

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

Injury No.: 05-066070

Employee: Fonda Allen Brandt
Employer: Cardinal Scale Manufacturing Company (Settled)
Insurer: Travelers Property Casualty 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. We have reviewed the evidence, read the briefs, and considered the whole record.¹ Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the April 13, 2011, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Discussion

Rate of compensation

The Second Injury Fund's Application for Review raises the sole issue of the administrative law judge's application of § 287.120.4 RSMo to increase the rate of compensation applicable to the award of permanent total disability benefits to employee. The facts are not in dispute and the parties agree that employee's injuries were caused by her employer's violation of a safety statute and that § 287.120.4 RSMo is thereby implicated in this matter. The parties dispute whether the terms of that provision operate to increase employee's award as against the Second Injury Fund.

In *Terry Hornbeck v. Spectra Painting, Inc., and Treasurer of the State of Missouri As Custodian of the Second Injury Fund*, No. SC92116 (July 31, 2012), the Supreme Court of Missouri held that the 15% enhancement under § 287.120.4 RSMo is inapplicable to an award of compensation against the Second Injury Fund. We believe this holding is determinative of the sole issue before us in this case.

For this reason, we modify the award of the administrative law judge. Discounting the 15% enhancement the administrative law judge applied to the permanent total disability rate results in a rate of \$233.00 per week. Accordingly, we conclude that the rate of compensation for permanent total disability benefits is \$233.00 per week.

¹ In addition, oral arguments in this matter were heard on September 28, 2011, before former Commissioners William F. Ringer and Alice A. Bartlett. Commissioner Curtis E. Chick, Jr., did not participate in oral arguments. James Avery has since been appointed to the Commission, and Chairman William F. Ringer has retired.

Employee: Fonda Allen Brandt

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Award

We modify the award of the administrative law judge on the issue of compensation rate. We find the appropriate rate of compensation for permanent total disability benefits is \$233.00 per week. In all other respects, we affirm the award of the administrative law judge.

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 L. Timothy Wilson, issued April 13, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 29th day of August 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Fonda Allen Brandt

Injury No. 05-066070

Dependents: N/A

Employer: Cardinal Scale Manufacturing Company

Insurer: Travelers Property Casualty Company

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

Hearing Date: February 1, 2011

Checked by: LTW

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 18, 2005
5. State location where accident occurred or occupational disease was contracted: Jasper County, Missouri (The parties agreed to a change in venue to Springfield, Greene 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: While engaged in her employment as a punch press operator at the Employer's (Cardinal Scale Manufacturing) Webb City plant, Employee's hand became caught in a punch press that she operated and it crushed her left hand. The accident injured all four fingers. Orthopedic surgeons eventually surgically amputated the long, ring and little fingers of her left hand.
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: Left Hand
14. Nature and extent of any permanent disability: 70 percent to left hand (122.5 weeks)
15. Compensation paid to-date for temporary disability: \$5,710.08
16. Value necessary medical aid paid to date by employer/insurer? \$151,166.99

Employee: Fonda Allen Brandt

Injury No. 05-066070

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$350.00
- 19. Weekly compensation rate: \$233.00 / \$233.00
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

The Employee and Employer / Insurer entered into a Stipulation for Compromise Settlement for \$105,000, wherein the parties disputed among other things the percentage of permanent disability and disfigurement, and the Employer and Insurer agreed to leave open future medical care. This stipulation compromised and resolved the claim filed against the Employer and Insurer.

- 22. Second Injury Fund liability: Yes

Weeks of permanent partial disability from Second Injury Fund: N/A

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund: Yes.

Employee is entitled to permanent total disability benefits (\$233.00 per week) for his lifetime. In addition, Employee is entitled to additional compensation in the amount of 15 percent of the compensation owed under Chapter 287, RSMo, premised on the employer committing a safety penalty violation under Section 287.120.4, RSMo. Accordingly, Employee is entitled to permanent total disability compensation in the amount of \$267.95 per week for Employee's lifetime (\$233.00 + 15% or \$34.95 = \$267.95).

There is not a weekly differential between permanent partial disability compensation paid by Employer / Insurer and permanent total disability compensation to be paid by Second Injury Fund. Accordingly, in light of Employee reaching maximum medical improvement on April 15, 2008, and responsible for payment of 122.5 weeks of permanent partial disability compensation, the payment of permanent total disability compensation by the Second Injury Fund is effective as of April 15, 2008, and shall take into consideration 122.5 weeks of permanent partial disability, which is attributable to the Employer. (April 15, 2008, to August 21, 2010, is 122.5 weeks.) Therefore, responsibility for payment of \$267.95 per week for Employee's lifetime by the Second Injury Fund began on August 21, 2010.

TOTAL: \$267.95 PER WEEK (LESS 122.5 WEEKS OF PPD PAID BY EMPLOYER & INSURER) FOR EMPLOYEE'S LIFETIME, EFFECTIVE AS OF APRIL 15, 2008.

- 23. Future requirements awarded: Yes (See Award)

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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: John Cowherd, Esq. and Patrick J. Platter, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Fonda Allen Brandt

Injury No. 05-066070

Dependents: N/A

Employer: Cardinal Scale Manufacturing Company

Insurer: Travelers Property Casualty Company

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on February 1, 2011. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about March 18, 2011.

The employee appeared personally and through her legal counsel, John Cowherd, Esq. and Patrick J. Platter, Esq. The employer and insurer were not part of the evidentiary hearing, having previously entered into a stipulation for compromise settlement with the employee, resulting in approval by an administrative law judge on or about January 12, 2011. The Second Injury Fund appeared through its attorney, Christina Hammers, Assistant Attorney General.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about July 18, 2005, Cardinal Scale Manufacturing Company was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Travelers Property Casualty Company.
- (2) On the alleged injury date of July 18, 2005, Fonda Allen Brandt was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about July 18, 2005, the employee sustained an accident, which arose out of and in the course of her employment with the employer.
- (4) The above-referenced employment and accident occurred in Jasper County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.
- (5) The employee notified the employer of her injury as required by Section, 287.420, RSMo.

- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) At the time of the claimed accident the employee's average weekly wage was \$350.00, which is sufficient to allow a compensation rate of \$233.00 for temporary total disability compensation, and a compensation rate of \$233.00 for permanent disability compensation.
- (8) Temporary disability benefits have been provided to the employee in the amount of \$5,710.08, representing 24 ½ weeks in disability benefits, payable for the period of July 19, 2005 to January 14, 2006.
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$151,166.99 in medical expenses.

The sole issues to be resolved by hearing include:

- (1) When did the employee reach maximum medical improvement relative to the work injury of July 18, 2005?
- (2) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?
- (3) Whether the employer committed a safety penalty violation under Section 287.120.4, RSMo relative to the work injury of July 18, 2005 and an alleged violation of Section 292.020, RSMo; and if so, whether the employee is entitled to payment by the Treasurer of Missouri, as the Custodian of the Second Injury Fund, of the penalty amount of 15 percent of the compensation due and owing to the employee?

EVIDENCE PRESENTED

The employee testified at the hearing in support of her claim. Also, the employee presented at the hearing of this case an additional witness, Wilbur Swearingin, CRC. In addition, the employee offered for admission the following exhibits:

- Exhibit A.....Medical Report of Roger W. Cameron, D.O.
- Exhibit B.....CV of Wilbur Swearingin, CRC
- Exhibit C.....Vocational Report of Wilbur Swearingin, CRC
- Exhibit D.....Medical Records from Bruce Silverberg, M.D.
- Exhibit E.....Medical Records from Freeman Health System
- Exhibit F.....Medical Records from MET Ambulance
- Exhibit G.....Medical Report of William R. Reynolds, M.D.
- Exhibit H.....Medical Report of Michael B. Grillot, M.D.
- Exhibit I.....Records of Division of Vocational Rehabilitation

- Exhibit J Medical Records from Steven M. Kory, M.D.
- Exhibit K..... Medical Report of Matthew J. Concannon, M.D.
- Exhibit LMedical Records from University Hospital and Clinics, University of Missouri Health Sciences Center
- Exhibit MMedical Records from Joann Mace, M.D.
- Exhibit N.. Medical Records from Good Shepherd Care Center (physical therapy)
- Exhibit O.....Deposition of James Kenneth Blundell, Ph.D.
- Exhibit P Deposition of Rick Lansaw
- Exhibit Q..... Deposition of John Whitescarver
- Exhibit R..... Deposition of Bryan Wiley
- Exhibit S Deposition of Robert Whitten, Ph.D.
- Exhibit T Medical (Psychological) Report of Dale Halfaker, Ph.D.
- Exhibit U. Supplemental Medical (Psychological) Report of Dale Halfaker, Ph.D.
- Exhibit V.....Stipulation for Compromise Settlement (Injury No. 98-071634)
- Exhibit W..... Stipulation for Compromise Settlement (Injury No. 95-410593)
- Exhibit X..... Work History of Fonda (Allen) Brandt
- Exhibit Y.....Summary Sheet of Surgeries & Procedures for Employee

Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, V, W, X and Y were received and admitted into evidence. In regard to admission of Exhibit C, reference by Mr. Swearingin of opinions of Dr. Halfaker are redacted and not included in the admission of Exhibit C.¹ (Employee withdrew from his offer for admission Exhibits T and U. Accordingly, Exhibits T and U were received but not admitted into evidence.)

The Second Injury Fund did not present any witnesses at the hearing of this case. However, the Second Injury Fund offered for admission the following exhibits:

- Exhibit I Vocational Report of James England, CRC
- Exhibit II Deposition of James England, Jr.
- Exhibit IIDeposition of Timothy Kaver
- Exhibit IVDeposition of Fonda (Allen) Brandt

Exhibits I, II, III and IV were received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

- Letter Dated February 3, 2011
- Notice of Hearing
- Cover Letter & Stipulation for Compromise Settlement in Injury No. 05-066070 (Between Employee & Employer / Insurer)

¹ In light of the reports of Dr. Dale Halfaker (Exhibits T and U) not being admitted into evidence, the Second Injury Fund sought and moved for deletion of any reference to the Halfaker report mentioned in any other Exhibits. That request is granted.

- Order Sustaining Change of Administrative Law Judge
- Minute Entry of Judge House
- Motion for Change of Administrative Law Judge
- Answer of Second Injury Fund to Amended Claim for Compensation
- Answer of Employer/Insurer to Amended Claim for Compensation
- Amended Claim for Compensation
- Answer of Employer/Insurer to Amended Claim for Compensation
- Claim for Compensation
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

Preliminary Statement

This claims centers upon an accident that happened on July 18, 2005. The employee, Fonda Brandt, worked as a punch press operator at the employer's (Cardinal Scale Manufacturing) Webb City plant. While engaged in this employment, Ms. Brandt's hand became caught in a punch press that she operated and it crushed her left hand. The accident injured all four fingers. Orthopedic surgeons eventually surgically amputated the long, ring and little fingers of her left hand. Additionally, prior to this work injury Ms. Brandt suffered from learning impairments and mental disorders.

The parties present three issues for adjudication. However, the primary issue is whether Ms. Brandt is permanently and totally disabled; and if so, whether the Second Injury Fund is liable for permanent total disability compensation.

DISCUSSION

Personal Background

Ms. Brandt resides alone in Versailles, Missouri. She has lived in Versailles for approximately three years. She previously resided in Carterville, Missouri. She is presently single (previously divorced). She has two children, ages 25 and 18.

Ms. Brandt attended schools in the Morgan County School District. She dropped out of high school after the ninth grade due to failing grades. She attended remedial classes during grade school. She achieved a GED equivalency after two attempts. She attended remedial classes.

Subsequent to suffering the underlying work injury Ms. Brandt attended one and a half semesters of college at Missouri Southern State University. Her first semester consisted of orientation courses designed to help her assimilate into a college setting. She withdrew in the middle of the second semester partly due to a separation from her husband and also due to problems with comprehension of course material.

Ms. Brandt's employment is varied and included the following: work at nursing homes;

production employee at the Lafaduer Manufacturing facility; an attendant at the Fulton State Hospital; referrals through Kelly Employment Services as a temporary employee; a cashier at the Dollar Tree; waitress at Denny's Restaurant; and then as a production employee at Cardinal Scales.

Ms. Brandt's personal skills include the following. She can balance a checkbook and make change. She can read and understand a newspaper. She can perform basic mathematical functions such as addition, subtraction, multiplication and division. She can check her e-mail and perform web searches on a computer. She, however, cannot type and has no training in any type of business computer functions such as word processing or spreadsheet compilations.

Work Environment at Cardinal Scale

Ms. Brandt worked for Cardinal Scale in Webb City, Missouri, primarily as a punch press operator. She worked in this facility for approximately two (2) years before suffering an accident on July 18, 2005. Notably, in July 2005 the plant facility in Webb City, Missouri, utilized approximately ten to fifteen punch presses. Ms. Brandt worked on no more than two, but mostly on the punch press that made aluminum beams. These beams serve as caps on top of doctor's scales. The aluminum part would be placed upon a die and would stay on the die while it was being pressed. Air would be projected that would push the piece from the die and permit the employee to remove that piece from the pinch point.

Ms. Brandt's training was strictly on-the-job. An employee showed her how to run the punch press on a few occasions and then she was responsible for running the operation. Supervisor Brian Wiley testified that safety training was provided to new employees, but was not really sure of what that training consisted. Mr. Wiley testified that employees were given a written brochure concerning operations. He called the approach in which an employee would show a new operator how to run the punch press the "buddy" system.

A company called Niagara manufactured the punch press, which is known as a Niagara single head punch press. The purpose of this machine is to pierce metal or cut steel. It makes one part, which is the beam. This is the reading beam at the top of the scale. Other operators could have been using this punch press than merely Ms. Brandt. The punch press in question had been at the plant for at least twenty (20) years before the accident.

Operators such as Ms. Brandt would sit in a chair in the front of the machine. The operators would place a part in the machine and then "trip the buttons." Starting these buttons puts the punch press into the cycle that presses the part. The term cycling is utilized to identify or mean that the punch press is operating. After the cycle of the machine, the operators would then pull the part out. With this particular punch press, it would be necessary to pull the part (or beam) out by hand. This means that an employee's hand is in the "pinch point" or point of operation. In other punch presses, employees could use hand tools to pull the parts out. This particular part or beam was too large and awkward to be pulled out by a hand tool.

Only two other punch presses had "pull backs." Guarding and pull backs were not added to this punch press and others until after Brandt's injury. Guardings have put around the chain since Brandt's accident. Pull backs have also been added since the accident. The pull back system works this way: when an operator is running parts and thus pushing palm buttons, it is

foreseeable that the press will decide to trip while an operator's hand is within a pinch point. If the ram comes down, the pull back will have cable connections attached to the operator's hand so that it pulls the hand back and out of the way of the pinch point. The warning label (Photo - Exhibit 3 used during the depositions of Cardinal Scale employees) was not assigned until after Ms. Brandt's accident. There were no warning signs on the press before the accident.

Weekly maintenance calls for an employee to check the belts and to check the palm buttons. A monthly maintenance check consists of checking the press to make sure it cycles and lubrication.

Accident of July 18, 2005

On July 18, 2005, a timing chain broke on Ms. Brandt's punch press, which had the effect of changing its operation from manual to automatic. It cycled while her hand was in the point of operation. The press came down upon her left hand twice and crushed it.

Immediately, upon suffering this crushing incident, Ms. Brandt experienced shock, and a coworker took her to another building. Another coworker then transported her to the emergency department at Freeman West Hospital in Joplin.

Cardinal Scale conducted an investigation that concerned the cause of the accident. The master link broke, which thus caused a break in the timing chain. It is rare for a master link to break. The accident started because a timing chain broke. This is like a bicycle chain. It was designated as chain number 31. The chain controlled a CAM switch.² The CAM switch tells the press what cycle the press is in when an operator pushes the palm button. Thus, the machine here cycled because of a break in the timing chain.

Ms. Brandt's supervisor, Brian Wiley, and maintenance employee, Rick Lansaw, installed the pull back system on Ms. Brandt's punch press after her accident. These changes were made after the investigation. Punch press operators are now required to wear pull back devices.

Kenneth Blundell, Ph.D., testified on behalf of Ms. Brandt. Dr. Blundell is an Associate Professor of Mechanical Engineering at the University of Missouri-Kansas City. He has been affiliated with UMKC for 28 years. He has taught subjects that concern the operation and guarding of punch presses. He has investigated numerous accidents. Dr. Blundell has used and owned a punch press machine.

Dr. Blundell testified that Cardinal Scale failed to comply with the guarding statute specified in *Section 292.020*. Cardinal Scales had experience in safeguarding this type of machinery and, for example, in adding pull back devices for some but not all of its punch presses. A pull back device, more probably than not, would have prevented the accident. In this regard, Dr. Blundell stated,

So they had machines equipped with those on the day of Ms. Brandt's injury, and that if this machine had been equipped with such a device, then I believe more probably than not, the accident wouldn't have happened.

² The deposition transcript of Rick Lansaw refers to this switch as a "CAM switch." The deposition transcript of John Whitescarver refers to this as a "Candy" switch. This difference is not material.

The punch press was not safely and securely guarded because it failed to have a means that would prevent the operator from having their hand under the point of operation. The United States Department of Labor had documented in the early 1980s examples of how to guard safely and securely a punch press. Pull back devices were invented in the early 1960s and have become one of the most prevalent means of providing a safeguard. The Department of Labor in one of its publications in the 1980s even specified the fundamental benefits of a pull back. The publication identified by Dr. Blundell actually concerned a power press that was comparable to the Niagara punch press used by Brandt and Cardinal Scale.

If the – if the compliance of the operator of this machine had incorporated a device, a pull back device or a comparable means of ensuring the operator's hands are not in the danger area, then I believe the accident would not have happened.

Further, the mechanical failure of the chain that caused the unexpected stroke may not have caused the injury.

That's one of the benefits of a pull back device. It's mechanically connected, and if the press descends for any reason at any point during the cycle, then given certain conditions of being properly installed and properly maintained and properly adjusted, then that would have more probably than not prevented the accident.

Moreover, the palm buttons that were located on the punch press at the time of the accident would not securely guard the safety of the operators' hands if the operators had to place their hands at the point of operation to remove the metal beams.

Because the – well, just under normal operation, never mind a situation where a – something untoward occurs. But the fact that she's able – she's able to reach in on the upstroke.

And that's unfortunately where the break occurred. And because the press descended and the palm buttons had released the operator's hands because they were not active on the ascent, then we have the situation where the press was falling essentially under gravity and her hands were in the point of danger.

Initial Treatment of Left Hand

Most of the medical treatment concerned efforts to save three fingers of the left hand though all four fingers were fractured. Those were the little finger, ring finger and long finger. It became apparent that medical treatment could not save the little finger because it became necrotic. Medical treatment then centered upon efforts to save the next two fingers.

Bruce Silverberg, M.D. assumed responsibility of the treating surgeon. He is a board certified orthopedic hand surgeon who practices in Joplin, Missouri. He first diagnosed a crush injury to the left hand with fractures involving all four fingers at the proximal joints, with a fracture to the small finger at the middle joint and vascularization of the middle, ring and small fingers.

The surgeries performed by Dr. Silverberg may be summarized as follows:

Date of Surgery	Condition	Type of Surgery
July 19 th , 2005	Crush injury to left hand with fractures of all four fingers at the proximal joints, including a fracture of the middle joint of the little finger; vascularization of the middle, ring and small fingers. Incomplete amputation recognizing attachment of the involved fingers only by the sublimis flexor tendon.	Fifteen hour surgery to the index, middle, ring and small fingers with vein graft harvest from the forearm and skin graft elevation. Open reduction and multitude pin fixation of the fractures of all fingers with several skin grafts from the forearm.
August 18 th , 2005	End necrosis of the left small finger and a small open wound, 2 x 4 cm. upon the dorsal side of the left ring finger.	Amputation of the left small finger and transposition of a volar flap for coverage; debridement of the left ring finger with application of a thick split thickness skin sheet graft from the forearm.
December 15 th , 2005	Shifting of middle finger fracture wire; crepitance in right finger with passive manipulation. Mal-union of ring finger proximal joint with syndactyly of the ring and middle fingers. ³	Tenolysis/syndactyly release and dorsal flap with split thickness skin graft coverage of the third web space between the middle and ring fingers harvested from the forearm. ⁴ Open resection of the mal-union of the ring finger with pin and wire tension fixation.
April 18 th , 2006	Remaining mal-union and non-union of the proximal joint of the left middle finger with recurrent syndactyly of the third web space and a nuisance dysfunctional stump of the left small finger.	Revision amputation of the left small finger (which removed the stump) with volar flap advancement on the dorsal side. Island flap dissection and elevation to provide complete coverage of the third web space between the middle and ring fingers. Resection of the mal-union and non-union of the middle finger proximal joint and bone fixation using a cross K-pin and dorsal tendon band wiring.
January 4 th , 2007	Multiple finger revascularization and persistent functional disability with retrained fixation pins.	Extraction of two pins in the left middle finger. Extraction of a single pin in the left ring finger. Manipulation of joints in those two

³ Syndactyly means any degree of webbing or fusion of the fingers or toes.

⁴ Tenolysis is also known as tendolysis. This is a release of a tendon from adhesions.

		fingers.
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The purpose of the first surgery was to provide arterial blood flow in all five digits of the left hand and to pin the fractures in all four fingers. The purpose of the second surgery was to amputate most of the left little finger because it had developed necrosis and to provide a skin graft for a wound that had developed on the left ring finger. The purpose of the third surgery was to improve the movement and function of the left, middle and ring fingers. The purpose of the fourth surgery was to remove the remaining portion of the left little finger because it was not functional and interfered with remaining hand function and, in addition, to re-pin and wire joints within the middle and ring fingers in order to improve function. The purpose of the fifth surgery was to remove the pins because they were loose and one pin was coming out of the middle finger with pus.

Dr. Silverberg saw Ms. Brandt on July 29, 2007, though he placed her at maximum medical improvement on March 9, 2007. He noted that her bone and soft tissue had healed, but the immobility in the long and ring fingers left her unable to use those fingers in hand functions. He found that she had significant arthritis in the middle joint of the long finger and that this could require a joint fusion or replacement. He also noted that developing arthritic change was a potential problem in the ring finger. He also noted that she had reduced sensation for her fingers but maintained a normal cascade with a fixed posture of flexion.

Completion of Treatment for Left Hand

Dr. Matthew Concannon of Columbia saw Ms. Brandt on July 9, 2007, after Ms. Brandt had moved to Versailles, Missouri. The primary purpose of the examination was to determine whether it was reasonable to proceed with surgical amputation of the left middle and ring fingers. Dr. Concannon believed that it was reasonable to proceed with the amputation. Those fingers were flexed in the palm, dystrophic and tender, completely stiff without any motion. The skin over the palm next to the fingers was atrophic and friable. Dr. Concannon recommended surgical amputation of the two fingers. He also recommended an open capsulotomy of the index finger and a tenolysis in order to maximize the range of motion in that finger. He considered Ms. Brandt an excellent candidate for hand prosthesis after the amputation and tenolysis.

Dr. Stephen Colbert performed this surgery on September 12, 2007. Dr. Concannon and Dr. Colbert were affiliated with the University of Missouri Medical Center in Columbia, Missouri. Dr. Colbert saw Ms. Brandt in follow-up five (5) times following this surgery. He saw Ms. Brandt on September 21, 2007; October 8, 2007; November 30, 2007; January 28, 2008; and March 7, 2008. Dr. Joanne Mace, a specialist in physical medicine in Jefferson City, saw Ms. Brandt four (4) times between the surgical amputation and prn release date. She prescribed medication, supervised physical therapy and also authorized an MRI scan of the left shoulder to rule out any significant internal derangement, presumably to determine if there was overcompensation to the shoulder joint from the loss of fingers on the right hand.

Efforts to Continue Employment

Ms. Brandt returned to work at Cardinal Scale after her accident. The company assigned her to several different departments. She started in the punch press building. The company then moved Ms. Brandt to a building that had no heat, and then transferred her to a department in which the parts weighed too much for her given that she was functionally one-handed. The

employer then transferred Ms. Brandt to another building where she filled orders for other departments. She resigned because she could not perform her job physically. She left work at Cardinal Scale in either June or July of 2006. This was during the period of time in which Dr. Silverberg was attempting to save her long and ring fingers. She tried to keep her fingers as long as she did because she acted on medical advice that she would eventually regain the full use of her hand.

Ms. Brandt then obtained a job at a grocery store in Joplin. She only worked there one day because there were too many jobs that she could not do and the company let her go. She has worked nowhere since then. Subsequent to being terminated from the grocery store position, Ms. Brandt has looked for jobs, such as housekeeping, grocery stores and similar positions. She has submitted applications for employment, but has not been offered opportunity for any interviews.

On June 15, 2006, Ms. Brandt applied for vocational placement assistance with the Missouri Division of Vocational Rehabilitation. Three different vocational placement counselors affiliated with the Division concluded that she had significant obstacles in any return to employment. Those counselors were located in Joplin, Mt. Vernon and Jefferson City respectively. The Mt. Vernon counselor, also affiliated with the University of Missouri Rehabilitation Center, worked with Ms. Brandt in Joplin.

The counselors did not refer Ms. Brandt to any vocational training programs. They did not refer her for attendance at Missouri Southern State University. At her own cost and expense, Ms. Brandt attended one and half (1½) semesters at Missouri Southern State University.

The Division eventually referred Ms. Brandt to the Missouri Rehabilitation Center for vocational evaluation services. The counselor from this center noted the following barriers to employment opportunities: bipolar II disorder; severe crush injury to the left hand and fingers; limited lifting, pushing, pulling, carrying and gripping; limited use of the left hand; impulse control; mood swings; depression/anxiety/panic attacks; limited judgment, decision making and problem solving skills; irritability and anger control; interpersonal and social skills; attention and concentration; poor attendance; history of substance abuse; substantial legal history; limited physically appropriate transferable work skills; medication non-compliant; and history of suicide attempts.

The vocational counselor from the Missouri Rehabilitation Center found these vocational strengths: a GED equivalency certification; some post secondary education; motivation to obtain employment; reporting a strong support system; self-reported maintenance of sobriety; transportation; good grooming and hygiene; a hard worker; and participating in counseling with pastor.

The Joplin office of the Division referred Ms. Brandt to a psychologist named Robert Whitten in Joplin for an assessment of her potential to complete a vocational program. He evaluated Ms. Brandt on August 16, 2006. He arrived at the following diagnostic impression: Axis I - attention deficit/hyperactivity disorder combined type; major depression and partial remission with possible history of bipolar disorder earlier; panic disorder with agoraphobia now controlled by medication; and likely generalized anxiety disorder; Axis II – histrionic traits seen; Axis III – injury to left hand with surgical repair; Axis IV – education problems; and Axis V – a

current GAF of 45 which indicates a serious impairment in aspects of cognitive, school, emotional and occupational functional.

Dr. Whitten measured these findings upon Ms. Brandt's abilities. Ms. Brandt's verbalized IQ was 79. Her performance IQ was 80. Her full scale IQ was 78. Her verbal comprehension index was 84. Her perceptual organization index was 85. These scores show that she has not been able to develop either verbal or nonverbal and visual based skills beyond the lowest threshold of low average. Her two index scores reached a more centrally low average level. The verbal IQ was lowered a great deal due to her serious difficulty with oral memory and number concentration ability on both arithmetic and digit span. Her weak information score was also strongly suggestive of both limited education and poor memory for facts that she has learned in the past.

Although Ms. Brandt reached an average score on picture completion, her lapses of attention were seen in several subtests. Ms. Brandt's scores on the Woodcock-Johnson test of achievement revised indicated a grade norm of 9.5. This was the limit of her formal education. Her overall level of developed learning ability did not suggest a presence of one or more learning disabilities. The scores were what Dr. Whitten called "solidly average." He did state that she was deficient in specific operations in math calculations. She would make computation errors even when understanding the basic operations. She did not consolidate memory full knowledge of fractional operations and had no visible knowledge of pre-algebra signed numbers. Her spelling was far below grade level. This was also true of her grammar use and use of irregular word forms. He did not consider her to be a candidate for post high school education like college.

The vocational counselor at the Joplin office of the Division made the following findings:

Client's mental illness impedes her ability to think rationally and make decisions that represent her own best interests. She also experiences difficulty with attention/concentration and impulsivity, having recently quit her job as a result. In regard to her crush injury involving the left hand, she can no longer perform her job duties as a waitress, punch press operator, or other packing and production duties since those positions require the simultaneous use of both upper extremities.

That same counselor considered vocational assistance to be worthwhile.

A vocational evaluation will prove beneficial in quantifying client's strength, weaknesses, interests, and abilities as they relate to defining an appropriate vocational goal. Possible training in a more suitable occupational or job placement services are anticipated.

Ms. Brandt eventually moved to Versailles because she divorced her husband and she transferred her case file to the Jefferson City office of the Division. Her counselor classified her to have a "Most Significant Disability." This meant that she was seriously limited in three or more functional capacities. Her limitations included self direction, work tolerance, and interpersonal skills. The following is what the counselor had to say concerning self directions:

Due to the nature of [claimant's] bipolar disorder, PTSD, anorexia nervosa, and BIF, she has historically made inappropriate decisions, has difficulty following directions/instructions and staying on task. [Clt.] has had both rehabilitation and psychiatric hospitalization and will need cont. mental healthcare mgmt. and guidance to experience optimal vocational success.⁵

The counselor stated the following with respect to work tolerance:

Due to the nature of clt's three digit amputations on left hand due to severe crush injury w/ resulting fractures and devascularization injuries to her small fingers, she cannot work in a physically demanding environment w/ out causing potential injury. clt. will need to work in an environment that offers flexibility in tasks, sedentary tasks, or accommodations for those tasks, she cannot perform. In addition, clt. due to Clt's BIF, bipolar disorder, PTSD, and anorexia nervosa, clt. cannot work in a high stress environment and will need to work in one w/ limited stressors in order to experience optimal vocational success.

The counselor had the following to say with respect to her work skills:

Due to the nature of clt's BIF, she has difficulty acquiring and maintaining information due to her overall intelligence. clt will need guidance and accommodations in a work setting that requires learning new tasks/skills and information, in order to experience optimal vocational success.

The counselor then had the following recommendations concerning Ms. Brandt's interpersonal skills:

Due to the nature of clt's BIF, bipolar disorder, PTSD, and anorexia nervosa, she has historically exhibited actions/behaviors that are distracting to others, making it difficult to establish appropriate relationships in a work setting. In addition, this type of behavior/affects makes it difficult for others to stay on task/maintain productivity, resulting in overall employee/employer dissatisfaction.

James England, CRC evaluated Ms. Brandt on November 4, 2009, at the referral of the Employer/Insurer. He agreed that at the time he evaluated Ms. Brandt, her lack of transferable skills and physical limitations left her in need of training in order to reenter the work force. He recommended that his office could assist her with training in order to reenter the work force.

Timothy Kaver from Mr. England's office started that procedure. He met with Ms. Brandt at her home in Versailles and recommended that she review the Occupational Handbook published by the United States Department of Labor. He told her to review the handbook and then to contact him to tell him in what jobs she was interested.

Mr. England had already asked Ms. Brandt her job interests during a Career Assessment

⁵ This text refers to a number of abbreviations. "PTSD" refers to post traumatic stress disorder. "BIF" refers to borderline intellectual function. "Clt" refers to claimant.

Inventory. An indicator called "General Interests Themes" had already reflected all of her interests to be in the average range. The highest scores were in the social and conventional fields. Under the indicator known as "Basic Interest Area Scales," she had high scores in areas such as protective service, animal service, medical service and religious activities. Under the "Occupational Scales," she had similar interests in fields that included x-ray technician, pharmacist, dental hygienist and chiropractor. Her "Educational Orientation" score reflected that her interests were for jobs which would require retraining of two years or less.

Mr. Kaver had this inventory when he interviewed Ms. Brandt. He, nonetheless, instructed her to read the Occupational Handbook. Ms. Brandt traveled to the library in Versailles and discovered that this library did not have the publication. She then traveled from her home in Versailles to Jefferson City. The library in Jefferson City had this handbook. She did not understand the book, became frustrated, and then called, according to her memory, Mr. Kaver on two occasions. Mr. Kaver interpreted one voicemail to mean that Ms. Brandt had quit the program.

Both Mr. England and Mr. Kaver were not aware of Ms. Brandt's attempts at retraining through the Missouri Division of Vocational Rehabilitation. Mr. England agreed with the Division's findings.

Vocational consultant, Wilbur Swearingin, CRC, was critical of the approach taken by Mr. England and Mr. Kaver for vocational assistance. He stated that it was not necessary to send Ms. Brandt to a library to read a book that she would likely have trouble comprehending, especially since Mr. England and Mr. Kaver already knew Ms. Brandt's vocational interests. He considered the exercise a mere pretext to "set her up to fail." He testified that a vocational counselor should have taken the information already available and then personally counseled Ms. Brandt about what options would be most viable.

Ms. Brandt attended one and a half semesters at Missouri Southern State University in Joplin. The Division of Vocational Rehabilitation did not approve any grants or assistance for her because, according to Ms. Brandt, her test scores were too low (this corresponds to Dr. Whitten's opinion). Ms. Brandt's second semester was the first one in which she attended academic classes. She reported to the Division counselor in Joplin that she had difficulties for two reasons. She mentioned a strained relationship with her husband. She also mentioned being overwhelmed with the course work.

Limitations upon Employment before Accident

Dr. Whitten diagnosed Ms. Brandt to suffer from attention deficit hyperactivity disorder. This is a neurological function that affects attention focus, often memory, and often associated with learning disabilities. It is characterized by an inability to stay focused, easy distractibility, disorganization, and frequent losing or forgetting of things and activities. It is also often associated with what's called hyperactivity. This, in adults, is seen as moving some part of the body constantly, usually in patients rushing through things and starting too soon on tasks. Testing is one example. Adults who have this disorder typically have a problem in completing tasks because of a loss of focus. Brandt had a "combined type" form of ADHD. This means that there are significant features of inattention, hyperactivity and impulsivity.

Some persons are reasonably good at learning how to accommodate themselves. Others simply cannot function at all without medication. There is a range of response that adults have to these problems. Ms. Brandt, in Whitten's opinion, appeared to have a rather severe problem with attention. She also seemed to have a pretty heavy interference from her attention focus problem when looking at her test materials.

This disorder starts by the age of six. It is, however, difficult to see unless a person is in a structured sufficiently environment that it becomes visible. This would have been an obstacle or a hindrance to her in obtaining employment or in improving her employment potential. People may not see it in hiring her. But, once she is on the job, it could often significantly interfere with job functioning. Completion of work tasks is slower because of distractibility. These persons also have trouble grasping directions because they cannot stay focused to hear the instruction or remember it. Dropping out of high school after her freshman year with poor grades would be a characteristic of ADHD.

Ms. Brandt had examples of how her learning difficulties had limited her employment. She took special education classes at school and later would have trouble with job duties because of the learning difficulties detected while she attended school. She did not catch onto job assignments as quickly as she normally should have. If she was on a job and trained, and they moved her to another work area for a few weeks, then tried to put her back on the original job again, she would not remember how to do it and she would have to be shown again. She also had an example where she lost a job while working at a grocery store in the mid-80s (Charley's Food of Versailles, Missouri.) She lost that job because she could not catch on to several job assignments that they wanted her to do. She would work in one area for a short time and then be moved. For example, they would have her be a cashier for a week; then move her to produce and want her to learn produce codes. They would then move her back to cashier. She would forget how to perform the cashier work after she had been in produce. Also she could not multitask.

Ms. Brandt suffered from a bipolar disorder first diagnosed in 1984. She attempted suicide in 2003 with an overdose of Dilantin and thyroid medication. She also had an inpatient admission for depression in 1999 when living in Mexico, Missouri. She admitted to drinking heavily from 2000 to 2003; she underwent inpatient treatment at the Lafayette House in Joplin during that time. She reported that she suffered from significant sexual abuse by an uncle between the ages of 4 to 12, but she never sought counseling. She had tried several antidepressant medications. Those included Prozac, Paxil, Celexa and Cymbalta. She believed that a combination of Cymbalta and Lithium relieved her symptoms of bipolar depression better than others.

Psychologist Sedosky, in June, 2006, tested Ms. Brandt's personality characteristics and found evidence of a thought disorder. He also stated that the scores suggested a possible development of an addictive disorder. Patients, according to this MMPI-II pattern, typically do not seek treatment on their own. They strongly mistrust mental health professionals and resist psychological interpretations of their problems. They may resist altering their behavior in any way suggested by others. There may be a masochistic quality to her suffering. Her symptoms likely resulted from relationship problems during her testing.

Dr. Ragade, on February 28, 2005, noted a past history of alcohol abuse and set about to distinguish whether Ms. Brandt had a bipolar disorder or major depressive disorder. He considered her global assessment of functioning to equate to 50. Ms. Brandt committed to sobriety shortly after starting her treatment program with Dr. Ragade.

Ms. Brandt was hospitalized for depression in Mexico, Missouri in 1996 or 1997 after having worked too much, not obtaining enough sleep and overtaxing her mental faculties. She checked herself into the hospital voluntarily. She resigned from a job upon the advice of one of her mental healthcare providers.

Ms. Brandt has also suffered from anxiety attacks and agoraphobia. She was already taking anti-anxiety medication when she was working at Cardinal Scale. She believes that she started taking that medication in approximately 2002 to 2003. She felt as if she would “run out of air” if she was in a public place that had lots of people. There were a couple of days when she was at Cardinal Scale that she had anxiety and shortness of breath and her heart started pounding. She would go into the bathroom for a few minutes, catch her breath and then come back out. Outside of work, there would be times when she would seem to have more problems going into public places so she would refrain from going into places like that. Medication, however, helped these symptoms.

Ms. Brandt subjectively described her depression as being worse at the present than it was before her injury at Cardinal Scale. Her anxiety and panic attacks are about the same as they were before the accident.

Disability Ratings

Dr. Bruce Silverberg rated Ms. Brandt on July 29, 2007. He considered her to have an impairment of forty-three percent (43%) of the wrist. This was composed of one hundred percent (100%) of the left little finger, ninety percent (90%) of the left ring and middle fingers, and thirty percent (30%) of the left index finger. These would respectively correspond to ten percent (10%), nine percent (9%), eighteen percent (18%) and six percent (6%) to the hand.

Dr. Roger Cameron of Jefferson City also rated Ms. Brandt. His aggregate rating was sixty-six percent (66%) to the left wrist. This was composed of one hundred percent (100%) loss to the little finger, ring finger and middle finger; sixty percent (60%) to the index finger due to loss of motion; twenty percent (20%) to the index finger due to lack of sensitivity; and an additional ten percent (10%) to the left hand due to extremely sensitive sensory aspects on the palm of the hand and distal aspects of the stumps of the amputated fingers.

Present Condition (Including Testimony of Wilbur Swearingin)

Ms. Brandt has an understandable weakness with pain in her left hand. This is especially located in her index finger. She has chronic pain across the knuckle of her left index finger. Motion and attempts to use the hand when pushing, pulling or manipulating objects aggravates it. She is unable to flex her index finger to the palm of her hand. She is, however, able to touch her index finger and left thumb. Her pinch strength is understandably weak.

She, therefore, tends to use her right upper extremity to compensate for her left.

She cannot shave under her right arm. She has difficulty with certain buttons and fasteners. She also has difficulty using a knife with her left hand to cut solid foods. She is able to perform most household chores. She, however, has difficulty holding a pan and lid for straining liquids. She cannot use a manual can opener. She does little sweeping or mopping. She is able to operate a vacuum cleaner, take a bath, pick up around the house and do laundry. Vibration causes severe pain in her left hand.

Wilbur Swearingin, CRC, interviewed, tested and evaluated Ms. Brandt on December 15, 2008, at the referral of her counsel. He concluded that Ms. Brandt could not be placed in the open labor market and that she was unemployable. He stated that she was functionally unable to use her left hand, had chronic pain in that hand, took narcotic medication for it, and had a history of psychiatric impairments, which included a limited educational background. He considered it unlikely that an employer would be willing to hire her. He also concluded that, while her symptoms have waxed and waned, her psychiatric impairments were on-going and sufficient to be considered a hindrance or obstacle to employment.

In addition, Mr. Swearingin reported that both the medical and psychiatric/psychological assessments did not indicate that she would be incapable of employment from either condition alone. However, considering her inability to use functionally her left hand, her inability to perform two-handed work tasks, her chronic pain, her use of narcotic medication, and her psychiatric/psychological impairments and disabilities, Mr. Swearingin opined that Ms. Brandt would not be able to return to the open labor market.

Mr. Swearingin found sixty-six (66) sedentary or light occupations to which Ms. Brandt's skills could transfer when handling, fingering and feeling are required upon a frequent basis (2/3 of a work day). He found seven (7) sedentary or light occupations when handling, fingering and feeling are occasional (1/3 of the work day). This, however, did not take psychiatric or cognitive impairment into account.

Her work or trade profile was comparable to work or trades of 1,051 sedentary and light occupations when handling, fingering and feeling are performed frequently and 27 occupations when those activities are occasional. He believed that she may be capable of some light work that did not require bimanual dexterity and use of the left hand. He believed that she may not be successful when working in a public environment given her self-consciousness of the appearance of her hand. He also, however, believed that her psychiatric impairments would likely interfere with her performance.

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying workers' compensation case involving an accident date of July 18, 2005, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on July 18, 2005, which is substantive in nature, and not procedural, governs substantively the adjudication of this case. Accordingly, in this context, several familiar principles bear reprise.

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo.App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo.Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo.App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo.App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Bruflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo.App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo.App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo.App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575,577 (Mo.App., W.D. 1994); and *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650 (Mo.App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo.App. W.D. 1993).

I.

Maximum Medical Improvement

The employee contends that relative to the July 18, 2005, accident Ms. Brandt reached maximum medical improvement on March 7, 2008. In arguing for this date, Ms. Brandt notes that this is the date on which Dr. Colbert released her upon a PRN basis. However, the Second Injury Fund argues that Ms. Brandt reached maximum medical improvement on November 3, 2008.

The medical records indicate that on September 12, 2007, Dr. Colbert and Dr. Phipott amputated Ms. Brandt's long and ring fingers. Additionally, Ms. Brandt received post-operative care that included physical therapy. And on March 7, 2008, Dr. Colbert released Ms. Brandt from his care upon a PRN basis. Yet, in issuing his final report Dr. Colbert acknowledged that Ms. Brandt had received a referral to treat with a pain specialist for treatment of her left hand and was continuing to receive treatment with a pain specialist. Notably, the hand therapy with the pain specialist continued through April 15, 2008, when Ms. Brandt received a discharge from occupational therapy to a home exercise program.

On November 3, 2008, Ms. Brandt underwent an independent medical examination and

evaluation from Roger Cameron, D.O., who is an orthopedic surgeon. At the time of this examination Dr. Cameron performed a digital block under local anesthetic, and recommended additional medical care. And on this date Dr. Cameron issued a final permanent disability rating.

After consideration and review of the evidence, I find and conclude that relative to the July 18, 2005, accident, Ms. Brandt reached maximum medical improvement on April 15, 2008.

II.

Nature and Extent of Permanent Disability

In resolving the claim against the employer and insurer, the employee and employer and insurer entered into a Stipulation for Compromise Settlement for \$105,000, wherein the parties disputed among other things the percentage of permanent disability and disfigurement, and the employer and insurer agreed to leave open future medical care. This settlement agreement, which received approval by the Hon. Victorine Mahon on January 12, 2011, is supported by the evidence and represents a compromise of a disputed claim.

After consideration and review of the evidence, I find and conclude that the work injury of July 18, 2005, causes Ms. Brandt to be governed by restrictions and limitations, which constitute a hindrance or obstacle to employment. I further find and conclude that this work injury caused Ms. Brandt to sustain a permanent partial disability of 70 percent to left hand (122.5 weeks).

In addition, the evidence demonstrates that Ms. Brandt is not totally disabled from the July 18, 2005, injury in isolation. Notably, no physician or vocational expert opines that this work injury, in isolation, renders Ms. Brandt totally disabled. And at the time of this work injury Ms. Brandt suffered permanent disability to her body as a whole, referable to bipolar disorder, ADHD, anxiety disorder, low back, right wrist and left wrist.

I thus find and conclude that the accident of July 18, 2005, considered alone and in isolation, does not render the employee permanently and totally disabled.

III.

Second Injury Fund Liability

The adjudication of Second Injury Fund liability is governed by Section 287.220, RSMo. The pertinent provisions of this statute are as follows:

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. . . . 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 of percentage of disability which existed prior to the last injury plus the disabilities 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.

Appellate courts have recently set forth a formula for deciding whether the Second Injury Fund is liable for permanent disability and, in particular, where injured employees seek permanent total disability. The first recent opinion that sets forth this four step formula is *Kizior v. Transworld Airlines*, 5 S.W.3d 195 (Mo.App. W.D. 1999). It relied upon *Stewart v. Johnson*, 398 S.W.2d 850, 852 (Mo. 1966). That four step formula is the following:

(1) The employer's liability is considered in isolation – '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;' (2) next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) the degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) the balance becomes the responsibility of the Second Injury Fund." *Kizior*, at p. 201. See, also, *APAC Kansas, Inc. v. Smith*, 227 S.W.3rd 1 (Mo.App. W.D. 2007).

The liability of the Second Injury Fund is fixed by the statute for the "balance, if any," resulting from the employer's liability compared with permanent total disability. *Kizior*, at p. 201. Further, it should be remembered that the General Assembly amended *Section 287.220.1* in 1993 by superseding the former judicially created standard of "industrial disabled" as the test for determining a preexisting disability. The new statute enacted in 1993 was intended to clarify which preexisting conditions would be sufficiently serious to trigger this statute. Since 1993, the preexisting injury need only be "of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed" in order to trigger *Section 287.220 R.S.Mo. 1994. Garibay v. Treasurer of Missouri*, 930 S.W.2d 57, 58 (Mo.App. E.D. 1996) quoting *Section 287.220.1*.

The first step in the *Kizior* formula is to determine the nature and extent of permanent disability from the last accident alone. In this regard, I find and conclude that this work injury caused Ms. Brandt to sustain a permanent partial disability of 70 percent to left hand (122.5 weeks). Although suffering a significant and severe injury to her left hand, which includes certain loss of use involving her left index finger, Ms. Brandt is still able to use her index finger and thumb. This is important when considering pinch strength between the index finger and thumb. She is also able to use the palm of her hand.

The next step in the formula is to determine Ms. Brandt's overall disability. It is ruled that she is permanently and totally disabled. Even the employer's vocational consultant, James England, admitted that Ms. Brandt could not reenter the workforce given her lack of transferable skills and physical limitations. The whole point behind the aborted vocational program purportedly started by Mr. England was to provide work skills to Ms. Brandt so that she could become employable. Further, Mr. Swearingin testified without equivocation that Ms. Brandt could not be placed for employment and was unemployable in the open labor market. Each

vocational counselor who evaluated Ms. Brandt on behalf of the Division of Vocational Rehabilitation believed that she had most significant disabilities and they did not recommend a placement program for her.

This conclusion is unfortunate since Ms. Brandt clearly showed a motivation to return to work. She attempted a return to work at Cardinal Scale, but could not be accommodated for what amounted to one-handed work. She attended Missouri Southern State University at her own cost. She likewise tried another job at a grocery store, but was fired when she could not physically handle her tasks with primarily one hand. She then underwent three different evaluations with counselors affiliated with the Division of Vocational Rehabilitation. She even started a program purportedly implemented on her behalf by James England.

Ms. Brandt's motivation to return to work far surpasses that of many other claimants who eventually seek permanent total disability benefits. Ms. Brandt's efforts to provide herself with sufficient training to reenter the workforce, and her inability to be trained and reenter the workforce, reflects a total disability as defined in *Section 287.200* and *Section 287.020(6)*.

Third, there is a difference between the disability caused by the July 18, 2005, accident and the total disability suffered by Ms. Brandt. First, it should be recognized that both vocational consultants, Mr. Swearingin and Mr. England, believed that Ms. Brandt suffered from disabilities before the accident at Cardinal Scales that were an obstacle or hindrance to employment. Mr. England specifically focused upon the evaluation of Stanley Hutson.

Dr. Hutson believed that Ms. Brandt was significantly limited in her ability to adapt during a normal eight hour work day. Likewise, counselors with the Division of Vocational Rehabilitation found many obstacles for Brandt not related to her left hand. Those included her bipolar disorder, anxiety disorder, borderline intellectual functioning, historically inappropriate decisions and an inability to work in a high stress environment. They also believe that she had difficulty acquiring and maintaining information due to her overall intelligence; that she used behaviors that were distracting to others, ultimately making it difficult for her to establish appropriate relationships in a work setting.

Recognition that Ms. Brandt would not necessarily recognize these problems is altogether explainable. Personality testing (MMPI-2) she undertook in June 2006 indicated that she would not recognize such. A preexisting disability need not be known to the employer at the time the claimant first starts employment with that employer. It is sufficient if the preexisting disability is a hindrance or obstacle to employment and, in particular, the *potential* that the preexisting injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there were no such prior conditions. *See, Garibay* at p. 59, citing *Wuebbeling v. West County Drywall*, 898 S.W.2d 615,623 (Mo.App. E.D. 1995). *See also, Carroll v. Loy-Lang Box Company*, 829 S.W.2d 86 (Mo.App. E.D. 1992); *Stoddard v. Wilson Freight, Inc.*, 651 S.W.2d 152 (Mo.App. W.D. 1983).

Here, Ms. Brandt's original injury and amputations left her physically unable to perform the bimanual physical labor to which she had become accustomed during her life. She had a lack of transferrable skills that, without training, could not place her into more sophisticated sedentary and light occupations that would not require the physical force she used during work before. Her

treating mental healthcare provider, Dr. Whitten, and even the vocational counselors (whether privately retained or employed by the Division of Vocational Rehabilitation) all agreed that she had mental and learning disorders that not only prevented her from training for new transferable work skills, but likewise prevented her from entering into occupations that would require those skills.

These mental and learning impairments limited her vocational potential. These types of jobs that one would try to retrain her for would be the types that require clear acumen and judgment. These are the jobs in which she has mental impairments and learning limitations. The evidence is, indeed, persuasive, and close to overwhelming, that Ms. Brandt's permanent and total disability results from a combination of preexisting and work related disabilities.

Accordingly, after consideration and review of the evidence, I find and conclude that the work injury of July 18, 2005, considered alone, does not render the employee permanently and totally disabled. Yet, as a consequence of the accident of July 18, 2005, in combination with the preexisting industrial disabilities, including bipolar disorder, ADHD, anxiety disorder and learning disorder, Ms. Brandt is permanently and totally disabled. Therefore, the Second Injury Fund is liable to the employee for payment of permanent total disability compensation.

IV. Safety Penalty Violation

The Second Injury Fund does not necessarily argue or dispute that the employer committed a safety penalty violation under Section 287.120.4, RSMo, but contends that the Second Injury Fund is not liable for the additional compensation associated with a violation of this statutory penalty. Section 287.120.4, RSMo states:

Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the *compensation* and death benefit provided for *under this chapter* shall be increased fifteen percent. Emphasis added.

The statute which the Employer violated is Section 292.020, RSMo. This statutory provision is set forth as follows:

The belting, shafting, machines, machinery, gearing and all drums of all *manufacturing, mechanical and other establishments* in this state, when *so placed as to be dangerous to persons employed* therein or thereabout while *engaged in their ordinary duties*, shall be *safely and securely guarded when possible*; if not possible, then notice of its danger shall be conspicuously posted in such establishments." Emphasis added.

It is first necessary to determine whether there was a violation of *Section 292.020*, which is part of the Factory Safety Act. After consideration and review of the evidence, I find and conclude that the employer committed such a violation. This is established with the testimony of the Cardinal Scale employees and Dr. Kenneth Blundell. Punch press operators had to place their hands within the point of operation in order to remove items that had been pressed for later assembly. Placing a bare hand in the point of operation was dangerous because it exposed the

hand to crush injuries and amputations. While the opening which led to the point of operation could not itself be guarded, the hand could be guarded by installing and requiring the use of pull back devices. The pull back device was already used with some punch presses, but not this one.

The violation is worse here because Ms. Brandt could not even use a hand tool that some other operators used because the aluminum beam she was pressing could not be removed with a hand tool. The pull back device was the most logical solution to avoiding injury because it was mechanically connected to the press. If the press descended for any reason during a cycle, then the pull back device would have pulled Brandt's hand away from the point of operation and avoid a crush injury or amputation.

The testimony from the Cardinal Scale employees, Dr. Blundell, and even from Ms. Brandt herself established that the punch press was dangerous, that it was reasonably foreseeable that a malfunction would happen in order to start a cycle of the press while a hand was in the point of operation, that Cardinal Scale knew of alternative safety remedies, knew of pull backs to avoid such injuries and Cardinal Scale failed to install the pull back device before Brandt's injury. This evidence is sufficient to conclude that Cardinal Scale violated *Section 292.020* of the Factory Safety Act. See, for example, *Simon v. St. Louis Brass Manufacturing Company*, 250 S.W. 74 (Mo. 1923); *Jobe v. Elmer*, 886 S.W.2d 947 (Mo.App. S.D. 1994); *Martin v. Star Cooler Corporation*, 484 S.W.2d 32 (Mo.App. 1972); *Mage v. Gille Manufacturing Company*, 219 Mo.App. 234, 271 S.W. 1023 (Mo.App. 25).

Next, it is necessary to determine whether the Second Injury Fund is liable for the payment of the penalty. First, the penalty statute under *Section 287.120.4* states that "compensation . . . under this chapter" shall be increased fifteen percent (15%) when the injury is caused by the failure of the employer to comply with a state statute. Courts, in recognizing a liberal construction of the Missouri Workers' Compensation Law before 2005, applied this liberal construction to the penalty statute. See, for example, *Martin v. Star Cooler Corporation*, 484 S.S.2d 32 (Mo.App 1972) in construing that compensation also meant that the penalty could be applied to medical expenses. The penalty statute says that the compensation provided for under the chapter, and not just benefits payable by the employer, are increased by fifteen percent (15%) for such statutory violations.

Further, *Section 287.220*, RSMo does not expressly exclude payment of the penalty. Before 2005, a liberal construction of the law was likewise applied to the statute that concerned compensation payable from the Second Injury Fund. For example, reasonable and necessary expenses provided for in *Section 287.220.5* was liberally construed to include death benefits paid to dependents of deceased employees when killed while working for uninsured employers subject to the law. See, for example, *Lyons v. Lyons Truck Service*, 831 S.W.2d 706 (Mo.App. W.D. 1992); *Tatum v. St. Louis Metro Delivery*, 887 S.W.2d 679 (Mo.App. E.D. 1994); *Wilmoth v. Bulman*, 908 S.W.2d 139 (Mo.App. S.D. 1995). As previously noted, the law, before 2005, was to be broadly and liberally interpreted and intended to extend benefits to the largest possible class. Applying the penalty for statutory violations under *Section 287.120.4*, RSMo does nothing more than apply that basic rule from statutory construction. Applying the statutory penalty against the Second Injury Fund does nothing more than what *Section 287.120.4*, RSMo permits.

Accordingly, I find and conclude that Cardinal Scale violated the Factory Safety Act

pursuant to Section 292.020, RSMo. This violation resulted in injuries to Ms. Brandt's left hand, and the Second Injury Fund is liable for the statutory penalty upon compensation payable from it.

Therefore, the Second Injury Fund is ordered to pay to the employee, Fonda Allen Brandt, the sum of \$267.95 per week for the employee's lifetime. (\$233.00 + 15% or \$34.95 = \$267.95) The payment of permanent total disability compensation (inclusive of the 15 percent penalty) by the Second Injury Fund is effective as of April 15, 2008, and shall take into consideration 122.5 weeks of permanent partial disability, which is attributable to the employer and insurer.

The award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Made by: /s/ L. Timothy Wilson

L. Timothy Wilson
Administrative Law Judge
Division of Workers' Compensation
(Signed April 5, 2011)

This award is dated and attested to this ____ day of _____, 2011.

Award approved 4/13/11

/s/ Naomi Pearson

Naomi Pearson
Division of Workers' Compensation