

**FINAL AWARD ALLOWING COMPENSATION**

Injury No.: 05-064453

Employee: Linda Beard  
Employer: Hy-Vee Foods (Settled)  
Insurer: Employers Mutual Casualty Insurance Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the transcript, considered the parties' stipulations and read the parties' briefs. We find 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, we issue this final award and decision affirming the September 20, 2010, award and decision of the administrative law judge.

**Preliminaries**

The administrative law judge heard this matter on July 19, 2010. For reasons unknown, the court reporter responsible for creating the hearing record was unable to produce a transcript of some of the proceedings. Most significantly, the court reporter was unable to produce a transcript of employee's testimony.

On the day of the hearing, employee settled her claim against employer/insurer and prosecuted her claim against the Second Injury Fund. On September 20, 2010, the administrative law judge issued her award of permanent total disability against the Second Injury Fund. The Second Injury Fund filed an Application for Review alleging the administrative law judge erred in determining employee was permanently and totally disabled because:

- 1) the administrative law judge did not consider that employee returned to work after the primary injury;
- 2) the administrative law judge did not consider that employee continued to work overtime;
- 3) the administrative law judge relied upon alleged preexisting neck complaints that were not shown to be hindrances or obstacles to employment; and,
- 4) the administrative law judge failed to consider the impact of a subsequent work injury.

**Findings of Fact**

We adopt the administrative law judge's factual findings except as modified herein. To avoid the delay and expense of re-trying the claim, employee and the Second Injury Fund jointly submitted Stipulated Facts, which they agree accurately recount the portion

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2004, unless otherwise indicated.

Employee: Linda Beard

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of the hearing for which we have no record. In accordance with the parties' stipulation, we find as follows:

1. Linda Beard was 49 years old as of the date of hearing.
2. On the date of injury, Linda Beard was employed by Hy-Vee as a baker.
3. Ms. Beard's responsibilities as a baker for Hy-Vee included making doughnuts, assisting with bread baking, unloading trucks, and carrying bags of flour and icing.
4. On July 2, 2005, toward the end of her shift, while putting away utensils, Ms. Beard slipped on water on the floor.
5. Ms. Beard used her right arm to catch herself and fell on her right elbow and right buttock.
6. Ms. Beard told her co-workers that she was okay and left.
7. During her hour long ride home, Ms. Beard began feeling stiff.
8. Ms. Beard was home for two days with right shoulder, right wrist, right knee, right ankle, and right hip pain.
9. Ms. Beard went to a medical center in Osage Beach where an x-ray of her foot was taken and she was allowed to return to work after a few day [sic] of taking it easy.
10. Ms. Beard did return to work following the last injury of July 5, 2005, although stated that she had some difficulty unloading the trucks and putting things away.
11. Ms. Beard did work some overtime following the last injury of July 5, 2005.
12. In October of 2005, Ms. Beard noticed her left arm getting weaker as the result of an inability to fully use her right arm.
13. On December 13, 2005, Ms. Beard was assisting another employee in lifting something onto a table when she felt intense pain in her right shoulder.
14. Ms. Beard was driven to the emergency room.
15. Ms. Beard did not return to work after the December 2005 lifting injury.
16. Ms. Beard was eventually diagnosed with a likely superior labral tear in her right shoulder by Dr. Leslie and surgery was recommended.
17. Ms. Beard has no insurance coverage and was, therefore, unable to have the recommended surgery.

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18. Ms. Beard did receive treatment for her right ankle with Dr. Elliot who referred her for physical therapy and prescribed Naprosyn.
19. Ms. Beard received additional treatment in the form of injections of Kenalog and Lidocaine into the right shoulder from Dr. Haupt.
20. Pre-existing disabilities alleged by Ms. Beard include her cervical spine and mental issues pertaining to depression.
21. Ms. Beard described being in two motor vehicle accidents, in 1998 and 2003, respectively, and sustaining whiplash injuries in each accident.
22. Ms. Beard also described needing mental health medications on several occasions prior to 2005.
23. Ms. Beard stated she missed work on one occasion prior to the primary injury due to her mental health symptoms following her son's death.
24. Ms. Beard stated she was under no restrictions due to mental health conditions at the time of her injury.
25. Ms. Beard was not under the active care of a psychologist or psychiatrist at the time of her injury.
26. Dr. Volarich found a disc bulge at C6-7 and rated Ms. Beard's permanent disability as the result of her whiplash injuries at 20 percent of the body.
27. Dr. Volarich rated Ms. Beard's permanent disability of her right shoulder at 60 percent of the right upper extremity.
28. Dr. Stillings, a psychiatrist, found Ms. Beard's permanent disability as a result of her "pre-existing psychiatric disorders/disabilities" to total 20 percent of the body.
29. Dr. Stillings went on to state that he believed Ms. Beard to be permanently and totally disabled as the result of her "psychiatric conditions/disabilities due to her primary injury combine[d] synergistically with her pre-existing conditions/disabilities which are a hindrance or obstacle to employment"
30. Mr. Eldred, a certified rehabilitation counselor, found Ms. Beard to be permanently and totally disabled as the result of her July 5, 2005, accident and injury, "combined with her pre-existing medical injuries and conditions."
31. Mr. Cordray, a certified rehabilitation counselor, determine [sic] Ms. Beard to be employable in the open labor market
32. Dr. Hughes, a psychiatrist, did not find any psychiatric disability as the result of Ms. Beard's July 5, 2005, work injury, but he did find Ms. Beard to have preexisting

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bipolar or dysthymic disorder as well as chronic adjustment disorder.

33. Ms. Beard described her current limitations in her right shoulder, right knee, and right ankle, as well as her limited neck movement and her depression.
34. Ms. Beard stated that she does not believe that she is capable of returning to the open labor market.

We find the opinions of Dr. Volarich, Dr. Stillings, and Mr. Eldred to be the most credible medical, psychiatric, and vocational opinions, respectively.

Dr. Volarich is of the opinion that employee sustained a 60% permanent partial disability of the right upper extremity, a 20% permanent partial disability of the body as a whole referable to her lumbrosacral spine, a 5% permanent partial disability of the body as a whole referable to the cervical spine, and a 20% permanent partial disability of the left lower extremity rated at the knee. Dr. Haupt evaluated employee for the purpose of assessing the condition of her right shoulder. He believed that employee sustained only a 3% permanent partial disability as a result of the work injury.

The administrative law judge found that employee sustained a 9% permanent partial disability of the body as a whole as a result of the work accident. Neither employee nor the Second Injury Fund challenged the administrative law judge's findings. We adopt the administrative law judge's finding that employee sustained a 9% permanent partial disability of the body as a whole due to her July 2005 work fall.

#### **Law**

Section 287.200.1 RSMo sets forth the liability of the Second Injury Fund. As regards a claim for permanent total disability, the section provides:

If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed... receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability...caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, ...[and] [i]f the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability...the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special

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fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141.

## Discussion

### *Points on Appeal*

Although we identified four allegations of error in the Second Injury Fund Application for Review, the Second Injury Fund has abandoned two of the allegations by not addressing them in its brief. It appears the Second Injury Fund preserves only the first and fourth allegation identified in the Preliminaries section, *supra*: specifically, employee was able to work after her July 2005 primary injury and employee suffered a new work injury in December 2005. We address these two points.

The Second Injury Fund makes much of employee's return to work after the July 2005 injury. Employee's failed attempt to continue working does not convince us that employee was able to compete for employment in the open labor market, particularly where the return to work failed due to employee's physical inability to perform her work duties.

Dr. Volarich and Dr. Haupt were in agreement regarding the nature of the lifting incident of December 2005. Both testified that the lifting incident was just an irritation or aggravation of the shoulder injury caused by the July 2005 work fall. We find that the December 2005 incident did not cause a new shoulder injury.

### *Second Injury Fund Liability*

#### Generally

"Section 287.220 creates the Second Injury Fund and sets forth when and the amount of compensation that shall be paid from the fund in 'all cases of permanent disability where there has been previous disability.'" *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000) (citations omitted). "In order to be entitled to Fund liability, the claimant must establish either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself." *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo. App. 2004) citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo. App. 2001).<sup>2</sup>

#### Preexisting measurable permanent disability

"Liability of the Second Injury Fund is triggered only 'by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.'" *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo. App. 2002), citing *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 215 (Mo. App. 1999).

Dr. Volarich found employee had a preexisting permanent partial disability of 20% of the body as a whole, referable to whiplash injuries. Dr. Stillings found employee had preexisting psychiatric disabilities of 20% of the body as a whole. Based upon these

<sup>2</sup> The following cases cited herein were overruled on other grounds *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003): *Karoutzos*, *E.W.*, *Messex*, *Carlson*, *Kizior*, *Vaught*, *Wright*, and *Elliott*.

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opinions, we find employee's preexisting disabilities were actual and measurable at the time the July 2005 work fall.

#### Hindrance or Obstacle

To implicate the Second Injury Fund, the preexisting disability must also be of such seriousness as to constitute a hindrance or obstacle to employment. *Section 287.220.1 RSMo.* "To determine whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, 'the Commission should focus on the potential that the pre-existing injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there was no such prior condition.'" *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo. App. 2002), citing *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997).

Dr. Volarich opined that employee's neck and psychiatric disabilities are hindrances or obstacles to her employment. Dr. Stillings opined that employee's preexisting psychiatric disabilities/disorders are hindrances or obstacles to her employment. We accept these opinions of Drs. Volarich and Stillings.

#### Overall Disability

Dr. Stilling believes employee is rendered permanently and totally disabled by the combination of employee's exacerbation of her psychiatric conditions with her preexisting psychiatric conditions. Mr. Eldred is of the opinion that employee is unable to return to gainful employment and that employee is permanently and totally disabled as a result of her injury on July 5, 2005, combined with her preexisting medical conditions.

We find that employee is unable to compete for employment in the open labor market as of December 13, 2005 – the last day employee was physically able to work. We conclude that employee is permanently and totally disabled.

#### Employer liability

Employee's permanent partial disability from the work injury was 9% of the body as a whole. Consequently, had employer not settled this claim employer would have been obligated to pay to employee 36 weeks of permanent partial disability benefits beginning December 14, 2005.

#### **Conclusions**

Employee sustained a 9% permanent partial disability of the body as a whole as a result of her fall at work in July 2005. Employee had preexisting permanent partial disabilities that were of such seriousness as to constitute hindrances or obstacles to her employment. Employee's disabilities of the shoulder, back, neck, and knee combine with her preexisting disabilities to result in substantially greater disability than the simple sum of the disabilities; in fact, the disabilities combine in such a way as to render employee unable to compete in the open labor market.

Pursuant to the provisions of § 287.220.1 RSMo, the Second Injury Fund is obligated to provide permanent total disability benefits to employee. Because employee's compensation rate for permanent partial disability and permanent total disability is the

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same, Second Injury Fund payments begin after the payment period for employer's permanent partial disability obligation has run.

**Award**

The Second Injury Fund shall pay to employee weekly permanent total disability benefits of \$281.71 for her lifetime, or until modified by law. The Second Injury Fund's obligation to pay weekly permanent total disability benefits began August 22, 2006 (36 weeks after December 14, 2005).

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Hannelore D. Fischer issued September 20, 2010, is attached and incorporated to the extent it is not inconsistent with our findings, conclusions, award, and decision.

Given at Jefferson City, State of Missouri, this 26<sup>th</sup> day of October 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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VACANT  
Member

Attest:

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Secretary

## AWARD

Employee: Linda Beard

Injury No. 05-064453

Dependents: N/A

Employer: Hy-Vee Foods (settled)

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: Employers Mutual Casualty Insurance Company

Hearing Date: July 19, 2010

Checked by: HDF/tmt

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: July 2, 2005.
5. State location where accident occurred or occupational disease was contracted: Camden 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 occurred or occupational disease contracted:  
See award.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Right shoulder, right knee, right ankle.
14. Nature and extent of any permanent disability: 9% body.
15. Compensation paid to-date for temporary disability: \$0.
16. Value necessary medical aid paid to date by employer/insurer? \$10,150.00.
17. Value necessary medical aid not furnished by employer/insurer? \$0.
18. Employee's average weekly wages: \$422.27.

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19. Weekly compensation rate: \$281.71.
20. Method wages computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable:
22. Second Injury Fund liability:

**Permanent and total disability from August 22, 2006, forward. (Note that past PERMANENT TOTAL DISABILITY benefits from August 22, 2006, through September 7, 2010, equal \$59,440.81.)**

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: Andrew Lyskowski

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

Employee: Linda Beard

Injury No: 05-064453

Dependents: N/A

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: Hy-Vee (settled)

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

Additional Party: Second Injury Fund

Insurer: Employers Mutual Casualty Insurance Company

Checked by: HDF/tmt

## **ISSUES DECIDED**

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on July 19, 2010. Memoranda were due by August 20, 2010. The claim was originally tried against the employer/insurer as well as against the Treasurer of the State of Missouri as Custodian of the Second Injury Fund; the claim against the employer/insurer was resolved by settlement several weeks after the hearing. In their briefs, both the claimant and the Second Injury Fund made reference to a settlement reflecting permanent partial disability of nine percent of the body, between the claimant and the employer/insurer.

The parties stipulated that on or about July 2, 2005, the claimant, Linda Beard was in the employment of Hy-Vee Foods and on or about that date sustained an injury by accident which arose out of and in the course of employment. The employer was operating under the provisions of Missouri's workers' compensation law; liability for workers' compensation was insured by Employers' Mutual Casualty Insurance Company. The employer had timely notice of the injury. A claim for compensation was timely filed.

The claimant's average weekly wage was \$422.27 per week. The appropriate rate of compensation for all benefits is \$281.71 per week for all benefits. No temporary disability benefits have been paid. Medical aid has been provided in the amount of \$10,150.00.

The issue remaining for resolution is the liability of the Second Injury Fund.

## **FINDINGS OF FACT**

The claimant, Linda Beard, 49 years old as of the date of hearing, was employed by Hy-Vee as a baker. Generally, Ms. Beard's responsibilities as a baker for Hy-Vee included making doughnuts, assisting with bread baking, unloading trucks, and carrying bags of flour and icing. On July 2, 2005, toward the end of her shift, while putting away utensils, Ms. Beard slipped on water on the floor. Ms. Beard used her right arm to catch herself and fell on her right elbow and right buttock. Ms. Beard told her co-workers that she was okay, locked out and left. During her

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hour long ride home, Ms. Beard began feeling stiff. Ms. Beard was home for two days with right shoulder, right wrist, right knee, right ankle, and right hip pain. Ms. Beard went to a medical center in Osage Beach where an x-ray of her foot was taken and she was allowed to return to work after a few days of "taking it easy." After her return to work, Ms. Beard stated that she had some difficulty unloading the trucks and putting things away. Ms. Beard did work overtime after her return to work after her July 2, 2005, accident and injury.

In October of 2005, Ms. Beard noticed her left arm getting weaker as the result of an inability to fully use her right arm. On December 13, 2005, Ms. Beard was assisting another employee in lifting something onto a table when she felt intense pain in her right shoulder. Ms. Beard was driven to the emergency room. Ms. Beard did not return to work after the December 2005 lifting injury. Ms. Beard was eventually diagnosed with a likely superior labral tear in her right shoulder by Dr. Leslie and surgery was recommended. Ms. Beard had no insurance coverage and was, therefore, unable to have the recommended surgery.

Ms. Beard did receive treatment for her right ankle with Dr. Elliott who referred her for physical therapy and prescribed Naprosyn. Ms. Beard received additional treatment in the form of injections of Kenalog and Lidocaine into the right shoulder from Dr. Haupt.

Preexisting disabilities alleged by Ms. Beard include her cervical spine and mental issues pertaining to depression. Ms. Beard described being in two motor vehicle accidents, in 1998 and 2003, respectively, and sustaining whiplash injuries in each accident. Ms. Beard also described needing medications on several occasions prior to 2005 to help her "nerves."

Dr. Volarich found a disc bulge at C6-7 and rated Ms. Beard's permanent disability as the result of her whiplash injuries at 20 percent of the body. Dr. Volarich found disability as the result of a prior right carpal tunnel syndrome too minimal to rate. Likewise, prior shoulder strains dating back to 2003 were found too minimal to rate.

Dr. Stillings, a psychiatrist, found Ms. Beard's permanent disability as a result of her "pre-existing psychiatric disorders/disabilities" to total 20 percent of the body. Dr. Stillings went on to state that he believed Ms. Beard to be permanently and totally disabled as the result of her "psychiatric conditions/disabilities due to her primary injury combine[d] synergistically with her pre-existing conditions/disabilities which are a hindrance or obstacle to employment", although Dr. Stillings did admit in his deposition that the psychiatric disabilities alone would "probably not" render Ms. Beard permanently totally disabled.

Mr. Eldred, a certified rehabilitation counselor, found Ms. Beard to be permanently and totally disabled as the result of her July 5, 2005, accident and injury, "combined with her pre-existing medical injuries and conditions."

Although Dr. Hughes, a psychiatrist, did not find any psychiatric disability as the result of Ms. Beard's July 5, 2005, work injury, he did find Ms. Beard to have preexisting bipolar or dysthymic disorder as well as chronic adjustment disorder.

Mr. Cordray, a certified rehabilitation counselor, found Ms. Beard to be capable of sedentary and light jobs and an "ideal candidate for vocational training program."

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Ms. Beard described her current limitations in her right shoulder, right knee, and right ankle, as well as her limited neck movement and her depression. Ms. Beard stated that she does not believe that she is capable of returning to the open labor market.

### **APPLICABLE LAW**

RSMo, Section 287.220. 1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject

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to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

**AWARD**

The claimant, Linda Beard, has sustained her burden of proof that she is permanently totally disabled as the result of her accident and injury of July 5, 2005, combined with her preexisting disabilities, specifically her cervical back and mental state. Ms. Beard testified with regard to her 2005 injuries, as well as her condition prior to 2005, both physical and mental. Drs. Stillings and Hughes both testified to Ms. Beard's preexisting mental condition, while Dr. Volarich testified to Ms. Beard's physical condition both pre and post 2005. Mr. Eldred's analysis of Ms. Beard's ability to be gainfully employed as the result of her 2005 injury and her preexisting disabilities is found credible and is supported by the testimonies of Ms. Beard and Dr. Stillings. Second Injury Fund liability is calculated based on a permanent disability for which the employer/insurer is responsible of nine percent of the body, since both claimant and Second Injury Fund counsel referred to the settlement of permanent disability based on nine percent of the body in their briefs and did not dispute or argue this issue.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

HANNELORE D. FISCHER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Naomi Pearson