

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

Injury No.: 06-057634

Employee: Janith K. English
Employer: Odyssey Healthcare (Settled)
Insurer: Ace American Insurance Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Introduction

The parties asked the administrative law judge to determine the following issues: (1) whether employee sustained an accident that occurred within the course and scope of her employment on June 29, 2006; and (2) the liability of the Second Injury Fund.

The administrative law judge rendered the following findings and conclusions: (1) the accident of June 29, 2006, occurred in the course and scope of employee's employment with employer; and (2) the Second Injury Fund is not liable for benefits because the last injury considered alone rendered employee permanently and totally disabled.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred in finding employee is permanently and totally disabled as a result of the primary injury considered alone.

For the reasons stated herein, we reverse the award and decision of the administrative law judge.

Findings of Fact

Preexisting conditions of ill-being

Employee suffers from poor vision. On September 8, 2003, employee's ophthalmologist, Dr. Rolfe Becker, diagnosed retinal scarring and cataracts in both eyes, and a macular lesion on the left. On January 4, 2005, Dr. Becker wrote a letter on employee's behalf requesting that employer make attempts to accommodate employee's difficulty with reading owing to her poor vision. Employee is unable to read more than half a page at a time before she needs to take a break to rest her eyes. Employee has significant trouble driving in the dark; employer accommodated this condition by not requiring employee to drive at night. We find that employee suffered considerable preexisting permanent partial disability referable to poor vision.

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Employee suffers from depression, for which she has taken prescribed antidepressant medications since 1992. Employee first sought treatment for depression in 1965. In 1967 and again in the early 1970s, employee was hospitalized in connection with treatments for depression. A previous employer fired employee after she confided to a patient that she suffered from depression. Employee's psychiatric expert, Dr. John Pro, confirmed that employee suffered from preexisting major depressive disorder. In light of employee's longstanding use of antidepressant medications, her loss of a job in connection with the disorder, and multiple hospitalizations, we find that employee suffered a preexisting 25% permanent partial disability of the body as a whole referable to depression.

Employee had numbness and pain in her right hand before the primary injury which caused her difficulty performing her work duties as a nurse such as taking a pulse and charting. As part of her treatment for the primary injury, employee underwent an EMG study on August 14, 2006, that revealed severe right carpal tunnel syndrome. Employee's medical expert, Dr. P. Brent Koprivica, opined that employee's carpal tunnel syndrome preexisted the primary injury and amounted to a 30% permanent partial disability of the right wrist. We find persuasive Dr. Koprivica's testimony that employee had significant permanent partial disability referable to her right wrist prior to her work injury. In light of testimony, however, that suggest employee's level of symptomatology referable to the right wrist is significantly enhanced as a result of non-physiological factors, we find employee suffered a 15% preexisting permanent partial disability referable to her right wrist as a result of carpal tunnel syndrome.

The primary injury

Employee worked for employer as a registered nurse and case manager. On June 29, 2006, employee drove from the nursing home where she was working for employer to the home of a patient where employee was to provide nursing services on behalf of employer. While en route to the patient's home, another driver sideswiped employee's vehicle, colliding with her car and forcing her onto a median.

Employee declined emergency medical treatment at the scene, and instead waited for her husband to take her to St. Luke's Hospital, where she arrived about two hours after the accident. There, treating physicians diagnosed a cervical strain, prescribed Lortab, Ativan, and Naproxen, and released employee to follow up with her primary care physician. Thereafter, employee sought treatment with employer's authorized physicians, who diagnosed cervical, thoracic, and lumbar strains, as well as right sciatic inflammation. Employee underwent a course of physical therapy and a series of epidural steroid injections, but continued to suffer from considerable neck and low back pain. During the initial course of this treatment, employee performed some light duty work for the employer, but on July 12, 2006, employee's supervisors determined it was too much of a risk to have employee in the workplace and placed her instead on FMLA leave.

Despite her continued pain complaints, employee wanted to return to her full duty work for employer, and asked the authorized physician, Dr. Ira Fishman, to release her without restrictions. Dr. Fishman relayed this information to the employer and insurer, who requested that employee first complete a functional capacity evaluation (FCE). On October 10, 2006, employee completed the FCE. Dr. Fishman reviewed the results of the

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FCE and noted that employee had given a valid effort, but that the FCE suggested employee would not be able to tolerate the demands of her regular duties with employer.

On January 17, 2007, Dr. Fishman released employee at maximum medical improvement, and opined that as a result of her cervical, thoracic, and lumbar strains, employee suffered a 10% permanent partial disability of the body as a whole. Dr. Fishman identified the following permanent physical restrictions for employee: no pushing over 90 pounds and no pulling over 100 pounds; only occasional squatting, bending, stooping, walking, standing, and sitting; no lifting from floor to waist, no lifting greater than 50 pounds from 12 inches above the floor to waist, and no lifting greater than 40 pounds from waist to shoulder; and no carrying more than a maximum of 25 pounds. Because of these restrictions and the results of the FCE, employer did not permit employee to return to work, and employee has not returned to any other employment.

Employee continues to suffer from what she perceives to be very high levels of neck and low back pain that she relates to the primary injury. Dr. Koprivica opined that the primary injury caused employee to suffer cervical, thoracic, and lumbar injuries which he rated at a combined 20% permanent partial disability of the body as a whole, as well as what he described as "marked functional overlay" with possible chronic pain syndrome deriving from psychological sources. Dr. Pro, employee's psychiatric expert, opined the primary injury aggravated employee's preexisting depression and also caused employee to develop chronic pain syndrome.

After careful consideration, we find that employee suffered a 15% permanent partial disability of the body as a whole referable to lumbar, thoracic, and cervical strains as a result of the primary injury. We are persuaded by Dr. Pro's testimony that the primary injury aggravated employee's depression, and we find that this injury amounts to an additional 5% permanent partial disability of the body as a whole.

Permanent total disability

In his report, employee's vocational expert Michael Dreiling opined that employee is permanently and totally disabled. We are persuaded by this essentially uncontested opinion from Mr. Dreiling; the more difficult question is whether employee's permanent total disability results from the primary injury considered alone, or the primary injury in combination with employee's preexisting conditions of ill-being. Mr. Dreiling did not specifically address this question in his report, but opined at his deposition that if employee needs to lie down during the day as a result of pain from the primary injury, employee is permanently and totally disabled as a result of the primary injury considered alone. Similarly, Dr. Koprivica provided a conditional opinion that if a psychiatric expert validated employee's chronic pain disorder, he would opine that employee is permanently and totally disabled as a result of the primary injury considered alone, because employee's subjective postural limitations (i.e. her perceived need to lie down during the day, and limitations referable to sitting and standing) did not arise until after the primary injury.

A close examination of Dr. Pro's testimony thus becomes necessary. Dr. Pro opined employee developed a chronic pain disorder after the primary injury to the extent of 19% permanent partial disability of the body as a whole. Dr. Pro's report suggests that the

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primary injury is the “prevailing cause” of the chronic pain disorder, but Dr. Pro also opined that employee’s depression is “driving her pain experience.” *Transcript*, pages 1006-07. As we have noted above, Dr. Pro identified a preexisting major depressive disorder, and we have found that employee suffered a 25% permanent partial disability of the body as a whole referable to preexisting depression in light of her multiple hospitalizations, longstanding use of antidepressant medications, and loss of a job in connection with the disorder.

We have found that the primary injury resulted in 15% permanent partial disability of the body as a whole referable to back and neck strains, and only a 5% permanent partial disability of the body as a whole referable to aggravation of employee’s preexisting major depressive disorder. After careful consideration, we simply are not persuaded that these injuries, standing alone, are sufficient to result in permanent total disability. Specifically, we do not believe such injuries would have produced severely disabling psychiatric symptoms in the absence of employee’s preexisting disabling depressive illness. We find that employee is permanently and totally disabled as a result of the primary injury in combination with her preexisting conditions of ill-being.

Conclusions of Law

Injury arising out of and in the course of employment

The parties asked the administrative law judge to determine whether employee “sustained an accident that occurred within the course and scope of her employment on June 29, 2006.” See *Transcript*, page 3. It appears that the parties mean to dispute whether employee suffered an injury arising out of and in the course of her employment. Section 287.020.3(2) RSMo provides, as follows:

An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

The courts have interpreted the foregoing language to involve a “causal connection” test that employees must satisfy in order to prove that an injury has arisen out of and in the course of the employment. *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012).

We have found that on June 29, 2006, employee was driving from the nursing home where she was working for employer to the home of a patient where employee was to provide nursing services on behalf of employer, when she was sideswiped by another driver, and that employee’s injuries resulted from this event. There is no evidence on this record to suggest, let alone prove, that employee ever deviated from the course of performing her work for employer while driving from the nursing home to the home of a patient on June 29, 2006. Nor is there any evidence that would suggest that the risk of

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driving was unrelated to employee's employment; rather, all of the relevant evidence is to the contrary.

We must conclude that employee's injuries arose out of and in the course of employment, because employee's injuries did not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that she suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We have found that employee suffered from numerous preexisting permanent partially disabling conditions referable to poor vision, depression, and carpal tunnel syndrome. We are convinced these conditions were serious enough to constitute hindrances or obstacles to employment. This is because we are convinced employee's preexisting conditions had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of her preexisting conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Having found that employee suffered from preexisting permanent partially disabling conditions that amounted to hindrances or obstacles to employment, we turn to the question whether the Second Injury Fund is liable for permanent total disability benefits. In order to prove her entitlement to such an award, employee must establish that: (1) she suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

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We have found that, as a result of the accident on June 29, 2006, employee sustained an overall 20% permanent partial disability of the body as a whole, and that employee is not permanently and totally disabled as a result of the last injury considered in isolation.

We conclude employee is permanently and totally disabled owing to a combination of her preexisting disabling conditions in combination with the effects of the work injury. The Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We reverse the award and decision of the administrative law judge.

The Second Injury Fund is liable for weekly permanent total disability benefits beginning January 17, 2007, at the differential rate of \$196.76 for 80 weeks, and thereafter at the stipulated weekly permanent total disability rate of \$561.84. The weekly payments shall continue for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Lisa A. Meiners, issued August 19, 2013, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

This award is subject to a lien in favor of John R. Stanley, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

Given at Jefferson City, State of Missouri, this 10th day of June 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD AS TO THE SECOND INJURY FUND ONLY

Employee: Janith K. English

Injury No. 06-057634

Dependents: N/A

Employer: Odyssey Healthcare

Insurer: Ace American

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

Hearing Date: July 15, 2013

Checked by: LAM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: June 29, 2006
5. State location where accident occurred or occupational disease was contracted: Merriam, Johnson County, Kansas
6. Was above Employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While driving from a nursing home to another patient's residence, Claimant was involved in a motor vehicle accident.
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: Back
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to date for temporary disability: \$16,029.14
16. Value necessary medical aid paid to date by employer/insurer? \$19,239.79
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$842.72
19. Weekly compensation rate: \$561.82/ \$365.08
20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: Employee previously settled her claim with the Employer for a lump sum of \$5,000.00.
22. Second Injury Liability: None
23. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Janith K. English Injury No. 06-057634
Dependents: N/A
Employer: Odyssey HealthCare
Insurer: Ace American
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: July 15, 2013 Checked by: LAM

On July 15, 2013, the parties appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, Janith K. English, appeared in person and with counsel, John R. Stanley. The Second Injury Fund appeared through Assistant Attorney General, Laura Van Fleet. There was no appearance on behalf of the Employer or Insurer as the claim between the Employer and the Employee has previously been settled.

STIPULATIONS

The parties stipulated to the following:

- 1) that the Employer, Odyssey Health Care, was an employer operating under and subject to the provisions of Missouri Workers' Compensation Law on June 29, 2006 and was fully insured by Ace American;
- 2) that Janith K. English was its employee;
- 3) that Employee notified the Employer of her injuries as required by law and her claim was filed within the time allowed by law;
- 4) that Employee's compensation rate was \$561.84 for temporary total disability and \$365.08 for permanent partial disability compensation;
- 5) that the Employer has paid temporary total disability compensation in the amount of \$16,029.14 and medical care costing \$19,239.79;
- 6) that the Employer and Employee settled the primary claim in Missouri for a lump sum of \$5,000; and
- 7) that the accident occurred in the state of Kansas.

ISSUES

The issues to be resolved by this hearing are as follows:

- 1) whether the accident of June 29, 2006 occurred in the course and scope of Employee's employment with Odyssey Health Care;
- 2) whether the Second Injury Fund is liable to the Employee for any disability compensation; and

- 3) whether Employee's prior disabilities were a hindrance or obstacle to her ability to maintain employment or to be reemployed should she become unemployed.

FINDINGS OF FACT AND RULINGS OF LAW

The Employee, Janith English, testified in person and offered the following exhibits, all of which were admitted into evidence without objection:

Claimant's Exhibit A – April 15, 2009 Deposition of P. Brent Koprivica, M.D.

Claimant's Exhibit B – December 3, 2009 Deposition of John D. Pro, M.D.

Claimant's Exhibit C – April 13, 2010 Deposition of Michael J. Dreiling

Claimant's Exhibit D – Stipulation for Compromise Settlement, Injury No. 06-057634

Claimant's Exhibit E – Award from State of Kansas Docket No: 1,031,622; 1,031,623

Claimant's Exhibit F – Employee's payment history 03/10/2006 through 06/16/2006

The Second Injury Fund offered the following exhibit, which was admitted into evidence without objection:

Second Injury Fund Exhibit 1 – June 2, 2008 Deposition of Janith English.

Based on the above exhibits and the testimony of the witness, this Court makes the following findings:

That Employee, Janith English, testified in person and was credible. Ms. English testified that she was driving from a nursing home where she had been performing her job as a hospice nurse to the home of a patient in Kansas City, Kansas to perform her job as a hospice nurse when she was hit by another car injuring her back. The injury occurred on June 29, 2006 in Merriam, Johnson County, Kansas.

Ms. English was not taken by ambulance to the hospital following the accident. She did go to St. Luke's Hospital of Kansas City (South) approximately 2 hours after the accident occurred. Ms. English was discharged approximately 2 hours after arrival with a diagnosis of a cervical strain. She was prescribed Lortab, Ativan and Naproxen. (Claimant's Ex. A, p. 246₁₈).

Ms. English was placed on light duty by Dr. Tentori of Concentra Medical Clinics in Kansas City, Missouri prior to transferring her care to Concentra Medical Clinics in Lenexa, KS. (Claimant's Ex. A, p. 187₈₅). On July 7, 2006, Ms. English was prescribed a Medrol dosepak and physical therapy to continue three times per week. (Claimant's Ex. A, p. 188₈₆). Ms. English was seen again by Dr. Hamedi on July 14, 2006, where she was prescribed two additional weeks of physical therapy and continued on her work restrictions. (Claimant's Ex. A., p. 185₈₃).

Concentra Medical Clinics referred Ms. English to Dr. Ira Fishman for evaluation and treatment of her neck, back and extremity pain on July 24, 2006. Dr. Fishman reviewed the medical records related to the lumbar MRI taken of Ms. English on June 14, 2006 which showed degenerative disk disease at L1-2 as well as the cervical MRI taken at the same time that showed multilevel degenerative disk disease from C2 through C7. (Claimant's Ex. A, 136₃₄). Dr. Fishman ordered an EMG study to be conducted. (Claimant's Ex. A, 138₃₆). On August 16,

2006, Dr. Fishman conducted an EMG and recommended physical therapy three times per week for three weeks and cervical epidural steroid injections. (Claimant's Ex. A, 144₄₂).

Dr. Fishman referred her to Pain Care for epidural steroid injections. Ms. English received cervical injections on August 23, 2006, September 7, 2006, and September 28, 2006. (Claimant's Ex. A, p. 171₆₉, 160₅₈ and 172₇₀). Ms. English received lumbar injections on September 14, 2006, September 28, 2006 and October 6, 2006. (Claimant's Ex. A, p. 170₆₈, 167₆₅ and 165₆₃).

On September 28, 2006, Ms. English requested Dr. Fishman release her to work without restrictions, which he did. (Claimant's Ex. A, 123₂₁). The Employer requested an assessment of her functional capacity. Ms. English completed a functional capacity test which indicated that she was unable to meet her job requirements with regard to lifting and carrying. (Claimant's Ex. A, p. 118₁₆). Dr. Fishman released Ms. English from his care on October 12, 2006 with permanent restrictions. (Claimant's Ex. A, p. 118₁₆). However, Dr. Fishman again evaluated Ms. English in January of 2007 following an evaluation she had with Dr. Hylton, a neurosurgeon in Kansas City, Missouri. (Claimant's Ex. A, p. 112₁₀). Dr. Fishman indicated that Ms. English was not a candidate for surgery and released her at maximal medical improvement on January 17, 2007. (Claimant's Ex. A, p. 113₁₁). Dr. Fishman assessed Ms. English's disability at 10 percent of the body a whole related to the June 29, 2006 injury. (Claimant's Ex. A, p. 109).

Ms. English still has pain as a result of her back injury. She has difficulty lifting more than 50 pounds and has pain when standing extended periods of time and when sitting for extended periods of time. Ms. English testified that she never returned to work at full duty following the June 29, 2006 accident. It is unclear when Ms. English stopped working for Odyssey Healthcare. She testified at hearing that she last worked on July 12, 2006, but her deposition testimony states October 12, 2006 as her last day of work. (Second Injury Fund Ex. 1, p. 62: 13-21). Ms. English testified that she has been unable to do any of her hobbies, such as beadwork, embroidery and birch bark carving, since the accident of June 29, 2006. (Second Injury Fund Ex. 1, p. 67:5-25; 68: 1-6). Ms. English's Missouri workers' compensation claim with her employer was settled for a lump sum total of \$5,000.

Dr. P. Brent Koprivica evaluated Ms. English regarding her injuries related to the June 29, 2006 accident as well as her pre-existing conditions. (Claimant's Ex. A, p. 1; Deposition of Dr. Koprivica p. 4: 4-12). He discussed her visual disabilities including the histoplasmosis with wet macular degeneration. (Claimant's Ex. A, p. 3; Deposition of Dr. Koprivica p. 9: 12-16). Ms. English cannot drive at night as a result of her visual difficulties and is legally blind in her left eye, although she does have a driver's licence. (Claimant's Ex. A, p. 3; Deposition of Dr. Koprivica p. 9: 24-25; 10:1-6).

Dr. Koprivica also testified by deposition that Ms. English has a history of mental health issues that warrant the consideration of a formal mental health expert evaluation. (Claimant's Ex. A, p. 3; Deposition of Dr. Koprivica p. 10: 8-14).

Dr. Koprivica further testified that Ms. English reported to him that she has pain in both of her hands, in her neck and right shoulder, in her low back that radiates to her hip and her right knee and sometimes to her left foot and big toe. (Claimant's Ex. A, p. 4; Deposition of Dr. Koprivica p. 16: 10-21). Dr. Koprivica's deposition also indicates that Ms. English has

overwhelming pain posturally. (Claimant's Ex. A, p. 4; Deposition of Dr. Koprivica p. 16: 24-25). She cannot sit for more than 15 minutes and has to semi-recline in the car. (Claimant's Ex. A, p. 5; Deposition of Dr. Koprivica p. 17: 1-2). She can only stand for a couple of minutes and has to prop her foot up when she stands. Her walking tolerance is less than 100 feet. (Claimant's Ex. A, p. 5; Deposition of Dr. Koprivica p. 17: 2-7). Dr. Koprivica testified that he conducted a physical examination on Ms. English. (Claimant's Ex. A, p. 5; Deposition of Dr. Koprivica p. 19: 9-12). Dr. Koprivica found that although Ms. English was cooperative during the examination that there was non-physiologic findings in the examination. (Claimant's Ex. A, p. 5; Deposition of Dr. Koprivica p. 19: 14-20). Ms. English developed severe pain to the point of crying when Dr. Koprivica attempted to do shoulder girdle range of motion testing. (Claimant's Ex. A, p. 6; Deposition of Dr. Koprivica p. 21: 7-9). Dr. Koprivica testified that his opinion was that Ms. English had a marked functional overlay with possible chronic pain syndrome. (Claimant's Ex. A, p. 6; Deposition of Dr. Koprivica p. 24: 1-4). He opined that she had developed severe dysfunction since the June 29, 2006 injury. (Claimant's Ex. A, p. 6; Deposition of Dr. Koprivica p. 24: 8-9). Dr. Koprivica believes that Ms. English's representation of her disabilities are so overwhelming that she is realistically not employable. (Claimant's Ex. A, p. 7; Deposition of Dr. Koprivica p. 27: 12-16). Dr. Koprivica testified that if a mental health expert found a causal relationship between the presentation of the functional overlay and the physical injuries of June 29, 2006, then he would consider her to be permanently and totally disabled based on the primary injury of June 29, 2006, despite her pre-existing conditions. (Claimant's Ex. A, p. 7; Deposition of Dr. Koprivica p. 27: 25; 28:1-8). Ms. English also testified at hearing that she is unable to work as a result of the June 29, 2006 injury.

Dr. John Pro evaluated Ms. English on November 27, 2007. (Claimant's Ex. B, p. 4; Deposition of Dr. Pro p. 5: 5). Dr. John Pro's deposition testimony indicates that he believes the June 29, 2006 injury was the prevailing cause of the dysthymia (depression) and transformed it into major depression which is causing the symptom magnification. (Claimant's Ex. B, p. 4; Deposition of Dr. Pro p. 12: 22-25; 13: 1-2, 24-25; 14: 1-2).

Ms. English testified that she has a history of depression dating back to a 1965 incident with her first husband. Ms. English further testified that she was last treated formally by a psychologist or psychiatrist for her depression in 2001. (Second Injury Fund Ex. 1, p. 44:13-20). She took Prozac from 1992 until after the accident in June of 2006 when she switched to Lexapro, but is otherwise not currently treating for depression. (Second Injury Fund Ex. 1, p. 47:8-14,48:3-15). Ms. English testified that the depression affected her work in a positive way. (Second Injury Fund Ex. 1, p. 48: 19 – 25, 49: 1-9).

Ms. English was diagnosed after the June 29, 2013 accident with carpal tunnel syndrome in her right extremity. This condition causes Ms. English to have difficulty with manual dexterity. Ms. English testified at hearing that charting for her job at Odyssey took her longer than normal as a result of the carpal tunnel syndrome. Ms. English testified in her deposition that she had no symptoms of carpal tunnel prior to the accident of June 29, 2006. (Second Injury Fund Ex. 1, Page 54:21-25, 55:1). Dr. Koprivica evaluated Ms. English and determined that she has a 30 percent permanent partial disability to the 135-week level of her right wrist related to the carpal tunnel syndrome. (Claimant's Ex. A, p. 8; Koprivica Deposition p. 31:4-9). However, Dr. Koprivica also could not perform a clinical examination regarding symptomatology due to the functional overlay. (Claimant's Ex. A, p. 6; Koprivica Deposition p. 23: 11-15).

Ms. English obviously has visual impairment as noted by her medical records from Cokington Eye Centers. (Claimant's Ex. A, p. 479 - 499₂₁). Dr. Koprivica referred any rating of disability on her visual deficits to an ophthalmologist, and no such rating was offered into evidence. (Claimant's Ex. A, p. 8; Deposition of Dr. Koprivica p. 30: 7-10).

The first issue to be determined by this Court is whether the accident of June 29, 2006 occurred in the course and scope of Employee's employment with Odyssey Healthcare. An injury is in the course of employment *only* if it is reasonably apparent that the accident is the prevailing cause of the injury *and* the injury does not come from a risk or hazard not employment related that the employee would have been equally exposed to in normal nonemployment life. RSMo 287.020.3(2) (2005). Missouri case law recognizes that "[i]n the case of a traveling employee, the employee is considered to be in the course of his employment continuously during the trip except when a distinct departure on a personal errand is shown." *Anderson v Veracity Research, Co.*, 299 S.W.3d 720, 733 (Mo. App. W.D. 2009). The evidence presented shows that the accident of June 29, 2006 was the prevailing cause of Ms. English's back injury and no evidence was presented to the contrary. Further, there is no dispute that Ms. English was required to travel as a result of her employment as a hospice nurse with Odyssey Healthcare. Ms. English testified that she was traveling from a nursing home where her patient resided to the home of another patient when the accident occurred. No evidence was introduced to indicate that Ms. English was embarking on a personal errand at the time of the accident or that she was, in fact, not traveling to the residence of her patient at the time of the accident. Therefore, this court finds that accident of June 29, 2006 occurred in the course and scope of Ms. English's employment with Odyssey Healthcare.

The next issue to be determined is that of the liability of the Second Injury fund. The court must first determine the disability of the last injury alone when determining the liability of the Fund. *Mihalevich Concrete Construction v. Davidson*, 233 S.W.3d 747, 754 (Mo. App. W.D. 2007). "If the last injury in and of itself rendered the claimant permanently and totally disabled, then the Fund has no liability..." *Id.* Dr. Koprivica testified by deposition that

"[i]f the mental health expert believes that the severe functional overlay is valid and a causal consequence of the June 29, 2006 injury, I would consider Ms. English to be permanently and totally disabled based on the primary injury of June 29, 2006, in isolation. This opinion is being given despite the fact that she did have pre-existent industrial disability..." (Claimant's Ex. A, p. 7; Deposition of Dr. P. Brent Koprivica p. 27: 25; 28: 1-7).

Dr. John Pro testified by deposition that "The second injury...on June 29th, 2006, was the prevailing cause of further aggravation of the dysthymia, the chronic low grade depression, and essentially, transformed it into a worse form of dysthymia, otherwise known as major depression." (Claimant's Ex. B, p. 3-4; Deposition of Dr. John Pro p. 12: 22-25; 13:1-2). Dr. Pro goes on to define the chronic pain syndrome as a psychological factor in magnification of Ms. English's pain symptoms. (Claimant's Ex. B, p. 4, Deposition of Dr. John Pro, p. 13: 9-25; 14: 1-2). Based on this testimony, this Court agrees with Dr. Koprivica's assessment that the June 29, 2006 injury caused Ms. English to be permanently and totally disabled. Therefore, the last injury rendered Ms. English permanently and totally disabled and there is no liability to the Second Injury Fund.

The Court therefore, has no need to determine whether Employee's prior disabilities were a hindrance or obstacle to her ability to maintain employment or to be reemployed should she become unemployed.

Made by: _____

Lisa A. Meiners

Administrative Law Judge

Division of Workers' Compensation