

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

Injury No.: 04-147025

Employee: Carolyn Brooks
Employer: Missouri Attorney General (Settled)
Insurer: C A R O (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by 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 September 3, 2008. The award and decision of Chief Administrative Law Judge Victorine R. Mahon, issued September 3, 2008, is attached and incorporated by this reference.

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.

Given at Jefferson City, State of Missouri, this 3rd day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Carolyn Brooks

Injury No. 04-147025

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: Missouri Attorney General / Central
Accident Reporting Office (Settled)

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

Insurer: (Settled)

Hearing Date: June 24, 2008

Record Closed July 24, 2008.

Checked by: VRM/meb

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: June 27, 2004.
5. State location where accident occurred or occupational disease was contracted: Springfield, 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? Self-Insured.
11. Describe work employee was doing and how accident occurred or occupational

disease contracted: Secretary.

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: Upper extremities.
14. Nature and extent of any permanent disability: Primary Injury Settled. Permanent Total Disability as against the Second Injury Fund.
15. Compensation paid to-date for temporary disability: Not applicable.
16. Value of necessary medical aid paid to date by employer/insurer? Not applicable.
17. Value necessary medical aid not furnished by employer/insurer? Not applicable.
18. Employee's average weekly wages: \$438.46.
19. Weekly compensation rate: \$292.32.
21. Method of wage computation: By agreement.

COMPENSATION PAYABLE

22. Amount of compensation payable: Settled as to Employer.
23. Second Injury Fund liability:
Beginning 68.4 weeks after February 5, 2007, the Second Injury Fund shall pay Permanent Total Disability at the rate of \$292.32, for the remainder of the employee's life, unless modified as provided by law.

The compensation awarded to the claimant shall be subject to a lien of 25 percent of all payments in favor of the following attorney for necessary legal services rendered to the claimant: Randy Alberhasky.

FINDINGS OF FACT AND RULINGS OF LAW

Employee: Carolyn Brooks

Injury No. 04-147025

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

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PREFACE

Carolyn Brooks (Claimant) was injured while working as a secretary at the Office of the Missouri Attorney General in Springfield, Missouri. She settled her claim against the employer (primary injury). This hearing, conducted on June 24, 2008, pertained solely to the nature and extent of any liability from the Second Injury Fund. Claimant appeared in person and by her attorney of record, Randy Alberhasky. The Second Injury Fund was represented by Patrick Platter.

Stipulations

The parties agreed to an average weekly wage rate of \$438.46, yielding a compensation rate of \$292.32. The parties recognized a prior settlement of \$20,000 on the primary claim, which equates to 17.1 percent of the body as a whole disability or 68.4 weeks.

Exhibits

The following were offered by Employee and Admitted:

- Doctors Hospital, 12 pages, certified 10/20/2005
- Hand Therapy & Orthopedic Rehab, 3 pages, certified 3/5/2007
- Harsham Chiropractic Clinic, 5 pages, certified 10/26/2005
- Healthtracks, 6 pages, certified 12/19/2007
- Orthopedic Specialist of Springfield, 36 pages, certified 10/17/2005
- Orthopedic Specialist of Springfield, 21 pages, certified 12/20/2006
- Orthopedic Specialist of Springfield, 33 pages, certified 10/23/2006
- Orthopedic Specialist of Springfield, 9 pages, certified 3/29/2007
- Smith Glynn Callaway Clinic, 60 pages, certified 11/18/2005
- St. John's Health Center, 200 pages, certified 1/30/2008 (objection - not admitted)
- St. John's Health Center, 72 pages, certified 10/25/2005
- St. John's Health Center, 9 pages, certified 10/26/2005
- Smith Glynn Callaway Clinic, 5 pages, certified 12/19/2007
- Smith Glynn Callaway Clinic, 19 pages, certified 10/14/2005
- Smith Glynn Callaway Clinic, 32 pages, certified 3/6/2008
- St. John's Clinic, Psychiatry, 47 pages, certified 10/10/2005
- St. John's Clinic, Psychiatry, 82 pages, certified 11/17/2007
- Springfield Neurological & Spine Institute, 3 pages, certified 9/12/2006

- St. John's Fremont Clinic, 3 pages, certified 6/19/2008
- Claim
- Answer Employer/Insurer
- Answer, Second Injury Fund
- Letters
- Wilbur T. Swearingin, CRC, report 6/16/2006
- Contract for Compromise and Release (Employer)
- Prior California Workers' Compensation File (medical records objected to & not admitted)
- Dr. P. Brent Koprivica and exhibits

BB. Dr. John D. Pro and exhibits

The following were offered by Second Injury Fund and admitted:

1. Deposition of James M. England, Jr.

- Personnel File - Office of the Attorney General, State of Missouri
- Description of Post Traumatic Stress Disorder (DSM-IV-TR)
- Description of Major Depressive Disorder (DSM-IV-TR)
- SSA Function Report - Adult
- SSA Disability Report - Appeal
- Medical Records - St. John's Health Center/Dr. Michael Whetstone
- Medical Records - St. John's Clinic of Psychiatry (Dr. Thomas Kuich)
- Medical Records - St. John's BHC (Monica Kile)
- Letter to Attorney Alberhasky from Dr. Kuich dated June 13th, 2008.
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STATEMENT OF FACTS

Carolyn & Robert Brooks

Claimant Carolyn Brooks is 54 years of age. She has been married to Robert Brooks for more than 20 years. They have a teenage son. Claimant has worked most of her adult life in a number of secretarial and administrative occupations both in California and Missouri. In the 1980's she worked for the Los Angeles Sheriff's Department in California and she suffered a work-related traumatic psychological injury. The injury resulted in her missing several months of work and receiving extensive therapy. She obtained a disability settlement in the amount of 24 percent to the body as a whole under California Workers' Compensation Law. After the settlement, she engaged in a multitude of jobs, but would leave each one after a period of time because she became unhappy with her supervisors or co-workers. She attended college and obtained a bachelor's degree.

Thereafter, she attempted to open her own childcare facility. She ended that enterprise because she could not get along with the parents. After moving to Missouri in the late 1990's, she attempted to start a business making documentary videos with her husband; but the venture never

made money. She also worked with a not-for-profit organization writing grant applications, but had inter-personnel problems and left. She worked for a newspaper as well, but that job did not last more than a few months. She tried working through a temporary agency as a secretary/administrator at several different temporary jobs, including one with the Office of the Missouri Attorney General in Springfield, Missouri. This latter position turned into a full-time, permanent job in 2002.

Claimant's job with the Attorney General required her to primarily type, complete medical summaries, file, and answer phones. At first she got along well and did not have problems at work. During 2003 she became unhappy with the people with whom she was working and fell into a deep depression. She ultimately admitted herself for psychiatric care in September of 2003, remaining for several days. She had suicidal ideations and began receiving treatment for her longstanding psychiatric problems under the care of Dr. Kuich, a psychiatrist. She took a leave of absence, but returned to work in December of 2003. She continued to miss a significant number of days from work, but did not formally leave her employment again until Dr. Kuich took her off work for psychiatric reasons on July 27, 2004. As Claimant did not return to work, this is also the last date that Claimant was exposed to the hazards of her occupational disease or repetitive trauma to her upper extremities.

The repetitive trauma injuries manifested in late 2003 or early 2004. Claimant began experiencing problems with pain and numbness in her hands. Results from electrodiagnostic studies in March of 2003 were positive for nerve entrapment. Claimant reported the symptoms to her employer and began receiving authorized care through Dr. Swango, who ultimately performed three surgeries. On August 4, 2004, Claimant was placed on limited work status with no use of her right hand. She had a right carpal tunnel release performed on October 7, 2004 (at which time she was taken off work one week), left carpal tunnel release on January 6,

2005 (at which time she was taken off work one week). Dr. Swango assigned a 10 percent impairment rating to each wrist on April 18, 2005. Dr. Swango also performed a left ulnar nerve transposition on November 14, 2006 (at which time Claimant again was ordered to remain off work). Dr. Swango released Claimant to return to work on November 29, 2006. On February 5, 2007, Dr. Swango placed Claimant at maximum medical improvement, without an additional rating, and released Claimant to full duty.

While under the care of Dr. Kuich, Claimant testified that she did not feel capable of working from a psychiatric point from July of 2004 through 2006, as she was receiving therapy and undergoing frequent medication changes. As she began to stabilize through the help of medications and therapy, she remained active in her church and in Boy Scouts, providing volunteer bookkeeping for the organization. By the fall of 2007, she had improved to the point where Dr. Kuich began to reduce her medications. Her nightmares had decreased and she was feeling less depressed. By March of 2007, she had improved so much that Dr. Kuich informed her disability insurance carrier that she was now capable of returning to work in a low-stress occupation, although not as a secretary. Consequently, her disability insurance terminated her total disability benefits. At the time of the hearing, Claimant and her husband both testified that Claimant was doing better than at anytime since she last worked in July of 2004.

Dr. Koprivica

As a result of the primary work injuries to her wrists and elbow, Dr. Brent Koprivica, a rating physician, found Claimant had significant loss of pinch and grip strength. He apportioned a 25 percent permanent partial disability of each upper extremity at the level of the elbow (210-week level). With the bilateral upper extremity involvement he assigned an overall 30 percent permanent partial disability to the body as a whole for the multiple conditions with involvement of hands, wrists, forearms, and elbows bilaterally. From a physical capability standpoint, Dr. Koprivica said Claimant's hand strength is such that she can only perform sedentary tasks, with no more than 10 pounds in terms of force. He recommended that she not return to secretarial work without significant accommodations.

Dr. Koprivica opined that even prior to the claim for repetitive injury through July 24, 2004, Claimant had significant disability. Dr. Koprivica identified several conditions that impacted her life that would pose a hindrance or obstacle to re-employment from a vocational standpoint. He assigned a 15 percent Permanent Partial Disability to the body as a whole due to morbid obesity which prevents Claimant from squatting, crawling, kneeling, or climbing. He found a 12.5 percent Permanent Partial Disability to the body as a whole attributable to low back pain which limits Claimant from repetitive bending, pushing, pulling, twisting, or lifting. Based on the chronic patellofemoral arthralgia in her right knee, which is more involved than the left, and with the history of prior direct traumatic injury to the right knee, Dr. Koprivica assigned a pre-existent 15 percent Permanent Partial Disability of the right lower extremity at the level of the knee (160-week level). Claimant is restricted from squatting, crawling, kneeling, or climbing based on the right knee condition. Dr. Koprivica recognized that Claimant also suffered disability due to psychological or psychiatric conditions, but deferred to the mental health care expert to assess the degree of permanent partial disability. He further opined an enhancement factor of 10 percent was appropriate given that the combined disabilities arise above the simple arithmetic sum of the separate disabilities.

Dr. Koprivica considered Claimant employable from a physical standpoint, but deferred to mental health experts as to the appropriateness of her returning to the open labor market and her ability to do the same.

Dr. Pro

Dr. John Pro, a psychiatrist, performed an independent medical examination on behalf of Claimant on January 12, 2006. He testified by deposition on June 1, 2006. Dr. Pro found it significant Claimant routinely quit jobs or was released after short periods of time with the same pattern of difficulty getting along with others on each occasion. He also noted that she had undergone two hospitalizations for depression and suicidal thinking. Her depression had impacted her ability to work time and again. As Dr. Pro stated, Well, it does in so many ways. First of all, it impacts her ability to work because obviously when she was in the hospital she couldn't go to work, No. 1.

No. 2, the fact that her depression necessitated hospitalization suggests that her depressions were severe, and which is consistent with her history that she gave me and which is consistent with the records. And the

severity of the depression has some correlation with the amount of impairment that the depression creates, not always.

(Ex. BB, p. 16-17).

Her difficulty getting along with people is the main reason that she can not – or could not in the past hold a job for any length of time. And it's the main reason that she was unable to get along well with colleagues or supervisors. . . I think when she became depressed she was even less able to get along with people. And No. 2, part of her paranoid personality that I diagnosed, part of that is probably related to her chronic low grade depression.

(Ex. BB, p. 18, 19).

As Dr. Pro explained, Claimant experienced a repetitive and endless cycle of finding a new employer, working well, then developing personal problems that exacerbated her depression, caused her to quit, and then necessitated finding a new job. This cycle dated back to at least 1984, when she was at work and locked herself in a bathroom because of paranoid and psychotic episode. She ended up spending a month in a psychiatric hospital and missing months of work.

Dr. Pro reviewed the prior workers' compensation claims that Claimant filed in California for psychiatric distress, which he felt was significant. He believed the level of prior impairment in California was consistent with someone who should be able to work with certain accommodations and with certain types of assistance. Dr. Pro's diagnosis was major depressive disorder, dysthymia, and social anxiety disorder under Axis I; and Axis II I listed the personality disorder she has with dependent and paranoid traits. The Axis VI listed 55. Dr. Pro found that, based on his review of Claimant's records and his interview with Claimant and her husband, there had been little change in Claimant's level of functioning. According to Dr. Pro, Claimant has had major depression ever since the first hospitalization in the 1980s at least, and possibly earlier, that has been permanent and continuously affected her in terms of employment. It is this depression that is part responsible for the chronic paranoia and her chronic inability to get along with people. Likewise, she suffers from Dysthymia, which Dr. Pro opined made Claimant more distant from people, more paranoid, more suspicious and more sensitive.

Dr. Pro testified that, as of and prior to July of 2004 for virtually her entire adult life, Claimant had a 45 percent whole person psychological impairment rating because of her severe difficulties maintaining jobs and working meaningfully with people, supervisors, and co-workers throughout her life. His rating was higher than that assigned in California in the 1980's, because Claimant has been hospitalized since then and has had continued job difficulties. Dr. Pro further indicated that Claimant cannot perform any supervisory, retail, or any other job where there is a high degree of stress. Despite these opinions, Dr. Pro did not believe Claimant was permanently and totally disabled from a psychiatric standpoint.

Q. From a psychiatric point alone did you feel that she was totally disabled?

A. No.

Q. Why not?

- Because as I stated, the rating that I gave her is a moderate to moderately severe rating. That's the 45 percent. So that implies that she has not lost all functioning. So theoretically she could still work from a psychological standpoint alone.

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- (Ex. BB, p. 43).
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Dr. Pro, however, did not believe Claimant could return to work as a legal secretary due to the stress of the

situation and the requirement that she would have to relate to other people. In fact, when asked about a number of the positions Claimant had held in the past, Dr. Pro responded that Claimant could not return to those positions.

Dr. Kuich Records

Dr. Kuich did not testify, but his records are in evidence. He first saw Claimant when she was admitted to the Marian Center between October 7, 2003, and October 17, 2003. At that time she was severely depressed. Dr. Kuich notes that, while Claimant was able to return to work briefly, she was unable to continue working in the same environment. In his treatment records are two letters dated May 13, 2008, and June 13, 2008. In them Dr. Kuich indicated that Claimant is disabled from working as a secretary. In the most recent letter, Dr. Kuich stated that he discussed with Claimant the possibility of working at some other job; but he noted, "I am not sure what that job would be, as she has little or no ability to handle any amount of stress."

James England

On December 22, 2006, James England issued a Vocational Rehabilitation Evaluation report on behalf of the Second Injury Fund. He noted that Claimant's past work history involved multiple positions, many ending because Claimant had interpersonal difficulties with staff or supervisors. England testified by deposition on December 6, 2007, at which he acknowledged that Claimant's pre-existing psychiatric problems started as early as the 1980's. He noted her problems continued even while she was working for the Attorney General's Office in the fall of 2003 through April 19, 2006. He recognized that Claimant's psychiatric problems waxed and waned, perhaps depending on whether she was adjusting to medication. He agreed that Claimant's employment history was one of performing sedentary or light-duty work. But, England determined that Claimant was permanently and totally disabled due to her psychiatric condition alone, "due to the simple fact her psychiatric problems have worsened again." (Ex. 1, depo. ex. 2, p. 12).

England made clear that he did not believe Claimant was permanently and totally disabled from a psychiatric standpoint prior to the work injury at the Missouri Attorney General's Office. When asked directly what date he believed Claimant had reached Permanent Total Disability from a psychiatric standpoint, England responded that it would be April 16, 2006 (Ex. 1, p. 33). He also suggested that Claimant could have been permanently and totally disabled as of the date she left the Attorney General's Office. But he then agreed that the April 2006 date was the clearest information he saw that would indicate Claimant's lack of ability to perform (Ex. 1, p. 35).

England did not believe there was any combination between the preexisting psychiatric condition and disability from the last injury. In reaching that conclusion, however, England was under the impression that Claimant's primary injury had not resulted in any "real" permanent restrictions on the use of the upper extremities.

- Okay. More specifically, do you believe that she is unplaceable due to a combination of her mental disorders from 1987 and the entrapment neuropathies to her upper extremities that she experienced in 2004?

-

- A. No.

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- Q. Why do you believe those propositions?

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- Well, I did not see any indication from Dr. Koprivica or from the other medical that placed any real restriction on the use of the upper extremities. Her lack of employability, in my opinion, is due to the poor mental functioning that Dr. Kuich in particular describes in his treatment notes and the functioning form, for lack of a better term, that he completed in April '06. In other words, her mental problems, I think, are sufficient to keep her from being able to sustain any type of employment, regardless of any physical problems. But I think the only physical restrictions that Dr. Koprivica talked about would not really prevent her from doing the kind of

work she did in the past, and there were no specific restrictions involving the upper extremities. So I don't see where there's a combination there.

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- (Ex. 1, Deposition pg. 26)
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- England later opined that absent Claimant's mental or personality disorders, she could work in a clerical or secretarial position or in a day care or teacher aide position in a school district. He recognized, however, that Claimant's mental condition had progressed and deteriorated through April 2006.
- Because the record as a whole supports a finding that Claimant did suffer permanent disability and has restrictions in her upper extremities due to the work injury, I do not find persuasive England's opinion that there was no synergistic or combined effect of the preexisting psychiatric disability and the disability from the primary injury. I do find credible his opinion that Claimant's psychiatric condition was permanently and totally disabling as of April 2006.

Wilbur Swearingin

Wilbur Swearingin is a vocational expert who examined Claimant at the request of her attorney and issued a report on June 16, 2006. He subsequently reviewed additional materials prior to testifying at the hearing, including Dr. Kuich's records through June of 2008. Swearingin noted that Claimant's preexisting history of psychiatric disability, mechanical back pain, knee pain, diabetes, obesity, and sleep disordered breathing, were vocationally disabling sufficient to contribute a hindrance or obstacle to employment and potential for re-employment. On a physical basis, Swearingin did not believe Claimant would be excluded from most of her past jobs, except for secretarial occupations, where she would be performing repetitive hand intensive work. With consideration of her psychiatric disability, however, Swearingin did not believe Claimant could perform any of her relevant past work. Swearingin also noted that there are a number of jobs that are either unskilled labor or lower level semi-skilled work in food service, retail, or service industries, that require only light to medium strength. On a physical basis, Claimant would be able to perform a number of the light occupations in this category. But her psychiatric condition would prohibit her employment in these common jobs. Considering Claimant's psychiatric disability, need for psychotropic medication, and her work restrictions resulting from the psychiatric impairments along with physical impairments and limitations, Swearingin said it was unlikely an employer in the normal course of business would hire Claimant.

Swearingin opined that Claimant was neither employable nor placeable in the open labor market and is permanently and totally disabled. He found that her Permanent Total Disability is the result of a combination of impairment and disability resulting from her last injury and preexisting conditions.

At the hearing Swearingin testified that Claimant had improved from a psychiatric standpoint since his initial evaluation and she was no longer taking as much medication. But, she was still unemployable in the open labor market as a result of the *combination* of her prior psychiatric disability, knee disability, back disability, and obesity together with her occupational disabilities to her arms. He testified that, per Dr. Koprivica's deposition, she was restricted to sedentary physical work based upon her physical disabilities. She could not return to any of her previous employments because of physical and mental restrictions.

RULINGS OF LAW

Disability From Last Accident

As noted in *Hughey v. Chrysler Corp.* 34 S.W.3d 845, 847 (Mo. App. E.D.2000), the first determination is the degree of disability from the last injury. If Claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. *Feld v. Treasurer of Missouri as Custodian of Second Injury Fund*, 203 S.W.3d 230, 233 (Mo. App. E.D. 2006). Claimant settled her primary claim for approximately 17 percent Permanent Partial Disability, or slightly more than 68 weeks of disability. I find nothing in the record suggesting that the settled amount was an inappropriate gauge of the degree of disability actually suffered by Claimant. Based on the whole record, I conclude that Claimant was permanently and partially disabled from the last accident in the amount of 68.4 weeks or 17.1 percent body as a whole.

Preexisting Disability

As a prerequisite to imposing liability on the Second Injury Fund, a claimant must establish that a preexisting permanent *partial* disability existed at the time the work-related injury was sustained and was of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. *Lingerfelt v. Elite Logistics, Inc.*, 255 S.W.3d 1, 5 (Mo. App. S.D. 2008).

1. Not Totally Disabled Prior to Primary Injury

While Claimant suffered from a serious psychiatric disability most of her adult life, Claimant's psychiatric condition was not totally disabling until April 2006. This was *after* the primary injury at the Missouri Attorney General's Office. Prior to the primary injury, Claimant was marginally employable, but employable nonetheless. Claimant was working in a job on the open labor market.

2. Permanent Total Disability from Combination

When the primary disability to the upper extremities is combined with Claimant's preexisting psychiatric disability, Claimant is permanently and totally disabled.

3. Post-Injury Progression

In *Garrett v. Treasurer of State of Missouri as Custodian for Second Injury Fund*, 215 S.W.3d 244, 250 Mo. App. S.D. 2007), the appellate court ruled that the Second Injury Fund is not liable for post accident worsening of a preexisting condition. But in *Garrett* the employee's preexisting psychiatric *condition* had not become a hindrance or obstacle to employment until *after* the work accident. Mr. Garrett had testified that his preexisting condition caused him no difficulty in finding or keeping employment. That is not the case here.

In the instant case, Claimant's psychiatric condition was significantly disabling in maintaining employment *prior to* the last accident. Claimant even had a significant prior workers' compensation settlement and had missed a substantial period of time away from her job as a result of the preexisting disability. Viewing Claimant's psychiatric and other physical disabilities as they existed at the time of her injury at work (which would be the last exposure on July 27, 2004), and considering the degree of disability sustained as a result of that 2004 occupational injury, I conclude Claimant is permanently and totally disabled. This is consistent with evidence that Claimant's psychiatric condition was deteriorating, but not yet totally disabling until April 2006. That was nearly two years after Claimant's occupational injury at the Attorney General's Office on or about July 27, 2004.

According to Dr. Pro, Claimant was destined to run into interpersonal problems and end her job as a secretary with the Attorney General's Office, just as she had at virtually every job prior. But, unlike in prior circumstances, Claimant now is unable to *physically* perform a number of jobs she has held in the past. This time, because of the overwhelming *combination* of her physical and *preexisting* psychiatric disabilities, Claimant is unable to work in the open labor market.

" Section 287.220.1 entitles the Fund to a credit against permanent partial disability paid by an employer for the last injury considered alone." *Harris v. Treasurer*, 192 S.W.3d 531 (Mo. App. E.D. 2006). In this case, the Permanent Partial Disability and Permanent Total Disability rates are the same: \$292.32. Based on Dr. Swango's opinion that Claimant reached maximum medical improvement as to her upper extremities on February 5, 2007, Permanent Total Disability, from the combination of disabilities, is affixed as of that date. Had the employer not settled the claim against it, it would be liable for 68.4 weeks of Permanent Partial Disability beginning February 5, 2007. Therefore, 68.4 weeks after February 5, 2007, the Second Injury Fund shall begin paying Permanent Total Disability at the rate of \$292.32 per week for the remainder of Claimant's lifetime, unless hereafter modified as provided by law.

The compensation awarded to Claimant shall be subject to a lien in the amount of 25 percent in favor of Randy Alberhasky for necessary legal services rendered to Claimant.

Date: September 3, 2008

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon

*Chief Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

*/s/ Jeffrey W. Buker
Jeffrey W. Buker
Director
Division of Workers' Compensation*

The record remained open for 30 days for the submission of Dr. Kuich's deposition, but the parties were unable to secure his testimony. On July 25, 2008, the Second Injury Fund sought to submit the supplemental report of James England, which purportedly was attached to the Fund's brief. Through an apparent oversight the report was not attached and the record has closed. Moreover, Claimant objected to the submission of such report and that objection is sustained.

While there was much haranguing by the parties about Dr. Kuich's last correspondence, absent further explanation, which the parties were unable to secure by deposition, Dr. Kuich's letter has little weight.