

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

Injury No.: 07-008035

Employee: Elaine Hilgar Milson
Employer: Laidlaw Transit, Inc. (Settled)
Insurer: American Home Assurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 1, 2010. The award and decision of Administrative Law Judge Suzette Carlisle, issued June 1, 2010, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 23rd day of November 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Elaine Hilgar Milson

Injury No.: 07-008035

Dependents: N/A

Employer: Laidlaw Transit, Inc. (Settled)

Additional Party: Second Injury Fund

Insurer: American Home Assurance Company (Settled)

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

Hearing Date: February 25, 2010

Checked by:SC

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: January 29, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis 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:
The Claimant injured her right shoulder when she used her shoulder to push open a school bus door.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right Shoulder
14. Nature and extent of any permanent disability: 30% PPD against the Employer, and Permanent Total Disability against the Second Injury Fund
15. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? \$19,809.70

Employee: Elaine Hilgar Milson

Injury No.: 07-008035

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$401.91
- 19. Weekly compensation rate: \$267.94/\$267.94
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

69.6 weeks of permanent partial disability from Employer (Previously paid) (\$18,648.62)

- 22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
Effective December 9, 2008, benefits to be paid for Claimant's
lifetime at the weekly rate of \$267.94. No weekly differential applied

TOTAL:

TO BE DETERMINED

- 23. Future requirements awarded: N/A

Said payments to begin 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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Robert Keefe

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Elaine Hilgar Milson

Injury No.: 07-008035

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Laidlaw Transit, Inc. (Settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: American Home Assurance Company Settled)

STATEMENT OF THE CASE

A hearing was held at the Missouri Division of Workers' Compensation (DWC), St. Louis office at the request of Elaine Hilgar Milson (Claimant) on February 25, 2010, pursuant to Section 287.450 RSMo (2005).¹ Claimant seeks an award for Permanent Total Disability (PTD) benefits against the Second Injury Fund (SIF). Jurisdiction properly lies with the DWC. Attorney Robert Keefe represented Claimant. Assistant Attorney General Karin Schute represented the SIF. The record closed after presentation of the evidence.

Prior to the hearing, Laidlaw Transit, Inc. (Employer) and American Home Assurance Company (Insurer) settled their case with Claimant for 30% of the right shoulder.

Claimant's Exhibits A-S and the SIF Exhibits I and II are admitted. Any notations contained in the Exhibits were present when admitted. Any objections contained in the depositions but not ruled on in this award are overruled.²

STIPULATIONS

The parties stipulated that on or about January 29, 2007:

1. Claimant was employed by Employer in St. Louis County;³
2. The accident arose out of and in the course of employment;
3. Employer and Claimant operated under the Missouri Workers' Compensation Law;
4. Employer's liability was fully insured by Insurer;
5. Employer had notice of the injury;
6. A Claim for Compensation was timely filed;
7. Claimant's average weekly wage was \$401.91;
8. The rates for Temporary Total Disability (TTD), Permanent Partial Disability (PPD), and PTD are \$267.94;
9. The Employer paid no TTD benefits;
10. Employer paid medical benefits totaling \$19,809.70; and
11. Claimant achieved maximum medical improvement (MMI) on August 7, 2007

¹ All references are to the 2005 Revised Statutes of Missouri unless otherwise stated.

² Claimant's objection is sustained to the SIF's question to Mr. England regarding Claimant's ability to develop PTSD in light of the gun incident, her daughter's attempted suicide, and financial problems. I find the question is outside the scope of Mr. England's vocational expertise. (Exhibit G - Page 17, line 12-25 and page 18, line 1-7).

³ References in this award to the Employer also include the Insurer.

ISSUES

The parties identified the following issues for disposition:

1. What is the nature and extent of the SIF liability, if any, for PPD benefits?
2. What is the nature and extent of the SIF liability, if any, for PTD benefits?

SUMMARY OF DECISION

Based on the entire record, Claimant's testimony, demeanor, medical records, and the applicable law of the State of Missouri, I find Claimant met her burden to show SIF liability for PTD benefits.

FINDINGS OF FACT

All evidence was reviewed but only evidence discussed below is considered to establish the facts based upon competent and substantial evidence contained in the record.

Background

1. Claimant was 39 years old when Dr. Jay Liss found her unable to work. Claimant earned a GED and an Associates' degree in accounting from Sanford Brown College. Claimant has been married three times, divorced twice, and the third marriage will soon end in divorce. She has two children, Tracy age 20 and Tori age 7. Claimant's second husband has custody of Tori. Claimant surrendered custody of Tori to her ex-husband after their divorce, due to Claimant's problems with bi-polar disorder and depression.
2. Claimant worked at least a dozen jobs during her adult life. The jobs include: bartender, greenhouse worker, farm worker, house and office cleaner, office worker, food service worker, billing clerk, laundry service, and driver for laundry service, school bus driver, and supervisor.
3. Most jobs lasted less than a year because of Claimant's attendance problems. Anxiety caused her to become afraid to go to work. Fear would carry over to the next day and create a "snowball effect."

Preexisting medical conditions-psychological

4. Claimant has experienced psychological problems including anxiety, mood, and attention problems since the age of five. She developed a fear of being around people, so she pretended to be sick, to avoid school. In school, Claimant's main problem was the inability to grasp academic concepts because of numerous absences.
5. In 1985, Claimant was diagnosed with a Behavior Disorder. Poor attendance in elementary school escalated in middle school, and later became "non attendance." Records show school interventions included placement with relatives, private therapeutic schooling, and referral to Division of Family Services, and a private psychologist. Finally, Claimant was reassigned to the Special School District. Authorities expected Claimant would eventually return to the

regular classroom. At the same time, Claimant received counseling for anxiety until the counselor “hit a nerve” with Claimant’s mother and counseling stopped. Claimant did not return to the regular classroom.

6. As a teenager and young adult, Claimant’s anxiety became worse. Claimant developed back pain and muscle relaxers were prescribed. Claimant has taken anxiety medication since age 19.
7. In July 2005, at age thirty-five, St. Anthony’s Highland Center admitted Claimant for her first in-house psychiatric treatment. Complaints included sadness, crying spells, increased appetite and periodic death wishes. She was involved in her second divorce and a custody battle over Tori. At the time of admission, Claimant lived with her boyfriend and soon to be third husband.
8. Claimant received treatment for one month. At her August 2005 discharge, Claimant was diagnosed with: Axis I: Major depression, Axis II: No diagnosis, Axis III: No diagnosis, and Axis IV: 1. Economic problems, 2. Marital problems, and 3. Sick daughter. Claimant’s Global Assessment Function (GAF) was 50.
9. In August 2005, Claimant was discharged with less depression and was no longer suicidal. It was noted Claimant had difficulty maintaining employment. Claimant was referred to Rashid Zia, M.D. and therapist Colleen Simmons.
10. In May 2006, Claimant returned to the Hyland Center to receive treatment for suicidal ideations, depression, increased appetite and irritability, decreased sleep, anhedonia, and panic attacks. Treatment included medication and group therapy. For the first time, Claimant was diagnosed with a bipolar condition. Treatment did not help and Claimant did not accept or understand the diagnosis.
11. The Hyland Center referred Claimant to Dr. Ardekani, a psychiatrist, for bi-polar disorder, obsessive compulsive disorder, and depression. Claimant was under the care of Dr. Ardekani in January 2007 when she injured her right shoulder.

Preexisting medical conditions –physical

12. In 2000, Claimant developed problems with her hands and arms while employed by Industrial Distribution as a billing and data entry clerk. On December 19, 2000, Dr. Crandall performed bi-lateral carpal tunnel releases. Dr. Crandall rated 5% PPD of each wrist but did not impose work restrictions when he released Claimant from medical care in July 2001.
13. She did not miss work because of her arms. Claimant transferred to customer service, where she talked more and typed less. She settled the case with her employer for 17 ½% of the left wrist, 20% of the right wrist, and 7 ½% of the right elbow.
14. Leading up to the 2007 work accident, Claimant continued to have sharp, shooting pains in her wrists, numbness from her finger tips to the first knuckle, and a pins and needles feeling. She drops pens and paper. It is difficult to shop for groceries. It used to take a half hour to clean a room now it takes all day. Also, she has to rest while wiping the kitchen counter. It

is difficult to grasp a steering wheel, manually open a bus door, or sweep. Numbness wakes her at night with a sharp pain. Claimant testified her wrist and elbow complaints increased after the 2007 work accident.

15. While working for Aramark in 2003, Claimant injured her low back when she lifted a manual elevator door. She received medical treatment but no surgery. Ongoing low back problems include daily pain when sitting or walking more than 20 minutes, inability to lift over 15 pounds, and bumps in the road caused pain and required her to shift in her seat when driving the school bus. To relieve pain, Claimant takes over-the-counter Ibuprofen. No medical restrictions were imposed after Claimant's back injury.
16. At the hearing, Claimant testified she did not know if her back complaints increased after the January 2007 work accident. However, during her deposition Claimant testified her back complaints increased after the 2007 accident.
17. **Jeffrey Faron, M.D.**, treated Claimant from November 3, 2003 to October 14, 2008 for numerous medical conditions, including but not limited to DeQuervain disease, anxiety, and pain in the lumbar region, right thumb, and right shoulder.
18. Prior to January 2007, Claimant treated with Dr. Ardekani, had two psychiatric admissions, experienced problems with both hands and her low back, and was prescribed Lexapro. In addition, she had two failed marriages, and had worked a dozen jobs over 20 years.

The work accident

19. Claimant passed a physical examination before Employer hired her as a school bus driver in 2006. On January 29, 2007, the bus door stuck and she used her right shoulder to manually open it and immediately felt a tear and burning, stabbing pain in her right shoulder.
20. Dr. Kostman performed right shoulder surgery, and released Claimant to work full duty on August 7, 2007.
21. Claimant returned to work on August 28, 2007 when students returned to school. Claimant experienced pain and popping in her shoulders, pain in her back and wrists, anxiety, and depression.
22. Six weeks after Claimant returned to work, an elementary student brought a gun onto the bus. Claimant blamed herself for not realizing the student had a gun. Claimant believed she did not do her job correctly and did not deserve to work there.
23. Claimant's supervisor suggested she take off work for a few weeks. Claimant last worked October 26, 2007, and informed Employer she planned to return to work on November 12, 2007. By November 12, 2007 Claimant's symptoms did not improve, and she did not return to work. She did not notify Employer that she would not return to work. Employer sent Claimant a termination letter.

24. Claimant testified she stopped working because of the gun incident, continued problems with her back, wrists, and shoulder, the bi-polar condition, anxiety, and depression. "Everything gets worse." Bipolar and depression make it difficult to go to the grocery store. She drives but should not. Now, Claimant is dropping things at home.
25. After Claimant stopped working, she thought about looking for work but did not, in part because she returned to the Highland Center for treatment.
26. Claimant testified her over-all health declined after the right shoulder injury in 2007, including the anxiety, depression and bi-polar disorder.
27. In October 2007, Claimant began once a week treatment with Ms. Kathy Wilhelmi, a therapist. During the first meeting, Claimant reported mild depression and moderate anxiety.
28. On October 17, 2007, Claimant reported her 16 year old daughter attempted to commit suicide.
29. On October 24, 2007, Claimant reported severe depression and anxiety, unemployment, fear of leaving her apartment, and "many stressors" at work including depression, anxiety and financial difficulties.
30. On November 7, 2007, Claimant reported severe depression and anxiety, financial problems, and things were not going well at work.
31. On November 26, 2007, Claimant reported severe depression, anxiety, and reluctance to leave her apartment.
32. Claimant has not looked for work and does not believe she can hold a job due to her bi-polar condition, depression, anxiety, wrists, and shoulder.

Medical treatment-right shoulder

33. On February 2, 2007, **Raikar Sudhir, M.D.**, at **Concentra**, diagnosed a right shoulder sprain, and ordered physical therapy and medication. After therapy failed, an MRI revealed a partial tear at the insertion of Claimant's supraspinatus tendon.
34. On June 18, 2007, **Chris Kostman, M.D.**, performed a right shoulder subacromial decompression, debridement, and partial thickness rotator cuff repair.
35. On August 7, 2007, Claimant continued to complain of discomfort with activity. Examination revealed full range of motion, no instability, and motor strength 5/5. Dr. Kostman concluded Claimant had achieved MMI and released her from care with no work restrictions.

Medical treatment-psychological-after work accident

36. In August 2008, Claimant was re-admitted to the Hyland Center for four weeks with complaints that medication was not stabilizing her moods and suicidal thoughts. The center provided individual and group therapy. At discharge, **Dr. Ahmad Ardekani** diagnosed Axis I: Bipolar disorder, depressive disorder, Axis II: Deferred, Axis III: Thyroid condition, allergies, Axis IV: Husband gone a lot as over the road truck driver, Claimant received workers' compensation, and economic problems.
37. Claimant returned to the Hyland Center for six more weeks in January 2009 due to suicidal thoughts as her third husband wanted a divorce, her mother was dying from cancer, and her father suffered from Alzheimer's disease. Other symptoms included mood swings, anxiety, decreased interest in life's pleasures, feeling hopeless, helplessness, withdrawal, poor concentration, crying, becoming easily upset, and inability to control her thoughts.
38. In early 2009, Dr. Coons began to prescribe Claimant's psychiatric medication. Claimant's medications include Lexapro for depression, Lithian and Topomax for the bi-polar condition, and Adivan for anxiety.
39. Claimant's February 16, 2009 diagnosis at discharge included: Axis I: 1. Bipolar disorder, 2. Obsessive-compulsive disorder, Axis II: deferred, Axis III: 1. High blood pressure, 2. Hypothyroidism, 3. Carpal tunnel surgery in 2000, 4. Right shoulder surgery in 2007, Axis IV: Failed marriage, mother dying of cancer, father suffering from Alzheimer's, lack of social support, unemployed, poor coping skills, and living with parents.
40. Medication causes Claimant's hands to shake, muscles to twitch, weight to fluctuate, and eyes to shake side-to-side. Her sleep is also affected with changes in medication. Claimant did not take Lithian before the work accident.

Expert testimony

41. On January 8, 2008, **David Volarich, M.D.**, performed an Independent Medical Examination at the request of Claimant's attorney.
42. Claimant informed Dr. Volarich that she stopped working because it became difficult to turn the steering wheel, which was a dangerous way to drive. However, Claimant did not inform Dr. Volarich that one of the reasons she stopped working was because a student brought a gun onto her bus.
43. For the primary injury, Dr. Volarich diagnosed right shoulder internal derangement, a partial rotator cuff tear with impingement, post arthroscopic subacromial decompression with partial rotator cuff debridement, left shoulder pain due to right shoulder compensation, and aggravation of right elbow, and lateral epicondylitis due to right shoulder compensation.
44. Dr. Volarich opined the January 29, 2007 work accident was the prevailing and primary cause of the diagnoses listed above. He rated 35% PPD of the right shoulder, 5% PPD of the left shoulder, and 5% PPD of the right elbow. Also, Dr. Volarich found the primary injuries were a hindrance or obstacle to Claimant's employment or re-employment.

45. Dr. Volarich diagnosed the following preexisting conditions: right and left elbow lateral epicondylitis, right and left carpal tunnel syndrome post surgery, recurrent right wrist strain, chronic cervical syndrome, chronic lumbar syndrome, and a right great toe fracture with arthritis.
46. Dr. Volarich rated the following preexisting disabilities: 25% PPD of the right wrist, 20% PPD of the left wrist, 10% PPD of the right elbow, 5% PPD of the left elbow, 15% PPD of the body as a whole for the cervical spine, 15% PPD of the right foot for a great toe fracture, and 15% PPD of the lumbar spine.
47. Dr. Volarich found the preexisting conditions caused a hindrance or obstacle to Claimant's ability to secure or maintain employment. He also found the preexisting disabilities and primary injury combined to create greater disability than their simple sum, and recommended a loading factor.
48. Dr. Volarich imposed the following restrictions for the shoulder: avoid all overhead use of the right arm and prolonged use above chest level, minimize pushing, pulling, and traction movements, use proper ergonomics, no lifting over five pounds away from the body or overhead, and no lifting over 10 pounds.
49. For the left shoulder, limit overhead use, pushing, pulling, and traction movements, and limit weight carried away from the body.
50. For the elbow, forearms, wrists, and hands; avoid using hands in an awkward position, minimize repetitive gripping, pinching, squeezing, pushing, pulling, twisting, rotator motions, avoid impact and vibratory trauma and use anti-vibration gloves, and no lifting over five pounds away from the body.
51. For the spine: Claimant may bend, twist, lift, push, pull, carry, climb and lift weight to tolerance.
52. Additionally, Dr. Volarich found Claimant sustained disability from depression and bipolar conditions but deferred to a psychiatrist for a disability rating.
53. **Jay Liss, M.D.**, a psychiatrist, examined Claimant on August 14, 2009 at the request of her attorney.
54. Prior to examination, Claimant completed a set of questionnaires. Based on the questionnaire answers, examination, and other medical reports, Dr. Liss opined Claimant's Global Assessment of Functioning (GAF) score was below 50, which reflected serious psychiatric symptoms. He found Claimant made a valid presentation during the examination.
55. Dr. Liss diagnosed the following conditions: Axis I (preexisting) - A. Attention Deficit Disorder- a lifelong congenital problem, B. Childhood anxiety and phobia including school phobias, C. Chemical abuse untreated, D. Bipolar illness, Axis II - Personality disorder with multiple psychiatric symptoms, Axis III- No major medical problems presently, Axis IV- Major stress in life due to disability and inability to provide financially for herself and family, Axis V-GAF less than 50.

56. Dr. Liss concluded Claimant's preexisting psychiatric disability combined with her right shoulder injury from 2007 and other physical disabilities create greater overall disability than their simple sum.
57. Further, Dr. Liss found Claimant to be permanently and totally disabled due to a combination of Claimant's preexisting psychiatric disability and other physical disabilities. He believed Claimant could only work at a minimal level, based on her psychiatric and physical disability.
58. Dr. Liss opined Claimant's medical conditions affected her ability to obtain and maintain jobs in the past and were an obstacle or hindrance to employment. But he commended Claimant's desire to work for short periods in low level positions, despite psychiatric problems. Dr. Liss found the bipolar disorder; anxiety and phobias existed prior to January 2007.
59. On cross examination, Dr. Liss opined Claimant is unemployable due to her psychiatric disability alone. On redirect, he testified Claimant had the same psychiatric condition five years ago. Furthermore, she was not totally disabled at that time. He found the addition of physical injuries caused Claimant to be permanently and totally disabled.
60. Dr. Liss opined Claimant's change in depression and anxiety in the fall of 2007 was most likely caused by her unpredictable moods and not a deteriorating psychiatric condition. However, Dr. Liss was unaware Claimant testified during deposition that her anxiety, depression, and bipolar conditions worsened after the right shoulder injury.
61. Claimant did not inform Dr. Liss about the gun incident, but, when asked he testified it may cause Post Traumatic Stress Disorder (PTSD).
62. Dr. Liss testified Claimant's medications can affect her ability to work and may cause lethargy, cognitive dysfunction, impact ability to think and make judgments, calculate, read, and cause academic and intellectual deficiencies.
63. **James England Jr.**, a vocational rehabilitation counselor, interviewed Claimant on January 19, 2010 at the request of her attorney. Claimant scored post high school level in reading and 8th grade level in math on the Wide-Range Achievement Test, Revision 3. Mr. England opined Claimant's test results were sufficient to qualify for a wide range of vocational options, absent physical and mental limitations.
64. Mr. England concluded Claimant's physical limitations alone limit her to less than a full range of sedentary work options. In particular, upper extremity restrictions prevent her from returning to clerical work due to the repetitive nature of the job.
65. However, when psychiatric limitations were added, Mr. England found Claimant incapable of sedentary work and totally disabled from a vocational standpoint. Also, the high unemployment rate makes it more difficult for Claimant to be hired given her restrictions.
66. Mr. England commended Claimant on her past work efforts. He noted Claimant's experience with Windows, Word, a billing system, and a variety of jobs including

bookkeeping, inventory control, shipping and receiving, and supervision. He noted Claimant's early clerical work required more skill. Later work as a cafeteria cashier and bus driver required less skill. Nevertheless, she continued to find work.

67. Mr. England did not recommend Claimant for rehabilitation services due to her lack of focus and follow through.
68. During an employment interview, Mr. England expected Claimant to be pleasant and cooperative, but appear tired and depressed.

RULINGS OF LAW

After giving careful consideration to the entire record, based upon the above testimony, competent and substantial evidence presented, and the applicable law of the State of Missouri, I make the following findings:

Claimant asserts the SIF is liable for PTD benefits due to the combination of her preexisting disabilities and the right shoulder injury. The SIF contends Claimant is PTD due to her preexisting disabilities alone or alternatively, because of deterioration of preexisting disabilities. Either way, the SIF has no liability.

The employee has the burden to prove by a preponderance of credible evidence all material elements of her claim, including SIF liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968). Claimant must prove the nature and extent of disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc*, 895 S.W.2d 650, 655 (Mo. App. 1995). (Overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo banc 2003)).⁴

Section 287.220.1 RSMo (2005)⁵, pertaining to SIF liability, provides that in a case of PPD or PTD benefits, Claimant must prove the following:

- 1) There must be a determination that the employee has permanent disability resulting from the last injury alone which is compensable, and
- 2) There was a pre-existing permanent disability that was serious enough to constitute a hindrance or obstacle to employment or re-employment which combines with the disability from the compensable work related injury to create a greater overall disability to the employee's body as a whole than the simple sum of the disability from the work injury the pre-existing disability considered separately.
- 3) To establish entitlement to PTD benefits, Claimant must also prove that all of the injuries and conditions combined, including the last injury; have resulted in the

⁴ Several cases herein were overruled by the *Hampton* case on unrelated grounds. No further reference will be made to *Hampton*.

⁵ See also *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. 2000) and *Luetzinger v. Treasurer of Missouri, Custodian of Second Injury Fund*, 895 S.W. 2d 591 (Mo. App. 1995).

employee being permanently and totally disabled. *Boring v. Treasurer*, 947 S.W. 2d 483 (Mo. App. 1997).

In deciding whether the SIF has any liability, the first determination is the degree of disability from the last injury considered alone. *Hughey*, 34 S.W.3d at 847. Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. *Id.* If the last injury in and of itself rendered Claimant PTD, then the SIF has no liability and the employer is responsible for the entire amount. *Id.* (Citations omitted).

Claimant sustained permanent partial disability from the last injury alone

Dr. Volarich rated 35% PPD of Claimant's right shoulder. Complaints included pain and popping with activity. Claimant settled the primary case with Employer for 30% PPD of the right shoulder. However, the SIF is not bound to the terms of the settlement between Claimant and Employer. *Totten v. Treasurer of State*, 116 S.W.3d 624, 628 (Mo. App. 2003). Based on the credible testimony of Dr. Volarich and Claimant, medical records and reports, I find Claimant sustained 30% PPD of the right shoulder as a result of the January 29, 2007 work injury.⁶

I find Claimant's pre-existing disabilities were sufficient to constitute a hindrance or obstacle to employment or re-employment. I find the opinions of Drs. Volarich and Liss are credible. They found Claimant's preexisting conditions create a hindrance or obstacle to her ability to secure or maintain employment. Also, they concluded Claimant's preexisting disability combined with her right shoulder injury and other physical injuries to cause more overall disability than the simple sum of the injuries. I find Claimant's testimony is credible that she continued to have problems with both wrists and her low back leading up to the work accident.

I find credible Dr. Liss' opinion that Claimant's Attention Deficit Disorder, bipolar disorder, anxiety, school phobias, and chemical abuse existed prior to the January 2007 work accident, affected her ability to obtain and maintain jobs in the past and were an obstacle or hindrance to her employment.

I find credible Claimant's testimony and medical records that show she suffered from crying spells, anxiety, death wishes, and other psychological disorders prior to the work accident. Claimant testified she was afraid to go to work at times and it would "snowball" into multiple days off work. She had a dozen jobs, most of which did not last more than a year, but Dr. Liss and Mr. England commended her efforts to work.

I find Claimant's preexisting psychological problems, bilateral wrists, and low back disability create a hindrance or obstacle to her employment or reemployment. I find the preexisting medical conditions combine with the right shoulder injury to cause more overall disability than the simple sum of the injuries.

⁶ Dr. Volarich also rated 5% PPD of the left shoulder and 5% PPD of the right elbow. However, the record does not contain competent and substantial evidence of ongoing disability to these body parts.

Claimant is permanently and totally disabled due to a combination of her primary injury and pre-existing disabilities

Section 287.020.7 RSMo defines total disability as the inability to return to any employment and not merely... [the] inability to return to the employment in which employee was engaged at the time of the accident.” The words "inability to return to any employment" means that "the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." ***Kowalski v. M-G Metals and Sales, Inc.***, 631 S.W.2d 919, 922 (Mo. Ct. App. 1982).

The words “any employment” mean “any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition. ***Id.*** at 922. Courts do not consider working very limited hours at rudimentary tasks to be reasonable or normal employment. ***Grgic v. P & G Const.***, 904 S.W.2d 464, 466 (Mo. App. 1995).

The primary determination for permanent-total disability is whether the claimant is able to compete in the open labor market given [her] physical condition and situation. ***Messex v. Sachs Elec. Co.***, 989 S.W.2d 206, 210 (Mo. App. 1999). The test for permanent total disability is whether, given the claimant's situation and condition, she is competent to compete in the open labor market... . The central question is whether in the ordinary course of business, an employer would reasonably be expected to hire the claimant in her present physical condition, reasonably expecting her to perform the work she is hired to perform. ***Grgic***, 904 S.W.2d at 466.

I find Dr. Volarich’s opinion is credible that Claimant’s work activities should be restricted, but she is not PTD from a physical standpoint. I find credible Mr. England’s opinion that Claimant can only work a very limited number of sedentary jobs, based on Dr. Volarich’s work restrictions. In particular, upper extremity restrictions prevent Claimant from returning to clerical work due to the repetitive nature of the business. Furthermore, when the psychiatric disability was added, Mr. England found no jobs that Claimant could perform.

I find credible Dr. Liss’ opinion that Claimant is PTD due to a combination of her preexisting psychiatric conditions and her physical disabilities, including the right shoulder. Also, Dr. Liss found Claimant’s medication can affect her ability to work because it may cause lethargy, cognitive dysfunction; other academic deficiencies and impact her ability to make decisions, calculate, and read.

The SIF’s contention is not persuasive that a student bringing a gun on the school bus may have triggered Claimant’s PTSD. When asked on cross-examination, Dr. Liss testified the incident could trigger PTSD. However, the burden of proof is not met by establishing there is a “possibility” the injury was the result of the accident. ***Davies v. Carter Carburetor Div.***, 429 S.W.2d 738 (Mo.1968).

I find Claimant testified credibly that leading up to January 2007; she had sharp shooting pain in her wrists and numbness from her finger tips to the first knuckle, tingling, she dropped pens and paper, had difficulty grasping a steering wheel, and elbow pain. Also, she had low back pain with sitting or walking more than 20 minutes, or riding on bumpy roads. As discussed

above, Claimant suffered from anxiety, phobias and death wishes prior to 2007. After the 2007 work accident, right shoulder complaints included pain with overhead movements and popping.

During Claimant's testimony, I observed her sit in the chair with her jacket behind her in what appeared to be an awkward position. However, she said the position of the jacket helped her back. Claimant sat 45 minutes and answered questions with no apparent physical or emotional distress. She seemed to have a little discomfort when she stood up.

I find not credible Claimant's testimony that her physical and emotional symptoms increased after the work accident. The record contains no evidence Claimant missed work or sought additional treatment for her right toe, carpal tunnel syndrome, cervical or lumbar spine after January 2007. Although Claimant disagreed with Dr. Volarich's statement that she did not self-impose work restrictions before January 2007, the record is clear no treating physician imposed restrictions during that time.

I find credible Dr. Liss' opinion that bipolar syndrome cycles in two unpredictable patterns of behavior, manic (hyper) and depression. The number of cycles varies over time. Moreover, he found the disorder affected Claimant before and after January 2007. Therefore, Dr. Liss did not believe psychological episodes after January 2007 represented increased symptoms.

However, Dr. Liss' provided some contradictory testimony: On cross-examination, Dr. Liss opined Claimant is unemployable based on her psychiatric disability alone. On redirect, Dr. Liss testified Claimant has the same psychiatric condition today that she had five years ago, and was not totally disabled at that time. Also, in Axis III, Dr. Liss reported "No major medical problems presently." Dr. Liss found Claimant's psychiatric condition created "close to 100 percent" disability, with only minimal employment options.

Nevertheless, he concluded the addition of Claimant's physical disabilities caused her to become totally disabled, as evidenced by her ability to keep working until the January 2007 work accident.⁷

Mr. England described Claimant as a younger worker with solid reading and math skills and transferable work skills, absent physical and psychological restrictions. However, based on credible testimony from Drs. Volarich and Liss, Mr. England, Claimant, medical records, reports, Claimant's work history, disabilities from preexisting and primary injuries, and Claimant's demeanor at the hearing, I find no employer in the ordinary course of business would reasonably be expected to employ Claimant in her present physical and psychological condition and reasonably expect her to perform the work she was hired to do. I find substantial evidence in the record as a whole that Claimant is unable to compete in the open labor market.

⁷ At the hearing, Claimant testified she stopped working because of physical and psychological pain and the gun incident. However, Claimant did not report the gun incident or her daughter's attempted suicide to Dr. Volarich, Dr. Liss or Mr. England. Consequently, they did not give an opinion about the impact of these events on Claimant's ability to compete in the open labor market.

Commencement Date for Permanent Total Disability Payments

The obligation to pay permanent disability compensation commences on the date claimant's permanent disability begins. ***Kramer v. Labor & Indus. Rel. Com'n***, 799 S.W.2d 142, 145 (Mo. App. 1990).

The parties stipulated Claimant achieved MMI on August 7, 2007. Therefore, I find Claimant reached MMI on August 7, 2007. Having previously found 30% PPD of Claimant's right shoulder, I find Employer is liable for 69.6 weeks of compensation at the stipulated rate of \$267.94 per week, beginning retroactively on August 7, 2007.

I find Employer's liability for PPD should have commenced August 7, 2007, and concluded on December 8, 2008. I find the SIF is liable to pay Claimant the sum of \$267.94 per week beginning December 9, 2008 for the remainder of her life. ***Laterno v. Carnahan***, 640 S.W.2d 470, 471 (Mo. App. 1982).

CONCLUSION

Claimant is permanently and totally disabled due to a combination of her preexisting medical conditions and primary work accident. The Second Injury Fund is liable for lifetime weekly benefits as outlined in this award. The award is subject to a lien in favor of Claimant's counsel for legal services rendered.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation