

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

Injury No.: 02-142380

Employee: Linda Kiemel
Employer: American Airlines (Settled)
Insurer: American Home Assurance
c/o Specialty Risk Services (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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 2, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John K. Ottenad, issued December 2, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 19th day of May 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Linda Kiemel

Injury No.: 02-142380

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

Dependents: N/A

Employer: American Airlines (Settled)

Additional Party: Second Injury Fund

Insurer: American Home Assurance
C/O Specialty Risk Services (Settled)

Hearing Date: August 28, 2008

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
 - 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
 - Date of accident or onset of occupational disease: February 14, 2002
 - State location where accident occurred or occupational disease was contracted: St. Louis County
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
 - 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: Claimant was a flight attendant for

Employer who injured her neck, low back and body as a whole when she fell and hit the serving cart during a bout of severe turbulence.

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: Body as a Whole-Cervical and Lumbar Spine

- Nature and extent of any permanent disability: 32.5% of the Body as a Whole referable to the Cervical Spine
and 7.5% of the Body as a Whole referable to the Lumbar Spine

15. Compensation paid to-date for temporary disability: \$18,207.65

16. Value necessary medical aid paid to date by employer/insurer? \$60,681.95

Employee: Linda Kiemel

Injury No.: 02-142380

17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: approximately \$628.78

19. Weekly compensation rate: \$455.19 for TTD/ \$329.42 for PPD

20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer/Insurer previously settled their risk of liability in this case

22. Second Injury Fund liability: \$0.00

Total: **\$0.00**

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: James B. Kleinschmidt.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Linda Kiemel	Injury No.:	02-142380
Dependents:	N/A	Before the	
Employer:	American Airlines (Settled)	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	American Home Assurance C/O Specialty Risk Services (Settled)	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri	
		Checked by:	JKO

On August 28, 2008, the employee, Linda Kiemel, appeared in person and by her attorney, Mr. James B. Kleinschmidt, for a hearing for a final award on her claim against the Second Injury Fund. The employer, American Airlines, and its insurer, American Home Assurance C/O Specialty Risk Services, were not present or represented at the hearing since they had previously settled their risk of liability in this claim. The Second Injury Fund was represented at the hearing by Assistant Attorney General Levander Smith. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- On or about February 14, 2002, Linda Kiemel (Claimant) sustained an accidental injury arising out of and in the course of her employment that resulted in injury to Claimant.
- Claimant was an employee of American Airlines (Employer).
- Venue is proper in the City of St. Louis.
- Employer received proper notice.
- The Claim was filed within the time prescribed by the law.
- At the relevant time, Claimant earned an average weekly wage of \$628.78, resulting in applicable rates of compensation of \$455.19 for total disability benefits and \$329.42 for permanent partial disability (PPD) benefits.

- Employer paid temporary total disability (TTD) benefits in the amount of \$18,207.65, representing a period of time of 40 weeks beginning on April 11, 2003.
- Employer paid medical benefits totaling \$60,681.95.

ISSUES:

- What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?
- What is the liability of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A Deposition of Dr. Shawn L. Berkin, with attachments, dated December 27, 2007
- B Deposition of Mr. James England, with attachments, dated May 5, 2008
- C Stipulation for Compromise Settlement for Injury Number 02-142380 between Claimant and Employer
- D Medical treatment records of BJC Corporate Health
- E Medical treatment records of Dr. David Kennedy
- F Operative report from Missouri Baptist Medical Center dated April 11, 2003
- G Medical treatment records of SSM Rehab
- H Medical treatment records of Dr. Rachel A. Feinberg
- I Medical treatment records of Injury Specialists
- J Medical treatment records of Missouri Baptist Medical Center
- K Medical report of Dr. Shawn Berkin dated February 24, 2005
- L Vocational rehabilitation report of Mr. James England dated February 29, 2008

Second Injury Fund Exhibits:

- I. Deposition of Ms. Linda Kiemel (Claimant) dated June 27, 2008

Notes: 1) Unless otherwise specifically noted below, any objections contained in these Exhibits are overruled and the testimony fully admitted into evidence.

2) Some of the records submitted at hearing contain handwritten remarks or other marks on the Exhibits. All of these marks were on these records at the time they were admitted into evidence and no other marks have been added since their admission on August 28, 2008.

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinion and deposition, the vocational opinion and deposition, the stipulations for compromise settlement, and the medical records, as well as my personal observations of Claimant at hearing, I find:

- **Claimant** is a 61-year-old, currently unemployed individual, who last worked for American Airlines as a flight attendant in January 2003. Claimant worked as a flight attendant for Ozark Airlines, TWA and then American Airlines (Employer) for over 36 years, from May 29, 1967 until July 1, 2003, on which date Employer laid off all of the flight attendants who had formally worked for TWA before American bought that airline. Although she was formally laid off on July 1, 2003, she last physically worked for Employer on January 26, 2003, when she asked to be removed from the flight line because she could not stand the pain anymore. In her position as a flight attendant, she was responsible for serving food and beverages to her passengers, getting pillows and blankets for them and helping them with their luggage. Her job required bending, stooping, carrying, and pushing food and beverage carts that weighed approximately 400 pounds. She testified that as a flight attendant she earned an annual salary of approximately \$32,000.00 per year.
- Claimant testified that her current income comes from Social Security disability of about \$1,600.00 per month and pensions from IAM, Ozark and American totaling about \$1,118.00 per month, for a total of approximately \$32,616.00 per year.
- According to the reports admitted into evidence, Claimant graduated from high school in Minnesota in 1964 and then took EMT training and a biology class at St. Charles Community College in the 1980's. She did not obtain any advanced degree or certificate from the community college.
- In her deposition taken on June 27, 2008 (SIF Exhibit I), Claimant testified that she first obtained her real estate license when she was working as a flight attendant. She took the training prior to working at American, but the money was not good and the people were too demanding. Claimant testified at trial that she then completed the testing and obtained her real estate license again in 2006, but it was set to expire at the end of August 2008. She testified that she never used the license since she obtained it, and she has not made any sales. Although she was unsure if she was going to do the necessary testing to retain that license, she left open the possibility that she may still take the tests in order to keep her real estate license.
- When she was asked in her deposition (SIF Exhibit I) why she had not more recently used the real estate license, she said that she was unable to fulfill the time schedule because of treatment she began to receive in 2004 for her brain tumor. According to her testimony, she was diagnosed with a brain tumor in September 2004 and had surgery to remove it in November 2004. She then had a course of treatment following surgery for the tumor and apparently as a result of that treatment schedule was unable to pursue any activity with her real estate license. When asked later in the deposition if the brain tumor was the exclusive reason that kept her from pursuing a real estate career, she replied that the tumor was 60% of the reason, and the other 40% was because of not being able to get her back and legs to do what she wants them to do. She also explained that the brain tumor was on her brain stem which cuts down on her ability to perform a lot of things. She described "severe shortness of breath

and multiple other issues.” She described that she did not believe she would even be capable of doing sedentary work because she could not guarantee that she would be present at work for 5 days in a row. She said that her opinion in that regard was based on how she had been living for the year prior to her deposition, not just because of her back and legs, but also because of her headaches and breathing problems that may be related to her brain tumor. In further questioning, she admitted that she has limitations on her ability to function as a result of the effects of the brain tumor, and that would be the reason why she would not consider sedentary work.

- Claimant testified that her first injury on the job occurred in 1985 when she developed right wrist carpal tunnel syndrome, for which she had surgery by Dr. Gold. There are absolutely no medical treatment records in evidence for any pre-existing right wrist treatment Claimant may have received for her right wrist carpal tunnel syndrome.
- Claimant testified that after she returned to work as a flight attendant after the carpal tunnel surgery, her right wrist occasionally affected her ability to perform her job duties. She said it would “hurt like heck” for approximately three days and then she would be fine, until the next flare-up. She testified that this problem continued from the time of her surgery in 1985 until the present time. She noted, however, that it did not affect her job performance, and it did not slow her down, but it did make her crabby. She testified that she occasionally took some pain medication to deal with her pain complaints.
- Claimant testified that her next on-the-job injury resulted in surgeries for her neck and low back in November 1990 performed by Dr. Karl Jacob. Although there are absolutely no medical treatment records in evidence for either of these pre-existing surgeries, some of the reports in evidence suggest that Claimant had a cervical discectomy and fusion at C5-6 and C6-7, as well as a lumbar discectomy at L5-S1, in 1990.
- After these surgeries, but prior to the February 14, 2002 accident, Claimant testified that she returned to full-duty work as a flight attendant. She had no permanent restrictions placed on her by the doctors after these surgeries. She said that she received a great deal of relief from her first back surgeries, and she was left with just ordinary daily pain, for which she would occasionally take pain medication. She confirmed that other employees really did not have to help her do her job and she was basically able to do all her job duties on her own. She testified that there were no physical problems that kept her from doing her job. In her deposition (SIF Exhibit I), Claimant specifically testified that the 1990 injuries to her neck and low back really did not pose any difficulty in her job performance once she returned to work after the surgeries. While she confirmed that her prior neck and low back conditions did not affect her job performance, and she did not remember seeking any treatment for the neck or low back after she recovered from her 1990 surgeries until her 2002 injury, she did admit that she did miss some work (“not often”) solely as a result of neck and low back pain leading up to the 2002 accident.
- Although according to Dr. Berkin’s report, Employer and Claimant apparently entered into some agreements to resolve these prior work injuries, none of these prior stipulations for compromise settlement were admitted into evidence in this case.
- Claimant’s injury on February 14, 2002, while working for Employer, occurred when she was serving passengers on a flight coming from Maui. She testified that about an hour into the flight, she was putting meals onto a cart, when they hit some severe turbulence. As a result of the turbulence, she was thrown against a cart, then lifted

off her feet and tossed across the galley, striking her head on a hinge.

- Claimant testified that she received initial medical treatment the next day at BarnesCare, and then began an extended period of treatment, including physical therapy, with Dr. David Kennedy. Claimant said that she continued to work regular duty as a flight attendant for almost a year while treating with Dr. Kennedy.
- Medical treatment records in evidence show that Claimant received initial medical treatment at **BJC Corporate Health-St. Peters** (Exhibit D) from February 15, 2002 until March 18, 2002. At her first visit on February 15, 2002, she reported a consistent history of the injury at work the previous day, and also reported continued complaints of headache, neck pain and low back pain. X-rays of the neck and low back showed multiple degenerative changes but no acute changes. Claimant denied numbness, tingling, weakness, nausea or vomiting complaints. She was diagnosed with neck and lumbar strains, as well as a pre-frontal contusion. In a follow-up visit on February 27, 2002, Claimant complained of headaches, nausea and neck pain, but she said her back is okay. She was diagnosed with a persistent neck strain, but a resolved lumbar strain. There was a notation in that record that Claimant had been diagnosed in the last 2 months with a C4 disc extrusion, based on an MRI from January 2002, and she was told she would probably need neck surgery. The BJC doctor recommended referral to a neurosurgeon for evaluation. Claimant was last seen at BJC on March 18, 2002, at which point she was still waiting to be seen by a neurosurgeon. She still reported neck and shoulder pain, as well as intermittent paresthesias of both sides of her face and bilateral arm fatigue.
- Claimant next treated with **Dr. David Kennedy** (Exhibit E) from March 25, 2002 through April 13, 2004. Dr. Kennedy's first note from March 25, 2002 contains a consistent history of the injury at work on February 14, 2002. He noted that an MRI showed a disc prolapse above the prior fusion. Claimant complained of neck pain with intermittent radiation into both arms. Dr. Kennedy diagnosed work-related cervical radiculopathy. He recommended a course of conservative care with physical therapy. Physical therapy notes from **SSM Rehab** (Exhibit G) document her initial round of physical therapy from April 22, 2002 through May 21, 2002. Claimant fairly consistently complained of intermittent neck, shoulder and upper back pain. Claimant seemed to make progress with this conservative care, since by September 3, 2002, she reported that her neck pain continued, but she had no radiating symptoms, and, in fact, her symptoms had largely resolved. However, subsequent notes reflect aggravations that increased her pain complaints, and by January 29, 2003, Dr. Kennedy found increased neck and left arm pain more suggestive of clear-cut radiculopathy. He took Claimant off work completely and ordered a cervical myelogram. He then recommended surgery and opined on February 28, 2003 that her work injury was the substantial factor in her current pain condition and her need for surgery.
- According to the records of **Missouri Baptist Medical Center** (Exhibit F) on April 11, 2003, Drs. Kennedy and Raskas performed a C4-5 and C5-6 partial vertebrectomy and microdiscectomy with allograft fusion and syntheses plating to treat Claimant's cervical spondylosis, and disc herniation at C4-5 with degenerative disc disease versus pseudoarthrosis at C5-6.
- Claimant continued to follow-up with Dr. Kennedy after her neck surgery. Records from **SSM Rehab** (Exhibit G) once again document physical therapy Claimant received from June 10, 2003 through September 18, 2003. According to the notes, Claimant showed improvement in her neck with decreasing pain complaints and increased activity during this course of physical therapy after her neck surgery. One of the last physical therapy notes on September 18, 2003 indicated that Claimant was attending a brokerage class and had to put her physical therapy on hold due to the lateness of her hours. None of these physical therapy notes from SSM contain any

back complaints. They all refer only to neck problems.

- As Claimant continued to follow-up with **Dr. David Kennedy** (Exhibit E), she had X-rays of her neck on October 1, 2003 that showed she was status post anterior fusion, stable when compared to her prior exam. As she continued to see Dr. Kennedy, her low back complaints became more evident, and so Dr. Kennedy ordered a low back MRI on January 5, 2004, which showed post-surgical changes, degenerative disc disease and degenerative facet disease at L5-S1, but no evidence of focal protrusion or neural element encroachment. By January 8, 2004, Dr. Kennedy noted that most of her pain was in the low back, and she had fairly marked degenerative facet disease at L5-S1. Claimant reported pain with bending, twisting, prolonged sitting or standing. Finally, Dr. Kennedy last examined Claimant on April 13, 2004, at which time she reported pain in the neck and low back. He recommended that she be seen by Dr. Feinberg for trigger point injections.
- Claimant next received an extended course of treatment at **Injury Specialists [Drs. Rachel and Barry Feinberg]** (Exhibits H and I) from April 28, 2004 through November 23, 2005. At her first visit on April 28, 2004, **Dr. Rachel Feinberg** (Exhibit H) wrote that most of Claimant's pain was coming from the thoracic spine and was biomechanical from the cervical fusion and lumbar laminectomy, with Claimant showing signs of kyphosis and thoracic spondylosis. Dr. Feinberg recommended a course of medications, physical therapy and injections. The records show that from April 28, 2004 through October 5, 2004 (Exhibit I) Claimant attended numerous office visits and received physical therapy and other treatment in their office. Over the course of the next year and a half that Claimant treated with Dr. Feinberg, she received numerous trigger point injections, SI joint injections, and median branch nerve blocks to treat some continued combination of low back, neck and mid-back pain and complaints.
- Claimant was examined by **Dr. Shawn Berkin** (Exhibit K) at her attorney's request on October 29, 2004. He issued one report containing his findings and conclusions dated February 24, 2005. His report contained a consistent history of the injury at work on February 14, 2002. Claimant reported complaints of pain and tenderness to the neck and back with tightness and muscle spasms, stiffness, limited motion and generalized weakness. His report also contained a history of the pre-existing low back injuries in 1988 and 1989, the right wrist carpal tunnel surgery in 1985, and the neck and low back injuries resulting in surgeries to those body parts in 1990. Despite the report containing a history of these pre-existing injuries and the medical treatment Claimant received, the report contained absolutely no history of any continuing pain, problems or complaints following her treatment for these conditions. Similarly, the report was silent on any ways in which these prior injuries affected Claimant's ability to work, or, in fact, if she had any problems doing any aspect of her job as a flight attendant because of these pre-existing injuries.
- On physical examination, Dr. Berkin found that Claimant had some spasm and lost range of motion in the neck, but he found no swelling, and also found a normal upper extremity examination, with no swelling, atrophy or reflex changes. Dr. Berkin found no swelling or atrophy in the right hand, normal pulses, normal range of motion, and negative clinical tests for carpal tunnel syndrome. The only abnormal finding on the examination of the right hand was a report of pain and tenderness. In the low back, Dr. Berkin found lost range of motion and tenderness, but no swelling. The examination of the lower extremities was also objectively normal. Dr. Berkin opined that the injury of February 14, 2002 was a substantial factor in causing strains of the neck and low back with associated herniated discs at C4-5 and C5-6. He rated Claimant as having permanent partial disability of 35% of the body as a whole referable to the cervical spine and 10% of the body as a whole referable to the lumbar spine attributable to the February 14, 2002 injury at work. Dr. Berkin also rated Claimant as having pre-existing permanent partial disabilities of 25% of the body as a whole referable to the neck, 25% of the body as a whole referable to the low back and 30% of the right wrist.

- Despite having absolutely no history of how, if at all, these pre-existing conditions affected her ability to work, or any history of her pre-existing continuing complaints in any of these body parts leading up to the primary injury in 2002, Dr. Berkin opined that these pre-existing disabilities represented a hindrance or obstacle to her employment or reemployment at the time of the February 2002 injury. He also opined that the combination of these pre-existing disabilities along with the disability from the February 2002 injury, creates a greater disability than the simple sum and so a loading factor should be applied. Finally, he opined that due to her cumulative disabilities, she is incapable of competing for employment in the open labor market and is, thus, permanently and totally disabled.
- Claimant was also seen by a vocational rehabilitation counselor, **Mr. James England** (Exhibit L), at the request of her attorney on February 21, 2008. Mr. England noted in his report that when he met with Claimant, “She seemed rather stiff in her head and neck movement and shifted often while seated.” In addition to meeting personally with Claimant, he also reviewed her medical records, many of which are already described above. He did, however, reference in his report and findings some records and reports he reviewed from Drs. Lange, Coyle and Cantrell, in connection with Claimant’s treatment for the February 2002 work injury. [The records of Drs. Lange, Coyle and Cantrell were not placed into evidence in this case at the time of trial.] According to Mr. England’s summary of Dr. Lange’s reports, Dr. Lange saw Claimant for an independent spine evaluation on November 6, 2003. He opined that Claimant was at maximum medical improvement for her neck and low back conditions related to the February 2002 injury. According to Mr. England’s summary of Dr. Coyle’s reports, Dr. Coyle saw Claimant for an independent medical evaluation on January 28, 2004. Because of her continued complaints, Dr. Coyle recommended a referral to a physiatrist to see if there would be any medications she could take to alleviate her complaints. Dr. Coyle placed no restrictions on her ability to work as a real estate agent. Following her evaluation by a physiatrist, Dr. Coyle believed she would be at maximum medical improvement. Finally, according to Mr. England’s summary of Dr. Cantrell’s reports, Dr. Cantrell saw Claimant for an independent medical evaluation on April 7, 2004. Dr. Cantrell also placed Claimant at maximum medical improvement and opined that she was capable of performing her regular duty activities.
- Regarding her prior problems and complaints from her pre-existing injuries, Claimant reported to Mr. England that after her right wrist carpal tunnel surgery in 1985, her right hand did not function as well as her left hand. She also reported that after her neck and low back surgeries in 1990, she was able to go back to her job as a flight attendant, but she tried to be careful with regard to bending, lifting, etc.
- In terms of her current functional abilities as reported to Mr. England, “She denied any trouble with reaching, seeing, talking, hearing, sitting, and balance.” She also reported that she could stand for up to 45 minutes, and walk up to a mile slowly. She said that she would not try to lift more than 20 pounds on an occasional basis, and her primary complaint was pain in her low back and pelvic area, followed by pain between her shoulder blades and in her neck. Mr. England summarized that Dr. Kennedy, Dr. Raskas, Dr. Cantrell and Dr. Lange did not apparently place any restrictions on her for her neck or low back, while Dr. Berkin placed restrictions on her and opined she was permanently and totally disabled.
- Although Mr. England took an educational and vocational history from Claimant, there was no mention in either of those sections of Claimant’s classes for obtaining her real estate license, nor any mention of her having previously obtained the license, and, in fact, having a current and valid real estate license at the time of Mr. England’s meeting with her. The only vocational history contained in the report was her work as a flight

attendant. Based on that history provided to Mr. England, he concluded that, "It does not appear she would have any transferable skills usable below a light level of exertion in alternative work within the industry other than some basic keyboarding." Mr. England did find that her academics were in good shape and would not prevent her from a variety of alternative work settings.

- Mr. England concluded that based on her description of her day-to-day functioning, her difficulty sleeping, "the problems she has with staying in one position more than briefly and the need to recline," he did not see how she would be able to last in any kind of a work setting, even a sedentary one. Based on her age and impairments, he found that, "it appears that she is likely to remain totally disabled from a vocational standpoint."
- Employer paid medical benefits totaling \$60,681.95 and also paid temporary total disability (TTD) benefits in the amount of \$18,207.65, representing a period of time of 40 weeks beginning on April 11, 2003.
- Claimant settled this **February 14, 2002 injury (Injury No. 02-142380) with Employer by Stipulation for Compromise Settlement** on June 3, 2008. (Exhibit C) The Stipulation reflects a settlement of \$52,707.20 based on approximate disability of 40% of the body as a whole. The Second Injury Fund Claim was left open on the stipulation.
- In terms of continuing complaints with the neck and low back from this injury, Claimant described problems with pain in the low back and burning sensations in the pelvis, as well as pain in the neck and between the shoulder blades. She testified that sitting is a problem because it increases the burning in her pelvis, but she can sit for a long time (all day) as long as she can take pain medication when she gets uncomfortable. She testified that she also has some problems sleeping and so Dr. Feinberg prescribed her something to help her sleep.
- While Claimant was testifying at the hearing, I had the chance to personally observe her actions and behaviors. During the entirety of her testimony, she sat completely still with her legs crossed, not moving her torso or even shifting around in her chair. Throughout her testimony, however, she was animated with her upper extremities, motioning and gesturing, without any apparent signs of pain or distress.
- The deposition of **Dr. Shawn Berkin** was taken by Claimant on December 27, 2007 to make his opinions in this case admissible at trial (Exhibit A). Dr. Berkin is an osteopathic family physician. He examined Claimant on one occasion, October 29, 2004, at the request of Claimant's attorney, and he provided no medical treatment to Claimant. Dr. Berkin admitted that 99% of the examinations he performs in Workers' Compensation cases are at the request of claimants' attorneys. In reviewing Dr. Berkin's curriculum vitae attached to his deposition and admitted into evidence, I found no special training or certification that he holds in vocational rehabilitation counseling or in determining an individual's ability to compete for employment in the open labor market. Dr. Berkin testified consistent with his opinions contained in his report and described above.
- On cross-examination, Dr. Berkin admitted that Claimant did not give him any history of any ongoing problems, complaints or limitations as a result of her prior back injury or her prior neck injury. He admitted that he really did not get any detailed information from Claimant about the physical requirements of her job as a flight

attendant and her ability to perform those requirements, such as lifting, up to the time of her primary injury in February 2002. He acknowledged that she was not working under any permanent restrictions placed by a treating physician at the time of her February 2002 injury. Claimant never reported to Dr. Berkin if she had any specific difficulties performing any job duties before the primary injury. Dr. Berkin also did not know which, if any, medications she was taking before the February 2002 injury. Dr. Berkin further admitted that although Claimant reported fatigue from exertional activities, he did not know any specific exertional activities that caused the fatigue. Regarding his opinion that Claimant was incapable of working, Dr. Berkin admitted that he does not place individuals into jobs as a part of his practice, but he refused to defer to a vocational expert who may be able to place Claimant into a job that fits within his restrictions, because he reasoned that he did not believe anyone would hire her and even if they did, she could not maintain that employment.

- The deposition of **Mr. James England** (Exhibit B) was taken by Claimant on May 5, 2008 to make his opinions in this case admissible at trial. Mr. England is a certified vocational rehabilitation counselor, who saw Claimant at the request of her attorney on February 21, 2008. Mr. England testified consistent with the opinions contained in his report described above.
- On cross-examination, Mr. England admitted that Claimant only told him she had to be careful with regard to her neck prior to her 2002 injury. She did not give Mr. England any specific examples of how the prior neck condition caused her any difficulty performing her job as a flight attendant up through her injury in 2002. In fact, she did not give him any examples of how any of her prior conditions or injuries affected her ability to do her job up through her 2002 injury. Mr. England also admitted that he saw no indication from any of the treating physicians that any of her pre-existing conditions were causing ongoing problems for Claimant up to the point of her 2002 injury.
- On redirect examination, Mr. England was specifically asked by Claimant's attorney if he had an opinion within a reasonable degree of vocational rehabilitation certainty whether Claimant could compete in the open labor market. Mr. England answered that his ultimate opinion would depend on what he assumes is accurate. He said that according to several doctors, Claimant had no restrictions, so "There wouldn't be any contraindication to going back to work." However, he noted that if you look at Dr. Berkin's opinion, her age (61), how she presents herself, and her description of her day-to-day functioning, then assuming that is accurate, Mr. England did not "see how she would be able to go out and last in a work setting." Mr. England further admitted on additional cross-examination, that if her presentation and her description of her day-to-day functioning were not accurate, then that could possibly alter his opinion on employability.

RULINGS OF LAW:

Based on a comprehensive review of the substantial and competent evidence, and based upon the applicable laws of the State of Missouri, I find: As a result of the February 14, 2002 accident, which arose out of and in the course of her employment, Claimant sustained a compensable injury to her cervical spine and lumbar spine. As a result of the injury to her neck and low back, adequately described in the records and reports of Dr. Kennedy, Dr. Raskas, Dr. Feinberg and Dr. Berkin, Claimant continued to have pain, limited motion and generalized weakness in her cervical spine and lumbar spine.

Issue 1: What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?

Issue 2: What is the liability of the Second Injury Fund?

Given that these two issues are so inter-related in this Claim, and further given Claimant's allegation that she is permanently and totally disabled, I will address these two issues together.

Claimant bears the burden of proof on all essential elements of her Workers' Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo.App.E.D. 1990) *overruled on other grounds* by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

Under **Mo. Rev. Stat. § 287.190.6 (2000)**, "'permanent partial disability' means a disability that is permanent in nature and partial in degree..." The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. *Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund*, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo.App. 1973). Expert testimony may be required when there are complicated medical issues. *Id.* at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. *Fogelson v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. App. 1975) (citations omitted).

Under **Mo. Rev. Stat. § 287.020.7 (2000)**, "total disability" is defined as the "inability to return to any employment and not merely ... inability to return to the employment in which the employee was engaged at the time of the accident." The test for permanent total disability is claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in her present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173 (Mo.App.E.D. 1995) *overruled on other grounds* by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

In cases such as this one where the Second Injury Fund is involved, we must also look to **Mo. Rev. Stat. § 287.220 (2000)** for the appropriate apportionment of benefits under the statute. In order to recover from the Fund, Claimant must prove a pre-existing permanent partial disability, that existed at the time of the primary injury, and which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment should employee become unemployed. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App.E.D. 1999) *overruled on other grounds* by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Then to have a valid Fund claim, that pre-existing permanent partial disability must combine with the primary disability in one of two ways. First, the disabilities combine to create permanent total disability, or second, the disabilities combine to create a greater overall disability than the simple sum of the disabilities when added together.

In the second (permanent partial disability) combination scenario, pursuant to **Mo. Rev. Stat. § 287.220.1 (2000)**, the disabilities must also meet certain thresholds before liability against the Second Injury Fund is invoked. The pre-existing disability and the subsequent compensable injury each must result in a minimum of 12.5% permanent partial disability of the body as a whole, or 15% permanent partial disability of a major extremity. These thresholds are not applicable in permanent total disability cases.

It is first necessary to determine the nature and extent of permanent partial and/or permanent total disability against Employer. Based on the evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational expert, as well as based on my personal observations of Claimant at hearing, I find that Claimant is not permanently and totally disabled under the statute against Employer as a result of the last injury alone.

Of all of the medical records and expert opinions I reviewed, I only found two that provided an opinion that Claimant was permanently and totally disabled, Dr. Berkin and Mr. England. However, neither of those experts indicated that the permanent total disability was the result of the last injury alone. Therefore, I find there is no

evidence in the record to substantiate a finding of permanent total disability against Employer.

I find that Claimant has successfully met her burden of proof that Employer is responsible for the payment of permanent partial disability at the level of the body as a whole referable to the cervical and lumbar spine, related to the February 14, 2002 injury.

With regard to the neck and low back injuries from the 2002 accident, Dr. Berkin rated Claimant as having 35% permanent partial disability of the body as a whole referable to the cervical spine and 10% permanent partial disability of the body as a whole referable to the lumbar spine. These ratings accounted for his diagnoses of neck and low back strains with associated herniated discs at C4-5 and C5-6 requiring a cervical spine fusion surgery. Claimant complained of pain, tenderness, decreased motion and generalized weakness following this 2002 injury.

On the basis of all of these findings, and Claimant's complaints, I find Claimant has 32.5% permanent partial disability of the body as a whole referable to the cervical spine and 7.5% permanent partial disability of the body as a whole referable to the lumbar spine attributable to the February 14, 2002 injury.

Having now established the nature and extent of the permanent partial disability attributable to the primary injury against Employer, it is now appropriate to determine whether or not Claimant has successfully met her burden of proving Second Injury Fund liability for permanent total or permanent partial disability.

Of all of the doctors and/or experts who examined and treated Claimant, there are only two that indicate Claimant is permanently and totally disabled, Dr. Berkin and Mr. England. Dr. Berkin, Claimant's rating physician, opined that Claimant is permanently and totally disabled due to the combination of her present and past disabilities. Similarly, Mr. England, Claimant's vocational expert, opined that Claimant is totally disabled from employment, as a result of the combination of the past and present disabilities, her age (61), how she presents herself, and her description of her day-to-day functioning. He admitted that he was assuming the opinion of Dr. Berkin and Claimant's presentation and description of her activities was accurate in rendering his opinion on permanent total disability.

I do not find either of these experts' opinions on the issue of permanent total disability to be competent, credible or persuasive. When Dr. Berkin was questioned about the basis of his opinion on permanent total disability, he admitted that he does not place individuals into jobs as a part of his practice, but he refused to defer to a vocational expert who may be able to place Claimant into a job that fits within his restrictions, because he reasoned that he did not believe anyone would hire her, and even if they did, she could not maintain that employment. However, Dr. Berkin admits that he is not a vocational expert, so it is completely unclear to me how he would know about hiring practices or someone's ability to be placed into employment in the open labor market in general. Additionally, Claimant's vocational history, as contained in Dr. Berkin's report, is inaccurate in that he apparently did not know that she had a real estate license, and was, thus, qualified from that perspective to do that type of work. The only vocational history contained in his report was her extensive years as a flight attendant. It is completely unclear to me how he could make any decision based on her abilities and work history, when he did not have a complete history. What is within Dr. Berkin's realm of expertise as a medical expert is placing medical restrictions on Claimant's ability to function as a result of her medical conditions. While he does place restrictions on Claimant's ability to function, he does so without the benefit of a functional capacity evaluation, and he also takes the next step of opining on her ability to be hired without a complete vocational history, any idea of her transferable skills, or any direct knowledge of the labor market. As a result of the deficient basis of his opinion, combined with his overreaching beyond his area of expertise, I find Dr. Berkin's opinion on permanent total disability is fatally flawed and cannot be used to support any award of permanent total disability benefits in this case.

Similarly, Mr. England, Claimant's vocational expert, did not have a complete vocational history in order to do an accurate assessment of Claimant's transferable skills, which in turn affected his assessment of whether or not there would be any sedentary jobs in the open labor market available to Claimant. When Claimant reported her work history and education/training/certifications to Mr. England, she apparently only told him about being a flight attendant. There was only a brief reference to her real estate agent activities in connection with a discussion of the opinions of Dr. Coyle, but no mention of her real estate license in the educational or vocational history that Claimant

provided to Mr. England. With the history he was given by Claimant, Mr. England wrote that Claimant's previous work was as a flight attendant and she does not have transferable skills usable below a light level of exertion in alternative work. While it may be true that Claimant has no transferable skills from her work as a flight attendant, Mr. England did not mention whether or not there were any such transferable skills from her training and certification as a real estate agent. Certainly, Claimant's training and certification as a real estate agent required a different skill set than the physical nature of her job as a flight attendant. Mr. England admitted that his opinion was based, at least in part, on Dr. Berkin's opinion and Claimant's history, and further admitted that if those were incorrect or inaccurate that could have an affect on his ultimate opinion on employability. Since Mr. England did not know about (or did not cover this position) in his analysis, and also relied on Dr. Berkin's fatally flawed opinion, I find his opinion on permanent total disability is incomplete, nonpersuasive and also fatally flawed. Thus, it cannot be used as a basis for an award of any such benefits in this case.

On the other hand, the treating and other evaluating doctors (according to the summary of their opinions contained in the record) released Claimant back to work. Dr. Kennedy, Dr. Raskas, Dr. Cantrell and Dr. Lange did not apparently place any restrictions on Claimant. According to Mr. England's report, Dr. Coyle specifically noted that Claimant had no restrictions on her ability to be a real estate agent.

The other evidence that cuts against a finding of permanent total disability for Claimant in this case, is Claimant's own testimony in her deposition as to the reason why she is unable to pursue a career as a real estate agent given her certification and license in that profession. Claimant testified that she had not used the real estate license, because she was unable to fulfill the time schedule because of treatment she began to receive in 2004 for her brain tumor. According to her testimony, she was diagnosed with a brain tumor in September 2004 and had surgery to remove it in November 2004. She then had a course of treatment following surgery for the tumor and apparently as a result of that treatment schedule was unable to pursue any activity with her real estate license. When asked later in the deposition if the brain tumor was the exclusive reason that kept her from pursuing a real estate career, she replied that the tumor was 60% of the reason, and the other 40% was because of not being able to get her back and legs to do what she wants them to do. She also explained that the brain tumor was on her brain stem which cuts down on her ability to perform a lot of things. She described "severe shortness of breath and multiple other issues." She described that she did not believe she would even be capable of doing sedentary work because she could not guarantee that she would be present at work for 5 days in a row. She said that her opinion in that regard was based on how she had been living for the year prior to her deposition, not just because of her back and legs, but also because of her headaches and breathing problems that may be related to her brain tumor. In further questioning, she admitted that she has limitations on her ability to function as a result of the effects of the brain tumor, and that would be the reason why she would not consider sedentary work.

It is clear to me in reviewing this testimony that Claimant believes the brain tumor, her subsequent treatment for it, and the residual effects the brain tumor had on her functional abilities is the reason why she cannot use her real estate license and the reason why she cannot do sedentary work. Since the brain tumor became symptomatic, was diagnosed, and was treated subsequent to the February 14, 2002 injury, and since no physician has indicated that the tumor was in any way related to the February 14, 2002 injury, I find that it represents a subsequent condition, which cannot be included in any decision on Second Injury Fund liability in this case. Since by Claimant's own estimation, the subsequent brain tumor accounts for 60% of the reason why she cannot pursue a real estate career, and the main reason why she does not believe she can do sedentary work, her Claim for permanent total disability fails, as she would need to include this subsequent disabling condition into the equation in order to obtain a finding that she is totally unemployable in the open labor market. After all, by her own account, but for the brain tumor, she may be able to do sedentary work, especially given her training as a real estate agent, and her statements to Mr. England that she has no trouble reaching, seeing, talking, hearing or sitting. To the extent that her inability to work is due to the subsequent disabling brain tumor, I find that she has failed to prove a compensable permanent total claim against the Second Injury Fund in this case.

Based upon Claimant's failure to provide a competent, credible and persuasive medical or vocational opinion on permanent total disability, as well as based on Claimant's own testimony regarding the effect of the subsequent brain tumor and how that impacts her ability to even do sedentary work, I find that Claimant has failed to meet her burden of proof that she is permanently and totally disabled under the statute against the Second Injury Fund.

The last issue then is whether Claimant is entitled to some amount of permanent partial disability from the Second Injury Fund based on the combination of her primary (February 14, 2002) injury and any pre-existing permanent partial disabilities. Having thoroughly considered all of the competent and credible evidence in the record, I find that Claimant has not met her burden of proof to show an entitlement to a permanent partial disability award against the Second Injury Fund either.

A review of the record of evidence in this case reveals that Claimant did not offer any pre-existing medical treatment records into evidence for any of the prior surgeries to the neck, low back or right wrist. The record contains none of the surgical notes for any of those conditions, none of the treatment doctor's records, test results, or other notes to show Claimant's outcome from surgery or any residual problems or complaints she may have had as a result of those procedures. Additionally, Claimant did not offer into evidence any of the prior stipulations for compromise settlement which would have documented any prior amounts of permanent partial disability which had been approved by a Judge at the Division of Workers' Compensation.

Dr. Berkin, Claimant's rating physician, was the only doctor in the record to offer an opinion on the nature and extent of pre-existing permanent partial disability referable to the pre-existing neck, low back and right wrist conditions. In addition to the concerns enumerated above regarding Dr. Berkin's opinion on permanent total disability, I also question the competency of Dr. Berkin's opinion on pre-existing permanent partial disability, based on the lack of pre-existing medical treatment records for his review and the lack of any problems or complaints voiced by Claimant regarding those conditions in connection with her examination by Dr. Berkin. For those reasons, I find that Dr. Berkin's opinion on pre-existing permanent partial disability lacks a sufficient basis and, is thus, not credible, competent or reliable.

While I do not doubt that Claimant had prior surgeries to her right wrist, neck and low back, if Dr. Berkin, anywhere from 15 to 20 years after the fact, is going to offer any opinion on Claimant's condition, complaints and her outcome from those surgeries, then that opinion, so many years removed from the actual surgery, must be based on some credible, competent and reliable evidence. In this case, a review of his report reveals that the only radiology reports he reviewed were for tests performed after the 2002 injury, nothing prior. The only surgical report he reviewed was for the 2003 neck surgery, none of the prior surgeries to the right wrist, neck or low back. The only physical therapy notes he reviewed were for the 2002 injury, nothing prior. Further, while his report lists Dr. Karl Jacob and Dr. Jonathan Gold as the treating surgeons for the prior right wrist, neck and low back conditions, Dr. Berkin had none of their records to review in connection with his evaluation either.

In addition to the absence of any of these key records, Dr. Berkin also admitted during his testimony that Claimant did not give him any history of any ongoing problems, complaints or limitations as a result of her prior back injury or her prior neck injury. He admitted that he really did not get any detailed information from Claimant about the physical requirements of her job as a flight attendant and her ability to perform those requirements, such as lifting, up to the time of her primary injury in February 2002. He acknowledged that she was not working under any permanent restrictions placed by a treating physician at the time of her February 2002 injury. Claimant never reported to Dr. Berkin if she had any specific difficulties performing any job duties before the primary injury. Dr. Berkin also did not know which, if any, medications she was taking before the February 2002 injury. I find the basis of his opinion on pre-existing permanent partial disability questionable since he really did not explain how he arrived at those figures, given that Claimant did not give him any history of problems or complaints she was having with the neck or low back leading up to the 2002 injury, and he had none of the pertinent medical treatment records.

In short, Dr. Berkin had no pre-existing medical treatment records for any of the surgeries or from any of the treating surgeons, and he had no history from Claimant of any limitations, problems or complaints that she had leading up to the time of the 2002 injury attributable to the alleged pre-existing conditions. Without any of this information upon which to base his opinion on pre-existing permanent partial disability, I am at a loss to understand how he arrived at the figures he did when he was assessing Claimant 15 to 20 years after those original surgeries and after Claimant had also had significant new treatment for both her neck and low back in connection with the 2002 injury.

For all these reasons, I find Dr. Berkin's opinions on the pre-existing permanent partial disability to not be

credible, competent or persuasive. In the absence of any competent, credible or persuasive medical opinions from Claimant's rating physician on the nature and extent of Claimant's alleged pre-existing permanent partial disability, and in the absence of any pre-existing medical evidence in the record at all to substantiate a finding on the nature and extent of the pre-existing permanent partial disability, I find that Claimant has failed to meet her burden of proof in that regard, and her Claim for permanent partial disability benefits from the Second Injury Fund is denied.

CONCLUSION:

Claimant had a compensable injury to her cervical spine and lumbar spine, resulting in strains of the neck and low back with associated herniated discs at C4-5 and C5-6, on February 14, 2002. Claimant has failed to prove that she is permanently and totally disabled under the statute and so that part of the claim is denied. Claimant has similarly failed to meet her burden of proof regarding any entitlement to Second Injury Fund compensation for permanent partial disability benefits. Therefore, the Claim against the Second Injury Fund is denied and no benefits are awarded in this case.

Date: _____

Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation