

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

Injury No.: 04-024054

Employee: Lynda R. Edwards
Employer: Allens Home Care Services, Incorporated (Settled)
Insurer: Travelers Commercial Casualty (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law by this supplemental opinion.

We offer this supplemental opinion to specify the amount of permanent partial disability benefits owed to employee from the Second Injury Fund. We adopt the administrative law judge's findings that employee has a 25% preexisting permanent partial disability of the body as a whole¹ that combines with a 40% permanent partial disability of the body as a whole² resulting from her work injury to result in a greater disability than the simple sum of the disabilities. We agree with the administrative law judge that the synergistic effect is properly represented by applying a multiplier of 15% against the simple sum of the disabilities.³ Employee's weekly compensation rate for permanent partial disability is \$347.05.

Based upon the foregoing findings, the Second Injury Fund shall pay to employee permanent partial disability benefits of \$13,534.95.⁴

Employee's former attorney, Ellen Morgan, filed an attorney fee lien with the Division of Workers' Compensation. Although she was provided notice of the hearing, Ms. Morgan failed to appear to prosecute the lien. She is awarded no lien on the compensation awarded herein.⁵

We approve and affirm the administrative law judge's allowance of attorney's fees herein in favor of Gary G. Matheny as being fair and reasonable.

¹ 100 weeks.

² 160 weeks.

³ This multiplier is commonly referred to as a "load factor."

⁴ The simple sum of employee's permanent partial disabilities is 260 weeks (100 weeks + 160 weeks).
260 X 15% = 39 weeks.

39 X \$347.05 = \$13,534.95.

⁵ Employee agreed to satisfy all attorneys' liens out of the proceeds of her settlement with employer/insurer.

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

The April 4, 2011, award and decision of Administrative Law Judge Gary L. Robbins is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 13th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Lynda R. Edwards

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified.

I believe employee has shown she is permanently and totally disabled for the reason that the disability associated with her pre-existing bipolar disorder combines with the disability caused by her work injury in such a manner that no reasonable employer could be expected to hire employee in her current condition.

Employee has experienced symptoms of bipolar disorder for at least twenty years. She testified credibly that the effects of the disorder may have long made it difficult for her to work in positions where she is responsible for multiple people; be it patients or subordinates. In her field of nursing, she had particular difficulty keeping track of all the information necessary to appropriately monitor and record care. It was for that reason that she pursued private duty nursing such as the job at which she was injured. Even with a single patient for which to care, employee had to engage in frequent note-taking to ensure she maintained an accurate patient care chart.

When I consider the limitations imposed by employee's surgically-fused back combined with the obstacles to employment caused by employee's bipolar condition, I am convinced employee cannot return to any work in the field of nursing.

I am mindful that "total disability" means the inability to return to any regular employment and not merely mean inability to return to the employment in which the claimant was engaged at the time of the accident.⁶ But, contrary to the administrative law judge and the majority of this Commission, I believe employee is unable to secure *and maintain* any regular employment and that she has shown this is due to disabilities caused by her preexisting bipolar disorder combined with the physical limitations of her back condition.

Dr. Berkin and Dr. Ball are both of the opinion that employee is unable to compete in the open labor market due to a combination of the cognitive/mental difficulties caused by her preexisting bipolar condition and the limitations caused by her back injury. The administrative law judge discounts their opinions because employee worked after she recovered from her back surgeries.

Consider the jobs employee tried after her surgeries.

Employee returned to work with the young patient she cared for at the time of her injury, but she no longer performed the duties of turning, lifting, or bathing the patient – essential duties of a private duty nurse. She was not physically performing the duties of this job due to the work injury.

⁶ *Molder v. Mo. State Treasurer*, 342 S.W.3d 406, 411 (Mo. App. 2011).

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Employee got work as a medication technician, but she was unable to keep track of the dispensation of the medications in the manner in which they must be tracked. She was not mentally capable of performing the duties of this job due to her preexisting condition.

Employee worked in a supported position at a sheltered workshop but such work is certainly not work in the open labor market.

On his own, the administrative law judge developed some evidence regarding an imaginary job not otherwise established by the medical or vocational evidence offered by the parties; the administrative law judge concluded that employee might be able to greet customers at a retail store if afforded the opportunity to alternate sitting and standing. But there is no evidence in the record that any employer -- including Wal-Mart -- hires workers exclusively to welcome customers. This hypothetical position is not shown to be available in the open labor market.

The bottom line is this: Before her back injury, employee was able to perform all the duties of at least one job in the open labor market -- private duty nursing -- notwithstanding the obstacles posed by her bipolar disorder. After the back injury, that open market job is no longer available to employee. And the evidence does not show that any other job is available to her, either.

No reasonable employer, in the ordinary course of business, would be expected to hire employee in her current condition and this is due to the combination of her preexisting cognitive/mental disabilities and her work-related physical disabilities. The Second Injury Fund is liable to employee for permanent total disabilities for her lifetime. The administrative law judge and Commission majority err by holding otherwise.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

Curtis E. Chick, Jr., Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Lynda R. Edwards Injury No. 04-024054
Dependents: N/A
Employer: Allens Home Care Services Incorporated
Additional Party: Second Injury Fund
Insurer: Travelers Commercial Casualty
Hearing Date: January 5, 2011 Checked by: GLR/rf

SUMMARY OF FINDINGS

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? March 4, 2004.
5. State location where accident occurred or occupational disease contracted: Bollinger County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did the employers receive proper notice? Yes.
8. Did the accidents or occupational diseases arise out of and in the course of the employment? Yes.
9. Were the claims for compensation filed within time required by law? Yes.
10. Were the employers insured by above insurers? Yes.

11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee was lifting a seven year old child out of a bathtub and hurt her back and body as a whole.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Back and body as a whole.
14. Nature and extent of any permanent disability: See Award. The employee settled her primary case with the employer-insurer for 40% permanent partial disability to the body as a whole.
15. Compensation paid to date for temporary total disability: \$14,140.71.
16. Value necessary medical aid paid to date by employer-insurer: \$62,572.21.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$640.00.
19. Weekly compensation rate: \$426.66 per week for temporary total and permanent total disability. \$347.05 per week for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See Award.
23. Future requirements awarded: None.

The Compensation awarded to the employee shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Gary G. Matheny.

FINDINGS OF FACT AND RULINGS OF LAW

On January 5, 2011, the employee, Lynda R. Edwards, appeared in person and by her attorney, Gary M. Matheny for a hearing for a final ward. The employer-insurer was not represented at the hearing as they had already settled their case with the employee. Assistant Attorney General Frank A. Rodman represented the Second Injury Fund. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Travelers Commercial Casualty.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Allens Home Care Services Incorporated and was working under the Workers' Compensation Act.
3. On or about March 4, 2004, the employee sustained an accident or occupational disease that arose out of and in the course of her employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$640.00. Her rate for temporary total disability and permanent total disability is \$426.66 per week. Her rate for permanent partial disability is \$347.05 per week.
7. The employee's injury was medically causally related to her accident or occupational disease.
8. The parties agreed that the employer-insurer paid \$62,572.21 in medical aid.
9. The parties agreed that the employer-insurer paid \$14,140.71 in temporary disability benefits.
10. The employee had no claim for previously incurred medical bills, mileage or future medical care.
11. The employee had no claim for any temporary disability benefits.
12. The employee has no claim for permanent partial or permanent total disability in this case as to the employer-insurer.

ISSUES

1. Liability of the Second Injury Fund for permanent partial disability or permanent total disability.

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical records from Barnes-Jewish Hospital.
- B. Medical records from St. Joseph Health Center.
- C. Medical records from Community Counseling Center.
- D. Medical records of Victoria A. Damba, D.O.
- E. Medical records from Des Peres Hospital.
- F. Medical records from Behavioral Counseling Center Incorporated.
- G. Medical records from Des Peres Hospital.
- H. Medical records from St. Joseph Health Center.
- I. Medical records from Center Point Hospital.
- J. Medical records from Center Point Hospital.
- K. Medical records from Psych Care Consultants.
- L. Medical records of Dr. Safwat Wahba.
- M. Deposition of Shawn L. Berkin, D.O.
- N. Deposition of Kenneth L. Ball, PhD.
- O. Social Security Extract from records.
- P. Premier Health Care Employment Records.
- Q. Medical records of Paul Simon, D.O.
- R. Medical records from St. Charles Psychiatric Associates.

Second Injury Fund Exhibits

- 1. Deposition of David Kennedy, M.D.
- 2. Deposition of Kevin D. Rutz, M.D.

Joint Exhibits taken from the temporary hearing held on May 17, 2007:

Employee Exhibits

- A. Medical records of St. Anthony Medical Center.
- B. Medical records of Dr. George Schoedinger.
- C. Medical records of Dr. Kevin D. Rutz.
- D. Records of Pro Rehab.
- E. Medical records of Dr. James S. Burke, Jr.
- F. Medical Records of St. Joseph Health Center.
- G. Deposition of Dr. David Kennedy.
- H. February 26, 2007 supplemental report of Dr. David Kennedy.

Employer-Insurer's Exhibits

1. Deposition of Dr. Kevin D. Rutz.
2. Medical records of Premier Health Care.
3. Medical records of Des Peres Hospital.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT-

Lynda R. Edwards, the employee, was the only witness to provide live testimony in this case. All other evidence was presented in the form of written reports, medical records or deposition testimony.

Testimony of Lynda R. Edwards

Lynda R. Edwards, the employee, lives by herself in a small house in Troy, Missouri. She was 58 years old at the time of her trial which was well over six years since her accident of March 4, 2004.

The employee was a registered nurse employed by Allen Home Care. She had been working as a nurse for approximately nineteen years prior to her accident. Her specific duty at the time of her injury was to provide one-on-one home care for a seven year old disabled child who weighed about thirty-seven pounds. She injured her back as she was assisting the child out of a bathtub. The employee testified that prior to the accident of March 4, 2004 she had no complaints regarding her back.

As outlined in the medical records, the employee first received conservative treatment for her back which failed. She then underwent her first back surgery on October 28, 2004 which was followed by back fusion surgery on July 28, 2005. She testified that Dr. Rutz performed her two back surgeries and he returned her to full work duty with no restrictions.

Work and Psychological History Prior to March 4, 2004

The records that the employee presented to document her prior psychological history were generally the records from Barnes Jewish Hospital, Employee's Exhibit A, and records from Community Health Center, Employee's Exhibit C (see all records infra). The mental health evaluators such as Dr. Ball stated that they relied on the psychological history that was provided by the employee in formulating their opinions.

The employee graduated from nursing school in 1985. While there are no specific records documenting the timeframe, the employee testified that she was diagnosed with Bipolar Disorder as early as 1984-1985 even while she was in nursing school. She explained her bipolar disorder as a cycling of mood swings from the depression side to the manic side and that these swings can happen rapidly even within the same day. She testified that she has been treated off and on for

these problems for about twenty years before her accident on March 4, 2004. She also testified that she had hallucinations and thoughts of suicide even though there were no suicide attempts. She testified that she was hospitalized in 1984 at Barnes Jewish Hospital and her bipolar disorder was diagnosed at that time.

The employee testified that ever since she graduated from nursing school she gravitated to private duty nursing as it was difficult for her to deal with people. She also testified that she could not work in a hospital setting as she could not keep track of the things she had to do for a lot of people. She further testified that when she got into stressful situations such as having to deal with multiple people or multiple tasks, her job became too stressful and she would feel overwhelmed and quit that employment. She indicated that she probably quit about three jobs prior to 2004, and was fired from one for drinking. She indicated that she took a lot of notes trying to meet the requirements of her job duties. This is some of the reasoning she provided that drew her to private duty nursing where the nursing is provided more on a one-on-one basis at a slower pace.

The employee also testified that she was taking medications prior to her accident as follows:

- Took a lot of things. Meds would be changed.
- Took a number of meds for months or a year.
- Was always on Lithium. This was her main bipolar drug.
- Others taken were Prozac and Cymbalta.
- Remembers changing to Lamictal before 2004.
- Anti- psychotic drugs that had side effects; mainly unable to stay awake and lethargic.

Work History Since the Accident

Prior to her accident the employee had worked as a nurse in various settings. The employee returned to work at Allens Home Care after her first surgery and again after her second surgery. Around December 2005 she went to work for another employer, Premier Health Care, however she again worked with the same disabled child that she worked with when employed by Allens Home Care. This was full time work. The employee testified that she has been employed two times since leaving Premier. She worked for Community Living in 2009 for about three to four months where she provided services to mentally disabled adults. She quit this job. In 2009 she was employed at a sheltered work shop for about one year. She testified that she would sort and hang up clothes and could come and go as she pleased. She indicated that she took breaks from working mostly due to emotional issues. She further testified that she quit working at the sheltered workshop due to a family incident which required her ninety-one year old mother to move in with the employee so she could take care of her.

The employee quit her job at Premier about August 2006. She testified that she quit because:

- She was having a hard time emotionally.
- There were other things going on in her life.
- Things were going on at home with her husband that really interfered with her being able to do her job.
- It was too hard to care for the child.

The employee testified that prior to her accident she had no restrictions for any condition and required no employer accommodations to perform her job duties.

The employee testified that she had carpal tunnel surgery in November 2006.

Physical Condition as of the Trial Date

The employee testified that she had no trouble with her back prior to March 4, 2004. She indicated that she now has continuing back pain which began after her surgery. She testified as to her continuing complaints:

- She really protects it to prevent pain. If she does something a couple of times in a row she has pain. If she does something wrong, back will hurt for hours or all day. Can lift a little but if she lifts with one hand or two much weight she will hurt for a while once she made it hurt.
- Does not bend or squat due to pain. When it hurts she keeps core muscles snug and this helps pain (ex. like trying to push back against the wall).
- She sits straight up and does not lean back in chair as this causes her pain. She keeps spine erect. More comfortable to stand than sit. She says she rarely sits by choice. She says she will turn in the direction she needs to address to keep back from hurting. One time activity can cause pain.
- She has no trouble in her right leg now.
- Other problems with low back are that she can't stand and lean over at a table to write something or do anything. She says she eats standing up.

The employee testified that in the last couple of years she has not received any treatment for her back. She testified that if she has pain she takes Ibuprofen. In addition, she indicated that if she has pain she deals with it by holding her core muscles snug. During trial the Court observed that the employee sat stiffly on the front edge of her chair, but did not exhibit other indicators of pain.

The employee testified that she did not feel that she could do a regular job.

Psychological Medical History Prior to March 4, 2004

The employee provided evidence that documented some problems she had with her psychological problems/Bipolar Disorder that existed prior to March 4, 2004. While the records appear to be lacking and incomplete, there is no question that the employee was hospitalized at Barnes Jewish Hospital in 1991 for complaints of manic psychosis, erratic behavior, confusion and fears about her job. The records indicate that the employee suffered from severe psychosis with auditory hallucinations and delusions, suspiciousness and paranoia. She was discharged because she improved. The records indicate that the employee had been taking Lithium Carbonate since 1984 as well as other medications. Dr. Saurez reported that the employee has a long history as he had seen her as early as 1985. The employee's diagnosis was Bipolar Disorder; psychotic and agitated and manic depressive psychosis.

Records from Community Health Center document that they saw the employee for psychological problems/Bipolar Disorder at least as far back as 2000 and for a couple of years after her 2004 accident. A lot of the records are prescriptions for Prozac. The records mention some of the problems that the employee was dealing with including:

- Pain due to fibromyalgia.
- Feeling ugly.
- Working night shifts is a stressor.
- Her husband has been increasingly difficult to get along with.
- Work is very stressful. Denies any problems.
- Family and work are stressor but she is handling it well.
- She thinks she is too heavy.

Accident

On March 4, 2004 the employee was working as a private nurse when she injured her back when she was lifting a seven year old child that weighed approximately thirty-seven pounds out of a bathtub. After conservative treatment failed to improve her symptoms the employee was treated by Dr. Rutz. He is an orthopedic surgeon with a fellowship in spinal surgery. Dr. Rutz testified by deposition on February 6, 2007.

Medical Records/Testimony of Physicians Providing Medical Treatment

Dr. Rutz

Dr. Rutz first saw the employee on September 24, 2004. His initial diagnosis was:

- Right leg radiculopathy, L4-5 distribution.
- L4-5 degenerative spondylolisthesis with rotator subluxation.
- L5-S1 disc degeneration with possible disc degeneration with possible far lateral disc herniation on the right.

He performed the following surgery on October 28, 2004:

- Right-sided L4-5 and L5-S1 laminotomy at 4-5.
- Facet joint cyst that was removed.
- L5-S1 discectomy was performed.

As of February 2005, Dr. Rutz saw the employee again due to additional concerns. He examined the employee and indicated that on one hand the employee had pre-existing L4-5 spondylolisthesis that existed prior to surgery. He said this problem was a degenerative condition that was not caused from the employee's accident. He said it became symptomatic because of the work injury. In addition, he ordered an MRI which showed dynamic instability at the L4-5 level which was work related. As conservative care failed, Dr. Rutz performed L4-5 decompression and fusion surgery on June 28, 2005. Dr. Rutz reported that after three months the employee had no pain in her legs, but some aching in her back. The employer-insurer paid for all of the medical care. As of December 6, 2005 the employee was returned to regular duty. As of February 2006, Dr. Rutz indicated that the employee did not report any specific problems

with regard to her job duties. Dr. Rutz said the employee was at MMI and rated her with a 5% permanent partial disability.

As of July 2006, the employee returned and complained of increased pain in her right leg and lower back. Dr. Rutz completed x-rays and reported that the employee developed degenerative spondylolisthesis at L5-S1 which is the level below her fusion. This was a new finding that was not there before. Dr. Rutz indicated that this was a degenerative problem secondary to the degenerative problems the employee had in the past and is not part of accident. He indicated that he could not treat the employee as part of her workers' compensation case but told her he would treat under group insurance. He has not seen the employee since that time. Dr. Rutz testified that having a fusion above another level is a risk factor for developing problems because it can increase stress there. He testified that, "This all comes down to opinions and some guesswork in saying, you know, is this the primary thing that's doing it or primarily her degenerative condition. And in looking at everything, I just didn't feel like and shouldn't say that her fusion and treatment and everything else was enough of a factor to count as the reason why she was having these problems as opposed to the fact that she was a patient that already had a history of degenerative changes in her spine". Dr. Rutz also indicated that he did not feel that a dorsal column stimulator as recommended by Dr. Kennedy was appropriate to address the employee's degenerative problem. He stated that if the employee truly has a pinched nerve then the appropriate treatment would be decompression and fusion.

Dr. Rutz testified that as of July 2006 the employee was working and there were no doctor imposed restrictions. He also testified that the employee was basically asymptomatic prior to her March 2004 lifting incident and that it was not limiting her work.

Dr. Rutz testified that while he did not have any medical records, the employee told him that she had a pre-existing history of depression. He also indicated that on the basis of what he saw, he saw no need for a psychiatric examination.

Psychological Medical History after March 4, 2004

Behavioral Counseling Center/Larry Kiel, PhD.

As of August 18, 2006, records indicate that the employee and her husband were in counseling. The records are hard to read but indicate that the employee did not think the marriage would hold as her husband was drinking and they were separated.

St. Joe Health Center/Howard J. Ilivicky, M.D. and David A. Peter, M.D.

The report of Howard J. Ilivicky, M.D. (a psychiatrist that was seeing the employee while she was in the hospital) indicate that the employee was admitted to the hospital on February 28, 2007 due to increasing manic symptoms, disease exacerbation, racing thoughts and vague suicidal ideation. Her medications were changed: Cymbalta was discontinued, Lamictal was increased and Abilify was added. The employee was stabilized and discharged to outpatient treatment on

March 5, 2007. **The final diagnosis was Bipolar Affective Disorder. Axis IV was “Stressors Severe”.** The records indicate that:

- Patient was getting divorced as had separated in August 2006.
- Living by herself in an apartment.
- The employee has not been able to work since August 23, 2006. She most recently worked as a skilled home care nurse for severe pediatric patients.

David A. Peter, M.D. (a medical doctor treating the employee while in the hospital) indicated that the employee reported **that she was not anxious to pursue any further treatment on her back for fear that it might jeopardize her work comp claim. She feels her pain issues are stable as long as she avoids certain activities. She has had significant problems with her bipolar disease which are being addressed by Dr. Ilivicky.** The employee was still having persistent pain in her right wrist. Also headaches.

Records also document some of the “stressors” that the employee was experiencing:

- Problems with her divorce; involved in a messy divorce.
- Financial problems. Has two attorneys working on divorce and workers’ compensation. The employee reported going through a messy divorce and trying to get workers’ compensation.
- Trying to get comfortable staying by herself.
- CTS surgery and pain.
- Husband started drinking and went to counseling.
- Feels hostility and anger towards husband.
- Was hospitalized due to her increased psych problems.
- Is not working. **She made that decision.**
- Physical, sexual, and emotional abuse from her husband.
- Feeling that something severe is going to happen to her.

This admission for psychological problems was just short of three years after the accident.

Center Point Hospital/John Canale, M.D.

The employee was admitted to Center Point Hospital on March 6, 2007 for increasing depressive symptoms and thoughts of suicide. She had just been released from St. Joe Health Center on March 5, 2007. She was discharged from Center Point Hospital on March 11, 2007. John Canale, M.D. treated the employee there. Record indicates that she went home and got more depressed with thoughts of suicide and had guns in the house which is prompting her readmission. Her GAF score was 35.

Records again document the stressors the employee was bringing up:

- She is having anxiety, fear and depression.
- She is going through a divorce with physical, mental, and sexual abuse.
- She has severe financial issues.
- She is sad and says something severe is going to happen.
- The employee reported Economic/Horrible.

- Said she was afraid to be alone.
- Says upset about her divorce.
- She denies any disabilities or legal issues.
- She says is fearful of impending doom and being around people she doesn't know.
- She said she is looking forward to group and all the enlightenment she can gain from the hospital.
- She reported she has three sisters and a daughter with bipolar; her father was an alcoholic.

The records also report that the employee said she is experiencing symptoms of grief due to divorce of husband of thirty-two years, and for the first time is admitting sexual, emotional, and physical abuse. She reported she is under severe financial stress and is unemployed.

The employee reported that upon her discharge she planned on finding a new job in her field. She indicated that she felt “bummed” when thinking of her situation. The report indicated that employee was working on developing coping skills and identifying triggers to anxiety.

As of March 14, 2007 the employee was admitted to the Intensive Outpatient Program at Center Point Hospital. She was discharged from this program on March 23, 2007 as the employee said she would follow up with home therapy.

Her prior medical problems were listed as:

- Bulging disc in back. Post accident.
- Carpal tunnel syndrome. Post accident.
- Possible ocular migraines.
- GERD.
- Hypertension.
- Two miscarriages.
- Three births by C-section.
- Gall bladder removal.
- Lap coly.

As in the past the records document the problems/stressors as reported by the employee. The records indicate that the employee was dealing with a family death in this period. **The employee reported that even though it was her choice, dealing with the fallout from her recent divorce where her husband was abusive had been one of the triggers for her recent symptom relapse. The employee also stated that she has been dealing with bipolar disorder for twenty years, but this is the worse exacerbation she has experienced.**

Psych Care Consultants

Medical records from Psych Care Consultants indicate that the employee was being treated in that facility in 2010. A Progress Note dated January 26, 2010 reports the employee's situation:

- Deals with several stressors.
- No mania or depression.

- Able to finish what she wants to do.
- No side effects reported.
- Not depressed.
- No anxiety.
- Not suicidal.

A record of March 12, 2010 indicates that the employee is now taking care of her mother and this is a stressor where she says she is overwhelmed. Records also indicate that as of June 15, 2009 the employee was working in a sheltered workshop.

Medical Records of Doctor Safwat Wahba

Dr. Wahba was seeing the employee in 2007 and 2008. His handwritten notes indicate that:

- The employee was working in 2007.
- As of November 15, 2007 she was undergoing a divorce where the husband is an alcoholic and abusive and is “asking me to do spooky things”.
- She had a breakdown in the last year of nursing school and was able to finish school and have a career.

The record indicates that the employee got a job in 2008.

Medical Records/Testimony of Physicians Providing Evaluations

Dr. Kennedy

Dr. Kennedy evaluated the employee at the request of her counsel. He saw the employee on September 19, 2006 and prepared a report of the same date. He testified by deposition on January 10, 2007. He diagnosed the employee with a diagnosis of a sciatic injury with disc herniation at L4-5, and status post two operative interventions of the spine.

Dr. Kennedy was of the opinion that employee’s accident of March 4, 2004 was a substantial factor in causing that diagnosis and gave the following treatment recommendations:

- The employee does not need direct surgical intervention at the L4-5 level.
- The employee continues to have significant right leg pain that is a due to a nerve injury from the original event.
- A dorsal column stimulator would ease her pain and make her more functional. This should be done on trial basis first. If pain is effectively reduced then a permanent one should be implanted. If there is no pain relief then the employee would be at MMI.

Dr. Kennedy stated that the original accident was a substantial factor in the need for that treatment and that the employee is temporarily totally disabled until that procedure is undertaken.

Dr. Kennedy was questioned by counsel for the employer-insurer and the Second Injury Fund. He agreed with employer-insurer counsel that:

- He only saw the employee one time and the employee has already taken herself off work at that time.
- After the employee's fusion she returned to full duty but she was not working when he first saw her.
- **When he saw the employee she reported that she had taken herself off work for reasons unrelated to the original injury and that she was working full time right up to the accident.**
- The employee would not be TTD if she had been working full duty and stopped working to take care of an elderly family member.
- **The employee told him that her quitting work was not due to her back complaints.**
- Even with her restrictions she could not do full nursing duty but she could work with the restrictions if the job did not involve stooping or bending or lifting; more of a supervising role.

Dr. Kennedy also agreed with several matters brought up by the Second Injury Fund:

- He did not review any records prior to 2004.
- He understood that the employee had no problems with her back prior to the accident.
- He did not perform a formal mental status examination as the employee was coherent and had insight into her condition.
- He did not review any psychiatric records.

Dr. Kennedy testified that from a physical standpoint, the employee could perform sedentary work. Upon further questioning on the matter, Dr. Kennedy again testified that **the employee said she was not working but it was not for issues related to her injury.**

Dr. Berkin

Dr. Berkin was retained by the employee's attorney to provide a rating. He saw the employee September 9, 2009, reviewed the medical reports he had and prepared a report dated January 12, 2010. He testified by deposition on July 27, 2010. Dr. Berkin took a history from the employee and performed a physical examination.

He provided the following diagnoses:

- Herniated disc at L5-S1.
- Lumbar spondylosis and spinal stenosis.
- Right L4-5 cyst.
- Status post surgery for her lower back requiring a laminectomy at L4-5 and L5-S1, and a discectomy at L5-S1 and at L4-5.
- Revision surgery for decompression at L4-5 with posterolateral fusion, posterior lumbar interbody fusion with interbody prosthesis and a posterior instrumentation.

Dr. Berkin's opinion was that the accident of March 4, 2004 was the prevailing factor in causing the diagnoses. He provided a rating of 45% permanent partial disability of the body as a whole at the spine.

Dr. Berkin testified that he read the report of Dr. Ball. Dr. Berkin said that the pre-existing psychiatric condition definitely presented a hindrance or obstacle to employment at the time of her injury. He stated he spent a lot of time reading her records and she has a significant pre-existing bipolar disorder which he thinks cogently impacts on her ability to work and to function.

Dr. Berkin testified that as a physician he is able to make judgments as to whether or not someone can work. He reported that in this case the employee had a significant injury to her back and an overwhelming pre-existing psychiatric disease. He stated that the employee is not employable in the open labor market and is totally disabled. He further stated that the employable is unemployable due to a combination of her pre-existing bipolar disorder and the orthopedic injury that she had on March 4, 2004. Dr. Berkin explained that the employee had an emotional or psychiatric status that represents a burden on her ability to function and work and she has had additional disability due to her back problem. He testified that considering these disabilities in combination, her total disability is greater than just simply adding the two disabilities together. In total it really impacts her ability to function to the extent that she cannot be employed or maintain employment

Dr. Berkin recommended the following restrictions:

- Avoid excessive squatting, kneeling, stooping, turning, twisting, lifting and climbing. She should remain active but use common sense.
- She should adhere to proper safety measures when she does perform activities that would impose stress to her lower back.
- If she is doing exertional activities she should take frequent breaks.
- She should pace herself so as to avoid exacerbations of her symptoms or further injury to her lower back.
- She should remain under the care of her mental health care provider to continue to manage her disease or bipolar disease which he thinks is significantly disabling.

Under cross examination, Dr. Berkin testified that Dr. Ball said he relied on the employee's records as far as his judgments about her psychiatric history. He indicated that he had a few records from Community Counseling before March 2004 and then a number of records from after March 2004 where the employee was actually hospitalized and treated with various medications. He indicated that he deferred to Dr. Ball as to the level of the employee's psychiatric condition.

In reviewing prior records, Dr. Berkin stated that the employee gave a history of hospitalizations in 1984 and 1991 but he had no records to support that. He also agreed that as to the records that existed prior to March 2004, he found no permanent work restrictions or limitations from any physician for any psychiatric condition.

Dr. Berkin was aware that the employee was hospitalized in 2007 for suicidal ideation. Also that she was employed as a nurse in 2008 but had issues with stress and therefore attempted employment three years after her accident.

Dr. Berkin further testified that prior to March 2004 the employee was working and that there were no records that her bipolar caused her to be unable to work or reduced her capabilities at

work. He agreed that prior to March 2004 he did not know exactly to what degree the employee was functioning. He also testified that he did not know if he was made aware that the employee felt she could work in a less stressful position.

Dr. Berkin performed a physical examination of the employee's back and stated that his findings were normal except:

- Findings of tenderness.
- Limited motion of her lower back.
- Yeoman's testing was positive.

Dr. Ball

Dr. Ball is a psychologist who evaluated the employee at her attorney's request. Dr. Ball evaluated the employee on one occasion on November 6, 2008. He reviewed medical records, took a history from the employee and prepared a report. Dr. Ball testified by deposition on July 27, 2007.

Dr. Ball testified that he looks at all dimensions of a person's life to put together a total picture of their ability to work. He indicated that psychological factors have a great impact on a person's outlook and ability to work (ex. pain and depression).

Dr. Ball saw the employee on November 6, 2008, about four and one-half years after the accident. He testified that considering all factors he came up with a diagnosis. Dr. Ball testified that **WHEN HE SAW THE EMPLOYEE** she was suffering from a bipolar disorder with a particular emphasis on depression. He reported that the interview revealed the factors that would impact that diagnosis with a very high degree of certainty. He testified that the employee met all of the basic symptoms that would be labeled as depression and part of the bipolar syndrome.

When questioned about the employee's pre-existing bipolar disorder, he stated that the reports that he read indicated that the employee was hospitalized with bipolar disorder, suicidal tendencies at one point prior to her injury. When asked to assess the employee's pre-existing bipolar disorder, Dr. Ball testified that "... you have to take the whole picture together and then determine what impact from the early life influenced her behavior today, and it seemed to me that her emotional condition was certainly in excess of 50 percent. I gave it a rating of 75 percent."

Dr. Ball's opinion was that the employee was not employable in the open labor market. He explained the basis for his opinion as:

1. The employee reports an inability to think clearly.
2. The employee reports having severe memory problems.
3. The employee reports getting severely nervous about work.
4. The employee reports a history of unsuccessful job experiences certainly in the recent past.
5. The employee reports seeking help at agencies and not being able to perform in the direction that they have given her.

6. From an employer's standpoint, the employee would not be an approved candidate for jobs that I can think of.

When asked if the employee was unemployable due to a combination of her pre-existing bipolar disorder and her injury of March 4, 2004, he answered "Well, certainly the situation she finds herself in now – and when I say now, at the time I interviewed her; the two taken together are what prevent her from being able to compete in the open labor market. How to sort that out is very difficult. As I testified earlier, the two interact together: The emotional side impacting the physical issues or her response to pain more specifically and vice versa. But taken together, yes, she is not employable in the open labor market".

Dr. Ball further testified that the pre-existing bipolar disorder was a hindrance or obstacle to employment or re-employment in the open labor market. He explained that by the material he was given to read regarding her background, in speaking with her, in interviewing her and seeing, hearing and verifying through intensive interviewing with her, the impact that her prior emotional difficulties had on her lifestyle and her work experiences, it was clear that the emotional difficulties negatively impacted her ability to work.

During cross examination by the Second Injury Fund, Dr. Ball agreed that **THAT WHEN HE REFERS TO THE EMPLOYEE'S PRESENTATION IT IS THE PRESENTATION THAT SHE MADE IN NOVEMBER 2008 ON THAT ONE OCCASION.** He testified that he never saw her before or after that date. He also agreed that the bulk of the records he had came from her back injury in 2004 and beyond, there were a few records from 2001 from Community Counseling Center. He indicated that those are the prior records that he had as far as any psychological issues. He also agreed that he had no records regarding a 1984 diagnosis. He had no records from 1992 where the employee reported she had severe depression. He said he did not recall the specifics of the records he had.

Dr. Ball further agreed that the employee was hospitalized in 2007 for psychological issues including suicidal ideation and this was three years after the accident. He also testified that there were no pre-existing work restrictions from a physician or a psychiatrist, and that the employee was working full time prior to hurting her back.

Dr. Ball stated that he gave an employability opinion and a psychological opinion and agreed that he based his summaries and conclusion somewhat on what the employee told him. He testified that he based his opinion that the employee was unable to work in a nursing home or hospital on what she told him.

Dr. Ball also testified that the employee told him she thought she could work in a low stress job. In his report he stated that the employee said she may be able to handle a low stress job such as at a floral shop where there is not a rush of customers.

Stipulation for Compromise Settlement

The employee and the employer-insurer settled their portion of this case by compromise settlement. On September 14, 2007, they settled for permanent partial disability equaling forty percent of the employee's body as a whole pertaining to her lower back. They agreed that there was "No contemplation of future medical care"; and left the matter of Second Injury Fund liability open.

Court Questions

The Court asked the employee questions at the end of trial. She testified that she could not do her old job due to her physical problems and also due to her psychological problems.

She agreed that she sat in her chair very erect and had no real back pain. The Court specifically asked the employee if she could work at a job such as a Wal-Mart greeter. She indicated that she thought she could do the physical job of being a Wal-Mart greeter but was hesitant about whether she could do it day after day. She was positive that if she had her mood swings that she could not do that job and she does not know when it would happen.

She also agreed that she worked at the sheltered workshop for about a year and she was physically able to do what she was required. She was there as she apparently sought out some place where she could get some employment. She was not a "regular normal" employee of the workshop. Putting aside her physical limitations, she was concerned with her ability to hold a job because her mood swings could happen at any time.

RULINGS OF LAW:

The issues before the Court are whether the Second Injury Fund has any liability for either permanent partial disability or permanent total disability. Generally speaking, the Second Injury Fund could have permanent partial disability liability if the employee has pre-existing injuries that meet a "threshold" level of disability and are a hindrance or obstacle to employment or re-employment and synergistically combine with the primary threshold injury to create a greater disability. The Second Injury Fund could have permanent total disability liability if a pre-existing disability and the primary injury combine so that the employee is permanently and totally disabled such that they are unemployable in the open labor market and no employer is likely to hire them.

The Court finds that the employee has presented ample evidence that convinces the Court that the employee had a pre-existing psychological disorder/bipolar disorder that pre-existed her accident of March 4, 2004. The records sufficiently document and the Court further finds that the employee has been dealing with the effects of this disorder for approximately twenty years prior to her accident. The Court further finds that the employee has continued to deal with the effects of her psychological disorder ever since her accident up until the day of trial and increased problems thereafter. In addition, the Court finds that the employee's pre-existing psychological disorder was a hindrance or obstacle to her employment.

On one hand the employee had to deal with the effects of her bipolar disorder for all or a substantial period of her working career. On the other hand, she is to be commended in that she rose above her disorder and was able to sustain a full nursing career lasting over twenty years despite the problems and obstacles that her disorder created. While the employee chose to tailor her nursing career to a more one-on-one approach, she was able to maintain responsible positions throughout her working career.

The employee's psychological disorders are only part of the evidence in this case. As a result of her March 4, 2004 accident the employee was required to undergo two back surgeries. The Court finds that the employee had no back problems prior to her accident on March 4, 2004; or at a minimum she was asymptomatic. The employee testified to this fact and the records support this finding. Therefore, in analyzing this case attention must be given to a psychological disorder and the disabilities caused by that disorder, both before and after March 4, 2004; and attention must also be given to the medical problems that were created due to the accident and the medical care that the employee received due to that accident.

A lot of the evidence presented in this case deals with disabilities/events that occurred after the employee injured herself on March 4, 2004. On the physical side, the employee had carpal tunnel surgery and complains of the pain associated with that matter. Additionally, there is the issue of the employee's need for additional medical care pertaining to her back and whether those problems are medically causally related to her accident of March 4, 2004 or not. The Court finds the testimony of Dr. Rutz to be the the most credible and finds that the employee reached maximum medical improvement regarding her back and her accident; but that she does have pre-existing degenerative problems that could be dealt with through additional care. The employee is responsible to deal with this matter on her own. From a physical point of view, the employee has back related issues that are compensable as pertains to Second Injury Fund liability and back related issues that are not compensable as pertains to Second Injury Fund liability.

From a purely physical standpoint, there are factors to be considered that affect the employee's ability to work. She returned to work after each surgery, but more importantly was working at multiple other jobs after her release from medical care. The employee worked at several jobs since her accident. Specifically, the employee worked at Allens after her surgeries, then switched to Premier in 2005, was working for Community Living in 2009 and then worked at the sheltered work shop for about a year. By her own testimony, before the sheltered work shop, each of these jobs was a full time job where she performed her duties with no employer accommodations. While the employee did have to take some self help measures to address any physical problems to be able to complete her job tasks, from a purely physical point of view the employee was able to work at some form of employment. The employee voluntarily quit these positions, but in each instance the voluntary termination of employment was due to psychological stressors that the employee had to deal with. The employee was working at some form of employment at least into 2010.

At trial the employee was asked by the Court if she could work as a Wal-Mart greeter. From a physical standpoint she said she could do the job. It was from the psychological standpoint that

she said she could not do that job. She advised Dr. Ball that she may be able to handle a low stress job such as working in a floral shop. When she saw Dr. Kennedy she told him that she took herself off work for reasons unrelated to the original injury and that her quitting work was not due to her back complaints. She told Dr. Peter that her pain issues are stable as long as she avoids certain activities and that she made the decision not to work. When discharged from Center Point Hospital the employee said that she planned on finding a new job in her area. From a physical point of view, the record is clear that the employee said she was going to work, she said she could work and she in fact did go out and get different forms of employment. The Court, after reviewing all the evidence, from a purely physical standpoint, believes that while it may be difficult, the employee is able to work in some capacity.

The employee's working potential also has to be examined in light of her psychological problems/bipolar disorder. The medical records generally refer to "stressors" that trigger these problems. Prior to March 4, 2004, despite any psychological problems, the employee had a nursing career. That situation began to change after her work related accident, however when you look at the evidence, the problems that have exacerbated the employee's disorder are stressors that occurred after her accident and are unrelated to her accident. These post accident psychological stressors are not related to the accident and should not be considered in determining whether the employee is able to work or not. As an example, there is no evidence indicating that the problems caused by or related to the employee's divorce are related to her accident. The Court has listed those problems/stressors previously. As the employee reported years after her accident, she has been dealing with Bipolar Disorder for twenty years, but this is the worse exacerbation she has experienced. Since March 4, 2004, the employee had had many stressors in her life that were not caused by or related to her back accident. Stressors such as the divorce from her husband due to abuse, alcoholism and being asked to do spooky things and other stressors have caused the employee's bipolar disorder and depression to become more severe.

Dr. Ball testified that the employee was unemployable in the open labor market and permanently and totally disabled. His credibility is greatly affected by several factors. Most important is that he stated that his opinion was based on the presentation that the employee made when he saw her in November 2008. This is about four and one-half years after her accident and after she had been hospitalized due to stressors that affected her life. Further, he stated that he relied on the records that he had and indicated that the bulk of the records that he had came from the employee's back injury after 2004. In reaching his conclusions regarding the employee's employability, he has considered the stressors that occurred after March 4, 2004. Those factors should not be considered in that assessment. The critical assessment is whether the employee's preexisting disabilities combine with her disabilities caused by the March 4, 2004 accident. Dr. Ball said that he had some records but not all records from the employee's previous difficulties. He also testified that the employee told him she could work. For these reasons, the Court does not find the testimony of Dr. Ball to be credible. His opinion is faulty in that it is based on evidence that is related to the accident. The Court is not supplementing its opinion for that of an expert, the Court is finding that the expert's opinion is not credible in that it is based on factors not relevant to the issue of Second Injury Fund liability, namely the stressors that affected the employee that were not caused by or related to her accident and occurred after March 4, 2004.

Dr. Berkin also testified that the employee was permanently and totally disabled in combination. He testified that he deferred to Dr. Ball as to the level of the employee's psychiatric condition. The psychological stressors after March 4, 2004, if not caused by the accident, are not relevant to the level of the employee's condition. Dr. Berkin relied on the psychological opinions of the Dr. Ball which the Court found lacked credibility. It is the combination of the preexisting disabilities with the effects of the primary injury that triggers permanent total liability. The Court finds that Dr. Berkin's testimony as to permanent total disability is not credible.

Second Injury Fund Liability for Permanent Total Disability

Based on a consideration of all of the evidence, the Court finds that the employee has not presented credible evidence proving that she is permanently and totally disabled due to a combination of her preexisting disabilities and disabilities that resulted from her accident. From a physical standpoint the employee told multiple medical providers and this Court that she can work. The psychological stressors that may and probably have affected the employee's ability to work occurred after her accident. Prior to her accident she was able to work responsible jobs despite her disorder. It is the events such as the effects and implications of her divorce and many others that has triggered and increased her psychological disorder to the point where she now says she cannot work. Even if she cannot work due to the implications of her post accident psychological problems, that is not a factor in determining Second Injury Fund liability.

The Court finds that the Second Injury Fund has no liability for permanent total disability.

Second Injury Fund Liability For Permanent Partial Disability

The Court has already ruled that the employee's pre-existing disabilities created a hindrance or obstacle to employment. The Court further finds that the employee's pre-existing disabilities created a permanent partial disability of 25% of her body as a whole. In addition, the Court finds that the employee sustained a 40% permanent partial disability to her body as a whole pertaining to her back as a result of her accident of March 4, 2004. In addition, the Court finds that these disabilities synergistically combine to create a greater disability than their simple sum. The Court imposes a 15% loading factor in this case. The Second Injury Fund is liable for permanent partial disability as found by the Court and shall make a lump sum payment to the employee.

ATTORNEY'S FEE

Gary G. Matheny, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Date: _____ Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation