

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

Injury No. 04-132438

Employee: Victoria Ann Myers
Employer: Truman Medical Center (Settled)
Insurer: Self-Insured (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, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to determine the issues of: (1) accident; and (2) Second Injury Fund liability.

The administrative law judge rendered the following determinations: (1) employee suffered an accident on December 20, 2004; (2) employee failed to prove that she is permanently and totally disabled; and (3) employee met her burden of proving Second Injury Fund liability for permanent partial disability benefits in the amount of 52 weeks.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred in finding the Second Injury Fund is not liable for permanent total disability benefits.

For the reasons stated below, we modify the award of the administrative law judge referable to the issue of Second Injury Fund liability.

Discussion

Accident

Before we address the issue of Second Injury Fund liability, we pause to note that this claim involves a primary injury of December 20, 2004, but the administrative law judge applied the definition of "accident" as amended by the Missouri legislature effective August 28, 2005. (The administrative law judge also appears to have addressed, *sua sponte*, the issue of medical causation, where he applied a "prevailing factor" test to the evidence.) These substantive amendments cannot be applied retroactively. *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 350 (Mo. App. 2007). Instead, the appropriate definition of "accident" applicable to this claim is the pre-2005 version of § 287.020.2 RSMo, which provides, in relevant part, as follows:

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The word “accident” as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.

We defer to and adopt as our own the administrative law judge’s finding that employee made a credible witness on the issue of accident, and we agree that her testimony regarding the event is amply supported by the medical treatment records. We conclude employee suffered an “accident” as defined above, because her fall on December 20, 2004, unquestionably amounted to an unexpected and unforeseen identifiable event that happened suddenly and violently and produced objective symptoms of an injury.

Permanent total disability

The administrative law judge thoroughly summarized the facts pertinent to the primary injury, employee’s preexisting conditions of ill-being, employee’s medical history, and the testimony provided by the evaluating experts. Accordingly, we hereby adopt and incorporate the administrative law judge’s findings as to these matters to the extent they are not inconsistent with our own herein. We also deem appropriate and hereby adopt as our own the administrative law judge’s determinations with respect to the nature and extent of permanent partial disability referable to employee’s preexisting conditions of ill-being as well as the primary injury.

Turning to the question of permanent total disability, however, we note that in reaching his determination that employee is not permanently and totally disabled, the administrative law judge substantially relied on the fact that employee has been working as a substitute school nurse since 2011. We acknowledge that the administrative law judge’s findings are not without support on this record, but we ultimately disagree for the following reasons.

First, we note that the administrative law judge did not find that employee lacked credibility regarding her disabilities and limitations referable to her preexisting conditions of ill-being or the effects of the primary injury. Employee thoroughly described her preexisting limitations referable to her bilateral knees, as well as her psychiatric history involving panic attacks and depression, and described how these conditions affected her work as a neonatal nurse. Employee also provided detailed testimony regarding the effects of the work injury. There is no evidence, or reason to believe, that employee is exaggerating her symptoms; her testimony is well-documented and corroborated by the voluminous medical treatment records in evidence. We find that employee’s testimony on these topics is credible.

Second, we note that each of the medical, vocational, and psychological experts to address the issue opined that employee is permanently and totally disabled. Dr. Michael Poppa believes employee is permanently and totally disabled due to a combination of the disability from her primary injury and the preexisting disability with regard to her knees, anxiety, and depression. The psychologist Dr. James Jackson opined that employee is permanently and totally disabled in light of the combination of employee’s preexisting psychiatric conditions with the effects of the work injury. The vocational expert Michael Dreiling testified that it is not reasonable to expect any employer to hire employee, and that she would not be able to sustain employment in any event.

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After leaving her job with employer in January 2007, employee did not work anywhere in any capacity until March or April 2011, when, at the suggestion of a friend from her church, she began accepting assignments to work as a substitute school nurse. Employee very credibly and extensively testified (and we so find) that she sought out this work because she felt a pressing need to use her nursing skills to recapture some sense of identity and self-worth, which she felt had been taken away after she was unable to continue in her job for employer. Employee's depression after leaving her job with employer was so bad that she was often unable to get out of bed, she "didn't know who [she] was anymore," *Transcript*, page 90, and her psychiatric condition deteriorated to the extent that her marriage ended. Working as a substitute school nurse provided employee with a much-needed sense of purpose.

It is well-settled in Missouri that an employee's ability to engage in part-time, sporadic, or otherwise limited employment is not necessarily preclusive of a finding that the employee is permanently and totally disabled. See, e.g., *Molder v. Mo. State Treasurer*, 342 S.W.3d 406 (Mo. App. 2011), noting that "[c]ertainly the ability to perform some work is relevant to th[e] [total disability] determination, but it is not dispositive. To the contrary, a number of cases have recognized that a claimant can be totally disabled even if able to perform sporadic or light duty work." *Id.* at 412 (citations omitted). Employee averaged only about one day of work per week in this capacity, but sometimes did not work for as long as a month. She typically only worked for part of a day to fill in for a nurse who had to leave for an appointment or who became ill. Sometimes employee had to decline an assignment owing to her psychiatric condition.

Employee did try working full-time during an eight-week period when a school nurse left for maternity leave, but this caused her to experience a lot of swelling and pain in her right knee which prompted a need for additional medical treatment, including a new prescription for anti-inflammatory medication (which employee continues to take) as well as a full-leg brace.¹ Employee turned down any offer to work full-time as a school nurse because she felt she would be unable to consistently report for work on a daily basis owing to her psychiatric limitations. "A claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of ... total disability." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. 2003).

Although the record lacks evidence to support a finding that employee was materially accommodated in her work as a substitute school nurse following the December 2004 primary injury, we are of the opinion that this work was too limited and sporadic to undercut the persuasive value of the essentially unanimous opinions from the experts on the issue of permanent total disability. We are especially persuaded by employee's testimony that her attempts to work full-time caused a significant exacerbation in her symptoms and prompted a need for additional medical care. Accordingly, we credit the testimony from Drs. Poppa and Jackson, as well as the testimony from Mr. Dreiling, and find that, at the time she reached maximum medical improvement from the effects of the

¹ The administrative law judge suggested that employee's knee problems should not be considered because they (unsurprisingly) worsened in the time between the December 2004 primary injury and the 2014 hearing in this matter. We disagree. On September 2, 2004, employee's primary care physician Dr. Kevin Fitzmaurice noted that employee had severe degenerative joint disease of both knees and opined she may need a knee replacement "soon." *Transcript*, page 1776.

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work injury on October 26, 2006,² employee was unable to compete for any type of employment in the open labor market owing to the combination of the effects of her preexisting disabilities with the disability resulting from the primary injury.

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).

We have adopted the administrative law judge's findings that employee suffered from preexisting permanent partially disabling conditions referable to her bilateral knees and her psychiatric history. We are convinced these conditions were serious enough to constitute hindrances or obstacles to employment. This is because we are convinced employee's preexisting conditions had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of these preexisting conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Fund liability for PTD under Section 287.220.1 occurs when [the employee] establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. For [the employee] to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD.

Lewis v. Treasurer of Mo., 435 S.W.3d 144, 157 (Mo. App. 2014).

Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). 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. *Id.*

We have adopted the administrative law judge's finding that, as a result of the accident on December 20, 2004, employee sustained a 25% permanent partial disability of the body as

² It appears to us from our search that employee's last treatment relevant to the work injury occurred on October 26, 2006, when the treating psychologist Dr. Keenan provided cognitive therapy for complaints that Dr. Keenan felt were related to the work injury. *Transcript*, pages 2279-80.

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a whole. None of the experts to address the issue testified that employee was permanently and totally disabled as a result of the primary injury alone. We conclude that employee is not permanently and totally disabled as a result of the last injury considered in isolation.

We conclude, instead, that employee is permanently and totally disabled owing to a combination of her preexisting disabling conditions in combination with the effects of the work injury. The Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability.

The Second Injury Fund is liable for weekly permanent total disability benefits beginning October 26, 2006, at the differential rate of \$321.85 for 100 weeks, and thereafter at the stipulated weekly permanent total disability rate of \$675.90. The weekly payments shall continue for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Kenneth J. Cain, issued October 14, 2014, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an 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 25th day of June 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD AS TO THE SECOND INJURY FUND

Employee: Victoria Ann Myers Injury No. 04-132438
Dependents: N/A
Employer: Truman Medical Center (Settled)
Self-Insurer: Self-Insured (Settled)
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: August 26, 2014
Briefs Filed: September 26, 2014 Checked by: KJC/lh

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: December 20, 2004
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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: Employee, while in the course and scope of his employment a neonatal nurse in the intensive care unit at Truman Medical Center was in the nurses' station and walking to her computer when her

foot caught on something on the floor causing her to fall forward and to land on her knees and left upper extremity and her face to strike a chair.

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: left shoulder, both knees and psyche.
14. Nature and extent of any permanent disability: 25 percent to body as a whole per the stipulation for settlement.
15. Compensation paid to-date for temporary disability: N/A.
16. Value necessary medical aid paid to date by employer/insurer? N/A.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: \$1,270.73
19. Weekly compensation rate: \$675.90/\$354.05.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: N/A.
N/A weeks for permanent partial disability
N/A weeks for temporary total (temporary partial) disability.
N/A weeks for disfigurement

22. Second Injury Fund liability:

52 weeks @ \$354.05 = \$18,410.60

Total: \$18,410.60

23. Future requirements awarded: None

Said payments to begin as of the date of the award and to be payable and be subject to modification and review as provided by law.

The compensation awarded herein shall be subject to a lien in the amount of 24 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ms. Steffanie Stracke

FINDINGS OF FACT AND RULINGS OF LAW

Employee: Victoria Ann Myers

Injury No. 04-132438

Dependents: N/A

Employer: Truman Medical Center (Settled)

Self-Insurer: Self-Insured (Settled)

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

Hearing Date: August 26, 2014

Briefs Filed: September 26, 2014

Checked by: KJC/lh

The employee settled her case against her employer on June 14, 2007 based on a permanent partial disability of 25 percent to her body as a whole with reference to her left shoulder, both knees and her psyche. The remaining parties, the employee and the State Treasurer as Custodian of the Second Injury Fund entered into various admissions and stipulations. The remaining issues were as follows:

1. Accident; and
2. Liability of the Second Injury Fund for compensation, and if so, the extent of any such liability.

At the hearing, Ms. Victoria Myers (hereinafter referred to as Claimant) testified that she was 67 years old. She stated that she was 57 years old when she sustained her injury at work.

Claimant testified that she graduated from high school in 1965 and that she started college 10 years later. She stated that she received her AA and RN degrees from Johnson County Community College in 1977. She stated that she worked as a neonatal intensive care nurse at Truman Medical Center (TMC) from 1977 to December 2004.

Claimant testified that as a neonatal intensive care nurse she took care of premature and sick babies. She stated that a neonatal nurse was required to be present at the delivery of all babies. She stated that she had to feed and change babies and to give medication and to insert IV lines. She stated that TMC had a lot of high risk births. She stated that they averaged 20 births per day.

Claimant testified that her injuries at work occurred on December 20, 2004. She stated that she was assigned to labor and delivery on that day. She stated that she had a busy shift. She stated that she had finished one delivery and another one was coming up. She stated that she was in the nurses' station and that while walking towards the computer her foot "caught" on something and that she fell forward. She stated that earlier she had dropped a vial of medicine and that she might have tripped on the broken glass.

Claimant testified that when she fell, she landed on her right knee and then her left knee and her left hand and that her face struck a chair. She stated that she immediately experienced “terrific” pain in her shoulder, knee and left arm. She stated that she had a “huge” bruise on her left breast. She stated that she could not raise her arm or move after she fell. She stated that she was placed in a wheel chair and taken to the emergency room for treatment.

Claimant testified that her co-employees saw her fall. She stated that her employer directed her medical care and paid for her medical treatment and her therapy with Dr. Keenan, a psychologist.

Claimant testified that she had two surgeries on her left shoulder. She stated that Dr. Phillips performed the first surgery in February 2005 and that afterwards her pain got worse while she was in physical therapy. She stated that Dr. Lowry Jones performed the second surgery on her left shoulder on October 14, 2005.

Claimant testified that Dr. Jones’ surgery involved a distal clavicle excision, biceps tendon repair, and a rotator cuff tendon repair due to a 90 percent full thickness tear in her rotator cuff. She stated that the rotator cuff tear was missed at the time of her initial surgery.

Claimant testified that she became depressed while in physical therapy following her second surgery. She stated that she could not sleep. She stated that she was anxious. She stated that she was crying a lot. She stated that she began to experience more panic attacks.

Claimant admitted that she had experienced anxiety, depression and panic attacks prior to her December 2004 injury. She stated that she experienced such problems in November 1998 after her cousin committed suicide and again about two years later when another cousin committed suicide. She stated that she was prescribed Prozac and Xanax prior to December 2004. She stated that she had panic attacks every couple of months and anxiety almost every day prior to December 2004. She stated that her depression was worse after the second suicide and that it affected her at work.

Claimant testified that due to her depression and panic attacks she had trouble focusing at work and that she was functioning in a “haze”. She stated that she was always tired due to sleeping problems.

Claimant testified that she had surgery on both of her knees prior to December 2004. She stated that she was advised that she was becoming bone-on-bone in both knees prior to December 2004. She stated that she was told that she was going to need bilateral total knee replacements prior to December 2004.

Claimant also testified that her knees caused her problems at work prior to December 2004. She complained of knee pain and swelling and an altered gait due to her knee problems which led to low back pain. She complained of difficulty in bending, stooping and kneeling at work. She stated that she had to modify her duties at work due to her knees.

Claimant testified that her knee pain increased after she fell on her knees in the December 2004 accident at work. She stated that she was unable to work from December 2004 until Dr. Jones released her from care in August 2006. She stated that she initially worked four hours per day.

Claimant testified that when she returned to work many of the policies and procedures had changed and that there had been a “huge” staff turnover. She stated that adjusting to the changes made her anxiety worse.

Claimant testified that her knees and left shoulder got worse when she began working full-time. She stated that they were not “too bad” when she was working four hour shifts. She stated she had to ask co-workers to do the lifting for her. She stated that prior to her injury she was the most experienced nurse and that the other nurses asked her for assistance and sought advice from her. She stated that after her injury the new nurses treated her like she was old and not doing her job. She stated that her stress, anxiety and depression increased. She stated that she had trouble sleeping. She stated that she decided in December 2006 that she could no longer do the job.

Claimant testified that she then retired and took her pension. She also stated that she was getting social security disability benefit. She stated, however, that she “loved” her job and that it was her identity. She stated that she went into a deep depression. She stated that she felt worthless. She also stated that she started having marital problems and that her husband eventually left her.

Claimant testified that in 2008 she had bilateral knee replacements. She indicated that she had a good recovery, although she still had some pain, swelling and aching in her knees. She stated that the pain was occasionally sharp. She complained of difficulty in climbing stairs and in bending. She stated that she was allergic to narcotic pain medication.

Claimant testified that in April 2011 she started working as a substitute school nurse. She stated that she was still so employed. She stated that on average she worked about 5 days per month. She stated that she did not work during some weeks or months. She stated that her duties were to provide medical care to students and teachers. She stated that she gave medicine to students. She stated that she provided care for special needs students. She stated that she inserted catheters and provided insulin shots. She stated that she had to insure that the students were up to date on their medications.

Claimant testified that she worked full-time as a substitute school nurse in 2013 for an eight-week period when the regular nurse was on maternity leave. She stated that her knee problems increased during the eight weeks and that she got a new brace. She also stated that she experienced more problems with anxiety and depression.

Claimant testified that parents were sometimes difficult. She stated that some were abusive. She stated that going to the different schools increased her anxiety. She stated that dealing with the different people increased her anxiety. She stated that each nurse she substituted for did the job differently and that she had to adjust which also increased her anxiety.

Finally, Claimant admitted that the school district offered her a full-time permanent job as a school nurse. She stated that she declined the offer due to her anxiety and depression. She also indicated that she believed that working full-time would cause more pain and swelling in her knees. She stated that as a school nurse she had to sometimes run out to the playground to provide care to a student and to climb stairs and that she had to stand on her feet for prolonged periods.

On cross-examination, Claimant admitted that she had no job restrictions based on her knees prior to December 2004. She stated that her anxiety and depression prior to December 2004 had never caused her to fail to properly care for a patient.

Medical Testimony

All the medical evidence was offered by Claimant. Michael J. Poppa, D.O. testified that he evaluated Claimant on November 14, 2006. His deposition was taken on September 20, 2012. He stated that he was board-certified in occupational medicine and as an independent medical evaluator. He stated that he was still the staff physician for Sanofi-Aventis Pharmaceutical Company.

Dr. Poppa noted Claimant injuries from the December 2004 accident at work. He noted that her MRI after the accident showed a partial thickness rotator cuff tear involving the supraspinatus tendon. He noted her two left shoulder surgeries. He noted that her second arthroscopic surgery involved a rotator cuff repair, distal clavicle resection and a debridement and a biceps tendon repair.

Dr. Poppa noted Claimant's impairments prior to December 2004. He noted that she had bilateral arthroscopic knee surgery prior to December 2004. He noted that she had injured her cervical spine in a 1996 motor vehicle accident. He noted her history of anxiety and depression prior to December 2004.

Dr. Poppa concluded that Claimant's December 20, 2004 fall at work was the direct, proximate and prevailing factor in causing her resulting medical conditions and disability to her left shoulder and right knee. He concluded that she should avoid overhead work and lifting greater than 50 pounds from the floor to waist level and greater than 20 from the waist to the shoulder.

Dr. Poppa concluded that Claimant had sustained a permanent partial disability of 37.5 percent of her left upper extremity at the shoulder level due to her injuries in the December 2004 accident and a permanent partial disability of 5 percent to her body as a whole due to her injuries to both knees. He concluded that she had sustained a permanent partial disability of 10 percent to her body as a whole due to her anxiety and depression from the December 2004 accident.

Dr. Poppa also concluded that Claimant had sustained a permanent partial disability of 37 percent to her body as a whole due to the combined effect of the disability from all of her injuries from the December 2004 accident at work. He concluded that prior to the December 2004 accident, Claimant had sustained a permanent partial disability of 15 percent of each knee. He concluded that Claimant had sustained an "enhanced" disability of 20 percent above the simple arithmetic sum of the separate disabilities due to the combined effect of the disability from her bilateral knee and left shoulder injuries from the December 2004 accident and her prior bilateral knee injuries. He concluded that her bilateral knee injuries prior to December 2004 were a hindrance or obstacle to her employment or reemployment.

Finally, Dr. Poppa testified that subsequent to his evaluation of Claimant, he reviewed Dr. Keenan's psychological notes and Mr. Dreiling's vocational report. He stated that after doing so he wrote a report dated June 16, 2009, in which he concluded that Claimant was not employable in the open labor market due to a combination of her disability in the December 20, 2004 accident at work and her preexisting disability. He stated that in his opinion Claimant was permanently and totally disabled.

Medical Records

Lowry Jones, M.D, and a board-certified orthopedic surgeon, noted his October 2005 surgery on Claimant's left shoulder. He noted that in August 2006 he released Claimant to return to work for 4 to 6 hours per day. He noted that Claimant did "reasonably" well with the limited hours and that when she returned to her full 12 hour per day work shifts she complained of being unable to tolerate the pain with overhead activity. He noted that he then restricted Claimant to 6 to 8 hours per day work shifts. Dr. Jones concluded that Claimant had sustained a permanent partial disability of 25 percent of her left upper extremity. He did not place any permanent restrictions on her.

Claimant had a left knee meniscectomy in 2007 due to medial and lateral meniscus tears. On October 20, 2008 she had bilateral knee replacements. The operative report noted that she had moderate degenerative arthritis in both knees in the medial and lateral compartments.

On January 5, 2005, Dr. Phillips noted that Claimant had been diagnosed with an impingement syndrome in her shoulder in the spring of 2004 and that she had a cortisone injection. He noted that she had a flare-up in October 2004 and another injection.

Psychologist Evidence

James O. Jackson, Ph.D. testified by deposition for Claimant. He stated that he evaluated Claimant on May 15, 2013 and that her primary complaint was "sleep avoidance". He stated that she also complained of anxiety and depression.

Dr. Jackson noted that Claimant had been treated for and prescribed medications for mental or emotional problems prior to December 2004. He noted that Claimant told him that she had been offered a full-time position as a school nurse and that she had declined the offer due to her "functional" limitations.

Dr. Jackson noted that Claimant described herself as private, introverted and sad. He noted that by history she had been sexually assaulted twice during her childhood. He noted that she had a family history of mental illness on her father's side.

Dr. Jackson testified that none of Claimant's tests indicated that she was malingering. He stated that her MMPI test results showed that she was anxious and depressed and that she needed treatment. He stated that her Axis 1 diagnosis was moderate and recurrent depression and panic disorder without agoraphobia. He stated that her Global Assessment of Functioning score (GAF) was 60, meaning that she was getting along "fairly" well.

Dr. Jackson concluded that Claimant was permanently and totally disabled. He stated that her preexisting physical and mental disability represented an industrial disability and a significant obstacle for her to gain re-employment should she have lost her job prior to December 2004. He rated Claimant's preexisting "industrial disability" due to her depression and panic disorder at 20 percent.

Finally, Dr. Jackson concluded that Claimant's permanent total disability was due to a combination of the disability she sustained in the December 2004 accident at work and her preexisting psychological disability from depression and panic disorders.

On cross-examination, Dr. Jackson admitted that he evaluated Claimant nearly nine years after her accident at work. He admitted that he had to rely heavily on the history she provided to him and entries in her medical records in formulating his opinions.

Kathleen J. Keenan, Ph.D. treated Claimant from 2005 to 2008. She noted that Claimant had significant stressors in her life in the year prior to December 2004, from the death of her mother and best friend.¹

Dr. Keenan concluded that Claimant was suffering from "significant" anxiety and depression. She concluded that Claimant's sleeping problems were a "big" contributor to her other symptoms. In 2006, she noted that Claimant was angry over her husband's perceived lack of effort in finding work. She also noted in early 2006 that Claimant had begun complaining about anxiety and concerns about going back to work.

Dr. Keenan noted in January 2006 that Claimant complained that she was afraid of going back to work. In February 2006, Claimant complained that she did not believe that she would be able to go back to work. In October 2006, Claimant complained that her anxiety and physical pain had "escalated" when she returned to work. Claimant complained of "horrible" dreams and difficulty with adjusting after she returned to work.

Finally, Dr. Keenan noted that Claimant provided a history of being over protected, "fragile" and shy as a child. She noted that Claimant became pregnant at age 20 and that Claimant had forced her first husband to marry her due to the pregnancy. She noted that Claimant's first husband had left Claimant when Claimant was three months pregnant and that Claimant believed that he was gay. She noted that Claimant became a single mother of two children and that Claimant went on welfare and later returned to school and earned her RN degree. She noted that during a hypnotic session Claimant related a memory of being raped at 19 years old.

Vocational Evidence

Michael J. Dreiling testified for Claimant. He stated that he had worked in the vocational rehabilitation field for 37 years. He stated that for 17 years he was the director of the Menninger Return to Work Centers. He stated that he was certified through the American Board of Vocational Experts.

Mr. Dreiling testified that he evaluated Claimant on April 15, 2009. He stated that he had not evaluated her since that date. He also stated that he considered the reports of Drs. Poppa and Jones in

¹ An entry in the medical records indicated that Claimant's mother had died in 1999.

rendering his opinions. Mr. Dreiling noted Claimant's age, education and work history. He noted that Claimant had transferable work skills from her job as a neonatal nurse to working with small children, but not for work in most doctors' offices or clinical settings due to the highly specialized nature of neonatal nursing work.

Mr. Dreiling testified that he did not do any vocational testing on Claimant due to her age and medical problems. He concluded that Claimant was not "really" a candidate to acquire other work in the open labor market. He stated that "I felt that based upon her level of functioning, that no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ her in her physical and emotional condition".

On cross-examination, Mr. Dreiling admitted that Claimant was qualified to do nursing work in other than a hospital setting. He stated that he would not eliminate Claimant from retraining to do other work based solely on her age.

Law

After considering all the evidence, including Dr. Poppa's deposition and report, Dr. Jones' rating and medical records, the other medical reports and records, Dr. Jackson deposition and report, Ms. Keenan's psychological records, the other exhibits and after observing Claimant's appearance and demeanor, I find and believe that Claimant failed to prove that she was permanently and totally disabled. She did prove the Second Injury Fund's liability for 52 weeks of compensation. At a rate of \$354.05 per week, for 52 weeks, the Second Injury Fund is liable \$18,410.60. The Second Injury Fund is ordered to pay that amount to Claimant.

Claimant had the burden of proving all material elements of her claim. Fischer v. Arch Diocese of St. Louis – Cardinal Richter Inst., 703 SW 2nd 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton vs. Big Boy Steel Erections, 121 SW 3rd 220 (Mo. Banc 2003); Griggs v. A.B. Chance Company, 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant met her burden of proof as set out above.

Accident and Injury

The applicable statute pertaining to accident and injury provides as follows:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the

accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable. . .

§ 287.020 RSMO. 2005

Claimant, who made a credible witness on the issue of accident, testified that on December 20, 2004, she was walking from the nurses' station to her computer at work and her foot "caught" on something causing her to fall forward. She stated that when she fell she landed on her right knee and then her left knee and her left hand. She also stated that her face struck a chair and that she had a "huge" bruise on her left breast. She stated that after the fall she was unable to raise her arm and that she could not move. She stated that she experienced immediate "terrific" pain.

The evidence supported Claimant's testimony. Her employer did not dispute that she had sustained a job-related accident. She clearly had an unexpected traumatic event. The uncontroverted evidence showed that the unexpected traumatic event was the prevailing factor in causing her resulting injuries and disability.

Thus, the Second Injury Fund's argument that Claimant had not sustained a job-related was without merit. The Second Injury Fund offered no evidence on the issue. Claimant proved that she sustained an accident under Missouri law.

Permanent Total Disability

Total disability is defined in the statute as an inability to return to any employment and not merely . . . inability to return to the employment in which the employee was engaged in at the time of the accident. See § 287.020 (6) RSMO.2005; Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo. App. 1995); Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919 (Mo. App. 1982); Crums v. Sachs Electric, 768 S. W. 2d 131 (Mo. App. 1989).

Missouri Courts have made it clear that the test for permanent total disability is whether any employer in the usual course of business would reasonably be expected to employ the injured worker in her present physical and mental condition. Boyles v. USA Rebar Placement, Inc., 25 S.W.3d 418 (Mo. App. W.D. 2000); Cooper v. Medical Center of Independence, 955 S.W.2d570 (Mo. App. W.D. 570); Brookman v. Henry Transportation, 924, S.W.2d 286 (Mo. App. 1996). The employee must also be able to compete for work in the open labor market. Stewart. V. Zweifel, 419 S.W.3d 915 (Mo. App. S.D. 2014); Cooper v. Med. Ctr. Of Independence, 955 S.W.2d 570 (Mo. App. 1977).

Claimant proved that that she was unable to return to her job as a neonatal nurse in the intensive care unit at TMC.² She did not, however, prove an inability to return to other employment as required by the statute or that no employer in the usual course of business would be reasonably expected to hire her in her present physical and mental condition or that she could not compete for work in the open labor market.

Claimant's accident occurred in December 2004. She treated until August 2006. She returned to work as a neonatal nurse in August 2006. After working for a few months she retired from her job, allegedly because she could no longer do the work. She then had unrelated bilateral knee replacements in 2008.

In 2011, Clamant returned to work as a nurse. Her new nursing job was as a substitute school nurse. She was still working as a substitute school nurse at the time of her hearing in August 2014. She admitted that in 2013 she worked full-time for eight consecutive weeks as a substitute school nurse when the school's full-time nurse was on maternity leave. She also admitted that the school district had offered her a full-time job as a permanent school nurse which she declined allegedly due to her health.³

² Claimant's job as a neonatal nurse required her to work 12- hour shifts, lift up to 50 pounds, to bend frequently and to stand on her feet for prolonged periods. The job was also stressful. She worked in the intensive care unit.

³ Claimant had earlier admitted that she was receiving social security disability benefits and a pension from the State of Missouri based on her nearly 30 years of service as a nurse at TMC. No questions were asked about the effects of a full-time job as a school nurse on her continued entitlement to social security disability benefits or even social security retirement benefits at her age.

Claimant also testified that on average she worked about 5 days per month as a substitute school nurse. She did not explain whether she used the nine or ten month school year or a calendar year as the basis for her calculations. Nevertheless, a full-time school nurse would work on average a few days less than 20 days per month, assuming that no days were lost due to illness, but including the various school holidays and breaks over a nine or ten month school year. A substitute school nurse position is similar to a substitute teaching position, meaning that the substitute nurse and teacher can only work when a nurse or teacher is absent from work. It does not mean that Claimant was incapable of working on average more than 5 days per month, assuming the accuracy of her calculations. Also, a person doing production work or working on an as needed basis can still be performing work in the open labor market. Miller v. State Treasurer, 978 S.W.2d 898 (o. App. 1998).

In addition, Claimant was offered a full- time permanent job as a school nurse. She alleged that she did not believe that she could do the job on a full-time basis due to her emotional problems and her knees. Based on her own testimony, however, some of the stressors she alleged as a substitute nurse would have been negated if she had accepted the full-time position. Claimant testified that the substitute position was stressful because she was

Missouri case law clearly shows that work alone is not dispositive of the permanent total disability issue. As the Labor and Industrial Relations Commission commented in a 2010 case; it is too simplistic an interpretation of the law to frame the question as simply whether the employee is working.⁴ See Stancie Molder v. Bank of America and Treasurer of State of Missouri as Custodian of the Second Injury Fund, Injury No. 02-103800. The issue is whether the employee's work demonstrates an ability to work in the open labor market and whether the employee can compete for work in the open labor market. Highly accommodated work or "made work" does not constitute work in the open labor market and it may not prove an ability to compete for work in the open labor market.

Clearly, Ms. Molder's job due to the highly accommodated nature of her work did not show that she was working in the open labor market. Ms. Molder worked part time. She worked sporadically. She worked from zero to twenty hours per week. She had the option of not reporting to work if she was "having a bad day". She was allowed to alternate between sitting and standing and she could recline as long as customers were not present.

The Missouri Court of Appeals for the Western District affirmed the Commission's reversal of the administrative law judge's decision in Molder. See Molder v. Treasurer, 342 S.W3d 406, 413-414 (Mo. App, W.D. 2011). The Court noted that Ms. Molder's highly accommodated part-time work which was gained because her daughter knew the employer did not "compel" the Commission to find that Ms. Molder was employable in the open labor market.

always going to different schools. If she had accepted the full-time permanent position she would have worked in only one school. She stated that it was stressful working around different people as a substitute nurse. Again, if she had accepted the full-time permanent position she would have worked at one school and around the same people. She stated that it was stressful because each school nurse did the job differently and that as a substitute she had to adjust to how each of the regular school nurses did the job. That stress too would have been alleviated if she had accepted the full-time permanent position where no adjustments would have been needed.

Finally, Claimant indicated that she believed that with the running and climbing of stairs and prolonged standing required as a school nurse, a full time job would have caused increased pain and swelling in her knees. Again, while that may have been true, her knees were a lot worse between 2011 and 2014 than they were in 2004 when she sustained the injury on the job. During the seven to ten years after her accident she had knee surgery in 2007 and bilateral knee replacements in 2008. Second Injury Fund liability may not be premised on a deterioration of a preexisting medical condition. Abt v. Mississippi Lime Co. and Treasurer of State of Missouri as Custodian of the Second Injury Fund, No. ED99779 (Mo. App. E.D. 2014). Also, per the 2008 operative report she only had moderate arthritis in her knees. Arthritis is a degenerative condition. She was not bone-on-bone in her knees or anywhere near bone-on-bone in 2004

⁴ The administrative law judge in Molder relied on Jason Rector v. Gary's Heating and Cooling and the Treasurer of the State of Missouri as Custodian of the Second Injury Fund, 293 S.W.3d 143 (Mo. Ct. App. S.D. 2009) in reaching her decision. The Commission noted in Molder that the administrative law judge had oversimplified the Court's decision in Rector. The Rector Court did not state as a matter of law that all work precluded a person from being permanently and totally disabled. The Commission reversed the administrative law judge's decision.

Jobs in the open labor market generally do not allow restrictions such as those granted to Ms. Molder. Reclining at work and getting to choose whether to come to work are not typical options given to employees working in the open labor market. It was also significant that Ms. Molder only got the job because her daughter the employer. On that basis alone, it cannot be found that Ms. Molder's highly accommodated job demonstrated in any way that she could compete for work in the open labor market or that employers would be reasonably expected to hire her with her physical impairments.

Miller v. State Treasurer, 978 S.W.2d 898 (Mo. App. 1998) appears to be more pertinent. Ms. Miller's injuries appeared to be more serious than Claimant's. There was no dispute that Ms. Miller was permanently and totally disabled. The Second Injury Fund argued that Ms. Miller was permanently and totally disabled based on her medical problems prior to her last injury on the job. In essence, the Second Injury Fund argued that Ms. Miller's job did not constitute work in the open labor market. The administrative law judge agreed. The Western District did not.

Ms. Miller did production work. After brain surgery and various other medical conditions she continued to do the production work. Her duties remained the same as the other production workers. She had no accommodations. The personnel manager testified that had Ms. Miller failed to meet her production quotas, she would have been removed from her position. Ms. Miller was not fired or removed from her position. The Western District did not buy the argument that Ms. Miller was not working in the open labor market and that she was in fact permanently and totally disabled prior to her last injury at work.⁵

The facts in Claimant's case clearly showed that she too was performing work as it is customarily done in the open labor market when she worked as a substitute school nurse. Claimant's duties as a substitute school nurse were the same as those of other substitute school nurses and even those of full-time permanent school nurses. Claimant, like Ms. Miller, was not working under any accommodations. Claimant admitted that as a substitute school nurse she had to provide nursing care to students and teachers. Regular school and other substitute school nurses do the same. Most nurses in other settings provide nursing care to patients. The other nurses are working in the open labor market.

Claimant admitted that as a school nurse she gave medicine to students. Again, nurses give medicine to patients. Claimant admitted that as a school nurse she provided care to special needs students, such as giving them insulin and inserting feeding tubes and catheters. Other nurses provide similar care.

Claimant admitted that as a school nurse she had to sometimes run out to the playground to provide care to an injured student. She admitted that she had to sometimes run up stairs to aid a student

⁵ See also Stewart v. Clint Zwiefel, Treasurer of the State of Missouri as Custodian of the Second Injury Fund, 419 S.W.3 915 (Mo. App. 2014) where the Fund raised similar arguments to those in Miller and its arguments were again rejected. Ms. Stewart, like Claimant, was getting social security disability benefits at the time of her injury at work. Her job was sporadic. The Fund argued that Ms. Miller was permanently and totally disabled prior to her last injury at work. The Court refused to find that Ms. Stewart was not performing work in the open labor market when she sustained the last injury at work. It also noted that her ability to answer jobs ads and to complete job applications was evidence that she could compete for work in the open labor market.

in need of nursing services. She admitted that she sometimes had to stand on her feet for prolonged periods. Regular and other substitute school nurses and nurses in other settings perform similar tasks.⁶

Thus, not only did Claimant's job duties as a substitute school nurse show that she was working in the open labor market, she had performed the work for nearly three years at the time of the hearing and she was still so employed. She had worked full-time for eight consecutive weeks while a regular school nurse was on maternity leave only a year prior to the hearing. She apparently performed her duties as a substitute school nurse in a competent, professional and satisfactory manner as evidenced by the school district offering her a full-time permanent school nursing position.

Claimant did not prove that she was permanently and totally disabled.⁷ She did not prove an inability to do all nursing jobs or other sedentary positions. Again, she was still working as a substitute school nurse at the time of the hearing. She had demonstrated that she could work full-time as a school nurse only a year prior to the hearing when she did so for 13 consecutive weeks. She did prove that she could no longer work the 12-hour shifts and do the lifting required on her prior job as a neonatal nurse in an intensive care unit at a hospital, but that did not mean that she was permanently and totally disabled.

Also, Claimant failed to prove that she could not compete for work in the open labor market. The school district offered her a full-time job as a school nurse. That showed that she could compete for work. The school district had earlier hired her to work as a substitute school nurse. She has the ability to

⁶There are no cases and no authority for the argument that a substitute school nurse is not performing work in the open labor market, merely because she is not working full-time or every day. The employee in Stewart worked much more sporadically than Claimant. The Court found that Ms. Stewart's sporadic part time work constituted work in the open labor market.

⁷ Claimant also cited Grgic v. P&G Construction, 904 S.W.2d 464 (Mo. App, E.D. 1995) as support for her alleged permanent total disability. Claimant noted that the Court had reversed the Commission's decision in Grgic. Claimant noted that the Court found that Mr. Grgic was only able to work very limited hours at rudimentary work. In Claimant's case, however, she worked a full day on those days she substituted. She worked a full day for eight consecutive weeks in 2013. The most credible evidence did not show that she could only work very limited hours. Also, Claimant was not doing rudimentary work when she worked as a substitute school nurse. Claimant was performing highly skilled and technical work which required substantial education and training to do.

Claimant argued that in an older case, Kinvon v. Kinvon, 230 Mo. App. 623, 71 S.W.2d 78 (1934) the Court had stated that "To hold attempts of some level of employment against the employee would encourage idleness on the part of injured employees and discourage them from making efforts to help themselves for fear that any activity on their part might furnish evidence against their right to the compensation which the law provides for them".

Again, as noted earlier, Claimant had an incentive for only working as a substitute school nurse and declining the offer of a full-time school nurse position. Claimant admitted that she was getting a retirement pension from the state and social security disability benefits. While she was allowed to continue to receive her social security disability benefits by working as a substitute school nurse, she would not have been entitled to the disability benefits if she had accepted the full-time school nursing position. She would not have been entitled to social security retirement benefits at her age if she were working a full-time job and earning a nurse's salary.

search want ads and to apply for jobs as the Court discussed in Stewart. Clearly, Claimant can compete for work and employers in the ordinary course of business can be reasonably expected to hire her in her present condition to perform work as it is customarily performed in the work force as evidenced by her employment with the school district and the offer of full-time permanent employment. Claimant did not prove that she was permanently and totally disabled.⁸

Second Injury Fund's Liability

Claimant did prove the Second Injury Fund's liability for compensation. The statute provides that the Second Injury Fund is liable for benefits if the employee sustains permanent partial disability of a certain severity due to an injury on the job which combines with the employee's preexisting permanent partial disability of a certain severity so as to result in a greater overall disability to her body as a whole than the disability represented by the simple sum of the disability from the impairments considered individually. See § 287.220 RSMo. 1995. Claimant's disability was of the severity as set out in the statute. The preexisting disability must also be an obstacle to the employee's employment or reemployment should the employee become unemployed. *Id.*

Claimant injured her left shoulder in the December 2004 accident at work. She had two surgeries on her left shoulder as a result of the injury. The second surgery involved a rotator cuff repair, biceps tendon repair, distal clavicle resection and a procedure to relieve the impingement in her shoulder.

Claimant also alleged injuries to both knees and psychological disability due to the December 2004 accident. She settled her case against her employer based on a permanent partial disability of 25 percent to her body as a whole. The evidence supported the settlement. The Second Injury Fund offered no medical evidence or any disability ratings. Claimant proved that she sustained a permanent partial disability of 25 percent to her body as a whole due to the injuries as set out above.

⁸The disability ratings offered by Claimant from Drs. Poppa and Jackson, a psychologist, and Mr. Dreiling's vocational opinion were considered. Dr. Poppa, however, examined Claimant in 2006. Claimant did not become a substitute school nurse until five years later. Her hearing was held in 2014. Dr. Poppa's opinion rendered prior to Claimant's return to work and without any knowledge of her working was entitled to little weight. Similarly Mr. Dreiling, who evaluated Claimant in 2009, was not aware that she had returned to work in 2011 or that she had been offered a full-time nursing position or that she was still working in 2014. His opinion was entitled to little weight. Dr. Jackson did not evaluate Claimant until nine years after her accident. She was 66 years old when he evaluated her. She had unrelated bilateral knee replacements during the nine year period between her accident and the time he evaluated her. She had another knee surgery. She had experienced unrelated emotional stressors during the nine year period, including a divorce. She complained to Dr. Jackson of extreme problems with sleeping, making her fatigued. In addition, Dr. Jackson, as a psychologist was not qualified to render medical opinions or diagnoses. Yet, he concluded that Claimant was permanently and totally disabled due to a combination of her physical injuries in combination with her psychological impairments. Also, not only was his opinion entitled to little weight, he failed to address the most important question of why he believed that Claimant was permanently and totally disabled when she was performing highly technical skilled work as a nurse when he evaluated her and had been doing so for two years.

Claimant also proved that she had sustained permanent partial disability prior to the December 2004 accident at work. Dr. Poppa concluded that Claimant had sustained a permanent partial disability of 15 percent of each knee prior to the December 2004 accident. Dr. Jackson concluded that she had sustained a permanent partial disability of 20 percent to the body as a whole due to her psychological problems.

The evidence supported their ratings. The Second Injury Fund offered no evidence. Claimant proved that the disability from her preexisting impairments was in accordance with the ratings as set out above.

Claimant also proved based on Dr. Poppa's uncontroverted opinion that her preexisting disability combined with her disability from her December 2004 injury on the job to result in a greater overall disability to her body as a whole than the simple sum of the disability from the impairments considered individually. She proved based on Dr. Poppa's uncontroverted opinion that her preexisting disability was a hindrance or obstacle to her employment or reemployment. She proved the Second Injury Fund's liability for compensation.

As noted above, Claimant proved that she sustained a permanent partial disability of 25 percent to her body as a whole due to her injuries in the December 2004 accident at work, or 100 weeks of compensation. ($400 \text{ weeks} \times .25 \text{ percent} = 100 \text{ weeks}$). She proved that prior to the December 2004 accident at work, that she had sustained a permanent partial disability of 15 percent of each knee at the 160 week level, or 24 weeks to each knee, or a total of 48 weeks of compensation. ($160 \text{ weeks} \times .15 = 24 \text{ weeks}$). She proved that prior to the December 2004 accident at work, that she had sustained a permanent partial disability of 20 percent to her body as a whole due to her psychological problems, or a total of 80 weeks of compensation.

Thus, the simple sum of Claimant's disability equaled 228 weeks of compensation, or a permanent partial disability of 57 percent to her body as a whole. ($100 \text{ weeks plus } 48 \text{ weeks plus } 80 \text{ weeks equals } 228 \text{ weeks}$). She proved that due to the combined effect of the disability that she sustained a permanent partial disability of 70 percent to her body as a whole, or 280 weeks of compensation. Thus, the Second Injury Fund is liable for 52 weeks of compensation. ($280 \text{ weeks minus } 228 \text{ weeks equals } 52 \text{ weeks}$) At a rate of \$354.05 per week for 52 weeks, the Second Injury Fund is liable for \$18,410.60. The Second Injury Fund is ordered to pay that amount to Claimant.

Made by: _____

Kenneth J. Cain
Administrative Law Judge
Division of Workers' Compensation