

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

Injury No.: 04-114796

Employee: Neva Vance
Employer: Health Systems, Inc.
d/b/a Hillcrest Healthcare Nursing Home (Settled)
Insurer: Missouri Nursing Home Insurance (Settled)
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 July 11, 2011, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Lawrence C. Kasten, issued July 11, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 8th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Neva Vance Injury No. 04-114796
Dependents: N/A
Employer: Health Systems, Inc. d/b/a Hillcrest Healthcare Nursing Home (settled)
Additional Party: Second Injury Fund
Insurer: Missouri Nursing Home Insurance (settled)
Appearances: James Haupt, attorney for employee.
Eileen Krispin, Assistant Attorney General for the Second Injury Fund.
Hearing Date: April 6, 2011 Checked by: LCK/rf

SUMMARY OF FINDINGS

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? November 4, 2004.
5. State location where accident occurred or occupational disease contracted: Jefferson 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? Yes.

11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee injured her low back moving a patient.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Low back and body as a whole.
14. Nature and extent of any permanent disability: See Rulings of Law.
15. Compensation paid to date for temporary total disability: \$4,954.66
16. Value necessary medical aid paid to date by employer-insurer: \$25,205.25
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$323.13
19. Weekly compensation rate: \$215.42
20. Method wages computation: By agreement.
21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: N/A.

FINDINGS OF FACT AND RULINGS OF LAW

On April 6, 2011, the employee, Neva Vance, appeared in person and with her attorney, James Haupt, for a hearing for a final award. The Second Injury Fund was represented at the hearing by Assistant Attorney General Eileen Krispin. At the hearing, the parties agreed on certain undisputed facts and identified the issue that was in dispute. These undisputed facts and issue, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. Health Systems, Inc. d/b/a Hillcrest Healthcare Nursing Home was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its' liability was fully insured by Missouri Nursing Home Insurance.
2. On November 4, 2004 Neva Vance was an employee of Health Systems, Inc. d/b/a Hillcrest Healthcare Nursing Home and was working under the Workers' Compensation Act.
3. On November 4, 2004 the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The average weekly wage was \$323.13. The rate of compensation for permanent total disability and permanent partial disability is \$215.42 per week.
7. The employee's injury was medically causally related to the accident.
8. The employer-insurer paid \$25,205.25 in medical aid.
9. The employer-insurer paid \$4,954.66 in temporary total disability for 23 weeks from January 3, 2006 through June 13, 2006. The parties stipulated that the employee was at maximum medical improvement on June 13, 2006.

ISSUES

1. Liability of the Second Injury Fund for either permanent total disability or permanent partial disability.

EXHIBITS

Employee Exhibits

- A. Stipulation for Compromise Settlement in Injury Number 04-114796 and medical records.
- B. Medical records of Contrea, Inc. and Dr. Graves.
- C. Deposition of Dr. Volarich including his CV and medical report.
- D. Deposition of James England, Jr. including his CV and report.

Second Injury Fund Exhibits

- I. Deposition of Neva Vance taken in October of 2007.
Judicial notice of the contents of the Division's files for the employee was taken.

WITNESS: Neva Vance, the employee.

BRIEFS: The Second Injury Fund filed its brief on May 20, 2011. The employee filed her brief on May 23, 2011.

FINDINGS OF FACT:

The employee was born in 1955 and lives in Barnhart. She is not employed and was last employed on January 3, 2005. After her November 4, 2004 accident, the employee attempted to return to work but was unable to do so. She is 5'6" tall and weighs 175 pounds. On November 4, 2004, she weighed about 150 pounds, and has put on the weight due to low physical activity.

The employee testified that she had motor vehicle accidents in 1981 and 1986 where she was rear ended. She injured her neck in both accidents. She has had physical problems in her neck and right shoulder and knee. She also had migraines from the accidents. She missed time from work due to the neck, shoulder and migraines. It made her jobs more difficult.

The employee testified at the deposition that she turned down overtime due to the pain. She received assistance from coworkers due to the neck and shoulders. Prior to 2004 she did not have any difficulties performing her job duties because of her right shoulder and neck and worked through the pain. The employee testified at the hearing, she was at a loss why she would have said those things.

The employee testified that in 1986 she was on a porch which collapsed, she fell about 15 feet and injured her ankles and left foot. She fractured a bone in her left foot and tore ligaments in both ankles. Her left foot was put in a cast and her right foot was wrapped. She continued to have ongoing problems with both ankles including swelling. Her left ankle still sprains easily. Her right foot still has bone chips which caused problems.

In her deposition, the employee testified that she had no problems walking or sitting but did have problems standing due her feet. She did not feel that she needed to lie down during the day due to the pain. The employee testified at the hearing that she did not remember saying that at the deposition. In her deposition, the employee testified that her ankles caused her problems in performing the duties of her job; she received help with her job, turned down overtime, and missed time from work.

The employee testified that prior to her November 4, 2004 accident, she had neck, ankle, and shoulder problems which caused her to miss work and restricted her activities including lying down during the day. The employee testified in her deposition that prior to November of 2004, she had physical problems doing her job with her neck, shoulder, right knee and feet. When asked if she worked through or missed work, she testified she just worked in pain.

The employee testified that she had suffered from depression all of her life. She had nightmares, mood swings, and depression. As a child she cried herself to sleep. In school, she

had trouble with math and spelling, and was in special classes. She had poor grades in school and had a learning disability which was later diagnosed as attention deficit disorder. Her father was illiterate which was quite upsetting. She quit school in the 8th grade, and got married at age 15. She eventually got her GED and received training as a certified nurse's assistant in 2003 from the nursing home she worked for. She continued to have problems with her depression and learning disability.

The employee testified after she married in 1970, she did not work until 1995 when she worked as a cashier at Wal-Mart. She worked there for about two years but had trouble due to her mental and physical problems including attention deficit disorder. She had anxiety being around a lot of people and had trouble weighing products. She then worked at Children's World as a day care assistant. She helped with feeding, changing, lifting and sitting with children. She had neck and knee problems from lifting. It was mentally stressful due to being responsible for 15 children. She worked there about two years and left to work at a Baptist Church as a pre-school attendant that did not require any lifting. She taught children but there was a lot of stress. She worked there for a year or two until she lost her job due to being fired for falling asleep at the job. She was sleeping due to too much pressure both mentally and physically.

She then worked at Partner's Financial Company as an office worker. She answered phones and copied checks but was unable to enter records into the computer. She was reprimanded 3 or 4 times because she could not answer the phone and do something else at the same time. She could not get the right pattern in copying checks. There were a lot of pressures, and after 9 months, she was terminated. She then worked at Jefferson County Job Service and her job was to hand out medication. She had trouble giving right doses, gave out the wrong dose sometimes, and sometimes did not give the dose at all. The employee had physical problems which made it hard to clean out cabinets and work with patients. She was terminated from her job and started working at Hillcrest Nursing.

The employee testified that she received treatment for her psychological difficulties. In the late 1990's, she was diagnosed with post traumatic stress disorder and bi-polar disorder. Due to the PTSD, the employee thought she was going crazy and her body shook. She could not drive, could not concentrate or form a sentence. She was having consistent problems in the late 1990s and early 2000s. She had panic attacks, which involved sweating, dizziness, tunnel vision, nausea, and trouble concentrating. She missed time from work due to PTSD which also affected her job performance. She had to get assistance from co workers. Due to her bi-polar disorder, the employee had terrible mood swings, loss of thought, anger, irritability, sleeping a lot, and stayed up days and nights. The employee cried a lot and had a feeling of paranoia that people were talking about her. She had tunnel vision when she was at the grocery store. Her bi-polar disorder affected her work at each place of employment. She missed time from work which was part of the reason for termination. She continues to have problems with depression.

The employee testified in her deposition that she was first diagnosed with post traumatic stress disorder in 1996 after her first husband was killed in an accident and her second husband had an affair. Sometimes at work she would have to go home due to the PTSD and the depression caused problems with sleeping.

In the initial client treatment plan in January of 2001, the diagnostic impression was adjustment disorder and to rule out bipolar. The employee was experiencing a depressed mood and having difficulty adjusting to a divorce/separation and lack of income.

On November 30, 2001 the employee had a psychiatric evaluation by Dr. DaSilva, for depression, anxiety, mood swings, poor sleep and nightmares. The employee had a life long history of mood swings with depression. As a child she cried herself to sleep. She did not have any treatment until a divorce last year precipitated a marked increase in her symptoms. She was treated by Dr. Data until she lost her insurance and started treating at Comtrea Community Treatment. The employee was taking Celexa, Effexor, Buspar, Xyprexa, and Xanax. The employee's husband died in a car accident eleven years ago and she married again at age 37. She divorced her second husband and he was not paying any support. Dr. DaSilva noted the employee was understandably depressed, anxious, and there was a disruption in her life. The diagnostic impression was adjustment disorder with depressed and anxious mood, rule out bipolar disorder, mixed, by history. The global assessment function was 60 out of 80. The plan was to continue her previous medications.

The employee completed a client treatment plan on February 20, 2003. She was diagnosed with bipolar disorder. The GAF code was 60. The employee experienced periods of depression and anxiety that hindered the employee's ability to follow through on goals. On July 18, 2003 the employee stopped going to the therapist and continued with a doctor only.

The employee testified that while working as a C.N.A at Hillcrest Healthcare Nursing Home she hurt her low back on November 4, 2004. She was attempting to move a patient from the bed to a wheelchair. All of the patient's weight was on her, and she twisted and felt a searing hot pain in her low back.

The employee saw Dr. Krewet on November 5. X-rays of the lumbar spine were negative. He diagnosed a low back strain; prescribed Flexeril and ibuprofen; and put the employee on limited duty. On November 11, Dr. Krewet diagnosed low back strain with radiculopathy to the right knee and on November 18 diagnosed a low back strain with right radiculopathy and rule out a herniated disc. Dr. Krewet ordered a lumbar MRI which was done on November 22. The impression of the radiologist was an L3-4 anterior and posterior disc bulge; a L4-5 posterior disc bulge associated with a more focal left posterior lateral disc protrusion that caused left lateral stenosis and a focus of increased signal intensity consistent with a focal annular tear. At L5-S1 there was a decreased disc signal associated with the posterior disc protrusion and a subtle annular tear at the posterior aspect of the protruding disc material.

In December, the employee was referred to Dr. Maynard an orthopedic surgeon. Dr. Maynard referred the employee to Dr. Anderson at The Pain Management Center for low back and leg pain. Dr. Maynard had prescribed a Medrol Dos Pak twice; and ordered physical therapy and pain management. The past medical history was significant for bipolar disorder. Dr. Anderson diagnosed multi-segmental degenerative disc disease of the lumbar spine most noted at

the L4-5 level. Dr. Anderson prescribed a series of lumbar epidural steroid injections which he performed on February 16, February 28 and March 21, 2005.

On April 4, 2005 the employee continued to have symptoms which limit her on a day-to-day basis. Dr. Anderson ordered a lumbar discogram and CT scan which were done on April 11. The discogram showed significant disc disruption resulting in concordant pain at L4-5 and to a lesser extent at L3-4; and a small left paracentral annular tear noted at L5-S1 which was concordant. The CT showed evidence of degenerative joint disease at the L3-4 facet joints with no evidence of disc protrusion or definite central or lateral spinal stenosis; at L4-5 there was a left posterior lateral protrusion of the disc causing left lateral spinal stenosis; and at L5-S1 a left paracentral disc protrusion causing left lateral spinal stenosis.

On April 20 Dr. Anderson noted the employee had significant disc disruption particularly at L3-4 and L4-5; and a moderate disc disruption at L5-S1. On June 8, Dr. Anderson performed a percutaneous disc decompression at L4-5 and L5-S1; and a radio frequency ablation of the posterior lateral branches of the sinuvertebral nerves bilaterally at L4-5 and L5-S1. On June 27, Dr. Anderson noted the employee had only marginal improvement in her symptoms. He diagnosed multi-segmental concordant disc disruptions most significantly at L3-4 and L4-5 and to a lesser degree at L5-S1; and prescribed Neurontin

On July 20, 2005 Dr. Anderson performed a selective L5-S1 nerve root block and ordered physical therapy. In August of 2005 additional therapy was ordered.

A lumbar MRI on October 17, 2005 was very similar to the prior lumbar MRI on November 21, 2004. On October 25, the employee went to Dr. Anderson's office and it was noted that the MRI showed little change compared to the prior MRI. After her June disc decompression her overall back and left leg pain symptoms improved. Dr. Anderson ordered a Brief Battery Health Inventory II that was performed on November 22. The clinical summary of findings stated that if there is an objective basis for the employee's diffuse reports of somatic symptoms and perceived disability, her reported depression may be a reaction to her condition. If not, the profile may suggest a somatoform disorder with diffuse unexplained medical symptoms associated with a prominently depressed mood. Psychological treatment for somatic preoccupation, and exaggerated perception of disability and depression should be considered. The somatic complaints were extremely high, the pain complaints were average, the functional complaints were extremely high, the depression was high, the anxiety was moderately high and suicidal ideation was present. Dr. Anderson noted that the Brief Battery for Health Improvement showed significant underlying depression and anxiety symptoms. The study was found to be valid and based on the test they did not find any reason to question whether or not her pain complaints were valid. The employee was seeing both a psychiatrist for medication management and a psychologist for counseling. Dr. Anderson added a low dose of Neurontin and Amitriptyline with Hydrocodone.

On January 10, 2006 Dr. Anderson noted that the employee experienced severe low back and bilateral leg pain, right greater than left. MRI studies demonstrated a significant right L3-4 paracentral disc disruption with thecal impingement, a left L4-5 paracentral herniated disc and a

slight right paracentral disruption without thecal impingement at L5-S1. Dr. Anderson performed a microdiscectomy to the right at L3-4, to the left at L4-5 and to the right at L5-S1 with excision of the disc. The post operative diagnosis was herniated disc to the right at L3-4, to the left at L4-5 and to the right paracentral L5-S1 with bilateral radiculitis. The employee followed up with Dr. Anderson in January and February. The employee treated with a psychiatrist at Comtreia in 2006.

Dr. Anderson stated on April 10 that the employee was on Hydrocodone almost daily, along with Amitriptyline, and Neurontin. On June 8, 2006 the employee saw Dr. Anderson with continue consistent right buttock and low back pain and rare left hip pain. She was advised to lift no more than twenty five pounds nor perform repetitive twisting, bending, or lifting. She would need to change positions at least once every half hour. The medications would be continued through July but the employee would need to have her primary care physician to continue her medicines. She was to follow up on an as needed basis.

The employee testified that when she was released from medical care in June of 2006, she could not go back to work either physically or mentally. She continued to have back, buttock and leg pain. In her deposition, the employee testified that she last worked sometime in January of 2005 and left work due to the back injury.

On September 6, 2006 the employee saw Dr. Draves, a family practice doctor. The employee was on Neurontin, Wellbutrin, and Seroquel. The employee viewed her ADD as a persistent problem and she continued to be bothered by chronic back pain. She used Lortab on an as needed basis. Dr. Draves diagnosed bipolar, ADD and chronic back pain. In October Dr. Draves refilled the Adderall for ADD and Lorcet Plus for chronic back pain.

On February 14, 2007 the employee saw a nurse practitioner for medication management and supportive psychotherapy. The employee takes Hydrocodone as needed for her back pain; and is also on Neurontin and Amitriptyline. Diagnosed were major depression, anxiety disorder and ADHD. She had increased stressors of continued physical and mental illness, history of multiple law suits and engagement to her boyfriend. Her GAF was 60-65. The employee was continued on Wellbutrin, Seroquel, and Adderall.

In 2007, the employee had counseling. On February 20, 2007 the employee saw Dr. Draves for pain and numbness on the lateral aspect of her left foot. She had numbness down her left leg that had gotten worse in her foot recently. The left foot numbness and left leg radiculopathy was probably related to her lumbar discectomy. In May, the employee continued to have neuropathy in her left third, fourth, and fifth toes secondary to lumbar discectomy and Neurontin was increased.

The employee settled her claim against the employer-insurer on June 27, 2007 for an approximate disability of 40% of the body as a whole at the level of the lumbar spine.

In July of 2007 the employee saw Dr. Baber, a psychiatrist. The employee's diagnosis had changed over time. Historically she was diagnosed and treated with adjustment disorder

with depressed and anxious mood and to rule out bipolar disorder. Most recently she has been diagnosed with ADHD by history and adjustment disorder with anxiety and depression. The employee had a somewhat trauma symptomatology and her trauma symptoms stem back to the death of her husband in 1991. In the employee's second marriage, her husband was physically and emotionally abusive to her. Currently she is stressed because her daughter has been separated from her husband and is now living with her. Dr. Baber diagnosed depressive disorder, NOS. He noted chronic back pain and a GAF of 65-70.

In September of 2007 the employee saw Dr. Stromsdorfer, a psychiatrist. The employee has been seen at Comtre for some time for addressing mood swings, predominantly depressed mood, and attention deficit disorder tendencies which has gone on for many years. Her sleep is a poor and her energy and concentration is horrible. Diagnosed was bipolar disorder, NOS; and attention deficit disorder, NOS. Seroquel, Wellbutrin and Adderall were continued. In October, Dr. Stromsdorfer discontinued Wellbutrin and started Cymbalta.

In November of 2007 the employee saw Nurse Practitioner Nash for increased stress. She had a history of bipolar and is seeing a psychiatrist and a therapist; and is taking Cymbalta and Adderall. She is not getting along with her fiancé which is causing her a lot of extra stress. Diagnosed was anxiety secondary distress with history of bipolar. She was given Ativan. In December, the employee saw Dr. Stromsdorfer.

In 2008 the employee continued with counseling. In March, May and June, the employee saw Dr. Stromsdorfer. In May, her mood worsened and Cymbalta was increased. In August, Nurse Practitioner Nash noted that the anxiety caused stomach problems. She has a lot of stress in her relationship with her fiancé and was seeing a counselor and a psychiatrist. She has a history of bipolar disorder and attention deficit disorder. Klonopin was prescribed. In September, the employee had been more stressed due to breakup with her fiancé. Dr. Stromsdorfer prescribed Klonopin and continued the other medications. In October, the employee had high stress due to her daughter and three children living with her and the employee had broken up with her fiancé. Her medication and counseling was continued. In December, the employee's stress was high due to problems with her daughter.

In 2009, the employee continued with counseling. In March and July, Dr. Stromsdorfer continued the medications. In August, Dr. Stromsdorfer noted her depression was worse and Cymbalta was increased.

The employee testified that she has not worked since Hillcrest Health Care. On a typical day, she has sleep problems due to her neck, shoulder, knee, and low back pain. She gets about 4 hours a sleep a night and has to stay in bed due to all the problems The employee has had trouble sleeping since the 1990's and her sleep pattern is out of control. She has a hard time getting out of bed due to the pain. She has difficult dressing and trouble crossing her legs. She has trouble doing household chores, and cannot do anything over her head or to the side, or carrying things due to her neck and back. She has problems with pushing, pulling, bending, stooping, twisting due to her neck and low back. She has to alternate between sitting and standing due to her back and knee. She cannot balance her checkbook and has problems with basic math. She does not

write letters, does not go out very much, and does not do any yard work. She is unable to work due to the combination of all of her disabilities. She lies down for back pain once in a while but mainly now it is the combination of everything. On average she lies down a couple of times a day for 15 minutes to a half hour due to her back but it does vary due to her stress level and sometimes it is more than twice a day. She has to lie down due to lack of sleep in addition to her back. Prior to 2004, she was not been able to control when she needed to lie down, and got fired from one job due to sleeping.

In her deposition, the employee testified that she does not think she can do any job due to too many mental and physical problems. When she is at home she lies down to help relieve pain. She cannot sleep for the physical pain which contributes to the mental pain. Prior to 2004, she slept a lot and would sleep from the time she got home from work until she had to get up due to problems with her feet so she could work. She took Tylenol P.M. to help get to sleep due to the pain. At work she would lie down during breaks and lie in car and recline due to pain. Now she cannot sleep all night and wakes up 4-5 times a night and gets 4-5 hours of sleep.

The employee testified that she is currently on and has been on medications for depression and bi-polar condition since the late 1990's. She just recently got on Lithium for depression and bi-polar. Prior to 2004, she had been on similar medications for depression, to help her with sleep, for concentration and focus, for nerves, and stress. She has been on non-steroidal anti-inflammatory for her knees and shoulders; and Neurontin for her neck, back and knee. She is being treated at Comtreia for her mental health and by Dr. Draves for the back, knee, and neck pain.

The employee saw Dr. Volarich on September 26, 2006. Dr. Volarich's deposition was taken on August 4, 2009. With regard to the November 4, 2004 injury, Dr. Volarich diagnosed discogenic pain syndrome, lumbar spine secondary to annular tears and disc bulges at L3-4, L4-5 and L5-S1; was status-post percutaneous disc compression at L4-5 and L5-S1 and radio frequency ablation; and persistent back syndrome status-post three level microdiscectomy at L3-4 to the right, L4-5 to the left and L5-S1 to the right; and failed back syndrome with persistent back pain and right leg radiculopathy.

It was Dr. Volarich's opinion that as a result of the November 4, 2004 injury, the employee sustained a 45% permanent partial disability of the body as a whole rated at the lumbar sacral spine due to the lumbar radicular syndrome/discogenic pain syndrome secondary to disc bulges and annular tears at L3-4, L4-5, and L5-S1 causing lower extremity radicular symptoms that required percutaneous disc decompression followed by percutaneous microdiscectomy. The rating accounts for ongoing back pain syndrome, loss motion and continuing right lower extremity radicular symptoms. It was Dr. Volarich's opinion that the low back disability created a hindrance to her employment or re-employment.

With regard to the medical conditions that pre-existed November 4, 2004, Dr. Volarich diagnosed 1) minor cervical strain syndrome, 2) right ankle lateral compartment strain with avulsion fracture distal fibula; 3) historic fractures left second and third toes; 4) bipolar disorder with post traumatic stress disorder, attention deficit disorder and learning disability.

It was his opinion that the employee had the following permanent industrial disabilities that were a hindrance to her employment or re-employment:

1. A 15% permanent partial disability of the body as a whole rated the cervical spine due to the chronic cervical syndrome causing neck pain and loss motion.
2. A 20% permanent partial disability of the right lower extremity rated at the ankle due to the chronic strain syndrome and avulsion fracture that continued to cause pain, swelling and mild loss in motion.
3. A 15% permanent partial disability of the left lower extremity rated at the foot due to the fractures of the second and third toes that continue to cause pain with prolonged weight bearing.
4. Considerable disability existed as a result of her bipolar disorder, post traumatic stress disorder, attention deficit disorder and learning disability. Dr. Volarich deferred to psychiatric evaluation for that assessment.

It was Dr. Volarich's opinion that the combination of her disabilities created a substantially greater disability than the simple total of each separate injury/illness and a loading factor should be added.

Dr. Volarich put restrictions to the spine of avoiding all bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks to an as needed basis. The employee should not handle any weight greater than fifteen to twenty pounds and limit the task to an occasional basis assuming proper lifting techniques. The employee should not handle weight over her head or away from her body, nor should she carry weight over long distances or uneven terrain. She should avoid remaining in a fixed position for anymore than about thirty minutes at a time including both sitting and standing, and should change positions frequently to maximize comfort and rest when needed. The restrictions for the lower extremities (ankles) were that the employee should limit repetitive stooping, squatting, crawling, kneeling, pivoting, climbing, and all impact maneuvers. She can handle weight to tolerance including standing and walking.

It was Dr. Volarich's opinion that the employee is unable to engage in any substantial gainful activity nor can she be expected to perform in an ongoing working capacity in the future. It was his opinion that the employee cannot reasonably be expected to perform in an ongoing basis eight hours per day, five days per week throughout the work year. It was Dr. Volarich's opinion that the employee is unable to continue in her line of employment that she last held as a CNA for Hillcrest Care nor can she be expected to work on a full time basis in a similar job.

The employee is 50 years old, has an education limited to the eighth grade but achieved a GED, has worked only as a nurses' aid or child care worker the majority of her work career, has been unable to get back to work since she was fired in January of 2005 and is applying now social security disability. It was Dr. Volarich's understanding that the employee was fired for being unable to perform her job duties following the November 4, 2004 injury due to her back problems. Before November 4, 2004 the employee was able to work unrestricted duty and denied having any problems with her back.

Dr. Volarich recommended that the employee undergo vocational evaluation and assessment to determine how she might best return to the open labor market. If the vocational assessment is able to identify a job for which she is suited, Dr. Volarich did not have an objection with her attempting to return to work based on his limitations. If the vocational assessment is unable to identify a job for which she is suited, then it is his opinion that the employee is permanently and totally disabled as a result of the work related injury of November 4, 2004 in combination with her pre-existing medical conditions. Dr. Volarich deferred to the vocational expert as to whether or not there were jobs that could meet his restrictions.

Dr. Volarich did not review any medical records for treatment for her psychiatric condition, neck condition, or lower extremities. With respect to the cervical spine and lower extremities, the employee worked full duty without any physician imposed or self imposed restrictions, and did not miss any additional days from work.

The employee saw James England on March 9, 2007 for a vocational rehabilitation evaluation. Mr. England's deposition was taken on August 25, 2009. The employee appeared to be rather uncomfortable physically and kept moving around when seated. She got up to move around every fifteen to twenty minutes. She was extremely nervous and anxious. He had to really work at redirecting her to keep her on the topic that they were discussing and get the questions answered because she seemed to really having trouble focusing. She had a very poor memory as well as a rather scattered thought process. The employee completed only the eighth grade. She got her GED around 2002 and had CNA training in about 2003 at a nursing home. The employee struggled to remember the details of her work history. Mr. England gave the employee the wide range achievement test and she scored at the seventh grade level on reading, and at the sixth grade level on arithmetic. On the reading comprehension portion of the adult basic learning examination, the employee scored at the post high school level on reading articles and paragraphs. Her academics should allow her to handle a variety of positions. It appeared that the employee's primary past skill would have been that of a nurses' aid which would normally require a medium level of exertion. It does not appear that the employee had any usable transferable skills at sedentary to light levels of exertion.

The employee told Mr. England that her primary complaint is pain in her low back going into her hips on the right side down to the knee level and in the left leg all the way into her toes. Since her second back surgery she has numbness in her left leg all the way into the foot. She also has swelling in her left foot and the toes have begun to curl under the foot. Mr. England reviewed the restrictions from Dr. Anderson and Dr. Volarich. Mr. England stated that the employee is a 51 year old woman who has a varied and somewhat sporadic work history. She has had trouble maintaining herself in a number of job settings in the past because of some pre-existing problems. Working at her overall functional ability, Mr. England did not believe that the employee is likely to be able to successfully compete for employment nor able to sustain it in the long run. The employee was having extreme problems with being anxious and depressed as well as having trouble focusing mentally on the topics discussed. Her thinking process comes across as scattered. She also seemed to be in obvious physical discomfort. All of those things would have a negative effect on her ability to project well in a prospective interview setting. More

importantly, she has difficulty sleeping well at night and at times is very tired during the day and cannot think very clearly. She is finding the need to lie down during the day and to change positions often particularly sitting with her legs elevated if she is not lying down just to relieve some of her discomfort. She has significant problems with her bipolar condition and anxiety. Mr. England stated that in combining all the factors it was his opinion that he did not believe the employee is able to sustain any type of regular work activity on a consistent day-to-day basis. Absent significant improvement in her overall functioning, Mr. England believed she was more likely to remain totally disabled from a vocational standpoint and would not be a good candidate for vocational rehabilitative services.

Mr. England did not review any psychiatric records. There were no records with regard to the 1981 to 1986 motor vehicle accidents and the 1986 injury. Mr. England stated that in his review of the medical records for her low back and hip, it would not surprise him that the employee needed to lie down to deal with the pain and it was possible that it was just due to that injury alone. Prior to November 4, 2004, she obviously was not lying down during the day to help deal with the pain since she was working. As far as he knows, since November of 2004, the employee has woken up at least four times during night and gets no more than four to five hours of actual sleep. Mr. England stated that he assumed the part of that was due to his low back pain but did not know how much of it may be emotional.

Mr. England stated that if just due to the November 4, 2004 injury the employee consistently needed to lie down during the day and change positions, it was his opinion that she was unemployable due to that injury itself. It was his opinion that if that injury was not the only reason she has to lie down and change positions it was possible that she was unemployable due to the combination of her physical and psychiatric disabilities. Mr. England stated that there was not a job in the open labor market for someone who needs to lie down during the day and change positions often.

RULINGS OF LAW:

Issue 1. Liability of the Second Injury Fund for permanent total disability or permanent partial disability.

The employee is claiming that she is permanently and totally disabled. The term “total disability” in Section 287.020.7 RSMo, means inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. The phrase “inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. See Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1992). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. See Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo. App. 1992). Total disability means the “inability to return to any reasonable or normal employment.” An injured employee is not

required, however, to be completely inactive or inert in order to be totally disabled. See Brown v. Treasurer of State of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990).

The question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she entered. See Reiner at 367, Thornton v. Haas Bakery, 858 S.W.2d 831, 834 (Mo. App. 1993), and Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995). The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo.

The first question to be addressed is whether the employee is permanently and totally disabled.

Dr. Anderson stated that the employee had consistent low back pain, right buttock pain, and left hip pain, and was on was on Hydrocodone, Amitriptyline, and Neurontin. Dr. Anderson put restrictions of no lifting more than twenty five pounds nor perform repetitive twisting, bending, or lifting; and the employee should change positions at least once every half hour.

It was Dr. Volarich's opinion that the employee is unable to engage in any substantial gainful activity nor can she be expected to perform in an ongoing working capacity in the future. It was his opinion that the employee cannot reasonably be expected to perform in an ongoing basis eight hours per day, five days per week throughout the work year. Dr. Volarich deferred to a vocational expert as to whether or not there were jobs that could meet the employee's restrictions. If the vocational assessment is unable to identify a job for which she is suited, then it is his opinion that the employee is permanently and totally disabled.

Mr. England stated that the primary past skill of a nurses' aid would require a medium level of exertion. It did not appear that the employee had any usable transferable skills at sedentary to light levels of exertion. It was his opinion that the employee would not be able to successfully compete for employment nor sustain any type of regular work activity on a consistent day-to-day basis; and would likely remain totally disabled.

Based on a review of all the evidence, I find that the opinions of Dr. Anderson, Dr. Volarich and Mr. England are credible and persuasive on whether the employee is permanently and totally disabled. I find that no employer in the usual course of business would reasonably be expected to employ the employee in her present condition and reasonably expect the employee to perform the work for which she is hired. I find that the employee is unable to compete in the open labor market and is permanently and totally disabled.

Given the finding that the employee is permanently and totally disabled, it must be determined whether the primary injury alone and of itself resulted in permanent total disability. The Second Injury Fund has no liability and the employer is responsible for full permanent total disability benefits if the last injury "considered alone and of itself," results in permanent total disability. See Roller v. Treasurer of the State of Missouri, 935 S.W. 2d 739 (Mo.App.1996), and Landman v. ICS, 107 S.W.3d 240, 248 (Mo. banc 2003).

The employee's testimony at the hearing has some inconsistencies with her deposition testimony and what she told Dr. Volarich and Mr. England in 2006 and 2007 regarding the primary injury and the pre-existing conditions. The employee testified at the hearing that she missed time from work due to her pre-existing cervical problems. She testified during her deposition, that she did not miss work for cervical pain. The employee testified at the hearing that prior to her November 4, 2004 accident, she laid down during the day. In her deposition, the employee testified that she did not need to lie down during the day due to foot pain. Mr. England stated that prior to November 4, 2004, the employee was not lying down during the day to help deal with the pain. The employee testified that she could not go back to work either physically or mentally. In her deposition, the employee testified that she stopped working due to her back injury. Dr. Volarich stated that due to back problems, the employee could not perform her job duties following the November 4, 2004 injury. These inconsistencies affect the employee's claim against the Second Injury Fund for permanent total disability.

It was Dr. Volarich's opinion that the employee is permanently and totally disabled as a result of the work related injury of November 4, 2004 in combination with her pre-existing conditions. It was his opinion that the employee had considerable pre-existing disability as a result of the employee's bipolar disorder, post traumatic stress disorder, attention deficit disorder and learning disability. Dr. Volarich's opinions are substantially affected by the fact that he did not review any medical records for psychiatric treatment and that he deferred to a psychiatric evaluation for that assessment which was not offered into evidence. I find that Dr. Volarich's opinion as to the cause of the employee's permanent total disability is not persuasive or credible.

Mr. England's opinion that the employee was not employable in the open labor market was due to a combination of all of the factors for the employee. Mr. England's opinion is substantially affected by the fact that he did not review any psychiatric records; and there were no records from the 1981 and 1986 motor vehicle accidents and the 1986 injury. I find that Mr. England's opinion as to the cause of the employee's permanent total disability is not persuasive or credible.

The more credible and persuasive evidence is that the employee is unable to compete in the open labor market and is permanently and totally disabled as a result of the November 4, 2004 accident and injury to her low back alone and of itself.

Mr. England stated that the employee needed to lie down during the day and to change positions often particularly sitting with her legs elevated to relieve some of her discomfort. It was his opinion that there was not a job in the open labor market for someone who needs to lie down during the day and change positions often and sitting with legs elevated. Mr. England reviewed low back and hip treatment records and stated that employee needed to lie down for the pain possibly due to the low back injury alone. It was his opinion that the employee is unemployable as a result of that injury alone if she needed to lie down during the day and change position due to the November 4, 2004 injury alone.

The employee told Mr. England that her primary complaint is pain in her low back going into her hips on the right side down to the knee level and in the left leg down into her toes. She has had numbness in her left leg all the way into the foot, swelling in her left foot, and her toes have begun to curl under the foot since the second back surgery

In 2006, Dr. Anderson stated that the employee continued to suffer from consistent low back pain, right buttock pain, and left hip pain, and was on Hydrocodone and Neurontin. Dr. Anderson stated that the employee should change positions at least once every half hour. In 2006 Dr. Draves prescribed narcotic pain medications for chronic back pain.

Dr. Volarich stated that prior to November 4, 2004 the employee was able to work unrestricted and denied having any problems with her back. As a result of the November 4, 2004 injury, Dr. Volarich diagnosed failed back syndrome with persistent back pain and right leg radiculopathy. Dr. Volarich stated that the employee was unable to perform her job duties following the November 4, 2004 injury due to her back problems. Dr. Volarich stated with regard to her spine that the employee should avoid remaining in a fixed position for anymore than about thirty minutes at a time including both sitting and standing, and should change positions frequently to maximize comfort and rest when needed.

Based on a review of the evidence, I find that the need for the employee to lie down during the day is a result of the November 4, 2004 low back injury. I therefore find that the employee is permanently and totally disabled due to the effects of the November 4, 2004 accident and injury alone and of itself. I find that the employee failed in her burden of proof that the Second Injury Fund is responsible for the employee's permanent total disability benefits. The employee's claim against the Second Injury Fund is hereby denied.

Lawrence C. Kasten
Chief Administrative Law Judge
Division of Workers' Compensation