

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

Injury No. 09-081847

Employee: Isabella Lovadina  
Employer: City of St. Louis (Settled)  
Insurer: Self-Insured (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 § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 11, 2015. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued May 11, 2015, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 25<sup>th</sup> day of September 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee:	Isabella Lovadina	Injury No.: 09-081847
Dependents:	N/A	Before the
Employer:	City of St. Louis (Settled)	<b>Division of Workers' Compensation</b>
Additional Party	Second Injury Fund	Department of Labor and Industrial Relations Of Missouri
Insurer:	Self C/O CCMSI (Settled)	Jefferson City, Missouri
Hearing Date:	February 2, 2015 (record closed February 25, 2015)	Checked by: KOB

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: October 5, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Claimant was assaulted by a suspect.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: body as a whole and right shoulder
14. Nature and extent of any permanent disability: 40% of the body as a whole and 17.5% of the right shoulder  
(200.6 weeks)
15. Compensation paid to-date for temporary disability: \$52,904.89
16. Value necessary medical aid paid to date by employer/insurer? \$144,841.46

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$746.00
- 19. Weekly compensation rate: \$497.77/\$422.97
- 20. Method wages computation: By Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Employer previously settled its liability.

- 22. Second Injury Fund liability: Yes

Beginning on September 11, 2012, and continuing for 200.6 weeks, the SIF is liable for weekly payments in the differential amount of \$74.80 for 200.6 weeks, and then \$497.77 per week thereafter, and continuing in accordance with the law.

TOTAL:

INDETERMINANT

- 23. Future requirements awarded: See Award

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: Stephen Thurmer

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Isabella Lovadina	Injury No.: 09-081847
Dependents:	N/A	Before the <b>Division of Workers' Compensation</b>
Employer:	City of St. Louis (Settled)	Department of Labor and Industrial Relations Of Missouri
Additional Party	Second Injury Fund	
Insurer:	Self C/O CCMSI (Settled)	Jefferson City, Missouri
Hearing Date:	February 2, 2015	Checked by: KOB

### PRELIMINARY STATEMENT

The matter of Isabella Lovadina (“Claimant”) proceeded hearing. Attorney Stephen Thurmer represented Claimant. Assistant Attorney General Elad Gross represented the Second Injury Fund. The City of St. Louis (“Employer”) previously settled its liability in this case and was not present for this trial.

The parties agreed that as of the date of injury, Claimant was an employee of Employer, and the parties were operating under and subject to the provision of the Missouri Worker’s Compensation Law (the “Act”). Further, on or about October 5, 2009, Claimant sustained an accidental injury arising out of and in the course employment that resulted in injury to Claimant. The parties agreed jurisdiction and venue are proper, and notice and filing of the claim were timely. Claimant’s average weekly wage was \$746.00, making the weekly compensation rate \$497.77 for permanent total disability (“PTD”) benefits and temporary total disability (“TTD”) benefits and \$422.97 for permanent partial disability (“PPD”) benefits. The parties stipulated Employer/Insurer paid \$144,841.46 in medical expenses and \$52,904.89 in TTD benefits. Claimant attained maximum medical improvement on September 11, 2012, and Claimant and Employer reached a settlement on the primary injury.

The issues to be determined are the nature and extent of permanent disability associated with the primary injury and the liability of the Second Injury Fund for PTD or PPD benefits.

The following exhibits were admitted on Claimant’s behalf:

1. Employer Report of Injury
2. Deposition of David T. Volarich, D.O. with exhibits dated June 13, 2014
3. Deposition of Dr. Adam Sky with exhibits dated January 5, 2015
4. Deposition of James England with exhibits dated August 14, 2014
5. Medical Records from City of St. Louis – EMS
6. Medical Records from St. Louis University Hospital
7. Medical Records from Barnes Jewish Hospital
8. Medical Records from PRORehab
9. Medical Records from J. Todd Glass, M.D.
10. Medical Records from Barnes Care

11. Medical Records from Susan MacKinnon, M.D.
12. Medical Records from Charles Nathan, M.D.
13. Medical Records from Delmar Gardens Home Care
14. Medical Records from Frontenac Surgery & Spine Care Center
15. Medical Records from Orthopedic Sports Medicine & Spine Care Institute
16. Medical Records from Rehabilitation Institute of St. Louis
17. Additional Medical Records from Rehabilitation Institute of St. Louis
18. Medical Records from Barnes-Jewish West County Hospital
19. Medical Records from Wayne Stillings, M.D.
20. Medical Records from Melissa Harbit, M.D.
21. Medical Records from Mercy Hospital
22. Medical Records from Charles Nathan, M.D.
23. Medical Records from Marcia McCabe, Ph.D
24. Medical Records from Barnes BJH
25. Medical Records from Tara Galovski, Ph.D.
26. Stipulation for Compromise Settlement on Primary Injury<sup>1</sup>
27. Deposition of Dr. Paul Michael Packman with exhibits dated January 28, 2015

The Second Injury Fund offered two depositions as follows, which were admitted without objection:

- A. Deposition of Karen Kane-Thaler with Exhibits dated January 15, 2015
- B. Deposition of Gregg Evan Bassett with Exhibits dated January 30, 2015

To the extent there are objections contained in the depositions to which the attorneys have not specifically directed the ALJ, those objections are now overruled. Any highlights or marks on the exhibits were present when submitted and were not placed thereon by the ALJ.

### **FINDINGS OF FACT**

Based on my observations of Claimant's demeanor during her testimony, I find that she is a very credible witness. Based on the testimony of Claimant, the medical records introduced, the evidenced admitted, and the expert evidence presented on behalf of Claimant, I make the following findings of fact:

Claimant is a 33 year old female who fulfilled a dream to become a police officer in 2007 when she entered the Police Academy and joined the City of St. Louis Metropolitan Police Department. She joined the force because she wanted to help people and was inspired by her older brother Alex, who was a police officer. Police officers had been a part of Claimant's life from an early age because her father was a drug addict who was physically and emotionally abusive, and when police officers were around her, she felt safe.

Claimant's childhood was difficult; she attended several schools but dropped out during her junior year, later earning her GED. There was a history of mental illness in her family.

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<sup>1</sup> On the date of the hearing, Claimant settled her primary injury claim against Employer for 40% of the body as a whole (psych), 17.5% PPD of the right shoulder and for an additional 20 weeks of disfigurement. Future medical treatment was left open for reasonably related issues. Said settlement also resolved disputed past medical, unpaid medical and disputed unpaid TTD benefits.

Claimant herself attempted suicide twice and received intermittent psychological care over the years, including four hospitalizations and ongoing medication for depression.

Before she became an officer, Claimant worked as a waitress, esthetician, and in retail. While some reports in evidence only discuss four or five prior jobs, Claimant also reported she held many jobs since she entered the work force at age 16, but was habitually late, had some conflicts at work, and left jobs frequently. In hindsight, Claimant realized her preexisting psychiatric problems interfered with her ability to work for a variety of reasons: they reduced her concentration, pace and persistence in the workplace and interfered with her motivation to get ahead.<sup>2</sup> Once she joined the force, Claimant successfully carried out the physical, stressful and demanding tasks of a patrol officer for two years leading up to the incident that forms the basis of this claim.

Late at night on October 5, 2009, Claimant was walking in the City of St. Louis with a male friend when two men with guns approached and forced them into a residence.<sup>3</sup> As the armed men ransacked the house, Claimant was forced at gunpoint to lie face down on the floor. She began thinking like a cop: playing out possible scenarios, trying to memorize the appearance of the perpetrators and being aware of everybody's location in the house. When one of the perpetrators was going to take another female downstairs to the basement, Claimant volunteered to go instead as she feared that the man would rape or kill her friend. Claimant rose to her feet and attacked the suspect in an attempt to disarm him. However, gunshots rang out. Claimant was shot five times, her male friend was shot, and the other woman was killed. The assailants fled, but were apprehended shortly thereafter and ultimately sentenced to lengthy prison terms.

Claimant was transported to Saint Louis University Hospital for multiple gunshot wounds. One bullet entered her right anterior chest and exited her shoulder, a second bullet grazed her right cheek, a third entered her right breast lodging in her left breast, a fourth bullet entered her right breast, and a fifth bullet entered her right posterior thigh which traveled through her uterus and became lodged in her pelvis. She suffered a collapsed lung and a sternal fracture. In addition to the initial surgical and conservative treatment for the gunshot wounds, Claimant required reconstructive breast surgery, a C6 transverse process block, and a nerve release in her forearm. She had follow up treatment with numerous physicians, with Employer paying \$144,841.46 in medical expenses. A functional capacity evaluation performed November 11, 2010 placed her in the heavy duty capacity with no restrictions from a physical perspective. Although she underwent a scar revision on October 30, 2012, Claimant was placed at MMI as of September 11, 2012.

Fortunately, the permanent disability caused by the gun shots is mostly limited to Claimant's right arm. She has limited mobility of the right wrist, decreased strength, and pain. She loses the functionality with use, and the scar is troublesome. She also is bothered by her chest with certain clothing and weather.

Although she ultimately recovered well from the gunshot wounds, Claimant's injuries were not just physical. She suffers from what all experts agree is Post-Traumatic Stress Disorder. Following the events of October 5, 2009, Claimant saw Dr. Melissa Harbit on a

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<sup>2</sup> See Exhibit 19, p.4, Report of Dr. Wayne Stillings.

<sup>3</sup> Claimant was not literally at work, but SIF does not challenge compensability because "[i]n a sense, a police officer is never off duty" *Spieler v. Vill. of Bel-Nor*, 62 S.W.3d 457, 459 (Mo. Ct. App. 2001)

regular basis as well as therapist Marcia McCabe, PhD. Records from Dr. Harbit indicate that Claimant's active problems included: depression, moderate recurrent major depression and post-traumatic stress disorder. Her symptoms waxed and waned, and her medications were adjusted. Claimant sees Dr. McCabe for psychotherapy to help her deal with a variety of stressors, including the guilt associated with the event, depressive symptoms, relationship issues, social anxiety and troublesome dreams. Dr. McCabe tracked both Claimant's "depressive" symptoms as well as her "PTSD" symptoms, and used cognitive behavioral psychotherapy to address issues stemming from the events of October 5, 2007 as well as those dating back to her childhood. Dr. McCabe's records indicate Claimant made progress and suffered setbacks over the course of treatment. Claimant continues to take medication as prescribed by Dr. Harbit, and sees Dr. McCabe regularly.

Following her physical recovery, Claimant made several attempts to return to the workforce. She was given a limited duty assignment at the Police Academy gym, monitoring the front desk and checking ID's. Claimant found her fear when alone and other stressors made it impossible to continue to function in this job. She briefly worked as a dog walker, but on some days she could not get out of bed due to overwhelming depression and lost this job. For ten months in 2013, Claimant worked as a Court Advocate for the Central West End Neighborhood Security Initiative, which involved tracking cases and otherwise supporting victims and the efforts of law enforcement. Yet again, her depression negatively impacted her attendance and lead to her termination. Claimant enjoyed volunteering for Girls on the Run, a local charity but she was unreliable. Claimant also attempted to take community college classes, but could not successfully complete her coursework. Claimant testified with all sincerity that she would like to work, but her depression keeps her from maintaining employment.

Currently, Claimant can identify several specific things that trigger her anxiety: red hoodies, men with dreadlocks, standing close to others, loud noises, going into bars, and being in the city, for example. Ironically, she has a fear of being alone but also does not like being around people or in a crowd. She feels safer outside. She can no longer do things that used to be enjoyable, like going to a show, kick boxing or working out. Her sleep patterns are erratic and she has nightmares. Her alcohol consumption has increased. Generally, she has a loss of energy and concentration. She feels helpless and hopeless, has 4 or 5 bad days a week, and is often homebound.

#### *Expert Testimony*

There are a number of expert medical, psychological and vocational experts to weigh in on this case. None of the experts dispute the fact that Claimant has significant physiological impairment following the events of October 5, 2009. **David T. Volairch, D.O.** is the only expert to address the physical disabilities.<sup>4</sup> He examined Claimant on September 15, 2013 and concluded Claimant suffers from the following permanent partial disabilities as a direct result of the primary injuries sustained on October 5, 2009:

1. 10% the body as a whole rated at the chest, due to ongoing chest wall pain after multiple gunshot wounds;

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<sup>4</sup> Dr. Christopher Pruett authored a report dated June 28, 2014 with ratings in line with Dr. Volairch, but only Ms. Kane-Thaler references the report, which is not in evidence.

2. 25% PPD of the right upper extremity rated at the shoulder, due to the injury to the subclavian artery that required surgical reconstruction and said rating accounts for right hand numbness and tingling with full abduction of the shoulder;
3. 25% PPD of the right upper extremity rated at the elbow due to the injury to the radial nerve that required decompression of the posterior interosseous nerve in the proximal forearm and said rating accounts for mild weakness in the extensors of the right hand fingers; and
4. Disability exists as a result of her psychiatric disorders, however Dr. Volarich defers to psychiatry for that assessment.

Dr. Volarich states that the combination of Claimant's disabilities creates a substantially greater disability than the simple sum or total of each separate injury. It is Dr. Volarich's opinion that Claimant is unable to return to work as a police officer due to her ongoing psychiatric difficulties. From physical standpoint, Dr. Volarich believes that she can return to full duty observing normal work precautions.

**Dr. Cantrell** mentioned her physical issues, but focused on her psychological when, on May 10, 2011, he performed an IME at the request of the St. Louis Police Retirement System of St. Louis. Dr. Cantrell wrote: "Although there are no objective findings on examination to support physical incapacitation, it is probable that she is suffering symptoms of post-traumatic stress disorder that relate to her injuries sustained on October 5, 2009, although the extent to which her residual psychological distress is as a result of PTSD versus pre-existing depression would be best answered and evaluated by a psychiatrist....It is possible that she is incapacitated due to psychological distress related to PTSD, although again, the extent to which current incapacitation from psychological distress relates to PTSD stemming from the October 5, 2009 injury versus pre-existing and long-standing depression would be best answered by a psychiatrist."

**Dr. Gregg Bassett**, board certified in general psychiatry, also examined Claimant at the request of the Police Retirement System of St. Louis on August 26, 2011 for the purpose of determining disability retirement from the police force. At the time of his examination, Dr. Bassett found that Claimant had not reached MMI. Dr. Bassett found Claimant had Axis I diagnosis of: "preinjury physical abuse of child by father with a focus of clinical attention on the victim, preinjury neglect of child by mother with focus of clinical attention on the victim, preinjury depressive disorder not otherwise specified (controlled/managed with medication) aggravated by injury/incident of 10/5/2009." Dr. Bassett noted that Claimant had some occasion to be late when she was working as a police officer.

In his report, Dr. Bassett states that "the incident/injury of 10/05/2009 and its sequel represent the prevailing factor for the aggravation of [Claimant's] pre-injury (but controlled/managed) depressive disorder." (Exhibit II: Deposition of Dr. Bassett, Exhibit 1, p. 3). "There is overlap between the depressive symptoms that are part of PTSD and the depressive symptoms that comprise a 'primary' depressive syndrome. However, [Claimant] has depressive symptoms beyond those associated with the diagnostic criteria for PTSD. It is for this reason that I opine that the incident/injury of 10/05/2009 represents the prevailing factor in the aggravation of [Claimant's] pre-injury depressive disorder. That said, it is my opinion that the anxiety symptoms/anxiety component of [Claimant's] work-injury-related PTSD represent the

main/major obstacle/impediment to her being able to resume her career as a police officer.” (Exhibit II: Deposition of Dr. Bassett, Exhibit 1, p. 3-4).

Dr. Bassett stated that Axis V is the global assessment of functioning and it is a numerical value from zero to 100 and he gave Claimant a GAF rating of 45; with a range of 41 to 50 corresponding to serious symptoms. Dr. Bassett testified that she had the following preinjury histories: of physical abuse of child by father, neglect of child by mother, partner relational problems and depression symptoms. Dr. Bassett confirmed the following symptoms of depression: helplessness, hopelessness, loss of energy, and self-loathing is associated with depression and some people consume more alcohol when depressed or anxious. Dr. Bassett testified that loss of interest in previously enjoyed activities, sleep changes, concentration problems are symptoms of both PTSD and depression.

**Dr. Paul Packman**, a physician specializing in psychiatry, examined Claimant on November 7, 2011, diagnosing chronic posttraumatic stress disorder with panic attacks and agoraphobia, chronic major depressive disorder, again chronic, and premenstrual dysphoric disorder. For Axis IV, assessment of overall impairment, Dr. Packman stated moderate to severe with a GAF at 35. Dr. Packman stated that at that time Claimant was not at MMI, had a temporary disability rating of 100%, and could not compete in the open labor market.

After reviewing records of Claimant’s pre-injury psychiatric treatment at Barnes Jewish Outpatient from 2003 – 2007, Dr. Packman authored a Supplemental Medical Report dated February 27, 2012, diagnosed Claimant with preexisting major depressive disorder dating back to mid-adolescence and stated Claimant “had increased vulnerability to developing posttraumatic stress disorder but was able to function at her job.” Dr. Packman concluded Claimant “felt depressed all of her life.” She was on Paxil and Zoloft back in 2003, was hospitalized three times for suicidal ideation, started on Cymbalta in 2006, and at different times was on Prozac, Lexapro, Remeron and Effexor. Dr. Packman stated her major depressive disorder preexisted the primary injury and in general people with major depressive disorder have a somewhat increased risk for developing PTSD if a traumatic event occurs.

On September 2, 2014, Dr. Packman authored a MMI Medical Disability Evaluation that took into consideration additional treatment records. While Dr. Packman did not change Claimant’s diagnosis in this report, he did find that her GAF improved to 63. It is Dr. Packman’s opinion that Claimant suffered a 30% permanent partial disability of the body as a whole as a result of her posttraumatic stress disorder, an additional 25% permanent partial disability of the person as a whole for major depressive disorder, and an additional 5% permanent partial disability for her post trauma migraine disorder, for a total rating of 60% PPD of the BAW. Dr. Packman stated that Claimant had a long history of depressant disorder with hospitalizations and suicide attempts by drug overdose, and that on the date of injury Claimant was taking Celexa, an SSRI anti-depressant. When asked how much of the 60% PPD existed prior to October 5, 2009, Dr. Packman stated “clearly she was having some disability but able to work” prior to the shooting so he would divide it up 50/50.<sup>5</sup>

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<sup>5</sup> Dr. Packman’s answer to how much disability existed before October 5, 2009 was interrupted by SIF’s objection (which is overruled) and is otherwise subject to interpretation. However, when read in context, I find Dr. Packman indicated Claimant’s preexisting depressive disorder accounts for 10% to 12.5% PPD of the body as a whole, and that the work accident does not account for all of her depressive disorder.

Dr. Packman stated that “[Claimant] attempted to briefly return to work and was terminated for poor attendance, having alcohol on her breath at work, so those are issues that need to be addressed, but they don’t prevent her ultimately, if she modifies her behavior, from returning to the open labor market.” Dr. Packman opined that with additional vocational training in an area of interest to Claimant, she would be able to return to the open labor market. Dr. Packman stated he would not defer to a vocational rehabilitation expert in regards to whether Claimant is employable in the open labor market.

**Dr. Wayne Stillings** saw Claimant on January 20, 2014 for a psychiatric IME. He also conducted a comprehensive records review of records dating back to her teens. Dr. Stillings’ report states that Claimant reported active symptoms of PTSD with aggravation of pre-existing major depressive disorder with active depressive symptoms. The report states that Claimant “reported chronic depressive disorder since childhood, which has persisted into adulthood. She had some psychiatric treatment at age 15 but only for a short period of time. She made several suicide attempts for which she was hospitalized, and has had intermittent chronic psychiatric care as an adult. She was taking an antidepressant, Celexa, at the time of the [shooting trauma]. In retrospect, now that she has become more psychologically sophisticated, she realizes that her pre-existing psychiatric problems interfered with her ability to work for a variety of reasons. For instance, they reduced her concentration, pace, and persistence in the workplace and interfered with her motivation to get ahead.”

Dr. Stilling’s indicates Claimant entered the workforce at age 16.5 and for the past 13 years, after quitting high school, she held 20 - 25 jobs, the shortest being about 2 days and the longest being her time as a police officer. As a police officer she was in good standing, but in 2008 or so, she received a written reprimand for being tardy for her shift on one or two occasions. On 1/30/14, Dr. Stillings found Claimant to have a GAF of 38-42. Dr. Stillings’ examination found Claimant to have some depressive psychomotor retardation, disrupted flow of thought, poor concentration, and flat affect. Her mood was very depressed and anxious.

Dr. Stillings opined Claimant is permanently and totally disabled from employment in the open labor market. Dr. Stillings noted Claimant attempted to return to work, but was emotionally unstable and unable to function in the jobs in an appropriate manner. In November of 2013, Claimant realized that working was aggravating her PTSD/major depression and that her psychiatric condition was deteriorating due to general work stress.

Dr. Stillings found the October 5, 2009 shooting trauma with near-death experience is the prevailing factor in causing Claimant to experience severe and ongoing PTSD and severe and ongoing aggravation of her pre-existing dysthymic disorder and the need for continued treatment for such. With respect to the permanent disability causally related to the work incidence, Dr. Stillings felt Claimant has a 70% psychiatric PPD of the body as a whole. In addition, Claimant had pre-existing psychiatric diagnosis/disabilities as follows: (a) dysfunctional family origin with an associated 10% psychiatric PPD of the body as a whole, (b) dysthymic disorder with an associated 10% psychiatric PPD of the body as a whole; and (c) personality disorder with an associated 5% psychiatric PPD of the body as a whole. On January 20, 2014, Dr. Stillings found Claimant to have a GAF of 42 (very serious symptoms/impairment).

**Dr. Adam Sky**, a physician specializing in psychiatry, examined Claimant on November 21, 2014. Dr. Sky assessed: major depression (moderate to severe, recurrent), post traumatic

stress disorder, anxiety disorder not otherwise specified, and a history of bipolar affective disorder. Dr. Sky's report states that Claimant has a 100% permanent *total* disability to the body as a whole as a result of the October 5, 2009 work related injury and a 30% preexisting psychiatric disability to the body as whole which was exacerbated by the primary injury. Dr. Sky stated that Claimant has reached maximum medical improvement though she will require ongoing psychiatric treatment to maintain her current degree of functioning.

Dr. Sky testified Claimant had a very significant past psychiatric history going back to her childhood, with a diagnosis of bipolar disorder as well as depression predating the primary injury by almost 15 years. He considered a history consistent with the credible evidence of record.

Dr. Sky testified that the combination of primary injury, the preexisting psychiatric problems, and the history of child abuse makes her permanently and totally disabled from a psychiatric standpoint. Dr. Sky could not see Claimant returning "to any gainful employment given the severity of the symptoms that I saw in the office. She was tearful. She was restless. She could not focus..... [S]he had difficulty answering a question in an appropriate manner. She had to be redirected to answer a straight question. She was exhibiting or reporting severe ... mood symptoms. And these symptoms were not just persistent as we talked about before but at this point they were severe."

Dr. Sky felt Claimant was not totally disabled due to the last injury alone. He testified that "absent the preexisting psychiatric issues I think it is reasonable to assume that she may be able to return to some work." Dr. Sky clarified under cross-examination that of the 100% disability he attributed to Claimant, 30% was preexisting and 70% can be attributed to the primary injury.

**Ms. Karen Kane-Thaler** is a vocational consultant hired by Employer who evaluated Claimant on May 16, 2014 and issued her report in December of that year. Ms. Kane-Thaler opined Claimant's current medical status would not preclude her from returning and participating in the available workforce. Ms. Kane-Thaler opined Claimant could return to the workforce based on Dr. Packman's recommendations, in line with Dr. Volarich's ... recommendations, or considering the records of Drs. McCabe and Harbit. If Ms. Kane-Thaler were to assume that Claimant is permanently and totally disabled per Dr. Sky or Stillings then "[Claimant's] ability to participate in the work force would be impacted."

Ms. Kane-Thaler testified that she considered Claimant's diagnoses of recurrent major depression, and PTSD and the life altering consequences thereof, like avoiding large crowds, noise, and bad neighborhoods, high anxiety, and fear of certain people or places. Yet, Ms. Kane-Thaler created a list of potential occupations for Claimant that did not seem to accommodate these issues including: cashier, front desk clerk, file clerk, and customer service representative. I do not find Ms. Kane-Thaler's testimony credible or persuasive.

**James M. England**, a rehabilitation counselor evaluated Claimant on April 28, 2014. He did not think she would be able to sustain regular employment on a consistent, day-to-day basis. She has attempted, on two different occasions, to do work that is less stressful and found herself unable to continue even in those settings. Assuming the doctors' psychiatric findings and her description of her functioning, Mr. England believes she is more likely to remain totally disabled

as a result of her psychiatric problems and that absent significant improvement in her overall, day-to-day functioning that she will likely remain totally disabled from a vocational standpoint.

### **RULINGS OF LAW**

The claimant has the burden of proving all the essential elements of the claim and must establish a causal connection between the accident and the injury. *Cook v. Sunnen Products Corp.*, 937 S.W. 2d 221, 223 (Mo. App. E.D. 1996)<sup>6</sup>. The claimant does not have to establish the elements of his case on the basis of absolute certainty; it is sufficient if he shows them by reasonable probability. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W. 2d 195, 198 (Mo. App. E.D. 1990). I find Claimant has met the burden required for recovering the benefits she seeks.

#### 1. Permanent Disability Associated with the Primary Injury.

Claimant seeks to recover permanent total disability from the Second Injury Fund. In deciding whether the Fund has any liability, the first determination is the degree of disability from the last injury. *Patterson v. Cent. Freight Lines*, 452 S.W.3d 759, 764 (Mo. Ct. App. 2015) (citations omitted). If the claimant's last injury alone rendered her PTD, then pre-existing disabilities are irrelevant, the Fund has no liability, and the employer is responsible for the entire amount. *Id.* The [fact finder] can consider all of the evidence in determining the amount of an employee's PPD and is not obligated to award the same percentages assigned by experts. *Id. at* 767.

There is no dispute that Claimant suffered significant physical and extremely serious psychological permanent disability as a result of the events of October 5, 2009. With respect to the physical injuries caused by the gunshot wounds, only Dr. Volarich provided ratings: 10% PPD of the body at the chest; 25% PPD of the right upper extremity rated at the shoulder; and 25% PPD of the right upper extremity rated at the elbow. He did not think the physical injuries alone prevented her from returning to work, and deferred to mental health expert as to the effect of the psychological injuries. Dr. Cantrell did not find evidence to support "physical incapacitation, and did not rate her gunshot wounds.

With respect to the psychological injuries from the primary claim, the experts agree Claimant has PTSD. Dr. Basset, in evaluating Claimant for the Police Retirement System and not under the workers compensations standards set forth in the Act, opined the symptoms of PTSD prevent Claimant from returning to her career as a police officer. Dr. Packman rated 30% PPD for the PTSD (which was related solely to the work accident), 5% PPD for post trauma migraine disorder (again work related), and 25% PPD for the major depressive order, which preexisted and was exacerbated by the work incident. When asked to determine how much of the depressive order was related to work as opposed to preexisting, Dr. Packman obliged by estimating a 50/50 split. He did not think Claimant was totally disabled. Dr. Stillings found 70% PPD due to the work accident with 25% PPD preexisting. Dr. Sky assigned 70% PPD to the primary injury with 30% PPD preexisting.

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<sup>6</sup> This is one of several cases cited herein that were among those overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32. Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton's* effect thereon.

Claimant's testimony regarding the lasting effects of the events of October 5, 2009 was credible, consistent with the record, and compelling. She has limited mobility of the right wrist, decreased strength, and pain. She loses the functionality of the right upper extremity with use, and the scar is troublesome. The effects of PTSD, which are supported by Claimant's testimony at hearing and in the various medical records, are profound.

Based on the substantial and credible evidence of record, including Claimant's testimony, the medical records and expert opinions, as well as the compromise lump sum settlement, which is not binding on the SIF but is relevant evidence, I find the permanent disability associated with the October 5, 2009 work incident is equal to 40% PPD of the body as a whole for psychological disability and 17.5% PPD of the right upper extremity at the level of the shoulder. This is a permanent partial disability, and does not in and of itself render Claimant permanently and totally disabled.

## 2. Liability of the Second Injury Fund.

Claimant seeks permanent total disability compensation from the Second Injury Fund. The standard for addressing the issue of total disability is set forth in *Carkeek v. Treasurer of State-Custodian of Second Injury Fund*, 352 S.W.3d 604, 608 (Mo. Ct. App. 2011) (citations omitted):

The Second Injury Fund compensates injured workers who are permanently and totally disabled by a combination of past disabilities and a primary work injury. Section 287.020.6, RSMo Cum Supp.2010, defines the term "total disability" as the "inability to return to any employment and not merely [an] 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 whether the worker is able to compete in the open labor market. Total disability means the inability to return to any reasonable or normal employment, it does not require that the employee be completely inactive or inert. "Any employment" means any reasonable or normal employment or occupation. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

A determination of permanent total disability focuses on the ability or inability of the employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employment. *Gordon v. Tri-State Motor Transit*, 908 S.W.2d. 849 (Mo. App. S.D. 1995).

There is substantial persuasive evidence in the form of Claimant's testimony, expert medical/psychiatric testimony, and vocational analysis to support the finding Claimant is totally disabled and unable to compete in the open labor market. Claimant has made genuine attempts to return to various types of employment, as well as attending classes to expand her vocational options, but has been unsuccessful. I am convinced Claimant has legitimate permanent disabilities that are incompatible with the ability to secure and maintain employment in the open labor market.

Dr. Stillings and Dr. Sky, both psychiatrists, concluded Claimant is permanently and totally disabled due to the combination of the significant PTSD disability, and the preexisting depressive disorder disability. I find these opinions to be credible, persuasive and consistent

with the facts found. Dr. Sky noted Claimant was tearful, restless, unfocused and exhibiting severe mood symptoms, all of which would prevent her from becoming employed. Dr. Stillings noted Claimant realized that work stress aggravated and caused her PTSD/major depression to deteriorate. There is thus convincing credible medical evidence to support the conclusion Claimant is permanently and totally disabled.

Of the two vocational experts, I find Mr. England's opinion Claimant is unable to work far more persuasive than Ms. Kane-Thaler's opinion Claimant can return to and maintain employment. Mr. England noted Claimant's unsuccessful attempts to find a less stressful job. He relied, as do I, on Claimant's credible description of her daily functioning as well as the doctors' psychiatric findings, and concluded she will remain totally disabled as a result of her psychiatric problems. Ms. Kane-Thaler suggested Claimant could work in sedentary positions that involved interaction with the public, which triggers Claimant's anxiety. She also fails to consider the fact Claimant's depression can prevent her from arriving at work, let alone functioning at work. Her testimony is not persuasive or well-founded.

One key to Claimant's recovery is proving she had a preexisting permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment. *Lewis v. Treasurer of State*, 435 S.W.3d 144, 162 (Mo. Ct. App. 2014). Claimant clearly had prior psychiatric disability that qualifies her for Second Injury Fund benefits. Although she functioned well as a police officer despite her preexisting depression, there is ample credible evidence her depression was a hindrance and obstacle to other employment. Her psychiatric problems interfered with her ability to work by reducing her concentration, pace, and persistence in the workplace, impacted her motivation to get ahead, and caused attendance and other issues that negatively impacted her employment.

Furthermore, Claimant must prove she is permanently totally disabled as a result of the primary injury and the preexisting injuries at the time of the primary injury. *Id.* This she has done with compelling evidence of combination. Drs. Stillings and Sky specifically state the total disability is due to the combination of PTSD and major depression. Dr. Sky goes so far as to clarify that "absent the preexisting psychiatric issues I think it is reasonable to assume that she may be able to return to some work." Dr. Cantell and Dr. Bassett establish the combination; while not specifically addressing whether and why Claimant is totally disabled, they explained the overlap of the preexisting depression and aggravation thereof by the PTSD. Dr. Packman adds the depressive disorder that dates back to Claimant's childhood increased her vulnerability to developing posttraumatic stress disorder. Claimant's inability to compete in the open labor market is due to the combination of her preexisting depressive disorder, which was serious enough to constitute a hindrance and obstacle to employment, and the disabilities caused by the primary injury of October 5, 2009.

Claimant is entitled to receive PTD compensation from the Second Injury Fund once she reaches maximum medical improvement, which occurred on September 11, 2012. The Second Injury Fund is entitled to a credit against PPD payments by an employer. *See Harris v. Treasurer of State*, 192 S.W.3d 531, 538 (Mo. Ct. App. 2006). Thus, for 200.6 weeks beginning on September 11, 2012, the SIF is liable for weekly payments in the differential amount of \$74.80, and then \$497.77 per week thereafter, and continuing in accordance with the law.

## **CONCLUSION**

Claimant is permanently and totally disabled due to a combination of her primary work injury and the preexisting disabilities that were hindrances and obstacles to employment. The Second Injury Fund is liable for permanent total disability benefits as outlined in this award and provided by law.

Attorney for Claimant, Stephen W. Thurmer, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Made by: \_\_\_\_\_  
KARLA OGRODNIK BORESI  
*Administrative Law Judge*  
*Division of Workers' Compensation*