

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

Injury No.: 07-009720

Employee: Ellen Oppenlander

Employer: Curators of the University of Missouri

Insurer: Curators of the University of Missouri c/o Corporate Claims Management

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.<sup>1</sup> We have reviewed the evidence and briefs, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge (ALJ) dated January 25, 2012.

**Preliminaries**

On February 5, 2007, employee slipped and fell at work, causing her to hit the left side of her head on a metal bed frame. Employee suffered a head injury as a result of this accident. Employee had also injured her head just over two weeks prior to the February 5, 2007, incident, on January 20, 2007, when she slipped and fell on her icy residential driveway. Employee proceeded to final hearing of her claims against employer and the Second Injury Fund for the February 5, 2007, incident.

The ALJ found that employee is permanently and totally disabled solely as a result of the February 5, 2007, work injury. The ALJ found employer liable for employee's past medical expenses, future medical care, and permanent total disability benefits. The ALJ found no Second Injury Fund liability.

Employer appealed to the Commission alleging that the ALJ erred in finding employee permanently and totally disabled. Employer argued in the alternative that if employee is permanently and totally disabled, it is due to the February 5, 2007, injury combining with employee's preexisting disabilities.

**Findings of Fact**

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are incorporated and adopted by the Commission herein.

Dr. Cohen opined that as a result of the February 5, 2007, injury, employee suffered a traumatic brain injury with cognitive deficits. Dr. Cohen concluded that the work injury left her with permanent partial disability of 37%-38% of the body as a whole. Dr. Cohen opined that employee sustained an additional 2%-3% permanent partial disability of the body as a whole as a result of the January 20, 2007, head injury at home.

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2006 unless otherwise indicated.

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Dr. Halfaker opined that employee suffers from a total of 45% permanent partial neuropsychological disability of the body as a whole. Of this 45%, Dr. Halfaker opines that 10% is attributable to employee's preexisting psychological problems associated with depression, anxiety, obsessive-compulsive behaviors, and borderline personality features; 8% is attributable to the January 20, 2007, head injury; 12% is attributable to the February 5, 2007, head injury; 10% is attributable to an exacerbation of her preexisting depression and anxiety caused by the January 20, 2007, and February 5, 2007, head injuries; and 5% is attributable to various contemporaneous stressors.

### **Discussion**

Employer contends that the ALJ erred in finding employee permanently and totally disabled. Section 287.020.6 RSMo<sup>2</sup> defines "total disability" as the "inability to return to any employment...."

The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

*Gordon v. Tri-State Motor Transit Company*, 908 S.W.2d 849, 853 (Mo.App. 1995) (citations omitted).

In this case, there are conflicting expert opinions as to whether employee is permanently and totally disabled. Dr. Crooks, Dr. Cohen, and Mr. Eldred all opined that employee is permanently and totally disabled; while Dr. Halfaker, Dr. Stillings, Dr. Hogan, Mr. England, and Mr. Weimholt all opined that employee is not permanently and totally disabled.

We find, based upon our review of employee's testimony, the voluminous medical records, the expert medical opinions, and the record as a whole, that Dr. Cohen's opinion with regard to employee's current limitations and restrictions is most credible. We further find, based upon said restrictions and limitations and the vocational expert opinions of Mr. Eldred and Mr. England (when assuming Dr. Cohen's restrictions), that employee is permanently and totally disabled. We do not find Mr. Weimholt's opinion that employee could return to work numerous jobs is credible.

The next issue we must address concerns whether employee is permanently and totally disabled solely as a result of the primary injury, or as a result of the primary injury combining with employee's preexisting disabilities.

The ALJ concluded that employee is permanently and totally disabled solely as a result of the primary injury; however, the ALJ provided little support for said conclusion. The

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<sup>2</sup> The ALJ inexplicably cited § 287.020.7 RSMo under the heading "APPLICABLE LAW." Section 287.020.7 RSMo defines the terms "commission" and "director." The Commission assumes that this citation was inadvertent and that the ALJ intended to cite § 287.020.6 RSMo, the subsection defining "total disability," as permanent "total disability" is an issue of contention in this case.

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ALJ cites Drs. Crooks, Cohen, and Halfaker's testimony in support of her finding that the February 5, 2007, work injury impacted employee's cognitive abilities, but she fails to cite to a medical expert opinion, or explain in any way, how the cognitive abilities solely affected by the February 5, 2007, work injury resulted in employee's permanent total disability. The ALJ simply concludes, in contrast to the opinions of the very experts she relies on, that "[n]o preexisting permanent disability is found." We find that the competent and substantial evidence supports a finding that employee had significant preexisting disabilities and, therefore, find that this case requires further analysis.

In evaluating cases involving preexisting disabilities, the employer's liability must first be considered in isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In *Kizior*, the Court set out a step-by-step test for determining Second Injury Fund liability:

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (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 preexisting 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.

*Kizior*, 5 S.W.3d at 200.

Dr. Cohen and Dr. Halfaker are the only doctors who provided ratings as to employee's permanent disability sustained as a result of the primary injury. As listed above, Dr. Cohen concluded that the work injury left employee with permanent partial disability of 37%-38% of the body as a whole; whereas Dr. Halfaker concluded that the primary injury resulted in employee sustaining 12% permanent partial disability of the body as a whole.

We find, based upon the totality of the evidence, that as a result of the primary injury, employee sustained 30% permanent partial disability of the body as a whole. We reject the ALJ's conclusion that employee is permanently and totally disabled solely as a result of the primary injury. The record contains no medical expert opinion stating that employee is permanently and totally disabled solely as a result of the primary injury. In fact, of the experts the ALJ relied on in coming to said conclusion (Dr. Crooks, Dr. Cohen, Dr. Halfaker, and Mr. Eldred), three of them (Dr. Crooks, Dr. Cohen, and Mr. Eldred) affirmatively opined that employee is permanently and totally disabled as a result of the primary injury **combining** with employee's preexisting disabilities, and one of them (Dr. Halfaker) believed employee is merely permanently partially disabled even after combining the primary injury with employee's preexisting disabilities.

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**Award**

For the foregoing reasons, we modify the award of the ALJ and find that as a result of the primary injury, employee sustained 30% permanent partial disability of the body as a whole. We further find that employee is permanently and totally disabled due to the combination of the disability from her February 5, 2007, work injury with her preexisting disabilities.

Beginning March 29, 2008,<sup>3</sup> employer shall pay employee 120 weeks<sup>4</sup> of permanent partial disability benefits. During said 120 weeks, the Second Injury Fund shall pay to employee \$342.32, the difference between employee's PTD rate and her PPD rate.<sup>5</sup> Thereafter, the Second Injury Fund shall pay to employee \$718.87 for the remainder of employee's life, or until modified by law.

The award and decision of Administrative Law Judge Hannelore D. Fischer issued January 25, 2012, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

The Commission further approves and affirms the ALJ's allowance of attorney's fee as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 3<sup>rd</sup> day of October 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

<sup>3</sup> We find Dr. Crooks' opinion that employee reached maximum medical improvement on March 28, 2008, credible.

<sup>4</sup> 120 weeks = .30 x 400 weeks.

<sup>5</sup> \$718.87 - \$376.55.

# AWARD

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Employer: Curators of the University of Missouri

Add'l Party: Treasurer of the State of Missouri,  
Custodian of the Second Injury Fund

Insurer: Curators of the University of Missouri  
c/o Corporate Claims Management

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Hearing Date: October 12, 14, and 28, 2011

Checked by: HDF/scb

## 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: February 5, 2007.
5. State location where accident occurred or occupational disease was contracted: Columbia, Boone 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: Slipped and fell on wet floor, striking head on a bed frame.
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: Head.
14. Nature and extent of any permanent disability: Permanent and total disability.
15. Compensation paid to-date for temporary disability: 28,586.85.
16. Value necessary medical aid paid to date by employer/insurer? \$25,050.89.
17. Value necessary medical aid not furnished by employer/insurer? \$6,184.47.

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- 18. Employee's average weekly wages: \$1,078.31 per week.
- 19. Weekly compensation rate: \$718.87/\$376.55.
- 20. Method wages computation: By stipulation.

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Permanent and total disability benefits in the amount of \$718.87 per week for the duration of the claimant's lifetime	Indeterminate
Permanent and total disability benefits from April 1, 2008, through January 24, 2012 For a total of 199 weeks	\$143,055.13
Out of pocket medical bills	\$6,184.47
Lifetime benefits of \$718.87 per week	Indeterminate

- 22. Second Injury Fund liability:

- 23. Future Requirements Awarded: Ongoing and future medical treatment.

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, with the exception of future medical expenses, in favor of the following attorney for necessary legal services rendered to the claimant: Christine Kiefer.

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

Employee: Ellen Oppenlander

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Dependents: N/A

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: Curators of the University of Missouri

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

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

Insurer: Curators of the University of Missouri  
c/o Corporate Claims Management

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard on October 12, October 14, and October 28, 2011. Memoranda were submitted by November 14, 2011.

The parties stipulated that on or about February 5, 2007, the claimant, Ellen Oppenlander, was in the employment of the Curators of the University of Missouri. The claimant sustained an injury by accident; the accident arose out of and in the course of her employment. The employer was operating under the provisions of Missouri's workers' compensation law and was self-insured for workers' compensation liability; Corporate Claims Management, Inc. is the third-party administrator. The employer had timely notice of the injury. A claim for compensation was timely filed. The agreed upon rate of compensation is \$718.87 per week for temporary partial and total disability benefits and \$376.55 per week for permanent partial disability benefits.

Temporary disability benefits have been paid in the amount of \$28,586.85, reflecting payments made through March 31, 2008. Medical aid has been provided in the amount of \$25,050.89.

The issues to be resolved as the result of hearing include 1) the medical causation of the injuries alleged, 2) the liability of the employer/insurer for past medical treatment, 3) the liability of the employer/insurer for future medical treatment, 4) the reasonableness and necessity of past and future medical care, 5) the nature and extent of permanent disability (permanent total disability is alleged as of March 31, 2008), and 6) the liability of the Second Injury Fund.

The parties stipulated that the amounts of medical bills for which reimbursement is sought include \$707.00 for out of pocket expenses from the University of Missouri Health Care System (Exhibit K), \$1,419.23 for out of pocket expenses from Dr. Schneider (Exhibit P), \$4,526.25 for out of pocket pharmacy expenses (Exhibit Q), and \$427.90 for out of pocket expenses for bills of University Physicians. The parties stipulated that should medical treatment be awarded, the employer/insurer would be responsible for third-party reimbursement as well as out of pocket expenses.

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### **FACTS**

The claimant, Ellen Oppenlander, 53 years old as of the date of hearing, is a registered nurse; Ms. Oppenlander received her bachelor's of science and nursing degree in 1981, and has worked as a nurse for the University of Missouri since 1982. Ms. Oppenlander worked in the labor and delivery unit of the University of Missouri hospital system and, after ten years in the labor and delivery unit, became a charge nurse for the unit. In 2007, Ms. Oppenlander worked as a labor and delivery charge nurse for 12 hour shifts on Saturdays and Sundays during the day and on Monday night.

On January 20, 2007, a Saturday, Ms. Oppenlander fell on the gravel driveway of her home after she returned from work; Ms. Oppenlander described the driveway as snowy and icy. Ms. Oppenlander testified that she did not remember her fall, only that she was lying face down in the snow. Ms. Oppenlander received emergency medical treatment at the University Hospital and Clinic emergency room. Ms. Oppenlander described vomiting and a very bad headache. She was released to return home that night.

Ms. Oppenlander did not return to work until the following Saturday, January 27, 2007, when she resumed working her full shift and full schedule. On February 5, 2007, Ms. Oppenlander was again the charge nurse in the labor and delivery unit when, while carrying IV bags into a patient's room, she slipped in a puddle of water and she fell onto her left hip hitting the left side of her head on a metal bed frame. Ms. Oppenlander described the part of her head that was hit as below the left ear. Ms. Oppenlander again went to the emergency room where a CT scan was done, she was treated with medication and sent home. Ms. Oppenlander again described vomiting and nausea and a severe headache as well as a feeling of panic.

Ms. Oppenlander did not return to work the following weekend. Ms. Oppenlander went to the work injury department of the University of Missouri and was referred to Dr. Carol Crooks, a specialist in physical medicine and rehabilitation at Rusk Rehabilitation. Ms. Oppenlander received physical therapy, speech therapy, and occupational therapy, as well as medications, including Klonopin and Aricept. Ms. Oppenlander described ongoing headaches, insomnia, and anxiety. Ms. Oppenlander also received treatment with Dr. Stucky, a physiatrist, and Dr. Houghton, a psychiatrist. Dr. Houghton prescribed Cymbalta for Ms. Oppenlander. Ms. Oppenlander had been receiving treatment from Dr. Houghton since prior to her 2007 falls. In May of 2007 Ms. Oppenlander returned to work as a nurse in the labor and delivery unit. Ms. Oppenlander had difficulty remembering how to accomplish work tasks that she had performed previously and was ultimately terminated from her position in the labor and delivery unit. Ms. Oppenlander then found employment in the utilization review department of the University of Missouri where her job was to interface with insurance companies to confirm and facilitate payment for treatment provided by the University of Missouri. Ms. Oppenlander was not successful in this position and was eventually terminated for poor performance. Ms. Oppenlander cited confusion and inability to operate office equipment as examples of her difficulty with this job.

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Ms. Oppenlander was referred to Dr. Burger who prescribed Topamax for her headaches and vertigo; Ms. Oppenlander said that the headaches and vertigo symptoms improved with the Topamax. Similarly, the anxiety symptoms improved with the use of Klonopin.

Ms. Oppenlander began seeing Dr. Schneider, a psychologist, who started Ms. Oppenlander in group therapy as a referral from Dr. Stucky. Dr. Stucky's notes reflect that psychotherapeutic group treatment with Dr. Schneider would be an "adjunct" to Dr. Stucky's treatment. Dr. Schneider's therapy records and bills in the amount of \$1,541.73 for therapy for Ms. Oppenlander are in evidence.

Currently, Ms. Oppenlander suffers from tinnitus, an inability to process and retain information, and lack of memory, all symptoms from which she has suffered since her fall on February 5, 2007. Ms. Oppenlander described taking Cymbalta prior to her work injury, then taking an increased dosage for a time after the accident and injury, and then again being on a decreased dosage.

In May of 2009, Ms. Oppenlander fell; after the fall Ms. Oppenlander experienced feelings of mania, which included binge eating, spending excess amounts of money, and driving too fast; Ms. Oppenlander saw Dr. Slaughter regarding her symptoms and was put on Lithium which has helped control the manic sensation.

Prior to 2007, Ms. Oppenlander suffered the death of her mother from cancer after a long illness when Ms. Oppenlander was in college, the death of a sister in a motor vehicle accident, an out of wedlock pregnancy and adoption of the baby Ms. Oppenlander delivered while in college, an abusive father, and a difficult marriage in which her husband was abusive. Ms. Oppenlander received mental health treatment, including prescription medication, at various periods in her life to help her cope with these situations.

Since 2007, Ms. Oppenlander's father and a second sister have died.

Dr. Carol Crooks testified by deposition that she specializes in brain injury and stroke rehabilitation within her physical medicine and rehabilitation practice. Ms. Oppenlander came to Dr. Crooks as a referral from the employer/insurer on February 15, 2007. Dr. Crooks was aware of both of Ms. Oppenlander's falls in early 2007 and described the first fall on January 20, 2007, as "either mild or no head injury" according to the Glasgow Coma scale which was used to describe initial head injury severity. Dr. Crooks stated that Ms. Oppenlander would have a similar rating on that scale after the February fall. Dr. Crooks stated that a brief loss of consciousness does not directly determine the outcome of a brain injury.

Dr. Crooks was aware of Ms. Oppenlander's attempts to return to work and recommended a neuropsychological evaluation for Ms. Oppenlander when it appeared that Ms. Oppenlander needed more supervision than was offered to her. Dr. Crooks defined a neuropsychological evaluation as developing "a neuropsychological profile outlining cognitive and psychological weaknesses of an individual patient from intellectual functioning to ability to pay attention, multi-tasking, processing speed." Dr. Crooks testified that she uses the testing to assist her in returning patients to school or employment and to recommend "adaptive measures." Dr. Crooks

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stated that the neuropsychological testing revealed Ms. Oppenlander to have “pretty on par” neurocognitive function, but that she had difficulty with higher level “cognitive flexibility issues and difficulties with working memory, attention, and immediate verbal memory and just the higher level cognitive processing. What that translates to is given a structured environment with minimal tasks, she performed very well. But when you started adding distracting factors, she breaks down.” Dr. Crooks found the neuropsychological test results to be consistent with what she identified in her treatment of Ms. Oppenlander.

Dr. Crooks opined that Ms. Oppenlander had preexisting depression, panic disorder, and obsessive compulsive disorder and that it was the combination of these preexisting psychiatric issues, the January 2007 head injury, and the February 2007 head injury which caused Ms. Oppenlander to be permanently and totally disabled. However, Dr. Crooks went on to say with a reasonable degree of medical certainty that the second fall, the fall on February 5, 2007, caused Ms. Oppenlander’s significant cognitive impairment. With regard to the first fall on January 20, 2007, Dr. Crooks said that that fall put Ms. Oppenlander at a “higher risk for greater consequences from the second fall.” According to Dr. Crooks, “It’s not the injury itself, it’s the brain that the injury happens to, in addition to the injury.”

Dr. Raymond Cohen, board certified neurologist, testified by deposition that he evaluated Ms. Oppenlander on June 30, 2008, and issued a report regarding the evaluation on January 9, 2009. When Dr. Cohen saw Ms. Oppenlander she identified complaints related to the February 5, 2007 fall as headaches, tinnitus, lack of memory, anxiety, and depression, and an inability to return to employment, and lack of balance. Dr. Cohen noted headaches associated with hormonal changes and depression as issues for Ms. Oppenlander prior to the February 5, 2007 fall. Dr. Cohen opined that Ms. Oppenlander is permanently and totally disabled “due to the combination of her preexisting significant psychiatric conditions, along with the primary work-related injury of 2/5/07.” Dr. Cohen noted that any disability from the January 20, 2007 fall would be “a minimal part of the overall head injury.” In order of significance, Dr. Cohen found Ms. Oppenlander’s cognitive deficits to be most significant, followed by post-traumatic migraines, tinnitus, severe fatigue, and unsteady gait. Dr. Cohen opined that as the result of the February 5, 2007 fall Ms. Oppenlander would need to continue medical treatment and prescription medications as described in Dr. Crooks’ records for the rest of Ms. Oppenlander’s life.

Dr. Dale Halfaker, licensed psychologist, testified by deposition that the majority of his practice “involves evaluating and assessing patients, especially patients with brain injury.” Dr. Halfaker authored a report regarding his evaluation of Ms. Oppenlander on January 26, 2010, after seeing her in December of 2009. Dr. Halfaker described “second impact syndrome” which results from the impact of a second blow to the head in close proximity in time, causing “a much more significant impact on the person’s ability to function across time than either of these two injuries alone.” Dr. Halfaker described Ms. Oppenlander as suffering from the synergistic effect of two brain injuries close together along with “emotional factors that enter the picture and further complicate things.” Dr. Halfaker described the two head injuries in early 2007 as well as dysphoria, psychological stress, and other emotional factors as barriers to Ms. Oppenlander’s vocational success. Dr. Halfaker described an apportionment of Ms. Oppenlander’s disabilities, including preexisting disabilities that “absent the brain injury and the trouble adjusting to the brain injury, [Dr. Halfaker] would have expected [Ms. Oppenlander] on a pre-injury basis to be

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able to pull herself together, surmount, and deal with..." During cross-examination Dr. Halfaker discussed the apportionment issue stating that the ten percent disability from the second injury, the February 5, 2007 fall, for exacerbation of emotional issues is explained by Ms. Oppenlander's ability to function well after her first fall in January of 2007, "and it's not until we get the second impact in that second injury that we get the greater degree of impairment. So I think had she not had the second injury, that she would have more than likely gone on and been just fine." Dr. Halfaker did not believe that Ms. Oppenlander is permanently and totally disabled, but did feel that she could not return to a highly stressful nursing position. Dr. Halfaker noted that Ms. Oppenlander had a fall in May of 2009, which resulted in Ms. Oppenlander's episodes of hypomania and need for treatment with Lithium.

Phillip Eldred, a certified rehabilitation counselor, testified by deposition that he evaluated Ms. Oppenlander on October 13, 2009. Mr. Eldred opined that Ms. Oppenlander is "permanently and totally disabled as a result of her injury on February 5, 2007 combined with her pre-existing injuries and medical conditions."

Dr. Thomas Martin, board certified in clinical neuropsychology and rehabilitation psychology, evaluated Ms. Oppenlander on June 18, 2009, and issued reports regarding his evaluation on June 18, 2009 and July 11, 2009. Dr. Martin opined that "Ms. Oppenlander's two traumatic brain injuries incurred in the beginning of January 2007 contributed to the onset of mild cognitive dysfunction and significant emotional distress that may be related to a shaken self-concept resulting from her failed return to work. This evaluation suggests that Ms. Oppenlander's primary barrier to vocational success is her psychological distress with her dysphoria likely to compromise her ability to comprehend, remember, and perform simple to moderately complex vocational tasks on a consistent basis." Dr. Martin opined that Ms. Oppenlander possesses "the cognitive abilities needed to sustain competitive employment" but needs "enhancement in psychiatric status." Dr. Martin recommended medical and psychiatric management of Ms. Oppenlander's health, noting Ms. Oppenlander's headaches, tinnitus, lack of coordination, and psychological issues.

Dr. Patrick Hogan, a board certified neurologist, testified by deposition that he examined Ms. Oppenlander on November 29, 2010, and authored a report of the same date. Dr. Hogan opined that Ms. Oppenlander's "neurological PPD would be 1% on a subjective basis only, not related to organic brain disease." Dr. Hogan also found that Ms. Oppenlander "is able to work at her usual tasks of nursing on a neurological basis but once again I would depend upon a psychiatrist to determine whether she is able to work because of her psychological disturbances." Dr. Hogan answered claimant's counsel's questions regarding Dr. Hogan's distinction between emotional problems and organic brain disease by stating at one point that a person that is malingering or has emotional problems will put the wrong adjectives with nouns on the mental status exam and later stated that a person with organic brain disease will "switch the adjectives around." Dr. Hogan's explanations with regard to this distinction were confusing and nonsensical. A similar discussion occurred with regard to the source of Ms. Oppenlander's headaches which Dr. Hogan stated occurred as the result of the psychological stressors in Ms. Oppenlander's life rather than her fall, but could not describe the difference in the headaches.

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Dr. Wayne Stillings, physician and psychiatrist, testified by deposition that he saw Ellen Oppenlander on January 30, 2008, and again on January 5, 2011. Dr. Stillings concluded that Ms. Oppenlander's fall on January 20, 2007, was the more serious of the two falls in early 2007, in part because of the loss of consciousness associated with that fall as opposed to the February 5, 2007 fall which was not associated with loss of consciousness; however, Dr. Stillings did say that the February 5, 2007 fall could have added to her complaints from the January 20, 2007 fall. Dr. Stillings found Ms. Oppenlander to have a permanent disability of one to two percent of the body as the result of the aggravation of Ms. Oppenlander's "pre-existing dysthymic disorder." Dr. Stillings opined that Ms. Oppenlander is fully able to work without restrictions and that she needs no "additional neuropsychiatric treatment, including medication or therapy." Dr. Stillings opined, based on MMPI-2 test results run on a forensic setting, that Ms. Oppenlander had an "invalid profile." "She responded to the MMPI-2 items in an exaggerated manner, endorsing a wide variety of symptoms and attitudes." When questioned about the MMPI-2 test and what qualifies as an "invalid profile" by counsel for Ms. Oppenlander, Dr. Stillings was less than forthcoming in his explanation, stating "What do you want to know here? I mean I don't understand why you're asking all these questions about the MMPI-2. It's clearly an invalid profile" and "Because it says right here, page 2, it's an invalid profile because F is greater than 89. Okay?"

Mr. James England testified by deposition that he is a rehabilitation counselor. Mr. England met with Ms. Oppenlander on November 20, 2008, and interviewed Ms. Oppenlander by telephone on March 14, 2011. Mr. England stated that opinions regarding Ms. Oppenlander's functional ability varied greatly, from Dr. Crooks' findings which would rule out a return to work because of "the combination of her ... two traumatic brain injury incidents" and Dr. Stillings' opinion which would allow a return to work "doing essentially any type of work that she was normally suited for."

Gary Weimholt, a vocational rehabilitation consultant, testified by deposition that he reviewed depositions and medical records pertaining to Ms. Oppenlander's work injury of February 5, 2007, as well as her ability to engage in gainful employment. Mr. Weimholt opined that as the result of the February 5, 2007 accident and injury Ms. Oppenlander is not able to return to her work as a nurse in the labor and delivery room and is similarly unsuited for a "skilled job ... [which is] highly detailed and complex" such as the utilization review job Ms. Oppenlander performed after her return to work after the February 2007 fall. Mr. Weimholt opined that Ms. Oppenlander is "employable in less detailed and complex forms of work, including jobs in a medical setting, which would include medical file clerk, medical office assistant, hospital patient representative or admitting clerk, medical appointment clerk and scheduler. These jobs would be somewhat detailed but not as complex as the work of a utilization reviewer or other skilled nursing work. These less complex jobs would also be more structured, fairly routine, require less independent judgment and decision making." Mr. Weimholt also noted other jobs which would be appropriate for Ms. Oppenlander outside of the medical field, such as "simple cashiering type jobs and other retail sales work" and "the work of a hotel and motel clerk and hotel night auditor" as well as "food service worker in cafeterias or dietary services."

Kelly Scheaffer, a labor and delivery unit nurse who worked with Ms. Oppenlander prior to her February 5, 2007 fall, testified to Ms. Oppenlander's competence as a labor and delivery nurse

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prior to her fall, including her competent return to work after her January 20, 2007 fall. Ms. Scheaffer was so confident in Ms. Oppenlander's ability that she scheduled the delivery of her own child on February 3, 2007, so that Ms. Oppenlander would be her nurse. Ms. Scheaffer testified to the decline in Ms. Oppenlander's ability to function as a nurse after her return to work after the February 5, 2007 fall.

Joshua Oppenlander, Ms. Oppenlander's oldest son, testified about the decline in his mother's personality and functioning after her fall in February of 2007. Mr. Oppenlander testified regarding Ms. Oppenlander's ability to function fully prior to February 5, 2007, and her inability to even care for herself completely since then.

Susan Reagan, a friend and co-employee of Ms. Oppenlander's, similarly testified about Ms. Oppenlander's abilities prior to February 5, 2007, and her lack of competence at work and at home thereafter.

Bonnie Steinmetz, Ms. Oppenlander's supervisor in the labor and delivery unit, testified that Ms. Oppenlander displayed good clinical skills prior to February 5, 2007, but had some negative interactions with other hospital personnel and families of patients. Ms. Steinmetz confirmed that Ms. Oppenlander's termination from the labor and delivery unit was based solely on her inability to competently fulfill her responsibilities after February 5, 2007.

Cindy Sherman, Ms. Oppenlander's coworker from March of 2002 and supervisor in the labor and delivery unit from March of 2004 until the time of Ms. Oppenlander's termination, testified that although Ms. Oppenlander had been reprimanded regarding her difficulties in appropriately communicating with co-employees and patients, her termination from the labor and delivery unit was over concerns regarding Ms. Oppenlander's "critical thinking skills and patient care."

### **APPLICABLE LAW**

RSMo Section 287.020.2. 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.

Medical causation, not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. Brundage v. Boehringer Ingelheim, 812 S.W.2d 200 (Mo.App.W.D., 1991).

RSMo Section 287.140.1. 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. If the employee desires, he shall have the right to select his own physician, surgeon, or

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other such requirement at his own expense. Where the requirements are furnished by a public hospital or other institution, payment therefor shall be made to the proper authorities. Regardless of whether the health care provider is selected by the employer or is selected by the employee at the employee's expense, the health care provider shall have the affirmative duty to communicate fully with the employee regarding the nature of the employee's injury and recommended treatment exclusive of any evaluation for a permanent disability rating. Failure to perform such duty to communicate shall constitute a disciplinary violation by the provider subject to the provisions of chapter 620. When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the employee's principal place of employment, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses; except that an injured employee who resides outside the state of Missouri and who is employed by an employer located in Missouri shall have the option of selecting the location of services provided in this section either at a location within one hundred miles of the injured employee's residence, place of injury or place of hire by the employer. The choice of provider within the location selected shall continue to be made by the employer. In case of a medical examination if a dispute arises as to what expenses shall be paid by the employer, the matter shall be presented to the legal advisor, the administrative law judge or the commission, who shall set the sum to be paid and same shall be paid by the employer prior to the medical examination. In no event, however, shall the employer or its insurer be required to pay transportation costs for a greater distance than two hundred fifty miles each way from place of treatment.

RSMo Section 287.020.7. As used in this chapter and all acts amendatory thereof, the term "commission" shall hereafter be construed as meaning and referring exclusively to the labor and industrial relations commission of Missouri, and the term "director" shall hereafter be construed as meaning the director of the department of insurance, financial institutions and professional registration of the state of Missouri or such agency of government as shall exercise the powers and duties now conferred and imposed upon the department of insurance, financial institutions and professional registration of the state of Missouri.

### **AWARD**

The claimant, Ellen Oppenlander, has sustained her burden of proof that her work-related accident of February 5, 2007, resulted in her diagnosis of post concussive syndrome, including head trauma, headaches, balance problems, tinnitus, memory loss, and cognitive loss. Dr. Crooks, Dr. Cohen, and Dr. Halfaker all described what Dr. Halfaker called second impact syndrome, the devastating effect of a second head trauma shortly after an initial head trauma, despite the fact that neither head trauma on its own would have been that serious. Dr. Crooks, Dr. Cohen, and Dr. Halfaker all concurred that Ms. Oppenlander had suffered just such a trauma. Dr. Hogan and Dr. Stillings both found Ms. Oppenlander to have sustained little or no trauma as the result of the February 5, 2007 fall, choosing instead to assign Ms. Oppenlander's cognitive deficits to psychological issues stemming from Ms. Oppenlander's personal life. Dr. Hogan and Dr. Stillings are less than forthcoming regarding how they reached their conclusions and their findings are, therefore, given little weight in this determination.

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The employer/insurer are liable for past medical bills in the amount of \$1,419.23 for treatment provided under the direction of Dr. Henry Schneider, past pharmacy bills in the amount of \$4,526.25, less any prescriptions for lithium (\$188.91) which I find are related to a fall in May of 2009 and are not the responsibility of the employer/insurer (and less unrelated expenses for drugs such as prednisone, which I assume have already been the subject of an adjustment made by the claimant and the employer/insurer) and \$427.90 in bills related to treatment provided by University Physicians. The bills in Exhibit K are not awarded where it is not clear for what the underlying services were provided and how they relate to Ms. Oppenlander's accident and injury of February 5, 2007. The parties have agreed that the employer/insurer will hold Ms. Oppenlander harmless from third parties seeking reimbursement of the bills outlined in this paragraph as compensable. Dr. Crooks, Dr. Cohen, and Dr. Halfaker all testified with regard to the effects of Ms. Oppenlander's trauma and her past and ongoing need for treatment to relieve the effects of her injury.

The employer/insurer are liable for payment of future medical treatment related to the accident and injury of February 5, 2007, including the continued prescription medications and the counseling provided by Dr. Schneider.

The employer/insurer are liable for permanent and total disability as the result of the impact of the February 5, 2007 accident and injury from the date of March 31, 2008 forward. Dr. Crooks, Dr. Cohen, and Dr. Halfaker all testified with regard to the impact of the February 5, 2007 fall on Ms. Oppenlander's cognitive abilities while Mr. Eldred testified to Ms. Oppenlander's inability to engage in gainful employment. No preexisting permanent disability is found; Ms. Oppenlander was fully able to engage in full-time permanent and challenging employment as an obstetrics nurse prior to her February 5, 2007 fall without restrictions. Episodic psychological treatment for stressful periods in Ms. Oppenlander's life does not constitute a preexisting disability sufficiently significant to trigger Second Injury Fund liability; it is the trauma resulting from the February 5, 2007 fall which has caused Ms. Oppenlander's permanent and total disability.

Made by: \_\_\_\_\_  
HANNELORE D. FISCHER  
*Administrative Law Judge*  
*Division of Workers' Compensation*