

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

Injury No.: 09-093079

Employee: Barbara Fagins
Employer: DolgenCorp., Inc.
Insurer: DolgenCorp., LLC
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 reviewed the evidence and considered the whole record, we find that the award of the administrative law judge denying 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 judge with this supplemental opinion.

Discussion

Medical causation

At issue in this matter is whether employee, an assistant manager at one of employer's retail stores, suffered a compensable psychiatric injury when an assailant pointed a gun at her head during an armed robbery of the store on November 1, 2009. Employee had very serious psychiatric problems before this event, for which she was receiving social security disability benefits. Yet, employee was able to work for employer for about 4.5 years prior to the event on November 1, 2009, advancing from a cashier to an assistant manager position. Two days after the robbery, employee was admitted to Research Psychiatric Center owing to acute anxiety and distress stemming from the event, and she ultimately never returned to work for employer.

The administrative law judge denied employee's claim on the issue of medical causation, crediting the testimony of employer's expert, the psychologist Dr. Keenan, over that of employee's medical expert, the psychiatrist Dr. True. It is well-settled in Missouri that in workers' compensation cases involving injuries that are beyond lay understanding, "the question of causation [is] one for medical testimony, without which a finding for claimant would be based on mere conjecture and speculation and not on substantial evidence." *Welker v. MFA Cent. Co-operative*, 380 S.W.2d 481, 487 (Mo. App. 1964). We agree that employee's alleged psychiatric injuries are beyond lay understanding, and that in the absence of credible expert medical testimony, a finding for employee in this matter would be based on conjecture and speculation.

We note that the administrative law judge placed considerable emphasis on the fact employee's counsel asked Dr. True whether the accident was "a" prevailing factor resulting in injury, rather than "the" prevailing factor. At least in this case, we perceive this to be a distinction without a difference. Although we do not find Dr. True's testimony in this matter

Employee: Barbara Fagins

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to be persuasive, his response to counsel's question does not suggest that counsel's use of "a" versus "the" was in any way important to Dr. True, or that it caused Dr. True to misunderstand the applicable standard of medical causation. The problem with employee's case is not the fact her attorney used "a" instead of "the" in posing a question to Dr. True; it's the fact she simply failed to present any credible expert medical testimony.

We note also that the administrative law judge relied on the case of *Gordon v. City of Ellisville*, 268 S.W.3d 454 (Mo. App. 2008) for the proposition that aggravation of a preexisting condition is not compensable following the 2005 amendments to the Missouri Workers' Compensation Law. The *Gordon* court used the word "aggravation" as shorthand for "something less than the prevailing factor." *Id.* at 459-60. Subsequent cases have clarified that aggravation (as a medical condition) is compensable after the 2005 amendments where a medical expert credibly opines that an accident was the prevailing factor resulting in aggravation of a preexisting condition. See, e.g., *Maness v. City of De Soto*, 421 S.W.3d 532, 540-41 (Mo. App. 2014). If employee had presented a credible medical expert opinion that the event of November 1, 2009, was the prevailing factor causing an aggravation of her preexisting psychiatric conditions and additional permanent partial disability, we are of the opinion that such injuries would be compensable.

Likewise, we wish to make clear that we are not persuaded by the theory from Dr. Keenan that because employee suffered serious preexisting psychiatric problems, she cannot have suffered any additional injury. We fail to see why employee's numerous suicide attempts, psychiatric hospitalizations, and need for psychiatric medications rendered her any less likely to suffer additional permanent partial disability as a result of having a gun pointed at her head; if anything, it would seem that employee's psychiatric fragility rendered her *more* likely to suffer injury. And where § 287.190.6(2) RSMo requires that "permanent disability ... shall be demonstrated and certified by a physician," we have doubts as to whether testimony from a psychologist is sufficient to demonstrate and certify the absence of permanent disability. For these reasons, we must disclaim the administrative law judge's reliance on the opinions of Dr. Keenan.

On the other hand, the sole expert medical testimony that employee procured and presented in this matter derives from the treating physician Dr. True, and even the most generous reading of his testimony supports the administrative law judge's conclusion that employee has failed to meet her burden of proof. From a lay perspective, it appears obvious to us that employee suffered some permanent injury from having a gun pointed at her head during the course of her work for employer. This is especially so when we consider employee's work history, her hospitalization following the event, and her inability to return to work thereafter. But our lay perspective is not determinative in this matter, and Dr. True's testimony is so uncertain, so ambiguous, and at times so contradictory, that we simply cannot credit it.

Because employee has failed to make her case with the testimony from Dr. True, we must deny the claim for compensation.

Employee: Barbara Fagins

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Conclusion

We affirm and adopt the award of the administrative law judge with this supplemental opinion.

The award and decision of Administrative Law Judge Kenneth J. Cain, issued September 10, 2013, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 13th 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

Employee: Barbara Fagins Injury No. 09-093079
Dependents: N/A
Employer: DolgenCorp., Inc.
Insurer: DolgenCorp, LLC (Self-Insured)
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: July 9, 2013; final brief filed September 4, 2013 Checked by: KJC/pd

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? No
3. Was there an accident or incident of occupational disease under the Law? Employee did not prove an "injury" by accident (See additional findings of fact and rulings of law)
4. Date of accident or onset of occupational disease: November 1, 2009
5. State location where accident occurred or occupational disease was contracted: Raytown, Jackson County, Missouri
6. Was above Employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee, while in the course and scope of her employment as a Third Key person at a Dollar General store was the victim of an armed robbery.
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: Alleged psyche
14. Nature and extent of any permanent disability: None
15. Compensation paid to date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$255.00 per week per stipulation of parties
19. Weekly compensation rate: \$170.00 per week per stipulation of parties
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:
Unpaid medical expenses: None
Weeks for permanent partial disability: None
Weeks for temporary total and temporary partial disability: None
Weeks for permanent total disability: None

22. Second Injury Liability: None

TOTAL: None

23. Future requirements awarded: None

Said payments to begin N/A and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the Claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Barbara Fagins Injury No. 09-093079
Dependents: N/A
Employer: DolgenCorp., Inc.
Insurer: DolgenCorp, LLC (Self-insured)
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: July 9, 2013; final brief filed September 4, 2013 Checked by: KJC/pd

Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

1. Accident;
2. Liability of the employer for temporary total disability benefits from November 2, 2009 to the date of the hearing;
3. The nature and extent of the disability sustained by the employee;
4. Whether all the conditions complained of by the employee resulted from the alleged accident;
5. Liability of the employer for past medical benefits; and
6. Liability of the Second Injury Fund for compensation.

At the hearing, Ms. Barbara Wright-Fagins (hereinafter referred to as Claimant) testified that she was born in 1959 and that she was 54 years old. She stated that she had been married about 10 years. She stated that she had an AA degree in business from Platte College.

Claimant testified that she was hired in 2007 or 2008 by Dollar General. She stated that she worked for the company for 4 ½ years. She stated that she was hired initially as a cashier. She stated that her job title was later changed to Third Key which was similar to being an assistant manager. She stated that in the Third Key position she opened and closed the store, gave change to the cashiers, did paper work and made sure that the store was clean. She stated that her salary was \$5.50 per hour and that she worked a 30 hour week.

Claimant testified that her injury at work occurred on November 1, 2009 during an armed robbery of the store. She stated that the robber had a “38 snub nosed gun.” She stated that the robber initially took money from a clerk’s wallet and then told her that he would shoot the clerk unless she opened the safe. She stated that the robber pointed the gun at her head. She stated that while she was bending down trying to open the safe, the robber had the gun at the back of her head.

Claimant admitted that the gun never touched her head. She stated that the incident lasted about 3 or 4 minutes. She stated that the next day at work she was nervous, "jumpy" and scared every time the bell on the store's door rang. She stated that she asked the store's manager for the crisis number, but lost it. She stated that on the following day after she again requested the crisis number, the manager told her to go to the hospital to get evaluated.

Claimant testified that she was admitted to Research Psychiatric Hospital for three days. She stated that she did not return to work after her discharge from the hospital because she had too many flashbacks to the robbery and too many memories of it. She stated that she was prescribed three new psychiatric medications after the robbery. She stated that Dr. True, her psychiatrist, told her that she would never be able to go into a store or shop again.

Claimant testified that she was readmitted to Research Psychiatric Hospital in January 2010. She stated that by January 2010 she was depressed, withdrawn and experiencing "bad" flashbacks. She stated that since the robbery she has been nervous, scared, withdrawn and "not sure of herself." She stated that she no longer wanted to leave home because she was afraid of what might happen.

Finally, Claimant admitted that she had experienced severe psychiatric problems prior to the robbery at work. She stated that she was diagnosed with mental problems in 1989. She admitted that she had a nervous breakdown prior to the robbery. She admitted that she had been "in and out" of psychiatric hospitals prior to the robbery. She stated that she had been diagnosed with seven different personalities prior to the robbery. She admitted that she was diagnosed as being bipolar prior to the robbery.

Claimant admitted that she was on medication for her bipolar condition prior to the robbery. She admitted that she had attempted suicide by shooting herself in the leg prior to the robbery. She denied any other suicide attempts.¹ She stated that she was awarded social security disability benefits in 1989 based on her bipolar diagnosis and due to seizures. She stated that her seizures were controlled with medication.

On cross-examination by her employer, Claimant admitted that her family physicians, Drs. Houston-Gray and McElmore had prescribed psychiatric medications for her prior to the robbery. She admitted that she was diagnosed with emphysema prior to the robbery. She admitted that she was familiar with guns prior to the robbery. She admitted that she had been around guns her entire life. She stated that her father, a police officer, had owned a 38 snub nose gun. She admitted that she had owned 25 and 38 caliber snub nosed guns. She admitted that her sons had owned firearms.

Claimant admitted that her son had taken her 38 snub nosed gun from her prior to the robbery because he was concerned that she was a danger to herself. She stated that she used a shotgun in her suicide attempt. She admitted that she used to go target shooting and hunting.

Claimant testified that she did not know how many times she had attempted suicide in the past. She acknowledged that an emergency room record at Research Hospital on August 6, 2000

¹ Claimant's medical records were replete with references to Claimant alleging more than one suicide attempt prior to November 2009. There were references to as many as 10 suicide attempts, with most in the range of 4 to 6 such attempts.

stated that she had attempted suicide by a drug overdose. She admitted that she was “probably” having family problems in August 2000 when she overdosed on drugs.

Claimant testified that she did not recall telling her doctor that she had attempted suicide multiple times between 1988 and 1994. She stated that she heard voices during the suicide attempt in which she shot herself. She admitted that she did not know how many times she had been hospitalized for psychiatric problems. Finally, Claimant admitted that she had injured her back at work at Dollar General prior to the robbery. She stated that she was diagnosed with an injury at L5.

On cross-examination by the Second Injury Fund, Claimant admitted that she had to limit the amount of money she made at Dollar General so that it would not affect her social security disability benefits.² She admitted that contrary to her testimony on direct examination; that she had testified at her deposition that Dr. Ciccarelli, an orthopedic surgeon, had not recommended any surgery following her June 2008 back injury at work.

Claimant testified that she had not experienced any flashbacks or nightmares until after the robbery. She stated that her psychiatric condition worsened after the robbery. She stated that she was first diagnosed with post traumatic stress disorder (PTSD) after the robbery.

Claimant admitted that she was being paid by an agency for taking caring of her mother. She admitted that she cooked her mother’s meals, gave her mother medication and cleaned her mother’s room. She stated that she worked about 1 ½ hours per day and that she was paid \$9.00 per hour. She stated that she got paid twice per month and that each check was for \$250.00. She stated that the agency was paying another lady to take care of her mother prior to hiring her.

Claimant admitted that when she attempted suicide by a drug overdose prior to the robbery it was around the time of her sister’s death. She stated that her family was getting on her nerves around that time.

On re-cross examination by her employer, Claimant admitted that she had continued to experience seizures although she had done well with medication. She acknowledged that she was hospitalized at St. Joseph Hospital in April 2010 with seizures. She stated that she did not recall telling Dr. True around that time that she had been suffering from seizures for the past year.

Medical Testimony

The medical evidence consisted of the deposition testimony and records of James True, M.D., a psychiatrist, and various other reports and records. Dr. True, who testified for Claimant, stated that he was board certified in psychiatry. He stated that he had worked at Swope Parkway Health Center since 1990.

Dr. True testified that he first evaluated Claimant on March 11, 2008. He stated that he had evaluated Claimant three times prior to the robbery in November 2009. He stated that Claimant had been seen by therapists at the Swope Park facility on numerous occasions.

² Claimant told one of the experts that she had returned to work after being awarded social security disability benefits because her doctor told her that she needed to get out of the house.

Dr. True testified that Claimant provided a history in March 2008 of hallucinations and people “playing games with her.” He stated that the purpose of his evaluation was to adjust her medications for her schizoaffective disorder. He stated that the term “affective” in the schizo-affective diagnosis referred to the transient nature of the condition, meaning that it would come and go. He stated that the term “schizo” was in reference to her hallucinations and her belief that people were out to get her.

Dr. True testified that after the robbery, Claimant complained of being more stressed and of experiencing nightmares and flashbacks. He stated that Claimant’s condition had gotten “a little bit worse” since the robbery. He stated that she had a lot of stress.

Dr. True stated that “I don’t think that she is able to work” and that “I would guess that she would not” be able to return to work in the future. He stated that “And I asked her, and she says, I don’t think I can face it anymore.” When asked whether he believed that Claimant’s total disability was permanent, Dr. True said, “Probably so, yes.”

Dr. True testified that as an “estimate” he had indicated that 60 percent of Claimant’s disability was caused by the robbery and the remainder by her underlying preexisting condition. When asked, “And do you believe that the work-related injury was a prevailing factor in causing this exacerbation, the robbery?”³ Dr. True responded, “I think that makes her not able to work now, yes.”

On cross-examination by Claimant’s employer, Dr. True indicated that he had no explanation as to why his office had only provided 5 pages of records on Claimant to Claimant’s employer when Claimant’s file contained several hundred pages of records. He stated that he had no explanation as to why his office did not furnish the records until after three requests were made for the records.

Dr. True admitted that he did not review the records of any other physician prior to preparing his report. He admitted that he did not review the Research Psychiatric Hospital records. He stated that he did not know how many times Claimant had attempted suicide or whether she had made any such attempts since the robbery.

Dr. True testified that he would “guess” that Claimant’s psychological condition prior to November 2009 could have affected her employability. He indicated that he believed that Claimant had suffered from a schizo-affective disorder for a “fairly” long time prior to March 2008.

Dr. True admitted that Claimant was taking anti psychotic medication prior to the robbery. He admitted that she was taking medication to prevent symptoms of hallucinations, hearing voices and delusions prior to the robbery. He admitted that she was taking medication to stabilize her moods which ranged from depression to mania prior to the robbery. He stated that

³ The standard in the statute is that work must be “the prevailing factor” in causing the injury and the resulting medical condition. That is a different standard than “a” prevailing factor, if such a standard as “a” prevailing factor can even exist. The word “a” seems to conflict with “prevailing factor”. The phrase “a prevailing factor” indicates that there is more than one prevailing factor, while “the prevailing factor” is defined in the workers’ compensation statutes as the primary factor in relation to all other factors. § 287.020 RSMo. 2005.

he would “guess” that Claimant probably would not have been able to work in November 2009 without the mood stabilizer and anti-psychotic medication and therapy she was receiving.

Dr. True admitted that he had never performed any psychological testing on Claimant. He admitted that Claimant had a number of psychological stressors in her life and that the majority of them were not work-related.

On cross-examination by the Second Injury Fund, Dr. True admitted that Claimant had requested an increase in her Xanax medication on December 2, 2009 to help her deal with the stress of a funeral. He admitted that he had noted on December 2, 2009 that Claimant “is very upset” over the funeral and family members who had shown up trying to “rob money” and take stuff out of the house while she had taken care of the relative for years.

Dr. True indicated that he did not believe that Claimant had multiple personalities. He indicated that he believed that the notion that Claimant had multiple personalities was probably “coached” into her by a therapist who diagnosed a lot of patients with multiple personalities. He admitted that “certainly” some of his opinion that Claimant was unemployable was based on Claimant telling him that she could not work.

Dr. True admitted that he did not know if he had ever diagnosed Claimant with PTSD. He stated that the diagnosis “sort of makes sense.” He admitted that the nature of the schizoaffective disorder meant that a person would have ups and downs in their ability to cope and that those ups and downs could happen for any reason, and not just the robbery in Claimant’s case.

Psychological Testimony

Claimant’s employer offered into evidence the deposition testimony of Kathleen Keenan, Ph.D. Dr. Keenan testified that she had been a psychologist since 1993. She stated that as part of her practice she treated physicians with behavioral, emotional and substance abuse problems. She stated that she evaluated Claimant on May 23, 2011.

Dr. Keenan testified that she reviewed Claimant’s medical records, deposition testimony and Claimant’s scores on the numerous psychological tests she administered to her. She stated that the MMPI was the most valid and most reliable of all the psychological tests. She stated that Claimant’s scores on the MMPI test were invalid due to Claimant’s exaggeration. She noted that Claimant’s scores on the other tests were also invalid due to Claimant’s extreme symptom magnification.

Dr. Keenan noted that Claimant had been diagnosed with a schizoaffective disorder, anxiety and depression prior to the robbery in 2009. She noted that it was significant that Claimant did not mention the robbery or any symptoms associated with the robbery when Claimant saw Drs. Houston-Gray and Koprivica shortly after the robbery as based on the histories contained in their reports.

Dr. Keenan noted that Claimant provided a history to her of several suicide attempts prior to the robbery. She noted that Dr. True’s records showed that Claimant had told him that she had first attempted suicide in the eighth grade. She noted that Claimant had multiple hospitalizations for psychiatric reasons. She noted that Claimant’s parents had taken Claimant’s children from

her prior to the robbery due to Claimant's psychiatric problems. She noted that Claimant provided a history of family mental problems including several suicide attempts by her mother and that her father had been diagnosed as schizophrenic. Dr. Keenan described Claimant's condition as "very serious."

Dr. Keenan testified that Claimant complained to her of nightmares, an inability to sleep, wanting to be with her dead sister, memory problems, seven different personalities and that she had become dangerous and wanted to kill someone. She stated that Claimant complained of seeing blood. She stated that Claimant told her that she had pulled a knife on her husband. She stated that Claimant complained of being depressed, withdrawn, agitated, and with concentration and memory problems and some suicidal ideation. She stated that Claimant also reported auditory hallucinations and of hearing voices. She stated that Claimant complained that the hallucinations had occurred both before and after the robbery.

Dr. Keenan concluded that Claimant was not psychotic. She stated that Claimant was alert, oriented and coherent during the evaluation. She indicated that Claimant was somewhat depressed and irritable, "but not terribly so." She stated, however, that Claimant's answers were vague, incongruent and contradictory.

Dr. Keenan concluded that Claimant's psychiatric problems were "clearly preexisting and not caused by her work injury." She stated that there was no real evidence that Claimant's psychiatric problems were significantly exacerbated by the robbery. She also noted that Claimant's psychological symptoms were not well-controlled before the robbery. She stated that Claimant's complaints before November 2009 were remarkably similar to her complaints after the robbery. She stated that the psychological problems Claimant attributed to the robbery were related to Claimant's underlying psychiatric disorder. She indicated that they were not caused or related to the robbery.

On cross-examination by Claimant, Dr. Keenan admitted that most of the cases she had worked on in the workers' compensation field were for employers. She admitted that she did not have Claimant's Research Psychiatric Hospital records from November 2009 when she evaluated Claimant. She indicated, however, that Claimant's Research Psychiatric Hospital records from January 2010 showed that Claimant had been admitted due to complaints of stress due to family issues. She noted that Claimant also complained at that time that her husband was using crack.

Dr. Keenan admitted that although she would expect an armed robbery to be stressful; that she found no "no compelling evidence that the robbery had markedly - - had significantly exacerbated her {Claimant's} symptoms."

Dr. Keenan testified that while PTSD was caused by some traumatic event in a person's life; that Claimant had experienced numerous traumatic events in her life prior to the robbery. She noted that Claimant had been raped by a boyfriend prior to the robbery. She noted that Claimant had shot herself with a shotgun prior to the robbery. She noted that Claimant had attempted suicide on multiple occasions prior to the robbery. She noted that Claimant grew up in a household with a mother who had attempted suicide on multiple occasions.

On cross-examination by the Second Injury Fund, Dr. Keenan testified that the November 2009 robbery was not the prevailing factor in causing Claimant's psychiatric problems. She stated that Claimant had not sustained any permanent partial disability due to the November 2009 robbery. She stated that she agreed that Claimant needed psychiatric treatment and that Claimant's need for the treatment was due to Claimant's preexisting conditions and not the robbery.

Medical and Psychological Records

The medical and psychological records were cumulative of the other evidence. The records showed that Claimant was admitted to Research Psychiatric Center on November 3, 2009 due to acute anxiety and distress following a robbery at gunpoint. It was noted that Claimant had previously been diagnosed with a bipolar disorder and that she had "apparently" not been doing "particularly" well in the last month or so. Claimant complained of losing weight. She stated that she had lost 40 pounds over the last year. She complained of increased stress due to increased responsibilities at work as a result of being in management.

The records showed that Claimant complained of depression coming on for the last few months. She complained that she was angry because her boss was not supportive. She denied any recent hallucinations. She complained of flashbacks to the robbery. She also admitted, however, that a gun had been pointed at her when she was "much" younger.

On January 20, 2010 Claimant was readmitted to Research Psychiatric Hospital with complaints of rage and anxiety. The records showed that Claimant complained that two days earlier she became angry with her nephew and that she had "talked" about killing him. She complained that her nephew was supplying drugs to her husband who was abusing crack cocaine.

In addition, Claimant complained of losing two sisters during the past year. She complained that her stepfather had died on the day after Thanksgiving. She complained that "this time of the year is difficult due to anniversaries of significant deaths." She complained that her spouse was afraid to sleep with her. She complained that her spouse had relapsed on crack cocaine over the past two years and that he drank heavily.

Claimant provided a history of losing her job at Hallmark in the past due to a seizure disorder. She complained that she had been the victim of domestic abuse.

In August 2005 Claimant complained of stress following the murder of her nephew. She complained that other family members had been shot. Swope Parkway Health Services records showed that on October 24, 2011, Claimant reported some flashbacks and headaches "that she thinks are due to the stress of November, the anniversary month of several of her traumas." On October 10, 2011, Claimant told the therapist about some of the son's "traumas" which included robberies and shooting.

On September 26, 2011, Claimant told the therapist that recently some bullets had whizzed past her as she left her mother's retirement apartment. She complained that the shooting incident had added to her PTSD and feeling of not being safe. She also mentioned that her husband and nephew had "landed" in jail over the Labor Day weekend.

On May 7, 2010, Dr. True noted that Claimant had been hospitalized due to seizures. He noted that she provided a history of visual and auditory hallucinations dating back to her early twenties. He noted that she had an extensive history of mood swings and of anxiety.

On November 17, 2009, Claimant's therapist noted that Claimant did not have any of the characteristics of Dissociative Identity Disorder (DID) or multiple personalities. Dr. True noted that Claimant had provided a history of an initial suicide attempt when she was in the eighth grade. He indicated that Claimant had a lot of stress due to family and money issues. He noted that her mood had improved and that she was not as irritable and "much less depressed."

On May 7, 2008 Claimant complained that she had "went off on my niece". She complained that she was "on edge at work." She stated that she had to put herself in time out.

On March 5, 2008, Claimant complained of losing weight and of problems with sleeping. She complained of spending most of her time in the bedroom. She reported trouble with concentration. She complained of being extremely anxious, mood swings, irritability, and visual and auditory hallucinations. She reported a history of delusions. She reported suicide thoughts. She stated that she had several personalities. She stated that she was stressed and worried about things.

Claimant indicated that she had returned to the workforce on a part time basis while getting social security disability benefits because her doctor had recommended that she go to work to get out of the house.

Hospital records from November 2000 showed that Claimant had attempted suicide by a "shotgun" blast" to her upper thigh. In August 2000 Claimant was admitted to the hospital due to an attempted suicide by an overdose of pills. Claimant complained that her family was getting on her nerves. It was noted that Claimant had been released from Research Psychiatric Center two weeks earlier following an inpatient admission. Claimant was complaining of delusions and of hearing voices.

Law

After considering all the evidence, including Dr. True's deposition testimony, the medical reports and records, Dr. Keenan's deposition testimony, the psychological reports and records, the other evidence, Claimant's testimony and after observing Claimant's appearance and demeanor, I find and believe that Claimant did not prove that her alleged accident at work was the prevailing factor in causing any injury or any resulting medical condition and disability as defined by Missouri law. Therefore, compensation must be denied and all other issues raised at the hearing were rendered moot.

Claimant had the burden of proving all material elements of her claim. Fischer v. Arch Diocese of St. Louis – Cardinal Richter Inst., 703 SW 2nd 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton vs. Big Boy Steel Erections, 121 SW 3rd 220 (Mo. Banc 2003); Griggs v. A.B. Chance Company, 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant did not meet her burden of proving a compensable injury by accident.

The Missouri statutes define “accident” and “injury by accident” as follows:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) 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.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

§287.020 RSMo. 2005

Claimant alleged that she sustained psychiatric injuries as a result of a robbery at work. To prove an “injury by accident,” however, Claimant needed to show that her accident was the prevailing factor in causing both the resulting medical condition and her disability. *Id.* Prevailing factor is defined as the primary factor in relation to any other factor in causing the injury and the resulting disability. *Id.*

Claimant did not offer a medical opinion stating that the robbery or her alleged accident at work was the prevailing factor in causing her alleged psychiatric problems and disability. Also, she offered no opinions or any evidence showing that the robbery was the primary factor in relation to any other factor in causing her alleged injury and her alleged disability. Thus, Claimant failed in her proof.

The evidence showed that Claimant had severe psychiatric problems prior to the robbery at work. The robbery at work occurred on November 1, 2009. Claimant admitted at the hearing that she had attempted suicide by shooting herself prior to November 2009. While she denied on direct examination any other suicide attempts; her medical records were replete with statements

that she had made to medical providers about numerous suicide attempts prior to November 2009. Hospital records showed that she had attempted suicide by a drug overdose in the year 2000. She told Dr. True that she had first attempted suicide while in the eighth grade.

Prior to November 2009 Claimant had complained to doctors and therapists about auditory and visual hallucinations. She had complained about delusions. She was paranoid. She had complained about stress and anxiety. She had complained about an inability to sleep and problems with concentration. She had complained about losing weight. She was diagnosed with anorexia prior to November 2009. She had complained about spending all of her time in her bedroom. She had mentioned to medical providers "talking" about killing her nephew. She had complained about problems with other family members. She had requested additional psychiatric medication to help her deal with family members. She complained that the month of November was stressful to her due to the loss of certain family members during that month.

Claimant had complained prior to November 2009 about her husband being addicted to crack cocaine and drinking heavily. She had complained about her nephew supplying her husband with drugs. She had complained about pulling a knife on her husband. She had complained that her husband would no longer sleep in the same room with her. She had complained about one of her nephews being murdered. She had complained about other family members being shot. She had complained about her son's "traumas" which included robberies and shootings. She complained to Research Psychiatric Hospital in November 2009 that someone had pulled a gun on her prior to the November 2009 robbery. She offered no explanation as to why she believed that the armed robbery at work was the source of her psychiatric problems as opposed to the earlier incident where someone had pulled a gun on her.

Claimant had complained prior to November 2009 about stress on her job at Dollar General due to being in management. She had complained about depression and being angry prior to November 2009. She testified that she had a nervous breakdown prior to the robbery. She testified that she was awarded social security disability benefits in 1989 due to her bipolar disorder and seizures.

Claimant had been diagnosed with a bipolar disorder, schizophrenia, a schizoaffective disorder, depression, paranoia, anorexia and anxiety prior to November 2009. Dr. Keenan, a psychologist, testified on cross-examination by Claimant, that while PTSD was caused by a traumatic event; that Claimant had experienced numerous traumatic events in her life, including being raped by her boyfriend and shooting herself during a suicide attempt prior to November 2009.⁴ Dr. Keenan noted that being raised in a household with a mother who had attempted suicide on multiple occasions was traumatic. Also, as noted above, the robbery was not the first time that a gun had been pulled on Claimant.

Claimant had been prescribed psychiatric medications prior to November 2009 due to schizophrenia, paranoia and violent mood swings. She was on anti-psychotic medication. She was being treated by a psychiatrist and a therapist prior to November 2009. She had been admitted for inpatient treatment at mental institutions numerous times prior to November 2009. Her complaints after the November 2009 robbery were essentially the same as her complaints prior to the robbery.

⁴ Dr. True admitted in his deposition that he did not know if he had ever diagnosed Claimant with PTSD. He stated that the diagnosis "sort of makes sense."

In addition, there were numerous stressors in Claimant's personal life subsequent to November 2009, which may have contributed to her psychiatric problems. She complained that on one occasion after November 2009 while leaving her mother's apartment some bullets "whizzed" past her. She told her therapist that the shooting incident had added to her PTSD. She complained of not feeling safe. Her stepfather died in November 2009 shortly after the robbery at work. Her husband and nephew were arrested after the robbery. She and her husband separated after the robbery.

Thus, with that background and her extensive history of psychological problems and stressors both before and after the November 2009 robbery; Claimant had the burden of proving that the robbery was the prevailing factor in causing her psychiatric problems and disability. She failed in her burden of proof. As noted earlier, she did not offer an opinion from any expert stating that her accident at work was the prevailing factor in causing her psychiatric problems or injury after the November 2009 robbery or in causing her alleged psychiatric disability.

Claimant did ask Dr. True, her expert, the following question at his deposition: "And do you believe that the work-related injury was a prevailing factor in this exacerbation, the robbery?" See Dr. True's deposition pp 18-19.⁵ First, the question presupposed that there was a work-related injury. Also, "accident" and "an injury by accident" are not the same as set out in the statute. *Id.* The statute requires the employee to prove that her accident was "the prevailing factor" in causing her injury and disability. *Id.* The statute does not provide that the accident may be "a prevailing factor" in causing the injury and disability.⁶

The statute further defined the phrase, "the prevailing factor" as the primary factor, in relation to any other factor, in causing both the resulting medical condition and disability. *Id.* The statute must be strictly construed. See § 287.800 RSMo. 2005. Thus, even had Dr. True provided an opinion that Claimant's "work-related injury was "a" prevailing factor in causing this exacerbation, the robbery", as Claimant asked him to do; it would not have made any difference in the outcome of the case. Such an opinion would not have constituted any evidence that Claimant's alleged accident was "the prevailing factor" in causing her injury and her disability as required by the statute.

Claimant also asked the doctor whether the robbery exacerbated her psychiatric problems. First, there was no credible evidence that any alleged exacerbation of Claimant's preexisting psychiatric problems by the robbery resulted in any permanent disability. Also, there

⁵ Dr. True's answer to the question was vague and uncertain. He answered numerous other questions with words or phrases, such as "possibly", "maybe", "I guess", "I believe so", or "sort of makes sense." His answer to Claimant's question as referenced above was "I think that makes her not able to work, yes." Thus, his answer did not appear to answer the question. It was vague, ambiguous and uncertain.

⁶The pre-2005 statute provided that "An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability." § 287.220 RSMo. 1994. The 2005 statute provided a much more stringent standard. Under the 2005 statute work must be the prevailing factor in causing the injury and disability. Prevailing factor is defined as the primary factor in relation to all other factors in causing the injury and disability.

Thus, Claimant's question to her expert which asked for an opinion on whether Claimant's "work-related injury was a prevailing factor in causing this exacerbation, the robbery" was irrelevant as far as proving her case. If there is such a thing as "a prevailing factor" it would not mean that her work was "the prevailing factor as required by the statute or that her work the primary factor in relation to all other factors in causing her injury and disability.

is case law providing that under the 2005 statute an aggravation of a preexisting condition by a work-related injury is no longer compensable. Gordon v. City of Ellisville and Treasurer of the State of Missouri as Custodian of the Second Injury Fund, 269 S.W.3d 454 (Mo. App. E.D. 2008).

The Gordon Court noted that under the pre-2005 statute an employee could prevail if a work-related injury aggravated a preexisting condition. The Gordon Court noted that under the 2005 statute work had to be the prevailing factor in causing both the resulting medical condition and the disability. The Court indicated that the prevailing factor language in the 2005 statute was inconsistent with the notion of an aggravation of a preexisting condition being compensable, as was authorized under the pre-2005 statute, where the employee only had to prove that her work was a substantial factor in causing the injury and need for treatment and not that her work was the prevailing or primary factor in causing the injury and disability.⁷

Thus, Claimant did not prove that the robbery was the prevailing factor in causing her psychiatric or psychological problems and the disability allegedly resulting from the alleged psychiatric problems. She did not prove her employer's liability based on any theory of some alleged exacerbation of her preexisting psychiatric problems.

In addition, the more credible expert testimony was offered by Claimant's employer. Dr. Keenan, a psychologist, testified for Claimant's employer. Dr. Keenan made a credible witness. Her opinions were clear and concise. The evidence supported her opinions. Dr. Keenan noted that Claimant's psychiatric problems were "clearly" preexisting and not caused by Claimant's work. She noted that Claimant's scores on the MMPI and other psychological tests were invalid due to "extreme" exaggeration by Claimant. Dr. Keenan specifically testified on cross-examination by the Second Injury Fund that the robbery was not the prevailing factor in causing Claimant's psychiatric condition.

In contrast, Dr. True, Claimant's expert, provided vague, uncertain and ambiguous testimony. He did not do any testing. He failed to adequately address the significance of Claimant's prior psychiatric problems. He failed to explain how he determined that the robbery had caused Claimant to experience permanent psychiatric problems and permanent disability, particularly when her complaints after the robbery were essentially the same as her complaints prior to the robbery. There was nothing in Dr. True's testimony or his opinions which showed that the robbery was the prevailing factor in causing Claimant's psychiatric problems or disability.

Thus, Claimant failed in her burden of proof. Compensation must, therefore, be denied.⁸

⁷ Claimant was admitted to Research Psychiatric Hospital on November 3, 2009. She complained of anxiety and distress following a robbery at gunpoint. She also complained, however, that she had been experiencing problems with increased stress prior to the robbery due to increased responsibilities at work. She complained that her depression had been coming on for the last few months. She admitted that the robbery was not the first time that a gun had been pointed at her. Dr. True saw Claimant on November 17, 2009 and noted that Claimant had a lot of stress due to family and money issues. He mentioned nothing about the robbery which had occurred only 16 days earlier as a source for Claimant's stress and anxiety.

⁸ Claimant alleged that she was permanently and totally disabled due to her psychiatric problems. She admitted, however, on cross-examination by the Second Injury Fund that she was being paid \$250 per week by an agency for providing care to her mother. She admitted that the agency hired her to provide the care.

Made by: _____

Kenneth J. Cain
Administrative Law Judge
Division of Workers' Compensation

Claimant also admitted that she had to limit the amount of money she earned so as to not affect her social security disability benefits. If Claimant's testimony were correct, although it did not appear to be so, she was making more money for providing care to her mother than she made for working at Dollar General. Claimant testified that she worked 30 hours per week at Dollar General and that she made \$5.50 per hour which would equal \$165 per week. The parties stipulated prior to the hearing, however, that the compensation rate in the case was based on an average weekly wage in excess of \$165 per week.