

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

Injury No.: 07-116823

Employee: Rosetta McLeary
Employer: Barnes Jewish St. Peters Hospital
Insurer: Self-Insured
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 March 8, 2013. The award and decision of Administrative Law Judge Edwin J. Kohner, issued March 8, 2013, 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 19th day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Rosetta McLeary Injury No.: 07-116823
Dependents: N/A Before the
Employer: Barnes Jewish St. Peters Hospital **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Self Insured Jefferson City, Missouri
Hearing Date: January 3, 2013 Checked by: EJK/lsn

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: November 9, 2007
5. State location where accident occurred or occupational disease was contracted: St. Charles 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:
The employee, a hospital patient care technician, injured her right shoulder while throwing a laundry bag into a cart.
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: Right shoulder
14. Nature and extent of any permanent disability: 25% permanent partial disability to the right shoulder
15. Compensation paid to-date for temporary disability: \$346.86
16. Value necessary medical aid paid to date by employer/insurer: \$14,410.11

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$450.00 for permanent disability/\$404.69 for temporary disability
- 19. Weekly compensation rate: \$269.80/\$300.00
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

58 weeks of permanent partial disability from Employer	\$17,400.00
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- 22. Second Injury Fund liability: Yes

50.7 weeks of permanent partial disability from Second Injury Fund	\$15,210.00
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TOTAL:	\$32, 610.00
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- 23. Future requirements awarded: None

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Nile D. Griffiths, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Rosetta McLeary	Injury No.: 07-116823
Dependents:	N/A	Before the
Employer:	Barnes Jewish St. Peters Hospital	Division of Workers'
Additional Party: Second Injury Fund		Compensation
Insurer:	Self Insured	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK/lsn

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a hospital patient care technician, suffered a torn right shoulder rotator cuff while throwing dirty linen onto a cart. The issues for determination are (1) Permanent disability and (2) Second Injury Fund liability. The evidence compels an award for the claimant for permanent partial disability benefits.

At the hearing, the claimant testified in person and offered depositions of Robert Margolis, M.D., James M. England, Jr., and Jay L. Liss, M.D. The defense offered depositions of the claimant, June M. Blaine, Russell Cantrell, M.D., and Michael R. Jarvis, PhD, M.D., and voluminous medical records.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

In 2007, this then 49 year old claimant was a hospital patient care technician with job duties that entailed inserting catheters and IVs, taking patients' vitals, bathing and cleaning patients, and computer work that included inputting vitals.

On June 19, 2007, she suffered a lumbar strain/sprain while pulling a patient up in bed. Although she had a prior history of back pain, she testified that she never experienced back pain at work. As she was transferring a patient, she heard a "pop" in her back, in the upper lumbar and lower thoracic region. She reported the injury and was seen one time on the date of accident by Dr. Houchin for lumbar back pain. She complained of pain radiating from her lower thoracic to the lumbar region. On physical exam, she had tenderness from T9-T12 and lumbar spasms. X-rays were negative for fracture. Dr. Houchin diagnosed a sprain in the thoracic and lumbar regions. He prescribed Vicodin and instructed her to stay off work for two days, then return to work with no lifting over ten pounds, no repetitive bending, and no prolonged standing for the subsequent five days. She was also instructed to attend physical therapy. See Exhibit 5. The claimant never reported for physical therapy and did not seek further treatment. She testified that she has a lot of problems with her low back, especially while doing household chores. She continues to take pain medication to treat a variety of pain. She had no other treatment besides

her initial visit with Dr. Houchin and no physician had placed any restrictions on her for her low back. She also testified that she never requested any further treatment for her low back from her employer. After working light duty for a few days, she returned to full duty, which is 36 hours per week, three 12-hour shifts.

On November 9, 2007, the claimant suffered a torn rotator cuff in her right shoulder tossing a bag of laundry on top of a laundry cart. Dr. Houchin administered a shot to the shoulder and referred her to Dr. McAllister, who initially treated her conservatively. On December 13, 2007, Dr. McAllister evaluated the claimant, and an ultrasound suggested a partial-thickness rotator cuff tear. He continued work restrictions of no overhead activity and no lifting over 15 pounds. On January 21, 2008, he administered a cortisone injection. After her shoulder pain persisted, she underwent a right shoulder arthroscopy with debridement of partial thickness rotator cuff tear, and subacromial decompression on April 29, 2008. After the surgery, the claimant underwent physical therapy and was placed on light duty. Dr. McAllister released her to full duty with no restrictions on July 28, 2008, while still receiving physical therapy. The claimant testified that her shoulder was just as bad, if not worse, than it was prior to her surgery. On September 8, 2008, she returned to Dr. McAllister with right shoulder complaints after moving a heavy patient at work. Dr. McAllister put her at maximum medical improvement and released her. See Exhibit 6.

On October 16, 2008, she reported some soreness after being shoved by a confused patient and striking her right shoulder on a closet door. Dr. McAllister opined that she sustained a minor contusion and that she was capable of working her normal duties. He noted she was starting a new job on the next day. He placed her at maximum medical improvement. Dr. McAllister opined the claimant has a 3% impairment of the upper extremity at the shoulder, which is 2% impairment of the whole person. See Exhibit 6.

On August 29, 2008, Dr. Vernon began treatment for the claimant's medical conditions and over the next 10 months, Dr. Vernon prescribed Vicodin, Xanax, Ambien, Z-pak, Flexeril, Cheratussin, Hydrocodone, Prednisone, Lexapro, and Celexa to treat her for asthma, PTSD, and facial pain stemming from her 2003 motor vehicle accident. On January 7, 2009, Dr. Vernon prescribed Wellbutrin. Dr. Vernon's April 21, 2009 office note reflects back spasms. See Exhibit 10.

The claimant testified that she left her job with this employer voluntarily in October 2008 to work with a pulmonologist, Dr. Goldberg. The reason for her job switch had nothing to do with the duties she was performing for this employer. She also testified that she left her job with this employer because she needed a job that was less physically and mentally demanding. She testified that the new job offered a schedule of Monday through Friday with no weekends or holidays. She started working at Dr. Goldberg's office in October 2008, full time, 40 hours per week. She did not tell Dr. Goldberg about any physical limitation. Her duties included putting patients in rooms, performing pulmonary function tests, injections, providing instructions on inhaler use, and computer work. She testified that filing overhead was difficult and that she liked the position because it did not require any heavy lifting. However, she was terminated after three months employment.

She testified that she worked full time until the time of her discharge from Dr. Goldberg's office and had no restrictions or accommodations with regards to her back or shoulder. However, she testified that she would use a ladder rather than reaching over her head to retrieve items. She was terminated from her position at Dr. Goldberg's office, because her daughter came to see her after an automobile accident. She also testified that she was fired due to complications she had with her memory. She complained that she had issues operating the computer, misfiling paperwork, and properly conducting pulmonary function tests. The claimant maintained that her memory issues caused her to be written up by her employer and ultimately led to her termination. She testified that her daughter also visited her at work frequently, which also led to a disciplinary action.

After her employment at Dr. Goldberg's office, the claimant opined that she could not hold a job but applied for unemployment benefits. She then withdrew her unemployment application and applied for Social Security Disability. She testified that her memory issues prevented her from working in a medical office. She briefly attempted to sell Avon products, but her psychological issues caused her to fail that venture. She was not able to sell in public. She occasionally babysits her three toddler nieces and nephews, but not as often. When she does babysit, one of her daughters is always there to assist.

The claimant also testified that she still had continuing issues with her right shoulder preventing her from brushing her hair, and performing domestic chores such as cooking, getting the roasting pan from oven, hanging laundry on the line, and sweeping. The claimant testified that if her hair did not look good, it increases her anxiety. Although she had a pre-existing psychiatric condition stemming from a 2003 motor vehicle accident, she testified that the physical limitations from the November 2007 injury made her feel like she could not do anything. Now, her typical day includes watching television and crocheting. She still drives, but does not like to drive alone. She got lost driving to Dr. Jarvis' office due to memory problems and it was embarrassing. The claimant testified that she was currently on Social Security Disability ("SSD"). She testified that around 1987 or 1988, she was on Social Security Disability as a result of complications stemming from an epidural received while giving birth to her second child. However, after her symptoms resolved, she came off SSD and had no residual complaints.

Pre-existing Conditions

In 2003, the claimant was involved in an automobile accident while driving in icy conditions and braking suddenly behind a truck carrying electrical poles. She slammed into the back of the truck and an electrical pole went through her van crushing the left side of her face. She was treated at St. John's Medical Center for a massive, left greater than right, multiple complex comminuted facial fractures, right infraorbital rib fractures, and closed head injury. See Exhibit 9. The injury resulted in 13 surgeries and left her with 13 screws and five plates in her face. See Exhibits 8, 9. She complains of daily pain and testified that her left eye is incapable of fully closing. The claimant subsequently developed Post-Traumatic Stress Disorder ("PTSD") and suffers from flashbacks, nightmares, panic attacks upon hearing helicopters, memory problems, and anxiety. She is highly self-conscious about her appearance after the injury and believes people look at her differently as a result of her injuries. Therefore, she does not like looking at or interacting with other people. After the 2003 accident, the claimant missed 11-12 months from work at a physician's office and claims to have been fired as a result of her time off.

On September 19, 2005, the claimant went to Lincoln County Medical Center with low back pain and a history of slipping on an oily substance on the floor and falling on to her tailbone. X-rays of the lumbar spine, sacrum, and coccyx were negative for fracture. She was diagnosed with a lumbar strain and received an order for physical therapy. See Exhibit 4. On September 22, 2005, the claimant went to Troy Family Practice for low back pain following a slip and fall on an oily substance that caused her to land on her buttocks. After an examination, she was diagnosed with coccyx tenderness and a swollen right middle finger. X-rays were negative for fracture. The claimant returned on September 29, 2005, complaining of back spasms and received an order for physical therapy. See Exhibit 11. On October 21, 2005, her physical therapist noted that she had recovered 100% and was discharged from care. See Exhibit 4.

She takes Xanax and Lexapro prescribed by her primary physician to treat her PTSD and depression, but has not sought professional psychiatric treatment or counseling for her psychological issues. After the November 2007 injury, Lexapro was getting too expensive and did not work quite as well, and she changed her medication for depression to Wellbutrin. She also had changes in her dosages of Xanax due to her anxiety getting worse and her body getting adjusted to that dosage. The claimant testified that neither of her work injuries had anything to do with her PTSD, memory, and concentration issues, and that she has not received any psychological treatment in connection with her work injuries. She testified that her depression and anxiety medication was related to her PTSD. Currently, the claimant takes pain medication for her face three times a day. Four months prior to the hearing, she began taking Morphine and Oxycontin, because she has become immune to Percocet and Vicodin.

She testified that in September 2005, she slipped and injured her back, was treated at Lincoln County Medical Center for low back pain, and fully recovered. For five years after the injury, she has had no other treatment to the low back. She also had a March 2006 incident where she had low back pain after a coughing attack.

She testified that the pain in her face and her memory issues have stayed the same since her work injuries. She also testified that her back issues had fully recovered from her slip and fall, bronchitis attack, and epidural. She testified that she has been hospitalized multiple times since her work injuries due to her asthma and her asthma can result in pneumonia. However, Dr. Levy has her asthma under control now.

The claimant testified that she had attempted suicide in 2009 after learning that a J-Tube would need to be inserted in her stomach. The J-Tube insertion caused her depression to worsen for a short time in 2009. She testified that the condition was a temporary problem when she was told she had to have a J-tube, and she now has no problems or depression from that incident since the J-tube was removed.

Dr. Robert Margolis

Dr. Margolis examined the claimant on January 14, 2010, took a medical history of the claimant, and reviewed the claimant's medical records. At the time of examination, the claimant reported occasional lumbar pain proportionate to activity, graded as 6 out of 10 lasting up to two

hours. She occasionally will have to take medications such as Tylenol. She denied any loss of motion or radicular complaints. Dr. Margolis testified that the claimant went back to working full duty after her June 2007 injury and did not report any specific problems that she had doing her job because of her back pain. The claimant reported constant right shoulder pain, graded as 4 out of 10 elevating a sharper pain of 8/10 with activity. She also reported weakness and loss of motion, that she can only lift five pounds with her right arm, and that lifting a gallon of milk causes pain.

As a result of the June 19, 2007 injury, he diagnosed a lumbar strain/sprain and opined that the claimant suffered a 15% permanent partial disability to her person as a whole. For the November 9, 2007 injury, he diagnosed a torn rotator cuff on the right shoulder opined that the claimant suffered a 40% permanent partial disability to the right shoulder. Dr. Margolis opined that her work was the prevailing factor causing both injuries. As a result of the January 2003 motor vehicle accident, he opined that the claimant suffered from a pre-existing 40% permanent partial disability from her facial fractures and subsequent surgeries. Dr. Margolis opined that her disabilities combine to form a total greater than the simple sum and that those disabilities are hindrances on her employment or reemployment. However, Dr. Margolis did not assign specific restrictions, because he did not have the results of a functional capacity evaluation. Rather, he left the patient to figure out her own limitations. He did not attempt to evaluate the claimant's depression or psychiatric condition.

Dr. Margolis testified that he took no history of her prior injuries because the claimant reported that her previous back complaints had completely resolved. He could not recall reviewing any medical records for treatment of the low back that occurred prior to June 2007. He testified that he found no objective findings on his physical exam of the claimant's back. He testified that the claimant had a range of motion of one hundred and fifty degrees with the right arm and one hundred and eighty degrees with the left arm while performing the upper reach test. However, when Dr. Margolis guided her shoulder through different passive ranges of motion, she had full range. He did not recall the claimant voicing any psychiatric or psychological complaints as a result of the November 2007 injury. The claimant never told Dr. Margolis of any specific problems she had performing her job at work because of her shoulder injury. He did not assign her specific restrictions, but instructed her to avoid activities that exacerbate her pain.

Dr. Russell Cantrell

Dr. Cantrell examined the claimant on December 21, 2011, took a medical history, and reviewed her medical records associated with her treatment. At the time of examination, the claimant reported localized pain in the right shoulder and residual low back pain without radicular symptoms. The claimant also reported adult onset asthma, a prior low back injury, and a motor vehicle accident in 2003 that caused severe facial trauma. He reviewed medical records that pertained to her motor vehicle accident, a 2004 left AC joint strain, records that pertained to pnuothorax in conjunction with 2005 rib fractures, and records pertaining to back complaints after a 2005 slip and fall. An x-ray report from the 2005 back injury was negative for fracture. The claimant's medications included Wellbutrin, Celexa, and Xanax in connection with her post-traumatic stress, as well as Vicodin for facial pain and Ambien to help her sleep.

Dr. Cantrell's x-rays of the claimant's back revealed moderate degenerative disc disease at L5-S1. In regards to the June 19, 2007 injury, he diagnosed a lumbar strain and opined that the injury was not the prevailing factor causing her current and ongoing complaints and rated her with no permanent partial disability stemming from the work injury. Dr. Cantrell opined that the claimant was able to return to work without restrictions from her June 19, 2007 injury. In regards to her November 19, 2007 injury, Dr. Cantrell opined that she sustained a partial rotator cuff tear as a result of her work accident and rated with a 10% permanent partial disability to the right shoulder and opined that the claimant is at maximum medical improvement, and able to return to work without restrictions.

Although Dr. Cantrell noted from her 2005 medical records that she was 100% recovered from her prior back injury, he still maintained any disability to her low back pre-existed the June 2007 injury. He attributed any disability she had to her back to degenerative changes shown on the radiographic studies, even though he did not assign any pre-existing disability in his report. He also noted pre-existing depression, asthma, severe facial fractures, and osteoporosis, but did not assess the extent of permanent disability that predated the 2007 injuries. Dr. Cantrell opined that chronic pain can contribute to depressive syndromes, but could not comment on whether the claimant's pain caused depression or whether pre-existing depression adversely affected her perception of pain.

Dr. Cantrell testified that he did not view any x-ray films that predated the 2007 injuries. Although the x-ray report of the lower back from September 2005 did not report degenerative disc disease, Dr. Cantrell could not definitively say that it was not present. He conceded that he did not know the extent of the claimant's degenerative disc disease prior to 2007, and that it is possible that her disc disease became worse between the 2007 injuries and when he examined her in 2011. However, given the amount of degenerative disc disease on the x-rays, he believes it was probably more than four years in duration. From his review of the records and examination, it appeared to Dr. Cantrell that the claimant did not have any major symptoms in her low back right before her 2007 work injury. He acknowledged that the claimant returned to work performing her regular duty activities after her work injuries.

Dr. Jay Liss

Dr. Liss examined the claimant on January 25, 2010, and took a medical history of her November 7, 2007 work injury and her 2003 motor vehicle accident. He reported that the claimant has not worked since April 13, 2009, when she was terminated from Dr. Goldberg's office and that she has been receiving social security disability since 2009 as a result of disability caused by asthma and Post-Traumatic Stress Disorder.

He diagnosed Post-Traumatic Stress Disorder caused by the 2003 motor vehicle accident with associated anxiety and depression, as well as attention-deficit disorder. He testified her main psychiatric difficulties are the result of the 2003 motor vehicle accident. Dr. Liss listed the claimant's current medications as Celexa for depression, Vicodin for pain, Ambien for sleep, and an inhaler. He opined that the November 7, 2007 work injury caused her to have psychiatric complications, particularly complications with her anxiety and depression. He opined that the claimant suffered a 25% permanent partial psychiatric disability as a result of the November 2007 work injury due to additional anxiety and depression that complicated a pre-existing

psychiatric condition and that the claimant had a 75% pre-existing permanent partial psychiatric disability. He also opined that the work-related disability and pre-existing disability combined to form a 100% permanent disability and that the claimant is unemployable.

The claimant reported that she was terminated from Dr. Goldberg's office due to concentration issues and did not mention being fired due to having lunch with her daughter at a unit station. Dr. Liss testified that the claimant did not receive any psychiatric or psychological treatment after the November 2007 injury. Dr. Liss did not review any psychiatric records. He testified that from the claimant's medical history that during a hospitalization in 2009, she attempted suicide with pills she brought into the hospital, but noted there was no psychiatric follow-up after that. To his knowledge, she was under no psychiatric treatment at the time of her exam. Dr. Liss opined that the claimant was employable, despite her Post-Traumatic Stress Disorder, associated anxiety and depression, and attention-deficit disorder before the 2007 work-related accidents. He testified that the fact that she worked until 2009 would also be an indicator that she was employable despite her conditions.

Dr. Michael Jarvis

On June 14, 2010, Dr. Jarvis examined the claimant and took a medical history in which the claimant reported taking Bupropion SR, Lasix, Xanax, Celexa, Carbamazepine, and Symbicort. During his exam, Dr. Jarvis opined that the claimant did not show much in the way of pain behavior. However, she showed a great deal of emotional distress when discussing her motor vehicle accident. She reported constant pain under her left eye coming from the location of the metal plate in her face and that she had been on pain medication since the accident. She gave a history of taking Percocet, Morphine, and most recently Vicodin. Although he reviewed medical records from her primary care physician and nurse practitioner that contained occasional references to psychiatric medications, he found no records of psychiatric care. He opined that the treatment she received for her Post-Traumatic Stress Disorder was not associated with the June 2007 or November 2007 work-related injuries.

When reviewing her medical history, Dr. Jarvis found it significant that the claimant did not contend that her psychiatric condition was relatable to either of her work injuries. During her exam, the claimant spoke substantially about the 2003 motor vehicle accident. The claimant recalled every detail from the 2003 accident, including the blood in her car, being placed on the stretcher, and overhearing witnesses' conversations about her being dead. According to the history provided to Dr. Jarvis, she was able to ignore the symptoms of Post-Traumatic Stress Disorder for about a year after the facial surgeries, but then started taking Lexapro prescribed by Dr. Bouldin. She reported multiple psychological issues that arise from the motor vehicle accident. She reported frequent, intrusive recollections of the automobile accident. These recollections are triggered whenever she hears real or imagined helicopter noise. She avoids anything to do with telephone poles and helicopters. Ms. McLeary reported having night terrors and will wake up screaming and sweating. Occupationally, she had stopped working in trauma and emergency rooms.

The claimant reported leaving this employer in 2008 to work at Associates in Pulmonary and Sleep Medicine, because it was Monday through Friday hours and no holidays. She reported that she was fired from that position, because her daughter came to have lunch with her at the

unit station. She also contended that the hospital was trying to cut back on staff, and since she was the last one hired, she was fired first. Dr. Jarvis pointed out that she did not report having concentration difficulty at work as reported by Dr. Liss. The claimant reported to Dr. Jarvis that she did not believe she could do any occupation because of her severe asthma.

The claimant reported to Dr. Jarvis that she had no psychiatric disability as a result of the June 2007 or November 2007 injuries. Dr. Jarvis opined that the claimant has Post-Traumatic Stress Disorder and major depression, but neither is a result of the June 2007 or November 2007 injuries. He opined that the Post-Traumatic Stress Disorder, which is a psychiatric disability that has a need for causation criteria, was caused by the 2003 motor vehicle accident. He opined that she has no psychiatric condition in which the June 2007 or November 2007 injury was the prevailing factor. He opined that she needs psychiatric care, but not because of her work injuries.

Dr. Jarvis opined that the claimant has no psychiatric permanent partial disability as a result of either 2007 work injury. Dr. Jarvis noted that the claimant was able to return to work after her 2007 work injuries. However, she does have a pre-existing disability. However, he testified that the claimant appeared to have gotten worse after he examined her in terms of Post-Traumatic Stress Disorder and major depression. He testified, "I suspect that she is probably now disabled but not from work injury." The claimant experiences the other three criteria of Post-Traumatic Stress Disorder, which include re-experience, avoidance, and hyper vigilance. All of these symptoms manifested themselves prior to 2007. Dr. Jarvis opined that the pain the claimant suffered from her 2003 accident makes her Post-Traumatic Stress Disorder and major depression more difficult to treat. Dr. Jarvis testified that the claimant suffers from self-image problems stemming from the 2003 motor vehicle accident. He was also aware that her shoulder problems affected her grooming and dressing in the morning. Dr. Jarvis testified that pain makes a major depression more difficult to treat.

Dr. Jarvis opined that the claimant's 2007 injuries are irrelevant to her ability to work. He cites multiple, non-work related issues that the claimant dealt with between her 2007 injuries and the time he examined her that caused her psychiatric condition to worsen. These incidents included rescuing her nephew from a drug overdose, her repeated hospitalizations, her attempted suicide, and her daughter's own psychiatric conditions. From a psychiatric standpoint, Dr. Jarvis opined that the claimant was not permanently disabled prior to the 2007 work injuries, because she had been gainfully employed. He opined that the claimant is severely disabled by her pulmonary function, which he ascertained during his exam. Dr. Jarvis opined that the claimant's primary physicians, Dr. Vernon and Dr. Bouldin, have done nothing to meet the claimant's psychotherapeutic needs. He opined that the right treatment could improve her psychiatric condition.

Dr. Jarvis opined that Dr. Liss's report was not credible from a psychiatric standpoint and that Dr. Liss's opinion was not based upon the foundation of the medical record. Dr. Jarvis testified, "Dr. Liss barely refers to her asymptomatic work related shoulder injury." Furthermore, Dr. Liss unequivocally states her depression and anxiety are due to her Post-Traumatic Stress Disorder. Dr. Liss's report writes about her multiple reconstruction surgeries on her face, a feeding tube inserted for complicated gastroplasty, a suicide attempt because of her need for a feeding tube, multiple other injuries, a history of uterine cancer for which she had a hysterectomy, severe asthma for which she has been repeatedly hospitalized and significant

social stressors. He reports little dysfunction attributed to her shoulder and minimally describes the work related injuries or the impact it may have had on Ms. McLeary. Therefore, he believes the psychiatric disability that Dr. Liss attributes to her 11/9/07 injury as neither plausible nor justified.

James M. England, Jr.

Mr. England, a rehabilitation counselor, evaluated the claimant on July 1, 2010, reviewed her medical records, and discussed her job history. He opined that she was not employable in the open labor market based on the combination of problems that she was having from a physical and psychological standpoint. Mr. England opined, "Absent the degree of her neurocognitive and psychological problems she would have some usable and transferable skill." He opined that her asthma was not a factor in her employability. His evaluation revealed that she is able to read and do basic math. As far as her work history revealed, Mr. England testified that she returned to work following her 2003 and 2007 accidents without any restrictions. He testified that after her termination from Dr. Goldberg's office she felt she could no longer work.

The claimant reported that she takes Vicodin three times a day for pain, Reglan, Carbamazepin, Actonel, Tizanidine, Lasix, Cymbalta, Wellbutrin, Zolpidem, Xanax, Albuterol, and an inhaler. She described a typical day as waking up in the morning around 8:00 am to let the dogs out, then perhaps starting laundry. She has a list of things she tries to accomplish around the house, but rarely completes the tasks. She reported being very frustrated over her inability to stay focused to accomplish things in a timely fashion.

He noted that Dr. McAllister released her to return to work without restrictions. Mr. England reported that Dr. Margolis opined that the claimant's disabilities are hindrances and obstacles to obtaining and maintaining employment and recommended that she avoid activities which exacerbated her pain. Mr. England also relied on Dr. Liss's opinion that the claimant had progressive PTSD, anxiety, and depression causing cognitive impairments and was totally disabled.

Mr. England opined that if the claimant did not have any psychological limitation, she would be capable of performing sedentary to light work, and therefore would be employable. However, his opinion is that based on the nonspecific restrictions by Dr. Margolis, the opinion of Dr. Liss, and her subjective pain complaints, she is likely to remain totally disabled from a vocational standpoint and would not be a candidate for vocational rehabilitation. The claimant reported to Mr. England that her primary pain is in her face followed by some pain in her shoulder and back.

June M. Blaine

Ms. Blaine performed a vocational evaluation on May 5, 2012, and reviewed all the medical records associated with the claimant's 2007 work injuries, including records from Dr. Houchin and Dr. McAllister, and reports from Dr. Margolis, Dr. Liss, Dr. Cantrell, and Dr. Jarvis. Ms. Blaine also reviewed medical records in connection with her 2003 motor vehicle accident. Ms. Blaine took a full employment history from the claimant. From 1987 through 2009, she worked at a variety of medical offices, including working as a patient care technician at

Barnes Jewish St. Peters Hospital and a Medical Assistant at Dr. Goldberg's office in 2008. According to Ms. Blaine's report, "she was asked to leave as she reported differences in lifestyle with other staff members and the facts that she did not 'fit in.' She also told us while working for Dr. Goldberg, she occasionally had difficulty using the computer and remembering information." Ms. Blaine found that her employment experience throughout her career was in the medical field.

The claimant's subjective complaints included back spasms and pain with certain activities and needs to change positions to relieve her pain. She reported difficulty with her right shoulder when she tried to complete extensive overhead activity, trying to complete lifting, or trying to make a bed. Dr. Cushman monitors her pain medication for both her back and face. She takes Morphine Sulfate and Vicodin for her pain and Wellbutrin, Cymbalta, Albuterol nebulizer, and an inhaler. She reported memory issues and Post-Traumatic Stress Disorder symptoms. The claimant reported that she has problems remembering how to get to places and frequently gets lost, which has been a constant problem since her motor vehicle accident. She reported ongoing face pain on a daily basis without relief. The claimant hopes that her pulmonary status will improve so that she can try to go back to work in a medical office type setting.

Ms. Blaine opined that the claimant was able to compete in the open labor market after the two 2007 injuries based on the fact that no treating physician gave her permanent restrictions after her injuries and that she was actually able to return to work. The issues that she had with her memory while working at Dr. Goldberg's office stemmed from her 2003 motor vehicle accident. Her pre-existing issues of Post-Traumatic Stress Disorder and depression also were related to her prior motor vehicle accident. These factors that predated the 2007 work injuries would prohibit her from working.

Ms. Blaine testified that Mr. England opined that the claimant was unemployable from a combination of her pre-existing and her 2007 work related injuries. Ms. Blaine opined that the claimant could perform light duty work as an office manager or an administrative worker. Ms. Blaine found nothing in the medical records that would preclude the claimant from performing heaving duty work, such as lifting 150-200 pound patients. Ms. Blaine testified that she would defer to the treating physicians. She testified that Dr. Margolis recommended avoiding activity that hurts her. So if lifting heavy patients hurt the claimant, then it should be avoided.

She did not consider the claimant's shoulder and back injuries a hindrance to her employment. Ms. Blaine acknowledged that the claimant continued to have additional hospitalizations and ongoing treatment after 2007. To her knowledge, Ms. Blaine was unaware of any medical restrictions referable to the claimant's pulmonary condition or psychiatric issues. After her 2007 injuries, the claimant returned to the same type of work.

PERMANENT DISABILITY

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant

to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's pre-existing condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630. Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

"Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

Permanent partial disability shall be demonstrated and certified by a physician.
Medical opinions addressing compensability and disability shall be stated within a

reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic images. Section 287.190.6(3), RSMo Supp. 2005.

When the opinions of medical experts are in conflict, the fact finding body determines whose opinion is most credible. Kelley v. Banta & Stude Construction Co., Inc., 1 S.W.3d 43, 48 (Mo. App. E.D. 1999). An administrative law judge may reject all or part of one party's expert testimony, which he does consider credible, and accept as true the contrary testimony offered by the other litigant's expert. The Workers Compensation Statute is to be construed strictly. Section 287.800, RSMo Supp. 2005.

In this case, the claimant suffered a compensable injury on November 9, 2007, after she injured her right shoulder after tossing a bag of laundry into a laundry basket. Dr. Houchin examined the claimant and gave her an injection. When this did not alleviate her complaints, she went to Dr. McAllister. After an ultrasound revealed a partial-thickness rotator cuff tear, Dr. McAllister continued work restrictions of no overhead activity and no lifting over 15 pounds. He ultimately performed arthroscopic surgery in April 2008. She underwent physical therapy and was released to work full duty in July 2008. She had a couple follow-up visits after incidents that exacerbated her shoulder complaints, but on October 16, 2008, Dr. McAllister opined that she was at maximum medical improvement. He released her without restrictions, and opined the claimant has a 3% impairment of the upper extremity at the shoulder, which is 2% impairment of the whole person. The claimant testified that she has not requested any further treatment to her right shoulder and that no physician has given her any restrictions.

The claimant voluntarily quit her employment with this employer and began her employment at Dr. Goldberg's office. She did not inform her employer that she had any physical limitations or required any accommodations in regards to her shoulder. She claimed to have pain in her shoulder whenever her duties required her to reach over-head. Her shoulder complaints also prevent her from brushing her hair. She testified that when her hair does not look good, it increases her anxiety about her self-appearance. It is well documented that she had anxiety about her appearance prior to the 11/9/07 injury. She also complains of difficulty performing other domestic chores such as cooking, getting the roasting pan out of the oven, hanging laundry on the line, and sweeping. During her 1/4/10 exam by Dr. Margolis, the claimant reported constant 4/10 pain, and indicated that the pain could elevate to 8/10 with activity. However, at the 6/14/10 exam with Dr. Jarvis, she described having occasional discomfort in her shoulder, particularly if she overused it.

During the IME with Dr. Margolis, he noted slight decreased range of motion in her right shoulder while performing the upper reach test. The claimant had full range of motion during passive tests. She complained of weakness in her arm and that lifting a gallon of milk causes pain. The claimant never told Dr. Margolis of any specific problems she had performing her job at Barnes-Jewish Hospital St. Peters because of her shoulder injury. He instructed the claimant to avoid activities that exacerbated her pain, but did not assign any specific restrictions.

Dr. Margolis examined the claimant on January 14, 2010, diagnosed a torn rotator cuff on the right shoulder, opined that the claimant suffered a 40% permanent partial disability to the

right shoulder from the November 2007 accident, and that her work was the prevailing factor causing the injury. He also opined that the claimant suffered a 40% permanent partial disability to her person as a whole as it related to her 2003 motor vehicle accident. Dr. Cantrell examined the claimant, diagnosed a partial rotator cuff tear as a result of her work accident, and opined that the claimant suffered a 10% permanent partial disability to her right shoulder from the November 2007 accident. Dr. McAllister rated opined that the claimant suffered a 3% permanent partial disability to her right shoulder from the November 2007 accident.

Based on the weight of the evidence, the claimant sustained a 25% permanent partial disability to her right shoulder as a result of the November 2007 accident. She returned to working performing her regular activities after her shoulder injury. Although Dr. Margolis imposed nonspecific restrictions by instructing her to avoid activities that exacerbate her symptoms, no physician has placed any specific restrictions on her shoulder.

The weight of the credible evidence suggests that the November 9, 2007, injury did not cause the claimant to sustain any psychiatric disability, and that any psychiatric disability resulted from the claimant's 2003 severe motor vehicle accident. The claimant suffered a 2003 motor vehicle accident when she slammed into the back of the truck and an electrical pole went through her van and crushed the left side of her face. This injury required her to have multiple reconstruction surgeries, and she testified that she now has 13 screws and five plates in her face. She complains of daily facial pain for which she takes pain medications for, including morphine and Oxycontin. These medications started after she built a tolerance to Percocet and Vicodin. She developed Post-Traumatic Stress Disorder as a result of this accident, and testified that she takes Xanax and Lexapro to treat these symptoms before her November 2007 injury. She now takes Wellbutrin instead of Lexapro because Lexapro became too expensive. As a result of the 2003 motor vehicle accident, the claimant suffers from flashbacks, nightmares, panic attacks, memory problems, and anxiety. She is highly self-conscious about her appearance after the 2003 accident, and therefore does not like interacting with other people. The evidence is credible that the claimant has suffered from PTSD, anxiety, and depression as a result of the 2003 motor vehicle accident.

Dr. Liss, a psychiatrist, opined that the claimant suffered a 25% psychiatric permanent partial disability from the November 2007 accident from additional anxiety and depression that complicated her pre-existing psychiatric issues. However, some of the evidence suggests that this conclusion is not well taken. For instance, the claimant did not receive any psychiatric or psychological treatment following the November 2007 accident and has never sought professional psychiatric treatment or counseling for her psychological issues. The claimant testified that her November 2007 accident had nothing to do with the Post-Traumatic Stress Disorder that she developed after her 2003 motor vehicle accident. Her PTSD causes her to suffer from flashbacks, panic attacks, memory problems, and anxiety. She has taken Xanax and Lexapro for her depression and anxiety prescribed by her primary physician since well before her November 2007 accident.

Dr. Jarvis, another psychiatrist, examined the claimant and opined to the contrary concluding that the claimant's November 2007 accident had no substantial effect on her psychiatric condition. He found that the claimant went into great detail about psychological issues stemming from her 2003 motor vehicle accident. She avoids anything to do with

telephone poles, including even looking at them. She complained that she has frequent, intrusive recollections of the automobile accident that are generated whenever she hears real or imagined helicopter noise. Dr. Jarvis reported, "She is greatly upset by her appearance and does not look at herself." See Dr. Jarvis medical report, page 13. When asked whether he agrees that the 2003 motor vehicle accident in 2003 adversely affected her self-esteem, Dr. Jarvis replied, "She does clearly say that it has affected the way she looks. She believes she looks horrendous." See Dr. Jarvis deposition, pages 22-23. Dr. Jarvis reported, "She perceives herself horribly disfigured, when to the casual observer she looks fine." See Dr. Jarvis medical report, pages 22-23. The claimant has felt suicidal since the 2003 motor vehicle accident. See Dr. Jarvis medical report, page 15. Dr. Jarvis listed multiple other non-work related issues that the claimant has dealt with after her November 2007 accident that caused her psychiatric condition to deteriorate including rescuing her nephew from a drug overdose, her repeated hospitalizations, her attempted suicide, and her daughter's own psychiatric conditions.

The claimant also reported to Dr. Jarvis that she did not feel her psychiatric condition was related to her work injuries. Dr. Jarvis opined that the claimant suffers from Post-Traumatic Stress Disorder, which has been treated by her primary care physician for years. She also suffers from major depression "for the last several years." See Dr. Jarvis medical report, page 22. However, he opined that the November 2007 accident caused neither of these psychological or psychiatric conditions. He opined that the claimant's PTSD resulted from the 2003 motor vehicle accident that crushed the left side of her face, caused her to have multiple surgeries, and continues to cause her daily facial pain. See Dr. Jarvis medical report, page 22. Dr. Jarvis opined that the claimant has no psychological disability from either 2007 accident. See Dr. Jarvis deposition, pages 14, 15.

While Dr. Liss's report writes about her multiple reconstruction surgeries on her face, a feeding tube inserted after a complicated gastroplasty, a suicide attempt because of her need for a feeding tube, and multiple other instances and significant social stressors, he reports little dysfunction attributed to her shoulder. Dr. Jarvis opined that Dr. Liss minimally described the work related injuries or the impact it may have had on the claimant. "Dr. Liss did not evaluate nor document psychiatric distress that he related to her work related injury. Without explanation, he attributes 25% psychiatric disability rating to the work related injuries." See Dr. Jarvis medical report, page 21. He opined, "The independent psychiatric examination offered by Dr. Liss where he attributes any psychiatric disability to Ms. McLeary's work-related injury is neither plausible nor justified." See Dr. Jarvis medical report, page 3.

Based on the weight of the credible evidence, the 2003 accident was the prevailing cause of the claimant's psychiatric permanent partial disability and the 2007 work related accidents were not. Dr. Jarvis' findings appear to be more consistent with the evidence than those of Dr. Liss. Notwithstanding, the claimant is awarded a 25% permanent partial disability to her right shoulder as a result of the November 2007 accident.

SECOND INJURY FUND

"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in '[a]ll cases of permanent disability where there has been previous disability.'" For the Fund to be liable for permanent, total disability

benefits, the claimant must establish that: (1) he suffered from 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. Section 287.220.1. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined...."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 50 (Mo.App. W.D. 2007).

The test for permanent, total disability is the worker's ability to compete in the open labor market. 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. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 48 (Mo.App. W.D. 2007).

In this case, the claimant suffered a 25% permanent partial disability to her right shoulder as a result of the November 2007 accident. The claimant suffered from a 7 ½% pre-existing permanent partial disability to her low back from her June 2007 accident at work. Dr. Liss opined that the claimant suffered from a 75% pre-existing permanent psychiatric partial disability based on her PTSD and depression. Dr. Margolis opined that the claimant's facial injuries from her 2003 motor vehicle accident constituted a 40% pre-existing permanent partial disability and that the claimant's permanent partial disabilities combined to form a total disability greater than the simple sum. See Dr. Margolis deposition, page 10. The claimant's disabilities from her 2003 accident were substantial and complex, suggesting the need to defer to expert opinion evidence. Dr. Liss' and Dr. Margolis' evaluations of those conditions were not contradicted by other evidence.

The claimant contends that the combination of her permanent partial disability from the last accident combined with her pre-existing permanent partial disabilities renders her unemployable in the open labor market and permanently and totally unemployable in the open labor market. The claimant relies on Mr. England who testified that based on the combination of problems that she was having from a physical and psychological standpoint, she was not employable in the open labor market and that based on the nonspecific restrictions by Dr. Margolis, the opinion of Dr. Liss, and her subjective pain complaints, she is likely to remain totally disabled from a vocational standpoint and would not be a candidate for vocational rehabilitation.

However, the claimant elected to leave her employment with this employer for a position with another employer with better hours sometime after the accident. Her election to seek another position had nothing to do with any of her permanent partial disabilities. The claimant was terminated from the subsequent position either for inability to concentrate on her job duties

or for allowing unauthorized guests at work during working hours. This leads to conclusion that either the claimant's psychiatric condition deteriorated or that the claimant elected to not comply with her employer's work rules. She testified in her deposition that she received two warnings before her termination. If the claimant suffered from a deterioration of her psychiatric condition after 2007, there is ample evidence in the record to support that conclusion. For instance, Dr. Jarvis related the claimant's current psychiatric state to pre-existing PTSD and factors that occurred subsequent to the 2007 work accidents. For example, Dr. Jarvis identified other events that occurred after the 2007 accidents such as the claimant rescuing her nephew in 2008 from a drug overdose, repeated hospitalization for her aspiration and asthma, attempted suicide, black mold in her house, and her daughter's continued psychiatric disability. See Dr. Jarvis deposition, page 39. It is unreasonable to conclude that those factors had no impact in the claimant's psychiatric condition given the uncontradicted testimony of Dr. Jarvis.

In summary, the claimant's lack of employment is not a result of the combination of her permanent partial disability from this accident and her pre-existing permanent partial disabilities. It is a function of her election to leave her position with this employer for another position and subsequent developments after the 2007 accident.

On the other hand, our statute provides for substantial additional permanent partial disability benefits two permanent partial disabilities. To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability pre-existing the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).
2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).
6. In cases arising after August 27, 1993, the extent of both the pre-existing permanent partial disability and the subsequent compensable injury must

equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability 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. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive 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. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1, RSMo 1994, contains four distinct steps in calculating the compensation due an employee, and from what source:

1. The employer's liability is considered in isolation- "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability."
2. Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered;
3. The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and
4. The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Based on the findings above, the claimant met her burden of proving eligibility for additional permanent partial disability benefits from the Second Injury Fund. Based on the entire record, the claimant suffered a compensable work related injury in November 2007 resulting in a 25% permanent partial disability to the right shoulder (58 weeks). At the time the last injury was sustained, the claimant had a 50% pre-existing permanent psychiatric partial disability based on her PTSD and depression (200 weeks), and a 20% pre-existing permanent partial disability from

her facial injuries in the 2003 accident (80 weeks). The simple sum of the claimant's permanent partial disability resulted in a 100% permanent partial disability of the body as a whole. The permanent partial disability from the last injury combines with the pre-existing permanent partial disability to create an overall permanent partial disability of the body as a whole that exceeds the simple sum of the permanent partial disabilities by 15%.

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. The claimant testified credibly about significant ongoing complaints associated with these injuries. The claimant changed how she performs many activities both at home and at work due to the combination of the problems. The claimant testified that as a result of the combination of the problems, she had limited ability to lift items.

Therefore, the Second Injury Fund bears liability for 50.7 weeks of permanent partial disability benefits.

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation