pain management. Claimant first saw Dr. Feinberg on December 12, 2008. Claimant continues to be a patient of Dr. Barry Feinberg. Dr. Feinberg did numerous injections and paravertebral blocks in Claimant's lumbar spine. He also prescribed physical therapy which was done partially in Hannibal or Monroe City and partially in St. Louis. During one of Claimant's office visits with Dr. Feinberg, he suggested the possible implantation of a spinal cord stimulator. Claimant met with Dr. David Kennedy on April 2, 2008 and also met that same day with Dr. Feinberg. A trial stimulator was implanted in Dr. Feinberg's office on June 16, 2008. This trial procedure was successful. Thereafter, Dr. Kennedy implanted a dorsal column stimulator on July 8, 2008.

The deposition of Dr. David Kennedy, taken on April 4, 2011, was in evidence. Dr. Kennedy first saw Claimant in his office on December 12, 2007. Dr. Kennedy testified that Claimant required a subsequent re-exploration by Dr. Abernathie on September 23, 2006. The medical records disclosed that there was a combination of recurrent disk herniation and probably some clots that were causing some additional pressure on the nerves running into the Claimant's legs. Dr. Kennedy characterized these complications as "quite severe". This is because not just one nerve root was involved but multiple nerve roots were impacted by this complication. Dr. Kennedy did a physical examination at his initial visit. Claimant's range of motion in her lumbar spine was reduced by approximately 50% in all planes. Pursuant to Dr. Kennedy's orders, a lumbar myelogram was performed on January 30, 2008. It disclosed extensive degenerative changes at the L5-S1 level and also indicated that there was some underfilling of the nerve roots on both sides of L5-S1. This indicated to Dr. Kennedy that there still was some compressive material, be it bone, disk or scar, continuing to impact Claimant's lumbar nerve roots.

Dr. Kennedy did the implantation of the dorsal column stimulator. He compared this instrument to a cardiac pacemaker. The electronic device generates electrical impulses that are transmitted to an electrode that sits at the top of her spinal cord. The idea is to have these electrical impulses block the abnormal or inappropriate pain impulses. This is basically a way to "mask" the pain as compared to a surgical approach or injection that might terminate the pain. It is Dr. Kennedy's opinion that the implantation of the dorsal column stimulator is permanent. The generator or battery portion of the stimulator will have to be replaced. It is estimated that the generator works for approximately 1 to 10 years.

Dr. Kennedy testified that Fentanyl is a very potent narcotic. However, the use of Fentanyl via a patch gives a smoother, more consistent pain relief since it is continually being delivered throughout the patient's symptom.

At page 20 of Dr. Kennedy's deposition he testified that in his opinion, within a reasonable degree of medical certainty, the Employee did not have the ability to do any kind of employment whatsoever.

"Q. Okay. Dr. Kennedy, do you have an opinion within a reasonable degree of medical certainty as to whether or not Daphne Pennewell has the ability to do any kind of employment whatsoever?

A. I don't believe so.

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Q. Okay. And why is that?

A. Well, number one, she still has quite a bit of aggravation of pain with most types of activity. I think particularly her flexibility is substantially reduced.

I find that people like that, and particularly when pain is at a level when you're requiring Fentanyl patches in order to function, generally people because of pain, loss of mobility, difficulties when concentration, things like that, fatigue, they're just not able to be gainfully employed usually.

Q. And do you feel that's the case with Daphne?

A. I do.

Q. Okay. Do you feel that she could work three 8 hour days if given the opportunity to lay down and rest if that would allow her to work?

A. No.

Q. Okay. And you have read the deposition and the report of Dr. Cantrell?

A. Yes.

Q. And do you disagree with him?

A. I do.

Q. And why is that?

A. Well, I don't think it's realistic. I mean, you know, putting this situation in perspective, she had three major lumbar spine surgeries, one of which was emergent, and which left her with significant nerve dysfunction that's never really recovered. That's impacted her mobility and, of course, it's left her with chronic pain, which requires, you know, considerable narcotic pain medications.

You know, my experience is people that have had that kind of course simply because of pain considerations and attention considerations, as well as loss of mobility, really are not able to function on a regular basis of employment."

The deposition of Dr. Feinberg taken on April 22, 2011 was also in evidence. Claimant was referred to Dr. Feinberg in February 2008 by Dr. David Kennedy, neurosurgeon. Dr. Feinberg and Dr. Kennedy worked together in treating Claimant; they had worked together previously. In regard to Claimant's care, it was not unusual for them to discuss Claimant's care over the telephone and exchange office notes.

Dr. Feinberg is in charge of Claimant's medications. When he first began treating Claimant Dr. Feinberg prescribed vicodin. This was later changed to Norco which is basically Tylenol 3 but just a lower strength version of it. In approximately May 2009, Claimant was switched from vicodin to Percocet. Percocet is a stronger narcotic than vicodin. Dr. Feinberg participated with Dr. Kennedy in the decision to implant a dorsal spinal column stimulator. The trial stimulator resulted in an 80% decrease in leg pain. This was a positive trial in Dr. Feinberg's mind and warranted the implantation of the spinal cord stimulator.

Dr. Feinberg testified at length about Claimant's desire to return to work. He initially allowed her to return to work six hours per day, three days per week. At her request, he then

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allowed her to work eight hours per day, three days per week. It was at this time that Dr. Feinberg felt that Claimant was beginning to overload her system.

Dr. Feinberg saw Claimant on October 26, 2009. At this time, she was attempting to work eight hours per day, three days per week. Since Claimant was becoming somewhat immune to the Percocet, Dr. Feinberg placed her on a Duragesic or Fentanyl patch for pain. Dr. Feinberg testified:

“A. ...And at this point I told her I did not think that she should continue with the working. I thought that now we’re getting up into a significantly stronger medication and we’re starting to make a trade-off. If she’s going to continue working then we’re going to be getting into escalating narcotics. So now we’re starting to treat a problem that is really self-imposed.

I told her that I did not think that it was smart to keep increasing narcotics and keep going with the narcotic medications for the purpose of her doing this work and it was setting her back, from my point of view.

And I thought even at the twenty-four hours a week she should stop. She explained to me how she had given up all of her activities at home. She had to rest when she had gotten home. And she has children and she was not able to take care of them and she was having problems with that at home. There was a lot of friction about that.

So I asked her to stop working, go onto the Duragesic. Let’s get the pain in control and follow up.

Q. Now is Duragesic also called a Fentanyl patch?

A. Yes.” (Feinberg depo Page 31 Line 19 - Page 32 Line 13)

It was at this point in time that Claimant stopped working.

It is the opinion of Dr. Feinberg that Claimant does not have the ability to do any kind of work at all. At Page 36 of his deposition, Dr. Feinberg explains his reasoning why Claimant cannot work:

“A. If you look at her medication, and I’m going to say this before I answer the question fully, the Duragesic medication has been continued from the time that we first went onto it in 2009 to the present.

She is on the 50 microgram patches and uses two of these patches now every forty-eight hours. So we’re on a hundred micrograms every forty-eight hours. And she still has medications, Flexerill, Efexor that she uses as well.

The doses, even with the activities that she has, is just—it’s too high. I just think that she is not capable of working at all. I think that the – if she tried to work even a couple of hours a day the doses would be off the charts and she would not be controlled even with the highest dose of Duragesic.

Q. So even without working she’s had to have her Duragesic increased?

A. Just the natural course of the tolerance has caused the increase from 2009, to you know, over these eighteen months.”

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Dr. Russell Cantrell performed an independent medical examination on November 18, 2009. He declared Claimant physically fit to perform the work of a physical therapist for the three eight-hour shifts per week as she had been performing throughout most of 2009. Dr. Cantrell testified that continuing to work helped to strengthen both her core abdominal muscles as well as her low back muscles and was a benefit to her. He declared Claimant to be at maximum medical improvement and required no further medical treatment from that point on. Following Dr. Cantrell's examination, Hannibal Regional Hospital again, on December 9, 2009, offered Claimant employment within the previously stated restrictions. She declined that job offer.

Employer retained a vocational counselor, June Blaine, to review Claimant's file. Ms. Blaine opined that Claimant was capable of performing employment and specifically the employment offered by Employer. Ms. Blaine's testimony was the only expert vocational testimony entered into evidence. Claimant was again offered employment in December, 2010 by Employer to return on either four or five days per week for four or five hours per day and indicated that it had considerable flexibility in accommodating her restrictions. Claimant again declined that job offer.

Ruth Rosenkrans is a physical therapist and was Claimant's supervisor. Ms. Rosenkrans was Claimant's physical therapist during much of her rehabilitation. Ms. Rosenkrans testified that Claimant was "an excellent team member". She also testified that there was "no doubt" that Claimant worked hard to recover from her injuries. Ms. Rosenkrans testified that Claimant wanted to return to work for Employer and that Claimant "loved her job".

Claimant alleges that she is permanently and totally disabled as a result of the work-related accident on July 14, 2006. Under section 287.020.7, "total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 404 (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.*

Despite her young age and extensive education, it is clear from the evidence that Claimant, physically, cannot return to any employment. An employer simply cannot reasonably expect Claimant to successfully perform work in her physical condition. Employer, in its brief, argues that Claimant has simply decided to quit working and is content to collect disability benefits despite being able to work. This was not my impression of Claimant at the hearing, and is obviously not the impression of Claimant's former supervisor and Employer's witness, Ruth Rosenkrans. Ms. Rosenkrans testified that there was "no doubt" that Claimant worked hard to recover from her injuries, that Claimant wanted to return to work for Employer and that Claimant "loved her job". Therefore, while it gives me no pleasure to consign Claimant to the ranks of the permanently disabled, that is the only reasonable conclusion I can draw from the evidence.

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Another issue to be decided is whether Employer 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.

At the time of the hearing, Claimant was still under active medical treatment. She is using a dorsal column stimulator and Duragesic (Fentanyl) patches for pain. Her use of these will need to be monitored by a physician. There is, at least, a "reasonable probability" that Claimant will need future medical treatment.

### **FINDINGS OF FACT**

In addition to those facts to which the parties stipulated, I find the following facts:

1. On July 14, 2006, Claimant sustained a work-related accident in Monroe City, Monroe County, Missouri while in the employ of Hannibal Regional ("Employer"), when she injured her back while jumping over a six inch cone with her right leg, her right knee started to cave or buckle, and she twisted awkwardly to avoid falling;
2. The July 14, 2006 accident caused Claimant to undergo epidural steroid injections and three surgical procedures, including a fusion with bone graft and instrumentation;
3. Claimant's condition requires her to use an implanted dorsal column stimulator and Fentanyl patches for pain;
4. Claimant returned to work for Employer at modified or part-time duty for many months;
5. In late October, 2009, Claimant stopped working for Employer;
6. Employer has offered Claimant employment on a modified duty basis, but Claimant has not accepted those offers;
7. Claimant's injuries sustained in the July 14, 2006 accident have rendered Claimant physically unable to return to any employment;
8. An employer cannot reasonably expect Claimant to successfully perform work in her current physical condition; and
9. Claimant requires ongoing medical care and treatment, including, but not limited to, a dorsal column stimulator and pain patches.

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### **RULINGS OF LAW**

In addition to those legal conclusions to which the parties stipulated, I make the following rulings of law:

1. As a result of the injuries sustained in the July 14, 2006 accident, Claimant is physically unable to compete on the open market for employment;
2. Claimant is permanently and totally disabled as a result of the July 14, 2006 accident;
3. Employer is liable for the payment of permanent total disability benefits from and after March 7, 2011;
4. Employer is required to provide Claimant with future and ongoing medical care and treatment; and
5. Employer's responsibility for payment of weekly benefits shall cease upon Claimant's death.

### **ORDER**

Hannibal Regional Hospital is ordered to pay Claimant permanent total disability benefits of \$718.87 per week for Claimant's lifetime, beginning March 7, 2011.

Hannibal Regional Hospital is ordered to provide Claimant with such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required to cure and relieve Claimant from the effects of the injuries she sustained in the July 14, 2006 accident.

Claimant's attorney, John Morthland, is allowed 25% of all permanent total disability benefits awarded herein, including future benefits, as and for necessary attorney's fees, and the amount of such fees shall constitute a lien on those benefits.

Any past due compensation shall bear interest as provided by law

Made by: /s/Robert J. Dierkes – 10-4-2011  
ROBERT J. DIERKES  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

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