

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

Injury No.: 04-091729

Employee: Carol M. King
Employer: Tri-County Group XV, Incorporated
Insurer: Liberty Mutual Insurance Company
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 January 16, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Gary L. Robbins, issued January 16, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 24th day of June 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Carol M. King

Injury No. 04-091729

Dependents: N/A

Employer: Tri-County Group XV, Incorporated

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance Company

Hearing Date: September 15, 2008

Checked by: GLR/sm

SUMMARY OF FINDINGS

- Are any benefits awarded herein? No
- Was the injury or occupational disease compensable under Chapter 287? Yes as to the employer.
- Was there an accident or incident of occupational disease under the Law? Yes
- Date of accident or onset of occupational disease? September 9, 2004
- State location where accident occurred or occupational disease contracted: Washington County, Missouri.
- Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
- Did employer receive proper notice? Yes

- 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
- Was employer insured by above insurer? Yes
- Describe work employee was doing and how accident happened or occupational disease contracted: The employee was lifting a vacuum cleaner when she injured her right shoulder.
- Did accident or occupational disease cause death? No
- Parts of body injured by accident or occupational disease: Right shoulder
- Nature and extent of any permanent disability: The employee settled with the employer-insurer for 36.40 percent permanent partial disability to the right shoulder.
- Compensation paid to date for temporary total disability: N/A
- Value necessary medical aid paid to date by employer-insurer: N/A
- Value necessary medical aid not furnished by employer-insurer: N/A
- Employee's average weekly wage: \$177.83
- Weekly compensation rate: \$118.55 for all purposes.
- Method wages computation: By agreement.
- Amount of compensation payable: \$0

- Second Injury Fund liability: \$0
- Future requirements awarded: None

No attorney fees are ordered in this case.

FINDINGS OF FACT AND RULINGS OF LAW

On, September 15, 2008, the employee, Carol M. King, appeared in person and by her attorney, Gary G. Matheny, for a hearing for a final award. The employer-insurer had previously settled the primary case with the employee. The Second Injury Fund was represented by Assistant Attorney General Frank A. Rodman. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. At the employee's request the record was left open to October 14, 2008 to allow the employee to obtain additional records from Rebekah A. Radmanesh, M.D. The record was closed on October 14, 2008 after the employee's counsel advised that the doctor's records were not available. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

- The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Liberty Mutual Insurance Company.
- On or about the date of the alleged accident or occupational disease the employee was an employee of Tri-County Group XV and was working under the Workers' Compensation Act.
- On or about September 9, 2004 the employee sustained an accident or occupational disease arising out of and in the course of her employment.
- The employer had notice of the employee's claim.
- The employee's claim was filed within the time allowed by law.
- The employee's rate for permanent partial and permanent total disability was stipulated to by the parties as \$118.55 per week.
- The employee's injury was medically casually related to her accident or occupational disease.

ISSUES

Liability of the Second Injury for either permanent partial disability or permanent total disability.

EXHIBITS

The following exhibits were offered and admitted into evidence without objection:

Employee's Exhibits

- A. Stipulation for Compromise Settlement
- B. Medical records of David Shaw, M.D.
- C. Medical records of Christian Hospital -- January 14, 2003 to May 14, 2005
- D. Medical records of Dale Doer, M.D.
- E. Medical records of Surgery Center of Kirkwood

- F. Medical records of The Orthopedic Center of St. Louis
- G. Medical records from Washington County Memorial Hospital -- January 17, 2007 to February 16, 2007
- H. Medical records from Christian Hospital -- February 7, 2007 to March 4, 2008
- I. Deposition of Shawn L. Berkin, D.O.
- J. Deposition of Samuel Bernstein, PhD.

SIF Exhibits

- 1. Deposition of Patrick L. Hughes, M.D.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT

The employee, Carol M. King, was the only witness to testify live at her trial. All other evidence was presented through written documentation, medical records or deposition testimony.

The employee settled her case against the employer-insurer on July 10, 2008, approximately two months prior to this trial against the Second Injury Fund. The only issue in this case is whether the Second Injury Fund has any liability for either permanent partial or permanent total disability.

Employee Exhibit A is the Stipulation for Compromise Settlement that was approved by the Court. The Court approved the settlement for a permanent partial disability of 36.40 percent to the right shoulder. The employee filed an original claim, an amended claim and a second amended claim. No claim was made against the Second Injury Fund in the original claim. Second Injury Fund liability was added in the amended claim for preexisting psychological disability. The claim for over compensation of the left arm was added in the second amended claim.

Testimony of the Employee

Ms. King testified that she is forty-seven years old, is a high school graduate, is divorced from her husband, lives in Potosi, Missouri with her fourteen year old son, is not employed, and is currently receiving supplemental security income and social security disability benefits. The employee testified that she was divorced from her then husband, Roger King on May 19, 2008.

Before working for Tri-County Group XV, Ms. King was employed as a school bus driver (1988-1989), as a cashier for Shop and Save (1997-2000) for Maid Works cleaning houses (2000-2001), and as a home health aid. She began her employment with Tri-County Group XV in October 2003. She was terminated from that job on May 15, 2005. She has not worked or tried to work since that time

On September 9, 2004 Ms. King received the injury to her right shoulder that is the basis for her workers' compensation claim. As a result of that injury, she had two shoulder surgeries and settled her primary claim against her employer-insurer. The first surgery was performed on October 12, 2004 and the second surgery was performed on July 5, 2005. Both surgeries were performed by Dr. Miller. During cross examination by the Second Injury Fund, the employee agreed that Dr. Miller released her back to work after both surgeries with no permanent restrictions. Ms. King testified that she applied for and received unemployment benefits and certified that she was able to work. She testified that she told the unemployment officer of her situation and that she had restrictions.

The employee had knee surgeries prior to September 9, 2004, however she testified that she recovered from these completely and they therefore are not relevant to this matter. There are also no other physical injuries that existed prior to September 9, 2004 that could be the basis for Second Injury Fund liability in this workers' compensation claim.

The employee also testified that prior to September 9, 2004 she performed her job duties and had no permanent restrictions of any kind from any doctor. She further testified that as of September 9, 2004 she had no work

restrictions from any doctor concerning any stress or anxiety problems and had not ever been hospitalized for stress or anxiety problems prior to September 9, 2004. Ms. King testified that she settled the claim against the employer-insurer on July 10, 2008 and that it did not involve her left shoulder or any aspect of stress or anxiety.

During her testimony at trial, the employee described problems with her right shoulder. She stated that:

1. Her shoulder hurts most of the time and she has 6/10 pain.
2. She cannot play ball with her grandkids.
3. Her arm is so weak that she cannot pick up a gallon of milk.
4. She has a burning sensation in the joint areas.
5. She has loss of motion and can only raise her arm to about eye level in the front and a little higher on the side.
6. It takes a lot of time to do laundry, vacuum and wash windows.
7. She takes Tylenol for her shoulder when she over exerts herself -- about four times a week.

Ms. King testified about her stress and anxiety problems. She testified that she has received care from a Dr. Radmanesh and then Dr. Shaw. The employee testified that she saw Dr. Radmanesh in 1999 and when that doctor left, Dr. Shaw took care of her emotional issues from 2001-2003. Employee's counsel indicated there were no records from Dr. Radmanesh's treatment of Ms. King.

The employee testified that she had anxiety and panic attacks that would cause her to get withdrawn and nervous. Some of the situations that she testified to that caused her these problems are:

1. She worked for Shop and Save from 1997 to 2000. While she was working there her boss cussed her out in front of customers. She testified that this embarrassed her, she did not like it, and she was afraid to go to work thinking that he would yell at her. She testified that she would take Xanax before she went to work and would try to avoid her boss. She indicated that she would miss time at work due to diarrhea from irritable bowel syndrome. She also indicated that she took two months stress leave and she never returned to work at Shop and Save after that.
2. She testified that her mother died while she was on leave and that her dad died in 2000.
3. She got married in 2000 and that she had problems with her husband's ex-wife and kids. She indicated that these problems got worse as of April 13, 2003 when her husband told her he loved his ex-wife and wanted to go back to her. She testified that after this she was no good. She indicated that this was what started her irritable bowel syndrome. Ms. King testified that she was talking to Dr. Shaw at that time and that is when she started taking Xanax.

Ms. King testified that shortly before her accident on September 9, 2004 she had stress and anxiety problems. She indicated she was withdrawn from people, could hardly work, could not function the way she was supposed to and that all she wanted to do was stay home and sleep.

Medical Records Preexisting September 9, 2004

Employee Exhibit B contains the records of Dr. Shaw. Dr. Shaw is neither a psychiatrist nor a psychologist. These records contain entries beginning August 8, 1998 and ending October 6, 2005. Most of the relevant entries regarding some aspect of "anxiety/stress" are set out below. Many of the notes report instances where the employee called the doctor's office and complained of different ailments. There were many notes regarding physical problems per se that the Court has omitted. It was the Court's intent to set out all notes regarding anxiety/stress problems:

- August 8, 1998-report the patient is stressed and has hemorrhoids, under a lot of CBC stress from social situation, able to work and perform necessary functions.
- August 31, 1998-the patient calls reporting she wakes up pm and feels nervous.
- October 7-8, 1998-the patient calls asking for Prozac, is not working. Prozac not given.
- November 20, 1998-A/trial of Xanax.
- January 20, 1999-refilled Xanax.
- September 29, 1999-"CC: pt took a stress leave of absence with work and home life its to much" It also says the patient returned for a follow up "continues to have significant social stressors from job/family". Stopped Xanax voluntarily as does not think it is helping or is the solution to her problem. A/P Anxiety/severe social

stressors. Off work 9/21 to 10/1.

- February 4, 2000-note that says "Reason for Call pt. nerves shot-wants some valium to help her sleep at night & calm her all day". Doctor said he would like her to discuss situation with Dr. Radmanesh.

- March 11, 2002 note-Reason for Call-CP associated with exertion, has been stressed a lot lately with trying to move.

-December 10, 2002- "Reason for Call pt c/o feeling anxious & stressed out due to problems? income, husb job, husb x-wife, ??? holidays; wondering if we can ?? something".

-June 9, 2003-patient calls wanting more Xanax.

-June 23, 2003-mentions Xanax.

-October 6, 2005-Reason for Call-"pt wants to know if you call her pt has some nerve problems, possible divorce". Doctor response Effexor and Xanax.

The employee was treated at Christian Hospital in the period January 14, 2003 to May 14, 2005. These are reflected in Employee Exhibit C. As the employee stated, she was treated mainly for physical problems related to her irritable bowel syndrome and her May 10, 2005 hysterectomy.

Employee Exhibit F contains the medical records of Dr. Miller concerning the two surgeries that the employee had to her right shoulder. Other than some references in the "Past Medical History" sections, the records do not discuss left shoulder problems and there is little mention of mental health problems. There are certainly no records of treatment for anxiety or depression by Dr. Miller. On October 11, 2004 the employee filled out a health assessment for Dr. Miller and reported that her health was very good. However she did check a box indicating she had depression that limited her activities and that she got treatment for depression. Dr. Miller provided a fifteen percent permanent partial disability to the employee's right shoulder.

Medical Records After September 9, 2004

The employee had her work-related accident on September 9, 2004.

Employee Exhibit G from Washington County Memorial Hospital and Employee Exhibit H from Christian Hospital documents treatment that the employee received for depression after September 9, 2004.

In a check list of complaints dated January 17, 2007 the employee checked "severe emotional distress". On January 27, 2007 the employee was admitted to the hospital for a reported suicide attempt by taking Xanax pills. A Dr. Simpelo released the employee on January 28, 2007 with an assessment of acute depression with overdoses of Xanax and Serax with a recommendation that she follow up with a psychiatrist, Dr. Shaw. However, the drug screen that was done at that time was negative.

The employee was hospitalized at Christian Hospital on January 29, 2007 and came under the care of Dr. Habib. At that time the employee reported "life in general has got her down" -- having a lot of stress and issue at home and took Xanax to do the job. At that time the employee was asked questions about the types of things that caused her to come to the hospital: Some of her responses were:

1. "I have just about had it. ...On April 13th, 4 years ago, my husband and I went to, a homecoming party and the ex-wife was there and April 14th my husband told me he still loved his ex-wife and he was ready to move me out and move her back in. I currently can't work because I have been having surgeries on my arms".
2. "I can't get it out of my head that he told me he loved his ex-wife ... it has built up over time. There is so much".
3. Patient states that she is paranoid about work and people are watching her from work. I just wish things could get better.
4. She say her boss told her she was a no good bitch.
5. She feels helpless.
6. The employee identified family relationships as the major source of her stress.
7. The employee reported she is hanging on to the feeling of betrayal by her husband 4 years ago.

8. The employee reported that her husband, stepson and husband's ex-wife are her triggers.

Dr. Habib discharged Ms. King as of February 7, 2007 reporting:

1. The employee was in the hospital about one week.
2. The employee reported she had been depressed since 2003 and has been increasingly more depressed.
3. The employee reported she took Xanax.
4. The employee reported she had never been hospitalized before.
5. The employee reported relationship and financial problems.
6. Diagnosis was depressive disorder, major depression, recurrent.

The employee was also hospitalized at Christian Hospital as of March 10, 2008 by Dr. Rebekah A. Radmanesh. When the employee was in the hospital this time she reported:

1. She was going to kill herself with a gun.
2. Stressed by her 14 year old son as well as her husband.
3. She can no longer deal with the stressors.
4. She complains of having a car to drive and not having any income.
5. She feels helpless, hopeless and worthless.
6. She complains of anxiety and racing thoughts.
7. She reports she feels disrespected by everyone.

Again, Ms. King was asked questions about why she came to the hospital and other questions. She says:

1. She was either going to kill herself or him.
2. She said she felt this way for years.
3. Says she tried to kill herself with Xanax in the past.
4. Says she was abused by her ex-husband.
5. In 1999 when she was working her boss told her she was a no good bitch.
6. She is currently having problems with her husband and her son.
7. Currently lives with her husband but does not want to be with him.
8. Transportation and financial problems.
9. She says she cannot function on the job. Said she was fired due to shoulder difficulties.
10. No one cares, nobody wants to listen, my son gives me no respect and tells me I am a no good mom, husband drinks.
11. Can't get over fact that her husband still loves his first wife.

Dr. Radmanesh released the employee with a diagnosis of Major Depression, recurrent.

At trial the employee testified that she is not employable now as:

1. She can't work around people.
2. She can't lift.
3. She is always paranoid.
4. She can't be around a crowd of people.
5. She can't work due to shoulder problems of not being able to lift and mental problems.

Testimony of Shawn L. Berkin, D.O.

Employee's counsel sent the employee to see Dr. Berkin for an evaluation. Dr. Berkin saw the employee on November 23, 2005 and June 5, 2007, and prepared reports dated January 10, 2006 and June 20, 2007. He took a history from the employee, reviewed medical reports and conducted physical examinations. Dr. Berkin testified by deposition on

March 18, 2008.

As a result of his first evaluation he opined:

1. The employee had a rotator cuff tear of the right shoulder with impingement.
2. The employee had fraying of the glenoid labrum of the right shoulder.
3. Status post arthroscopy of right shoulder.
4. The employee had a second surgery due to complications.
5. The accident of September 9, 2004 was the prevailing factor in his diagnosis.
6. The employee has a permanent partial disability of forty-five percent of her right shoulder.

After his second evaluation, Dr. Berkin had further opinions:

1. The diagnoses for the right shoulder are the same.
2. The employee has over use tendonitis of the left shoulder with impingement syndrome.
3. The accident of September 9, 2004 was the prevailing factor in the problems with the left shoulder.
4. The doctor increased his rating for the right shoulder to fifty percent permanent partial disability as he felt the employee's symptoms were worse.
5. The employee has a twenty percent permanent partial disability to the left shoulder. He also stated that the employee has a loading factor that should be applied.

Dr. Berkin's first report did not mention or address the concepts of permanent partial disability to the employee's left shoulder, the concept of permanent total disability or any psychological component concerning Ms. King.

Ms. King's counsel asked the doctor to evaluate her a second time. Dr. Bernstein saw the employee on May 4, 2006 and prepared a report the same day. He also provided a supplemental letter dated September 22, 2006. Dr. Berkin reviewed Dr. Bernstein's report and took his opinions into consideration when he formulated his own opinions. However, Dr. Berkin did not personally provide a rating as to the psychological component of this case.

On March 18, 2008 Dr. Berkin testified and was cross examined about his opinions and the information he relied on in reaching his opinions. He testified that:

1. The employee did not have any psychiatric records that showed psychiatric/psychological treatment prior to September 9, 2004.
2. The records did not show any, and the employee told him that she did not have any permanent restrictions or any condition or disability prior to September 9, 2004.
3. If the employee only had the two shoulder problems, she would not be permanently and totally disabled.
4. His ratings assume some type of psychiatric disability.
5. The employee had prior left knee surgeries but said her symptoms resolved after the surgeries.
6. That on the November 23, 2005 examination the employee had no left shoulder complaints.
7. That in his January 10, 2006 report the only disability he rated was the right shoulder and he rated no preexisting disability or noted no preexisting disability that served as a hindrance or obstacle to employment.
8. That in his first report he did not provide an opinion about employability.
9. The employee's left shoulder problems apparently began about August 2006.

In his second report, Dr. Berkin provided his opinions about the employee disabilities. He stated that:

1. Due to her the employee's disabilities, when considered in combination they represent a significantly greater disability than the sum of her individual disabilities and a loading factor should be applied.
2. He would defer an opinion of disability due to her anxiety and depression to Dr. Bernstein who rated her degree of disability at 25%.
3. The disability due to her depression represented a hindrance or obstacle to employment or reemployment at the time of the September 2004 injury involving her arms.
4. The disability due to her depression in combination with the disability rating resulting from the September 2004

injury creates a significantly greater disability than the sum of her individual disabilities and a loading factor should be applied.

5. Based on the nature and extent of her injuries, I do not feel the patient is capable of competing for or maintaining gainful employment in the open labor market and is permanently and totally disabled to work.

Testimony of Samuel Bernstein, Ph.D.

Dr. Bernstein saw the employee on May 4, 2006 and prepared a report with the same date and a supplemental letter dated September 22, 2006. He testified by deposition on December 29, 2006 and indicated that he is a psychologist and vocational expert who is now retired and living in Florida.

When Dr. Bernstein saw the employee he made personal evaluations and took a medical history from the employee. He testified that he has seen and reviewed the medical records of Dr. Shaw. Those records were summarized earlier in this award.

Dr. Bernstein provided his opinions about the employee's disabilities:

1. He testified that Dr. Shaw's records show a history of depression and anxiety that existed in 2002.
2. He diagnosed Major Depression that he says existed at the time of the employee's accident and prior to the accident based on his review of Dr. Shaw's records. He stated that throughout Dr. Shaw's records he alluded to anxiety and family problems.
3. He rated her preexisting depression at 25%.
4. He rated the major depression as 25% of the person when you combine the preexisting depression with her orthopedic injury of September 9, 2004.
5. The employee is not employable in the open labor market when you combine her psychological with her orthopedic problems -- she couldn't get through an eight hour workday and be in a persistent and regular basis -- she couldn't function in a regular work situation.
6. Based on the record and his own observations of the employee, the preexisting depression was a hindrance or obstacle to employment. Dr. Bernstein stated that the employee's chest pain, stomach pain, family problems were all depressive and would be a hindrance to functioning in a work situation.

Dr. Bernstein was cross examined about the basis for and his opinions. He admitted that:

1. The employee told him that she had never been seen by a mental health professional before her accident.
2. When he was asked if Dr. Shaw ever diagnosed paranoia, anxiety or major depression, he responded by stating that Dr. Shaw alluded to psychiatric or psychological problems -- Dr. Shaw is a medical doctor. When asked where the information was, he responded, it is in the record, he picked up on anxiety but does not know if he gave it a "major" heading.

Dr. Bernstein testified that the employee told him that her problems started in 2002 and worsened. He testified that "This has progressively worsened to the point where she now has a full-blown major depression and anxiety. When asked when the employee's situation worsened to major depression, his response was he cannot give an exact date but that it goes way back, when you look at Dr. Shaw's records, but he does not know when it began. When asked if she had depression and then went to major depression, the doctor stated that he could not give an exact date but her depression goes way back.

Dr. Bernstein further testified that despite the employee's recent post injury problems of contemplation of divorce, suicide attempts, care for the grandchild, and the hysterectomy, that based on the record he still believed that major depression existed prior to the accident of September 9, 2004. He testified that he believed this even without any mental health records supporting these conclusions.

Testimony of Patrick L. Hughes, M.D.

Dr. Hughes was employed by the Second Injury Fund and was asked to review Ms. King's case. He testified by deposition on June 9, 2008 He testified that he is a board certified psychiatrist practicing clinical psychiatry on a daily basis. He was able to review all of the medical records and depositions, including the deposition of Dr. Bernstein. He

was not allowed the opportunity to interview the employee personally. He admitted that a personal interview is always better, but testified that the depositions had many questions that he would ask in a face-to-face interview and he therefore felt he could render an opinion about the employee's psychiatric state. As part of his review process, Dr. Hughes testified that he reviewed a considerable amount of records that predated September 9, 2004.

As a result of his review, Dr. Hughes opined:

1. The employee developed a full episode of illness, major depression, in 1998 that lingered on and wasn't fully relieved until June of 2003, when she received the first adequate doses of pharmacotherapy that we would expect to resolve an episode of major depression.
2. In the records between June of 2003 and September of 2004 when she injured her shoulder, there was no reference in that treating doctor's records to her reporting any other psychiatric distress.
3. In fact, she was off her medications quite some time before the September 9, 2004 injury.
4. She had an episode of major depression spanning August 1998 through June of 2003 that was resolved and gone, off medication, a considerable time period before her September 9, 2004 shoulder injury.

The doctor also reviewed information from after September 9, 2004. He testified that there isn't any reference to psychiatric symptoms or complaints until October 6, 2005 when the employee told her doctor that she was having "nerve problems" upon learning about the possibility of facing divorce.

Dr. Hughes commented on the report that was prepared by Dr. Bernstein. He testified that Dr. Bernstein's testing was real time "how do you feel today" symptom questionnaires so that they reflect almost entirely what the patient herself reported was her subjective psychiatric distress and symptoms in May of 2006; therefore the tests are of no value in determining preexisting psychiatric conditions or complaints.

He indicated that determining preexisting psychiatric conditions or complaints relies entirely on a review of the medical records and what the patient reported her status was in the past. He indicated that the psychological testing done by Dr. Bernstein doesn't tell that; "Therefore, I don't see any valid way that psychologist Bernstein could conclude, one way or another, about preexisting psychological distress prior to September of '04".

Dr. Hughes further testified that "he also erroneously concluded that she was permanently partially disabled from depression ...at best it is premature to say that untreated major depression is permanently disabling, and it's not at all in keeping with what ... psychiatrists expect and anticipate what will happen when we treat somebody with depression. We would not expect any permanent psychiatric disability if treatment rendered is adequate".

Dr. Hughes also reviewed the employee's medical history from events that happened in January and April of 2007. He took a look at the diagnoses of the doctors who saw the employee after those events and testified that "... the vast preponderance of scientifically sound medical credible research done in the last 20 years clearly indicates that the illness, major depression, is a genetically caused biochemical disturbance of the brain that varies often spontaneously to waxing and waning symptoms, but most commonly leads to 8 to 16 month episodes of biological brain dysfunction."

He testified that while it is not his opinion that life events can trigger generic depression, what was referred to as reactive depression or anxiety is now called adjustment disorder. He testified that the records indicate that the employee's admission in April 2007 clearly was more from an adjustment disorder than a major depression. He stated with the above background he wonders about the psychiatrists who saw her in April 2007, diagnosing her with recurrent major depression. He said the records clearly indicate that she

presented alleging suicidal ideation after having the latest of upsetting conversations with her husband. Dr. Hughes testified that would be characterized as an adjustment disorder.

Dr. Hughes was asked if the employee was suffering from any major depression at the time of her injury of September 9, 2004. He replied that the records are clear that the employee was not, that her 1998 through 2003 episode had resolved with treatment, and she was symptomatic off treatment. He stated there is evidence in the records of some dysfunctional ways of looking at things and operating, but there was not sufficiently detailed or broad or sustained evidence of personality pathology that I feel you could diagnose a personality disorder to a degree of medical certainty.

Dr. Hughes further opined that the employee had no psychiatric disability that preexisted her 2004 injury, nor causing her any impairment or distress at the time of her shoulder injury. However he stated that there was a new episode of major depression from sometime in 2005. As to the 2005 episode, he noted that the employee's doctor noted changes in her psychological functioning that sounded like major depression and increased her antidepressants and anxiety meds as would be appropriate.

Dr. Hughes testified that there is no report of any meaningful psychiatric distress until Dr. Bernstein's report in April 2006 and that this episode was not connected to her workplace injury as orthopedic injuries don't cause major depression, nor do they cause depression secondary to a general medical condition. He provided his opinion stating:

1. As of the time of the employee's deposition, her two psychiatric diagnoses and adjustment disorders in 2007 (reactive depression) seemed resolved.
2. The employee has 0% psychiatric disability or impairment from her work injury.
3. The employee requires no restrictions or accommodations for work due to psychiatric issues.

Dr. Hughes was cross examined about his conclusions by the employee's attorney. When he was informed that the employee testified that she had problems in 2003, the doctor responded by saying that his statement that the employee's 2003 problems subsided did not come from the employee, he based his opinion that it had subsided from records of her primary doctor. Dr. Hughes testified that there was not any reference to any further psychiatric complaints to her treating doctor after he raised her antidepressant dosage. When Dr. Hughes was asked if he infers from this that she no longer had those complaints, he said "absolutely," there are no references to the employee's mental outlook during that interim period of time. Dr. Hughes stated "It's resounding by its silence," usually people go to doctors and report their distress.

Dr. Hughes agreed that from 1998 to 2003 the employee has a diagnosis of major depression. However he testified that Dr. Bernstein was wrong in his opinion diagnosing a preexisting mental disorder as he stated that the records support that opinion when in fact they do not. Dr. Hughes further testified that he absolutely disagrees with Dr. Bernstein's opinion as the record does not show treatment that was preexisting after medication was raised -- it is only the employee that is saying she had continuing psychiatric problems. In addition Dr. Hughes does not agree with Dr. Bernstein's opinion that the employee has some partial disability attributable to her preexisting mental disorder.

During the trial on September 15, 2008, the Court observed the manner of the employee. At 10:25 AM the employee was being questioned by her attorney and stated that she was having a panic attack and needed a break. A short break was taken. The Court observed no outward indication of any problems that the employee was experiencing during her testimony nor after she returned after the break.

RULINGS OF LAW

Section 287.020.7 RSMo. provides as follows: The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the

employee was engaged at the time of the accident.

The phrase “the inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. **Kowalski v. M-G Metals and Sales, Inc.**, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. **Reiner v. Treasurer of the State of Missouri**, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the “inability to return to any reasonable or normal employment”. **Brown v. Treasurer of the State of Missouri**, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. **Id.** The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s physical condition, reasonably expecting the employee to perform the work for which he or she is hired. **Reiner** at 365. See also **Thornton v. Haas Bakery**, 858 S.W.2d 831,834(Mo.App.1993).

The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the “Second Injury Fund” hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

In general, the issues that are to be determined in this case are:

1. Whether the employee had any disabilities that preexisted September 9, 2004 that were of such a hindrance or obstacle to employment or reemployment that meet what is called “threshold” and combine with the disability created by the September 9, 2004 shoulder accident to create Second Injury Fund liability for permanent partial disability, or
2. Whether the employee had any disabilities that preexisted the September 9, 2004 accident that combine with the disabilities from that accident that create such an obstacle to employment or reemployment that the employee is not competent to compete and is unemployable in the open labor such that no employer would be likely to hire her justifying Second Injury Fund liability for permanent total disability.

The resolution of those legal issues mainly focuses on several blocks of evidence:

1. The testimony of the employee.
2. The medical records of Dr. Shaw that predated the accident.
3. The testimony of Dr. Bernstein.
4. The testimony of Dr. Hughes.

The overall testimony of Dr. Berkin is less critical as he adopts the opinions of Dr. Bernstein in formulating his opinions. Obviously, if the opinions of Dr. Bernstein are not found to be credible, per se the opinions of Dr. Berkin would be found to lack credibility.

The record is clear that there are no physical injuries or disabilities that preexisted September 9, 2004 that generate Second Injury Fund liability. The only matters that are in evidence are the employee’s prior knee surgeries and she testified and the record shows that she recovered fully from those injuries. Any Second Injury Fund liability therefore focuses on any psychiatric/psychological disabilities that the employee may have had, the extent of those disabilities and when any such disabilities started or existed.

In general the employee testified that she had stress and anxiety problems as far back as 1998-1999 that affected her

ability to work. She testified that she started seeing Dr. Radmanesh and Dr. Shaw in about 1999 for what she referred to as emotional issues and anxiety/panic attacks. There are no records from Dr. Radmanesh in evidence covering this time period, nor did Dr. Radmanesh testify by deposition. The employee also testified that she worked for at least five employers during that period and that she had no physical limitations or restrictions of any kind that were placed on her by any doctor. She also testified that she had no work restrictions that were placed on her by any doctor for anxiety or stress problems. She also testified and the record documents that she was not hospitalized for any emotional/anxiety/stress/psychiatric/psycho-logical problems prior to September 9, 2004. Despite this information, the employee testified that she had “problems” that caused her to have difficulty doing her job and in fact at least on one occasion caused her not to work for a couple of months due to stress. The employee also testified that she cannot presently work due to a combination of her physical and mental problems.

Other than the employee’s testimony, the only medical evidence that was presented that documents the employee’s medical care prior to September 9, 2004 are the records contained in Employee’s Exhibit B which generally contains the records of Dr. Shaw. It is Dr. Shaw’s records that were reviewed by Dr. Bernstein and Dr. Hughes and which formed part of the basis for their professional opinions.

The Court carefully reviewed Dr. Shaw’s records. Dr. Shaw is a medical doctor and is neither a psychiatrist nor a psychologist. The first dated entry in those records is August 28, 1998 and the last is September 23, 2005. When you review his records you find that are several references to stress, emotional problems, nerves or anxiety. There is no question that the employee has had difficulties in her personal life that have been of great concern to her for a long time. When you add the psychiatric records post September 9, 2004, the major events that are recurring and which seem to be the major source of the employee’s problems are 1) her husband told her he did not love her anymore and wanted to return to his first wife, and 2) the situation with her boss who she says yelled at her and called her a no good bitch. As best as can be determined, the situation with the boss occurred sometime while the employee was working for Shop and Save. The employee indicated that period was somewhere from 1997 to 2000. The time frame for the initial statement by the husband was mentioned in the January 29, 2007 records of Christian Hospital as occurring on April 13th or 14th about four years earlier.

Dr. Shaw’s records make a few general references to social stressors and problems with her job. When you read the records, the references to “problems” are sometimes included in the section “Reason for Call”. The Court believes that the source of that information is the employee. While the employee was prescribed Xanax, there is no diagnosis of any psychiatric or psychological illness in his records. On September 9, 1999 Dr. Shaw’s records indicate “A/P Anxiety/severe social stressors”. The Court interprets this to mean assessment and plan. On February 4, 2000, Dr. Shaw’s record indicates that he would like the employee to see Dr. Radmanesh. When you consider the extent, the substance and the content of all of Employee’s Exhibit B, it is the Court’s opinion that there is not a whole lot of information that documents the existence of, extent of, severity of, or timing of any psychological problems that the employee may have had before September 9, 2004. There are no records of any mental health professionals. There are no records that the employee sought the services of any mental health professionals at any community counseling centers prior to September 9, 2004.

Regardless of the Court’s opinion, it is the records of Dr. Shaw that is the basis for the opinions of medical health professionals that is relevant in this case, and that would have to be utilized in assessing Second Injury Fund liability. The Court has very carefully reviewed, contrasted and compared the opinions of Dr. Bernstein and Dr. Hughes. It is the opinion of the Court that the opinions of Dr. Hughes are far more credible than those of Dr. Bernstein. Dr. Hughes’ opinions provide a more credible view of what the records of Dr. Shaw say and what they do not say. While it is certainly relevant that Dr. Hughes is a board certified psychiatrist and Dr. Bernstein is a psychologist, it is the content of their opinions and the conclusions that they derived from the records that they reviewed, specifically the records of Dr. Shaw, that caused the Court to value the opinion of Dr. Hughes far more greatly than the opinion of Dr. Bernstein. The Court finds it interesting that one of the main reasons that employee’s counsel gives for suggesting that the opinion of Dr. Hughes should not be given any weight is because he did not personally interview the employee. Dr. Hughes testified that a personal interview is always the best. The Second Injury Fund is not given the right under the law to demand that Dr. Hughes be allowed to interview the employee. Only the employee could allow or disallow such an interview. Dr. Bernstein’s opinion is based on a review of Dr. Shaw’s records. Regardless of that observation, it is the content, substance and expertise of the doctors’ opinions that is relevant to the Court.

Dr. Bernstein reviewed the evidence and testified that Dr. Shaw's records alluded to anxiety and family problems and showed a history of depression and anxiety that existed in 2002. In addition he stated that he diagnosed Major Depression that existed at the time of the employee's accident on September 9, 2004. Dr. Hughes took exception to the findings of Dr. Shaw indicating that there was no basis for them. He testified that it was clear that the employee was not suffering from any major depression at the time of her injury on September 9, 2004. His opinion was that the employee had an episode of major depression spanning August 1998 to June 2003, but as of June 2003 that problem was resolved and gone. He testified that the employee was off medication a considerable time before September 9, 2004 and that between June 2003 and September 2004 when the employee injured her shoulder, there was no reference in the treating doctor's records to the employee reporting any psychiatric distress. There is no credible evidence presented by the employee that there was a hindrance or obstacle to employment in this time period.

Dr. Hughes was particularly critical of Dr. Bernstein's testing and analysis. He testified that asking a patient about how they feel today does nothing to establish a condition that existed years before. The only way to do that is by an examination of the prior records which reports what the patient's condition was in the past. While there are no psychiatric/medical records diagnosing Major Depression prior to the employee's accident, that is certainly not the case beginning in 2007 and 2008. The record is clear that the employee has suffered from and been diagnosed with severe problems in that time frame. Some of the stressors that existed in the past have apparently continued to cause distress to the employee but have escalated. It is also clear that any left shoulder problems developed after the fact; if not, they would have been dealt with when the employee settled her case in 2008. While the employee had problems after September 9, 2004, those matters do not form any basis for Second Injury Fund liability.

The opinion by Dr. Bernstein that the employee is permanently and totally disabled as a result of the combination of her preexisting mental problems and the disabilities from her accident is rejected by the Court as lacking in foundation and credibility. The employee has failed to prove that the Second Injury Fund is responsible under the law to pay permanent total disability benefits.

There is no question that the employee has experienced a lot of stressors in her life that have caused her anxiety and stress. But the evidence does not convince the Court that a combination of any problems that she had prior to September 9, 2004 and/or on September 9, 2004 combine with the disabilities that she received from her shoulder surgeries to create permanent total disability and liability for the Second Injury Fund. The employee has not presented credible and convincing evidence that she is unemployable in the open labor market.

In addition the Court finds that the employee has failed to prove that she had any disabilities that preexisted September 9, 2004 that arose to a level of hindrance or obstacle to employment or reemployment that meet what is called "threshold" and combine with the disability created by the September 9, 2004 shoulder accident to create Second Injury Fund liability for permanent partial disability. The employee worked at Tri-County Group XV without restriction. She was working full duty with no restrictions prior to the primary injury. She worked for employers in the past without restriction. Any anxiety/stress problems that the employee may have had in the past were resolved at the time of her accident or were not job debilitating. Her subsequent psychiatric problems were far more serious, as evidenced by the multiple hospitalizations for expressed suicidal ideations

The employee has the burden of proof to provide competent and credible evidence proving the issues in dispute. The employee has not done so in this case. The Second Injury Fund has no liability in this case.

ATTORNEY'S FEE

No attorney fees are awarded in this case.

INTEREST

No interest will be due in this case.

Date: _____

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Ms. Nasreen Esmail
Acting Division Director
Division of Workers' Compensation