

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

Injury No.: 99-181630

Employee: Stephen Bray
Employer: G & K Services
Insurer: United States Fidelity & Guarantee
c/o Gallagher Bassett
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 14, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John K. Ottenad, issued October 14, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 9th day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Stephen Bray

Injury No.: 99-181630

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: G & K Services

Additional Party: Second Injury Fund

Insurer: United States Fidelity & Guarantee
C/O Gallagher Bassett

Hearing Dates: June 5, 6 and 13, 2008
(Record formally closed on July 3, 2008)

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
 - Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
 - Date of accident or onset of occupational disease: (allegedly) July 1, 1999
 - State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? No
 - Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was a salesman for Employer and was allegedly physically and sexually harassed to the point where he was unable to work anymore.

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: (allegedly) Body as a Whole—Psychiatric
(Mental injury)

14. Nature and extent of any permanent disability: N/A

15. Compensation paid to-date for temporary disability: \$0.00

16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Stephen Bray

Injury No.: 99-181630

17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: \$788.46

19. Weekly compensation rate: \$525.64 for TTD/\$303.01 for PPD

20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Claim denied	\$0.00
--------------	--------

22. Second Injury Fund liability:

Claim denied	\$0.00
--------------	--------

Total:	<u>\$0.00</u>
--------	----------------------

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Richard K. Dowd.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Stephen Bray	Injury No.:	99-181630
Dependents:	N/A	Before the	
Employer:	G & K Services	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	United States Fidelity & Guarantee C/O Gallagher Bassett	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri	
		Checked by:	JKO

On June 5, 2008, the employee, Stephen Bray (Claimant), appeared in person and by his attorney, Mr. Richard K. Dowd, for a hearing for a final award on his claim against the employer, G & K Services, its insurer, United States Fidelity & Guarantee C/O Gallagher Bassett, and the Second Injury Fund. The employer, G & K Services (Employer), and its insurer, United States Fidelity & Guarantee C/O Gallagher Bassett, were represented at the hearing by their attorney Ms. Kim M. Parks. The Second Injury Fund was represented at the hearing by Assistant Attorney General Kay Osborne.

Because of the extent of the evidence and testimony to be presented, the hearing was not able to be concluded on the original date we began (June 5, 2008). Therefore, the record of evidence was technically left open for a period of time not to exceed 30 days for the rest of the evidence and testimony to be presented. Additional testimony and evidence was received on subsequent hearing dates of June 6, 2008 and June 13, 2008. The record of evidence in this case then was formally closed on July 3, 2008 pursuant to our discussions on the first day of the hearing.

At the outset of the hearing, Claimant filed Voluntary Dismissal Memoranda for his two open companion claims with Injury Nos. 98-178852 and 99-182304. Pursuant to those filings, those two companion claims against Employer/Insurer and the Second Injury Fund were voluntarily dismissed. The only Claim proceeding to hearing, then, was Injury No. 99-181630, with a date of injury of July 1, 1999.

At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- On or about July 1, 1999, Claimant has alleged an occupational disease.
- Claimant was an employee of Employer.
- Venue is proper in the City of St. Louis.

- The Claim was filed within the time prescribed by law.
- At the relevant time, Claimant earned an average weekly wage of \$788.46, resulting in applicable rates of compensation of \$525.64 for total disability benefits and \$303.01 for permanent partial disability (PPD) benefits.
- Employer has not paid any benefits to date.

ISSUES:

- Did Claimant sustain an occupational disease?
- Did the occupational disease arise out of and in the course of employment?
- Are Claimant's injuries and continuing complaints medically causally connected to his alleged occupational disease at work on or about July 1, 1999?
- Is Employer responsible for the payment of past medical expenses in an amount to be determined?
- Is Employer liable for future medical care?
- Is Claimant entitled to the payment of TTD benefits for a period of time to be determined?
- What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this injury?
- What is the liability of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A) G & K Human Resources report by Ms. Sheri Stolp of February and March 2000
- B) Deposition of Ms. Sheri Stolp dated April 23, 2004
- C) Deposition of Dr. Eduardo Garcia-Ferrer, with attachments, dated March 29, 2007
- D) Compilation of medical treatment records for Claimant
- E) Records of Claimant's sales attempts including "2 Week Hot List"
- F) Professional Sales Weekly Management Calendar for the last two weeks Claimant worked for Employer
- G) Vocational Rehabilitation Report of Mr. Timothy Lalk
- H) G & K Services, St. Louis Branch, employee list with employment dates
- I) Central Region Quick Silver Tracking Report for the 3rd Quarter of 1999
- J) Memo from Stan Schlotthauer dated November 12, 1998
- K) G & K Sales & Service *Exchange*, Volume 5, Issue 3
- L) Accounts Working List
- M) G & K Services Major Account Plan
- N) G & K Services Performance Review Forms from various customers in 1997 & 1998
- O) Active Patient Ledger for Claimant's charges from his treatment with Dr. Patricia Berne from December 26, 2000 through December 27, 2005

Employer/Insurer Exhibits:

- Deposition of Dr. Elizabeth Pribor, with attachments, dated March 17, 2003
- Deposition of Dr. Wayne Stillings, with attachments, dated April 4, 2002
- Deposition of Ms. Andrea Platz dated April 11, 2002
- Deposition of Mr. Stanley Schlotthauer dated June 2, 2008
- Business records from G & K Services, including various memos and Claimant's earnings record

- Medical treatment records from Dr. Koustall
- Claimant's academic transcript from Southern Illinois University Edwardsville
- Medical report of Dr. Richard Wetzel dated September 23, 2002
- Records from the Social Security Administration, including the report of Dr. Stephen Vincent

- G & K Services Managers' Guide to Human Resources Policies and Procedures

Second Injury Fund Exhibits:

Nothing submitted at the time of trial

Notes: 1) Unless otherwise specifically noted below, any objections contained in these Exhibits are overruled and the testimony fully admitted into evidence.

2) Some of the records submitted at hearing contain handwritten remarks or other marks on the Exhibits. All

of these marks were on these records at the time they were admitted into evidence and no other marks have been added since their admission on June 5, 6 and 13, 2008.

*3) Objections were raised by Employer and the Second Injury Fund at the time of Dr. Patricia Berne's live testimony at hearing regarding whether her opinion testimony would violate the Seven-Day Rule. I find Dr. Berne is not a "physician" pursuant to the Workers' Compensation Act, and so therefore, the objections are **OVERRULED**, and her testimony is admitted in its entirety.*

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational expert opinion and testimony, the medical records, the other business records, and the depositions and testimony of the other witnesses, as well as based on my personal observations of Claimant and the other witnesses at hearing, I find:

- **Claimant** is a 45-year-old, currently unemployed individual, who worked for G & K Services (Employer) as a route manager and a salesman from 1996 until July 1, 1999. Claimant applied for and received short-term disability payments through G & K Services (Exhibit D) for approximately 13 weeks and then long term disability payments for approximately 24 months after July 1, 1999.
- By way of relevant history that would have an impact on current psychiatric diagnoses, Claimant was raped at age 10 by an older brother of one of his friends. He testified that it had an impact on his life and it is mentioned in a number of the psychiatric treatment records and reports.
- Claimant testified that he attended the Academy of Greater St. Louis for high school in Southern Illinois, York College in Nebraska, Southern Illinois University Edwardsville, and Lipscomb College in Nashville. He graduated initially with a bachelor's degree in speech communications.
- After working in various jobs on a dairy farm, as a laborer, as a group home parent for boys in Nashville, and in commercial real estate leasing, Claimant joined the Army in 1988. He attended basic training in Alabama and Florida, and received further training to become a Combat Aviation Unit Coordinator. He was called up as a part of the mass mobilization for Desert Storm and served in the combat zone for one year. While in the Middle East with a Black Hawk helicopter unit, he was ½ to ¼ mile away at the other end of a runway, when a SCUD Missile hit a military barracks killing 80 marines, including many people that he knew. While testifying about this incident, I observed that he began to visibly tear-up at trial.
- After returning to civilian life in 1991 or 1992, he received treatment from the **William S. Middleton Memorial Veterans Hospital** (Exhibit D) in Madison, Wisconsin in 1993 for depression and post traumatic stress disorder associated with his combat experiences. On June 14, 1993, Claimant reported that "things are falling apart," and he is "not all there." He reported being depressed, including crying for no reason, being tired, irritable, and feeling worthless and guilty. He reported that he felt "unsupported" in his marriage and he felt "unconnected" to his wife. He reported that he was very irritable and angry at work most of the time. He reported that he felt cheated out of promotions and discriminated against. He had been taking Zoloft and Ativan for his complaints and problems. He gave a family history of a father and grandfather who had untreated depression, another grandfather who was an alcoholic, and a sister who is bipolar and has problems with drug and alcohol abuse. He was diagnosed with major depression and mild PTSD. He was continued on medication and therapy. By July 22, 1993, he reported that he felt "boxed in" by a critical, unloving wife, and he had several supervisors at

work who did not appreciate him. He had difficulty sleeping, felt like running away, and was described as paranoid. He was continued on medication. Although he treated for a brief time longer, the records reveal that he eventually stopped going to treatment and was characterized as a no-show from September 1, 1993 until April 22, 1994.

- Claimant testified that from early 1994 until his hospitalization on July 1, 1999, he had no other treatment, and no medication, for any mental or psychiatric problems. He testified that during this time he was fully functioning, working and confident.
- Upon further questioning, he admitted that he did have marriage counseling with his wife throughout the time that they were married. He testified that he saw a counselor with her at the request of his wife. He seemed to suggest that all of the counseling during this period leading up to their divorce in 1998 was at her request. He also downplayed the effect that the divorce clearly had on him.
- The employment and the supervisors discussed in the Veterans Hospital records above was apparently a reference to his employment at Sears (or Tire America) after he came back from Active Duty. He worked for Sears (Tire America) as a General Manager from 1989 to 1996. According to his testimony, Claimant was sent to a problem store to correct some mistreatment of African Americans there, but he had a problem with his supervisors who would not support him. He eventually resigned instead of being fired, and then filed a lawsuit claiming he was forced out for trying to support the African Americans. He testified the lawsuit was settled, but he refused to explain the basis or amount of the settlement, claiming that it was confidential.
- Following his employment at Sears (Tire America), Claimant began working for Employer as an Account Route Manager. He supervised route service people. He described himself as a good and successful employee. He testified that the Branch General Manager, Mike Frost, participated in, and encouraged, inappropriate sexual behavior and talk at work for Employer. Claimant testified that Mr. Frost would talk about his exploits with prostitutes, and how he was excommunicated from the Mormon Church because of that. Claimant said that Mr. Frost would bounce golf balls and shoot rubber bands at people's genitals, and Claimant was even struck once with a golf ball. He said Mr. Frost would throw paper clips, or paper wads down women's shirts. Claimant said that things got even worse and the behavior intensified when Andrea Platz began working in their office. Claimant testified that he did not like this behavior, because he was raised to treat women with respect. He said that Andrea and he tried to stick it out. Claimant said she was like a sister to him.
- Since Claimant was a manager for Employer during this time, he received training on **Human Resources Policies and Procedures** (Exhibit 10). According to the Manager's Guide, which Claimant verified that he received and agreed to follow on June 6, 1997, he was "legally responsible for actively participating in preventative measures" to prevent workplace harassment and sexual harassment. He was also provided with the guidelines for handling a harassment complaint that he sees or hears about (Exhibit 10). Finally, Claimant verified that he viewed a number of videos on May 23, 1997 dealing with recognizing and preventing sexual and workplace harassment.
- It is clear to me from this documentation (Exhibit 10) that Employer took the subject of workplace or sexual harassment seriously, and they had a definite policy and investigative procedure set up to handle any such

complaints that they might receive. I further find that it is equally clear that Claimant was, or should have been, aware of how to handle complaints about workplace or sexual harassment that he might receive or personally witness. Despite this knowledge, however, I find no indication in any of the records or documentation that Claimant ever complained about or filed documentation of any of the alleged acts of sexual or workplace harassment he attributed to Mike Frost during this period of time.

- To the contrary, I find that when **Andrea Platz** (Exhibit 3) and Anita Ruben did complain about Mike Frost's behavior, and they met with the Regional Managers, Brad Sunday and Eric Fosse, to voice their complaints, Mr. Frost was immediately terminated that same day or the next. Ms. Platz testified that she called Brad Sunday and he and Eric were in St. Louis to meet with her within the week. She "was very impressed with how quickly they responded." Ms. Platz testified that she made complaints about his behavior, such as getting too close to her when they were one-on-one, or making inappropriate comments that she believed constituted sexual harassment, such as comments about pornography or prostitutes. She remembered Mr. Frost shooting rubber bands and paper clips at people, but she denied that he aimed for specific body parts such as genitals or women's chests. She testified that she never heard anyone else at Employer, including Claimant, complain about getting hit in the genitals or chest with an object thrown by Mr. Frost. She testified that Mr. Frost was never "handsy" with her and he never grabbed her either.
- Despite Claimant describing his relationship with Ms. Platz as "like a sister to him," Ms. Platz testified that she knew of no specific instances when Claimant complained to her of Mr. Frost's behavior or his treatment of him. She could not recall Claimant having any more trouble with Mr. Frost, than anyone might have with their boss. She did not remember Claimant having the same type of complaints about Mr. Frost that she did. In fact, she was not aware of Claimant complaining to anyone at any level about any type of sexual harassment while he was employed for Employer. She stated that when she transferred into the St. Louis office in the spring of 1997, she was a sales manager and he was a route manager. She testified that she and Claimant did not work closely together, because both of them were "in the field all the time" riding along with people who worked for them. She testified that the only complaint that she had about Claimant during the time that she worked with him, was that sometimes he was a little bit high-strung, or easily agitated. He was intense about his work, but she said that his heart was in the right place. She said that he was very private about his marriage and his children, and never really talked about anything outside of G & K. Regarding job performance, she said both she and Claimant were under pressure to get results, and they were not achieving those goals. She testified that Claimant had difficulty getting his route drivers to consistently produce, because they did not take him seriously. She also testified that she never personally heard from Claimant about any problems he was having with Mr. Moon either.
- Before Mr. Frost was terminated, he had begun the process of hiring Tim Moon to work as the Sales Manager for the St. Louis branch. Mr. Moon started after Mr. Frost was terminated and Stan Schlotthauer had taken over as the General Manager. Claimant testified that Mr. Frost and Mr. Moon were very much alike, except he thought Mr. Moon was more hateful and belligerent, and would torment people emotionally. Claimant said that Mr. Moon picked up on the same type of antics after Mr. Frost was terminated. Claimant accused Mr. Moon of doing such things as trying to shove Claimant's head into Mr. Moon's crotch, slapping Claimant on the buttocks up to 15 times, talking about the movie "Deliverance" and about city boys being anally raped by country boys, grabbing and slapping Claimant's genitals, and telling Claimant 50-60 times that he wanted to bend him over and make him squeal like a pig.
- Claimant testified that Chris Kalips also took part in the harassment. Claimant accused Ms. Kalips of telling him constantly that she wanted to "tap that ass." He testified that she would rub her breasts on his shoulders, back

and head, and whisper to him “Have you had any sex?” Claimant alleged that she would look at his crotch and tell him that she could take care of that for him. He indicated that Ms. Kalips and Mr. Moon repeatedly made reference to his “sweet lips” and “sweet ass.” Claimant testified that both she and Mr. Moon talked about sex in graphic terms, and even acted out sex acts, such as oral sex in the office. Claimant testified that Ms. Kalips talked about her sex life with her husband in graphic terms.

- In her testimony, Andrea Platz also expressed displeasure at having worked with Mr. Moon and Ms. Kalips, but not because she had any specific complaints about their behavior, rather just because they had a little social clique that interfered into the office. She said it was just little things like they would stop talking when she walked into a room, or they would snicker at her as she entered. Ms. Kalips would not give her information that she needed to do her job, and it made the working circumstances difficult. They were rude, but there was nothing sexual about it. She did not recall them acting out oral sex in the office, nor had she heard from anyone else that they had done that. She did not remember any of them saying anything of a sexual nature to Claimant. She never heard Ms. Kalips say that she would like to “tap that ass.” She did, however, remember some times when Mr. Schlotthauer became quite upset because Ms. Kalips and Mr. Moon would be discussing inappropriate topics at meetings, such as what she had done with her husband the night before. Ms. Platz said that Mr. Schlotthauer made it very clear that he did not want to hear that type of talk in the workplace.
- Although Claimant testified that he was having problems with Mr. Moon from the very beginning of his employment there, on New Year’s Eve day (December 31, 1998), Mr. Moon invited Claimant to his house for dinner with his family since Mr. Moon heard Claimant was at work that day and “felt sorry for him” since Claimant had nothing else to do that night. According to Claimant, it was at this party at Mr. Moon’s house (with Mr. Moon’s wife and kids present) that Mr. Moon grabbed Claimant’s head and shoved it down into Mr. Moon’s crotch. Claimant testified he was upset by this behavior, but because there was some ice on the roads, he stayed the night on Mr. Moon’s couch at his house and left the next morning.
- Despite Claimant’s graphic examples of Mr. Moon’s alleged behavior and how offended Claimant was by it, Ms. Platz testified that when Mr. Moon first came to work for Employer, Mr. Moon and Claimant “got along well.” In fact, she said that Claimant got along better with Mr. Moon than she did, and Claimant tried to bridge the gap between them. She further testified that they got along together so well, that Claimant decided to go work for Mr. Moon in the Sales Department, and that is why Claimant switched jobs at Employer.
- **Mr. Stanley Schlotthauer** (Exhibit 4) testified by deposition in this case about his recollection of the events surrounding Claimant’s allegations. I find Mr. Schlotthauer’s testimony to be credible and consistent with the testimony of another credible witness, Andrea Platz. Mr. Schlotthauer is not longer employed by Employer and has no financial affiliation with Employer. He was the General Manager in the St. Louis office after Mr. Frost in 1998, until the beginning of 1999, when Ben Buchanan took over. He was familiar with Claimant, as well as the other individuals referenced in this case who worked in the St. Louis office. He admitted that he did hear Mr. Moon and Ms. Kalips making sexually tainted, teasing and suggestive comments, but they did not use explicit language. He never saw them make sexual gestures with their bodies, hands or mouths, nor any other type of sexual gesture. He testified that no one ever came to him and complained about Mr. Moon or Ms. Kalips’ comments or conduct, but he did remember Claimant complaining in general about the lack of professionalism in the office. Claimant never complained about anyone in particular though. After the lack of professionalism was raised though, Mr. Schlotthauer remembered having talks with people about maintaining professionalism and staying away from inappropriate topics. He testified that Claimant also participated in the bantering and he had to talk to Claimant when he talked with everyone else about it. He denied that he ever saw any sexual

conduct, contact, or inappropriate touching between Claimant and Mr. Moon. He denied that he heard any reports of that either.

- Mr. Schlotthauer admitted that when he became angry at the landlord one time, he did say, “If you want to play fuck you, everybody’s going to get a turn.” His version of this expression was consistent with Andrea Platz’s recollection and testimony. It was different from Claimant’s version in that there was no inclusion or reference to having “the biggest stick.”
- Regarding Claimant’s move to the Sales Department and his performance there, Mr. Schlotthauer testified that Claimant, a number of times, very adamantly requested a transfer to the Sales Department because he needed to make more money. He told Claimant that the ability to make more money was based on his performance, but Claimant said that he had pretty serious financial issues and needed to make the move. Mr. Schlotthauer testified that Claimant confided in him that in addition to financial issues, he also had marital problems, issues with visitation for his children, and a relationship issue with a coworker. Once Claimant was in the Sales Department, Mr. Schlotthauer remembered having conversation and being advised that there were real concerns about whether Claimant was actually working in the field or not, because the expected production and the results were not there with Claimant. He noted that this definitely caused friction between Claimant and Mr. Moon. While he testified that Claimant’s performance in the Service Department was good, Claimant was struggling in sales. He believed the majority of the reason for this was his personal issues.
- In 1999, in the months leading up to Claimant’s hospitalization on July 1, 1999, Claimant moved into the Sales Department under Mr. Moon and took training to become a salesman for Employer. Claimant said he was put in the Sales Department to get his feet wet and to secure some big accounts for Employer. Claimant alleged that Mr. Moon would yell and scream and make people cry to prove he was the big man, the boss. He alleged that in June 1999, Mr. Moon slammed his head against a plate glass window. He said that he, Andrea and others called the hotline to make complaints about Mr. Moon’s behavior.
- Medical records from **Dr. Koustall**, the counselor he saw with his wife while they were married, (Exhibit 6) show that Claimant went on his own for additional counseling on March 31, 1999 and June 21, 1999. In those visits, he reported that he was not moving forward in his life, and was filled with sadness and regret about his failed marriage and his children. The report indicates that Claimant still wanted reconciliation. He “hopes to find [sic] fulfilling career.” Dr. Koustall recommends anti-depressants. Given that these visits with Dr. Koustall occurred in the months leading up to his hospitalization on July 1, 1999 (the last one coming only 9 days before), and given that Claimant was allegedly being physically and sexually harassed at work for Employer during this period of time, it is hard to understand why Claimant never mentions any problems or harassment at work to Dr. Koustall during these visits. However, neither report contains any indication that Claimant was having any problems at work or was being harassed by anyone.
- Claimant testified that on June 23, 1999, his mother had surgery for kidney stone removal. They gave her too much anesthesia and she was unconscious for 24 to 48 hours. Various records in evidence indicate that Claimant believed she was gravely ill and perhaps might die, so he was spending time at the hospital with her.
- Claimant alleged that the last altercation with Mr. Moon occurred in the copy room on Monday, June 28, 1999.

According to the records I reviewed, I find that Claimant was told by Mr. Moon to stay with his mother if she was that sick, but Claimant insisted on coming into work anyway. Once there, Mr. Moon began to question Claimant about some sales that he was trying to make, and Claimant did not answer him. Claimant then got defensive and said, "Leave me alone." According to Claimant, Mr. Moon began to shove him and tell him that he should answer him when he asks Claimant a question. Both Mr. Moon and Claimant went into Ben Buchanan's office (the new General Manager) at that point to discuss the situation. Claimant testified that he said he cannot take being harassed, pushed and shoved anymore. He told Mr. Buchanan to get Mr. Moon off of him and away from him. The statements from Mr. Buchanan and Mr. Moon (Exhibit A) both indicate that Claimant appeared to be the angry and aggressive one, at one point standing up and yelling, getting so angry that Ben could see "the veins coming out of his neck." Mr. Buchanan told Claimant to sit down and said that he was worried about him, and perhaps he should get some help. After he left, they called the suicide hotline and got a number for Claimant and entered the number on Claimant's pager.

- Over the next couple of days, Claimant said that he went about his regular business of visiting perspective clients. The records in evidence indicate that neither Mr. Moon nor Mr. Buchanan heard from Claimant so they were trying to figure out what was going on. Mr. Moon admitted making several calls and leaving messages for Claimant to contact them, expressing concern about his mother, but with each message getting more stern than the last (Exhibit 5), without any return call from Claimant. According to Claimant, Mr. Moon was leaving messages that consisted of pig squealing noises, and a country voice saying he would "bend him over and make him squeal like a pig." Claimant testified that Ben finally called him on Thursday, July 1, and Claimant "lost it on the phone." Claimant said that he felt like running his car off the bridge, but instead called the suicide hotline and then checked himself into St. Anthony's Hospital for treatment.
- Claimant testified that he was doing well in sales up to his breakdown and was on the verge of signing some pretty big accounts. He testified that Mr. Moon was jealous of him because none of his other team members were getting the results Claimant was getting. I do not find that this testimony is supported by any of the other evidence in the record. Although Claimant placed into evidence a **2 Week Hot List** (Exhibit E), a **Professional Sales Weekly Management Calendar** (Exhibit F), and an **Accounts Working List** (Exhibit L), which were all filled out with appointments and potential sales on the horizon, Claimant placed nothing into evidence showing that he had actually made sales to any of these individuals. Claimant's repeated testimony was that he was close to making the sale and they were almost ready to close the deal. Instead, Andrea Platz testified that Claimant's sales were not where they needed to be to generate a full bonus. A memo included in Exhibit 5, also shows that Claimant was taking a draw on his commissions to keep his salary the same as when he was in service, and since he was not making enough sales to generate a full bonus, he owed over \$2,000.00 for the difference in what his commissions actually were and what draw he took. Based on this evidence and testimony from Andrea Platz, I find that he was not very successful in sales. Claimant was having a hard time meeting his goals and was undoubtedly taking some heat from his boss for not meeting those expectations.
- The records from Claimant's hospitalization at **St. Anthony's Medical Center** (Exhibit D) on July 1, 1999 reveal a number of reasons Claimant gave for his need to seek psychiatric help at that time, but nowhere does he indicate that the overall work environment, or sexual harassment at work, is one of those reasons. On July 1, 1999, as his reason for admission, the report indicates that Claimant received bad news on his mother having health problems in the hospital, and he also had problems with a "bossy, pushy supervisor." Claimant apparently reported a history of panic attacks and anxiety "off and on for a long duration." He reported a marriage to a borderline woman and his being a co-dependent. He also reported severe panic and anxiety attacks and PTSD from the Gulf War for which "he never got treatment." He admitted seeing a counselor himself for anxiety, feeling indecisive and having passive issues. On the Hyland Intake form dated July 1, 1999, Claimant was specifically asked about "Abuse History" in Section H. According to the record, he denied

physical abuse, listed “boss” under mental abuse and for sexual abuse listed “at age 10 by an older boy.” He apparently gave no indication in this section that anyone was physically abusing him, and he certainly never listed his boss or anyone else at work as having sexually abused him.

- On July 2, 1999, he again reported that his mother has brain damage and his wife recently left him. In a Recreational Therapy Assessment filled out by Claimant, he wrote that he was frustrated by people taking advantage of him or abusing him “physically, financially, or emotionally and mentally.” He specifically mentioned that his mother’s medical condition was not appreciated and he was being pushed by his boss, threatened with his job, and asked about his sex life by his boss.
- At the Hyland Behavioral Health System (Exhibit D) on July 2, 1999, there is a note that indicates Claimant had PTSD from Desert Storm, he was on Zoloft for a couple months, and he has problems at work with his boss. He was apparently preoccupied with his harassing work situation and his manager. There were five areas of need identified: 1) Stress management skills; 2) Assertiveness skills; 3) Trauma remediation from Desert Storm (combat and seeing the barracks bombing) and “negative comment of boss”; 4) his mother who set high expectations and wanted him to be a minister and his father who was in the Army; and 5) current divorce pending and mom near death. The therapist wrote that he had a very chaotic work environment and this all was a “bad combination.”
- When directly questioned about the reason he presented to the hospital on July 1, 1999 for treatment, Claimant said he was falling apart, having panic attacks, and the impulse to drive his car off a bridge because of the stress from the way he was being treated by Tim Moon and Chris Kalips. When asked, “Were there any other factors in your life causing you stress on July 1, 1999?” Claimant responded, “Not that I recall, no.” Claimant’s testimony in this regard is not credible because the records from St. Anthony’s and the Hyland Center (Exhibit D) consistently and repeatedly discuss three reasons Claimant sought treatment: 1) his mother’s failing health; 2) his marital problems; and 3) problems with his boss. It is also important to note that his problems with his boss in these records are all seemingly directed at only his supervisor who was pushing him. There is no generalized discussion of the overall harassing nature of his employment situation over the last number of years. It is all seemingly directed at just the one individual, his boss.
- It is also interesting to find in these records on July 5, 1999, Claimant apparently described the final confrontation with his boss that precipitated his admission. He said his boss was shoving him and putting his finger in his chest, so Claimant went to see his manager and his manager sent him home. He said he did not feel supported or understood. Claimant also, at that point, started asking the counselors questions about Workers’ Compensation and return-to-work letters. There were a couple of references to Claimant’s questions about Workers’ Compensation in these records.
- Claimant’s statements about the history of sexual abuse he allegedly endured at Employer began to surface in the records approximately a month after his hospitalization while he was also in the process of seeking short-term and long-term disability payments from Employer. On July 27, 1999, he reported to Family Life Consultants (Exhibit D) that his boss made sexual gestures at him and threw golf balls at his genitals. He also reported that his boss tried to get him to perform oral sex on him by grabbing his head and pulling it toward his crotch. In a later note dated September 7, 1999, Claimant again recounts how the alleged sexual assault on New Year’s Eve caused PTSD from his prior anal rape as a boy. Interestingly enough, in all of the various notes, records and entries from Claimant’s prior hospitalization at the beginning of July 1999, I found no references to

the alleged sexual assault on New Years' Eve, the attempted oral sex, or golf balls striking his genitals.

- After his initial hospitalization, Claimant testified that he was stabilized and put on medications for depression and anxiety. He said that he lost it again in October 1999, and was hospitalized at the Veterans Administration Hospital. At his admission to the VA on October 14, 1999, Claimant reported flashbacks to the Gulf War off and on for years but they have been especially bad over the last 4-5 months. He reported that his boss at work physically pushed him and made sexual advances such as pulling his hand to his crotch and calling him "sweet lips." He characterized his work environment as the major stressor at that time of all of his stressors. He reported that his male boss made sexual advances to him through the window. On October 20, 1999, Claimant reported that he would go to the warehouse at his civilian job and yell and hit various things to let out his anger. He reported that he also had a serious argument with his father over the summer, when his father was trying to tell him what to do about his ex-wife. Claimant also reported his arrest for sitting on his wife to restrain her one time when they were still married.
- Following his VA Hospital admission, Claimant treated with Dr. Garcia, who tried a number of different medications and varying doses to try to control and alleviate Claimant's symptoms. According to Claimant, he was able to keep Claimant out of the hospital, but he still had symptoms and complaints. Claimant also began an extensive course of therapy visits with **Dr. Patricia Berne**, which lasted from December 26, 2000 through December 27, 2005 (Exhibit O). Dr. Berne's records (Exhibit D) are full of even more references to his alleged sexual abuse at work, not only to him, but also to other employees by the supervisors. In a report dated June 13, 2001, based on Claimant's statements to her about his work environment, she described a pattern of psychological, emotional, physical and sexual harassment that resulted in severe depression and anxiety from his abuse at work. She opined that Claimant needed treatment and could not work. She found that he had fully recovered from his depression and PTSD in 1992 prior to his harassment at work for Employer. Claimant testified that he stopped going to see Dr. Berne because it was not covered by his insurance, and she wanted to talk about things that he did not want to discuss.
- **Ms. Sheri Stolp**, the Regional Director of Human Resources for Employer, investigated Claimant's allegations of physical and sexual harassment in early 2000. She prepared a summary of her interviews and findings (Exhibit A) and then testified by deposition regarding those findings and conclusions (Exhibit B). Based on her investigative materials, her interviews, and her testimony, I believe that there definitely were inappropriate topics discussed and sexually-related jokes and innuendos thrown around the conference room and the office. Ms. Kalips, Ms. Platz, Mr. Moon and Mr. Schlotthauer all basically confirmed that there was inappropriate talk and sexually-related jokes and comments made in the office. However, Ms. Stolp testified that her investigation did not validate the allegations in the way that Claimant described it. Mr. Sunday told her that he had met personally with Claimant to inform him that Mr. Frost was being terminated and Claimant never said a word about any harassment or other mistreatment. Neither Brad Sunday nor Eric Fosse ever heard any complaints from Claimant about being harassed at work. She heard from Mr. Schlotthauer that the only person at the office Claimant was close to was Margo Otey. She also found that Claimant and Anita Reuben were seen joking around about the same type of inappropriate topics, and Anita was seen giving Claimant a shoulder massage in the office one day. She testified that her interviews with people in the office, including Ed Heebner, revealed that Mr. Moon was arrogant, condescending to those under him, and would raise his voice at his employees. She testified that she heard about a lunch where Mr. Moon commented to two women, Chris and Michelle, that it would turn him on if they kissed. Ms. Stolp testified that he had already been put on notice because his performance (sales numbers) were not where they needed to be, so this was the last straw, and he was terminated. She noted that she was aware from meetings she attended that Claimant was not hitting his hundred dollars a week weekly sales average.

- Claimant applied for Social Security Disability in 2001. In his **Social Security Disability application** (Exhibit 9), Claimant alleged that the conditions that disable him and keep him from being able to work are “PTSD, major depression, panic attacks, herniated and deteriorating disc in lower back, bilateral carpal tunnel syndrome, TMJ, [and] tinnitus.” On the application where it asked for information on his spouse or former spouse, he wrote that his “marriage is being annulled very soon & I do not wish to give out this information.” However, this application was filed in 2001 and he was already divorced for a number of years already.
- The Social Security Administration apparently sent Claimant to **Dr. Stephen Vincent** (Exhibit 9) for a psychological assessment in connection with his application for benefits. Dr. Vincent’s report, dated August 29, 2001, contains absolutely no indication that Claimant suffered from stress related to his former employment, or that anything from his former employment played any role in his alleged current disability. According to the report, Claimant attributes all of his current problems and need for treatment to his Desert Storm war experiences. There is no discussion of, or report of, work-related stress or physical or sexual harassment. The report indicates that Claimant’s two hospitalizations in 1999 were for “breakthrough problems associated with PTSD, as well as depression with suicidal thoughts with no intention.” Dr. Vincent concludes that Claimant is a “multi-diagnostic and dysfunctional young man who comes with a history of PTSD secondary to Desert Storm experiences with complications associated with panic disorder with possible agoraphobic-like component, as well as a major depressive disorder.” He is diagnosed with, “Posttraumatic Stress Disorder. Major Depression, Single Episode, Moderate. Panic Disorder With Agoraphobia.”
- Following Claimant’s hospitalizations in 1999 at St. Anthony’s and the VA Hospital, and while he was treating with Dr. Garcia and Dr. Berne, who were opining he was unable to work because of his psychiatric condition, Claimant began attending classes at Southern Illinois University Edwardsville to obtain a masters degree in social work. According to his **Academic Transcript from SIUE** (Exhibit 7), he began taking general classes in accounting, management and economics in the fall 2000 semester. He received two B’s, one D, and one F in the four classes that he took. He received two B’s in the two classes he took in the spring 2001 semester. Then in the fall semester of 2001 he began to work on his social work masters degree, receiving two A’s and one B in the three classes he took. According to his testimony at trial, he completed six semesters toward his master’s degree and received that degree in 2003 or 2004. He testified that he had to keep at least a B average in his master’s level classes in order to secure that degree. He testified that he had classes two or three days per week for an hour to an hour and a half for each class. He then had homework or project time away from class for an hour to an hour and a half per class hour. Additionally, he had to compile research, sometimes working with others, and he had to work observing a Drug/Alcohol Counselor for one or two semesters. He said that he was assigned to do the intake questionnaires with the people coming to the counselor for treatment.
- Of all of the co-workers and supervisors to be interviewed, give deposition testimony, or testify live, the only witness to corroborate all of Claimant’s descriptions of the offensive jokes, comments and physical altercations at work, was **Margo Otey**. She basically confirmed every single comment, every gesture, action, joke and offensive touching that Claimant said occurred at Employer. Despite having apparently witnessed all of this behavior, however, she never apparently filed any complaint or raised any issue about these activities to anyone she considered to be a supervisor as these events were occurring. It is clear, though, that she knew about the complaint process because when she felt as though she was sexually harassed by Mike Abbott, she reported it to Tim, Andrea and Ben, and an investigation was conducted. Yet, she allegedly witnessed all of this other harassing and inappropriate behavior and never said a word!

- It is clear from the testimony of the witnesses that Margo and Claimant were close when they worked together at Employer. She also testified that she was fired by Employer on December 11, 1999, at which time she signed a release and was given a month of severance pay. She testified that she was not clear on why they fired her. Another witness (Chris Kalips) testified that she was terminated for coming in late or not coming in at all, and because her deposits were not balancing. On the basis of her failure to contemporaneously report any of these alleged abusive events involving Claimant, her friendship with Claimant, and her subsequent termination by Employer which clearly left her upset with Employer, I do not find her testimony credible, persuasive or reliable.
- **Christine Kalips** testified at trial on behalf of Employer. She worked with Claimant for two years. She was no longer employed by Employer. She left after she had a baby. On direct examination, she basically denied that she ever saw or heard any of the allegedly harassing behavior described by Claimant. She never saw Mr. Moon or Mr. Frost physically touch or inappropriately touch Claimant. She never heard the phrases “squeal like a pig,” “sweet lips” or “sweet ass” used at work directed at Claimant. She admitted that there were sexual conversations at work, but she attributed them to the route guys, the sales people, and the office people. She said Claimant was there for some of these conversations, but he never complained to anyone about the conversations or jokes. She downplayed her involvement in any of these sexual conversations, and directly denied that she ever made sexual gestures, or discussed sex in the workplace or with Claimant. On cross-examination, she admitted that she does have a “potty mouth” and she does curse. She said there was cursing, jokes and comments, but not all the time. She said that she did not consider the work environment sexually-charged.
- I did not find Ms. Kalips’ testimony to be wholly credible and believable. She downplayed her involvement in the sexual jokes and conversation on direct, but then basically admitted to some participation in them on cross. Based on the credible testimony of others like Andrea Platz and Stan Schlotthauer, I believe that she did participate in some such conversations, albeit probably not to the degree or to the same level of involvement as described by Claimant. While I believe that she probably did participate in some inappropriate and sexually related conversations, I also believe that she did not directly aim sexual remarks or advances at Claimant. I believe her when she denies the activities related by Claimant such as laying her breasts on Claimant and making crude, sexually-explicit remarks directly to him.
- **Ben Buchanan** testified live at trial for Employer. Other than confirming that there were some inappropriate conversations, jokes, and topics discussed at work, and confirming that he could not recall Claimant ever complaining about any mistreatment or harassment, Mr. Buchanan did not add a lot to this case with his testimony because he simply could not recall or remember many of the things surrounding this case that he was asked about.
- Since leaving Employer in July 1999, Claimant admitted that he has made no effort to look for employment. He said he has not looked for work because of what his doctors have told him, and because of the anger he sometimes feels and his desire to avoid people. He admitted that he is able to pay his own bills and he checks on his checking account balance at the ATM when he retrieves money. He is able to type and he accesses the Internet a couple of times per week. He admitted that he has been dating someone off and on for a couple of years. They met at church. They watch movies, usually at home, and go to dinner occasionally. He exercises by sometimes walking at the park and occasionally riding his bicycle. His mother and father buy household items for him and sometimes come to his home and clean up for him. He admitted that he has been able to take Art classes off and on for a few years, with the last class being in 2006 or 2007.

- On cross-examination, Claimant admitted that he has some rental properties which have all been purchased since 1999. He did not know how many rental properties he had, but he knew that he had 3 different property management companies taking care of them for him. He said that his father set all of this up for him, but Claimant calls the companies occasionally regarding repairs and expenses. Claimant estimated that he collected \$170,000.00 in rent income from his units, but on his 2007 taxes, it was all negative income due to depreciation. He also admitted that he was involved in a Small Claims Court action in 1999, 2000 or 2001 where he acted as his own attorney in a rear-end collision case. He agreed that he filed the lawsuit, pursued it himself and was awarded money damages.
- The deposition of **Dr. Eduardo Garcia-Ferrer** (Exhibit C) was taken by Claimant on March 29, 2007 to make his opinions in this case admissible at trial. Dr. Garcia is board certified in general psychiatry, addiction psychiatry and geriatric psychiatry. He first began treating Claimant on March 31, 2000. He diagnosed Claimant with a combination of illnesses including depression, post traumatic stress disorder, and anxiety symptoms. He opined that the situation Claimant was put in at work “clearly brought on these symptoms of depression, anxiety and panic attacks that he’s experiencing.” He believed Claimant only had a couple months of treatment at the Veterans Administration for PTSD prior to working for Employer. Despite all the treatment and medications Dr. Garcia has given Claimant, he believed Claimant has made some improvement, but not a whole lot. He did not believe Claimant was malingering. Regarding Claimant’s ability to go back to school, Dr. Garcia testified that he understood Claimant sat in the back of the classroom and did not interact with others. He did admit, however, that it was not typical in his experience for someone to be able to function at school but not in a work setting. He testified that the treatment and harassment that Claimant endured at Employer was the cause of Claimant’s psychiatric diagnoses. He believed the work environment and harassment as Claimant described it was extraordinary and unusual, and he also opined that Claimant was permanently and totally disabled as a result of it. He opined that all of Claimant’s treatment thus far had been reasonable and necessary, and he would need ongoing psychiatric treatment for his condition.
- On cross-examination, Dr. Garcia admitted that the complaints he attributed to his various diagnoses of Claimant were all subjective complaints, and there was no way for the doctor to verify or confirm that those complaints were true. Dr. Garcia admitted that he did not know about Claimant’s prior lawsuit against Sears. He admitted that he did not have any of the records pertaining to Claimant’s psychiatric treatment (VA records or Dr. Koustall) prior to July 1999, nor any verification of what medications he may have been on prior to that time. He was not aware of Claimant’s prior history of sexual abuse at age 10. He testified that he did not believe he was aware of Claimant’s mother’s illness at the time of his first hospitalization in 1999. He also never administered an MMPI to Claimant, nor reviewed the results of the MMPI’s that were administered by others.
- The deposition of **Dr. Wayne Stillings** (Exhibit 2) was taken by Employer on April 4, 2002 to make his opinions in this case admissible at trial. Dr. Stillings is a board certified psychiatrist. He examined Claimant on one occasion, February 18, 2002, and he provided no treatment. Claimant reported that he was assaulted several times in the spring of 1999 and in June 1999, resulting in panic attacks that started for the first time in his life in June 1999 at the age of 35. Dr. Stillings noted that that would be an unusual complaint because based on 100 years of psychiatry, it is well known that panic attacks almost always begin before age 35. In his review of the records, Dr. Stillings noted that it was significant to him that the initial hospitalization records from St. Anthony’s in July 1999 contain nothing about sexual harassment or assault. He testified that in forensic psychiatry the record that is closest in time to the alleged assault is the one to rely on, and in this case those records do not contain any history of sexual harassment or assault. In describing the results of his examination, Dr. Stillings noted that Claimant had a “bizarre fixed stare” at times, and at other times manifested “gaze

avoidance and a dispassionate affect” regarding his alleged sexual harassment. He characterized Claimant as evasive. He agreed that Claimant had consistent signs of PTSD from the Gulf War, but did not think his employment at Employer could cause PTSD because it was not life-threatening and he talked dispassionately about it, not emotionally traumatized. After the evaluation, Dr. Stillings interpreted Claimant’s MMPI test results and found that he was “faking bad” or over-reporting his symptoms in a manipulative fashion for personal or secondary gain. He reached this conclusion by finding that Claimant had so highly elevated scores on 9 of the 10 scales, that he was essentially claiming nearly any and every psychiatric problem. Dr. Stillings also found that on the Fifteen Item Test, Claimant was falsely claiming that his psychiatric problems were impairing his concentration and memory. Dr. Stillings diagnosed Claimant with physical and sexual abuse as a child and adolescent, PTSD solely related to his Gulf War experience, and partner-relational problems concerning his relationship with his ex-wife. He opined that none of those three diagnoses were causally related to or aggravated by his employment with Employer. He agreed that Claimant needed psychiatric treatment for his personal and PTSD issues, but not related to his employment for Employer.

- **Dr. Patricia Berne** testified live at hearing on behalf of Claimant. Dr. Berne is a licensed psychologist who treated Claimant from December 26, 2000 through December 27, 2005. Claimant was also under the care of Dr. Garcia for medications at the same time. She testified that she was aware of his prior treatment for PTSD and believed that he had recovered after some medications in 1992. She was aware of his troubled marriage, his mother’s illness at the time he left Employer, and his history of sexual abuse as a child. She believed the MMPI she administered showed a very high degree of stress, and she knew that Dr. Garcia was treating him for depression and anxiety. She agreed that as high as the scales on the MMPI were, you could conclude that he was faking, but as a treater she was in a better position to know the accuracy of his profile compared to someone just doing an evaluation. She did not believe Claimant was malingering. She believed that there were a number of accommodations made for him in order to complete his class work.
- Dr. Berne opined that he had substantially recovered from his pre-existing PTSD and there was no disability as a result of his Gulf War experiences and PTSD. She opined that he was significantly disabled as a result of his experiences at Employer, and he was not able to return to any employment as a result of that harassment and mistreatment. She testified that Claimant stopped coming to see her because he was unable to leave his house, but she believes it was probably really because he was not able to pay for the sessions anymore. She said that the harassment at Employer brought back the past experiences from the Gulf War and he described flashbacks to her that he was having. She admitted that she had \$25,052.00 in unpaid office visit expenses and she was seeking to have those bills paid as a part of an award in this case.
- On cross-examination, she admitted that she had scored the Beck Depression Inventory at 86, when anything over 30 signifies depression that needs treatment. She scored it that high because Claimant marked more than one answer per question, so she added all the answers rather than just the highest per question. She admitted that it could look like an exaggeration, but in her estimation it was not. She admitted that her opinions were based on discussions with Claimant and the Stolp report. She never talked to any other employees or reviewed any of their deposition testimony. She admitted that she did not know he had completed his master’s degree at the time she was treating him. Finally, she admitted that there was absolutely no improvement in his condition in the 5 years that she treated him.
- **Mr. Timothy Lalk** testified live at the hearing on behalf of Claimant. Mr. Lalk is a vocational rehabilitation counselor who met with Claimant one time, on November 21, 2007, and generated a report dated January 14, 2008 (Exhibit G). Based on his review of a large amount of medical records, the history and description of problems from Claimant, and his description of his family and social problems, Mr. Lalk concluded that

Claimant is unable to secure and maintain employment in the open labor market because of the severity of his complaints. He testified that these complaints included panic attacks, anxiety, crying spells, low back pain (physical complaints), and poor sleep. He believed Claimant was barely able to function and rarely left the house. He testified that the sexual nature of the environment was unusual and this was the biggest scale of company-wide harassment that he had seen. He said it was rare to have a situation where there were multiple people involved in the harassing, and the work situation was extraordinary because of that harassment. He said the significant factor of the stress on Claimant was that he was routinely placed in situations where he was being talked to sexually or the recipient of touching or thrown objects meant to embarrass and humiliate him. He believed Claimant was totally the victim.

- On cross-examination, Mr. Lalk admitted that he had no information from anyone else at Employer as to what may have gone on while Claimant was employed there. He only had Claimant's recitation of the facts and he clearly relied on all of those statements from Claimant in reaching his conclusions in this case. He admitted there was no mention of sexually-based harassment in the St. Anthony's records. He agreed that he did not have Claimant's Social Security file, and further noted that the Social Security report was not consistent with Claimant's history to him, but somewhat consistent with the medical records he reviewed. At any rate, he also did not have reports from Dr. Vincent or Dr. Stillings, nor did he have the MMPI results, or Dr. Wetzel's interpretation of them. He agreed that if Claimant's description of his work environment at Employer was incomplete or inaccurate, then that could change his opinion on whether the stress was extraordinary or unusual, but it would not change his opinion on ability to work. He further agreed that the amount of activity he is able to do could have an effect on his employability. Mr. Lalk was not aware of involvement in the ownership of rental property.
- In connection with her evaluation of Claimant, Dr. Elizabeth Pribor sent Claimant's MMPI tests to **Dr. Richard Wetzel** for review, comment and comparison (Exhibit 8). Dr. Wetzel is a Professor of Psychiatry and a Professor of Neurology and Neurological Surgery at Washington University School of Medicine. He had two MMPI's and an MMPI-2 given at three different times by different evaluators in the course of Claimant's treatment and evaluation for this condition. Dr. Wetzel also had the Beck Depression Inventory administered by Claimant's treating psychologist (Dr. Berne). In reviewing and comparing these test results, Dr. Wetzel wrote that, "There is no doubt that his approach exaggerated his psychiatric symptoms." He noted further that, "Malingering should be considered seriously." He noted that the 1999 MMPI-2 is an even more convincing example of malingering. He wrote that the Beck Depression Inventory was not scored "competently" and the extremely high score was more likely due to exaggeration than depression. He also noted that the Rey Fifteen Item Test was interesting in that the order of the items recalled was "odd" and it seemed the person taking it was trying "to prove something." Dr. Wetzel's ultimate conclusion was that Claimant was trying to exaggerate or malingering a psychiatric condition with these test results.
- The deposition of **Dr. Elizabeth Pribor** (Exhibit 1) was taken by Employer on March 17, 2003 to make her opinions in this case admissible at trial. Dr. Pribor is board certified in general psychiatry. She also has subspecialty certifications in geriatric psychiatry and forensic psychiatry. In comparing Claimant's statements to her about his history and background with medical records provided to her, she was able to discover a number of inconsistencies in his history. Although he told her his childhood was quite good and satisfactory, she found records from a prior therapist that described problems in childhood such as an emotionally unavailable father and getting mixed messages from his parents. When she asked about his education, he never told her about his master's degree in social work from SIU-E, and described himself as essentially nonfunctional (unable to follow a TV program), which ultimately was not true if he was able to complete his master's degree. Regarding his divorce, he told Dr. Pribor that the divorce was not hard on him, just the relationship afterwards with his children. She found that was not consistent with the medical records she reviewed. Claimant told her he was

never involved in another lawsuit besides this case, which was not true when considering his prior suit against Sears (Tire America). He downplayed his family psychiatric history when compared to what was reported in other medical records. He downplayed and contradicted his prior history of medical conditions for which he had previously sought treatment, such as Burning Semen Syndrome. He could not recall his nightmares and flashbacks when talking to Dr. Pribor, but was able to recount them to the VA and others. She found that although he was treating with Dr. Koustall during much of his employment for Employer, the first reference to problems related to G & K came many months after he had stopped working there. Claimant reported to her that he had no problems prior to Employer and that his Gulf War problems had resolved, but this was not accurate according to the other medical records.

- Dr. Pribor described Claimant as seeing everything in the world “in a black and white type of structure.” Everything with him had a theme of good versus evil in the world. For example, he was a wonderful manager at Sears, but the fraudulent behavior and discriminatory bosses made it hard on him to do a good job. Or, he was a hard worker and good manager at Employer, but the harassment and jealousy of his boss kept him from being successful. He described himself as there at G & K to protect the women by being a friend and listening. He said that they (the bosses at Employer) were just trying to make him snap and make him and Andrea go crazy. Dr. Pribor also observed that Claimant changes what the cause of his problems is, depending on who he is talking to about his problems. When he is at the VA, the Gulf War did it. When he is with Dr. Koustall, his marital problems caused it. When he is seen by Dr. Berne and Dr. Garcia, his employment at Employer caused it.
- Based on all the medical records and reports that she reviewed, as well as based on her extensive meeting and examination with Claimant, and Dr. Wetzel’s interpretation of the MMPI test results, Dr. Pribor opined that Claimant had three diagnoses: 1) Malingering; 2) Post-traumatic Stress Disorder; and 3) Psychotic Disorder, not otherwise specified. With regard to the third of those diagnoses, Dr. Pribor explained that just because she uses the term “psychotic” doesn’t mean he is hallucinating or has paranoia. Rather, she means that although there may be a kernel of truth in what they say or the history they give, that kernel of truth is carried out to the paranoid degree. It seemed to dovetail with the malingering diagnosis as far as exaggerating or feigning complaints for the purpose of financial or secondary gain. Dr. Pribor opined that the psychotic disorder and the PTSD pre-dated his employment for Employer. Dr. Pribor further opined that if the alleged discrimination at Employer did occur, then she thought it could have caused a minimal exacerbation of his underlying PTSD, but it would be minimal at best, because of the numerous other stressors he was under at the time, including his divorce, problems with his children, and his ongoing lawsuit. She did not believe it caused the paranoid disorder.
- On cross-examination, Dr. Pribor was asked whether or not the original evaluating and treating psychiatrists might not be in a better position to determine causal connection for the original breakdown, need for hospitalization and medication, since he was the first doctor to see and treat Claimant, as opposed to her coming into the picture for an evaluation years later. She explained that she did not agree with that analysis because of the different roles between a treater and an evaluator. She explained that in treatment, you do not question what the patient says, you just take it at face value and try to get them better. As an evaluator, you are trying to separate this from that and you are looking at the whole picture and more information than a treater might have. She further explained that that is why the American Academy of Psychiatry and the Law has taken a position that unless you are forced to, you should not be a treater and testify about independent facts because the two roles are so separate.

RULINGS OF LAW:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational expert opinion and testimony, the medical records, the other business records, and the depositions and testimony of the other witnesses, as well as based on my personal observations of Claimant and the other witnesses at hearing, and based upon the applicable laws of the State of Missouri, I find:

Issue 1: Did Claimant sustain an occupational disease?

Issue 2: Did the occupational disease arise out of and in the course of employment?

Issue 3: Are Claimant's injuries and continuing complaints medically causally connected to his alleged occupational disease at work on or about July 1, 1999?

Given that these three issues are so inter-related in this Claim, I will address these three issues together.

As the Claim in this case involves an alleged mental injury brought on by alleged mental stress at work it is necessary to apply **Mo. Rev. Stat. § 287.120.8 and 9 (1992)** to determine if this matter is a compensable claim under the statute. **Mo. Rev. Stat. § 287.120.8 (1992)** indicates that, "Mental injury resulting from work related stress does not arise out of and in the course of the employment, unless it is demonstrated that the stress is work related and was extraordinary and unusual. The amount of work stress shall be measured by objective standards and actual events." Further, under **Mo. Rev. Stat. § 287.120.9 (1992)**, "A mental injury is not considered to arise out of and in the course of the employment if it resulted from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination or any similar action taken in good faith by the employer."

Claimant bears the burden of proof on all essential elements of his Workers' Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo.App.E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

Therefore, under these sections, Claimant has the burden of proving that the stress he suffered from, which led to his mental injury, was both work related, and extraordinary and unusual. He must prove the amount of this stress by objective standards and actual events, and the stress cannot be as a result of good faith employment actions by employer, such as transfers, demotions or disciplinary actions.

Since the Second Injury Fund is also involved in this case, it is also important to consider that under **Mo. Rev. Stat. § 287.220.1 (1992)**, in order to qualify for Second Injury Fund benefits, Claimant must prove the presence of pre-existing permanent partial disability, along with a "subsequent *compensable injury* resulting in additional permanent partial disability... [emphasis added]." In other words, if the primary injury against Employer is not a *compensable* injury, then the Second Injury Fund Claim fails.

Having thoroughly reviewed all of the evidence described above regarding Claimant's alleged mental injury resulting from alleged mental stress at work, including Claimant's testimony, the testimony of the other witnesses, the medical treatment records, reports and testimony, and the vocational testimony, I find that Claimant has failed to meet his burden of proving that an occupational disease of mental stress and any resulting mental injury arose out of and in the course of his employment, or was medically causally connected to it.

In reaching this conclusion, I first and foremost find that Claimant's testimony, both concerning the presence of extraordinary and unusual stress in the workplace and concerning his overall current complaints and abilities, is not credible or believable.

In order for Claimant to satisfy his burden of proof in this matter, he would first need to present credible and believable testimony as to the nature of the stress or harassment he endured at work and its effect upon him. Claimant has failed to present such credible or believable testimony. While initially upon direct examination, Claimant seemed believable and seemed to have been genuinely affected by the nature of the environment he was subjected to at Employer, that all fell apart for him on cross-examination when he became evasive and contradictory at times with his testimony. The real problems arose for Claimant though when comparing his testimony to the other documentary evidence and medical reports, and finding that there were glaring discrepancies and inaccuracies that went straight to the heart of his testimony.

Although there were a number of inaccuracies and discrepancies that led me to the conclusion that Claimant is not credible or believable, here are just a few examples. Claimant testified that his prior PTSD had resolved, he was fully functioning, and had no problems with the PTSD from 1993 until 1999, but this was not consistent with the medical records. Claimant said that the hospitalization on July 1, 1999 was solely caused by the repeated harassment at work from Tim Moon and Chris Kalips, and he denied any other cause for that admission. However, the medical records for that hospitalization are full of references to his troubled marriage, his mother's illness and his pushy boss. There is no mention of sexual harassment, and, in fact, on the intake sheet, the only mention of sexual harassment refers back to his rape as a 10-year-old boy. Claimant characterizes himself as a good, hard-working, successful employee and alleges that Mr. Moon was jealous of him. However, the records in evidence reveal that he was not making his sales quotas and had made draws against his commissions of over \$2,000.00 that he had to pay back if his sales did not improve. Finally, Claimant claims an inability to get out of the house, an inability to be around others, and an inability to concentrate and work. However, he has been able to date a woman off and on for a number of years, go out to dinner with her and go shopping, be in regular contact with three different property management companies to manage all of his apartment buildings (he did not know how many he had), and attend classes (including a practicum in a counselor's office) in order to obtain a master's degree in social work.

The discrepancies and inconsistencies regarding his alleged harassment at work even more strongly support my conclusion that Claimant is not credible or believable. Claimant alleged that the harassment from Mike Frost occurred right up to the time that Mr. Frost was fired. However, Claimant had the opportunity to complain about Mr. Frost's behavior when Ms. Platz filed her complaint and met with the regional managers, but Claimant never made any such complaint. Claimant alleged that Mr. Moon's harassment picked up right where Mr. Frost left off, however, Claimant voluntarily went to his house for New Year's Eve, and then after alleging further harassment there, stayed overnight on his couch. Then, despite all of this alleged harassment from Mr. Moon, Claimant voluntarily decided to take a job in sales directly under Mr. Moon. It makes absolutely no sense to me why, if Claimant was being harassed as he alleges, that he would voluntarily put himself in situations at Mr. Moon's house and as a subordinate to Mr. Moon, where more harassment was likely to occur. Instead, I would think that he would stay as far away from Mr. Moon as possible to eliminate any opportunities for further harassment, but that was not the case here! Claimant's actions and behavior at work are not consistent with his claims of repeated sexual and physical harassment by his supervisors and co-workers.

Further, Claimant's claims of sexual and physical harassment are not supported by the competent and credible testimony of the other witnesses in this case. Of all the witnesses who testified live or by deposition, the only witness who fully supported Claimant's claims regarding the nature and extent of the harassment he allegedly endured was Margo Otey. However, for the reasons described above in the findings of fact, I find that Ms. Otey's testimony is not credible or believable. Claimant testified that Andrea Platz was like a sister to him, but even she does not support his accusations or his description of the work environment.

Based on the competent, credible and reliable testimony of Andrea Platz, Stan Schlotthauer, Ben Buchanan and Sheri Stolp, I find that certainly there were inappropriate sexual jokes, cursing and sexual innuendo and conversation that occurred in the workplace. I further find that it certainly was not a "politically correct" or often business-appropriate environment. But I also find that supervisors like Stan Schlotthauer and Ben Buchanan took steps to correct these inappropriate behaviors at the time they heard of or learned of them. I also find that Employer took swift action to discipline employees and supervisors for behaviors that were reported as harassing, such as the action taken by Employer with regard to Mr. Frost and Mr. Moon. All in all, their competent and credible testimony does not support Claimant's extreme descriptions of the work environment or of the physical and sexual harassment he

allegedly endured.

In order to make this a compensable case, Claimant would not only need his own credible testimony (which he does not have), but he would also need competent, credible and reliable medical testimony to support his contention that the extraordinary and unusual stress at work was responsible for causing his mental injury. Claimant fails on this aspect of his proof as well. I find that the medical experts who testified on Claimant's behalf, Dr. Garcia and Dr. Berne, were not competent, credible, reliable or persuasive, because they based their opinions on inaccurate or incomplete histories, and on Claimant's history and statements, which were themselves, not credible.

In order to meet his burden of proof, Claimant relies on the treatment and opinions of Drs. Garcia and Berne, to support his contention that his mental injury and complaints are related to his alleged extraordinary and unusual work-related stress. Essentially, they seem to just take his complaints at face value and continue providing therapy and medications without any attempt to determine the validity, truth or accuracy of his complaints and statements. Dr. Garcia admitted that he rendered his opinions in this case without the benefit of any pre-existing psychiatric treatment records, and without the benefit of knowing Claimant's full history of sexual abuse at age 10, his prior lawsuit against Sears, or his mother's illness at the time of Claimant's first hospitalization in July 1999. Similarly, Dr. Berne was unaware that Claimant had completed his master's degree at the time she was treating him and she did not have any information on the alleged harassment other than what Claimant told her and what she saw in the Stolp report.

Given my prior findings on Claimant's lack of credibility or believability, to the extent that Dr. Garcia and Dr. Berne relied on Claimant's incredible descriptions of his work environment and his complaints in formulating their opinions on medical causation, I find that Dr. Garcia and Dr. Berne's opinions in that regard, thus, also are not competent, credible or reliable. Therefore, Dr. Garcia and Dr. Berne's opinions cannot serve as the basis for any award of compensation in this case. Similarly, since Mr. Lalk relied on the truthfulness and accuracy of Claimant's history in order to render his opinions on employability, I find Mr. Lalk's opinions and testimony are not competent, credible or reliable.

Of all of the medical professionals to provide opinions or testimony in this case, I find Dr. Pribor's opinions and testimony are the most competent and credible. Dr. Pribor had a complete picture of Claimant's pre-existing mental health problems since she not only took a complete history from Claimant, but she also had the pre-existing medical treatment records to review. She had the benefit of multiple MMPI's to review and enlisted an expert (Dr. Wetzel) to independently review them and render his opinion on what they showed. She also had the ability as an evaluator, not wrapped up in treating Claimant or trying to make him better, to objectively review all of the records, the history and evidence to provide a comprehensive opinion on his psychological/psychiatric problems and whether they are related to his work for Employer. I was impressed by the detail, analysis and explanations in her report. Since I have found her the most credible of the medical experts in this case, I find, based on her testimony, that Claimant is a malingerer, and has pre-existing PTSD from the Gulf War, as well as a pre-existing psychotic disorder, not otherwise specified. I further find that his employment at G & K did not cause or exacerbate any of these psychiatric diagnoses. To the extent that other experts such as Dr. Stillings rendered consistent opinions with Dr. Pribor, I similarly find their opinions in that regard to be competent and credible as well.

Given Claimant's failure to provide credible testimony regarding any alleged extraordinary or unusual mental stress at work for Employer, and given his failure to offer any competent or credible medical testimony on the issue of medical causation, I find that he has failed to prove that there was extraordinary and unusual mental stress in the course and scope of his employment for Employer. Furthermore, given my findings that Dr. Garcia, Dr. Berne and Mr. Lalk's opinions are not competent, credible or persuasive, since they relied on Claimant's incredible testimony and assertions, Claimant has also then failed to meet his burden of proof on the medical causation issue. So, he has failed to prove that any such stress resulted in any mental injury for which he currently suffers. Claimant's Claim against Employer is denied.

Since Claimant has failed to prove the presence of a compensable underlying primary injury in this case, Claimant's Claim against the Second Injury Fund also then fails for that lack of proof. The Second Injury Fund Claim here is denied.

Since this ruling on these issues is dispositive of this case, the other remaining issues in this case are moot and will not be ruled on in this award.

CONCLUSION:

Claimant has failed to prove that he sustained a compensable primary injury in this case. He failed to meet his burden of proving the presence of an occupational disease of mental stress that arose out of or in the course and scope of his employment for Employer, by failing to provide credible testimony or evidence of any work-related extraordinary and unusual stress in the workplace. He also failed to provide competent, credible and persuasive medical or vocational evidence on the issues of medical causation or the nature and extent of disability connected to his alleged primary injury on July 1, 1999. Since Claimant has failed to prove the presence of a compensable underlying primary injury in this case, Claimant's Claim against the Second Injury Fund also then fails for that lack of proof. Therefore, for all of the above-stated reasons, the Claimant's Claim against Employer and the Second Injury Fund is denied.

Date: _____

Made by: _____

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

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation