

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

Injury No.: 04-148624

Employee: Erica Powers  
Employer: Curators of the University of Missouri  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 28, 2012, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued December 28, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10<sup>th</sup> day of July 2013.

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: Erica Powers

Injury No. 04-148624

Dependents:

Employer: Curators of the University of Missouri

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: Self-Insured

Hearing Date: September 24, 2012 and September 27, 2012

Checked by: RJD/cs

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
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: December 2, 2004.
5. State location where accident occurred or occupational disease was contracted: Boone County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Employer is self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was helping a knee surgery patient with a constant positive motion machine when she had an acute onset of back pain.
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 has no permanent disability.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? None.

Employee: Erica Powers

Injury No. 04-148624

18. Employee's average weekly wages: \$586.20.
19. Weekly compensation rate: \$390.80 for temporary total disability and permanent total disability; \$354.05 for permanent partial disability.
20. Method wages computation: Stipulation.

**COMPENSATION PAYABLE**

21. From Employer:

None. The claim for compensation against Employer is denied.

22. Second Injury Fund liability:

None. The claim for compensation against the Second Injury Fund is denied.

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## **AWARD**

Employee: Erica Powers

Injury No. 04-148624

Dependents:

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Before the  
**DIVISION OF WORKERS'  
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Additional Party: Second Injury Fund

Department of Labor and Industrial  
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Jefferson City, Missouri

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Hearing Date: September 24, 2012 and September 27, 2012

## **PRELIMINARIES**

The evidentiary hearing in these cases (Injury No. 04-148624 and 05-033874) was held on September 24, 2012 in Columbia. Employee Erica Powers appeared personally and by counsel Truman Allen. Employer University of Missouri appeared by counsel Rick Montgomery. The Second Injury Fund appeared by counsel Curtis Schube, assistant attorney general. The record was held open for submission of unemployment compensation records; these were submitted on September 27, 2012 and the record was closed. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on November 7, 2012.

## **ISSUES DECIDED**

In Injury No. 04-148624, the hearing was held to determine the following issues:

1. Whether the work-related accident of December 2, 2004 was a substantial factor in the cause of any or all of the injuries and/or conditions alleged in the evidence;
2. The liability, if any, of Employer for permanent partial disability benefits or permanent total disability benefits; and
3. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

In Injury No. 05-033874, the hearing was held to determine the following issues:

Employee: Erica Powers

Injury No. 04-148624

1. Whether the work-related accident of December 2, 2004 was a substantial factor in the cause of any or all of the injuries and/or conditions alleged in the evidence;
2. The liability, if any, of Employer-Insurer for permanent partial disability benefits or permanent total disability benefits;
3. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits; and
4. The liability, if any, of Employer-Insurer for future medical benefits pursuant to Section 287.140, RSMo.

### **STIPULATIONS**

In Injury No. 04-148624, 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 Boone 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 is \$586.20, with compensation rates of \$390.80 for temporary total disability benefits and permanent total disability benefits and \$354.05 for permanent partial disability benefits;
6. That Claimant, Erica Powers, sustained an accident arising out of and in the course of her employment with University of Missouri on December 2, 2004;
7. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation;
8. That Employer-Insurer has paid no medical benefits and no temporary benefits; and
9. That University of Missouri was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times.

In Injury No. 05-033874, the parties stipulated as follows:

Employee: Erica Powers

Injury No. 04-148624

1. That the Missouri Division of Workers' Compensation has jurisdiction over the case;
2. That venue for the evidentiary hearing is proper in Boone 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 is \$855.00, with compensation rates of \$570.00 for temporary total disability benefits and permanent total disability benefits and \$354.05 for permanent partial disability benefits;
6. That Claimant, Erica Powers, sustained an accident arising out of and in the course of her employment with University of Missouri on April 13, 2005;
7. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation;
8. That Employer-Insurer has paid \$36,062.99 in medical benefits and \$2,446.28 in temporary benefits; and
9. That University of Missouri was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times.

### **EVIDENCE**

The evidence consisted of the testimony of Claimant, Erica Powers, as well as Claimant's deposition testimony; medical records, including records of the Veteran's Administration; the narrative report and deposition testimony of Dr. David Volarich; the narrative report and deposition testimony of Barbara Markway, PhD.; the narrative report and deposition testimony of Dr. A. E. Daniel; the narrative report and deposition testimony of Dr. Edwin Wolfgram; the records and deposition testimony of Dr. John Miles; the narrative report and deposition testimony of James England, a vocational rehabilitation consultant; official notice was also taken of the files of the Missouri Division of Workers' Compensation in these cases.

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### **DISCUSSION**

In Injury No. 04-148624, the evidence was clear that on December 2, 2004 Claimant felt something pull in her low back when she was helping a knee surgery patient with a constant positive motion machine. The evidence was also clear that Claimant took ibuprofen for a week, did not miss work, and had a full recovery. None of the many physicians even remotely suggested that this injury was anything other than a very minor injury with a speedy and full recovery. Therefore, no compensation will be awarded in Injury No. 04-148624, and the remainder of the discussion will focus on Injury No. 05-033874.

Psychological issues are central to this case. Claimant has a long personal and genetic history of psychiatric illness. Claimant's mother is on Prozac because of depression. Claimant's father suffered from depression and committed suicide at age 32. It took Claimant eight years to get over the grief. Claimant was placed on Zoloft at the age of 10. She did not approve of her mother's boyfriend. Claimant, her mother and her brother all have Attention Deficit Disorder (ADD). Her uncle suffers from schizoaffective disorder. (Powers depo., p. 63). Claimant's sister treated for ADHD, abused Adderal and still struggles with drugs. Claimant entered the Air Force to get away from her boyfriend. She was discharged from the Air Force due to her failure to adjust, and was given a 10% permanent psychological disability from the Air Force, which was later raised to 30%. She has had three abortions.

Prior to joining the Air Force, Claimant received an associate's degree in nursing science from Moberly Area Community College in 1996. She worked at Williamsburg Skilled Nursing Facility and then did home health care, first through Callaway Community Hospital and later through an agency called Staff Builders. In 1998 she joined the Air Force. She testified that she thought she would be working as a registered nurse while in the Air Force, but she instead was put in charge of medical records. She testified that she did not like the medical records work, and felt she had been lied to. She became angry and depressed. She eventually was hospitalized in a military hospital for depression and suicidal ideation. She was discharged from the Air Force in 1999 after serving approximately fifteen months. Claimant was prescribed Prozac prior to her discharge and was referred to the VA for ongoing treatment, which has continued from that point to the present.

On October 1, 1999, Claimant began working for Columbia Regional Hospital, then owned and operated by the University of Missouri ("Employer" in this case). Claimant generally worked two or three twelve-hour shifts each week in the "step-down unit". She would occasionally take shifts in other units if the patient census in the step-down unit was low. Claimant continued to treat for psychiatric problems at the VA hospital. She testified at the hearing that after going to work for Employer, she stopped taking Prozac and was feeling good about herself. On October 15, 2001, it was noted in the VA records that she had in fact stopped taking Ritalin and Prozac, but it made her unable to function in her job as a nurse. On December

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21, 2001 it was noted that she was depressed and drowsy, unable to concentrate and had to take time off work. On June 4, 2002, it was noted that Claimant had thoughts of hurting herself last week, felt empty and unhappy all the time, and continued to have severe problems with her ex-boyfriend of 10 years. She was directed to continue taking Prozac and increase Ritalin. On November 14, 2002, it was noted that Claimant's mood is depressed and she becomes easily tearful, she gets suicidal ideation once in a while, and again was to continue Prozac and Ritalin. On February 4, 2005, approximately two months prior to the work injury of April 13, 2005, Claimant presented to the VA, at which time she was taking Ritalin, having difficulties with energy, was not taking Ritalin as prescribed, and was taking Vistaril to help with sleep. She was asked to continue Ritalin, start Wellbutrin and continue Vistaril for diagnoses of ADD, anxiety, psychotic disorder not otherwise specified (NOS), nicotine abuse and occupational stressors.

While working for Employer, Claimant attended night school at Columbia College and received a Bachelor's in Criminal Science. Claimant hoped to pursue a law degree thereafter, but her application to the University of Missouri-Columbia School of Law was denied.

As stipulated, on April 13, 2005 Claimant sustained an accident arising out of and in the course of his employment with Employer. On that date, Claimant was repositioning a patient. As she lifted the patient's leg and pulled on a pillow to support the patient, Claimant experienced pain in her low back. Claimant filled out another incident report and did not seek immediate medical attention believing that this pain would go away as before. On April 22, 2005, Claimant went to Karen Hackmann, RNCS, who took her off work and later referred her to Dr. Hoerner. A thoracic MRI ordered by Dr. Hoerner was interpreted as normal. Claimant was placed on a work hardening program; Claimant testified that the work hardening made her symptoms much worse and engendered additional symptoms. Dr. Hoerner subsequently ordered a lumbar MRI which showed minimal annular disc tear and neural foramina narrowing at L4-5. Employer transferred Claimant's care to Dr. John Miles at Columbia Orthopaedic Group.

Dr. Miles saw Claimant six times and prescribed additional physical therapy. Dr. Miles ordered EMG studies and a discogram study. He also prescribed more physical therapy for core strengthening. Dr. Miles released Claimant on October 25, 2005 at maximum medical improvement with nothing else to offer. In his deposition, he explained that all he could do would be a "big operation" and he did not want to do such a big operation without objective evidence of the problem and because Claimant was hypersensitive to the injury. He noted upon her release that Claimant had intractable pain. Dr. Miles testified in his deposition that a referral to a pain management clinic would have been appropriate, but that Claimant needed a holistic approach to pain management which was not available in Columbia. In Dr. Miles' opinion, the pain management physicians in Columbia only wanted to prescribe narcotics, which is not what Claimant needed.

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Claimant had been working light duty in the telemetry department which light duty work ended once she was released by Dr. Miles. Claimant reported back to the step-down unit and was informed that they did not have any work for her. In the course of the next 6 months, Claimant was offered 20 hours of work. Claimant worked a shift in the Intensive Care Unit on a "last-minute call"; this work caused her symptoms to escalate. Claimant applied for unemployment as a constructive discharge and was awarded benefits. She drew benefits from March 26, 2006, to December 9, 2006. Claimant did attempt to find work and was successful in finding a temporary job reviewing medical charts which could be done at Claimant's pace and from her home or office. This lasted only a couple of months. The other job Claimant found was a workers' compensation nurse case manager job. Claimant's work was to coordinate medical care with workers' compensation patients and doctors, go to office visits at times, and write reports for the adjuster. Claimant worked from her home and the schedule was somewhat flexible. Claimant testified that she left that job after three months because the work was becoming too demanding; Claimant testified that she had problems with the traveling required by the job and had trouble concentrating. Claimant also testified that she felt she wasn't being paid enough for what she was doing, and that this also factored into her decision to leave that position.

Following Dr. Miles' release, Claimant was offered psychological treatment by the VA as a part of pain management. Claimant was offended and saw Dr. Street who gave Claimant four steroid injections. Following this series of injections in April and May of 2006, Claimant returned to the VA as her primary source of medical care. Claimant eventually accepted psychological treatment with the pain management through Dr. Carole Bernard and continues with treatment at the VA up to the present.

No doctor has recommended surgery in spite of a documented annular tear. Claimant continues to take multiple medications. These medications, which Dr. Wolfgram counted as 17, include Ambien/Zolpidem, Tramadol, Gabapentin, Cymbalta/Duloxetine, Ritalin/Methylphenidate, Hydrocodone, Cyclobenzaprine/Flexeril, Flomax/Tamsulosin, Albuterol, Levalbuterol, Methylprednisolone, Ferrous/iron, ascorbic acid/vitamin C, Prilosec 1% Neomycin, and Levothroxine/synthroid.

Claimant testified that she has constant low back pain ranging from 2-3 to 8, with leg pain and numbness in her toes, and muscle spasms. Activity causes her pain to go up and she can sit, stand or walk for no more than an hour. Lifting is limited to 10 pounds or less and she has to lie down and rest. Driving and everyday chores are difficult and cannot be done as one normally would do. She is depressed and anxious, which causes difficulty concentrating and focusing. She feels helpless, hopeless and worthless. She spends a lot of time watching TV and there are days she does not get dressed or shower because of pain and depression. She does not clean as she should and has to pace herself with any activity. For the most part, she has not lived alone but lived with her sister or boyfriend since the injury.

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A nerve conduction study in January 2000 confirmed the presence of carpal tunnel syndrome. Dr. James Eckenrode performed a carpal tunnel release shortly thereafter. Claimant was diagnosed with recurrent carpal tunnel syndrome with positive EMG findings on May 2, 2003. She was diagnosed with bilateral carpal tunnel on December 15, 2005 that an EMG/NCV of 1/23/06 determined was moderate. She was diagnosed with and treated at the VA for a sprain and osteoarthritis in the left foot in March of 2006. She underwent right carpal tunnel surgery on December 4, 2006. She began complaining of neck pain and underwent an MRI and X-rays of the cervical spine on October 31, 2006 and December 4, 2006, respectively. She was prescribed Flexeril. On April 17, 2007, she complained of tremors, painful numbness in feet and numbness in the right calf with aching behind the knee. On June 29, 2007, she was diagnosed with bronchitis and a right foot strain. She underwent a left carpal tunnel release on August 20, 2007. She was diagnosed with cellulitis, plantar fasciitis and stress fractures in the right foot on September 24, 2007. She treated for left toe pain in December of 2007. She was prescribed various ongoing pain medications for these injuries. She was diagnosed with hypothyroidism, hyperlipidemia, and right hip pain on August 26, 2008. She was diagnosed with pneumonia, iron deficient anemia, and GERD on March 25, 2009. She continued regular visits for anxiety, depression and psychiatric illness throughout this entire time having never been released at maximum medical improvement for these conditions either prior to or after her accident of April 13, 2005.

Claimant alleges that she is permanently and totally disabled. She is seeking permanent total disability benefits from either Employer or from the Second Injury Fund.

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.*

Second Injury Fund liability exists only if Employee suffers from a pre-existing permanent partial disability that constitutes a hindrance or obstacle to employment or re-employment, that combines with a compensable injury to create a disability greater than the simple sums of disabilities. § 287.220.1 RSMo 2000; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576, (Mo.App.E.D. 1985). When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990).

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In order to find permanent total disability against the Second Injury Fund, it is necessary that Employee suffer from a permanent partial disability as a result of the last compensable injury, and that disability has combined with prior permanent partial disability(ies) to result in total disability. 287.220.1 RSMo 1994, *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990), *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo.App. 1985).

Where preexisting permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability **after** the employer has paid the compensation due the employee for the disability resulting from the work related injury. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 366 (Mo.App. 1992) (emphasis added). In determining the extent of disability attributable to the employer and the Second Injury Fund, an Administrative Law Judge must determine the extent of the compensable injury first. *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-43 (Mo.App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* It is, therefore, necessary that the Employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury Fund liability.

Section 287.200.1 does not require a claimant to distinguish each disability and assign a separate percentage for each of several pre-existing disabilities to prevail on a claim for permanent total disability against the Second Injury Fund. Rather, a claimant must establish the extent, or percentage, of the permanent partial disability resulting from the last injury only, and prove that the combination of the last injury and the pre-existing disabilities resulted in permanent total disability. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo. App. E.D. 2007).

As indicated above, psychological issues are central to this case. Claimant has been evaluated by a psychologist, Barbara Markway, PhD, and by two psychiatrists, Dr. A. E. Daniel, and Dr. Edwin Wolfgram; all three have testified by deposition in this case. Before discussing the testimony of each individually, it is important to note that I find that Claimant has conceived and perpetuated a story that her mental condition was "just fine" after being discharged from the Air Force, and that her current pitiable mental state started on April 13, 2005. Even a cursory review of Claimant's adolescent medical history, Air Force record, and VA medical records prior to April 13, 2005 reveals this story to be a myth. Dr. Markway was completely taken in by this myth and thus did not even question Claimant about anything prior to April 13, 2005; for this reason alone, I find Dr. Markway's testimony to be completely unworthy of belief. Dr. Daniel bought into the myth for quite some time, whereas Dr. Wolfgram recognized that Claimant's story was a fiction.

Psychologist Barbara Markway testified that the injury of April 13, 2005 was the substantial contributing factor in causing Claimant's current depression and anxiety symptoms.

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Dr. Markway also testified that Claimant had pre-existing depression and anxiety that went into remission and that Claimant's not returning to work after the 4/13/05 accident aggravated this condition or "triggered" her depression and anxiety after the accident. Dr. Markway provided a disability rating of 50 percent as a result of the work injury, and of that, 10 percent was preexisting. Dr. Markway did not have the benefit of any of the VA records available for review, which further damages her credibility.

Psychiatrist Dr. Daniel stated in his report: "Percentage of psychiatrically-based disability related to the injury dated April 13, 2005 is 45 to 50% of the person as a whole." He also stated in that report: "Percentage of psychiatrically-based disability due to pre-existing conditions is nil." However, in his deposition, Dr. Daniel "clarified" his report by stating that he believed Claimant had a pre-existing psychiatric-based disability of 15% of the person as a whole.

Psychiatrist Dr. Edwin Wolfgram testified that there was no temporary or permanent psychiatric disability caused by the April 13, 2005 accident. Dr. Wolfgram testified that all of Claimant's psychiatric disability pre-existed and was unrelated to the accident. Dr. Wolfgram diagnosed Ms. Powers with pre-existing somatization disorder, polysubstance dependence, and depression. Dr. Wolfgram testified that Claimant's somatization disorder has caused her to experience pain to a significantly greater degree than can be explained by her physical injuries alone. However, he did not believe that Claimant was malingering. He also stated that "superficial explanations like deceit, malingering, and corruption are not applicable." Dr. Wolfgram believes that Claimant's problems are treatable with lifestyle changes and weaning herself off of medications.

Dr. John Miles testified by deposition. He testified that the objective evidence only showed a really very mild disease that did not warrant surgery. Dr. Miles felt Claimant was a histrionic person; one who thinks everything hurts right as you walk up to them with a needle. Dr. Miles testified that Claimant's physical examinations were benign. On October 25, 2005 Dr. Miles indicated that Claimant was at maximum medical improvement, did not believe she required any permanent restrictions and provided a rating of 1 percent body as a whole. He believed she may have had a small annular tear, but testified that almost everyone has an annular tear and a great majority of them are asymptomatic or merely temporarily symptomatic. Dr. Miles testified that if Claimant had any injury it was a mild lumbar strain. Dr. Miles concluded that Claimant had a fairly minor incident at work, probably a microscopic annular tear, but because of psychosocial stressors, she can't get over it.

Dr. David Volarich testified on behalf of Claimant. Dr. Volarich diagnosed lumbar left flank strain/sprain with disc bulge and annular tear at L4-5 and disc bulge at L5-S1 resulting in moderately severe myofascial pain syndrome and rated Claimant's disability as 30% permanent partial disability of the body as a whole referable to low back. He also rated Claimant with preexisting bilateral upper extremity of 15% permanent partial disability. Dr. Volarich believes

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Claimant is at maximum medical improvement but also believes Claimant would benefit from pain management. Dr. Volarich agreed that psychological factors are generally present with chronic pain syndromes and believed psychological disability existed. He did not attempt to quantify the psychological factors or determine which if any were preexisting. He defers to a psychologist or psychiatrist and vocational consultant. Dr. Volarich reported that Claimant said she intended to go back to work and that he has never said a person is permanently and totally disabled if they said they were intending to go back to work. He opined that Claimant was at maximum medical improvement in January of 2008, and that she was unable to work from Dr. Jefferies' maximum medical improvement date of September 18, 2005, because of her pain syndrome. The MRI, discogram, and clinical findings including trigger point at L5-S1 level and loss of range of motion were objective findings. Dr. Volarich did not find radicular symptoms on examination.

Mr. James England is a vocational expert who evaluated Claimant and testified on behalf of the Employer. Mr. England opined that Claimant could work based on the restrictions or lack thereof if one considered the physical problems alone. He did not question the validity of no restrictions by Dr. Miles when he placed Claimant at MMI without restrictions while noting intractable pain. Mr. England also opined that if one looks at the psychological conditions discussed by Dr. Daniel and Dr. Wolfgram, then Claimant cannot work because the severity of these problems would preclude all work. Assuming Claimant was permanently and totally disabled, Mr. England further opined that Claimant's total disability was based on a combination of the April 2005 injury and preexisting conditions.

In almost eighteen years as an administrative law judge, I have seen thousands of injured workers, but I have seen only a handful who impressed me as being as psychiatrically disabled as Claimant. Unless Claimant is an incredible actress (and neither Dr. Daniel nor Dr. Wolfgram believed that Claimant was malingering, feigning or deceiving), there is no question whatsoever that no employer would hire Claimant for any position. Certainly her long history of psychiatric problems, multiple medications, and history of substance abuse would strongly suggest that her psychiatric disability is real, deeply-rooted and permanent. Claimant is clearly permanently and totally disabled.

Employer, in its brief, argues a legal issue that needs to be addressed. Employer argues that Claimant's claim for psychiatric injury or disability is time-barred. The original claim for compensation filed November 3, 2005 alleges injury to "middle and lower back, both feet", and does not contain a claim against the Second Injury Fund. The first amended claim for compensation (although marked "original claim") filed September 21, 2006 alleges injury to "low back, middle back & BAW", and alleges a claim against the Second Injury Fund; one of the pre-existing disabilities alleged is "1998 or 1999 - Anxiety". It is not until the second amended claim, filed April 9, 2009, that Claimant alleges as "part(s) of body injured" in the April 13, 2005 accident as "Low back, middle back, Psyche & BAW". As Employer filed a timely report of

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injury, the statute of limitations is two years from “the last payment made under this chapter on account of the injury”. Employer cites *Hunsicker v. J.C. Indus.*, 952 S.W.2d 376, 382 (Mo. Ct. App. 1997) for the proposition that Claimant cannot allege a “new and distinct” injury after the statute of limitations has expired. I find that Employer is correct that, per *Hunsicker*, the claim against Employer for injuries to Claimant’s “Psyche” would be barred if the April 9, 2009 amended claim was filed outside of the limitations period. However, it is impossible to know from the evidence when Employer made “the last payment ... under this chapter on account of the injury”; although it can be strongly inferred that such “last payment” was made more than two years prior to April 9, 2009, I believe that on such a technical question, and one on which Employer has the burden of proof (see §287.808: “(i)n asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.”) the evidence should be clear. However, as indicated above, I believe that Claimant’s psychiatric problems preexisted the April 13, 2005 accident, and I find no credible evidence to the contrary. I note that Claimant’s failure to include psychiatric injuries in her claim against Employer until four years after the accident is additional evidence that no such psychiatric injuries indeed occurred as a result of the April 13, 2005 accident, and that all of Claimant’s psychiatric anomalies pre-existed the April 13, 2005 work accident.

There is no evidence that the lumbar and thoracic injuries which Claimant sustained in the April 13, 2005 work accident, considered alone, caused Claimant’s permanent and total disability. I find that the April 13, 2005 accident caused permanent *partial* disability only, and I find same to equal 20% of the body as a whole for the physical injuries to Claimant’s lumbar and thoracic spine. I find then, that Claimant is permanently and totally disabled due to the lumbar and thoracic injuries Claimant sustained in the April 13, 2005 accident *in combination with* her substantial pre-existing psychiatric disability. (While Claimant also had preexisting carpal tunnel syndrome, the evidence was essentially silent as to how and whether that condition has contributed to Claimant’s overall disability.) The Second Injury Fund is liable for permanent total disability benefits.

I find that Claimant’s lumbar and thoracic spine injuries, caused by the April 13, 2005 accident, reached maximum medical improvement on October 25, 2005, which is the date that Dr. Miles released Claimant from his care. Although Claimant received pain management treatment after that date (and at least up through the date of hearing), I find that the need for pain management is due to Claimant’s pre-existing psychiatric conditions, particularly somatization disorder and depression. Therefore, the liability of the Second Injury Fund for weekly permanent total disability benefits began on October 26, 2005, subject to a credit for Employer’s liability for permanent partial disability benefits. I realize that Claimant worked approximately twenty hours for Employer after October 25, 2005 and that she worked part-time for a few months, apparently in 2007. I find that the work that Claimant performed after October 25, 2005 did not demonstrate Claimant’s ability (then, or at anytime thereafter) to compete in the open market for employment. The fact that Claimant was unable to sustain even the part-time work is consistent

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with a finding of permanent total disability. I also note that Claimant received unemployment compensation benefits from June 2006 to December 2006. While §287.170.3 states: “(a)n employee is disqualified from receiving temporary total disability during any period of time in which the claimant applies and receives unemployment compensation”, Chapter 287 is silent on whether an employee is disqualified from receiving *permanent* total disability benefits while receiving unemployment compensation. While my personal belief is that Claimant should not be allowed to receive both unemployment compensation and permanent total disability benefits for the same time period, the “shall construe the provisions of this chapter strictly” language of §287.800 must be considered. If the General Assembly had intended that unemployment compensation and permanent total disability benefits be mutually exclusive, they would have so stated in Chapter 287.

The liability of Employer for permanent partial disability benefits is 80 weeks of benefits at the weekly rate of \$354.05; the permanent total disability rate is \$570.00 per week. The weekly differential is \$215.95.

As I find that the need for pain management is due to Claimant’s pre-existing psychiatric conditions, no award of future medical benefits is made against Employer.

### **FINDINGS OF FACT AND RULINGS OF LAW IN INJURY NO. 04-148624**

In Injury No. 04-148624, in addition to the facts and legal conclusions to which the parties stipulated, I find the following:

1. The work-related accident of December 2, 2004 did not cause any permanent injury or disability to Erica Powers (“Claimant”);
2. The work-related accident of December 2, 2004 was not a substantial factor in causing any of the injuries or conditions alleged in the evidence;
3. Employer has no liability for permanent partial disability benefits or permanent total disability benefits;
4. The Second Injury Fund has no liability for permanent partial disability benefits or permanent total disability benefits; and
5. The Claim for Compensation should be denied in full.

Employee: Erica Powers

Injury No. 04-148624

**FINDINGS OF FACT AND RULINGS OF LAW IN INJURY NO. 05- 033874**

In Injury No. 05-033874, in addition to the facts and legal conclusions to which the parties stipulated, I find the following:

1. Erica Powers (“Claimant”) has a long personal and genetic history of psychiatric illness;
2. As of April 13, 2005, Claimant had a pre-existing permanent partial disability due to psychiatric illness, including somatization disorder, polysubstance dependence and depression;
3. The work-related accident of April 13, 2005 was a substantial factor in the cause of injuries to Claimant’s lumbar and thoracic spine, including an annular tear and injuries to soft tissues;
4. The work-related accident of April 13, 2005 was not a substantial factor in the cause of any psychiatric or psychological illness or disability;
5. The deposition testimony of Dr. Barbara Markway was not credible;
6. Claimant is unable to compete in the open market for employment;
7. Claimant is permanently and totally disabled;
8. The work-related accident of April 13, 2005, considered alone, did not result in Claimant’s permanent and total disability;
9. The work-related accident of April 13, 2005, considered alone, resulted in a permanent partial disability of 20% of the body as a whole, referable to the lumbar and thoracic spine;
10. Employer’s liability for permanent partial disability benefits is 80 weeks of benefits at the weekly rate of \$354.05, totaling \$28,324.00;
11. Claimant is unable to compete in the open market for employment as a result of the April 13, 2005 lumbar and thoracic spine injuries in combination with her pre-existing psychiatric disabilities;
12. The Second Injury Fund is liable for the payment of permanent total disability benefits;
13. Claimant’s lumbar and thoracic spine injuries from the April 13, 2005 accident reached maximum medical improvement on October 25, 2005;
14. The Second Injury Fund’s liability for the payment of permanent total disability benefits at the stipulated weekly rate of \$570.00, began on October 26, 2005, subject to a credit for the permanent partial disability attributable to Employer for the April 13, 2005 lumbar and thoracic spine injuries;
15. The Second Injury Fund’s liability for weekly benefits shall cease upon Claimant’s death;
16. Claimant’s need, if any, for future pain management, is due solely to Claimant’s pre-existing psychiatric conditions;
17. The evidence does not justify an award of future medical benefits; and

Employee: Erica Powers

Injury No. 04-148624

18. Employer has no liability for future medical benefits.

**ORDER IN INJURY NO. 04-148624**

In Injury No. 04-148624, the claim for compensation against Employer is denied in full, and the claim for compensation against the Second Injury Fund is denied in full.

**ORDER IN INJURY NO. 05-033874**

In Injury No. 05-033874, Employer is ordered to pay to Claimant the sum of \$28,324.00 for permanent partial disability benefits.

The Treasurer of the State of Missouri, as custodian of the Second Injury Fund, is ordered to pay to Claimant permanent total disability benefits of \$215.95 per week for 80 weeks, beginning October 26, 2005 through and including May 8, 2007; beginning May 9, 2007, the Second Injury Fund is ordered to pay Claimant permanent total disability benefits of \$570.00 per week for Claimant's lifetime.

Claimant's attorney, Allen & Nelson, PC, is allowed 25% of all 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 – 12-28-12  
Chief Administrative Law Judge  
Division of Workers' Compensation

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

Injury No.: 05-033874

Employee: Erica Powers  
Employer: Curators of the University of Missouri  
Insurer: Self- Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 28, 2012. The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued December 28, 2012, 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 10<sup>th</sup> day of July 2013.

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: Erica Powers

Injury No. 05-033874

Dependents:

Employer: Curators of the University of Missouri

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: Self-Insured

Hearing Date: September 24, 2012 and September 27, 2012

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: April 13, 2005.
5. State location where accident occurred or occupational disease was contracted: Boone County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Employer is self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was repositioning a patient and lifted the patient's leg and was reaching for a pillow when she had an acute onset of back pain.
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: Body as a whole, lumbar and thoracic spine.
14. Nature and extent of any permanent disability: 20% permanent partial disability of the body as a whole; Employee is permanently and totally disabled.
15. Compensation paid to-date for temporary disability: \$2,446.28.
16. Value necessary medical aid paid to date by employer/insurer? \$36,062.99.

Employee: Erica Powers

Injury No. 05-033874

- 17. Value necessary medical aid not furnished by employer/insurer? None.
- 18. Employee's average weekly wages: \$855.00.
- 19. Weekly compensation rate: \$570.00 for temporary total disability and permanent total disability; \$354.05 for permanent partial disability.
- 20. Method wages computation: Stipulation.

**COMPENSATION PAYABLE**

21. From Employer:

80 weeks of permanent partial disability benefits	\$28,324.00
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22. Second Injury Fund liability:

The Treasurer of the State of Missouri, as custodian of the Second Injury Fund, is ordered to pay to Claimant permanent total disability benefits of \$215.95 per week for 80 weeks, beginning October 26, 2005 through and including May 8, 2007; beginning May 9, 2007, the Second Injury Fund is ordered to pay Claimant permanent total disability benefits of \$570.00 per week for Claimant's lifetime.

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:

Allen & Nelson, P.C.

Employee: Erica Powers

Injury No. 05-033874

## **AWARD**

Employee: Erica Powers

Injury No. 05-033874

Dependents:

Employer: Curators of the University of Missouri

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: Self-Insured

Hearing Date: September 24, 2012 and September 27, 2012

## **PRELIMINARIES**

The evidentiary hearing in these cases (Injury No. 04-148624 and 05-033874) was held on September 24, 2012 in Columbia. Employee Erica Powers appeared personally and by counsel Truman Allen. Employer University of Missouri appeared by counsel Rick Montgomery. The Second Injury Fund appeared by counsel Curtis Schube, assistant attorney general. The record was held open for submission of unemployment compensation records; these were submitted on September 27, 2012 and the record was closed. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on November 7, 2012.

## **ISSUES DECIDED**

In Injury No. 04-148624, the hearing was held to determine the following issues:

1. Whether the work-related accident of December 2, 2004 was a substantial factor in the cause of any or all of the injuries and/or conditions alleged in the evidence;
2. The liability, if any, of Employer for permanent partial disability benefits or permanent total disability benefits; and
3. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

In Injury No. 05-033874, the hearing was held to determine the following issues:

Employee: Erica Powers

Injury No. 05-033874

1. Whether the work-related accident of December 2, 2004 was a substantial factor in the cause of any or all of the injuries and/or conditions alleged in the evidence;
2. The liability, if any, of Employer-Insurer for permanent partial disability benefits or permanent total disability benefits;
3. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits; and
4. The liability, if any, of Employer-Insurer for future medical benefits pursuant to Section 287.140, RSMo.

### **STIPULATIONS**

In Injury No. 04-148624, 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 Boone 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 is \$586.20, with compensation rates of \$390.80 for temporary total disability benefits and permanent total disability benefits and \$354.05 for permanent partial disability benefits;
6. That Claimant, Erica Powers, sustained an accident arising out of and in the course of her employment with University of Missouri on December 2, 2004;
7. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation;
8. That Employer-Insurer has paid no medical benefits and no temporary benefits; and
9. That University of Missouri was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times.

In Injury No. 05-033874, the parties stipulated as follows:

Employee: Erica Powers

Injury No. 05-033874

1. That the Missouri Division of Workers' Compensation has jurisdiction over the case;
2. That venue for the evidentiary hearing is proper in Boone 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 is \$855.00, with compensation rates of \$570.00 for temporary total disability benefits and permanent total disability benefits and \$354.05 for permanent partial disability benefits;
6. That Claimant, Erica Powers, sustained an accident arising out of and in the course of her employment with University of Missouri on April 13, 2005;
7. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation;
8. That Employer-Insurer has paid \$36,062.99 in medical benefits and \$2,446.28 in temporary benefits; and
9. That University of Missouri was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times.

### **EVIDENCE**

The evidence consisted of the testimony of Claimant, Erica Powers, as well as Claimant's deposition testimony; medical records, including records of the Veteran's Administration; the narrative report and deposition testimony of Dr. David Volarich; the narrative report and deposition testimony of Barbara Markway, PhD.; the narrative report and deposition testimony of Dr. A. E. Daniel; the narrative report and deposition testimony of Dr. Edwin Wolfgram; the records and deposition testimony of Dr. John Miles; the narrative report and deposition testimony of James England, a vocational rehabilitation consultant; official notice was also taken of the files of the Missouri Division of Workers' Compensation in these cases.

Employee: Erica Powers

Injury No. 05-033874

### **DISCUSSION**

In Injury No. 04-148624, the evidence was clear that on December 2, 2004 Claimant felt something pull in her low back when she was helping a knee surgery patient with a constant positive motion machine. The evidence was also clear that Claimant took ibuprofen for a week, did not miss work, and had a full recovery. None of the many physicians even remotely suggested that this injury was anything other than a very minor injury with a speedy and full recovery. Therefore, no compensation will be awarded in Injury No. 04-148624, and the remainder of the discussion will focus on Injury No. 05-033874.

Psychological issues are central to this case. Claimant has a long personal and genetic history of psychiatric illness. Claimant's mother is on Prozac because of depression. Claimant's father suffered from depression and committed suicide at age 32. It took Claimant eight years to get over the grief. Claimant was placed on Zoloft at the age of 10. She did not approve of her mother's boyfriend. Claimant, her mother and her brother all have Attention Deficit Disorder (ADD). Her uncle suffers from schizoaffective disorder. (Powers depo., p. 63). Claimant's sister treated for ADHD, abused Adderal and still struggles with drugs. Claimant entered the Air Force to get away from her boyfriend. She was discharged from the Air Force due to her failure to adjust, and was given a 10% permanent psychological disability from the Air Force, which was later raised to 30%. She has had three abortions.

Prior to joining the Air Force, Claimant received an associate's degree in nursing science from Moberly Area Community College in 1996. She worked at Williamsburg Skilled Nursing Facility and then did home health care, first through Callaway Community Hospital and later through an agency called Staff Builders. In 1998 she joined the Air Force. She testified that she thought she would be working as a registered nurse while in the Air Force, but she instead was put in charge of medical records. She testified that she did not like the medical records work, and felt she had been lied to. She became angry and depressed. She eventually was hospitalized in a military hospital for depression and suicidal ideation. She was discharged from the Air Force in 1999 after serving approximately fifteen months. Claimant was prescribed Prozac prior to her discharge and was referred to the VA for ongoing treatment, which has continued from that point to the present.

On October 1, 1999, Claimant began working for Columbia Regional Hospital, then owned and operated by the University of Missouri ("Employer" in this case). Claimant generally worked two or three twelve-hour shifts each week in the "step-down unit". She would occasionally take shifts in other units if the patient census in the step-down unit was low. Claimant continued to treat for psychiatric problems at the VA hospital. She testified at the hearing that after going to work for Employer, she stopped taking Prozac and was feeling good about herself. On October 15, 2001, it was noted in the VA records that she had in fact stopped taking Ritalin and Prozac, but it made her unable to function in her job as a nurse. On December

Employee: Erica Powers

Injury No. 05-033874

21, 2001 it was noted that she was depressed and drowsy, unable to concentrate and had to take time off work. On June 4, 2002, it was noted that Claimant had thoughts of hurting herself last week, felt empty and unhappy all the time, and continued to have severe problems with her ex-boyfriend of 10 years. She was directed to continue taking Prozac and increase Ritalin. On November 14, 2002, it was noted that Claimant's mood is depressed and she becomes easily tearful, she gets suicidal ideation once in a while, and again was to continue Prozac and Ritalin. On February 4, 2005, approximately two months prior to the work injury of April 13, 2005, Claimant presented to the VA, at which time she was taking Ritalin, having difficulties with energy, was not taking Ritalin as prescribed, and was taking Vistaril to help with sleep. She was asked to continue Ritalin, start Wellbutrin and continue Vistaril for diagnoses of ADD, anxiety, psychotic disorder not otherwise specified (NOS), nicotine abuse and occupational stressors.

While working for Employer, Claimant attended night school at Columbia College and received a Bachelor's in Criminal Science. Claimant hoped to pursue a law degree thereafter, but her application to the University of Missouri-Columbia School of Law was denied.

As stipulated, on April 13, 2005 Claimant sustained an accident arising out of and in the course of his employment with Employer. On that date, Claimant was repositioning a patient. As she lifted the patient's leg and pulled on a pillow to support the patient, Claimant experienced pain in her low back. Claimant filled out another incident report and did not seek immediate medical attention believing that this pain would go away as before. On April 22, 2005, Claimant went to Karen Hackmann, RNCS, who took her off work and later referred her to Dr. Hoerner. A thoracic MRI ordered by Dr. Hoerner was interpreted as normal. Claimant was placed on a work hardening program; Claimant testified that the work hardening made her symptoms much worse and engendered additional symptoms. Dr. Hoerner subsequently ordered a lumbar MRI which showed minimal annular disc tear and neural foramina narrowing at L4-5. Employer transferred Claimant's care to Dr. John Miles at Columbia Orthopaedic Group.

Dr. Miles saw Claimant six times and prescribed additional physical therapy. Dr. Miles ordered EMG studies and a discogram study. He also prescribed more physical therapy for core strengthening. Dr. Miles released Claimant on October 25, 2005 at maximum medical improvement with nothing else to offer. In his deposition, he explained that all he could do would be a "big operation" and he did not want to do such a big operation without objective evidence of the problem and because Claimant was hypersensitive to the injury. He noted upon her release that Claimant had intractable pain. Dr. Miles testified in his deposition that a referral to a pain management clinic would have been appropriate, but that Claimant needed a holistic approach to pain management which was not available in Columbia. In Dr. Miles' opinion, the pain management physicians in Columbia only wanted to prescribe narcotics, which is not what Claimant needed.

Employee: Erica Powers

Injury No. 05-033874

Claimant had been working light duty in the telemetry department which light duty work ended once she was released by Dr. Miles. Claimant reported back to the step-down unit and was informed that they did not have any work for her. In the course of the next 6 months, Claimant was offered 20 hours of work. Claimant worked a shift in the Intensive Care Unit on a "last-minute call"; this work caused her symptoms to escalate. Claimant applied for unemployment as a constructive discharge and was awarded benefits. She drew benefits from March 26, 2006, to December 9, 2006. Claimant did attempt to find work and was successful in finding a temporary job reviewing medical charts which could be done at Claimant's pace and from her home or office. This lasted only a couple of months. The other job Claimant found was a workers' compensation nurse case manager job. Claimant's work was to coordinate medical care with workers' compensation patients and doctors, go to office visits at times, and write reports for the adjuster. Claimant worked from her home and the schedule was somewhat flexible. Claimant testified that she left that job after three months because the work was becoming too demanding; Claimant testified that she had problems with the traveling required by the job and had trouble concentrating. Claimant also testified that she felt she wasn't being paid enough for what she was doing, and that this also factored into her decision to leave that position.

Following Dr. Miles' release, Claimant was offered psychological treatment by the VA as a part of pain management. Claimant was offended and saw Dr. Street who gave Claimant four steroid injections. Following this series of injections in April and May of 2006, Claimant returned to the VA as her primary source of medical care. Claimant eventually accepted psychological treatment with the pain management through Dr. Carole Bernard and continues with treatment at the VA up to the present.

No doctor has recommended surgery in spite of a documented annular tear. Claimant continues to take multiple medications. These medications, which Dr. Wolfgram counted as 17, include Ambien/Zolpidem, Tramadol, Gabapentin, Cymbalta/Duloxetine, Ritalin/Methylphenidate, Hydrocodone, Cyclobenzaprine/Flexeril, Flomax/Tamsulosin, Albuterol, Levalbuterol, Methylprednisolone, Ferrous/iron, ascorbic acid/vitamin C, Prilosec 1% Neomycin, and Levothroxine/synthroid.

Claimant testified that she has constant low back pain ranging from 2-3 to 8, with leg pain and numbness in her toes, and muscle spasms. Activity causes her pain to go up and she can sit, stand or walk for no more than an hour. Lifting is limited to 10 pounds or less and she has to lie down and rest. Driving and everyday chores are difficult and cannot be done as one normally would do. She is depressed and anxious, which causes difficulty concentrating and focusing. She feels helpless, hopeless and worthless. She spends a lot of time watching TV and there are days she does not get dressed or shower because of pain and depression. She does not clean as she should and has to pace herself with any activity. For the most part, she has not lived alone but lived with her sister or boyfriend since the injury.

Employee: Erica Powers

Injury No. 05-033874

A nerve conduction study in January 2000 confirmed the presence of carpal tunnel syndrome. Dr. James Eckenrode performed a carpal tunnel release shortly thereafter. Claimant was diagnosed with recurrent carpal tunnel syndrome with positive EMG findings on May 2, 2003. She was diagnosed with bilateral carpal tunnel on December 15, 2005 that an EMG/NCV of 1/23/06 determined was moderate. She was diagnosed with and treated at the VA for a sprain and osteoarthritis in the left foot in March of 2006. She underwent right carpal tunnel surgery on December 4, 2006. She began complaining of neck pain and underwent an MRI and X-rays of the cervical spine on October 31, 2006 and December 4, 2006, respectively. She was prescribed Flexeril. On April 17, 2007, she complained of tremors, painful numbness in feet and numbness in the right calf with aching behind the knee. On June 29, 2007, she was diagnosed with bronchitis and a right foot strain. She underwent a left carpal tunnel release on August 20, 2007. She was diagnosed with cellulitis, plantar fasciitis and stress fractures in the right foot on September 24, 2007. She treated for left toe pain in December of 2007. She was prescribed various ongoing pain medications for these injuries. She was diagnosed with hypothyroidism, hyperlipidemia, and right hip pain on August 26, 2008. She was diagnosed with pneumonia, iron deficient anemia, and GERD on March 25, 2009. She continued regular visits for anxiety, depression and psychiatric illness throughout this entire time having never been released at maximum medical improvement for these conditions either prior to or after her accident of April 13, 2005.

Claimant alleges that she is permanently and totally disabled. She is seeking permanent total disability benefits from either Employer or from the Second Injury Fund.

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.*

Second Injury Fund liability exists only if Employee suffers from a pre-existing permanent partial disability that constitutes a hindrance or obstacle to employment or re-employment, that combines with a compensable injury to create a disability greater than the simple sums of disabilities. § 287.220.1 RSMo 2000; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576, (Mo.App.E.D. 1985). When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990).

Employee: Erica Powers

Injury No. 05-033874

In order to find permanent total disability against the Second Injury Fund, it is necessary that Employee suffer from a permanent partial disability as a result of the last compensable injury, and that disability has combined with prior permanent partial disability(ies) to result in total disability. 287.220.1 RSMo 1994, *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990), *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo.App. 1985).

Where preexisting permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability **after** the employer has paid the compensation due the employee for the disability resulting from the work related injury. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 366 (Mo.App. 1992) (emphasis added). In determining the extent of disability attributable to the employer and the Second Injury Fund, an Administrative Law Judge must determine the extent of the compensable injury first. *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-43 (Mo.App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* It is, therefore, necessary that the Employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury Fund liability.

Section 287.200.1 does not require a claimant to distinguish each disability and assign a separate percentage for each of several pre-existing disabilities to prevail on a claim for permanent total disability against the Second Injury Fund. Rather, a claimant must establish the extent, or percentage, of the permanent partial disability resulting from the last injury only, and prove that the combination of the last injury and the pre-existing disabilities resulted in permanent total disability. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo. App. E.D. 2007).

As indicated above, psychological issues are central to this case. Claimant has been evaluated by a psychologist, Barbara Markway, PhD, and by two psychiatrists, Dr. A. E. Daniel, and Dr. Edwin Wolfgram; all three have testified by deposition in this case. Before discussing the testimony of each individually, it is important to note that I find that Claimant has conceived and perpetuated a story that her mental condition was "just fine" after being discharged from the Air Force, and that her current pitiable mental state started on April 13, 2005. Even a cursory review of Claimant's adolescent medical history, Air Force record, and VA medical records prior to April 13, 2005 reveals this story to be a myth. Dr. Markway was completely taken in by this myth and thus did not even question Claimant about anything prior to April 13, 2005; for this reason alone, I find Dr. Markway's testimony to be completely unworthy of belief. Dr. Daniel bought into the myth for quite some time, whereas Dr. Wolfgram recognized that Claimant's story was a fiction.

Psychologist Barbara Markway testified that the injury of April 13, 2005 was the substantial contributing factor in causing Claimant's current depression and anxiety symptoms.

Employee: Erica Powers

Injury No. 05-033874

Dr. Markway also testified that Claimant had pre-existing depression and anxiety that went into remission and that Claimant's not returning to work after the 4/13/05 accident aggravated this condition or "triggered" her depression and anxiety after the accident. Dr. Markway provided a disability rating of 50 percent as a result of the work injury, and of that, 10 percent was preexisting. Dr. Markway did not have the benefit of any of the VA records available for review, which further damages her credibility.

Psychiatrist Dr. Daniel stated in his report: "Percentage of psychiatrically-based disability related to the injury dated April 13, 2005 is 45 to 50% of the person as a whole." He also stated in that report: "Percentage of psychiatrically-based disability due to pre-existing conditions is nil." However, in his deposition, Dr. Daniel "clarified" his report by stating that he believed Claimant had a pre-existing psychiatric-based disability of 15% of the person as a whole.

Psychiatrist Dr. Edwin Wolfgram testified that there was no temporary or permanent psychiatric disability caused by the April 13, 2005 accident. Dr. Wolfgram testified that all of Claimant's psychiatric disability pre-existed and was unrelated to the accident. Dr. Wolfgram diagnosed Ms. Powers with pre-existing somatization disorder, polysubstance dependence, and depression. Dr. Wolfgram testified that Claimant's somatization disorder has caused her to experience pain to a significantly greater degree than can be explained by her physical injuries alone. However, he did not believe that Claimant was malingering. He also stated that "superficial explanations like deceit, malingering, and corruption are not applicable." Dr. Wolfgram believes that Claimant's problems are treatable with lifestyle changes and weaning herself off of medications.

Dr. John Miles testified by deposition. He testified that the objective evidence only showed a really very mild disease that did not warrant surgery. Dr. Miles felt Claimant was a histrionic person; one who thinks everything hurts right as you walk up to them with a needle. Dr. Miles testified that Claimant's physical examinations were benign. On October 25, 2005 Dr. Miles indicated that Claimant was at maximum medical improvement, did not believe she required any permanent restrictions and provided a rating of 1 percent body as a whole. He believed she may have had a small annular tear, but testified that almost everyone has an annular tear and a great majority of them are asymptomatic or merely temporarily symptomatic. Dr. Miles testified that if Claimant had any injury it was a mild lumbar strain. Dr. Miles concluded that Claimant had a fairly minor incident at work, probably a microscopic annular tear, but because of psychosocial stressors, she can't get over it.

Dr. David Volarich testified on behalf of Claimant. Dr. Volarich diagnosed lumbar left flank strain/sprain with disc bulge and annular tear at L4-5 and disc bulge at L5-S1 resulting in moderately severe myofascial pain syndrome and rated Claimant's disability as 30% permanent partial disability of the body as a whole referable to low back. He also rated Claimant with preexisting bilateral upper extremity of 15% permanent partial disability. Dr. Volarich believes

Employee: Erica Powers

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Claimant is at maximum medical improvement but also believes Claimant would benefit from pain management. Dr. Volarich agreed that psychological factors are generally present with chronic pain syndromes and believed psychological disability existed. He did not attempt to quantify the psychological factors or determine which if any were preexisting. He defers to a psychologist or psychiatrist and vocational consultant. Dr. Volarich reported that Claimant said she intended to go back to work and that he has never said a person is permanently and totally disabled if they said they were intending to go back to work. He opined that Claimant was at maximum medical improvement in January of 2008, and that she was unable to work from Dr. Jefferies' maximum medical improvement date of September 18, 2005, because of her pain syndrome. The MRI, discogram, and clinical findings including trigger point at L5-S1 level and loss of range of motion were objective findings. Dr. Volarich did not find radicular symptoms on examination.

Mr. James England is a vocational expert who evaluated Claimant and testified on behalf of the Employer. Mr. England opined that Claimant could work based on the restrictions or lack thereof if one considered the physical problems alone. He did not question the validity of no restrictions by Dr. Miles when he placed Claimant at MMI without restrictions while noting intractable pain. Mr. England also opined that if one looks at the psychological conditions discussed by Dr. Daniel and Dr. Wolfgram, then Claimant cannot work because the severity of these problems would preclude all work. Assuming Claimant was permanently and totally disabled, Mr. England further opined that Claimant's total disability was based on a combination of the April 2005 injury and preexisting conditions.

In almost eighteen years as an administrative law judge, I have seen thousands of injured workers, but I have seen only a handful who impressed me as being as psychiatrically disabled as Claimant. Unless Claimant is an incredible actress (and neither Dr. Daniel nor Dr. Wolfgram believed that Claimant was malingering, feigning or deceiving), there is no question whatsoever that no employer would hire Claimant for any position. Certainly her long history of psychiatric problems, multiple medications, and history of substance abuse would strongly suggest that her psychiatric disability is real, deeply-rooted and permanent. Claimant is clearly permanently and totally disabled.

Employer, in its brief, argues a legal issue that needs to be addressed. Employer argues that Claimant's claim for psychiatric injury or disability is time-barred. The original claim for compensation filed November 3, 2005 alleges injury to "middle and lower back, both feet", and does not contain a claim against the Second Injury Fund. The first amended claim for compensation (although marked "original claim") filed September 21, 2006 alleges injury to "low back, middle back & BAW", and alleges a claim against the Second Injury Fund; one of the pre-existing disabilities alleged is "1998 or 1999 - Anxiety". It is not until the second amended claim, filed April 9, 2009, that Claimant alleges as "part(s) of body injured" in the April 13, 2005 accident as "Low back, middle back, Psyche & BAW". As Employer filed a timely report of

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injury, the statute of limitations is two years from “the last payment made under this chapter on account of the injury”. Employer cites *Hunsicker v. J.C. Indus.*, 952 S.W.2d 376, 382 (Mo. Ct. App. 1997) for the proposition that Claimant cannot allege a “new and distinct” injury after the statute of limitations has expired. I find that Employer is correct that, per *Hunsicker*, the claim against Employer for injuries to Claimant’s “Psyche” would be barred if the April 9, 2009 amended claim was filed outside of the limitations period. However, it is impossible to know from the evidence when Employer made “the last payment ... under this chapter on account of the injury”; although it can be strongly inferred that such “last payment” was made more than two years prior to April 9, 2009, I believe that on such a technical question, and one on which Employer has the burden of proof (see §287.808: “(i)n asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.”) the evidence should be clear. However, as indicated above, I believe that Claimant’s psychiatric problems preexisted the April 13, 2005 accident, and I find no credible evidence to the contrary. I note that Claimant’s failure to include psychiatric injuries in her claim against Employer until four years after the accident is additional evidence that no such psychiatric injuries indeed occurred as a result of the April 13, 2005 accident, and that all of Claimant’s psychiatric anomalies pre-existed the April 13, 2005 work accident.

There is no evidence that the lumbar and thoracic injuries which Claimant sustained in the April 13, 2005 work accident, considered alone, caused Claimant’s permanent and total disability. I find that the April 13, 2005 accident caused permanent *partial* disability only, and I find same to equal 20% of the body as a whole for the physical injuries to Claimant’s lumbar and thoracic spine. I find then, that Claimant is permanently and totally disabled due to the lumbar and thoracic injuries Claimant sustained in the April 13, 2005 accident *in combination with* her substantial pre-existing psychiatric disability. (While Claimant also had preexisting carpal tunnel syndrome, the evidence was essentially silent as to how and whether that condition has contributed to Claimant’s overall disability.) The Second Injury Fund is liable for permanent total disability benefits.

I find that Claimant’s lumbar and thoracic spine injuries, caused by the April 13, 2005 accident, reached maximum medical improvement on October 25, 2005, which is the date that Dr. Miles released Claimant from his care. Although Claimant received pain management treatment after that date (and at least up through the date of hearing), I find that the need for pain management is due to Claimant’s pre-existing psychiatric conditions, particularly somatization disorder and depression. Therefore, the liability of the Second Injury Fund for weekly permanent total disability benefits began on October 26, 2005, subject to a credit for Employer’s liability for permanent partial disability benefits. I realize that Claimant worked approximately twenty hours for Employer after October 25, 2005 and that she worked part-time for a few months, apparently in 2007. I find that the work that Claimant performed after October 25, 2005 did not demonstrate Claimant’s ability (then, or at anytime thereafter) to compete in the open market for employment. The fact that Claimant was unable to sustain even the part-time work is consistent

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with a finding of permanent total disability. I also note that Claimant received unemployment compensation benefits from June 2006 to December 2006. While §287.170.3 states: “(a)n employee is disqualified from receiving temporary total disability during any period of time in which the claimant applies and receives unemployment compensation”, Chapter 287 is silent on whether an employee is disqualified from receiving *permanent* total disability benefits while receiving unemployment compensation. While my personal belief is that Claimant should not be allowed to receive both unemployment compensation and permanent total disability benefits for the same time period, the “shall construe the provisions of this chapter strictly” language of §287.800 must be considered. If the General Assembly had intended that unemployment compensation and permanent total disability benefits be mutually exclusive, they would have so stated in Chapter 287.

The liability of Employer for permanent partial disability benefits is 80 weeks of benefits at the weekly rate of \$354.05; the permanent total disability rate is \$570.00 per week. The weekly differential is \$215.95.

As I find that the need for pain management is due to Claimant’s pre-existing psychiatric conditions, no award of future medical benefits is made against Employer.

### **FINDINGS OF FACT AND RULINGS OF LAW IN INJURY NO. 04-148624**

In Injury No. 04-148624, in addition to the facts and legal conclusions to which the parties stipulated, I find the following:

1. The work-related accident of December 2, 2004 did not cause any permanent injury or disability to Erica Powers (“Claimant”);
2. The work-related accident of December 2, 2004 was not a substantial factor in causing any of the injuries or conditions alleged in the evidence;
3. Employer has no liability for permanent partial disability benefits or permanent total disability benefits;
4. The Second Injury Fund has no liability for permanent partial disability benefits or permanent total disability benefits; and
5. The Claim for Compensation should be denied in full.

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**FINDINGS OF FACT AND RULINGS OF LAW IN INJURY NO. 05- 033874**

In Injury No. 05-033874, in addition to the facts and legal conclusions to which the parties stipulated, I find the following:

1. Erica Powers (“Claimant”) has a long personal and genetic history of psychiatric illness;
2. As of April 13, 2005, Claimant had a pre-existing permanent partial disability due to psychiatric illness, including somatization disorder, polysubstance dependence and depression;
3. The work-related accident of April 13, 2005 was a substantial factor in the cause of injuries to Claimant’s lumbar and thoracic spine, including an annular tear and injuries to soft tissues;
4. The work-related accident of April 13, 2005 was not a substantial factor in the cause of any psychiatric or psychological illness or disability;
5. The deposition testimony of Dr. Barbara Markway was not credible;
6. Claimant is unable to compete in the open market for employment;
7. Claimant is permanently and totally disabled;
8. The work-related accident of April 13, 2005, considered alone, did not result in Claimant’s permanent and total disability;
9. The work-related accident of April 13, 2005, considered alone, resulted in a permanent partial disability of 20% of the body as a whole, referable to the lumbar and thoracic spine;
10. Employer’s liability for permanent partial disability benefits is 80 weeks of benefits at the weekly rate of \$354.05, totaling \$28,324.00;
11. Claimant is unable to compete in the open market for employment as a result of the April 13, 2005 lumbar and thoracic spine injuries in combination with her pre-existing psychiatric disabilities;
12. The Second Injury Fund is liable for the payment of permanent total disability benefits;
13. Claimant’s lumbar and thoracic spine injuries from the April 13, 2005 accident reached maximum medical improvement on October 25, 2005;
14. The Second Injury Fund’s liability for the payment of permanent total disability benefits at the stipulated weekly rate of \$570.00, began on October 26, 2005, subject to a credit for the permanent partial disability attributable to Employer for the April 13, 2005 lumbar and thoracic spine injuries;
15. The Second Injury Fund’s liability for weekly benefits shall cease upon Claimant’s death;
16. Claimant’s need, if any, for future pain management, is due solely to Claimant’s pre-existing psychiatric conditions;
17. The evidence does not justify an award of future medical benefits; and

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18. Employer has no liability for future medical benefits.

**ORDER IN INJURY NO. 04-148624**

In Injury No. 04-148624, the claim for compensation against Employer is denied in full, and the claim for compensation against the Second Injury Fund is denied in full.

**ORDER IN INJURY NO. 05-033874**

In Injury No. 05-033874, Employer is ordered to pay to Claimant the sum of \$28,324.00 for permanent partial disability benefits.

The Treasurer of the State of Missouri, as custodian of the Second Injury Fund, is ordered to pay to Claimant permanent total disability benefits of \$215.95 per week for 80 weeks, beginning October 26, 2005 through and including May 8, 2007; beginning May 9, 2007, the Second Injury Fund is ordered to pay Claimant permanent total disability benefits of \$570.00 per week for Claimant's lifetime.

Claimant's attorney, Allen & Nelson, PC, is allowed 25% of all 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 – 12-28-12  
Chief Administrative Law Judge  
Division of Workers' Compensation