

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

Injury No. 07-131505

Employee: Susan Green
Employer: ZLB Plasma Services (Settled)
Insurer: Travelers' Insurance Corp. (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 modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to determine the following issues: (1) whether employee's preexisting disability was a hindrance or obstacle to her ability to maintain employment or to be employed should she become unemployed; (2) whether the Second Injury Fund has any liability to employee for any disability compensation; and (3) whether employee suffered an accident within the course and scope of her employment.

The administrative law judge rendered the following determinations: (1) employee sustained an accident arising out of the course and scope of her employment resulting in a 26% permanent partial disability of the body as a whole; (2) employee suffered a 25% preexisting permanent partial disability with respect to her low back which meets the statutory thresholds and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment; (3) employee has failed to prove that she had preexisting disability to her hands prior to the September 2007 accident; (4) the evidence demonstrates that employee is permanently and totally disabled at the time of hearing; (5) employee has failed to prove that she was rendered permanently and totally disabled due to a combination of the preexisting disabilities and the injuries resulting from the September 2007 work injury; (6) the credible evidence establishes that the last injury, combined with the preexisting permanent partial disabilities, causes 10% greater overall disability than the independent sum of the disabilities; and (7) the Second Injury Fund is liable for 20.3 weeks of permanent partial disability benefits.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred in finding the Second Injury Fund is not liable for permanent total disability benefits.

Employee: Susan Green

- 2 -

For the reasons stated below, we modify the award of the administrative law judge referable to the issue of Second Injury Fund liability.

Discussion

Second Injury Fund liability

Section 287.220 RSMo¹ 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 deem reasonable and hereby adopt the administrative law judge's finding that employee suffered from a preexisting permanent partially disabling condition referable to her low back. We additionally find persuasive the uncontested opinion from Dr. Brent Koprivica that employee suffered preexisting permanent partial disability affecting her bilateral upper extremities referable to carpal tunnel syndrome as of the date of the primary injury.² Finally, we find persuasive the un rebutted psychological opinion from Dr. Allan Schmidt that employee suffered from a preexisting personality disorder; we deem employee's history of requiring psychiatric medications sufficient to support a finding that she suffered preexisting permanent partial psychiatric disability referable to this condition.

After careful consideration, we are convinced that each of 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 these preexisting conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

¹ We note that it appears from the administrative law judge's award that he applied the 2013 amendments to § 287.220 RSMo to this claim alleging a primary injury of September 9, 2007. Those amendments, by their express terms, apply prospectively to claims alleging primary injuries by accident occurring after January 1, 2014. Consequently, we have applied the version of § 287.220 RSMo as it existed on the date of employee's work injury.

² The Second Injury Fund makes much of Dr. Koprivica's concession that he could not say with "absolute certainty" that employee's carpal tunnel syndrome predated 2007, but the applicable standard is not "absolute certainty" but rather "a reasonable degree of medical certainty." See § 287.190.6(2) RSMo. Especially in the absence of any contrary expert medical opinion evidence, we find Dr. Koprivica's testimony sufficient to meet this burden.

Employee: Susan Green

- 3 -

Fund liability for PTD under Section 287.220.1 occurs when [the employee] establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. For [the employee] to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD.

Lewis v. Treasurer of Mo., 435 S.W.3d 144, 157 (Mo. App. 2014).

Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). 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. *Id.*

None of the experts to address the issue testified that employee was permanently and totally disabled as a result of the primary injury alone. We deem reasonable and hereby adopt the administrative law judge's finding that, as a result of the accident of September 9, 2007, employee sustained a 26% permanent partial disability of the body as a whole. We conclude that employee is not permanently and totally disabled as a result of the last injury considered in isolation.

We turn now to the question whether the evidence supports a finding that employee is permanently and totally disabled as a result of the effects of the last injury combined with her preexisting conditions of ill-being. The administrative law judge quoted testimony from employee's vocational expert, Mary Titterington, that employee most likely would have been unemployable on the open labor market between her September 9, 2007, work injury and her last day of work for employer in April 2010. The administrative law judge did not indicate that he disbelieved this essentially uncontradicted vocational opinion from Ms. Titterington, which is supportive of a finding of Second Injury Fund liability for permanent total disability benefits. Yet, without explanation, he rejected that opinion in rendering his final award.³

The Second Injury Fund suggests the administrative law judge's choice to disregard the testimony from Ms. Titterington is supported because employee remained employed by employer for about a year and a half following the work injury. But this argument is circular in that it ignores the very substance and import of Ms. Titterington's testimony. Notably, there is no dispute as to the administrative law judge's finding that employee was permanently and totally disabled as of the date of the March 25, 2014, hearing in this matter. Logically then, the Second Injury Fund appears to take the position that employee has been rendered permanently and totally disabled owing to a worsening of her condition not shown to be causally related to the accident of September 2007. But the Missouri courts have suggested medical expert testimony is necessary to support a finding that an

³ The courts have repeatedly cautioned that the fact-finder in a workers' compensation matter must provide specific reasoning for rejecting uncontradicted testimony. See *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 179-80 (Mo. App. 2004), discussing the so-called *Corp* versus *Alexander* rules.

Employee: Susan Green

- 4 -

employee's permanent and total disability is the product of post-accident worsening. See, e.g., *Abt v. Miss. Lime Co.*, 388 S.W.3d 571, 581 (Mo. App. 2012), holding that because "no medical expert concluded that [the employee] was permanently and totally disabled due solely to subsequent deterioration, the Commission's finding [that the employee was permanently and totally disabled for that reason] is not supported by substantial and competent evidence." Here, as in *Abt*, there is no such testimony on the record.

Employee's work for employer after reaching maximum medical improvement from the effects of the work injury is certainly a relevant factor, but is by no means dispositive, because the relevant test is whether employee was capable of competing for work in the open labor market, not whether she was able to return to her former employment. See *Brashers v. Treasurer of the State as Custodian of the Second Injury Fund*, 442 S.W.3d 152, 162-63 (Mo. App. 2014). Employee was absent for sustained periods of time after returning to work for employer (including two different twelve week periods) and employer disciplined her for poor attendance.⁴ The record further reveals that employer moved employee to various positions in an effort to find one that would be compatible with employee's physical limitations, but employee was ultimately unable to tolerate even very limited work duties.

After careful consideration, we discern no basis for rejecting the uncontradicted testimony from Ms. Titterington regarding employee's ability to compete in the open labor market between September 2007 and April 2010. We credit her testimony on that point, as well as Dr. Koprivica's opinion that employee is permanently and totally disabled owing to a combination of her preexisting disabling conditions in combination with the effects of the September 2007 work injury. We so find.

We conclude, therefore, that the Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability.

The Second Injury Fund is liable for weekly permanent total disability benefits beginning on the date of maximum medical improvement, November 18, 2008, at the differential rate of \$38.29 for 104 weeks, and thereafter at the stipulated weekly permanent total disability rate of \$427.33. The weekly payments shall continue for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Lawrence Rebman, issued June 18, 2014, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

⁴ The Second Injury Fund, in its brief, argues that there is no "objective" evidence that employer disciplined employee for poor attendance. Employee specifically so testified, see *Transcript*, page 34, and there is no contrary evidence on this record. We discern no basis for rejecting employee's uncontradicted testimony on this point.

Employee: Susan Green

- 5 -

This award is subject to a lien in favor of Christopher R. Smith, 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 30th day of July 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

**FINAL AWARD
SECOND INJURY FUND ONLY**

Employee: Susan Green Injury No: 07-131505
Dependents: N/A
Employer: ZLB Plasma Services (Settled)
Insurer: Travelers' Insurance Corp. (Settled)
Additional Party: Missouri Treasurer as the Custodian of the Second Injury Fund
Hearing Date: March 25, 2014 Checked by: LGR/drl

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 9, 2007
5. State location where accident occurred or occupational disease was contracted: Kansas City, Wyandotte 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: Employee fell in a pothole in a parking lot.
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: Right shoulder, right wrist, right elbow, left knee and left ankle.
14. Nature and extent of any permanent disability: 26% PPD Body as a Whole
15. Compensation paid to date for temporary disability: \$6,358.92
16. Value necessary medical aid paid to date by employer/insurer? \$52,019.79
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$641.00
19. Weekly compensation rate: \$427.33/\$389.04
20. Method wages computation: By Stipulation
21. Amount of compensation payable: Employer paid \$40,000
22. Second Injury Fund liability: \$7,897.51
23. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Susan Green Injury No: 07-131505
Dependents: N/A
Employer: ZLB Plasma Services (Settled)
Insurer: Travelers' Insurance Corp. (Settled)
Additional Party: Missouri Treasurer as the Custodian of the Second Injury Fund
Hearing Date: March 25, 2014 Checked by: LGR/drl

On March 25, 2014, two claims for compensation 07-131505 and 09-105860 came for hearing before Administrative Law Judge Lawrence Rebman. Separate awards have been entered in both claims. The Division had jurisdiction to hear this case pursuant to §287.110 RSMo. The Claimant, Susan Green, (hereinafter Claimant), appeared in person and was represented by counsel, Christopher R. Smith. The Second Injury Fund appeared through counsel, Assistant Attorney General, Benita M. Seliga. The Employer's liability was settled prior to hearing and did not appear.

STIPULATIONS

The parties stipulated to the following:

- 1) that the employer, CSL Plasma f/k/a ZLB Plasma was an employer operating under and subject to the provisions of Missouri Workers' Compensation Law on September 9, 2007;
- 2) that the employer's liability for workers' compensation was insured by Travelers Indemnity Company of America;
- 3) that Susan Green was an employee of CSL Plasma f/k/a ZLB Plasma;
- 4) that Employee notified Employer of her injury as required by law and her claim was filed within the time allowed by law;
- 5) that Employee's average weekly wage was \$641.00, resulting in a compensation rate of \$427.33 for permanent total disability and \$389.04 for permanent partial disability;
- 6) that the employer has paid \$6,358.92 temporary total disability compensation and \$52,019.79 for medical care; and
- 7) that the employer and Employee settled the primary claim for a lump sum payment of \$40,000 which represents 26 percent permanent partial disability of the body as a whole.

ISSUES

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

- 1) Whether Employee's pre-existing disability was a hindrance or obstacle to employment or to reemployment should unemployment have occurred;
- 2) Whether the Second Injury Fund is liable to Employee for any disability compensation; and
- 3) Whether Employee sustained an accident in the scope and course of her employment with CSL Plasma f/k/a ZLB Plasma.

EVIDENCE

Employee Susan Green testified in person and offered the following exhibits which were admitted into evidence:

Claimant's A -	Stipulation for Compromise Settlement Injury #07-131505
Claimant's B -	Stipulation for Compromise Settlement Injury #09-105860
Claimant's C -	Deposition: P. Brent Koprivica dated 06/21/13
Claimant's D -	Deposition: Allan D. Schmidt, PhD, dated 03/14/13
Claimant's E -	Deposition: Mary W. Titterington, MS, CCFC, dated 03/19/13
Claimant's F -	Susan K. Green, Claimant Deposition 10/16/13
Claimant's G -	Medical records: Clay Platte Family Medicine
Claimant's H -	Medical records: Centerpoint Medical Center
Claimant's I -	Medical records: Christopher Bagby, MD, Northland Bone & Joint
Claimant's J -	Medical records: Biomet
Claimant's K -	Medical records: American Medical Response
Claimant's L -	Medical records: Terrence W. Coleman, MD
Claimant's M -	Medical records: Dickson Diveley Midwest Orthopedic Clinic
Claimant's N -	Medical records: Hanger Prosthetics & Orthotics
Claimant's O -	Medical records: Homelink
Claimant's Q -	Medical records: Gates Hospitalists, LLC
Claimant's R -	Medical records: Kmart Pharmacy
Claimant's S -	Medical records: University of Kansas Hospital
Claimant's T -	Medical records: Liberty Hospital
Claimant's U -	Medical records: Gregory Markway, MD and Family Medicine, Inc.
Claimant's V -	Medical records: Medical Imaging
Claimant's W -	Medical records: Metro Emergency Physicians, LLC
Claimant's X -	Medical records: North Kansas City Hospital
Claimant's Y -	Medical records: OHS Compcare
Claimant's Z -	Medical records: Pinnacle Therapy Services
Claimant's CC -	Medical records: Ramic Medical Imaging
Claimant's DD -	Medical records: St. Luke's Hospital

Claimant's EE -	Medical records: The Family Conservancy
Claimant's FF -	Medical records: Two Rivers Psychiatric Hospital
Claimant's GG -	State of Kansas Division of Workers' Compensation records
Claimant's HH -	Division of Workers' Compensation: MO records (Judicial Notice Taken)

The Second Injury Fund offered no exhibits.

Findings of Fact

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

Ms. Susan Green testified in person at the hearing. She was born on November 20, 1956 and is 57 years old. She received vocational-technical training in early child education while in high school, graduated from high school in 1975 and attained a certificate in medical assisting in 1985. She has received no other formal education or training.

Employee was hired by CSL Plasma in 1985 and worked there for 25 years. Her first position there was phlebotomist. By 2007, Employee was working as an acting supervisor in processing, and as such, her job was to pack bottles of plasma into boxes. Physically, she was required to lift and carry boxes weighing 32 lbs. frequently. She was also required to clean the freezer in which the bottles of plasma were stored.

On September 9, 2007, Ms. Green was driving to another facility of her employer to pick up something and became lost. She ended up in Kansas City, Kansas where she stopped at a gas station to ask directions. While walking across the pavement, she accidentally stepped into a pothole and twisted and wrenched her left knee, left ankle and left foot. She extended her right arm to break her fall and in so doing injured her right elbow. Claimant reported the injury to the employer and underwent a course of authorized medical treatment which included knee surgery by Dr. Jones on October 23, 2007 and ankle and foot surgery by Dr. Horton on April 16, 2008.

Following the 2007 work injury, she returned to work at CSL Plasma. Upon returning to work, she continued to have problems with her upper extremities and low back. Added to that was the disability from the left knee, ankle and foot and right elbow from the 2007 work injury. She had tremors in her hands. She had low back pain. She had pain, swelling, weakness and decreased range of motion in the ankle. She wore an ankle brace prescribed by Dr. Horton. She required a cane to walk. At first, she resumed the processing position she had held before the 2007 injury. However, it soon became clear that due to the combination of disabilities, she was unable to continue in that position and was moved, at various times, to less strenuous positions. These positions included receptionist, a screening position and a position where she merely issued payment to plasma donors. These positions enabled her to sit as needed and required minimal physical exertion as compared with the processing position

she had held previously. Employee never resumed full-duty work responsibilities throughout the remainder of her employment with CSL Plasma.

Following the 2007 work injury, Ms Green was allowed to do jobs that were easier from a physical standpoint. While none of these positions were specially created accommodation by her employer, it is apparent that the employer tolerated Ms. Green's physical limitations and provided work within them.

On April 22, 2010, Employee's employment with CSL Plasma was terminated due to her multiple impairments and inability to meet the physical requirements of the job. She has not worked since then.

Ms. Green currently has multiple complaints, the most significant of which include constant low back pain, constant numbness and tremor in her hands, pain in her right elbow and constant pain, swelling, weakness and decreased range of motion in her left knee, ankle and foot. She takes multiple prescription medications on daily basis, including those to manage pain and inflammation. She also takes prescription medications to treat depression and anxiety. She spends her days at home doing very little. She has to lie down regularly and frequently throughout a typical day for pain management. On the rare occasions when she leaves her home, it is to attend a medical appointment or grocery shop. She does not drive and now relies on friends and relatives for transportation to medical appointments, to the grocery store and to run other necessary errands. Her young grandchildren help her with her laundry.

Ms. Green was determined to be totally disabled by the Social Security Administration in October, 2009, prior to the work injury in December of that year, and started receiving Social Security Disability benefits in 2010.

Conclusions of Law

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim. *Fischer v. Archdiocese of St. Louis*, 793 S.W. 2d 195, 198 (Mo. App. W.D. 1990). Proof is made only by competent and substantial evidence, and may not rest on speculation. *Griggs v. A.B. Chance Company*, 503 S.W. 2d 697, 703 (Mo. App. W.D. 1974). Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W. 2d 596, 600 (Mo. Banc 1994). When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder. *Hawkins v. Emerson Elec. Co.*, 676 S.W. 2d 872, 977 (Mo. App. 1984).

The Claimant must prove that he sustained an accident arising out of her employment that caused injuries. Under the Workers' Compensation Law, an accident is an unexpected traumatic event occurring during a single work shift, identifiable by time and place of occurrence, and producing at the time objective symptoms of an injury caused by the event. §287.020.3(1) RSMo. Furthermore, the Claimant will establish causation – that her injuries

arose out of employment – only if (a) the work accident is the prevailing factor in causing his injuries and (b) the accident is not caused by a hazard or risk unrelated to his employment. §287.020.3(2) RSMo; *Pile v. Lake Regional Health System*, 321 S.W.3d 463, 466-67 (Mo. App. S.D. 2010), *reh'g and/or transfer denied*, (Sept. 22, 2010) *and transfer denied*, (Oct. 26, 2010).

A claimant in a workers' compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W. 3d 902, 911 (Mo.App. E.D. 2008). In order for a claimant to recover against the Second Injury Fund, he must prove that he sustained a compensable injury, referred to as “the last injury,” which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of comp for injuries to the body as a whole or 15 % for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W. 3d 267, 272 (Mo. App. E.D. 2008) (Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 183 S.W. 3d 714, 717-718 (Mo.Banc 2004). Claimant has met the burden imposed by law.

MO.REV.STAT. §287.220. 2. requires the administrative law judge or the commission to ascertain the compensation liability of the employer for the last injury, considered alone, before determining any pre-existing disability.

The Second Injury Fund has no burden in producing any evidence; rather the Claimant must establish permanent total disability by introducing evidence. *Teresa Carkeek v. Second Injury Fund*, 352 S.W. 3d 604 (Mo App W.D. 2001) citing *Clarks Harts Auto Repair*, 274 S.W. 3d 612, 616 (Mo. App. 2009) *Michael v. Treasurer of Mo.*, echoed a similar statement saying “The SIF however has no obligation to present conflicting or contrary evidence on the claim for permanent total disability benefits . . . rather claimant ‘must prove the nature and extent of any disability by a reasonable degree of certainty.’” 334 S.W. 3d 654, 662 (Mo. App. S.D. 2011) citing *Dunn v. Treasurer of Mo.*, 272 S.W. 3d 267, 275 (Mo. App. E.D. 2008) and *Elrod v. Treasurer of Mo.*, 138 S.W. 3d 714, 717 (Mo. Banc 2004).

“For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. The testimony of a lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. An injury, however, may be of such a nature that expert opinion is necessary to show that it was caused by the accident to which it is assigned. Medical causation, which is not within the common knowledge or experience of lay understanding, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. Proper opinion

testimony as to causal connection is competent and can constitute substantial evidence.”
Landers v. Chrysler Corporation, 963 S.W.2d 275 (Mo.App. E.D. 1997).”

1. Last injury resulted in permanent partial disability.

Ms. Green testified that on September 9, 2007, she injured her left knee, ankle and foot and her right elbow while on a work-related errand. She reported the injury to the employer who accepted compensability and sent Employee for a course of authorized medical care. The Court finds Employee to be credible regarding her accidental injury. Her testimony is consistent with the medical records and other reports in evidence as well as her prior statements. Dr. Koprivica opined that there was a work-related accident, and I find him credible as well. Therefore, based upon the evidence the Court finds that on September 9, 2007, I find that Employee sustained an accident arising out of the course and scope of her employment.

Ms. Green settled her claim against the employer and insurer for a lump sum payment of \$40,000.00 which represents 26 percent permanent partial disability of the body as a whole referable to the right arm and left leg. She complains of continuing problems with constant pain and swelling in her left knee, foot and ankle and constant pain in the right elbow. Employee was credible in her testimony, and the evidence and settlement percentage support her complaints.

Ms. Green has established that she has permanent partial disability of 26 percent of the body as a whole as a result of the injury she sustained to the left knee, ankle and foot and the right elbow on September 9, 2007.

Pre-existing Disability

Ms. Green alleges that she had permanent partial disability prior to the work accident in September, 2007 involving her wrists, hands and her low back. She also claims she had disability related to depression and anxiety and has a personality disorder which developed as early as young adulthood.

Low Back

Ms. Green’s low back problems are demonstrated throughout her medical records. On July 15, 2003, Dr. Scowcroft indicates that Employee had low back pain during that time frame. A contemporaneous MRI showed bulging of the L4-L5 disk with bilateral neuroforaminal encroachment and anterior thecal sac compression. Contemporaneous electrodiagnostic studies confirmed Dr. Scowcroft’s diagnosis of left L5 radiculopathy. Employee underwent epidural steroid injections in her lumbar spine on July 15, 2003 and August 4, 2003. A contemporaneous CT myelogram revealed diffuse spinal canal narrowing from L3 to S1 and significant stenosis at L4-L5 with a moderate bulge along with mild bilateral neuroforaminal narrowing.

The evidence in this case document ongoing persistent pre-existing back problems. Complaints of back pain, discomfort and problems are noted in the records of a rheumatologic evaluation at Kansas Medical Center on November 29, 2005 and a pre-anesthesia workup of April 5, 2007.

Employee's complaints of ongoing back pain radiating down her left leg began in 2003, and from that point forward, she had difficulty standing, bending and twisting. Numbness, weakness and tremors in her upper extremity problems were present as early as 1997. These problems were continuous and impacted Employee's ability to perform her job duties prior to September, 2007. She had to work at a slower pace. She relied on co-workers to help her with her work, specifically with heavy lifting and carrying. The employer was aware of Employee's limitations, and condoned the assistance of co-workers: when she reported her complaints to her supervisor, the supervisor's responded, "get the boys to help you."

Dr. Koprivica notes recordings of Dr. Rope that Employee reported back pain radiating down the left leg into the foot which persisted for several years and that she had radiating low back pain prior to July of 2007. Dr. Koprivica issued a rating of 25 percent permanent partial disability of the body as a whole for pre-existing ongoing symptomatic spinal stenosis.

Having given careful consideration to the entire record, based upon the above testimony, stipulations of the parties, the competent and substantial evidence presented, and the applicable law of the State of Missouri and stipulations of the parties, I find that as of the time the 2007 injury was sustained, Ms. Green had 25 percent permanent partial disability to her low back which meets the statutory thresholds and is of such seriousness as to constitute a hindrance or obstacle to employment or re-employment.

Bilateral Upper Extremities

Ms. Green first reports problems with her hands to Dr. Markway. Dr. Markway's note of May 1, 1997 which indicated that he did tests and that there is "no evidence of carpal tunnel syndrome." (Ex U, p. 1248) Ms. Green testified that her hands caused her problems over the years and that she would have problems on the computer and performing blood drawing tasks. There are no other notations in the volumes of medical records regarding hand or elbow problems.

Dr. Koprivica found that based upon the medical records and Ms. Green's statements that she had pre-existing bilateral carpal tunnel syndromes, and assigned separate ratings of 15 percent permanent partial disability at the 175 week level for each upper extremity. Upon cross examination at his deposition, Dr. Koprivica acknowledged that record and explained: "Correct. It was not present clinically at that point, but it was an overuse or repetitive use problem."¹ When asked about the absence of medical records documenting a prior diagnosis of, or treatment for, carpal tunnel syndrome. Dr. Koprivica answered:

¹ page 18, lines 4-6, Dr. Koprivica's deposition transcript, Claimant's Exhibit C

Well, it's based on positive provocative findings for carpal tunnel syndrome on clinical examination physically.

She had positive Phalen's testing and reverse Phalen's testing. She had loss of strength. But I pointed out and I will point out that what's difficult about her assessment is the fact that my clinical opinion was that there's a psychological contribution to her disability presentation. Her grip strengths were not bell type, which tells me she has greater capacities than what she told – than what she demonstrated, and so I have to interpret that clinically. When I assigned 15 percent, it was meant to be apportioned for the physical disability only.

Her presentation of disability would suggest much greater disability in her hands. But I didn't believe it was all physical; I thought there was likely a psychological component. So that's what it's based on.

So it's her statements that she made to me that she'd had it for a long time; physically I found – my findings in 2011, records that she had complaints with overuse as far back as the 90's. Those were – that was the basis for it.²

And because there are contemporaneous records that document her upper extremity complaints and then her statements to me, which don't rely on any medical sophistication as to numbness and problems with her hands, I feel comfortable saying that it predated 2007. But within – but not with absolute certainty.³

Based on Ms. Green's testimony, Dr. Koprivica's testimony and the medical reports and records in evidence, has failed to prove that she had pre-existing disability to her hands prior to the September, 2007 work accident.

Psychological Disability.

The medical records indicated that Ms. Green has been taking anti-depressants for a number of years prior to the 2007 injury. Dr. Allan Schmidt, a psychologist, evaluated Employee to determine her psychological status and the degree of any psychological disability. Dr. Schmidt authored reports and testified on Employee's behalf. He opined that Employee has a current psychological disability of 35 percent and apportioned 25 percent to disability pre-dating the work accident of December 29, 2009 and 10 percent to disability resulting from that accident. Dr. Smith testified that Ms. Green did suffer from psychological disability prior to the September 9, 2007 accident as well, but declined to specifically apportion the percentage of psychological disability pre-dating September, 2007.

The records from Two Rivers Psychiatric Hospital evidence that Ms. Green's psychological problems become significantly worse in October 2009. Ms. Green was admitted to the hospital for severe depression. (Ex FF, p. 2087) The medical records indicate

² page 20, line 2 – page 21, line 5, Dr. Koprivica's deposition transcript, Claimant's Exhibit C

³ page 22, lines 13 – 18, Dr. Koprivica's deposition transcript, Claimant's Exhibit C

that Ms. Green had no previous treatment and had never seen a psychiatrist. The records indicate that she was off work since the first of October.

While acknowledging that Employee received very little formal psychiatric or psychological treatment prior to 2007, Dr. Schmidt opined that she must have experienced episodes of depression as evidenced by the fact that she was taking psychotropic medications. According to medical records he reviewed, she was prescribed Zoloft, an antidepressant medication in 1991. In 2003, she was taking Zoloft and another antidepressant, Amitriptyline. In 2006, a physician noted that Employee had psychiatric problems underlying her physical complaints. And, Dr. Schmidt found numerous references to depression and antidepressant medications in other records which pre-date September, 2007.

Regarding psychological disability prior to September, 2007, it is Dr. Schmidt's opinion that Ms. Green has a longstanding personality disorder. He testified that by definition, personality disorders are formed by early adulthood which he agreed, in Ms. Green's case, would have been by approximately 1977. He specified that Ms. Green's personality disorder is characterized by difficulty with interpersonal relationships. When asked how he could now assess that Ms. Green had a personality disorder beginning as far back as early adulthood, he testified that "[i]t's a multistep process. I'm looking at the results of psychological testing, I'm getting a history for – from her, and I'm looking for patterns of behavior. And so it's not one specific issue, it's a pattern of behaviors, test results, and clinical impression."⁴ He further testified that the nature of a personality disorder is that it is longstanding, and that "longstanding", in this instance, would mean that it was in place before 2007.⁵

Dr. Schmidt opined that Ms. Green had psychological disability prior to September, 2007. However, there is little to no testimony and medical evidence to support the contention that before 2007 Ms. Green's psychological problems constituted a hindrance or obstacle to her employment or reemployment should she become unemployed. Ms. Green testified that prior to 2007 she had seen a counselor once and has taken anti-depressants. Ms. Green did not provide details on how her psychological condition affected her ability to work.

Ms. Mary Titterington rendered an opinion as to whether Ms. Green is permanently and totally disabled. Ms. Titterington was asked whether Employee was employable after the 2007 injury and prior to the injury in December, 2009.

Well, you know, she was working. But I think clearly, if she wasn't officially accommodated, she was officially tolerated. With the behaviors that she demonstrated on the job and the amount of time she missed in terms of her hospitalizations for the psychiatric problems, the FMLA she had to take, I think it's highly probably – more probable than not that she would have been unemployable in the open labor market if she hadn't had a benevolent employer, basically.

⁴page 54, lines 13-18, Dr. Schmidt's deposition transcript, Claimant's Exhibit D

⁵page 54, line 24 – page 55, line 11, Dr. Schmidt's deposition transcript, Claimant's Exhibit D

Ms. Titterington agreed that it would have been difficult or even impossible for Employee to get another job during this timeframe:

Absolutely, that's what I'm saying. She was a long-term employee. And it's always difficult to terminate a long-term employee who has lots of physical problems. I mean, there's all sorts of red flags.

And eventually, they could demonstrate and prove that she couldn't meet the essential functions of the jobs. And they tried multiple jobs. And so yes, my feeling is that if she'd had to – if she had been terminated earlier and had had to go out and seek work with walking on a cane, you know, being in her 50's, the emotional ability (*sic*), I don't – you know, with the emotional ability (*sic*), to even really have sought a job would have been difficult for her. So I think it's more probable than not, she would not have been employable in the open labor market.

Right, I mean, I think – if you think just realistically, if she walked in to qualify for an interview, she is – you know, she's on a cane, she's walking at a very slow pace, she's slower intellectually, she mispronounces words, she digresses when she tries to answer questions, she doesn't always answer questions.

And you put all that together and you have her walking in to interview for a job – and the first thing they're going to see also is that she has trouble getting up and down – there's going to be real safety issues in almost any employer's mind. And then when you see the limited functioning level intellectually and emotionally, it's truly the question of: Why would I hire this person? And she didn't have any exceptional skills that would have made them want to accommodate, I think, her.⁶

Furthermore, Ms. Green admitted she returned to work after the 2007 injury and continued to work until March of 2010.

The evidence demonstrates that Ms. Green is permanently and totally disabled at the time of the hearing. However, Ms. Green has failed to prove that she was rendered permanently and totally disabled due to a combination of the pre-existing disabilities and the injuries resulting from the September 9, 2007 work injury. The evidence demonstrates that Ms. Green was able to return to work following the 2007 injury and she continued working through her 2009 injury.

As of the time the last injury was sustained, Ms. Green had a 26 percent permanent partial disability to her low back (103 weeks). The preexisting permanent partial disability meets the statutory thresholds and is of such seriousness as to constitute a hindrance or obstacle to employment or re-employment.

⁶ page 18, line 7 – page 20, line 21, Ms. Titterington's deposition transcript, Claimant's Exhibit E

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes 10 percent greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 103 weeks for the last injury plus 100 weeks for pre-existing injuries = 203.00 weeks x 10% = 20.3 weeks of overall greater disability. $20.3 \times \$389.04 = \$7,897.51$.

Made by:

Lawrence Rebman
Administrative Law Judge
Division of Workers' Compensation