

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

Injury No.: 05-129528

Employee: Surajeta Nikoletic  
Employer: Green Park Nursing Home  
Insurer: Commerce and Industry Insurance  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the April 13, 2010, 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 stipulated that on or about November 20, 2005, employee sustained an accident arising out of and in the course and scope of her employment with employer. The administrative law judge heard this matter to consider: (1) whether employee is entitled to future medical treatment; (2) whether employer is required to pay employee's past medical bills; (3) whether employer is liable for past temporary total disability benefits; (4) the nature and extent of employee's disability resulting from the primary injury; and (5) the liability, if any, of the Second Injury Fund for permanent total disability benefits.

The administrative law judge found that: (1) employee is permanently and totally disabled as a result of the primary injury considered alone; (2) employer is liable for temporary total disability benefits in the sum of \$291.20 per week, beginning September 6, 2006 to January 29, 2009, for a total of 124.42 weeks, equaling \$36,231.10; (3) employee is entitled to future medical expenses for physical and psychiatric treatment as a result of the primary injury; (4) employee's medical bills were discharged in bankruptcy and, therefore, employer is not responsible for any additional medical bills; and (5) employer is required to pay employee permanent total disability benefits at the rate of \$291.20 per week for life as provided by law.

Employee filed an Application for Review arguing that the award is erroneous in that it declines to award past medical bills and that the same are due regardless of employee's bankruptcy status.

Employer filed an Application for Review arguing: (1) the administrative law judge erred in failing to specify whether the 2005 amendments to the Workers' Compensation Law applied in this matter; (2) the administrative law judge's ruling that employee was permanently and totally disabled due to the work injury alone is erroneous; (3) employee is not entitled to

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temporary total disability benefits from September 6, 2006 to January 29, 2009; and (4) employee is not entitled to future medical care.

### **Findings of Fact**

The findings of fact and stipulations of the parties are set forth in the award of the administrative law judge. We have incorporated those findings to the extent that they are not inconsistent with the modifications set forth in our award. Therefore, we address only those findings of fact pertinent to our modification herein.

#### *Pre-existing psychiatric disability*

Before the work injury in November 2005, employee experienced psychiatric and emotional problems as a result of her traumatic experiences during the Bosnian war. During the war, claimant lost family members, suffered a miscarriage, and lived under the constant fear that she and her family would be killed. Employee experienced flashbacks, crying spells, and depression, which led her to seek psychiatric treatment from her family physician, Dr. Staten. On January 28, 2005, Dr. Staten placed claimant on Fluoxetine, a medication used to treat major depression. Dr. Staten saw claimant three more times for depression before the work injury in November 2005.

On January 3, 2008, Dr. Wolfgram examined employee at the request of employee's attorney. Dr. Wolfgram used a translator to interview employee; he also interviewed employee's husband. Dr. Wolfgram opined that, prior to the work injury of November 2005, employee suffered from post traumatic stress disorder (PTSD) attributable to her Bosnian war experiences, somatization disorder and recurrent mild to moderate depression disorder without psychotic features. Dr. Wolfgram assigned a 15% permanent partial disability of the body as a whole to each of these preexisting conditions. Dr. Wolfgram attributed employee's PTSD to her experiences during the Bosnian war.

On July 9, 2008, Dr. Stillings evaluated employee on behalf of employer. Dr. Stillings used an interpreter to interview employee. Dr. Stillings performed three psychiatric tests and opined that employee suffered from preexisting PTSD attributable to her Bosnian war experiences with secondary depression and personality disorder. Dr. Stillings assigned a 20% permanent partial disability of the body as a whole to the preexisting PTSD and 10% to the preexisting depression and personality disorder.

We find the opinions of Dr. Stillings and Dr. Wolfgram persuasive regarding employee's preexisting psychiatric disabilities attributable to her Bosnian war experiences. We find employee suffered a 20% permanent partial disability of the body as a whole referable to her preexisting PTSD and a 10% permanent partial disability of the body as a whole referable to her preexisting depression and personality disorder.

#### *The work injury*

Employee suffered a compensable work injury on November 20, 2005, when she hurt her neck attempting to lift a patient. On September 6, 2006, Dr. Mirkin, employee's treating physician, determined that employee was at maximum medical improvement for the work injury. Dr. Mirkin opined that employee was not permanently and totally

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disabled and could return to her old job if she was motivated to do so. Dr. Mirkin opined that employee suffered a 10% permanent partial disability of the body as a whole referable to the neck, and a 5% or 10% permanent partial disability of the left eye, as a result of the work injury. With regard to future medical care, Dr. Mirkin stated there was a small chance that employee could develop degenerative changes at another level of her spine that may require treatment.

We find Dr. Mirkin more credible than Dr. Shuter (the other doctor who rated employee's cervical spine and left eye disabilities); we find that employee reached maximum medical improvement for the work injury on September 6, 2006, and that she sustained permanent partial disability of the body as a whole referable to the cervical spine as a result of the work injury. We consider Dr. Mirkin's rating of the cervical spine somewhat conservative; we find that employee sustained a 20% permanent partial disability of the body as a whole referable to the cervical spine. We find Dr. Mirkin's rating as to permanent partial disability of the left eye lacking in credibility: Dr. Mirkin forthrightly admitted that he does not typically rate eyes and that he was surprised when he was asked to do so. We find Dr. Pernoud more credible with regard to the left eye; Dr. Pernoud's records indicate that she found employee to have sustained no loss of visual acuity as a result of the work injury. Accordingly, we find no permanent partial disability referable to employee's left eye condition. We find credible Dr. Mirkin's opinion that employee may need future medical care as a result of the cervical fusion.

Dr. Wolfgram opined that the November 2005 work injury resulted in employee developing a pain disorder, major depressive disorder, and a "reactivation" of employee's preexisting PTSD; Dr. Wolfgram assigned a 20% permanent partial disability of the body as a whole to each condition. Dr. Wolfgram explained that the work injury triggered employee's preexisting PTSD with the result that memories and emotions from the war resurfaced. Ultimately, Dr. Wolfgram opined that employee was permanently and totally disabled due to a combination of her psychiatric problems both preexisting and resulting from the work injury.

Dr. Stillings opined that employee's preexisting PTSD was aggravated by the November 2005 work injury to the extent that employee sustained an additional 2% permanent partial disability of the body as a whole as a result of the work injury. Dr. Stillings observed that, during his interview, employee displayed no psychological distress regarding the work injury or its sequelae. Regarding the Bosnian war, however, employee displayed significant psychological stress: employee was hysterical, labile, and tearful, and was difficult to assess because of her affective presentation. Dr. Stillings opined that employee's reports of auditory and visual hallucinations may have been hysterical presentations rather than truly psychotic symptoms. In the event employee was not truly psychotic, Dr. Stillings opined that, from a psychiatric standpoint, employee was at maximum medical improvement and was able to return to work without restrictions, and that the work injury of November 2005 was not the prevailing factor in employee's need for further psychiatric treatment. However, if employee was having true psychotic symptoms, Dr. Stillings opined that she was permanently and totally disabled due to her non-work-related psychiatric conditions. In his deposition dated January 4, 2010, Dr. Stillings opined that he was then of the opinion that employee was most likely psychotic.

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Dr. Brockman provided her testimony in this matter at the request of employee's attorney. Dr. Brockman first saw employee in October 2007 and was employee's treating psychiatrist. Dr. Brockman assigned a 5% permanent partial disability of the body as a whole to employee's preexisting depression. Dr. Brockman did not diagnose preexisting PTSD, because she did not think employee displayed the required symptoms. Dr. Brockman did not diagnose preexisting personality disorder, citing employee's ability to hold a job and maintain stable relationships prior to the work injury. Ultimately, Dr. Brockman opined that the work injury was the prevailing factor in employee's current psychiatric condition and inability to compete for employment.

We find a number of problems with Dr. Brockman's opinions in this case. Dr. Brockman did not perform any of the psychiatric testing that Dr. Stillings performed. Unlike the other psychiatrists to offer their opinions in this case, Dr. Brockman did not use an interpreter to interview employee. Dr. Brockman admitted that there were a number of instances in which there were difficulties communicating with employee, including misunderstandings and inconsistencies in reporting symptoms. We are most concerned with the fact that Dr. Brockman appears to have had very limited knowledge of employee's Bosnian war experiences. Specifically, Dr. Brockman admitted that she never discussed employee's miscarriage, flashbacks, recurring nightmares, or that employee experienced depression as far back as 2002. Incredibly, Dr. Brockman testified that if employee had never experienced the Bosnian war, employee would be in the same condition that she is in today.

Because Dr. Brockman rendered her findings without a full understanding of employee's war experiences and her history of emotional and psychiatric difficulties predating the work injury, we consider Dr. Brockman's opinions to be of little value as to the nature and extent of disability attributable to the work injury. On the other hand, we find the opinions and testimony of Dr. Stillings credible. We find that, as a result of the work injury, employee sustained a 2% permanent partial disability of the body as a whole referable to aggravation of her preexisting PTSD. We find that the work injury is not the prevailing factor in employee's need for future psychiatric care.

#### Vocational Experts

James England evaluated employee at the request of employee's attorney. Mr. England used an interpreter in his interviews of employee. Mr. England opined that employee was permanently and totally disabled due to employee's physical problems from the last injury in combination with her preexisting psychological problems and psychological problems that were related to or worsened by the work injury.

Karen Kane-Thaler evaluated employee for the employer. Ms. Kane-Thaler did not meet with or interview employee. Ms. Kane-Thaler opined that, if employee is truly psychotic, she is permanently and totally disabled; on the other hand, if employee is not psychotic, there are entry level jobs employee could successfully compete for and perform. On cross-examination, Ms. Kane-Thaler acknowledged that the only doctor who indicated employee might not be psychotic was Dr. Stillings. Ms. Kane-Thaler indicated further that she had not had the opportunity to read Dr. Stillings's deposition of January 4, 2010, in which he indicated that employee most likely was psychotic.

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We find the opinions of Dr. Wolfgram and Mr. England credible and persuasive; we find that employee is permanently and totally disabled due to the physical and psychiatric residuals from the work injury in combination with employee's preexisting psychiatric conditions of PTSD, depression, and personality disorder.

### **Conclusions of Law**

#### Temporary Total Disability Benefits

The administrative law judge determined, for reasons that were not specified in the award, that employee is entitled to temporary total disability benefits from the employer from September 6, 2006 through January 29, 2009. Presumably, the administrative law judge intended these benefits to cover the period during which employee received psychiatric treatment from Dr. Brockman, but the administrative law judge included no findings, conclusion, or analysis on the issue as to when employee reached maximum medical improvement.

We have found credible and adopted Dr. Mirkin's opinion that employee reached maximum medical improvement from the effects of the work injury on September 6, 2006.

Temporary total disability benefits are owed until the employee can find employment or the condition has reached the point of maximum medical progress. *Vinson v. Curators of Univ. of Missouri*, 822 S.W.2d 504, 508 (Mo. App. 1991). A temporary award is not warranted when further progress is not expected. *Phelps v. Jeff Wolk Const. Co.*, 803 S.W.2d 641, 646 (Mo. App. 1991).

Given our finding that employee reached maximum medical improvement from the effects of the work injury on September 6, 2006, we conclude that employer is not liable for temporary total disability benefits after that date.

#### Future Medical Expenses

Section 287.140.1 RSMo establishes the employer's liability to provide medical treatment and provides, in relevant part, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

In order to receive future medical benefits under the Missouri Workers' Compensation Law, employee is not required to present "conclusive" evidence that future medical treatment is needed. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 282 (Mo. App. 1997) (citation and quotation omitted). Employee is, however, required to establish a reasonable probability that future medical treatment will be necessary. *Id.* In addition, she must show through competent medical evidence that the future medical treatment "flows" from the work injury. *Id.*

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We have found credible and adopted Dr. Stilling's finding that employee is not in need of future psychiatric care as a result of the primary injury. We have also found credible Dr. Mirkin's opinion that employee may require future treatment related to the cervical fusion.

Accordingly, we conclude that employer is not liable for future psychiatric medical expenses, but that employer is liable for future medical expenses related to physical care and treatment that employee may need in connection with the November 2005 work injury and resulting cervical fusion.

Liability of the Second Injury Fund

We agree that there is no doubt that employee is permanently and totally disabled. The issue is whether employee is unemployable in the open labor market as a result of the last accident alone or a combination of the last accident and employee's preexisting conditions.

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent, total disability benefits, employee must establish that: (1) she 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. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

We have found that employee suffered from preexisting permanent partial disabilities. We have also found that employee suffered permanent partial disability as a result of the November 2005 work injury. Given the credible and persuasive opinions of Dr. Wolfgram and Mr. England on the issue, and after carefully reviewing the entire record, we have found that employee is permanently and totally disabled due to a combination of the last injury and her preexisting disabilities. Accordingly, we conclude that employee has established that she is entitled to permanent total disability benefits from the Second Injury Fund under § 287.220 RSMo. By the same token, employer is not liable for permanent total disability benefits.

The parties stipulated that employee's rates for permanent partial and permanent total disability benefits are equal at \$291.20 per week. Because the rates for permanent partial and permanent total disability are equal, the differential rate for which the Second Injury Fund would otherwise be liable for 88 weeks<sup>1</sup> under the foregoing section is \$0. After 88 weeks, the employer's liability for permanent partial disability attributable to the primary injury is satisfied, and the Second Injury Fund is then responsible for the remainder of compensation due for permanent total disability. The appropriate date for commencement of permanent total disability payments from the Second Injury Fund is thus May 14, 2008 (88 weeks after employee's MMI date of September 6, 2006). On

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<sup>1</sup>Employee suffered 20% permanent partial disability of the body as a whole referable to the cervical spine and 2% permanent partial disability of the body as a whole referable to aggravation of employee's PTSD; the employer is therefore liable for 88 weeks of permanent partial disability payments.

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May 14, 2008, permanent total disability benefits are owed from the Second Injury Fund at the rate of \$291.20 per week.

**Award**

We modify the award of the administrative law judge on the issue of temporary total disability, future medical expenses, and the liability of the Second Injury Fund for permanent total disability benefits.

We conclude that employee reached maximum medical improvement on September 6, 2006. Accordingly, employer is not liable for temporary total disability benefits after that date.

We conclude that employer is not liable for future psychiatric medical treatment, but that employer is liable for future medical treatment related to employee's cervical spine injury and fusion.

We conclude that the employee is permanently and totally disabled due to a combination of the last injury and employee's preexisting disabilities. Accordingly, the Second Injury Fund is ordered to pay to employee permanent total disability benefits at the rate of \$291.20 per week, beginning May 14, 2008, and continuing thereafter for employee's lifetime, or until modified by law.

In all other respects, we affirm the award.

The award and decision of Administrative Law Judge Cornelius T. Lane, issued April 13, 2010, 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 attorney's fees 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 15<sup>th</sup> day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

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Secretary

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### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed.

I am convinced that the best evidence demonstrates employee is permanently and totally disabled as a result of the work injury alone. I disagree with the decision of the majority to discount the findings and opinions of Dr. Brockman. Dr. Brockman was employee's primary treating psychiatrist following the work injury; she saw employee between 20 and 30 times and had ample opportunity to observe employee's condition and to formulate an informed and thorough opinion as to the cause of employee's permanent total disability. Dr. Brockman opined that she did not diagnose employee with PTSD because employee does not have the symptoms of PTSD. Dr. Stilling admitted that employee does not have symptoms of PTSD apart from recurring thoughts of Bosnia. Employer's position in this case boils down to an argument that employee *must* have preexisting PTSD due to the harrowing experiences she suffered during the Bosnian war. But we are not psychiatrists and we are not allowed to substitute our own judgment or speculation for that of the qualified medical experts. *Angus v. Second Injury Fund*, No. WD72141 \*18 (Oct. 12, 2010) (the Commission is not permitted to substitute its own opinion based on "logic and common sense" where "the subject matter at hand is far too complicated for such simple reasoning"). The majority also faults Dr. Brockman for not using an interpreter, while citing this as an important reason for accepting Dr. Stilling's opinion. The majority fails to mention Dr. Stilling's testimony that employee's English comprehension and expression were adequate and that he was able to conduct a significant portion of the interview in English without the use of an interpreter.

Likewise, the majority fails to address significant portions of Dr. Wolfgram's testimony that show employee's psychiatric condition did not pose a hindrance or obstacle to her employment until *after* the November 2005 work injury. The majority expressly relies, in part, on the opinion of Dr. Wolfgram that employee's permanent total disability stems from a combination of her preexisting and post-injury psychiatric conditions. But Dr. Wolfgram admitted employee was working full-time, carrying on with family and social responsibilities, and was able to function as a wife and mother prior to the work injury. Before the work injury, there is no evidence that employee heard voices, sensed unexplained odors, believed there were intruders in her home, saw imaginary people, and believed people were trying to harm her. As noted by Dr. Wolfgram, employee experienced *all* of these symptoms after the work injury. Also following the work injury, employee's depression caused her to lock herself in her room, isolate from her family, and attempt suicide more than once. Employee was hospitalized no less than five times for psychiatric complaints following the work injury. All of this evidence undercuts Dr. Wolfgram's combination opinion and supports Dr. Brockman's position that employee's disabling psychiatric conditions are a result of the November 2005 work injury alone.

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Finally, in discussing Dr. Wolfgram's testimony, the majority also fails to note that Dr. Wolfgram opined employee remains in need of psychiatric treatment as a result of the work injury. Specifically, Dr. Wolfgram opined that employee will need the appropriate psychoactive medications, that employee is a suicide risk, that electrotherapy may be helpful, and that aqua therapy may enable employee to engage in physical activity which would also help ameliorate her psychiatric symptoms. These findings (from a doctor the majority finds credible) amply support an award of future medical treatment from the employer and run directly contrary to the majority's conclusions on that issue.

In sum, I would affirm the administrative law judge's findings that employer is liable to employee for permanent total disability benefits, and that employee is entitled to future medical treatment from the employer as a result of the November 2005 work injury.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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John J. Hickey, Member