

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

Injury No.: 01-086243

Employee: Deborah Madison
Employer: NABI/ZLB Plasma (Settled)
Insurer: Liberty Mutual (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 26, 2008, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Victorine R. Mahon, issued August 26, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 27th day of January 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Deborah Madison

Injury No. 01-086243

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: NABI/ZLB Plasma (settled)

Additional Party: Treasurer of the State of Missouri
as Custodian of the Second Injury Fund

Insurer: Liberty Mutual (settled)

Hearing Date: June 16, 2008

Record closed on July 16, 2008

Checked by: VRM/meb

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
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: July 16, 2001.
5. State location where accident occurred or occupational disease was contracted: Greene County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment?
Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Blood splashed in employee's eyes and mouth as she was working as a phlebotomist.

12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Mental injury.
14. Nature and extent of any permanent disability: Employer/Insurer settled.; No liability by the Second Injury Fund.
15. Compensation paid to-date for temporary disability: Not applicable.
16. Value of necessary medical aid paid to date by employer/insurer? No applicable.
17. Value necessary medical aid not furnished by employer/insurer? Not applicable.
18. Employee's average weekly wage: \$304.54.
19. Weekly compensation rate: \$203.03.
21. Method of wage computation: By agreement.

COMPENSATION PAYABLE

22. Amount of compensation payable: Settled with Employer.
23. Second Injury Fund liability: None.
24. Future requirements awarded: None.

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FINDINGS OF FACT AND RULINGS OF LAW INTRODUCTION

The undersigned Administrative Law Judge heard this Workers' Compensation claim on June 16, 2008 in Springfield, Missouri. Jurisdiction is appropriate in Missouri and the parties agreed to venue in Springfield, Missouri. The issues between Claimant and Employer settled for a lump sum. Claimant now proceeds against the Second Injury Fund, alleging Permanent Total Disability. Claimant Deborah Madison appeared in person and with her counsel of record, Ryan Murphy. The Treasurer of the State of Missouri, as custodian of the Second Injury Fund, appeared by Assistant Attorney General Susan Colburn.

Upon motion by the Second Injury Fund, the record remained open for 30 days for the receipt of a deposition by James England, Jr., a rehabilitation counselor, whose deposition previously had been scheduled for July 11, 2008. The deposition was submitted and received into evidence on July 15, 2008. Thereafter, Employee requested that the record remain open for receipt of additional evidence to be submitted in response to Mr. England's opinion. That request was denied. The record closed July 16, 2008.

Exhibits

The following exhibits were submitted on behalf of Employee and admitted into evidence:

- A. Deposition -- Dr. Bennoch, with report
- B. Deposition -- Dr. Whetstone, with reports
- C. Report -- Mr. Eldred
- D. Medical Records -- Burrell
- E. Medical Records -- Cox 5/28/96 -- 8/15/05
- F. Medical Records -- Cox 8/16/05 -- 11/21/05
- G. Medical Records -- Jordan Valley
- H. Medical Records -- Kitchen Clinic
- I. Medical Records -- SJC Infectious Disease Associates
- J. Medical Records -- SJC Orthopedic Specialists
- K. Medical Records -- SJC Psychiatry
- L. Medical Records -- Dr. Donald Thompson
- M. Medical Records -- Dr. James Jordan. 7/19/01
- N. Medical Records -- SJC. 8/05/02 - 8/10/02
- O. Medical Records -- SJC. 2/22/07 - 2/27/07
- P. Report of Injury -- Cox
- Q. Wage Statement
- R. Medical Records -- Cox Family Physicians. 1/01/96 - 10/07/04
- S. Performance Rating
- T. Compromise Settlement

The following exhibit was submitted on behalf of the Second Injury Fund and admitted into evidence:

- 1. Deposition -- Mr. England

Witnesses

Deborah Madison -- Employee/Claimant

Phillip Eldred -- Certified Vocational Counselor

FINDINGS OF FACT

- Deborah Madison (Claimant) worked as a phlebotomist for NABI/ZLB Plasma Services (Employer). On July 16, 2001, as she was preparing to stick a needle into a new donor to draw blood, blood sprayed over Claimant's face, including her eyes, mouth, and nostrils. The donor had not yet been tested for blood born illnesses and diseases. Three days after the exposure, Claimant had blood drawn for hepatitis C antibody and the results were reactive. Subsequent testing, however, was within normal limits. Claimant did not have a history of drug transfusions or IV drug usage that would account for hepatitis C. Claimant continued to work for Employer for more than one year after the blood splatter incident.
- Claimant testified that she was receiving good reviews about her work until the blood splatter incident. But she became overwhelmed with the diagnosis of hepatitis. She became increasingly anxious until she suffered what she describes as a breakdown in August 2002.
- **Prior Work History**

- Although there is some evidence in the record of prior abuse, Claimant graduated from high school where she was socially active. She had attended Long Beach Community College and was six hours short of obtaining her Associate of Arts Degree. She obtained management training and worked several years for Merle Norman Cosmetics in Salem, Oregon. She quit that job and moved back to California where she volunteered for the St. Vincent DePaul Society. She worked for a car dealership a couple of years, but quit when she became pregnant with twins. After living in California for many years, she moved to Springfield at the request of one of her children. For one and one-half years she lived at the Missouri Hotel in Springfield, but also worked at the homeless facility as a desk clerk. She also worked two years with the VISTA program as a recruitment coordinator and a short time as a convenience store clerk. Immediately before obtaining her job with NABI/ZLB Lab, Claimant had worked for Cox Medical Center in its housekeeping department and received good reviews. She quit that position when the employer failed to move her into a lab position which had been promised her at the time of hire.
- **Prior Injuries or Disabilities**
- Claimant sprained her ankle while working for Cox Medical Center, but she did not indicate that the sprain resulted in any permanent difficulties. Claimant said she worked through discomfort while employed at the plasma center. But, there is no evidence that she sought medical treatment or missed work due to any foot condition while working as a phlebotomist. Claimant was diagnosed with osteoarthritis sometime in 2004, and thereafter underwent a fusion in her foot.
- Claimant was diagnosed with high blood pressure in April 1996. Medical records from the Kitchen Clinic document that Claimant's blood pressure in 1996 was in the range of 180/120. The records document that she was ordered off work for a few days at her request. Claimant also took off a few work hours due to high blood pressure while employed by the NABI/ZLB Lab. Other than these two incidents, there is no documentation that high blood pressure caused Claimant any difficulty.
- Medical records also document that prior to the primary injury on July 16, 2001, Claimant suffered from hyperventilation and anxiety and was prescribed Xanax. She was treated at Burrell Behavioral Health in 1996, diagnosed provisionally with dysthymia, and prescribed antidepressants. When Claimant worked as a recruitment coordinator for the VISTA program, she sometimes became overwhelmed and took off a day.
- **Current Complaints**
- Claimant said with the hepatitis diagnosis on her mind, she continues to experience anxiety and panic attacks, as well as depression. She cannot now deal with the public. She is unable to cope with a variety of environments.
- **Expert Evidence**
- **Dr. Michael Whetstone**
- Dr. Michael Whetstone is a licensed neuropsychologist who originally examined Claimant at the request of the Employer/Insurer on September 18, 2007, six years after the blood splatter incident. Dr. Whetstone explained in deposition that he is actively engaged in treating patients. According to Dr. Whetstone, Claimant suffers a 30 percent Permanent Partial Disability from depression and anxiety. Of that 30 percent, 60 percent is related to preexisting conditions (18 percent of the whole body) and 40 percent (12 percent of the whole body) is related to the blood splash incident of July 16, 2001. As to employability, Dr. Whetstone stated in his report:
- I do not believe Ms. Madison is unable to compete in the open labor market solely as a result of the July 16, 2001 event. I do believe that the ongoing nature of her anxiety and post-traumatic stress symptoms, however, render her unable to function adequately in work related to phlebotomy in hospitals or medical centers, or in any location where blood or needles are likely to be in evidence.
- (Ex. B, deposition ex. 1, p. 11). Dr. Whetstone later clarified his opinion, stating that Claimant is functionally totally vocationally disabled. (Ex. B, deposition ex. 4). While he believed that Claimant could obtain employment, her psychologic distress would cause her to be unable to maintain the employment.
- Dr. Whetstone admitted that Claimant did not report any preexisting symptoms significant enough to interfere with her work. He merely assumed that by virtue of Claimant receiving treatment in the past "there might be" difficulties in compliance with a work situation (Ex. B, p. 36). But he had no records or history to support that assumption. He further admitted that a number of persons suffer depression, but many are on effective medications or are in treatment and are able to function in a work environment. Claimant had told Dr. Whetstone that before the primary injury she was able to "bounce back" after personal setbacks. Dr. Whetstone did not doubt the history Claimant had provided him.

- **Dr. Shane Bennoch**

- Dr. Shane Bennoch testified in favor of Claimant. He opined that Claimant suffered 15 percent Permanent Partial Disability to the body as a whole secondary to the exposure to and infection with hepatitis C. He noted, however, that Claimant may never have any physical problems as a result of the hepatitis C exposure.

- Dr. Bennoch found that Claimant suffered from several preexisting disabilities that he believed were a hindrance or obstacle to employment. First, he noted that Claimant had preexisting disabilities of 20 percent in each hand due to severe arthritis in the carpometacarpal joints and dysfunction in those joints, 25 percent of the right foot due to talonavicular arthrosis. Dr. Bennoch agreed, however, that Claimant had sought no treatment for the foot until 2002, more one than year after the work accident. She also sought no treatment for her hands until 2004. When asked if these conditions would have posed Claimant any difficulty in performing her job as a phlebotomist, Dr. Bennoch indicated that there was no history of Claimant having any difficulty performing her job as a result of the arthritis in her hands. Nothing indicated that Claimant had difficulty performing her job because of her feet. Dr. Bennoch conceded that he was postulating that the conditions existed prior to the date Claimant sought treatment.

- Dr. Bennoch found that Claimant suffered a 35 percent Permanent Partial Disability to the whole body due to psychiatric illness, including depression, anxiety, panic attacks, and paranoia. Of that amount, he said 30 percent (or 10.5 percent) pre-existed the blood splash and 70 percent of the 35 percent disability (or 24.50 percent) was attributable to the last work accident. Dr. Bennoch stated that Claimant would not be permanently and totally disabled if Claimant just had been exposed to hepatitis C. But “secondary to that fact, her psychiatric illness has significantly worsened.” (Ex. A., p. 20). While Dr. Bennoch indicated that the combination of all of the claimant’s disabilities is greater than the simple sum, he believed that the severity of Claimant’s psychiatric illness is sufficient, alone, to permanently and totally disable Claimant (Ex. A., p. 21). Dr. Bennoch did not list the high blood pressure as a preexisting disability.

- **Mr. Phillip Eldred**

- Mr. Phillip Eldred provided a vocational opinion that Claimant is unemployable in the open labor market and is permanently and totally disabled as a result of her preexisting limitations, combined with her injury on July 16, 2001. In relating that opinion, Mr. Eldred relied on the opinions of Dr. Bennoch and Dr. Whetstone. While Claimant self-reported to Mr. Eldred moderate to severe impairments in standing, stooping, kneeling, crawling, walking, handling, sitting, and other postural difficulties, her preexisting conditions were not alleged to have caused any of these physical problems or disabilities.

- **Mr. James England**

- Mr. James England, a vocational expert employed by the Second Injury Fund, performed a review of Claimant’s medical records and the opinions of the other experts. While recognizing that Claimant had been diagnosed with depression prior to the last work accident, he did not believe the depression or any other condition had been a vocational hindrance or obstacle to employment prior to the blood splatter incident at work on July 16, 2001. While noting that Claimant had some absenteeism problems, he did not find that Claimant missed work due to depression. Claimant’s absenteeism appeared to have resolved, her performance reviews were generally favorable, and Claimant liked her job. Even after the work incident with the blood splatter, Claimant continued to work for more than one year on a full-time basis, even incurring overtime.

- Mr. England admitted that statistically people who have been diagnosed with depression have a higher rate of absenteeism than other workers. He agreed that depression often co-exists with physical illnesses that can impede an individual’s ability to work. He further admitted that if Dr. Whetstone was correct in his assessment of Claimant, then Claimant would not be employable. But even if Claimant was now unemployable, Dr. Whetstone’s opinion did not alter Mr. England’s opinion that Claimant had no vocational hindrance or obstacle prior to the primary injury. Mr. England reviewed the GAF scores that had been assigned by various experts. He noted that in February 2007 Dr. Dobbard assigned Claimant a GAF score of 25, which Mr. England said was “almost institutionalization.” The prior month, Claimant’s GAF, assigned by Dr. Stewart, was 65. The most recent GAF of 55, which was assigned by Dr. Whetstone in October 2007, demonstrates moderate difficulty in social and occupational functioning. Mr. England believed GAF scores reflected some subjectivity of the expert assigning the score. I find Mr. England’s opinion credible that Claimant had no vocational hindrance or obstacle prior to the primary injury.

- **RULINGS OF LAW**

Permanent Total Disability

Claimant is permanently and totally disabled. Mr. England, testifying on behalf of the Second Injury Fund, conceded that if Dr. Whetstone was correct in his assessment, Claimant was unemployable. He agreed that Claimant's last GAF scoring indicated difficulty in occupational functioning. Even if Claimant could *obtain* employment, she would be unable to *maintain* the employment on the open labor market.

No Second Injury Fund Liability

To find Second Injury Fund liability for Permanent Total Disability, the Claimant must have had a preexisting disability at the time of the last accident that is actual and measurable. *Messex v. Sach Electric Co.*, 989 S.W.2d 206, 215 (Mo. App. E.D. 1999) *overruled on other grounds Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003); *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 366 (Mo. App. E.D. 1992) *overruled on other grounds Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). The Second Injury Fund is not liable if post accident progression of the Claimant's preexisting condition causes the Permanent Total Disability. *Roller v. Treasurer of the State of Missouri*, 935 S.W.2d 739, 742-43 (Mo. App. S.D. 1996) *overruled on other grounds Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Merely because an individual has a preexisting condition does not mean it is a "disability." For instance in *Walls v. Treasurer of Missouri*, 207 S.W.3d 136 (Mo. App. W.D. 2006), the appellate court found no Second Injury Fund liability for Permanent Total Disability due to the combination of a work-related neck injury and multiple sclerosis, which first manifested itself subsequent to the work accident.

The evidence clearly demonstrates that of Claimant's many conditions, they either manifested themselves or worsened *after* the work accident, and were not preexisting measurable disabilities.

1. Foot and Hand Conditions

Medical records reflect a history of hand and feet problems that began *after* the blood splatter incident that occurred in 2001. Claimant was not diagnosed with arthritis until 2004. Her sprain at Cox Medical Center resolved. Dr. Bennoch's opinion that the condition with Claimant's hands and feet were disabilities that were a hindrance or obstacle to employment is not credible as such opinion was based solely on his assumption.

2. High Blood Pressure

No doctor rated high blood pressure as a pre-existing disability. The evidence does not support a finding that the high blood pressure interfered with Claimant's work ability to obtain or maintain employment, or that it would prove a hindrance to employment in the future.

3. Depression and Anxiety

There is evidence that Claimant suffered preexisting depression and anxiety. For instance, she was treated five years before the last work injury at Burrell Behavioral Health. On that occasion she was diagnosed provisionally with dysthymia and was provided medication for her condition(s). But there is no evidence that she missed work at ZLB/NABI because of any psychological condition. There is no evidence that she was unable to obtain employment anywhere as a result of her psychological condition prior to the blood splatter incident. She worked full time and overtime both before *and after* the blood splatter incident. Though she was counseled for absenteeism before the last injury, her personnel records demonstrate that her absences were not due to depression. If Claimant had a psychological disability before the last injury, it was asymptomatic or so insignificant that it was not interfering with her work. The evidence is that Claimant became psychologically disabled only *after* the last injury.

The mere fact that a condition exists does not render the condition disabling and the Workers' Compensation Law does not indemnify for a mere physical (or mental) ailment. *Simmerly v. Bailey Corp.*, 890 S.W.2d 12, 14 (Mo. App. S.D. 1994). Claimant's physical and mental condition deteriorated subsequent to the last accident. As noted above, the Second Injury Fund is not liable for the progression of preexisting conditions occurring after the last work-related injury. *Highley v. Von Weise Gear*, 247 S.W.3d 52, 58 (Mo.App. E.D. 2008); § 287.200.1, RSMo 2000; *Leutizinger v. Treasurer of Missouri*, 895 S.W.2d 592, 593 (Mo. App. E.D. 1995). This post-accident worsening of Claimant's psychological condition is made evident by the opinions of Dr. Bennoch who quantified the preexisting disability as being something less than 11 percent to the body as a whole (Ex. A., p. 21) and stated that Claimant's "psychiatric illness *has significantly worsened*" secondary to the blood splatter incident. Dr. Whetstone, likewise, indicated that it was the "ongoing nature of her anxiety and *post-traumatic stress* symptoms" that rendered Claimant unable to function adequately at work. There is no evidence that Claimant exhibited post-traumatic stress symptoms until after the blood splatter incident.

Conclusion

The Claim for Compensation against the Second Injury Fund is denied. Claimant's permanent

and total disability results from the last accident and a worsening of physical and psychological conditions after the last accident. The Second Injury Fund has no liability.

Date: August 26, 2008

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker
Jeffrey W. Buker
Director
Division of Workers' Compensation