

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

Injury No.: 01-165842

Employee: Linda Cardwell
Employer: Schnucks Markets, Inc. (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: May 31, 2001
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence 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 January 4, 2007. The award and decision of Administrative Law Judge John K. Ottenad, issued January 4, 2007, 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 10th day of August 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Linda Cardwell

Injury No.: 01-165842

Dependents: N/A
Employer: Schnucks Markets, Inc. (Settled)
Additional Party: Second Injury Fund
Insurer: Self-Insured (Settled)
Hearing Date: September 5, 2006 and September 6, 2006

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

Checked by: JKO

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: May 31, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant fell while working in the floral department for Employer and developed low back pain, resulting in surgery at L4-5 and depression.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Body as a Whole—Low Back and Psychiatric
14. Nature and extent of any permanent disability: 15% of the BAW referable to the low back & 12.5% of the BAW referable to psychiatric
15. Compensation paid to-date for temporary disability: Settled as “disputed” with Employer
16. Value necessary medical aid paid to date by employer/insurer? Settled as “disputed” with Employer

Employee: Linda Cardwell Injury No.: 01-165842

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$489.60
19. Weekly compensation rate: \$326.40 for TTD/ \$314.26 for PPD
20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Claim against Employer previously settled

22. Second Injury Fund liability:

21 weeks of permanent partial disability from Second Injury Fund \$6,599.46

TOTAL: **\$6,599.46**

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 attorneys for necessary legal services rendered to the claimant:

Ray B. Marglous and Robert Merlin.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Linda Cardwell	Injury No.: 01-165842
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Schnucks Markets, Inc. (Settled)	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	Self-Insured (Settled)	Checked by: JKO

On September 5, 2006, the employee, Linda Cardwell, appeared in person and by her attorneys, Mr. Ray B. Marglous and Mr. Robert Merlin, for a hearing for a final award on her claim against the Second Injury Fund. The employer, Schnucks Markets, Inc., which is Self-Insured, was not represented at the hearing because their portion of the Claim was previously settled by Stipulation for Compromise Settlement. The Second Injury Fund was represented at the hearing by Assistant Attorney General Kevin Nelson. The hearing was continued until September 6, 2006 to give Claimant the opportunity to submit two additional exhibits into evidence. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of facts and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about May 31, 2001, Linda Cardwell (Claimant), sustained an accidental injury arising out of and in the course of her employment that resulted in injury to Claimant.
- 2) Claimant was an employee of Schnucks Markets, Inc. (Employer).
- 3) Venue is proper in the City of St. Louis.

- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage of \$489.60, resulting in applicable rates of compensation of \$326.40 for total disability benefits and \$314.26 for permanent partial disability (PPD) benefits.
- 7) Whether or not Employer paid temporary total disability (TTD) benefits or medical benefits in connection with this case was in dispute at the time Employer settled their liability.

ISSUES:

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

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A—Deposition of Mr. James M. England, Jr., with attachments, dated August 30, 2006.
- B—Deposition of Jerome F. Levy, M.D., with attachments, dated August 18, 2006.
- C—Deposition of Wayne Stillings, M.D., with attachments, dated August 14, 2006.
- D—Certified medical treatment records from Christian Hospital.
- E—Certified medical treatment records from SSM DePaul Health Center.
- F—Certified medical treatment records from SSM DePaul Health Center.
- G—Certified medical treatment records from Christian Hospital.
- H—Medical records of Jonathan A. Gold, M.D.
- I—Certified medical treatment records from Joseph Novinger, D.O.
- J—Certified medical treatment records from St. Louis Labor Health Institute.

Second Injury Fund Exhibits:

Nothing submitted at the time of trial.

Notes: *The Second Injury Fund's objections to Exhibit C are OVERRULED, and the exhibit is fully admitted into evidence in this case.*

Exhibit B was admitted with objections from the Second Injury Fund contained in the record on pages 30 and 53. Both of those objections are SUSTAINED.

Unless otherwise specifically noted below, any other objections contained in the exhibits are overruled and the testimony fully admitted into evidence.

FINDINGS OF FACT:

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinions and depositions, and the medical records, as well as my personal observations of Claimant at hearing, I find:

- 1) **Claimant** was 55-years-old at the time of the hearing. Her highest level of education was achieving a high school diploma from Riverview Gardens in 1969. She had no formal education or training after her high school graduation.

- 2) Claimant testified that after high school her first job was as a cashier for National Food Stores from 1969 – 1973. She left her job to become a homemaker after the birth of her second child. Claimant returned to work in 1985 for Sears in the ladies department, carrying clothes, stocking shelves, carrying boxes, and helping customers. She worked for Sears until 1990 when her neck was injured when a rack fell and hit her on her head. Her treatment consisted of physical therapy and cervical fusion surgery. After this injury she left her job because she could not do the lifting or reaching overhead.
- 3) Medical treatment records of **Dr. Jonathan A. Gold** (Exhibit H) indicate Claimant had a one level anterior cervical fusion at C5-6 on February 26, 1991. The records also document her initial evaluation when she was sent for work hardening after the cervical fusion surgery. Although this was the subject of a Workers' Compensation case, the prior settlement document and/or award was not submitted into evidence at this hearing.
- 4) After her treatment ended, Claimant was not working for a couple of years, until she was hired by Schnucks Markets. She was hired to work in the video department, but only stayed in that department for a few months. She was then transferred to the floral department where she worked from 1993 until her first work-related injury in 2001.
- 5) Regarding other injuries prior to the 2001 back injury, Claimant testified that she had a prior injury to her low back. Her only treatment consisted of a few hot and cold packs. She testified that she was able to continue to operate fairly well. She also described a prior right shoulder injury when she slipped and fell. She did not have surgery. Again, she testified she recovered fairly well. In the mid 1990s, she said she was diagnosed with bilateral carpal tunnel syndrome, which she attributed to making ribbons and stripping roses. She did not file a Workers' Compensation claim. She was treated with injections and testified that she had problems gripping, and she noticed she was not as fast. She never had carpal tunnel releases until after the 2002 injury. She also had a prior right knee injury from 1996 that was not the subject of a Workers' Compensation Claim. She said she fell on it wrong and dislocated her kneecap. She testified she had arthroscopic surgery to put the kneecap back in place. She described continued complaints affected by changes in the weather. She said the knee would bend less and she worked slower on it. On cross-examination, Claimant admitted that she was working full duty without restrictions prior to the 2001 injury.
- 6) Certified medical records from **St. Louis Labor Health Institute** (Exhibit J) document treatment Claimant had for many various conditions and body parts from approximately 1972 to 1999. Included in those records are notes regarding a recommendation for a right knee arthroscopic surgery in 1994 to perform a capsular release to treat her patella that was tracking laterally. Although it appears she had the surgery, there is no surgical note contained in the file to know exactly what was done, nor are there any significant follow-up notes that explain her progress. There are also notes from 1996 diagnosing carpal tunnel syndrome, because of nocturnal numbness and complaints in both hands, as well as x-ray reports that document basilar joint arthritis of the left thumb. She was treated with injections and cock-up splints. Finally, there are a number of relevant prior entries documenting various complaints of, and treatment for, low back pain, as well as some entries regarding the pre-existing neck fusion performed by Dr. Gold.
- 7) Claimant testified that she was first diagnosed with depression 11 or 12 years ago after her mother died. She testified her neck injury at Sears and her inability to do all the things she used to be able to do worsened her depression. She testified she was depressed because she felt like she wasn't the person she wanted to be. She said her depression got progressively worse because of increased pain after each injury. Claimant treated with Dr. Novinger for her depression since 1993. She also saw a Dr. Androphy at St. John's for a second opinion at Dr. Novinger's request. Claimant testified that before her 2001 back injury, the depression affected her ability to work by making her more tired, more quickly. She said she could not function the way that she should.
- 8) Although there were certified medical treatment records from **Dr. Joseph Novinger** (Exhibit I) admitted into evidence, none of those records document any treatment for depression Claimant may have had prior to the 2001 back injury. Dr. Novinger's records cover the period of time from June 4, 2001 to August 20, 2003. In that first note dated June 4, 2001, just a few days after the May 31, 2001 accident, Claimant is seen for an acute worsening of low back pain. "She said she can't recall any specific injury, bending, lifting, etc." Throughout the notes, Claimant follows-up occasionally for low back complaints, as well as a number of other problems. She is diagnosed with depression at one point and periodically is prescribed anti-depressant medication.
- 9) Claimant was injured in 2001 when a display she was pushing gave way causing her to fall forward to the ground. She treated with her primary doctor, who referred her to Dr. Scodary, a surgeon, after conservative treatment of physical therapy and epidural injections failed. She worked while treating but was taking medication. Claimant had low back surgery in October 2001. Following surgery, she was in a lot of pain. She was off work for four months, and she had limited mobility. She returned to work initially on light duty, but she could not do much bending. She went back to work in February 2002, but she was slower, and she could not do any bending or twisting, nor any lifting over 12 pounds. She testified the low back injury hindered her ability to work because she could not work long hours as a result of being tired from the medications. She said the pain

affected her mental well-being also. Eventually, Dr. Scodary did lift the restrictions, but she still did no heavy lifting or bending. She admitted that there was only a brief period of time from when the restrictions were lifted until she had the injury in 2002.

- 10) The certified medical treatment records from **Christian Hospital** (Exhibit D) document the October 2, 2001 hemilaminotomy and discectomy performed by Dr. Scodary to treat the right herniated L4-L5 disk. There are no follow-up notes from Dr. Scodary or any other medical records in evidence regarding the care and treatment Claimant received for this 2001 back injury.
- 11) While testifying at the hearing on September 5, 2006, Claimant shifted around in her chair from the very beginning as if she was uncomfortable after a brief period of sitting. At approximately 30 minutes into her testimony, Claimant stood up, apparently in an attempt to relieve her back complaints caused by the sitting.
- 12) The deposition of **Dr. Jerome F. Levy** was taken by Claimant on August 18, 2006 to make his opinions in this case admissible at trial. (Exhibit B) Dr. Levy is a physician and surgeon licensed in the State of Missouri. He examined Claimant twice at the request of her attorney for the purpose of forming his opinions as to her disability. In the course of preparing his three reports, he reviewed medical records, took a medical history, and recorded a consistent history of the work injuries, as well as performed physical examinations of Claimant.
- 13) In his first report dated November 9, 2004, Dr. Levy recorded physical examination findings of a moderately wobbling gait, normal range of motion of the neck with moderate discomfort and tenderness posteriorly, and reduced range of motion of the low back with moderate discomfort and tenderness but no spasm. He found decreased range of motion and tenderness in the right shoulder, positive Tinel's on the right, negative Tinel's on the left, and negative Phalen's bilaterally. Claimant had normal reflexes and sensation in the upper extremities. She had normal range of motion and no tenderness, or any other obvious deformity, in the lower extremities. Although the right leg was weaker and the thigh circumference was less than the left side, the sensation and reflexes in the lower extremities were normal.
- 14) Dr. Levy opined Claimant suffered a 20% permanent partial disability of the body as a whole referable to the low back following the May 2001 work-related accident. He opined this disability was a hindrance or obstacle to her employability. With regard to pre-existing injuries, he opined Claimant suffered permanent partial disabilities of 32% of the cervical spine, 10% of the right shoulder, 15% of each wrist due to carpal tunnel syndrome, 15% of the right knee, and 5% of the body as a whole referable to the back. He opined Claimant's pre-existing injuries were a hindrance and obstacle to employment and that the combination of those pre-existing disabilities and the present injury provided a greater disability than the simple sum, so therefore a loading factor should be applied. He opined that the treatment and surgeries for the low back injuries were reasonable, necessary and related to the accidents at work.
- 15) Following his initial rating, Dr. Levy reviewed additional records, examined Claimant a second time on September 27, 2005, and issued his second report dated October 21, 2005. At the second appointment Claimant continued to complain of low back pain that interfered with activities of daily living. She also stated that she was having too many problems to return to work. The third surgery Claimant had now had, left her with further decreased range of motion in the back and spasm on each side of the incision. Dr. Levy believed this third surgery was related to the back injuries Claimant suffered at work. He assigned an additional permanent partial disability of 10% due to this surgery, or a total now of 55% of the body as whole referable to the low back from the back injuries in 2001 and 2002. He did not change any of the ratings he issued in the first report on the pre-existing injuries.
- 16) The deposition of **Dr. Wayne Stillings** was taken by Claimant on August 14, 2006 to make his opinions in this case admissible at trial. (Exhibit C) Dr. Stillings is a board certified psychiatrist. He examined Claimant on one occasion, May 13, 2004, at the request of Claimant's attorney, and then produced a total of four reports. The purpose of the evaluation was to determine Claimant's psychiatric condition and occupational capacity, as well as to formulate opinions on psychiatric disability as a result of the injuries in 2001 and 2002, and also determine if there was any pre-existing psychiatric disability.
- 17) Claimant took psychological tests, including the MMPI and an Oswestry Disability Index, to allow Dr. Stillings obtain a comprehensive psychological assessment. When Dr. Stillings interviewed Claimant he had her test results and he reviewed her social and personal history, the history of her injuries and her medical history. Her complaints were in two major categories, depression and pain. She told Dr. Stillings she started being depressed in the summer of 2002 because she cannot deal with her back. Dr. Stillings opined Claimant had a typical cluster of significant major depressive symptoms; daily low moods, poor concentration, loss of energy, decreased interest, loss of appetite, loss of enjoyment, feelings of hopelessness, worthlessness, and suicidal thoughts. He performed a mental status exam and testified her MMPI results proved she is significantly depressed and the Oswestry revealed a functional capacity marked by fairly significant low back pain. He noted, by way of history, that she treated for depression since the 1990s following her mother's death.

- 18) Dr. Stillings opined Claimant's Axis I diagnosis was pathological bereavement for her mother because it went on for so long and required treatment, as well as a mood disorder due to her low back injury, and then a chronic pain disorder associated with both psychological factors and a general medical condition. With regard to Axis V, he diagnosed a GAF score of 48 indicating serious symptoms and occupational impairment. He opined with reasonable psychiatric certainty that with a GAF score of 48 she cannot be employable in the open labor market, because she would have impaired concentration, slowed productivity and emotional problems.
- 19) Dr. Stillings opined the work-related injury of May 2001 was a substantial factor in causing Claimant to develop a mood and pain disorder. He opined Claimant suffered a pre-existing permanent partial disability of 10% of the body as a whole referable to psychiatric due to her pathological bereavement arising from the loss of her mother. He further opined Claimant suffered a permanent partial disability of 20% of the body as a whole referable to psychiatric related to the May 2001 work-related injury, with one half referable to the pain disorder and one half referable to the mood disorder. He opined her psychiatric disabilities were a hindrance and obstacle to Claimant's employability.

RULINGS OF LAW:

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinions and depositions, and the medical records, as well as my personal observations of Claimant at hearing, and based upon the applicable statutes of the State of Missouri, I find the following:

Although the contemporaneous medical treatment records from Dr. Novinger and others raise questions about an accident in this case, since the Second Injury Fund presented no evidence and since the Fund stipulated to accident and medical causation, those issues are not in dispute. Based on the stipulations of the parties, as a result of the May 31, 2001 accident, which arose out of and in the course of her employment, Claimant sustained a compensable low back injury, including a disc herniation at L4-L5 on the right, which was treated surgically. As a result of the injury to her low back, described in the records and reports of Christian Hospital, Dr. Stillings and Dr. Levy, Claimant continued to have pain, limited mobility and weakness in her low back, as well as some psychological symptoms.

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

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

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

Under **Mo. Rev. Stat. § 287.190.6 (2000)**, "'permanent partial disability' means a disability that is permanent in nature and partial in degree..." The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. ***Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund***, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. ***Griggs v. A.B. Chance Co.***, 503 S.W.2d 697,703 (Mo.App. 1973). Expert testimony may be required when there are complicated medical issues. *Id.* at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the Claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. ***Fogelsong v. Banquet Foods Corp.***, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

Since Employer has already settled their risk of liability in this case, the main issues are the extent of the disability attributable to the primary and pre-existing conditions, and whether there is a greater combination of those disabilities that gives rise to Second Injury Fund liability.

Pursuant to **Mo. Rev. Stat. § 287.220.1 (2000)**, if an employee has a pre-existing disability of such seriousness to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and if the pre-existing disability and the subsequent compensable injury each result in a minimum of 12.5% permanent partial disability of the body as a whole, or 15% permanent partial disability of a major extremity, and if the combined disability is substantially greater than that which would have resulted from the last injury alone, then Employer is only responsible for payment for the disability from the last injury, any amount of pre-existing disability is subtracted out, and the Second Injury Fund shall pay Claimant compensation based on the balance left (or greater combination).

The parties put at issue whether Claimant was permanently and totally disabled in connection with this injury. There is no evidence in the record to substantiate a finding of permanent and total disability in connection with this May 31, 2001

claim. Not only is there no medical evidence to that effect, but Claimant also went back to work, albeit for a brief time, for Employer doing her regular job. Given the totality of the competent and substantial evidence in the record described above, I find that Claimant is not permanently and totally disabled in connection with this May 31, 2001 claim.

Based on a review of the medical records, and specifically the uncontradicted reports and depositions of Dr. Levy and Dr. Stillings, I find that Claimant sustained an L4-L5 disc herniation status post discectomy and foraminotomy regarding the low back condition that is medically causally related to Claimant's employment, with a related mood disorder due to her low back injury, and then a chronic pain disorder associated with both psychological factors and a general medical condition.

I further find that Claimant was generally credible when she testified about the continuing complaints of limited mobility, pain and weakness in the low back. These same complaints are generally recorded in the reports of Dr. Levy and Dr. Stillings. Both Dr. Levy and Dr. Stillings also provided opinions on permanent partial disability specifically attributable to this injury, and acknowledged the impact this injury and the surgical treatment had on Claimant's overall back condition and her psychological well-being.

In trying to assess the percentage of permanent partial disability related to this injury for which Employer would have responsibility, it is also necessary to take into account the pre-existing permanent partial disability to the same body part. Claimant testified about the prior low back injury, including the treatment she received. The medical treatment records from the St. Louis Labor Health Institute document treatment Claimant received and complaints she had regarding the low back before the injury in 2001. Finally, Dr. Levy diagnosed a pre-existing low back condition and rated disability attributable to that condition.

Based upon all of these findings, as well as based on Claimant's testimony and the medical evidence, I find that up through the injury of May 31, 2001 and the resultant medical treatment, Claimant had a total of 20% permanent partial disability of the body as a whole referable to the low back. I further find that Claimant had pre-existing permanent partial disability of 5% of the body as a whole referable to the low back. Accordingly, I find that Employer was responsible for 15% permanent partial disability of the body as a whole referable to the low back (which meets the statutory threshold for Fund purposes). I also find that up through the injury of May 31, 2001 and the resultant medical treatment, Claimant has a total of 15% permanent partial disability of the body as a whole referable to psychiatric conditions. I further find that Claimant had pre-existing permanent partial disability of 2.5% of the body as a whole referable to psychiatric conditions. Accordingly, I find Employer was responsible for 12.5% permanent partial disability of the body as a whole referable to psychiatric conditions related to the May 31, 2001 injury (which meets the statutory threshold for Fund purposes).

With regard to the pre-existing injuries and disabilities Claimant has alleged, I find Claimant has provided credible testimony to explain the nature of the injuries to her neck, right knee, right shoulder, bilateral carpal tunnel syndrome (wrists), low back and psychiatric condition. She also credibly explained the various ways in which these disabilities impacted her ability to work. It is clear from her testimony that the prior neck fusion resulted in her inability to continue to work at Sears because of problems with lifting and reaching overhead. It is equally clear that the prior right shoulder and low back conditions did not cause her many problems after she was treated and recovered. She also described the continued complaints she had with the right knee, and her wrists, as well as the effect the prior psychiatric condition had on her ability to work.

In reviewing the medical records submitted into evidence, I did find notes regarding the neck fusion to substantiate the extent of that injury. However, despite references in some of the records to a prior adjudication of a certain amount of disability to the neck, I did not find any prior award or stipulation for compromise settlement admitted into evidence on that prior neck injury. I also found a fairly normal examination of the neck in Dr. Levy's report. I found no pre-existing treatment records for the psychiatric condition or the right shoulder. I also found very few entries that described the bilateral wrist treatment, right knee treatment, or continued low back treatment. In that respect, I had no surgical note for the right knee, nor any clear indication as to what surgery was performed or what may have been discovered during, or treated by, that surgery. There were few notes on the wrists describing only conservative treatment, which was short-lived. While Claimant did provide opinions from Dr. Levy and Dr. Stillings that addressed the extent of Claimant's disability for these various conditions, based on my review of the medical records and Claimant's testimony, I do not think the extent of the disability rises to the levels opined by Dr. Stillings or Dr. Levy for some of these conditions.

Accordingly, based on all of this evidence, I find that Claimant had pre-existing permanent partial disabilities of 25% of the body as a whole referable to the neck, 10% of the right knee, 5% of the right shoulder, 7.5% of each wrist, 5% of the body as a whole referable to the low back, and 2.5% of the body as a whole for the psychiatric condition. I further find that only the 25% of the body as a whole referable to the neck rises to the required statutory threshold for Fund purposes. Additionally, I find that only the pre-existing disability to the neck was a hindrance or obstacle to employment since Claimant testified she continued to have problems with the neck and could not do lifting or overhead reaching. Based on Claimant's testimony, the lack of substantial medical treatment records for the rest of these conditions, and the low amounts of disability attributable to these other conditions, I do not find that they constituted hindrances or obstacles to employment.

The final issue that impacts the nature and extent of permanent partial disability in this case against the Second Injury Fund is whether or not there is some greater (synergistic) combination of the primary low back and psychiatric disabilities with the prior neck disability above and beyond their simple sum when they are added together, thus bringing the Second

Injury Fund into this equation. I find that Claimant has met her burden of proof to show that there is a synergistic effect due to the combination of the disabilities, and a 10% loading factor is appropriate to affix Second Injury Fund liability.

Accordingly, the Second Injury Fund is responsible for 21 weeks of disability pursuant to this award, based on 15% permanent partial disability of the body as whole referable to the low back, 12.5% permanent partial disability of the body as whole referable to the psychiatric condition, and 25% of the body as a whole referable to the neck, with a 10% loading factor.

CONCLUSION:

The parties stipulated that Claimant had a compensable injury to the low back in the course and scope of her employment that resulted in a herniation at right L4-L5 on May 31, 2001. The Second Injury Fund is to pay 21 weeks of permanent partial disability benefits. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Mr. Ray B. Marglous and Mr. Robert Merlin, for necessary legal services.

Date: _____

Made by: _____

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

A true copy: Attest:

Patricia "Pat" Secest
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-032561

Employee: Linda Cardwell
Employer: Schnucks Markets, Inc. (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: April 4, 2002
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission

(Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence 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 January 4, 2007. The award and decision of Administrative Law Judge John K. Ottenad, issued January 4, 2007, 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 10th day of August 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Linda Cardwell	Injury No.:	02-032561
Dependents:	N/A		
Employer:	Schnucks Markets, Inc. (Settled)		Before the Division of Workers' Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial Relations of Missouri
Insurer:	Self-Insured (Settled)		Jefferson City, Missouri
Hearing Date:	September 5, 2006 and September 6, 2006	Checked by:	JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
3. 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
6. Date of accident or onset of occupational disease: April 4, 2002
7. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes

7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
10. 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 fell while working in the floral department for Employer and developed low back pain, resulting in surgeries at L4-L5 and L5-S1, and depression.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Body as a Whole—Low Back and Psychiatric
15. Nature and extent of any permanent disability: 30% of the BAW referable to the low back &
20% of the BAW referable to psychiatric
15. Compensation paid to-date for temporary disability: Settled as “disputed” with Employer
16. Value necessary medical aid paid to date by employer/insurer? Settled as “disputed” with Employer

Employee: Linda Cardwell

Injury No.: 02-032561

17. Value necessary medical aid not furnished by employer/insurer? N/A
19. Employee's average weekly wages: \$481.32
19. Weekly compensation rate: \$320.88 for TTD/ \$320.88 for PPD
20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Claim against Employer previously settled

22. Second Injury Fund liability:

\$320.88 per week for Claimant's lifetime starting 8/23/09, subject to review and modification by law

23. Future requirements awarded: As awarded

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 attorneys for necessary legal services rendered to the claimant:

Ray B. Marglous and Robert Merlin.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Linda Cardwell	Injury No.: 02-032561
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Schnucks Markets, Inc. (Settled)	Department of Labor and Industrial
Additional Party:	Second Injury Fund	Relations of Missouri Jefferson City, Missouri
Insurer:	Self-Insured (Settled)	Checked by: JKO

On September 5, 2006, the employee, Linda Cardwell, appeared in person and by her attorneys, Mr. Ray B. Marglous and Mr. Robert Merlin, for a hearing for a final award on her claim against the Second Injury Fund. The employer, Schnucks Markets, Inc., which is Self-Insured, was not represented at the hearing because their portion of the Claim was previously settled by Stipulation for Compromise Settlement. The Second Injury Fund was represented at the hearing by Assistant Attorney General Kevin Nelson. The hearing was continued until September 6, 2006 to give Claimant the opportunity to submit two additional exhibits into evidence. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of facts and rulings of law, are set forth below as follows:

STIPULATIONS:

- 8) On or about April 4, 2002, Linda Cardwell (Claimant), sustained an accidental injury arising out of and in the course of her employment that resulted in injury to Claimant.
- 9) Claimant was an employee of Schnucks Markets, Inc. (Employer).
- 10) Venue is proper in the City of St. Louis.
- 11) Employer received proper notice.
- 12) The Claim was filed within the time prescribed by the law.
- 13) At the relevant time, Claimant earned an average weekly wage of \$481.32, resulting in applicable rates of compensation of \$320.88 for total disability benefits and \$320.88 for permanent partial disability (PPD) benefits.
- 14) Whether or not Employer paid temporary total disability (TTD) benefits or medical benefits in connection with this case was in dispute at the time Employer settled their liability.

ISSUES:

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

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A—Deposition of Mr. James M. England, Jr., with attachments, dated August 30, 2006.
- B—Deposition of Jerome F. Levy, M.D., with attachments, dated August 18, 2006.
- C—Deposition of Wayne Stillings, M.D., with attachments, dated August 14, 2006.
- D—Certified medical treatment records from Christian Hospital.
- E—Certified medical treatment records from SSM DePaul Health Center.
- F—Certified medical treatment records from SSM DePaul Health Center.
- G—Certified medical treatment records from Christian Hospital.
- H—Medical records of Jonathan A. Gold, M.D.
- I—Certified medical treatment records from Joseph Novinger, D.O.
- J—Certified medical treatment records from St. Louis Labor Health Institute.

Second Injury Fund Exhibits:

Nothing submitted at the time of trial.

Notes: *The Second Injury Fund's objections to Exhibit C are OVERRULED, and the exhibit is fully admitted into evidence in this case.*

Exhibit B was admitted with objections from the Second Injury Fund contained in the record on pages 30 and 53. Both of those objections are SUSTAINED.

Unless otherwise specifically noted below, any other objections contained in the exhibits are overruled and the testimony fully admitted into evidence.

FINDINGS OF FACT:

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

- 20) **Claimant** was 55-years-old at the time of the hearing. Her highest level of education was achieving a high school diploma from Riverview Gardens in 1969. She had no formal education or training after her high school graduation.
- 21) Claimant testified that after high school her first job was as a cashier for National Food Stores from 1969 – 1973. She left her job to become a homemaker after the birth of her second child. Claimant returned to work in 1985 for Sears in the ladies department, carrying clothes, stocking shelves, carrying boxes, and helping customers. She worked for Sears until 1990 when her neck was injured when a rack fell and hit her on her head. Her treatment consisted of physical therapy and cervical fusion surgery. After this injury she left her job because she could not do the lifting or reaching overhead.
- 22) Medical treatment records of **Dr. Jonathan A. Gold** (Exhibit H) indicate Claimant had a one level anterior cervical fusion at C5-6 on February 26, 1991. The records also document her initial evaluation when she was sent for work hardening after the cervical fusion surgery. Although this was the subject of a Workers' Compensation case, the prior settlement document and/or award was not submitted into evidence at this hearing.
- 23) After her treatment ended, Claimant was not working for a couple of years, until she was hired by Schnucks Markets. She was hired to work in the video department, but only stayed in that department for a few months. She was then transferred to the floral department where she worked from 1993 until her first work-related injury in 2001.
- 24) Regarding other injuries prior to the 2001 back injury, Claimant testified that she had a prior injury to her low back. Her only treatment consisted of a few hot and cold packs. She testified that she was able to continue to operate fairly well. She also described a prior right shoulder injury when she slipped and fell. She did not have surgery. Again, she testified she recovered fairly well. In the mid 1990s, she said she was diagnosed with bilateral carpal tunnel syndrome, which she attributed to making ribbons and stripping roses. She did not file a Workers' Compensation claim. She was treated with injections and testified that she had problems gripping, and she noticed she was not as fast. She never had carpal tunnel releases until after the 2002 injury. She also had a prior right knee injury from 1996 that was not the subject of a Workers' Compensation Claim. She said she fell on it wrong and dislocated her kneecap. She testified she had arthroscopic surgery to put the kneecap back in

place. She described continued complaints affected by changes in the weather. She said the knee would bend less and she worked slower on it. On cross-examination, Claimant admitted that she was working full duty without restrictions prior to the 2001 injury.

- 25) Certified medical records from **St. Louis Labor Health Institute** (Exhibit J) document treatment Claimant had for many various conditions and body parts from approximately 1972 to 1999. Included in those records are notes regarding a recommendation for a right knee arthroscopic surgery in 1994 to perform a capsular release to treat her patella that was tracking laterally. Although it appears she had the surgery, there is no surgical note contained in the file to know exactly what was done, nor are there any significant follow-up notes that explain her progress. There are also notes from 1996 diagnosing carpal tunnel syndrome, because of nocturnal numbness and complaints in both hands, as well as x-ray reports that document basilar joint arthritis of the left thumb. She was treated with injections and cock-up splints. Finally, there are a number of relevant prior entries documenting various complaints of, and treatment for, low back pain, as well as some entries regarding the pre-existing neck fusion performed by Dr. Gold.
- 26) Claimant testified that she was first diagnosed with depression 11 or 12 years ago after her mother died. She testified her neck injury at Sears and her inability to do all the things she used to be able to do worsened her depression. She testified she was depressed because she felt like she wasn't the person she wanted to be. She said her depression got progressively worse because of increased pain after each injury. Claimant treated with Dr. Novinger for her depression since 1993. She also saw a Dr. Androphy at St. John's for a second opinion at Dr. Novinger's request. Claimant testified that before her 2001 back injury, the depression affected her ability to work by making her more tired, more quickly. She said she could not function the way that she should.
- 27) Although there were certified medical treatment records from **Dr. Joseph Novinger** (Exhibit I) admitted into evidence, none of those records document any treatment for depression Claimant may have had prior to the 2001 back injury. Dr. Novinger's records cover the period of time from June 4, 2001 to August 20, 2003. In that first note dated June 4, 2001, just a few days after the May 31, 2001 accident, Claimant is seen for an acute worsening of low back pain. "She said she can't recall any specific injury, bending, lifting, etc." Throughout the notes, Claimant follows-up occasionally for low back complaints, as well as a number of other problems. She is diagnosed with depression at one point and periodically is prescribed anti-depressant medication.
- 28) Claimant was injured in 2001 when a display she was pushing gave way causing her to fall forward to the ground. She treated with her primary doctor, who referred her to Dr. Scodary, a surgeon, after conservative treatment of physical therapy and epidural injections failed. She worked while treating but was taking medication. Claimant had low back surgery in October 2001. Following surgery, she was in a lot of pain. She was off work for four months, and she had limited mobility. She returned to work initially on light duty, but she could not do much bending. She went back to work in February 2002, but she was slower, and she could not do any bending or twisting, nor any lifting over 12 pounds. She testified the low back injury hindered her ability to work because she could not work long hours as a result of being tired from the medications. She said the pain affected her mental well-being also. Eventually, Dr. Scodary did lift the restrictions, but she still did no heavy lifting or bending. She admitted that there was only a brief period of time from when the restrictions were lifted until she had the injury in 2002.
- 29) The certified medical treatment records from **Christian Hospital** (Exhibit D) document the October 2, 2001 hemilaminotomy and discectomy performed by Dr. Scodary to treat the right herniated L4-L5 disk. There are no follow-up notes from Dr. Scodary or any other medical records in evidence regarding the care and treatment Claimant received for this 2001 back injury.
- 30) Claimant was injured again in April 2002 when she fell over some candy boxes on the floor at work while carrying rose vases. She fell on her back and hit the cooler too. She initially treated conservatively (taking medications and going to pain management) and continued working until she had surgery in July 2003. She testified her depression worsened and she got shingles which kept her off work for a time. She testified the second fall worsened her back condition and the second surgery involved a fusion and the placement of a cage at L5-S1. Since this surgery, she said she cannot sit very long and she has had more problems with her back. Claimant testified the second surgery did not "take" and so she had a third surgery involving the placement of rods and screws in her back. This third surgery occurred in March 2005, and was also performed by Dr. Scodary.
- 31) The certified medical treatment records from **SSM DePaul Health Center** (Exhibit F) detail the L5-S1 transforaminal epidural steroid injections Claimant had on August 2, 2002 and September 9, 2002, following her April 2002 fall.
- 32) The certified medical treatment records from **SSM DePaul Health Center** (Exhibit E) document the L4-L5 and L5-S1 anterior lumbar interbody fusion with BAK cages performed by Dr. Scodary on July 23, 2003 to treat degenerative disc disease at L5-S1 and L4-L5.
- 33) The certified medical treatment records from **Christian Hospital** (Exhibit G) document Claimant's admission for

an L4-5 and L5-S1 decompressive laminectomy, posterolateral fusion with stabilization screws and rods, performed by Dr. Scodary on March 21, 2005 to treat the pseudoarthrosis from an anterior lumbar fusion at L4-5 and L5-S1. Once again, there are no follow-up notes from Dr. Scodary or any other medical records in evidence regarding the care and treatment Claimant received for this 2002 back injury after these surgeries. Additionally, there is no report from Dr. Scodary indicating when Claimant may have been placed at maximum medical improvement following the third lumbar surgery.

- 34) Claimant testified that she had some accidents following the 2002 injury at work. One time she slipped on water at a store and had her back checked out by her doctor. A second time she slipped in the bathroom and went to the emergency room to have her back examined. Finally, on one occasion, her grandson went over her on the bed and she had a doctor look at her back. She testified that none of the incidents changed the ultimate condition of her back.
- 35) Claimant testified her depression has worsened since her back injury in 2002 because she could not do the floral job and was let go by Schnucks. She said she continues to take medications for pain and depression.
- 36) Claimant testified she is not able to work. She cannot sit or stand for longer than 20 minutes without increased pain in her back, and her legs and feet going numb. She testified that even if she could sit, her hands still hurt. Claimant testified walking for approximately 20 minutes causes her to have pain up and down her spine. She said she does not even grocery shop and she cannot lift more than a gallon of milk. She testified that her weight has fluctuated because of inactivity since these injuries. She also testified that she is allowed to drive, but does not, unless it is an emergency.
- 37) While testifying at the hearing on September 5, 2006, Claimant shifted around in her chair from the very beginning as if she was uncomfortable after a brief period of sitting. At approximately 30 minutes into her testimony, Claimant stood up, apparently in an attempt to relieve her back complaints caused by the sitting.
- 38) The deposition of **Dr. Jerome F. Levy** was taken by Claimant on August 18, 2006 to make his opinions in this case admissible at trial. (Exhibit B) Dr. Levy is a physician and surgeon licensed in the State of Missouri. He examined Claimant twice at the request of her attorney for the purpose of forming his opinions as to her disability. In the course of preparing his three reports, he reviewed medical records, took a medical history, and recorded a consistent history of the work injuries, as well as performed physical examinations of Claimant.
- 39) In his first report dated November 9, 2004, Dr. Levy recorded physical examination findings of a moderately wobbling gait, normal range of motion of the neck with moderate discomfort and tenderness posteriorly, and reduced range of motion of the low back with moderate discomfort and tenderness but no spasm. He found decreased range of motion and tenderness in the right shoulder, positive Tinel's on the right, negative Tinel's on the left, and negative Phalen's bilaterally. Claimant had normal reflexes and sensation in the upper extremities. She had normal range of motion and no tenderness, or any other obvious deformity, in the lower extremities. Although the right leg was weaker and the thigh circumference was less than the left side, the sensation and reflexes in the lower extremities were normal.
- 40) Dr. Levy opined Claimant suffered a 20% permanent partial disability of the body as a whole referable to the low back following the May 2001 work-related accident and a 25% permanent partial disability of the body as a whole referable to the low back following the April 2002 work-related accident. He opined these injuries were a hindrance or obstacle to her employability. With regard to pre-existing injuries, he opined Claimant suffered permanent partial disabilities of 32% of the cervical spine, 10% of the right shoulder, 15% of each wrist due to carpal tunnel syndrome, 15% of the right knee, and 5% of the body as a whole referable to the back. He opined Claimant's pre-existing injuries were a hindrance and obstacle to employment, and that the combination of those pre-existing disabilities and the present injury provided a greater disability than the simple sum, so therefore a loading factor should be applied. He opined that the treatment and surgeries for the low back injuries were reasonable, necessary and related to the accidents at work. He believed Claimant was in need of additional medical care (surgery) to treat her continuing back complaints. Finally, considering the combination of all of her disabilities, he also opined Claimant was permanently and totally disabled.
- 41) Following his initial rating, Dr. Levy reviewed additional records, examined Claimant a second time on September 27, 2005, and issued his second report dated October 21, 2005. At the second appointment, Claimant continued to complain of low back pain that interfered with activities of daily living. She also stated that she was having too many problems to return to work. The third surgery Claimant had now had, left her with further decreased range of motion in the back and spasm on each side of the incision. Dr. Levy believed this third surgery was related to the back injuries Claimant suffered at work. He assigned an additional permanent partial disability of 10% due to this surgery, or a total now of 55% of the body as whole referable to the low back from the back injuries in 2001 and 2002. He did not change any of the ratings he issued in the first report on the pre-existing injuries. His still felt Claimant was permanently and totally disabled. He was also very clear in this report and his third one, that he did not consider any of the subsequent accidents or injuries in formulating his opinion on disability.

- 42) The deposition of **Dr. Wayne Stillings** was taken by Claimant on August 14, 2006 to make his opinions in this case admissible at trial. (Exhibit C) Dr. Stillings is a board certified psychiatrist. He examined Claimant on one occasion, May 13, 2004, at the request of Claimant's attorney and then produced a total of four reports. The purpose of the evaluation was to determine Claimant's psychiatric condition and occupational capacity, as well as to formulate opinions on psychiatric disability as a result of the injuries in 2001 and 2002, and also determine if there was any pre-existing psychiatric disability.
- 43) Claimant took psychological tests, including the MMPI and an Oswestry Disability Index, to allow Dr. Stillings obtain a comprehensive psychological assessment. When Dr. Stillings interviewed Claimant he had her test results and he reviewed her social and personal history, the history of her injuries and her medical history. Her complaints were in two major categories, depression and pain. She told Dr. Stillings she started being depressed in the summer of 2002 because she cannot deal with her back. Dr. Stillings opined Claimant had a typical cluster of significant major depressive symptoms; daily low moods, poor concentration, loss of energy, decreased interest, loss of appetite, loss of enjoyment, feelings of hopelessness, worthlessness, and suicidal thoughts. He performed a mental status exam and testified her MMPI results proved she is significantly depressed and the Oswestry revealed a functional capacity marked by fairly significant low back pain. He noted, by way of history, that she treated for depression since the 1990s following her mother's death.
- 44) Dr. Stillings opined Claimant's Axis I diagnosis was pathological bereavement for her mother because it went on for so long and required treatment, as well as a mood disorder due to her low back injury, and then a chronic pain disorder associated with both psychological factors and a general medical condition. With regard to Axis V, he diagnosed a GAF score of 48 indicating serious symptoms and occupational impairment. He opined with reasonable psychiatric certainty that with a GAF score of 48 she cannot be employable in the open labor market, because she would have impaired concentration, slowed productivity and emotional problems.
- 45) Dr. Stillings opined the work-related injury of May 2001 was a substantial factor in causing Claimant to develop a mood and pain disorder, and the April 2002 work-related injury was a substantial factor in aggravating her mood and pain disorder. He opined Claimant suffered a pre-existing permanent partial disability of 10% of the body as a whole referable to psychiatric due to her pathological bereavement arising from the loss of her mother. He further opined Claimant suffered a permanent partial disability of 20% of the body as a whole referable to psychiatric related to the May 2001 work-related injury, with one half referable to the pain disorder and one half referable to the mood disorder. He rated 30% permanent partial disability of the body as a whole referable to psychiatric related to the April 2002 work-related injury with one half related to the pain disorder and one half related to the mood disorder. He opined her psychiatric disabilities were a hindrance and obstacle to Claimant's employability. Dr. Stillings testified she is permanently and totally disabled from a psychiatric standpoint because of the combination of her disabilities. He opined Claimant needs further psychiatric care.
- 46) The deposition of **Mr. James England** was taken by Claimant on August 30, 2006 to make his opinions in this case admissible at trial. (Exhibit A) Claimant was examined by Mr. England, a vocational rehabilitation counselor, at the request of her attorney, on May 11, 2004 to determine her employability in the open labor market. He interviewed her, administered tests, and reviewed records and expert opinions to learn about her problems, treatment, and restrictions. Mr. England found her to be nice but tired, depressed, and physically uncomfortable. She got up and moved every 15 minutes and had difficulty getting out of her chair. He noted the importance of Claimant's medical history in forming his opinion, including specifically her neck injury and fusion surgery, multiple back operations, Dr. Levy's rating report, right knee surgery, bilateral carpal tunnel, and her psychiatric disabilities.
- 47) Mr. England opined Claimant is not employable from a physical standpoint alone and he did not believe an employer would hire her in her physical condition. Once he included her GAF score of 48 as found by Dr. Stillings, and other psychiatric conditions, he opined her level of depression would keep her from functioning in the work place. Mr. England opined he did not "see how she could [be employable in the open labor market] based on how she appears to be functioning. I don't know of any kind of work I could recommend for her or that I felt that she could perform."

RULINGS OF LAW:

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

Although the contemporaneous medical treatment records from Dr. Novinger and others raise questions about the

medical causation in this case, since the Second Injury Fund presented no evidence and since the Fund stipulated to accident and medical causation, those issues are not in dispute. Based on the stipulations of the parties, as a result of the April 4, 2002 accident, which arose out of and in the course of her employment, Claimant sustained a compensable low back injury, necessitating two back fusion surgeries at L4-L5 and L5-S1. As a result of the injury to her low back, described in the records and reports of Christian Hospital, SSM DePaul Health Center, Dr. Stillings and Dr. Levy, Claimant continued to have significant pain, limited mobility and weakness in her low back, as well as some psychological symptoms.

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

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

Given that these two issues are so inter-related in this claim with primary and pre-existing disabilities to the same part of the body, and further given Claimant's allegation that she is permanently and totally disabled, I will address these two issues together.

Since Employer has already settled their risk of liability in this case, the main issues are the extent of the disability attributable to the primary injuries and whether the combination of the primary and pre-existing disabilities renders Claimant permanently and totally disabled, for which the Second Injury Fund would have liability.

Under **Mo. Rev. Stat. § 287.020.7**, "total disability" is defined as "inability to return to any employment and not merely ... inability to return to the employment in which the employee was engaged at the time of the accident." The test for permanent total disability is claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173 (Mo.App. E.D. 1995), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

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

First, is Claimant permanently and totally disabled?;

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

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

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

Based on the competent and substantial evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational expert, as well as based on my personal observations of Claimant at hearing, I find that Claimant is permanently and totally disabled under the statute.

Claimant has provided uncontradicted medical, psychological and vocational expert evidence to meet her burden of proof that she is permanently and totally disabled. Her credible testimony at hearing regarding her on-going complaints and problems only served to bolster her expert evidence. Further, her mannerisms at hearing which I personally observed, including her constant shifting in the chair while sitting and her need to stand up after approximately 30 minutes of testimony, were consistent with the medical findings and further bolstered her case. Quite simply, there was no evidence in the record to support a finding that she was employable in any capacity. To the contrary, each of the experts was very clear that whether you looked just at medical problems, or psychiatric problems, she was unemployable as a result of either condition.

The next finding then must be the nature and extent of permanent partial disability Claimant has attributable to the body as a whole referable to the low back and psychiatric condition from this last injury on April 4, 2002.

Based on a review of the medical records, and specifically the uncontradicted reports and depositions of Dr. Levy and Dr. Stillings, I find that Claimant sustained an aggravation of her low back condition resulting in two low back fusion surgeries at L4-L5 and L5-S1, that is medically causally related to Claimant's employment. I also find Claimant sustained a significant aggravation of her mood disorder due to her low back injury, and then a chronic pain disorder associated with both psychological factors and a general medical condition.

I further find that Claimant was generally credible when she testified about the continuing complaints of limited mobility, pain and weakness in the low back. These same complaints are generally recorded in the reports of Dr. Levy and Dr. Stillings. Both Dr. Levy and Dr. Stillings also provided opinions on permanent partial disability specifically attributable

to this injury, and acknowledged the impact this injury and the surgical treatment had on Claimant's overall back condition and her psychological well-being.

I do not find any credible evidence to suggest that Claimant's permanent total disability is the result of the last injury on April 4, 2002 alone. None of the experts who provided opinions on disability, or ability to work, including Dr. Levy, Dr. Stillings or Mr. England, indicated that just the last injury alone is the reason for the permanent total disability. Quite to the contrary, they all indicated the reason for the permanent total disability was the combination of the primary injury and pre-existing disabilities. The medical experts assessed only permanent partial disability against Employer for the last injury. Additionally, Claimant's credible testimony supports the finding that the last injury alone did not make her permanently and totally disabled. Therefore, Employer had only permanent partial disability liability for the April 4, 2002 injury.

In trying to assess the percentage of permanent partial disability related to this injury for which Employer would have responsibility, it is also necessary to take into account the pre-existing permanent partial disability to the same body part. Claimant testified about the prior low back injuries, including the treatment she received. There is also the award of disability in Injury No. 01-165842 that attributes a specific amount of pre-existing disability to the low back and psychiatric condition. The medical treatment records from the St. Louis Labor Health Institute document treatment Claimant received and complaints she had regarding the low back before the injury in 2001. Additionally, medical treatment records from Christian Hospital document the first surgery Claimant had for her low back prior to this last injury. Finally, Dr. Levy and Dr. Stillings diagnosed pre-existing low back and psychiatric conditions and rated disability attributable to these conditions.

Case law in this area has stood for the proposition that since pre-existing permanent partial disability to the same part of the body is conclusively presumed to continue undiminished, it is appropriate for the total amount of permanent partial disability to be reduced by the prior amount, leaving the balance to be paid by the Employer in the instant case. *Helm v. SCF, Inc.*, 761 S.W.2d 199 (Mo.App. 1988).

Based upon all of these findings, as well as based on Claimant's testimony and the medical evidence, I find that Claimant has a total of 50% permanent partial disability of the body as a whole referable to the low back. I further find that Claimant had pre-existing permanent partial disability of 20% of the body as a whole referable to the low back. Accordingly, I find that Employer was responsible for 30% permanent partial disability of the body as a whole referable to the low back. I also find Claimant has a total of 35% permanent partial disability of the body as a whole referable to psychiatric conditions. I further find that Claimant had pre-existing permanent partial disability of 15% of the body as a whole referable to psychiatric conditions. Accordingly, I find Employer was responsible for 20% permanent partial disability of the body as a whole referable to psychiatric conditions related to the April 4, 2002 injury.

With regard to the pre-existing injuries and disabilities Claimant has alleged, I find Claimant has provided credible testimony to explain the nature of the injuries to her neck, right knee, right shoulder, bilateral carpal tunnel syndrome (wrists), low back and psychiatric condition. She also credibly explained the various ways in which these disabilities impacted her ability to work. It is clear from her testimony that the prior neck fusion resulted in her inability to continue to work at Sears because of problems with lifting and reaching overhead. It is equally clear that the prior right shoulder and low back conditions did not cause her that many problems after she was treated and recovered. She also described the continued complaints she had with the right knee, and her wrists, as well as the effect the prior psychiatric condition had on her ability to work.

In reviewing the medical records submitted into evidence, I did find notes regarding the neck fusion to substantiate the extent of that injury. I also found the medical treatment records on the low back and some notes regarding treatment from Dr. Novinger for various conditions. Additionally there were the records from the St. Louis Labor Health Institute that showed Claimant's complaints and her treatment for various conditions. Then, of course, there are the credible and uncontradicted medical opinions from Dr. Levy and Dr. Stillings, as well as the uncontradicted vocational opinion of Mr. England, all of whom opine Claimant is permanently and totally disabled as a result of the combination of her primary low back disability and psychiatric disability with her pre-existing disabilities to multiple parts of her body.

Accordingly, based on all of this evidence, I find that Claimant has met her burden of proof to show that she is permanently and totally disabled as a result of the combination of her primary low back disability and psychiatric disability with her pre-existing disabilities to multiple parts of her body. Since the permanent total disability is the result of the combination of her disabilities, the Second Injury Fund has liability for this disability.

Having established the responsibility of the Second Injury Fund for the permanent total disability exposure in this claim, there is yet one issue regarding the amount and timing of the payments under the statute. As of his first report dated November 9, 2004, Dr. Levy opined that the medical treatment for the low back provided so far was related to her work-related injuries and he also opined that more treatment was needed for her on-going complaints. He confirmed that Employer owed temporary total disability benefits during the periods of time Claimant was off work treating for her back injuries. Claimant received additional treatment in the form of an additional back fusion surgery prior to Dr. Levy's second report, dated October 21, 2005. Employer owed temporary total disability during this period of time as well, since Dr. Levy opined that the need for the additional surgery was related to the work injury. Since none of the treating doctor's notes have been placed into evidence, and since Claimant provided no other direct evidence of when she may have been placed at maximum medical improvement following the third back surgery, I find that Dr. Levy's report dated October 21, 2005

establishes the date Claimant reached maximum medical improvement. Employer would have had responsibility for temporary total disability benefits up until the date of maximum medical improvement, but since Employer settled out their liability by stipulation for compromise settlement, this date is relevant only for the purpose of calculating Second Injury Fund liability.

Since Claimant reached maximum medical improvement on October 21, 2005 and Employer was responsible for all appropriate temporary total disability up through that date, I find that Claimant is permanently and totally disabled as of October 22, 2005.

By the terms of this award, Employer was responsible for 200 weeks of permanent partial disability at a rate of \$320.88. Therefore, from October 22, 2005 until August 22, 2009 (200 weeks), Employer had liability for \$320.88 per week, which Claimant and Employer settled by the terms of the stipulation for compromise settlement that extinguished Employer's liability for this case. Because the TTD and PPD rates are the same, there is no differential due.

Starting then on August 23, 2009, the Second Injury Fund is to pay \$320.88 per week for Claimant's lifetime, subject to review and modification by law.

CONCLUSION:

The parties stipulated that Claimant had a compensable injury to the low back on April 4, 2002 in the course and scope of her employment that resulted in two back fusion surgeries at L4-L5 and L5-S1. Claimant is permanently and totally disabled under the statute as a result of the combination of her primary low back disability and psychiatric disability with her pre-existing disabilities to multiple parts of her body. Since the permanent total disability is the result of the combination of her disabilities, the Second Injury Fund has liability for this disability. Starting on August 23, 2009, the Second Injury Fund is to pay \$320.88 per week for Claimant's lifetime, subject to review and modification by law. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Mr. Ray B. Marglous and Mr. Robert Merlin, for necessary legal services.

Date: _____

Made by: _____

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

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation