

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

Injury No.: 99-181902

Employee: Debra Adams
Employer: DaimlerChrysler (Prior Award)
Insurer: Self-Insured C/O ESIS (Prior award)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: October 2, 1999
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 21, 2006, as supplemented herein.

The administrative law judge concluded that employee failed to meet her burden of proof on her claim for either permanent partial disability or permanent total disability benefits against the Second Injury Fund as a result of her October 2, 1999, injury. Thus the administrative law judge denied that claim. We agree with this conclusion. We offer this supplemental opinion to address issues raised by employee in her brief.

The first day of the hearing was August 3, 2006. At that hearing, employee was given an additional thirty days to have certain medical records certified before the administrative law judge would rule on their admissibility. The medical records of Dr. Hanaway were among those records. On Monday, August 28, 2006, two days before the second setting and four days before the record was to be closed, employee's attorney deposed Dr. Hanaway. At that deposition, Dr. Hanaway gave his opinion regarding employee's extent of disability. This was not in his medical records or reports. The Second Injury Fund made a proper seven-day rule objection to this evidence, but did not postpone the deposition or request a continuance of the hearing.

In his award, the administrative law judge sustained the Second Injury Fund's objection despite the lack of a request for relief. He reasoned that employee's counsel knew the record needed to close on August 30, 2006, yet still scheduled Dr. Hanaway's deposition for August 28, 2006, leaving no time for the Second Injury Fund to obtain a continuance to remedy the seven-day rule.

We believe that the seven-day rule objection should have been overruled and that Dr. Hanaway's testimony that employee was disabled should have been admitted into evidence. "When a party does not receive a medical report before a deposition, he has at least two options. First, he can cross-examine the doctor immediately after direct examination. He is free to schedule further cross-examination if he decides it's necessary. Second, he could postpone all cross-examination until he has had an opportunity to review the testimony and prepare." *Goodwin v. Farmers Elevator and Exch.*, 933 S.W.2d 926, 929 (Mo.App. 1996) (internal citations omitted).

While the Second Injury Fund made a proper seven-day rule objection, it failed to request any relief based on that objection. Counsel for the Second Injury Fund cross-examined Dr. Hanaway without requesting a postponement or continuance. Since the Second Injury Fund cross-examined Dr. Hanaway, it will not be prejudiced by the

admittance of his opinions regarding employee's disability. Therefore, in reviewing this matter, the Commission has taken into consideration Dr. Hanaway's testimony in its entirety.

Dr. Hanaway first saw employee on May 6, 2003, over three-and-a-half years after her work accident. In that medical report, he incorrectly indicated that employee had worked in April of 2001. The report noted that employee had sleep apnea, chronic anxiety, chronic low back pain with radicular pain in her legs, "problems" with both shoulders, and impingement on both sides. Dr. Hanaway also wrote that employee has "multiple problems, and they may not have all been mentioned here. Some of them have to be picked up later on, but this is what I got from the patient this time."

Dr. Hanaway next saw employee on May 27, 2003, after an MRI had been performed on her neck. Dr. Hanaway diagnosed employee with two herniated discs at C4-5 and C5-6. He then opined that "it would seem that her working at Chrysler over the years is responsible for this."

Employee returned to Dr. Hanaway nearly two years later on May 3, 2005. Dr. Hanaway did not mention any herniated discs at C4-5 and C5-6 at that time, but merely states that those discs are protruding. He also indicated that employee had been living with her neck problem for more than two years and that she was getting along fairly well without any surgery.

Employee's final visit with Dr. Hanaway occurred on May 21, 2006. For the first time, Dr. Hanaway finds that employee has a herniated disc at L5-S1 and a protruding disc at L4-5.

As indicated in the administrative law judge's award, Dr. Hanaway's reports do not contain any opinions on disability or employee's need for permanent work restrictions. His testimony simply recites his reports and only reflects that he believes employee is disabled. That conclusory opinion was provided at his deposition on August 28, 2006, over three years after he saw employee for the first time and over six-and-a-half years after employee's work injury. He failed to explain or opine how employee's pre-existing disabilities synergistically combined with her primary work injury to create a greater overall disability than the simple sum. As such, Dr. Hanaway's reports and deposition testimony do not provide competent and substantial evidence that employee is entitled to either permanent partial disability or permanent total disability from the Second Injury Fund.

Therefore, the Commission still agrees with the ultimate conclusion reached by the administrative law judge that employee failed to meet her burden of proof to show that the Second Injury Fund is liable to her for permanent total disability benefits or permanent partial disability benefits based on a combination of her primary neck injury and pre-existing disabilities.

The award and decision of Administrative Law Judge John K. Ottenad, issued December 21, 2006, is affirmed, and is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20th day of September 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Debra Adams Injury No.: 99-181902
Dependents: N/A Before the
Employer: DaimlerChrysler (Prior Award) Division of Workers'
Additional Party: Second Injury Fund Department of Labor and
Industrial Relations of Missouri
Jefferson City, Missouri
Insurer: Self-Insured C/O ESIS (Prior Award)
Hearing Date: August 3, 2006 and August 30, 2006 Checked by: JKO

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: October 2, 1999
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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 occurred or occupational disease contracted: Claimant was employed as an assembly line worker for Employer and was injured when she was knocked backwards and unconscious by the mirror on a van passing by on the assembly line.
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 referable to the neck
14. Nature and extent of any permanent disability: 17.5% of the body as a whole referable to the neck
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$977.05

Employee: Debra Adams Injury No.: 99-181902

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: Sufficient to result in maximum rates of compensation
19. Weekly compensation rate: \$578.48 for TTD/ \$303.01 for PPD
20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable: (Claim against Employer resolved previously)
22. Second Injury Fund liability: \$0.00

TOTAL: **\$0.00**

23. Future requirements awarded: None

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: Harry J. Nichols.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Debra Adams	Injury No.: 99-181902
Dependents:	N/A	Before the
Employer:	DaimlerChrysler (Prior Award)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Self-Insured C/O ESIS (Prior Award)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: JKO

On August 3, 2006, the employee, Debra Adams, appeared in person and by her attorney, Harry J. Nichols, for a hearing for a final award on her claim against the Second Injury Fund. The employer, DaimlerChrysler, which is Self-Insured C/O ESIS, was not represented at the hearing because their portion of the Claim had been previously resolved by an Award issued on September 15, 2005. The Second Injury Fund was represented at the time of the hearing by Assistant Attorney General Kareitha A. Osborne. The hearing was continued until August 30, 2006 to give Claimant the opportunity to call her vocational expert as a witness (since the vocational expert was unavailable on the first day of hearing) and to give Claimant a chance to obtain certified copies of medical records and reports which were uncertified and objected to by the Second Injury Fund on the first day of hearing. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of facts and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about October 2, 1999, Debra Adams (Claimant), sustained an accidental injury arising out of and in the course of her employment that resulted in injury to Claimant.
- 2) Claimant was an employee of DaimlerChrysler (Employer).
- 3) Venue is proper in the City of St Louis.

- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage sufficient to result in the maximum applicable rates of compensation of \$578.48 for total disability benefits and \$303.01 for permanent partial disability (PPD) benefits.
- 7) Employer paid no temporary total disability (TTD) benefits.
- 8) Employer paid medical benefits totaling \$977.05.

ISSUES:

- 1) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this claim?
- 2) What is the liability of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- C. Social Security Award dated February 24, 2001 (for the sole purpose of proving motivation to return to work)
- D. Medical records of Joseph Hanaway, M.D.
- E. Curriculum Vitae of Joseph Hanaway, M.D.
- F. Voluntary Dismissal Memoranda for 99-181901, 99-181903, 00-172529, & 99-181998
- G. Orders of Dismissal for 99-181901, 99-181998, & 99-181903
- L. Medical report of George E. Mendelsohn, M.D. dated January 21, 1997
- M. Report of Samuel Bernstein, Ph.D, C.R.C. dated April 25, 2006
- N. List of Claimant's Medications
- O. Claimant's W-2's for 1997, 1998 & 1999 for Employer
- Q. Medical records of Edward Burns, M.D.—Exhibit is partially admitted since some of the records are certified and others are not certified [**ONLY THE CERTIFIED PORTIONS OF THE EXHIBIT ARE ADMITTED**]
- R. Medical records of Allied Behavioral Consultants, Inc.—Exhibit is partially admitted since some of the records are certified and others are not certified [**ONLY THE CERTIFIED PORTIONS OF THE EXHIBIT ARE ADMITTED**]
- S. Deposition of Joseph Hanaway, M.D. dated August 28, 2006 [**ADMITTED SUBJECT TO THE OBJECTIONS CONTAINED THEREIN**]
- T. Prior Stipulations for Compromise Settlement/ Awards for 84-67083, 85-64124, 88-024190, 89-068303, 90-178993, 90-151430, 96-011861, 96-128332, 96-128333, 97-045361, 97-440705, & 98-057107 [**ONLY THE STIPULATIONS ARE ADMITTED. THE UNCERTIFIED MEDICAL RECORDS AND REPORTS ACCOMPANYING THE STIPULATIONS ARE NOT ADMITTED BASED ON THE OBJECTION OF THE SECOND INJURY FUND THAT WAS SUSTAINED.**]

Second Injury Fund Exhibits:

Nothing submitted at the time of hearing.

Note: Some of the records submitted at hearing contain highlighted portions, handwritten remarks or other marks. All of these marks were on these records at the time they were admitted into evidence and no other marks have been added since their admission on August 3, 2006 or August 30, 2006.

EVIDENTIARY RULINGS:

Claimant sought to have Exhibits A, H, I and J admitted into evidence. The Second Injury Fund made various objections to these exhibits including, but not limited to, that they were not certified, irrelevant, cumulative evidence, self-serving and contained hearsay. The Second Injury Fund's objections to Exhibits A, H, I and J are SUSTAINED, and the exhibits are not admitted into evidence in this case.

Claimant also sought to have Exhibits B, K and P admitted into evidence. The Second Injury Fund objected on the basis of hearsay since these exhibits contained uncertified medical reports and expert medical opinions for which the Second Injury Fund had never been afforded the opportunity to cross-examine the experts in deposition or through live testimony. Additionally, Exhibit P was a duplicate of documents contained in Exhibit B. The exhibits were originally offered on the first day of hearing (August 3, 2006) and any ruling on the Second Injury Fund's objections was delayed until the continuance of the hearing on August 30, 2006 to give Claimant the opportunity to get the records certified and make them admissible. As of the continuance of the hearing on August 30, 2006, the records remained uncertified and so the objections of the Second Injury Fund to Exhibits B, K and P are SUSTAINED, and the exhibits are not admitted into evidence in this case.

Claimant moved for the admission of Exhibits Q and R into evidence in this case. The Second Injury Fund objected on the basis of hearsay since these exhibits contained uncertified medical records and reports. The exhibits were originally offered on the first day of hearing (August 3, 2006) and any ruling on the Second Injury Fund's objections was delayed until the continuance of the hearing on August 30, 2006 to give Claimant the opportunity to get all of the records certified and make them admissible. As of the continuance of the hearing on August 30, 2006, the records remained partially uncertified and so the objections of the Second Injury Fund to the uncertified portions of Exhibits Q and R are SUSTAINED, and ONLY the certified portions of those exhibits are admitted into evidence.

Likewise, Claimant moved for the admission of Exhibit T which was a compilation of various stipulations for compromise settlement and awards from prior Workers' Compensation injuries, with attached medical records and reports from various physicians which were all uncertified. The Second Injury Fund objected to the whole exhibit as it was uncertified and contained hearsay, but most specifically objected to the admission of the medical records and reports on that basis. The stipulations for compromise settlement and the awards in Exhibit T are admissible as records of the Division of Workers' Compensation, but the Second Injury Fund's objections to the medical records and reports are SUSTAINED, and those parts of Exhibit T are not admitted into evidence in this case.

Finally, on the second day of the hearing (August 30, 2006), Claimant moved for the admission of Exhibit S, Claimant's deposition of Dr. Hanaway taken on August 28, 2006. Dr. Hanaway's deposition was apparently scheduled and taken because the Second Injury Fund objected to the admission of Dr. Hanaway's reports (Exhibit D) on the first day of the hearing (August 3, 2006), since they were uncertified and contained hearsay. As noted above with the discussion of Exhibits B, K, P, Q and R, Claimant was granted the extra time to get Exhibit D certified, or otherwise make that evidence admissible. Claimant scheduled and took the deposition of Dr. Hanaway, and in the course of that deposition, elicited new opinions from Dr. Hanaway on disability that are not contained in any of his prior reports. The Second Injury Fund objected at the outset of the deposition claiming it was untimely and the record was not left open for such a deposition. The Second Injury Fund also objected during the course of the deposition (on pages 14 and 21) to any opinions on disability based on the Seven Day Rule, and the fact that those disability opinions were not contained in the original reports, nor provided to the Second Injury Fund at least seven days prior to the deposition.

The Second Injury Fund's overall objection to Dr. Hanaway's deposition as being untimely and beyond the scope of the hearing continuance is OVERRULED. Claimant was given the opportunity to certify the records or make them admissible for hearing. Claimant chose to depose the doctor to make those medical reports admissible instead of getting the records certified. To the extent then that the deposition was taken to make Dr. Hanaway's records in Exhibit D admissible at hearing, Exhibit S is also then admitted into evidence in this case.

However, the Second Injury Fund's objections in Exhibit S on pages 14 and 21 based on the Seven Day Rule regarding the opinions on disability are SUSTAINED. None of Dr. Hanaway's reports provided to the Second Injury Fund or admitted into evidence in this case contain any opinions on disability from work. On page 15 of Exhibit S, Dr. Hanaway even acknowledges that he was not asked about disability at the time he generated his report. With no opinions on disability from work contained in any of Dr. Hanaway's reports provided to the Second Injury Fund prior to the deposition, it is unfair surprise for Claimant to then elicit such opinions at the deposition, especially when the deposition (and the continuance of the hearing) was ONLY for the purpose of making the reports admissible, NOT developing new evidence in the case.

Normally the Seven Day Rule (**Mo.Rev.Stat. § 287.210.3**) is to be used as a shield and not a sword, providing for a continuance for the objecting party to allow an opportunity to review the new opinions and be ready to cross-examine the expert about these new opinions. However, in this case, a continuance for additional cross-examination was not a viable remedy to Claimant's violation of the Seven Day Rule. Claimant's attorney was well aware from discussions held on the first day of hearing (August 3, 2006), that the record would close on August 30, 2006, at the very latest, since it needed to be closed in 30 days, and the 30th day fell on the holiday weekend. Knowing the record was going to close on August 30, 2006, Claimant scheduled and took the deposition of Dr. Hanaway on August 28, 2006. The opinions on disability Claimant

elicited at that deposition were obtained less than seven days before the record would close, and so there was no time for the Second Injury Fund to obtain a continuance to remedy the Seven Day Rule objection.

Claimant had almost seven years from the date of accident until the date of hearing to obtain opinions on disability and provide them to the Second Injury Fund, yet no such opinions were apparently ever obtained or provided. Then Claimant had almost another 30 days between the first and second days of hearing to obtain such an opinion and provide it to the Second Injury Fund, but again failed to do so. It would be manifestly unjust to the Second Injury Fund to allow such opinions on disability into evidence given the circumstances in this case. The only viable remedy is to sustain the Second Injury Fund's objections to these disability opinions and strike the responses from the record of evidence in this case.

Finally, Claimant sought to make the Transcript of Evidence from the first hearing against the Employer in this Claim, a part of the record of evidence in this matter. The Second Injury Fund objected, and those objections were SUSTAINED. The hearing against the Employer on August 2 and 3, 2005 documented in that prior Transcript of Evidence dealt with different issues. Additionally, all of the exhibits marked at that prior hearing, and which were part of that prior Transcript, were all individually marked again by Claimant for this hearing against the Second Injury Fund. The admissibility of those exhibits has already been ruled on in connection with this hearing. Claimant was the only witness to testify at that the prior hearing and once again testified at this proceeding. Essentially, at best, it represented cumulative evidence, and at worst, it was irrelevant given that there were different issues being litigated in this hearing than were litigated at the first hearing against Employer. Either way, it was inadmissible and excluded from evidence in this case.

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, Dr. Hanaway's deposition, the medical records, a vocational opinion and testimony, Stipulations for Compromise Settlement/ Awards for various pre-existing injuries and the Award resolving Employer's portion of this case, as well as my personal observations of Claimant at hearing, I find:

- 1) **Claimant** is a 50-year old former assembly line worker, who worked for Employer from April 1995 until October 1999. She performed regular labor work on the assembly line during her time working for Employer. She worked on approximately 59 cars per hour. At the time of her injury in October 1999, she was a floater, or utility worker, on the line, which means she filled in and did various jobs. On her last day of work, she was putting screws and patches onto the air conditioning units of the cars. Claimant testified she worked 10 hours a day, 6 days a week. She said it was a left handed job, but she did it with her right hand because of the prior injury and surgery to her shoulder.
- 2) Prior to her work at Employer, Claimant worked as a shipping clerk and machine operator for over 15 years for various other employers. She testified that all of her jobs required physical effort.
- 3) Regarding her education, Claimant testified that she left school in the 11th grade and had no specialized training after that.
- 4) Claimant testified that she was injured in October 1999 when a mirror sticking out on a van going down the assembly line hit her and knocked her backwards. Claimant lost consciousness and woke up on her back. The first thing she recalled after the accident is the medical people standing over her. She said she went to the hospital with complaints to her head, neck, back and foot. Claimant testified that Employer sent her to Dr. Mendelsohn, and she was also examined by Dr. Morrow at the request of her attorney. She also remembered seeing Dr. Bernstein one time.
- 5) Despite Claimant's testimony regarding her examination with Dr. Mendelsohn, the only medical report from **Dr. George E. Mendelsohn** that is in evidence in this case is dated January 21, 1997. Obviously, it pre-dated the October 1999 injury, and it describes an apparent injury at work from October 1996 involving complaints in the left wrist, left shoulder and neck. The doctor indicates that an athrogram of the left shoulder was normal, but an MRI of the neck revealed disc protrusions at C5-6 and C4-5, without evidence of a lateralizing herniated disc. Dr. Mendelsohn opined that Claimant had unexplained left upper extremity pain for which he had no suggestions regarding treatment.
- 6) Claimant testified that when she was off work following the October 1999 injury, Employer paid other benefits to her, but no workers' compensation. She said her group insurance paid the medical bills and she received S&A from Employer. She said that following that accident she began receiving Social Security benefits for disability.
- 7) Claimant testified that after her last injury, she asked Employer for a job, but they said they had no work available for her. She said she has not tried to get a job because her doctor, Social Security, and Employer all said no jobs were available for her.

- 8) Claimant testified that she received an Award of Compensation for the October 1999 injury for three herniated discs in her lower neck. According to the records of the Division of Workers' Compensation, the Award issued against Employer on September 15, 2005 in Injury No. 99-181902, was based on 17.5% permanent partial disability of the body as a whole referable to the neck.
- 9) In addition to this award of disability for the neck, Claimant testified that she also had a prior injury to the neck for which she received 4.75% permanent partial disability. With regard to other prior injuries, Claimant testified that she had a head injury, but she did not receive compensation for it. She said her eyes and ears were OK. She had no problems with the mid-back, but she did have two herniated discs in the low back for which she received compensation. She testified that she had a left shoulder surgery and received compensation for it. She has also had problems with her right shoulder, but she does not recall receiving workers' compensation for that. She testified that both of her elbows were injured at work. She has not had surgery on either one, but she received compensation for the right elbow. She said she has had right hand carpal tunnel surgery, but not left. She has had problems with her left hip, but no surgery, and does not know if she received compensation or not. She has had surgery on the left knee in the 1980s which was the subject of a workers' compensation case. She also had surgery on the right knee as a young girl. She said both of her ankles have twisted numerous times, but she does not remember if she received workers' compensation for them or not.
- 10) Claimant testified that she compiled the **List of Medications** (Exhibit N) that she currently takes. The medications listed are Ambien for sleeping, Ultracet for pain when she needs it, Zocor, Aciphex, Diazepam, Seroquel, Prozac, Wellbutrin, the use of a CPAP machine, and medication for acid reflux.
- 11) Claimant testified that on an average day she is homebound and suffering from depression. She said she is not able to do a lot of chores. She said she has short term memory problems. She said she usually stays home unless her husband takes her somewhere.
- 12) Claimant testified that her family doctor for the last 10 to 15 years has been Dr. Edward Burns, Jr. She testified that she sees Dr. Burns regularly for complaints with various parts of her body. She also testified that for about 10 years, she has received treatment for psychological problems at Allied Behavioral Group. She said she still sees them regularly for treatment of psychiatric problems, and she also takes medications for that condition.
- 13) The certified medical treatment records from **Dr. Edward Burns** (Exhibit Q) include an MRI of the left shoulder taken on May 18, 2000 and a nerve conduction study taken on May 18, 2000 because of complaints of numbness in the left hand. There are no accompanying medical notes or reports that give a history or explanation of the onset of these problems, nor is there any diagnosis or causation opinion. Furthermore, there are no medical records pre-existing the primary neck injury of October 2, 1999.
- 14) While the certified medical treatment records of **Allied Behavioral Consultants, Inc.** (Exhibit R) contain duplicate copies of many of the pages, they do document treatment Claimant had there beginning on October 24, 1996. Records continuing through 1997, 1998 and 1999 indicate visits for depression, panic attacks, and trouble sleeping, that Claimant attributed to sexual harassment at work and problems with her family (her sons). She received prescriptions for various medications throughout this period of time to treat her complaints. The notes from 1999, leading up to the time of her primary neck injury, document that she was taken off work at least one week in July 1999 by Dr. Hicks because of her on-going psychiatric care with him. Dr. Hicks issued a report dated September 21, 2000 in which he indicated that since March 16, 1999, Claimant has been seen by him every 4 to 6 weeks. She was frustrated with lack of progress on her legal problems and focused on her disability issues. She had continued sleep and appetite issues, occasional crying spells, and frustration and anger at being fired from work. The doctor comments that she "views herself as unable to continue with working in her previous environment."
- 15) The notes from Allied Behavioral Consultants, Inc. (Exhibit R) continue after the primary neck injury of October 2, 1999. She was now reporting mild auditory hallucinations in addition to the other previously reported complaints. She continued to take medications. The records also document that she continued to perceive conflict with Chrysler and her family members. She described additional stress from the death of her son's parrot that worsened his schizophrenia on June 14, 2001. She also in that note described distress from her recent diagnosis of fibrocystic disease. On October 11, 2001, she described increased trauma and frustration from her arrest at Disney World in Florida for theft. On December 13, 2001, she continued to describe problems related to dealing with that arrest. On April 18, 2002, she described problems related to a recent diagnosis of skin cancer on her forehead and she also explained how she had been stopped at Scott Air Force Base for shoplifting. The last note is dated January 19, 2005. Throughout this course of treatment (going back even before the primary neck injury), Claimant has generally been diagnosed with major depression, recurrent, severe, as well as a panic disorder without agoraphobia, an occupational problem with sexual harassment, possible acute post traumatic stress disorder, and a dependent personality disorder.
- 16) Prior to the last injury in October 1999, she said she was off work a lot. She said that is why her pay on the **W-2's** was less. (Exhibit O) She said she never worked a 50 or 60 hour week because of the prior injuries. She

admitted on cross-examination though, that there were times during the week when she would get overtime pay because of working overtime.

- 17) She denied any subsequent accidents and testified that her condition is no better since she quit work.
- 18) Claimant admitted that she was not using a CPAP machine at the time of her injury in October 1999. She was using it, however, about 3 years before she was evaluated by Dr. Bernstein. Claimant said she has breathing problems from the sleep apnea, and trouble sleeping at night. She said that condition makes it difficult for her to function because of a lack of sleep. She said she told Dr. Burns about the breathing problems, but she was unsure if she told anyone else.
- 19) **Dr. Joseph Hanaway** first examined Claimant at the request of her attorney on May 6, 2003. (Exhibits D and S) In his deposition, he corrected the date in his report that she supposedly last worked from 2001 to 1999. The report contained a consistent description of the injury at work on the line, although it was not clear if he thought that occurred in 1997 or in October 1999. It also contained a history of an injury at work in 1997, when she injured her left shoulder and had neck pain. Spasm was found on the neck examination, as well as lost range of motion. There was lost range of motion on examination of both shoulders and also lost range of motion and spasm on examination of the low back. Motor function, muscle bulk, tone, strength, sensory examination and reflexes were all normal. Dr. Hanaway formed an impression that Claimant injured her left shoulder and neck in 1997 and then mentions she was injured again in October 1999, but never says what body parts were involved in that injury. He notes chronic low back pain and radicular pain in the legs, but radicular pain in the legs is mentioned nowhere else in his findings or in the report. He also notes sleep apnea, chronic anxiety and problems with her shoulders and elbows. He recommends testing and treatment, but provides no opinion on medical causation, what is related to the October 1999 injury as opposed to pre-existing conditions or subsequent deterioration, and also provides no opinion on disability regarding any condition listed in his report.
- 20) Dr. Hanaway's next report is dated May 27, 2003. He notes that he has now reviewed an MRI of the cervical spine from May 22, 2003 which reveals a "clearcut central herniated disc at C5-6 with spinal cord compression." He also finds a herniated disc at C4-5. He notes now that "All of the patient's reflexes are hyperactive." He also finds bilateral Hoffmann signs. He explained in his deposition that the Hoffmann signs are "a pathologic reflex which doesn't exist unless the patient has spinal cord compression." He opined that, "her working at Chrysler over the years is responsible for this." He recommends a surgical consultation.
- 21) In his next report dated May 3, 2005, Dr. Hanaway notes that Claimant has seen a surgeon, discussed neck surgery with him for the herniated discs, and she decided not to have that surgery. He notes that she is getting along fairly well without the surgery.
- 22) The last report from Dr. Hanaway is dated May 21, 2006. It is clear in the deposition though that there is some mix-up regarding that date, and the doctor was unsure when he actually examined Claimant. The report refers to a lumbar spine CT done on May 19, 2003 which showed disc abnormalities at L3-4, L4-5, and L5-S1. The doctor notes that Claimant last worked in 1999. The examination revealed tenderness, spasm, and lost range of motion in the low back. Dr. Hanaway diagnosed a herniated disc at L5-S1 and a protruding disc at L4-5. He recommended that she "get an MRI scan of the *neck* because of her reflexes and bring that to me."(emphasis added) Once again there was no opinion on disability, medical causation, or what is related to the October 1999 injury as opposed to pre-existing conditions or subsequent deterioration.
- 23) Claimant admitted into evidence various **prior Stipulations for Compromise Settlement/ Awards** without any supporting medical records or reports, since none of the medical records or reports were certified, and since the experts were not deposed and subject to cross-examination prior to hearing. (Exhibit T) The Stipulations/ Awards for these prior cases contain the following amounts of disability: Injury No. 84-67083, 20% of the left knee and a Second Injury Fund settlement for pre-existing disability to the back; Injury No. 85-64124, 10% of the back and a Second Injury Fund settlement for pre-existing knee and body disability; Injury No. 88-024190, 5% of the body as a whole (face, chest, shoulders, neck and arms) for dermatitis and an alleged Second Injury Fund settlement that will not be considered because the stipulation submitted is unsigned by the parties and unapproved; Injury No. 89-068303, 17.5% of the right hand and an alleged Second Injury Fund settlement that will not be considered because the stipulation submitted is unsigned by the parties and unapproved; Injury No. 90-178993, 20% of the right wrist, 15% of the left wrist and 2.5% of the body as a whole referable to the low back; Injury No. 90-151430, 25% of the mid joint of the left index finger; Injury No. 96-011861, 15% of the left hip and a Second Injury Fund settlement for alleged pre-existing disability to the left hip, right hand, left wrist, left leg and low back; Injury No. 96-128332, unknown disability to the left wrist; Injury No. 96-128333, 4.786% of the neck and body; Injury No. 97-045361, 17.45% of the left shoulder and a Second Injury Fund settlement for alleged pre-existing disability to the left shoulder, left hip, right hand, left wrist, left knee, and low back; Injury No. 97-440705, unknown disability to the right arm; and Injury No. 98-057107, unknown disability to the left ankle and hip.
- 24) Claimant's vocational expert, **Dr. Samuel Bernstein**, testified live at the continuation of the hearing on August

30, 2006. Dr. Bernstein is a licensed psychologist and vocational expert. He met with Claimant one time at the request of Claimant's attorney and prepared a report dated April 25, 2006. (Exhibit M) The one and only time he met with Claimant occurred some 6 ½ years after her claimed injury on October 2, 1999. Dr. Bernstein testified that her age was a factor in her ability to be placed in employment. He noted that she had multiple orthopedic problems and psychological problems as well. He also found that she had limited education. Her prior work was essentially as an assembly worker doing light, unskilled repetitive work. He testified that all of her prior injuries were impairments. He concluded that at the time he saw her, given the combination of all of her injuries and problems, she would not be employable.

25) On cross-examination, Dr. Bernstein admitted that any limitations listed in the report came from Claimant. He admitted that there were no limitations placed on her by physicians, because if there had been, he would have noted that in his report. He did not see any restrictions, psychiatric or otherwise, from any medical professional. He admitted that he took into account her breathing problems, sleep apnea, and use of the CPAP machine, but he did not think it was a big part of his ultimate conclusion. He admitted that he did not see any doctor's opinions on ability to work.

RULINGS OF LAW:

Given the nature of this Claim and the evidence submitted, both of the issues in this case can be addressed at the same time.

Issue 1: What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this claim?

Issue 2: What is the liability of the Second Injury Fund?

Based on a comprehensive review of the evidence described above, including Claimant's testimony, medical records and reports, a vocational opinion and testimony, Stipulations for Compromise Settlement/Awards for various pre-existing injuries, and the Award resolving the Employer's portion of this case, as well as my personal observations of Claimant at hearing, and based upon the applicable statutes of the State of Missouri, I find the following:

As a result of the October 2, 1999 injury, which arose out of and in the course and scope of her employment, Claimant sustained a compensable injury to the body as a whole referable to the neck, which resulted in an award of 17.5% permanent partial disability to the body as a whole referable to the neck.

The central questions for this hearing were whether Claimant met the burden of proof to show that she is permanently and totally disabled, and whether the Second Injury Fund is responsible for the permanent total disability based on a combination of her primary neck injury and pre-existing disabilities.

Under **Mo. Rev. Stat. § 287.020.7**, "total disability" is defined as "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 test for permanent total disability is claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173 (Mo.App. E.D. 1995), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

In cases such as this one where the Second Injury Fund is involved and there is an allegation of permanent total disability, we must also look to **Mo.Rev.Stat. § 287.220** for the appropriate apportionment of benefits under the statute. The analysis of the case essentially takes on a three-step process:

First, is Claimant permanently and totally disabled?;

Second, what is the extent of Employer's liability for that disability from the last injury alone?; and

Finally, is the permanent total disability caused by a combination of the disability from the last injury and any pre-existing disabilities?

In determining this case, we will follow this three-step approach to award all appropriate benefits under the Statute.

Considering the evidence listed above, I find that Claimant has failed to meet her burden of proof on the issue of permanent total disability, and also failed to meet her burden of proof to show that the Second Injury Fund is responsible for permanent total disability based on a combination of her primary neck injury and pre-existing disabilities, including psychiatric disability.

The primary reason Claimant has failed to meet her burden of proof is the absence of competent and substantial medical evidence to support a finding on disability, much less a finding of permanent total disability. A thorough review of the admissible evidence in the record reveals reports and records from only Dr. Mendelsohn, Dr. Burns, Allied Behavioral Consultants, and Dr. Hanaway.

Claimant testified that Dr. Mendelsohn examined her after the October 2, 1999 neck injury, but actually his report was dated prior to that injury and showed what were apparently pre-existing problems with Claimant's neck. The admissible medical records of Dr. Burns contained only a left shoulder MRI report and a nerve conduction study report of the left upper extremity, both from 2000. There is no indication in the record if those tests were connected with the primary injury, a pre-existing condition, or a subsequent event.

While the records of Allied Behavioral Consultants do show a consistent pattern of treatment for psychiatric problems, starting prior to her October 2, 1999 injury and continuing after that injury, they do not contain any opinions on disability (including any description of disability pre-existing the neck injury as opposed to any disability that may have occurred after it). These records also do not contain any discussion of Claimant's continued inability to work or permanent, functional work restrictions on account of her psychiatric condition. Without any opinion on permanent disability, or its attribution to pre-existing as opposed to subsequent incidents, I find Claimant has not provided competent and substantial evidence regarding the psychiatric portion of her case.

Finally, there are the records and reports from Dr. Hanaway. Taken as a whole, the reports and deposition testimony of Dr. Hanaway is confusing and convoluted. In his first report dated May 6, 2003, he indicates Claimant was still working in April 2001, but then amends that in his deposition to April 1999, even though she was injured in October 1999. He interchangeably describes a neck and left shoulder injury from 1997 and the injury from 1999. He forms an impression in that report of radicular pain in the legs, but neither that complaint, nor that finding on physical examination is noted anywhere else in the report. When he sees Claimant on May 27, 2003, less than a month after his first examination of her, Claimant now has hyperactive reflexes and bilateral Hoffmann signs, which were not noted on the first examination. In testifying about his fourth report dated May 21, 2006, he admits that there is some mix-up regarding when that examination actually occurred, and he cannot remember when he actually performed that examination. More confusing though, is the fact that he describes the results of a CT scan of the low back from 2003 showing disc abnormalities at multiple levels, and then notes that she will get an MRI of the neck for him to review.

Regardless of all these inconsistencies, none of Dr. Hanaway's reports contain any opinions of disability, need for permanent work restrictions, or any opinions of what is related to the primary 1999 injury versus her pre-existing conditions or any subsequent events. While he certainly does discuss treatment at various times, he is completely silent on all of these other items that would have helped in determining the central questions in this case. In that respect then, based on his silence on these critical issues, as well as based on the confusing and convoluted nature of his reports and testimony, I find Dr. Hanaway's records are not competent and credible evidence, and thus they cannot serve as a basis for an award in this case.

Claimant also failed to meet her burden of proof in this matter by failing to provide competent and substantial evidence that the problems and disabilities discussed in the medical records and testimony pre-existed the October 2, 1999 injury and were not made subsequently worse, unrelated to the primary injury. The Second Injury Fund argues subsequent deterioration of conditions unrelated to the primary injury as a means of defeating this claim for permanent total disability. Claimant testified that she started using a CPAP machine for her sleep apnea after the primary injury on October 2, 1999. She was not being treated for that condition prior to the October 2, 1999 injury. It is clear that condition worsened after the primary neck injury causing the need for this additional treatment that was not needed before. There is no evidence that the worsening was related in any way to the 1999 work accident. The testimony of Dr. Bernstein was also clear that he took into account her breathing problems into his overall conclusion, but he did not believe that was a significant part of his rationale. Therefore, Dr. Bernstein took into account a condition that subsequently deteriorated unrelated to the primary injury, and his opinion is thus faulty in that regard.

Dr. Bernstein also though took into account the records of Dr. Hanaway, who in his May 21, 2006 report, describes in great detail a CT scan of the lumbar spine done on May 19, 2003 that shows disc abnormalities at multiple levels of the lumbar spine. That CT scan was clearly done 3 ½ years after the October 2, 1999 injury. Since there are no opinions on pre-existing versus subsequent disability and since there are no medical records to show if those disc abnormalities were present prior to the October 2, 1999 injury, it is impossible to know if those represent pre-existing or subsequent findings. An award cannot be based on mere conjecture or speculation. Since Claimant bears the burden of proof, and has failed to provide any to clear up this issue, Claimant has failed to meet that burden for this reason as well as the others already stated.

Certainly, Claimant has submitted into evidence numerous Stipulations for Compromise Settlement and Awards that document varying degrees of disability to numerous different body parts. However, there were no admissible medical records, but for the one report on her neck from Dr. Mendelsohn, to document any of the treatment Claimant may have received for these various injuries. Additionally, while Claimant did testify that these injuries to various parts of her body occurred, and while she acknowledged that she often received some settlement for problems she was having, she did not testify in any great detail regarding the specific problems she had from each injury and how those problems impacted her ability to work. Therefore, with no comprehensive medical opinion on overall disability, no substantial pre-existing medical

records to document her treatment, and no detailed testimony from Claimant as to the impact these various injuries had on her ability to work, I find that there is an insufficient basis to award compensation, much less permanent total disability compensation, from the Second Injury Fund.

In the absence of a positive finding on permanent total disability, Claimant also put at issue if she would be entitled to an award of permanent partial disability from the Second Injury Fund based on the combination of her primary neck injury and her pre-existing disabilities. For many of the same reasons enumerated above, Claimant fails to meet her burden of proof on this issue by failing to provide any competent and substantial evidence to support such an award. In addition to the lack of medical records and disability opinions, Claimant also specifically fails to meet the burden of proof on this issue by failing to provide any opinion that the pre-existing disabilities synergistically combined with the primary neck injury to create greater overall disability than the simple sum. Without such an opinion, Claimant has not met the required burden of proof to sustain such a claim for permanent partial disability compensation from the Second Injury Fund.

For all of these reasons, Claimant has failed to meet her burden of proof on her claim for permanent disability (total or partial) from the Second Injury Fund, and thus her claim against the Second Injury Fund is denied.

CONCLUSION:

Claimant has failed to meet her burden of proof on the issue of permanent total disability and also failed to meet her burden of proof to show that the Second Injury Fund is responsible for the permanent total disability and/or permanent partial disability based on a combination of her primary neck injury and pre-existing disabilities. Accordingly, the Claim for Compensation against the Second Injury Fund is denied.

Date: _____

Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation