

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

Injury No.: 04-046785

Employee: Rebekah Mandina  
Employer: Glass Group (Settled)  
Insurer: Pennsylvania Manufacturers Insurance Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of Administrative Law Judge Carl Strange.

**Introduction**

The parties asked the administrative law judge to resolve the issues of: (1) the nature and extent of employee's disability; and (2) Second Injury Fund liability.

The administrative law judge found: (1) employee suffered a temporary aggravation of her underlying panic disorder and no permanent partial disability as a result of the primary work injury; and (2) the Second Injury Fund is not liable for permanent total disability benefits.

Employee filed an Application for Review alleging the administrative law judge erred: (1) by failing to list any evidence or inconsistency in support of his finding employee was not credible; (2) in failing to consider Dr. Liss's entire testimony; and (3) in misconstruing the testimony of Dr. Pribor.

For the reasons set forth herein, we reverse the award of the administrative law judge.

**Findings of Fact**

*Preexisting conditions*

Employee has suffered migraine headaches since about the eighth grade. These headaches cause photosensitivity, nausea, and debilitating pain in employee's head and neck. Employee received treatment with her family doctor in the form of medications, and missed work when she had migraines. We find that this condition amounted to a preexisting permanent partial disability of 10% of the body as a whole.

Employee suffered considerable preexisting psychiatric problems. Employee saw Dr. Wudel in 2002 for treatment related to complaints of depression. Dr. Wudel prescribed antidepressant medications which didn't help employee. Employee next treated with Dr. Guiley in 2003 for her psychiatric complaints. Dr. Guiley diagnosed major depression with anxious features and prescribed antidepressant medications.

Employee: Rebekah Mandina

- 2 -

The parties present competing medical expert testimony as to the nature and extent of employee's preexisting psychiatric disability. Employee presents Dr. Liss, who opined that employee suffered from preexisting major depression that amounted to a permanent partial disability of 25% of the body as a whole, and a preexisting substance abuse disorder. The Second Injury Fund, on the other hand, presents Dr. Pribor, who opined that employee suffered from the following preexisting conditions of ill: bipolar affective disorder, mixed; panic disorder with agoraphobia; cannabis abuse; and alcohol dependency. We deem credible Dr. Liss's opinion (and so find) that employee suffered preexisting major depression, and we find that this condition amounted to a permanent partial disability of 15% of the body as a whole. We deem credible Dr. Pribor's opinion (and so find) that employee suffered preexisting panic disorder with agoraphobia, and we find that this condition amounted to a preexisting permanent partial disability of 15% of the body as a whole.

Both doctors diagnosed substance abuse as a preexisting psychiatric condition. The evidence reveals that employee struggled with alcohol dependency and marijuana abuse beginning in her teen years. Employee quit drinking about five years before the January 18, 2012, hearing in this matter. Employee smoked marijuana daily for about 20 years, but quit approximately one year before the hearing. Employee believed smoking marijuana helped her psychiatric condition, but quit because her therapist advised her to do so. We credit both doctors on this issue and find that employee suffered a preexisting substance abuse disorder in the form of cannabis abuse and alcohol dependency, which we find amounted to a preexisting permanent partial disability of 10% of the body as a whole.

Employee did not finish high school but has her GED and an associate's degree in criminal justice from Mineral Area College. Employee worked for employer for about nine years running a glass machine. Before the work injury, employee worked a lot of overtime and took pride in her job and her ability to support herself.

#### Primary injury

On May 21, 2004, employee's work for employer exposed her to noxious fumes that caused her to experience a burning sensation in her nose and lungs, some minor burns on her face, an episode of temporary blindness, and sensations of extreme fear and panic. She settled her claim arising from this event with employer for permanent partial disability of 12.5% of the body as a whole referable to psychiatric injury. She pursues this claim against the Second Injury Fund.

Employee suffers from nightmares related to the May 2004 work injury. Her recollection of the event is so upsetting that she avoids thinking or talking about it, even with her therapist. She believes her psychiatric problems are considerably worse following the work injury. Dr. Liss and Dr. Pribor disagree over the issue whether employee sustained any permanent psychiatric disability as a result of the work injury.

Dr. Liss has been board-certified in psychiatry since 1974 and is an expert in post-traumatic stress disorder (PTSD). Dr. Liss serves as a consultant to the Veterans Administration in the area of PTSD, and regularly treats a number of veterans with the disorder in his own practice. Dr. Liss opined that the work injury caused employee to suffer PTSD with panic disorder and a general anxiety disorder with depression. Dr. Liss

Employee: Rebekah Mandina

- 3 -

testified that employee suffered a panic attack in his office while recounting the events of May 21, 2004, for him, and that her recall of the event approached an almost hallucinatory level.

Dr. Pribor obtained her board-certification in psychiatry in 1991 and is a former student of Dr. Liss's. Dr. Pribor disagrees with Dr. Liss regarding the diagnosis of PTSD. Dr. Pribor believes the work injury did not cause employee to develop PTSD because employee's symptoms are more consistent with her preexisting psychiatric conditions. Dr. Pribor believes the work injury temporarily aggravated employee's preexisting panic disorder with agoraphobia, but otherwise did not cause her any psychiatric injury, and that employee ultimately suffered no permanent disability as a result of the work injury.

The administrative law judge reasoned that Dr. Liss lacks credibility because Dr. Liss acknowledged that employee missed some work and actively treated for psychiatric problems before the work injury, but nevertheless opined that employee's preexisting psychiatric problems were not a "hindrance." *Award*, page 4. We disagree with this analysis for two reasons. First, Dr. Liss is a medical expert, not a lawyer. That Dr. Liss may not understand the workers' compensation term of art "hindrance or obstacle to employment" does not, in our view, diminish his extensive qualifications in the area of researching, diagnosing, and treating PTSD. Second, the administrative law judge's credibility determination rests on the mistaken assumption that, for purposes of § 287.220.1 RSMo, the issue whether employee's preexisting conditions were hindrances or obstacles to her employment turns upon the extent of her past difficulties. This is not the proper focus of the inquiry, as we will discuss in more detail below.

We find Dr. Liss more credible than Dr. Pribor on the issue whether employee sustained PTSD and permanent disability as a result of the work injury. We find that employee's work was a substantial factor causing employee to suffer PTSD as diagnosed by Dr. Liss, along with an associated permanent partial disability to the extent of 15% of the body as a whole.

The parties have failed to suggest a date that employee reached maximum medical improvement from the effects of the work injury. As a result, we have been constrained to search the medical record for evidence relevant to this critical finding. Employee, in her brief, asks for permanent total disability benefits commencing on June 21, 2004, but fails to explain why we should find that she reached maximum medical improvement on that date. That date corresponds to employee's last treatment with Dr. Wudel, but the record reveals employee thereafter sought additional psychiatric treatment which helped to improve her PTSD symptoms until at least 2008.

We note that Dr. Chen, employee's treating psychiatrist from 2005 to 2008, recorded a gradual improvement in employee's PTSD symptoms with subsequent visits, until his note from April 24, 2008, in which he recorded employee's PTSD symptoms as follows: "residual PTSD sx nightmares." On May 22, 2008, in the last treatment note we have from Dr. Chen, the doctor recorded the same complaint: "residual PTSD sx nightmares." In light of this evidence, we find employee reached maximum medical improvement from the work injury on April 24, 2008, the last day that the treatment record reveals an improvement in her PTSD symptoms.

Employee: Rebekah Mandina

- 4 -

*Permanent total disability*

Employee tried to return to work for employer in June 2004, but suffered a panic attack or psychiatric episode in which she experienced a recurrence of the extreme terror and temporary blindness from the May 2004 primary injury. Employee lost consciousness and woke up in an ambulance. After this, employee did not try to return to work for employer, and eventually lost her job. Without insurance, employee could not continue her psychiatric treatments, and her situation deteriorated. Employee spent nine months without leaving her house until thoughts of suicide prompted her to finally check herself into a psychiatric hospital in March 2005.

Employee currently attends therapy sessions with her psychiatrist once a week and a mental health worker visits her home at least that often. Employee never leaves home unless she is accompanied by the mental health worker. Employee testified that she is afraid of being outside her home and of interacting with other people. Specifically, she fears she will lose her eyesight again and hurt someone. Employee has not worked since reaching maximum medical improvement from the primary injury.

Dr. Pribor devoted part of her report to cataloguing a number of inconsistent statements by employee to treating doctors regarding her mental health problems, personal life, substance abuse, and level of disability. We acknowledge the list of inconsistencies from Dr. Pribor, but it appears to us that many of these items, if not all of them, are more consistent with memory problems and changes in mood and perception referable to employee's longstanding psychiatric and substance abuse problems, rather than evidence of dishonesty. For example, Dr. Pribor notes that employee told one doctor that her marriage had been difficult for a long time, while reporting to Dr. Pribor that her marriage was terrific until the work injury. But employee's psychiatric conditions (and the various combinations of psychotropic medications doctors prescribed to treat those conditions) may have caused her to experience vastly different emotions about the strength of her marriage from day to day, so describing it differently to different doctors would not necessarily make her untruthful. Other contradictions appear to be examples of a poor memory, which is consistent with employee's longstanding substance abuse disorder. Ultimately, we find employee's testimony at the hearing to be credible regarding her current psychiatric complaints and disabilities.

Dr. Liss opined that employee is permanently and totally disabled owing to a combination of the primary injury and employee's preexisting conditions of ill. Asked to consider the primary injury considered alone and whether it would have rendered employee permanently and totally disabled absent her preexisting conditions, Dr. Liss opined that employee could have worked following the primary injury in spite of his diagnosis of PTSD. Dr. Pribor, on the other hand, opined that employee's apparent inability to work is not due to any combination of the primary injury with her preexisting psychiatric conditions, but rather an underlying progression of preexisting bipolar disorder and ongoing cannabis abuse. Dr. Pribor assumes employee continues to abuse marijuana daily, and she opined that this abuse compounds employee's psychiatric problems and takes away her motivation to get out of the house and return to work.

We have found that employee quit smoking marijuana about a year before the hearing in this matter, so Dr. Pribor's opinion rests on an assumption that is inapplicable to the facts before us. We find persuasive and credit Dr. Liss's testimony that employee is

Employee: Rebekah Mandina

- 5 -

permanently and totally disabled as a result of the primary injury in combination with her preexisting conditions of ill.

### **Conclusions of Law**

#### Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that she suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

*Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

The foregoing "potential to combine" standard has been consistently cited by the courts to determine whether a preexisting condition constitutes a hindrance or obstacle to employment. See *Concepcion v. Lear Corp.*, 173 S.W.3d 368, 371 (Mo. App. 2005); *E.W. v. Kan. City Sch. Dist.*, 89 S.W.3d 527, 538 (Mo. App. 2002); and *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997). When we analyze employee's preexisting major depression, panic disorder with agoraphobia, substance abuse, and migraine headaches, we are convinced that each of these conditions were serious enough to represent a hindrance and obstacle to employment at the time of the work injury, because we believe that a cautious employer could reasonably perceive employee's psychiatric conditions and migraine headaches as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995). Accordingly, we conclude that at the time employee sustained the primary injury, employee suffered from preexisting permanent partially disabling conditions in the form of major depression, panic disorder with agoraphobia, and migraine headaches that were serious enough to constitute hindrances or obstacles to her employment or reemployment for purposes of § 287.220.1 RSMo.

We now proceed to the question whether employee met her burden of establishing entitlement to permanent total disability benefits from the Second Injury Fund. For the Fund to be liable for permanent total disability benefits, employee must establish that: (1) she suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

Employee: Rebekah Mandina

We have found that, as a result of the last injury, employee sustained a 15% permanent partial disability of the body as a whole referable to PTSD. We have credited the testimony from Dr. Liss that employee would not be permanently and totally disabled based on his diagnosis of PTSD alone, but that her permanent total disability stems from a combination of her preexisting conditions of ill and the effects of the work injury. We conclude that the primary injury, considered in isolation, did not render employee permanently and totally disabled, but that employee is permanently and totally disabled due to a combination of her preexisting conditions of ill as they existed on May 21, 2004, in combination with the disability stemming from employee's psychiatric injury sustained on that date.

Employee has met her burden of establishing Second Injury Fund liability under § 287.220.1.

**Conclusion**

We reverse the award of the administrative law judge. The Second Injury Fund is liable for permanent total disability benefits.

The difference between the stipulated rates for permanent total and permanent partial disability benefits is \$264.22. To account for employer's theoretical liability for permanent partial disability benefits, payment of benefits from the Second Injury Fund are due in the amount of \$264.22 per week for 60 weeks beginning April 24, 2008, employee's date of maximum medical improvement. Thereafter, the Second Injury Fund is liable to employee for permanent total disability benefits in the amount of \$611.27 per week. The weekly payments shall continue for employee's lifetime, or until modified by law.

This award is subject to a lien in favor of Robert Keefe, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

The award and decision of Administrative Law Judge Carl Strange, issued April 16, 2012, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 21<sup>st</sup> of November 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

          V A C A N T            
Chairman

\_\_\_\_\_  
James Avery, Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**AWARD**

Employee: Rebekah Mandina

Injury No. 04-046785

Dependents: N/A

Employer: Glass Group

Additional Party: Second Injury Fund

Insurer: Pennsylvania Manufactures Insurance Company  
(TPA: Gallagher Bassett Services)

Hearing Date: January 18, 2012

Checked by: CS/rf

**SUMMARY OF FINDINGS**

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? May 21, 2004.
5. State location where accident occurred or occupational disease contracted: St. Francois 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 happened or occupational disease contracted: Employee was exposed to chemicals which she alleged caused a psychological disorder.

12. Did accident or occupational disease cause death? N/A
13. Parts of body injured by accident or occupational disease: Alleged body as a whole (See Findings).
14. Nature and extent of any permanent disability: (See Findings).
15. Compensation paid to date for temporary total disability: \$400.91.
16. Value necessary medical aid paid to date by employer-insurer: \$555.66.
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: Not calculated.
19. Weekly compensation rate:  

\$611.27 for temporary total disability and permanent total disability; and  
\$347.05 for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: Denied (See Findings).
22. Second Injury Fund liability: Denied (See Findings).
23. Future requirements awarded: N/A

## FINDINGS OF FACT AND RULINGS OF LAW

On January 18, 2012, the employee, Rebekah Mandina, appeared in person and by her attorney, Robert O'Keefe, for a hearing for a final award. The Second Injury Fund was represented at the hearing by its attorney, Assistant Attorney General Gregg Johnson. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

### UNDISPUTED FACTS:

1. On or about May 21, 2004, Glass Group was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Pennsylvania Manufactures Insurance Company with a third party administrator of Gallagher Bassett Services.
2. On or about May 21, 2004, the employee was an employee of Glass Group and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about May 21, 2004, the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's rate for temporary total disability and permanent total disability is \$611.27, and her rate for permanent partial disability is \$347.05.
7. The employee's injury is medically causally related to the work injury occurring on or about May 21, 2004.
8. The employer has furnished \$555.66 in medical aid to employee.
9. The employer has paid temporary total disability benefits at a rate of \$611.27 per week for a total of \$400.91.

### ISSUES:

1. Nature and Extent of Disability
2. Liability of the Fund

### EXHIBITS:

The following exhibits were offered and admitted into evidence:

#### Employee's Exhibits

- A. Stipulation for compromise settlement injury #04-046785;
- B. Deposition of Dr. Jay Liss;
- C. Medical records of Dr. Robert Wudel;
- D. Medical records of Dr. Terry Guiley;
- E. Medical record of Flat River Glass Medical Facility;
- F. Medical records of Precision Eye Care;

- G. Medical record of Flat River Glass Medical Facility;
- H. Medical records of Parkland Hospital Emergency Room;
- I. Medical records of Dr. Li-Shuin Chen; and
- J. Social Security Administration file.

#### Second Injury Fund's Exhibits

- I. Deposition of Dr. Elizabeth Pribor.

### **FINDINGS OF FACT & RULINGS OF LAW:**

#### ***Issue 1. Nature and Extent of Disability & Issue 2. Liability of the Fund***

Rebekah Mandina ("Employee") in this case has alleged that she is entitled to an award of permanent total disability benefits against the Second Injury Fund. In support of her position, Employee has offered her testimony and the opinion of Dr. Jay Liss. The Second Injury Fund has offered the opinion of Dr. Elizabeth Pribor in support of their position that Employee did not suffer any permanent partial disability from the May 21, 2004 injury and that they do not owe any benefits.

Dr. Jay Liss evaluated Employee on May 6, 2006 and opined that Employee was presently disabled due to psychiatric illness and injury as a result of the accident in May of 2004. Further, he opined that Employee had pre-existing depression of 25% permanent partial disability that made her more vulnerable to the post accident diagnosis. At his deposition, Dr. Liss testified that this sentence refers to her disability being a result of her pre-existing psychiatric illness in combination with the injury as a result of the accident of May 2004 to a total of 100%. Further, Dr. Liss testified that Employee's condition that pre-existed the May 2004 injury would not standing alone prohibit Employee from working in an office and was not a hindrance (Employee's Exhibit B). Dr. Elizabeth Pribor evaluated Employee on July 16, 2007 and noted 16 significant inconsistencies and contradictions by Employee. As a result of her examination, Dr. Pribor opined that the May 6, 2004 accident caused a temporary aggravation of her underlying panic disorder. Further, Dr. Pribor opined that Employee's inability to work was not related to the accident, but rather to Employee's Cannabis use and later from progression of her bipolar disorder. Finally, Dr. Pribor opined that Employee's symptoms were more consistent with her pre-existing disorders than with post traumatic stress disorder (Second Injury Fund Exhibit I).

I find there are numerous inconsistencies in the evidence and the testimony that require me to find that Employee is not credible. Additionally, Dr. Liss testified concerning the significance of Employee's pre-existing disability but then stated that it was not a hindrance. The evidence clearly shows that Employee's pre-existing condition was causing her to miss work and actively seek treatment prior to the May 21, 2004 accident. Consequently, I find the opinion of Dr. Liss to be not credible. Based on the evidence, I find the opinion of Dr. Elizabeth Pribor to be credible and more credible than the opinion of Dr. Liss. In accordance with the opinion of Dr. Pribor, I find that Employee suffered a temporary aggravation of her underlying panic disorder as a result of the May 6, 2004 accident that resulted in no permanent partial disability.

Consequently, I find that Employee has failed to satisfy her burden of proof on the issue of the Second Injury Fund's liability for her permanent total disability.

Made by:

---

Carl Strange  
*Administrative Law Judge*  
*Division of Workers' Compensation*