

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

Injury No.: 99-089905

Employee: Sandra F. Johnson  
Employer: Southwestern Bell Telephone Company  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

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

**Discussion**

Moot issues

Because we agree with the administrative law judge that employee is permanently and totally disabled as a result of the effects of the last injury considered in isolation, the plain language of § 287.220.1 RSMo is not implicated, and the Second Injury Fund has no liability in this matter. *Palmentere Bros. Cartage Serv. v. Wright*, 410 S.W.3d 685, 691 (Mo. App. 2013). As a result, we discern no need to consider the moot issue whether employee timely filed her claim against the Second Injury Fund. Accordingly, we hereby disclaim the administrative law judge's findings, analysis, and conclusions with respect to this issue.

We also wish to make clear that we focused our inquiry on employee's condition as of the time she reached maximum medical improvement in resolving the issue of the nature and extent of permanent disability resulting from the work injury. We believe that the administrative law judge did so as well, but to the extent the administrative law judge's comments on page 17 of her Award regarding employee's 13 years out of the labor market may suggest otherwise, we hereby disclaim those comments.

**Conclusion**

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Emily Fowler, issued July 8, 2013, is attached and incorporated by this reference.

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

Employee: Sandra F. Johnson

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

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of March 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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DISSENTING OPINION FILED  
James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: Sandra F. Johnson

### **DISSENTING OPINION**

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the Commission should modify the award of the administrative law judge to award permanent partial rather than permanent total disability benefits to this employee.

I wholly disagree with the administrative law judge's finding that employee is credible regarding her pain complaints and purported need to lie down throughout the day. Employee was only 42 years of age when she suffered her accident on July 14, 1999. That accident resulted in a mere low back strain injury for which employee received conservative treatment. After a series of specialists determined that there was no medical or objective basis for employee's continued complaints of debilitating low back pain, attending physicians released her to return to work with minimal permanent partial disability ratings. Since then, employee has done little to improve her situation.

In fact, employee has not sought out any additional medical treatment for her allegedly totally disabling low back pain for over *ten* years. Instead, employee relies on Advil and meditation to manage a condition for which she asks us to hold her employer liable for permanent total disability benefits for the rest of her lifetime. I find it difficult to accept that employee would fail to seek additional medical treatment if she really were suffering from a pain condition of the degree and magnitude that she described in her testimony. Especially as one who has suffered from chronic pain conditions of my own, I do not believe that employee would decide in 2003 that she would no longer look for medical assistance to manage her condition, and instead simply live with her pain.

But this is not the only problem with employee's testimony regarding her condition. Employee asks us to believe that she can only sit for about an hour owing to low back pain, and that she has trouble concentrating for prolonged periods of time. But the record reveals that employee sat for almost the entire duration of the hearing before the administrative law judge in this matter, during which she was able to answer, with clarity and specificity, what must have seemed to her a near-endless stream of questions posed to her by multiple attorneys.

Employee presented some expert testimony to bolster her case for an award of permanent total disability benefits, but this expert testimony suffers from a crucial and (in my view) fatal flaw: both Dr. Koprivica and employee's vocational expert Mr. Santner relied on employee's subjective complaints to reach their determinations that employee is permanently and totally disabled as a result of her low back pain resulting from the work injury. Where employee's complaints are not credible, the testimony from these experts lacks foundation, and their opinions provide no support whatsoever for an award of lifetime benefits from the employer.

In sum, although I acknowledge that employee suffered a compensable low back strain injury, I have serious doubts as to the credibility of employee's testimony with regard to the nature and extent of permanent disability resulting from that injury. I would enter an order modifying the award of the administrative law judge and entering an award of

Employee: Sandra F. Johnson

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permanent partial rather than permanent total disability benefits against the employer. Because the majority has determined otherwise, I respectfully dissent.

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James G. Avery, Jr., Member

## **FINAL AWARD**

EMPLOYEE: Sandra F. Johnson

EMPLOYER: Southwestern Bell Telephone Company

INSURER: Self-insured c/o Sedgwick CMS

INJURY NO.: 99-089905

DATE OF INJURY: July 14, 1999

ADDITIONAL PARTY: Treasurer of the State of Missouri;  
Custodian of the Second Injury Fund

HEARING DATE: May 13, 2013 Checked by: ESF/cy

### **FINDINGS OF FACT AND CONCLUSIONS 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? Accident
4. Date of accident or onset of occupational disease: July 14, 1999
5. State location where accident occurred or occupational disease was contracted: 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? Employer was self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was moving furniture in order to install a phone jack.
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: Low back
14. Nature and extent of any permanent disability: Permanent total disability as to the employer
15. Compensation paid to-date for temporary disability: \$36,278.96
16. Value necessary medical aid paid to date by employer/insurer? \$13,302.60
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$1,106.13
19. Weekly compensation rate: \$578.48/\$303.01
20. Method wages computation: Stipulation of the parties
21. Amount of compensation payable: permanent total disability from the employer beginning July 21, 1999, in the amount of \$578.48 per week for as long as Employee remains permanently and totally disabled
22. Second Injury Fund liability: N/A
23. Future requirements awarded: Employer shall provide Claimant with any and all future medical care and treatment necessary to care and relieve the effects of both her medical and psychological conditions arising from her July 14, 1999 injury.

Said payments to begin as of date of this award and to be payable and be subject to modification and review as provided by law.

Attorney's lien is granted in favor of Mr. William Spooner in the amount of 25% of the compensation payable.

## **FINDINGS OF FACT and CONCLUSIONS OF LAW**

EMPLOYEE: Sandra F. Johnson

EMPLOYER: Southwestern Bell Telephone Company

INSURER: Self-insured c/o Sedgwick CMS

INJURY NO.: 99-089905

DATE OF INJURY: July 14, 1999

ADDITIONAL PARTY: Treasurer of the State of Missouri;  
Custodian of the Second Injury Fund

HEARING DATE: May 13, 2013 Checked by: ESF/cy

On May 13, 2013, the employee, the self-insured employer and the Second Injury Fund appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Ms. Sandra Johnson (hereinafter "Ms. Johnson" or "employee"), appeared in person and with counsel, Mr. William Spooner. The employer appeared through counsel, Mr. Thomas Munsell. The Treasurer of the State of Missouri as Custodian of the Missouri Second Injury Fund appeared through counsel, Ms. Kimberly Fournier.

### **STIPULATIONS**

Prior to the hearing, the parties stipulated to the following issues:

1. At all times relevant herein, Southwestern Bell Telephone Company was an employer operating subject to Missouri's Workers' Compensation Law and was fully self-insured as required by Missouri law;
2. Ms. Johnson was Employer's employee working subject to the law in Clay County, Missouri;
3. Ms. Johnson timely notified SWBT of her July 14, 1999 accident;
4. SWBT provided Ms. Johnson with medical care costing \$13,302.60;
5. SWBT paid TTD in the amount of \$36,278.96 at the temporary total disability rate of \$578.48/week. This is a total of 62 5/7 weeks of compensation;
6. Ms. Johnson provided SWBT with timely notice of this claim and a written claim against SWBT was filed within the time allowed by law.

### **ISSUES**

The parties requested the Division to determine the following issues:

1. Whether Ms. Johnson suffered an injury by accident as a result of her employment with SWBT;
2. The nature and extent of Ms. Johnson's alleged permanent partial and/or permanent total disability, if any;
3. Whether Ms. Johnson is entitled to receive, and whether SWBT is required to provide additional medical care in the future as is necessary to cure and relieve the effects of the July 14, 1999 accident;
4. Whether Ms. Johnson filed a written claim against the Missouri Second Injury Fund with the Division of Workers' Compensation within the time allowed by law; and,
5. The obligation of the Missouri Second Injury Fund for Ms. Johnson's alleged permanent partial and/or permanent total disability, if any.

The employee is not seeking further compensation for any alleged unpaid temporary total disability benefits or unpaid past medical expenses.

### **FINDINGS OF FACT**

The parties submitted an extensive record in this matter. Employee testified on her own behalf. In addition, the employee presented the following exhibits, each of which were admitted into evidence without objection, or if deposition transcripts, subject to the objections contained therein:

	<b><u>Document</u></b>	<b><u>Date[s]</u></b>	<b><u>Bates #</u></b>
A	Claim for Compensation	07-13-01	1
B	Answer to Claim for Compensation (Employer/Insurer)	07-19-01	3
C	Amended Claim for Compensation	01-22-07	4
D	Answer to Claim for Compensation (Employer/Insurer)	02-01-07	6
E	Answer to Claim for Compensation (Second Injury Fund)	02-21-07	8
F	Amended Claim for Compensation	04-13-09	10
G	Answer to Claim for Compensation (Employer/Insurer)	04-22-09	12
H	Answer to Claim for Compensation (Second Injury Fund)	04-22-09	14
I	Dr. P. Brent Koprivica (report)	09-18-01	16
J	Dr. P. Brent Koprivica (addendum report)	03-20-02	27
K	Dr. P. Brent Koprivica (addendum report)	08-21-05	29
L	Dr. P. Brent Koprivica (addendum report)	10-26-11	31
M	Dick Santner (report)	10-12-02	37
N	Dick Santner (addendum report)	03-26-12	42
O	Dr. Todd P. Hill (report)	12-01-08	48
P	Dr. Todd P. Hill (addendum report)	05-21-12	56
Q	Dr. Steven Cicero/Northtown Medical Group	10-25-95 thru 09-27-02	60
R	North Kansas City-Occupational Medicine Associates	07-15-99 thru 08-23-99	110

S	Dr. David K. Ebelke/Spine Surgery, Ltd.	08-09-99 thru 07-07-00	125
T	North Kansas City Hospital	08-09-99 thru 09-25-00	167
U	North Kansas City Hospital	09-25-00 thru 10-29-01	187
V	HealthSouth	10-08-99 thru 12-21-99	247
W	Dr. Ira Fishman	10-15-99 thru 03-06-01	290
X	Dr. Stephen L. Reintjes/Kansas City Neurosurgery Group	02-09-00 thru 03-22-00	318
Y	Dr. Michael Clemente/Orthopedic Surgeons, Inc.	09-22-00 thru 12-20-00	328
Z	Dr. Joseph Palazola	12-18-07 thru 04-02-08	339
AA	Dr. David W. Myers	10-18-95 thru 08-07-96	355
	Myers, Fitch, Kalbac, Gorman Women's Clinic		
BB	Liberty Hospital	02-15-96 thru 04-01-96	367
CC	Liberty Hospital	05-08-97 thru 06-02-97	376
DD	North Kansas City Hospital	09-10-96	381
EE	North Kansas City Public Schools (transcript)		384
FF	Metropolitan Community College (transcript)		386
GG	Park University (transcript)		388
HH	Social Security Administration		390
	• Dr. Steven L. Reintjes	(02-09-00 thru 08-31-00)	395
	• Dr. Steven L. Hendler	(09-17-03)	426
	• Dr. David Ebelke	(08-23-99 thru 02-26-03)	431
	• North Kansas City Hospital	(02-16-00 thru 10-29-01)	436
	• Dr. P. Brent Koprivica	(09-18-01)	448
	• Dick Santner	(10-12-02)	454
	• Dr. Stephen Cicero	(05-07-99 thru 09-27-02)	459
	• Dr. Michael Clemente	(09-22-00 thru 12-20-00)	463
II	Deposition of Dr. P. Brent Koprivica	10-13-03	
JJ	Deposition of Dr. P. Brent Koprivica	02-16-12	
KK	Deposition of Dick Santner	04-15-12	
LL	Deposition of Dr. Todd P. Hill	06-04-12	
MM	Deposition of Sandra Johnson	01-23-03	
NN	Deposition of Sandra Johnson	04-01-08	
OO	1998 Payroll Summary		
PP	1999 Payroll Summary		

Although the Employer did not call any witnesses, it did present the following exhibits, which were admitted into evidence without objection, or if deposition transcripts, subject to the objections contained therein:

1. Certified Records of Northtown Medical Group/Dr. Steven Cicero regarding treatment of employee;
2. Certified Business Records of SWBT – Personnel file of Sandra F. Johnson;
3. Deposition transcript of Bud Langston, M.S., dated March 6, 2012;
4. Deposition transcript of Terrence Pratt, M.D., dated February 23, 2012;
5. Deposition transcript of Allan D. Schmidt, Ph.D., dated April 10, 2012;
6. Addendum Report of Allan D. Schmidt, Ph.D., dated June 25, 2012; and,
7. Certified Records of HealthSouth, North Kansas City, regarding treatment of employee.

The Second Injury Fund did not offer any additional evidence, either through testimony or documentation.

Based on these exhibits and testimony, I make the following findings. Claimant was born on July 27, 1957, and was 42 years of age when she was injured while working for Southwestern Bell Telephone Company (hereinafter referred to as Employer) on July 14, 1999. At the time of the hearing, the Claimant is 55 years of age. The Claimant graduated from Winnetonka High School in 1975 and attended Maple Woods Community College and Park University obtaining approximately 51 hours of college credit. Claimant took general courses in college and none of her college hours related to work done by a computer. Claimant was hired by Employer in 1979. The Claimant continued to work for Employer for the next 21 years. The Claimant's last day of employment was July 21, 1999. The Claimant worked for the Employer as a customer service technician for the last five years of her employment. A customer service technician installs and repairs phone lines inside and outside of homes. This job includes cable wiring, installing phone jacks and repair. It requires heavy lifting, the use of ladders, climbing telephone poles, moving furniture and working at or above floor level with extended bending, stooping and crouching.

### **CLAIMANT'S PHYSICAL INJURIES**

On or about July 14, 1999, the Claimant was working at a customer's residence. The customer requested that the Claimant move a large solid oak entertainment center. The Claimant unloaded the shelves with the customer and, thereafter, lifted the cabinet up approximately three inches. While lifting and moving the cabinet up to her right, she felt immediate pain in her low back. Claimant testified she heard a loud pop and felt pain that went from her low back through her hip and down her right leg. She reported the injury to her Supervisor, Jim Dougherty, after completing work at the customer's house. She had severe pain in her low back and right leg and within an hour after her injury, the pain caused her to lie on the ground. Claimant declined medical treatment that day after reporting the injury anticipating the pain would subside. Over the weekend the Claimant's pain in her low back, hip and right leg worsened. She requested medical treatment from her employer the following Monday, which was provided. The Claimant first treated with Occupational Medicine Associates and, due to ongoing pain, was sent for an MRI study on August 9, 1999. This revealed spondylolysis at L5 with Grade I spondylolysis of L5 on S1. There was degenerative disk disease present and a small central protrusion or bulge at

L2-L3. Claimant was next referred from Occupational Medicine Associates to Dr. David Ebelke, orthopedic surgeon. Dr. Ebelke administered epidural steroid injections and administered narcotic pain medication and muscle relaxers. The Claimant did not have a positive response. The Claimant was referred to Dr. Ira Fishman, a physiatrist, who treated her from October 15, 1999 through August 9, 2000. The Claimant underwent an EMG Study which was negative for radiculopathy. The Claimant underwent extensive physical therapy. Claimant entered a work hardening program, which she did not tolerate well. Claimant testified that she was able to barely tolerate the first part of work hardening, which was four hours a day; however, when the work hardening progressed to eight hours a day, she was unable to complete the last five visits of work hardening due to pain. Claimant was also examined by Dr. Stephen Reintjes, neurosurgeon, who did not recommend surgery, but conservative management. The Claimant also completed a Functional Capacity Evaluation which revealed some symptom magnification and self-limiting behaviors. Claimant was released from care by Dr. Fishman with a 15-pound restriction from floor to overhead and a 20-pound 100-foot lifting restriction which were permanent. At the time of the Claimant's release by Dr. Fishman, Claimant testified that she had continued pain in her low back as well as pain and weakness from her low back into her right hip and her right leg.

On September 18, 2000, Claimant was walking from her driveway to her front porch steps when she had severe pain in her right lower back and hip and her legs went out or gave way causing her to fall striking her left kneecap on the edge of the concrete step. Claimant suffered a transverse fracture of her left patella. She was referred to Dr. Michael Clemente who did a surgical resection of the patellar fragments and reattached the patellar tendon surgically. The Claimant was released from Dr. Clemente's care as of December 20, 2000. Claimant testified that on other occasions after her July 14, 1999 injury, she had other instances when her back, hip and right leg had given way causing her to fall. She has continued to have the same low back pain and sensations of her back, hip and legs giving way over the last 13 years since the July 14, 1999 injury. These complaints are also documented in the medical records. Claimant testified that for several years she has used a cane, although not medically prescribed, to help her with her balance when her back, right hip and right leg give way. Claimant used prescription narcotic medication for a period of approximately three years, but after difficulties and possible addiction problems, she discontinued the use of prescription narcotics in approximately 2003. Claimant testified that the use of the narcotics affected her concentration and that her family doctor was concerned about her narcotic use so she followed his recommendation to discontinue the use of narcotic medications. The Claimant currently uses only over-the-counter medications.

Claimant testified that she has constant low back pain and that her activities of daily living are greatly affected by her injuries. She has difficulty with sitting for too long, as well as standing for too long due to pain, causing her to constantly change postural positions throughout the day. She has difficulty with lifting and bending. The pain in her low back wakes her up at night after less than an hour of sleeping and that generally she only obtains about four hours of sleep a day. Sometimes she might be up all night due to pain and then the next day get four to six hours of sleep. These sleep patterns are affected by her chronic sharp low back pain. While laying down, she is unable to lay on her right side, as it puts too much pressure on her back and it hurts more. Sometimes she has to get up from bed during the night and move around, walk or sit up for a while before she is able to resume sleep. She has to lay down unpredictably at different

times during her day and that she has fatigue, focus and concentration problems, particularly on bad days due to pain. She cannot predict on a daily basis the extent of her capabilities and that she has multiple bad days during the week. She does very little house cleaning and minimal cooking due to pain. She has a recliner which allows her to sit and relieve her pain during the day. She is sitting and standing frequently and that three to four times a day she must lie down to relieve pain in her back and legs. She does not take any sleeping pills because she does not believe that her problem is falling asleep as much as it is staying asleep due to the sharp pains that she has in her low back, right hip and right leg, as well left knee.

Claimant testified that as a result of her back injury on July 14, 1999, she has a pain level of eight most of time on a scale from one through ten. She has a constant throbbing in her right lower back. Her back is also very sore to the touch and feels like a fist in her back and she has pressure in her back from swelling. She has a constant shooting pain that radiates down the back of her right leg right above the knee and pain in her right foot in the heel, pain along the outside of the bottom of her foot and under the ankle on the outside. She has to lie on the floor as straight as she can and try to relax and relieve her low back pain. The spasms usually last approximately 15-20 minutes and are sometimes accompanied with sharp pain in the lower back around the waist line. She is unable to bend forward and that she cannot get any further than a right angle. She has a dull headache all of the time due to being in constant pain and at times the headaches are much worse when she has a lot of back pain. Claimant has to lie down as straight as possible to help ease her back pain.

Claimant testified that while sitting she has constant pain in her right leg and that after about ten minutes of sitting, her right foot goes numb. After sitting she has to find a wall and press herself against it in order to straighten her back to ease her back pain. If she sits too long, then she will have intense and painful spasms. While standing, she is unsteady on her feet and sometimes she may start to sway or fall and usually has to grab something to keep her from falling. She is unable to put much weight on her right leg, as it puts pressure on her right hip and hurts. She has pinching in her right hip slightly above where her right leg and hip join each other. When walking, her right leg gives out causing her knees to buckle and causing her to fall. Claimant's testimony with regards to her back, right hip, right leg and left knee is consistent with her deposition testimony given in 2003 and 2008, her testimony at trial, as well as the contemporaneous medical records. Claimant was a very active person prior to the July 14, 1999 injury. She played volleyball competitively and worked full-time without restriction. Claimant has not worked in more than 13 years.

#### **CLAIMANT'S PHYSICAL MEDICAL CONDITION BEFORE JULY 14, 1999.**

Claimant had an unremarkable medical history until approximately 1996. At that time, the Claimant began to experience severe stomach, back and flank pain as well as blood in her urine. Claimant testified that these health problems were severe enough that she went to her family doctor, Dr. Steven Cicero. Dr. Cicero completed numerous medical tests over the next several months to try and discover the source of her pain. Claimant missed work during this period of time. Dr. Cicero could not find the source of her problem. Due to the pains that she was having across her back Dr. Cicero referred her to Dr. Barry Rose, an orthopedic surgeon. On January 29, 1996, Dr. Rose examined the Claimant for low back and right flank pain. The

Dr. Rose ordered x-rays which showed Grade I to Grade II spondylolysis and some mild degenerative changes. He recommended weight reduction and Naprosyn, as well as a back program. She went to approximately six physical therapies, but inasmuch as they only lasted fifteen minutes and because it was not helping with the source of her pain, she quit going. Claimant returned to Dr. Rose on February 27, 1996. Dr. Rose's records indicated that she was improving although it is recorded that she did have back and leg pain. Dr. Rose charted that while her pain was not worse, he did feel that she may have some postural limitations with climbing, bending and stooping. Claimant's third and last visit with Dr. Rose was on March 18, 1996. At that time, Dr. Rose stated that the Claimant was doing okay as far as her back was concerned although the Claimant still had some back pain. Dr. Rose discharged Claimant from his care, but thought she might need a back program. Claimant testified that she does recall going to the physical therapy visits.

Claimant indicated that she continued to have problems with her torso, flank and low back. She was quite frustrated with the inability of the doctors to discover the source of her medical problem from late 1995 until May of 1997. She underwent ultrasound studies of her abdomen and stomach and had a series of tests dealing with her small bowels in March of 1996. She also had a laparoscopy for endometriosis in March of 1996 and underwent upper GI series testing as well as heart stress testing. All of these tests were normal.

Eventually in early 1997, her doctors finally concluded that she had gallbladder problems. The Claimant's gallbladder was removed on May 19, 1997. After her recovery from gallbladder surgery she returned to work full-duty and fully recovered from any and all problems associated with her torso, back and flank pain. Payroll records from 1998 and 1999 indicated that the Claimant did not miss work after returning to work from her gallbladder surgery. In 1998, the payroll records entered into evidence show that the Claimant worked 361.50 hours of overtime and 40-hour work weeks. In 1999, Claimant worked over 361.50 hours of overtime for the first seven and a half months before her July 14, 1999 injury. Claimant testified that she worked without any medical issues and without any physical problems of any kind and returned to her job as a customer service technician without restrictions or limitations. Claimant was able to climb poles, use ladders, carry heavy equipment, including her utility belt. She was able to install equipment both outside and inside homes without difficulty. She had no difficulty with reaching, bending and stooping. Claimant indicated that she was able to work at or above floor level where the cable jacks were located in the wall without any issue. Claimant testified that for over two years before July 14, 1999, she did not have any postural limitations with standing, walking, sitting, stooping, bending or lifting or ongoing low back, right hip or right leg pain or left knee pain. She was able to completely fulfill her normal job duties without any problems or pain. In addition, she did not have any problems with sleep interruption or erratic sleep patterns before July 14, 1999. She also did not have any focus or concentration issues nor did she have any erratic sleep patterns. Claimant testified that she did not need to lie down during her day due to low back pain before July 14, 1999.

#### **CLAIMANT'S PSYCHOLOGICAL CONDITION BEFORE JULY 14, 1999.**

Claimant testified that she was frustrated with the doctors' inability to diagnose and/or treat her medical conditions from late 1995 through May of 1997. Claimant was instructed by

her Supervisor in 1996 to go to an EAP or an Employment Assistance Program to discuss problems that the Supervisor felt that she was having with stress. She did go to the EAP counselor on one occasion in 1996 and, thereafter, she was not referred to any other professional, psychiatrist or psychologist. She did not return to the EAP and was not instructed by the EAP for any additional outside counseling and there were no follow-up visits with the EAP. In January 1997, a chart note from Dr. Cicero indicated he was going to refer the Claimant one last time for GI testing to determine if she had any additional problems with her gallbladder. If not, he would want to refer her to a psychiatrist. This referral never occurred and the Claimant did have gallbladder surgery. Claimant testified in 1998 that she had anxiety and stress due to an adoptive daughter's behavior. The Claimant's adopted daughter was misbehaving and attempted to burn down the family home. The Claimant was afraid her daughter would harm her, so she was not sleeping at night for fear of being harmed. Claimant went to Dr. Cicero in January 1998 to discuss with the doctor anxiety that she had as a result of her extremely disobedient child. Dr. Cicero diagnosed a condition called "stress syndrome" and prescribed Buspar medication. Claimant testified that she did fill this medication, but only took one pill and then discontinued its use. The Claimant did report crying, short temper, insomnia and concentration problems due to her family situation. After the daughter left the house, her anxiety and stress went away. The medical records do not contain any other pertinent physical or mental medical history prior to July 14, 1999.

**EXPERT DEPOSITION SUMMARY**  
**Dr. P. Brent Koprivica**

The deposition of Dr. P. Brent Koprivica was taken on two occasions; in 2003 and then again in 2012. Dr. Koprivica first examined Claimant on September 18, 2001. Dr. Koprivica acknowledged in his original report that prior to July 14, 1999, the Claimant did have degenerative disease of her lumbar spine along with Grade I spondylolysis of L5-S1. Dr. Koprivica testified that prior to July 14, 1999, there was no evidence that the Claimant had ongoing symptomatic or disabling pain from her low back pain. At the time of the September 18, 2001 examination, Dr. Koprivica did not have knowledge of medical treatment or medical records the Claimant received in 1996 from Dr. Barry Rose. Dr. Koprivica, in his September 18, 2001 report, felt that the Claimant's chronic low back pain and intermittent episodes of weakness in the right leg associated with that back pain was also the direct and probable consequence of the Claimant's fall at home on September 18, 2000, in which the Claimant injured her left knee. Dr. Koprivica stated that the fractured left kneecap and all the treatment associated with the reattachment of the patellar tendon and the patellar fracture was causally related to her original July 14, 1999, low back injury claim, given that the Claimant's back, right hip and right leg gave way causing her to fall. Dr. Koprivica felt that the Claimant would require ongoing chronic pain management and that consideration for treatment of her degenerative disk disease would include the possibility of lumbar surgery at some point in the future. Dr. Koprivica restricted the Claimant to a light physical demand level of activity with restrictions on avoiding bending at the waist, pushing, pulling and twisting except on rare occasions and also postural restrictions of sitting, standing and walking. Dr. Koprivica reported exaggerated pain behavior of the Claimant on Waddell's test. Dr. Koprivica recommended a psychiatric referral. Dr. Koprivica testified that even though the Claimant exhibited this behavior in his examination as well as some self-limiting behavior (which was similarly found in the FCE), he did not feel that the Claimant was malingering, but needed a psychological workup. In the 2003 deposition, Dr. Koprivica testified

on cross-examination that the pre-existing degenerative disk disease suffered by the Claimant may or may not be important overall depending upon whether the Claimant continued to be symptomatic from her degenerative disk disease and low back problems up through the time of her work related injury in July of 1999. Dr. Koprivica testified that if he had to hypothetically assume that the Claimant continued to have ongoing chronic mechanical back pain prior to the 1999 injury, then he would apportion permanent partial disability for the prior condition as well as the July 14, 1999 condition. Dr. Koprivica testified in his 2003 deposition that he did not believe that the spondylolysis was symptomatic in 1999 and, therefore, was not a hindrance or obstacle to employment because the Claimant did not have ongoing low back problems. However, Dr. Koprivica did not know about treatment received by the Claimant from Dr. Rose in 1996. In March of 2002, Dr. Koprivica prepared an addendum report after he was asked some specific questions regarding day-to-day functioning of the Claimant. Dr. Koprivica stated that the Claimant's concentration would be affected by her use of Hydrocodone and pain medication although not to the level that the Claimant was complaining of at that time. Dr. Koprivica testified that the sleep interruption was typical of a person with disabling back pain and that the Claimant's testimony regarding the need to lie down four hours per day as it related to her physical back pain was a medically consistent limitation, although not a medical restriction. Dr. Koprivica did feel that there might be some psychological overlay in the Claimant's presentation as well. Dr. Koprivica stated that when considering the psychological impact of her sleep disturbance, that he had grave concerns about her ability to be vocationally retrained and placed. On August 21, 2005, Dr. Koprivica issued a third addendum report after reviewing Dr. Rose's 1996 medical records. In that addendum report, Dr. Koprivica suggested that assuming that the Claimant did continue to remain symptomatic he would apportion his overall 25% permanent partial disability rating to the body as a whole. His apportionment was 12.5% permanent partial disability to the body as a whole predating July 14, 1999, and 12.5% permanent partial disability to the body as a whole as a result of the July 14, 1999 injury assuming again that the Claimant had remained symptomatic. Dr. Koprivica felt the Second Injury Fund liability would exist hypothetically if the Claimant continued to remain symptomatic after 1996, but felt the Claimant was still permanently and totally disabled.

Dr. Koprivica evaluated the Claimant on October 26, 2011 and issued his fourth report. Dr. Koprivica reviewed additional medical and psychological records (since 2001) and opined that the Claimant was permanently and totally disabled based upon the primary injury in isolation in and of itself. Dr. Koprivica based this opinion upon the review of all of the vocational data, psychological/psychiatric data and medical restrictions. Dr. Koprivica concluded that in his opinion, the Claimant's need to unpredictably recline would be consistent with the physical and psychological disability which he related to the primary injury in isolation in and of itself. Dr. Koprivica testified that when he originally gave his deposition in October 2003, he was unaware of the existence of treatment records which the Claimant had with Dr. Barry Rose. Thereafter, Dr. Koprivica reviewed those medical records and concluded that even though the Claimant had gone to Dr. Rose and been diagnosed with spondylolysis and had received five physical therapy visits, that this condition did not rise to the level that would affect his overall conclusion because the Claimant did not continue to remain symptomatic with low back pain after March 1996. Dr. Koprivica testified that Dr. Rose specifically did not document the Claimant's need to lie down or change positions unpredictably prior to 1999, nor was there any documentation of sleep deprivation due to pain as an ongoing problem prior to 1999. After

reviewing Dr. Hill's opinion, that there was no apportionment of his psychological disability rating for any pre-existing psychological disability, Dr. Koprivica testified that the Claimant was permanently and totally disabled based on the July 14, 1999 work accident alone. Dr. Koprivica testified that his opinions were based on the fact that the Claimant did not have ongoing disabling back pain after March 1996. Dr. Koprivica did not feel that the pre-existing spondylolysis condition combined with the July 1999 injury would result in permanent and total disability. Dr. Koprivica testified that the Claimant did not have to recline prior to 1999, was not suffering from sleep deprivation or an unpredictable need to recline on a frequent basis prior to 1999. Further, Dr. Koprivica also based his conclusion that the Claimant was permanently and totally disabled based on the July 14, 1999 injury considered alone on the fact that the Claimant did not have the inability to reliably predict her functional capacities on a daily basis prior to 1999, nor did the Claimant have severe postural limitations which she had after the July 1999 injury.

#### **Dr. David Ebelke**

Dr. David Ebelke, orthopedic surgeon, treated the Claimant with medication and epidural injection therapy. Dr. Ebelke noted the Claimant was having pain in her right low back and right hip with cramping and numbness in the calf. Dr. Ebelke noted that the Claimant complained of difficulty sleeping due to pain. Dr. Ebelke diagnosed a lumbar strain with degenerative disks L2 through S1 and spondylolysis at L5 with L5-S1 Grade I/II spondylolysis. Dr. Ebelke then referred Claimant to a psychiatrist to treat her pain. Dr. Ebelke did not recommend surgery.

#### **Dr. Ira Fishman**

Claimant was treated by Dr. Ira Fishman, physiatrist, from October 15, 1999 until August 9, 2000. Dr. Fishman specializes in physical medicine and rehabilitation. Dr. Fishman noted that Claimant experienced dull aching pain in her right lower lumbar region with occasional burning discomfort and pain which was constant in the right hip. Dr. Fishman noted the Claimant experienced intermittent pain radiating down her right leg just below the knee and occasionally to the right ankle. Dr. Fishman felt the Claimant had an unresolved lumbosacral strain superimposed upon pre-existing degenerative disk disease of the lumbar spine as well as Grade I to II spondylolysis. Dr. Fishman felt that the Claimant's symptoms were compatible with lumbar radiculitis, although there was no evidence of a full blown lumbar radiculopathy. Dr. Fishman treated the Claimant with intensive physical therapy treatments progressing her to work conditioning and a work hardening program. Dr. Fishman kept the Claimant off of work during this treatment. Dr. Fishman noted the difficulties the Claimant was having in the work hardening program as the number of hours of the sessions increased. Dr. Fishman noted in his last visit that the Claimant displayed poor posture and a guarded gait with a limp, as well as some breakaway weakness with muscle testing and noted the Claimant had complaints of severe pain in the right sacroiliac region. Dr. Fishman recommended an FCE which limited the Claimant to light physical demand category with occasional floor to knuckle lifting of 15 pounds, knuckle to shoulder lifting of 15 pounds, shoulder to overhead lifting of 15 pounds and carrying of 20 pounds. Dr. Fishman noted that the Claimant did test positive for six out seven Waddell signs indicating significant symptom magnification, as well as elevated reports of significant lower back pain. Dr. Fishman released the Claimant on August 9, 2000 with restrictions in the light to light-medium physical demand category, including lifting of 30 pounds

maximum on an occasional basis with more frequent lifting of 15 pounds and constant lifting of more than seven pounds. In terms of the Claimant's physical activity, Dr. Fishman felt that it would be more appropriate considering the Claimant's then current condition to allow her to return to work with occasional kneeling, squatting, stooping and bending of her low back with allowances to alternate between the sitting and standing position every hour and to avoid prolonged sitting and standing. Dr. Fishman assigned a 5% permanent partial disability rating without considering any pre-existing conditions.

#### **Dr. Stephen Reintjes**

Dr. Stephen Reintjes, neurosurgeon, opined on August 31, 2000, that the Claimant had sustained a 5% permanent partial disability to her body as a whole from her July 14, 1999, and restricted her to a 35-pound weight restriction with sitting, standing and walking up to four hours at a time up to ten hours per day. Claimant was instructed to limit her bending, squatting, kneeling, climbing and reaching. Dr. Reintjes did not recommend surgery. Dr. Reintjes noted the Claimant complained of low back and right hip pain that would radiate into the right buttocks, right thigh and lateral calf and ankle. Dr. Reintjes also noted the Claimant complained of weakness in her right leg.

#### **Dr. Terrence Pratt**

Dr. Terrence Pratt, physiatrist, evaluated the Claimant in 2003. Dr. Pratt did not treat the Claimant. In Dr. Pratt's May 12, 2003 report he opined that the Claimant had limitations of her ability to lift at the light physical demands level. He recommended lifting of 20 pounds only on an occasional basis and instructed the Claimant not to perform activities that would require her to frequently climb or perform activities on unlevel surfaces. Dr. Pratt felt that the Claimant would have difficulty with prolonged walking and standing and it would be necessary for the Claimant to be able to change positions. Dr. Pratt restricted Claimant's ability to stand or walk to two and a half hours prior to changing position and instructed her to avoid frequent kneeling, crawling, bending or twisting. Dr. Pratt testified that the July 1999 injury was the precipitating factor of her overall back injury. Dr. Pratt assigned an overall 14% permanent partial disability to the body as a whole assigning 7% permanent partial disability directly related to the July 1999 work event and 7% permanent partial disability related to an aggravation of a pre-existing condition. He also assigned 8% permanent partial disability at the 160-week level for the subsequent patellar fracture, but did not feel the September 2000 fall was work related. Dr. Pratt did not feel that the Claimant was permanently and totally disabled.

#### **Dr. Stephen Hendler**

Dr. Stephen Hendler, physiatrist, examined the Claimant on behalf of Social Security Disability Determinations. On September 17, 2003, Dr. Hendler reported that the Claimant had consistent and persistent continuous back pain. Claimant also had difficulty sitting or standing in any one position for any length of time over one hour and told Dr. Hendler that she got bad headaches and reported instability in her gait when walking and difficulty driving. Claimant also told Dr. Hendler she had numbness and tingling in the last three toes of right side after prolonged

sitting, but otherwise no problems with numbness or tingling. Dr. Hendler felt that Claimant had a vertebrogenic disorder, spondylolysis at L5-S1, Grade I/II. Dr. Hendler noted that the Claimant's physical condition had not changed since 2000. Dr. Hendler recommended that the Claimant only be able to perform two hours a day of standing and/or walking daily and would need to take breaks while sitting due to the spondylolysis.

### **PSYCHOLOGICAL EXPERTS**

#### **Dr. Todd P. Hill**

Claimant was evaluated by Dr. Todd P. Hill, psychiatrist, on November 16, 2011. Dr. Hill's diagnosis was "chronic pain disorder associated with both psychological factors and a general medical condition." Dr. Hill assigned a 20% permanent partial disability to the body as a whole from a psychiatric and psychological standpoint over and above any physical disability directly attributed to the July 14, 1999 injury. Dr. Hill did not believe that there was any pre-existing permanent partial disability associated with any psychological or psychiatric factors. Dr. Hill felt that the Claimant's chronic pain syndrome associated with her general medical condition about her back and knee was a direct result of the injury sustained on July 14, 1999. Dr. Hill noted the chronic debilitating pain from the 1999 injury and the psychological distress from the pain, which in his opinion, affected the Claimant with crying spells, poor concentration, poor memory, feelings of hopelessness, helplessness and worthlessness. Dr. Hill testified that the Claimant's significant sleep impairment from chronic pain and her reaction to her pain greatly impacted her vocationally. Dr. Hill testified that chronic pain disorder associated with a general medical condition caused significant distress and impairment in the Claimant's social interaction, her occupation, as well as her daily functioning. Dr. Hill did suggest the possibility of benefit from treatment of her psychiatric symptoms. Dr. Hill felt that the Claimant's pain disorder imposed limitations on her from the vocational standpoint, including focus and concentration when she was in pain.

#### **Dr. Allan D. Schmidt**

Claimant was psychologically evaluated by Dr. Allan D. Schmidt, psychologist, on November 16, 2011. Dr. Schmidt also diagnosed Claimant with a pain disorder associated with both psychological factors and a general medical condition. Dr. Schmidt assigned a 15% permanent partial psychological disability attributing half or 7.5% for pre-existing psychiatric disability and 7.5% permanent partial disability associated with her July 1999 injury. Dr. Schmidt felt the assignment of pre-existing psychological problems was due to a pattern of emotional and psychological stress which the Claimant exhibited before July 14, 1999. Dr. Schmidt testified that he based his opinion of pre-existing psychological impairment on three events: (1) the 1996 supervisor referral to an EAP program; (2) in 1997 Dr. Cicero questioned the need for the Claimant to be seen by a psychiatrist due to distress the Claimant had to her then ongoing and undiagnosed general medical condition; and (3) a 1998 office visit with Dr. Cicero where the Claimant was complaining of stress associated with an adopted daughter who tried to set the house on fire and who threatened the Claimant.

## **VOCATIONAL EXPERTS**

### **Bud Langston**

Claimant was vocationally evaluated by Bud Langston. Mr. Langston saw the Claimant in March 2007. Mr. Langston concluded that when considering the Claimant's physical injuries only and specifically the physical medical restrictions of Drs. Koprivica, Reintjes, Pratt and Fishman, that the Claimant would be potentially employable. Mr. Langston felt that with the exception of the psychological diagnosis, Claimant would have the capacity to return to the type of work she performed prior to 1999. However, Mr. Langston did have concerns about the Claimant's ability to be vocationally retrained or placed when considering the psychological impact of the July 1999 injury, including the significant sleep disturbance referred to by Dr. Koprivica. Mr. Langston stated in his 2007 report that his opinions were absent any psychological diagnosis. On cross-examination, Mr. Langston agreed that the sleep pattern described by the Claimant would significantly interfere with her ability to perform work. Mr. Langston testified that both Dr. Hill and Dr. Schmidt's psychological/psychiatric reports were completed after his evaluation. He testified on cross-examination that when considering the psychological information from Dr. Hill and Dr. Schmidt, it would be difficult if not an impossible task for the Claimant to return to work. Mr. Langston testified because the Claimant had not worked since 1999, this would be a very negative fact for any potential employer. Mr. Langston testified that when considering Dr. Koprivica's opinions of sleep deprivation and interruption due to pain, as well as the chronic pain syndrome psychologically diagnosed by two medical health professionals, including the need to recline unpredictably during the day, that from a vocational standpoint he felt the Claimant would not be employable or retrainable.

### **Dick Santner**

Vocational expert, Dick Santner, originally evaluated the Claimant on October 12, 2002. At that time, Mr. Santner did not have any psychological or psychiatric information. In the original interview with Mr. Santner, Claimant described issues she was having with her capacity to concentrate as well as the impact of sleep disturbance on her capacity to return to work and her life. Mr. Santner concluded that Claimant's sleep disturbance caused by the disabling low back pain and the need to lie down during the day was vocationally significant. Mr. Santner requested additional information from Dr. Koprivica. Thereafter, Mr. Santner reviewed Dr. Koprivica's March 2002 addendum and noted Dr. Koprivica's opinion that the Claimant's limitations were medically consistent with her injuries. Mr. Santner concluded in his original report that based just upon the physical restrictions, Claimant may be able to work, but when considering the Claimant's limitations of having to lie down due to chronic pain unpredictably during her day in an effort to manage her pain and her erratic sleep pattern that this would make it impossible for the Claimant to be employable in the open labor market. Subsequently, on March 26, 2012, Mr. Santner then reviewed additional data, including both psychological reports and the depositions of Drs. Koprivica, Hill, Schmidt, Pratt and the medical records from Dr. Rose, Dr. Fishman, HealthSouth, Social Security records and Ms. Johnson's 2003 and 2008 depositions. Mr. Santner relied on the medical opinions of Dr. Koprivica as well as Drs. Hill and Schmidt. Both psychologists testified that the Claimant suffered from chronic pain syndrome and reported interrupted sleep as well as difficulty maintaining focus and concentration for

protracted periods of time. Mr. Santner testified that the issue of sleep deprivation had the most significant impact on the Claimant's functionality vocationally and on a day-to-day basis. Mr. Santner testified that even though the Claimant had some college education, she could still drive and operate elementary tasks on the computer, she was permanently and totally disabled based upon the medical restrictions and limitations, her chronic pain syndrome, her very erratic sleep patterns, her need to lay down and her inability to stay up and function during the course of an eight hour day.

### **CONCLUSIONS OF LAW**

The first issue to be determined is whether Claimant sustained a work related injury while in the employ of the Employer. The evidence establishes that the Claimant sustained a work related injury to her low back on July 14, 1999. Dr. P. Brent Koprivica, Dr. Ebelke, Dr. Reintjes, Dr. Pratt all have opined that the Claimant suffers from chronic mechanical low back pain with a history of degenerative disease of the lumbar spine along with Grade I or II spondylolysis of L5 on S-1. Employer/Insurer's authorized treating physicians agree that Claimant sustained a work related injury and all assigned permanent partial disability directly related to the July 14, 1999 injury. These medical conditions were severe enough that the Claimant underwent medical treatment for over a year. Claimant's treatment included extensive physical therapy, epidural steroid injections, narcotic medications and work hardening.

Therefore, I find the Claimant sustained a work related injury on July 14, 1999, and as a direct and probable consequence of the Claimant's permanent injury to her lumbar spine the development of chronic low back pain and intermittent episodes of weakness in the right leg and hip associated with that back pain. In addition, I find that the Claimant sustained a fall at home on September 18, 2000, in which she injured her left knee and that this injury was a direct and proximate consequence of her July 14, 1999 injury. I find that as a consequence of this fall, the Claimant developed a displaced comminuted patella fracture and a torn patellar tendon which was surgical reattached. The medical evidence establishes Claimant's complaints of back pain and right leg and hip weakness. Claimant's testimony taken in 2003, 2008 and at trial consistently explain how she has low back pain associated with her right hip and her right leg giving way. I agree with Dr. Koprivica's medical conclusion that the weakness in the right leg associated with her back pain caused her to fall injuring her left knee on September 18, 2000, and that this was a direct and proximate consequence of her July 14, 1999 injury while working for the Employer.

The next issue to be determined is whether Claimant suffered any disability from her work related accident and if so the nature and extent of such disability. I find the evidence establishes that the Claimant is permanently and totally disabled. She is no longer employable in the work place. To summarize, I find credible the Claimant's testimony that she needs to lie down several times during her day to alleviate low back pain and right leg weakness. The Claimant's testimony of her interrupted sleep due to pain, her postural limitations and the unpredictability of her capability on a daily basis are persuasive. When combining these medical/physical restrictions, as well as the Claimant's limitations with her psychological diagnosis of chronic pain disorder associated with her physical injury and considering her overall low level of functioning, she is clearly permanently and totally disabled. Both vocational experts

in this case, Dick Santner and Bud Langston, agree that as the Claimant presents both physically and psychologically, she is unemployable. Both vocational experts arrive at this conclusion when considering the physical injuries and limitations as well as the Claimant's psychological impact, which has been diagnosed by both Drs. Hill and Schmidt. Both vocational experts agree that if one were to consider just the physical restrictions, the Claimant may be employable; however, both vocational experts agree that the psychological impact from her physical injuries, including her sleep interruption as well as the need to lie down during the day at unpredictable times vocationally affect her. Dr. Hill testified that the Claimant's chronic pain syndrome, as well as difficulty maintaining focus and concentration for protracted periods of time vocationally affect her. In addition, I find the Claimant suffers from significant interruption of sleep, which is vocationally significant. I agree with Mr. Santner that the Claimant does possess the intellectual capacity to be retrained. However, in order for the Claimant to return to work Claimant would need to increase her overall functioning level, including stabilizing her psychiatric condition. Claimant's very erratic sleep patterns and inability to stay up and be functional during the course of an eight-hour work day, as well as the unpredictability of her need to recline for varying lengths of time during the day do not make her capable of substantial and gainful employment. In addition, the Claimant has not worked for 13 years. I agree that the Claimant is not a candidate for vocational rehabilitation. Additionally, Claimant's medical restrictions from Dr. Koprivica restrict her to sedentary level work. This eliminates a large percentage of available jobs. When I look at her medical physical restrictions as well as her overall low level of functioning, it is my opinion that the Claimant is unemployable. I do not believe that it is reasonable for an employer to hire an individual such as Claimant. I find that the Claimant's pain manifestations, such as changing positions frequently, would adversely impact her employability and presentation to employer. Finally, the Claimant's inability to attend work on a regular basis and sustain work as well as her difficulties of concentration, focus would impact her ability to obtain and maintain employment. I find that Claimant's sleep deprivation and need to recline and lie down during the day significantly impacts her ability to obtain and maintain employment. I find the Claimant has no transferrable work skills. Claimant is permanently and totally disabled based on the restrictions placed on her by all of her physicians, her psychological condition and limitations which greatly affect her daily functioning.

The next issue to be determined is whether the Claimant is permanently and totally disabled based on the injury of July 14, 1999 in isolation, or whether Claimant is permanently and totally disabled based on a combination of her pre-existing conditions and subsequent July 14, 1999 injury. I find the Claimant's current medical and psychological condition and permanent medical and psychological restrictions assigned by numerous medical and psychological professionals are a direct and proximate result of her July 14, 1999 injury at Southwestern Bell Telephone Company. I also find the Claimant's overall low level of functioning and psychological condition is a direct and proximate result of her July 14, 1999 injury.

Prior to July 14, 1999, Claimant was working full-time as well as a significant amount of overtime hours upon reviewing the payroll records. I find that for approximately one and a half years prior to the July 14, 1999 injury, Claimant was not missing work and was fully functioning as a customer service technician on both a regular and overtime basis. The physical demanding

nature of her job suggests that the Claimant was fully functioning prior to July 14, 1999. In addition, prior to July 14, 1999, the Claimant did not have significant sleep interruption due to pain or the need to lie down during the day unpredictably due to pain. There is no documentation of sleep deprivation as an ongoing problem prior to July 14, 1999. There is no documentation of severe postural limitations prior to 1999. I find no evidence of significant psychological/psychiatric disability that would have predated the July 14, 1999 injury, or likely to have contributed to the chronic pain behaviors of significance, which the Claimant currently suffers. I find Dr. Hill's conclusions consistent with testimony of the Claimant and the medical evidence. I find there were no physical medical restrictions applicable to the Claimant prior to July 1999. I find that the Claimant's testimony that she was very active before 1999 and fully functioning which included playing on competitive volleyball leagues and exercising to be persuasive. I find that the Claimant's ability to return to work after her gallbladder surgery, including a consistent 40-hour week plus overtime for over one and a half years prior to July 14, 1999 injury also persuasive as to the Claimant's overall level of functioning. Prior to July 14, 1999, the Claimant was evaluated over a three month period on three occasions by an orthopedic surgeon complaining of low back pain and attended six physical therapy visits between January 1996 and March 1996. However, after reviewing the numerous pages of medical records, there are no other complaints of or treatment for low back pain prior to July 14, 1999. I find Dr. Koprivica's opinion persuasive that this episode of low back pain in 1996 was not sufficient to rise to the level of disability. After being released in March of 1996 by Dr. Rose, I find no other medical evidence of an ongoing medical problem associated with the Claimant's low back. I do not find that the Claimant suffered any pre-existing physical permanent partial disability prior to July 14, 1999, notwithstanding her diagnosis of Grade I spondylolysis, which clearly pre-existed, but was asymptomatic prior to July 14, 1999. Prior to July 14, 1999, Claimant testified she was able to fully function at home. She cooked, cleaned, did laundry and had no assistance or help with any of these activities. I place great weight on the Claimant's overall functioning level at work and at home for the two years prior to July 14, 1999.

The psychological experts in this case provided additional evidence on issue of the Claimant's pain experience associated with her July 14, 1999 injury. Dr. Hill testified that the Claimant suffers from chronic pain syndrome. Dr. Hill testified that Claimant's chronic pain syndrome was the direct result of her July 14, 1999 injury and the subsequent chronic debilitating pain from that injury. Dr. Hill testified that Claimant's chronic pain syndrome continued to cause her to suffer psychological distress from this pain, which includes crying spells, poor concentration and poor memory, as well as a significant impairment of her sleep from chronic pain which also impacted her mood. Dr. Hill documented Claimant's pain disorder and psychological limitations on her from a vocational standpoint, including her ability to sustain focus and concentrate for more than an hour at a time which he felt was from her chronic pain disorder. I find Dr. Hill's conclusions more persuasive than Dr. Schmidt.

Dr. Schmidt also diagnosed chronic pain syndrome; however, he testified that based on three pre-existing individual events that half of her overall psychological disability pre-existed July 14, 1999, and the other half was a result of the July 14, 1999 injury. I do find and agree with the psychological experts in this case that the Claimant suffers from chronic pain syndrome.

I do not find Dr. Schmidt's conclusions that part of the chronic pain syndrome or psychological or mental impairment pre-existed July 14, 1999. There is no persuasive evidence of any pre-existing mental conditions that affected the Claimant's ability to perform her job or impair the Claimant's ability to work prior to July 14, 1999. Claimant was evaluated by an EAP counselor in 1996, but was not referred to a mental health professional nor returned to the EAP. She was not referred for any additional outside counseling. In 1998, the Claimant had a personal family situation, which caused stressed and anxiety. However, I do not find Dr. Cicero's diagnosis of "stress syndrome" to be persuasive as a pre-existing impairment or disability. The Claimant saw Dr. Cicero on only one occasion for stress. Dr. Cicero prescribed Buspar medication, which the Claimant filled, but only took one pill. I find it persuasive that Dr. Cicero did not refer the Claimant to a psychiatrist or other mental health professional or counselor nor did the Claimant return to Dr. Cicero or require or request any other psychiatric medication. The Claimant's numerous medical health problems from 1995 to 1997 are certainly well documented and while the Claimant missed work for these problems up until the time the Claimant's gallbladder was removed, Claimant returned to full duty and her overall level of functioning was normal. Therefore, I do not find that the Claimant suffered any pre-existing permanent partial disability or impairment either from a physical or mental condition. I do not agree with Employer's psychological expert, Dr. Schmidt's, conclusion that the Claimant suffered from pre-existing psychological disability. Overall I found Dr. Schmidt's testimony unpersuasive. I find no evidence that the Claimant's alleged pre-existing psychological impairment ever surfaced to a level of a "disability prior" to July 14, 1999. Pursuant to the Act, in order for a condition to be considered a "pre-existing disability," said condition must present an obstacle or hindrance to Claimant's employment prior to the primary injury. The very definition of "disability" implies some degree of physical or mental impairment which substantially limits one or more of a person's life's activities. Dr. Schmidt failed to provide evidence which supports his opinion that Claimant's psychological issues are pre-existing in nature.

Employer presented no evidence which demonstrates Claimant's alleged pre-existing psychological condition ever presented an obstacle or hindrance to her prior employment. In fact, the evidence in this case directly contradicts Dr. Schmidt's conclusion. First, at no time prior to July 14, 1999, was the Claimant on any medication prescribed to treat psychological conditions except for one visit to Dr. Cicero in 1998. Second, Claimant testified that she did not receive any treatment for a psychological condition on an ongoing basis prior to July 14, 1999. Third, Claimant had suffered medical conditions prior to July 14, 1999, where she sought and received medical treatment including a surgery. She did not have any psychological effects from these surgeries and/or treatments, and in fact, underwent all treatment required and returned to work full-time. I find no evidence suggesting how or when this alleged pre-existing psychological impairment hindered the Claimant prior to July 14, 1999. I do find, however, that both Dr. Schmidt and Dr. Hill agree there is a significant psychological component to Claimant's complaints. Both Dr. Hill and Dr. Schmidt have diagnosed chronic pain disorder involving both psychological factors and a general medical condition. The GAF score of Dr. Hill was 55 on the date of his examination. Dr. Schmidt's GAF score was 60 on the day of his evaluation. I find that Claimant did indeed suffer from significant chronic pain disorder which greatly affected her overall level of functioning as evidenced by these low GAF scores. I agree with Dr. Schmidt and Dr. Hill that the Claimant is currently impaired in her activities of daily living, social and work functioning and adaptation.

In conclusion, it is my opinion that Claimant did not suffer any pre-existing psychological impairment prior to her July 14, 1999 injury. I find the Claimant's current psychological condition and impairment is a direct and proximate result of her July 14, 1999 in isolation.

I do not believe the Second Injury Fund has liability in this case for the reasons stated above. The Claimant was able to maintain a 40-hour week plus overtime job requiring extensive use of her body in a very physical demanding vocation without difficulty for at least two years prior to July 14, 1999. The Claimant often worked overtime. In addition, Claimant was able to function and participate in life's daily activities prior to July 14, 1999. I find that it was not until Claimant's primary injury of July 14, 1999, that her medical and psychological conditions quickly deteriorate to the point where she became unemployable. Both Claimant's and Employer's vocational experts agree that when considering these psychological data, the Claimant is unemployable. Dr. Koprivica opined that the Claimant was permanently and totally disabled due to her injuries and subsequent pain behavior documented by both mental health professionals. Dr. Hill assessed the Claimant with a 20% permanent partial disability to the body as a whole due to the psychological factors suffered by the Claimant due to the accident of July 14, 1999. Dr. Schmidt believed that Claimant's psychological factor was 15% permanent partial disability to the body as a whole, but attributed 7.5% of that overall disability to a pre-existing psychological condition and 7.5% permanent partial disability referable to the July 14, 1999 injury. Dr. Reintjes and Dr. Pratt opined that the Claimant suffered a 5% permanent partial physical impairment. I find Dr. Koprivica's determination of permanent and total disability combined with Dr. Hill's analysis and both vocational experts' opinions that the Claimant is permanently and totally disabled to be persuasive. In conclusion after reviewing all of the evidence presented, I find the Claimant is permanently and totally disabled based on her July 14, 1999 injury in isolation.

The next issue to be determined is whether the Employer must provide Claimant with additional medical care necessary to cure and relieve the effects of her July 14, 1999 injury. I find the medical evidence presented by the medical and psychological experts in this case provides a basis for an award of future medical care and treatment against the Employer/Insurer. This award of future medical and psychological care includes any necessary medical and psychological treatment, as well as any necessary psychological or mental treatment necessary to relieve Claimant's chronic pain condition. In regards to her physical condition, Dr. Koprivica has indicated that chronic pain management, as well as possible surgical treatment may be necessary in the future. In regards to her psychological issues, including chronic pain syndrome, Dr. Hill opined that the Claimant needs ongoing treatment, including medications and psychotherapy. As such, I hereby order Southwestern Bell Telephone Company to provide Claimant with any and all future medical care and treatment necessary to care and relieve the effects of both her medical and psychological conditions arising from her July 14, 1999 injury.

The next issue to be determined is whether the Claimant timely filed her claim against the Second Injury Fund. Pursuant to § 287.430, a claim against the second injury fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, whichever is later. Mo. Rev. Stat. § 287.430 (2007). In addition, per § 287.800, administrative law judges shall construe the provisions of this

chapter strictly. Mo. Rev. Stat. § 287.800 (2007). Ms. Johnson filed the original claim for compensation on July 13, 2001 naming only the employer at that time. (Exhibit A) The amended claim for compensation, naming the Second Injury Fund as a party for the first time, was filed by Ms. Johnson on January 26, 2007. (Exhibit C) No amended claims for compensation were filed between the two just stated. Ms. Johnson did not properly file this claim to bring in the Second Injury Fund as a party until after the statute of limitations had run. As such, her claim for compensation is barred as a matter of law, and she can be afforded no recovery from the Second Injury Fund.

An injured worker is given two potential statutes of limitation depending on the situation. A Second Injury Fund claim must be filed within two years after the date of injury, or within one year after a claim is filed against the employer, whichever is later. The alleged date of injury is 7/14/99, the original claim for compensation was filed against the employer on 7/13/01, thus deferring to the date to file which would be "later", the Second Injury Fund claim should have been filed before July 14, 2002. Rather, the claim against the Second Injury Fund was filed 4 ½ years after the statute of limitations expired. Since the claim was filed out of time against the Second Injury Fund, there can be no Second Injury Fund liability.

It is also significant that Ms. Johnson did not plead the Second Injury Fund in her original claim for compensation. The amended claim filed by Ms. Johnson, and naming the Second Injury Fund for the first time as a party in January of 2007 cannot relate back to the filing of the original claim in order to satisfy the statute of limitations because the amended claim added the Second Injury Fund as an additional party. The statute of limitations will not apply to an amendment of a claim if it perfects or amplifies the claim set out in the original pleading. *See Ford v. American Brake Shoe Company*, 252 S.W.2d 649, 652 (Mo.App. 1952). But Missouri law is clear that a claim does not relate back to the original filing of the claim if the amendment "sets up an entirely new and distinct claim or cause of action from that embraced in the original petition or complaint." *Id.* at 652. The 2007 amended claim (Exhibit C) did not amend the claim in an effort to seek any additional benefits or compensation from Employer nor did it report more parts of body that were injured. Therefore, the 2007 claim was not a "new and distinct claim" but rather was only filed to bring in the Second Injury Fund. It did not comply with the applicable statute of limitations, and Second Injury Fund liability should be denied.

Wherefore this Court finds Employer liable to Claimant for permanent total disability benefits beginning July 21, 1999 at the rate of \$578.48 per week for as long as Claimant remains permanently totally disabled. Further this Court finds that Employer shall provide to Claimant such medical care necessary to cure and relieve the effects of her July 14, 1999 injuries. Finally this Court finds that Claimant's claim against the Second Injury Fund was filed outside the Statute of Limitations and therefore Claimant has no claim against the Second Injury Fund.

The Court awards to the Claimant's attorney, William C. Spooner, 25% of all benefits awarded herein.

Made by: \_\_\_\_\_  
Emily Fowler  
*Administrative Law Judge*  
*Division of Workers' Compensation*