

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

Injury No.: 03-021846

Employee: Gloria Rowe
Employer: Barnes-Jewish Hospital (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the ALJ dated May 2, 2011, as supplemented herein.

The ALJ found that as a result of the primary injury employee sustained 12.5% permanent partial disability (PPD) of the body as a whole (BAW) referable to the lumbar spine. The ALJ further found that employee had the following preexisting permanent partial disabilities: 12.5% PPD of the BAW referable to the cervical spine, 12.5% PPD of the BAW referable to the lumbar spine (L5-S1), and 30% PPD of the BAW referable to her psychiatric conditions. Finally, the ALJ found that employee's primary injury and preexisting disabilities combined to create a load factor of 15%.

Employee argues on appeal that the ALJ erred in denying her claim for permanent total disability (PTD) benefits against the Second Injury Fund. Specifically, employee argues that the ALJ substituted his own opinion for that of a qualified, unimpeached expert, Mr. England.

We find that although Mr. England opined that employee is unable to compete in the open labor market due to a combination of her physical and psychiatric problems, his vocational opinion (given on May 16, 2006) included consideration of significant events that occurred subsequent to the primary injury date of March 18, 2003. Specifically, Mr. England considered two additional injuries to employee's low back, and additional treatment and complaints. These subsequent injuries and the affect they had on employee's overall condition are not relevant as to the issue of Second Injury Fund liability for this injury. Therefore, while employee may very well have been unable to compete in the open labor market when Mr. England provided his opinion, employee failed to meet her burden that she is unable to compete in the open labor market due to the March 18, 2003, injury combining with her preexisting disabilities.

¹ Statutory references are to the Revised Statutes of Missouri 2002 unless otherwise indicated.

Employee: Gloria Rowe

- 2 -

We find that the ALJ did not substitute his own opinion for that of a qualified, unimpeached expert. We find that the ALJ thoroughly reviewed and analyzed the record as a whole and came to a conclusion that is fully supported by the competent and substantial evidence.

We affirm the award of the ALJ as supplemented herein.

The award and decision of Administrative Law Judge John K. Ottenad, issued May 2, 2011, 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 administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 22nd day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Gloria Rowe

Injury No.: 03-021846

Dependents: N/A

Employer: Barnes-Jewish Hospital (Settled)

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Self-Insured (Settled)

Hearing Date: January 4, 2011

Checked by: JKO

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: March 18, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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: Claimant worked as a radiation therapist for Employer, and she had to use one of the heaviest cassettes for the treatment she was administering, when the cassette slipped and she developed neck and back pain when she caught the cassette before it hit the patient.
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: Body as a Whole—Low Back and Neck
14. Nature and extent of any permanent disability: 12.5% of the Body as a Whole referable to the Lumbar Spine
15. Compensation paid to-date for temporary disability: \$11,316.72
16. Value necessary medical aid paid to date by employer/insurer? \$8,201.54

Employee: Gloria Rowe

Injury No.: 03-021846

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1,260.00
- 19. Weekly compensation rate: \$649.32 for TTD/ \$340.12 for PPD
- 20. Method wages computation: Mo. Rev. Stat. §287.250 (2000)

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer previously settled its risk of liability

22. Second Injury Fund liability:

40.5 weeks of permanent partial disability \$13,774.86

TOTAL: \$13,774.86

23. Future requirements awarded: None

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorneys for necessary legal services rendered to the claimant: Robert S. Merlin and Ray B. Marglous.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Gloria Rowe	Injury No.: 03-021846
Dependents:	N/A	Before the
Employer:	Barnes-Jewish Hospital (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Self-Insured (Settled)	Checked by: JKO

On January 4, 2011, the employee, Gloria Rowe, appeared in person and by her attorney, Mr. Robert S. Merlin, for a hearing for a final award on her claim against the Second Injury Fund. The employer, Barnes-Jewish Hospital, which is duly self-insured under the statute, was not present or represented at the hearing since it had previously settled its risk of liability in this case. The Second Injury Fund was represented at the hearing by Assistant Attorneys General Kristin Frazier and David Morin.

In addition to this claim, the employee also tried a companion claim against the Second Injury Fund at the time of this hearing. That companion claim with a date of injury of July 28, 2003 was assigned Injury Number 03-072820. A separate award has been issued to dispose of that additional claim, despite the fact that a consolidated hearing on both claims was held.

At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about March 18, 2003, Gloria Rowe (Claimant) allegedly sustained an accidental injury.
- 2) Claimant was an employee of Barnes-Jewish Hospital (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) Employer paid temporary total disability (TTD) benefits in the amount of \$11,316.72, representing a period of time of 17 weeks.
- 7) Employer paid medical benefits totaling \$8,201.54.

ISSUES:

- 1) Did Claimant sustain an accident?
- 2) Did the accident arise out of and in the course of employment?
- 3) Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to her alleged accident at work on or about March 18, 2003?
- 4) What is the appropriate average weekly wage and rates of compensation for this case?
- 5) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this injury?
- 6) What is the liability of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Deposition of Mr. James England, with attachments, dated November 14, 2007
- B. Deposition of Dr. Wayne Stillings, with attachments, dated March 29, 2007
- C. Deposition of Dr. Shawn Berkin, with attachments, dated August 27, 2007
- D. Deposition of Dr. Michael Jarvis, with attachments, dated January 7, 2005
- E. Certified medical treatment records from BarnesCare
- F. Certified medical treatment records from University Medical Consultants
- G. Certified medical treatment records from St. Louis Behavioral Medicine Institute
- H. Certified medical treatment records from Dr. Harold Wolff
- I. Certified medical treatment records from Barnes-Jewish Hospital (Jan 1984)
- J. Certified medical treatment records from Barnes-Jewish Hospital (2003)
- K. Certified medical treatment records from Barnes-Jewish Hospital (Dec 2003)
- L. Certified medical treatment records from Barnes-Jewish Hospital (July 2003)
- M. Certified medical treatment records from Barnes-Jewish Hospital (1993-2003)
- N. Certified medical treatment records from Barnes-Jewish Hospital (Jan 1984)
- O. Certified medical treatment records from Barnes-Jewish Hospital (Jan 1984)
- P. Certified medical treatment records from Barnes-Jewish Hospital (Jan 1984)
- Q. Certified medical treatment records from Orthopaedic Surgery, Division of Washington University Medical School
- R. Certified medical treatment records from Memorial Hospital, Belleville, IL
- S. Certified medical treatment records from Memorial Hospital, Belleville, IL

- T. Certified medical treatment records from Pain Treatment Center, Inc.
- U. Certified medical treatment records from Dr. Cynthia Florin
- V. Certified medical treatment records from St. Louis Behavioral Medicine Institute
- W. Certified medical treatment records from St. Louis Orthopedic, Inc.
- X. Stipulation for Compromise Settlement in Injury No. 03-021846 between Claimant and Employer
- Y. Stipulation for Compromise Settlement in Injury No. 03-072820 between Claimant and Employer

Second Injury Fund Exhibits:

- I. Employer's reports of injury for alleged dates of injury of March 18, 2003 and July 14, 2003
- II. Certified medical treatment records from Metropolitan Orthopedics
- III. Certified medical treatment records from Missouri Baptist Medical Center
- IV. Certified medical treatment records of Dr. Harold Wolff
- V. Deposition of Dr. Edwin Wolfgram, with attachments, dated December 18, 2008

Notes: 1) Any stray marks or handwritten comments contained on any of the exhibits were present on those exhibits at the time they were admitted into evidence, and no other marks have been made since their admission into evidence on January 4, 2011.

2) Some of the exhibits were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence.

FINDINGS OF FACT:

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical and vocational opinions and depositions, the medical records, and the Stipulations for Compromise Settlement between Claimant and Employer, as well as based on my personal observations of Claimant at hearing, I find:

- 1) **Claimant** is a 55-year-old, currently unemployed individual, who last worked for Barnes-Jewish Hospital (Employer) on July 28, 2003 as a radiation therapist. Claimant testified that she applied for Social Security Disability in 2006 and began receiving Social Security Disability benefits in August 2008.
- 2) Claimant testified that she graduated from Collinsville High School in 1973 and then took two years of classes in general studies at the University of Illinois. She left the University of Illinois and went to West Berlin, Germany to study music (opera singing). Eventually, she moved back to Austin, Texas and tried to save money so she could go back to school. She took classes at Belleville Area College, where she obtained an associate degree in radiology in May 1978. She then took one additional

year of classes at Mallinckrodt Institute of Radiology to obtain an associate degree as a radiation therapist. Claimant's only other education consisted of one basic computer class in 2007. She testified that she basically learned how to do e-mail.

- 3) Prior to working for Employer, Claimant worked for Belleville Memorial Hospital as an X-ray technician. She worked there part-time from 1979 to 1984. She was hired for a full-time position as a radiation therapist by Employer and worked the rest of her career at Washington University and Barnes-Jewish Hospital in that position. Claimant testified that she worked for Employer full-time, for at least 40 hours per week and sometimes overtime as well. She testified that her rate of pay when she last worked for Employer was \$31.50 per hour and that she would also receive time and a half for any overtime worked.
- 4) As a radiation therapist, Claimant testified that her job consisted of treating cancer patients with radiation therapy. She said that her job was very physical in nature, including lifting heavy objects and patients, bending, stooping, twisting and turning. She estimated that she would have to lift over 50-60 pounds regularly and, on occasion, even more than that. She admitted that she would have to have help when lifting the heavier patients. She said that her job required standing and walking as well all day. She also described lifting overhead and using her arms overhead throughout her career. Claimant testified that she loved her job and loved feeling like she was helping people who were in dire straits.
- 5) Claimant testified that she started to have problems with migraine headaches while she was in X-ray school. She described a sharp pain over her eyebrows with nausea and increased pain from bright lights. Claimant noted that she would go to work with migraines and then sit down and tell others what to do to perform the job. Claimant said the headaches made it harder to concentrate and she occasionally missed work because of them. She believed that she got the headaches more frequently as her career progressed. Claimant testified that the headaches affected her job performance and her ability to work with co-workers. They also negatively impacted her mental state.
- 6) Claimant testified that she received treatment for a herniated disc in her low back in 1984. She said that she just woke up one morning with the back pain. She denied having any accident or injury at that time. Claimant testified that she had surgery, a chymopapain injection, that dissolved the part of the disc that was impinging on the spinal cord. Claimant noted that before the surgery she was in horrible pain, but after about four to five weeks following the injection, she had basically recovered.
- 7) The medical treatment records from **Barnes-Jewish Hospital** (Exhibits I, N, O and P) document Claimant's admission to that facility on January 23, 1984 for low back and right leg pain. She was diagnosed with a herniated nucleus pulposus at L5-S1, for which she received an L5-S1 discogram and chemonucleolysis with a chymopapain injection on January 24, 1984. According to the notes, she progressed well after the injection and was released the next day to go home.

- 8) Claimant testified that there was some residual pain and she also had some remaining right leg numbness. She said that she had to be careful with body alignment so as not to stress her low back. She also had some problems with stooping and squatting. She could not lift more than 30 pounds and she would get more help from her partner with work activities. She said that she walked slower too. In general, Claimant testified that the limitations with her back made doing her job more difficult. She believed the low back was a hindrance or obstacle to her employment and she noted that it affected her mental state as well. It depressed her. Claimant testified that she missed work occasionally because of back pain.
- 9) Claimant testified that she sustained a neck injury in 1987, when she was hit by a drunk driver. She said that she was pushed into the car in front of her and her car was totaled. Claimant described radiating pain that was relieved with months of physical therapy. She said that every once in awhile she would have to get more therapy to help her condition. After treatment, she was able to return to lifting the same amounts she was lifting before the accident, but she still experienced pain with working overhead. She said that she needed more help doing certain tasks and she also needed more breaks and rest to accomplish her work.
- 10) Medical treatment records from **Memorial Hospital in Belleville, IL** (Exhibits R and S) document the treatment and physical therapy Claimant received for her neck complaints following her car accident. The records confirm that Claimant had neck complaints and numbness down her arms that improved with physical therapy and other treatment that she received from November 1987 through February 1988. She apparently had a reoccurrence of cervical complaints and left arm/hand pain, numbness and tingling, for which she sought another course of physical therapy beginning on March 15, 1990. The records indicated that she was missing work as a result of her complaints. The notes show that her complaints decreased with the treatment she received. The records reflect that she last received physical therapy in April 1990 for her neck and left arm complaints following the car accident.
- 11) Claimant sustained another injury to her neck in 1995, when she fell up some steps and herniated two discs in her neck (C5-6 and C6-7). Claimant said that she developed radiating pain in her right arm. Claimant received physical therapy, but still had constant pain in the neck and constant radiating pain, with numbness that comes and goes. She said that this injury affected her ability to bend, stoop, lift and carry. She said that she required more assistance from co-workers to do her job. Claimant missed five weeks of work at the time of the injury and then continued to occasionally miss days after that. She noted that this injury also negatively impacted her mental state, because she was in agony.
- 12) With regard to her significant pre-existing mental disability, Claimant testified that she has had treatment for diagnosed psychiatric illness going back to 1992. She agreed that she had some problems before that as well. Claimant said that it affected all aspects of her life. She described her condition as going from periods of being very happy, to crashing into a period of depression. During her manic episodes, Claimant said that she was able to stay up all hours of the night. She would engage in

excessive spending, dangerous activities like driving drunk and dangerous relationships. She would be able to work at a quick pace and be extremely happy. However, at some point, she would crash and become depressed. During those times, other workers would ridicule her. Claimant said that this condition resulted in conflict with other employees and caused her to miss time from work. Claimant was hospitalized for a week in July 1993 because she was suicidal and she was placed on medications. She said that she started working overtime in 1993 to make up for the time she was missing while she was sick. Claimant said the depression and bipolar conditions made it difficult to get up and get to work, but she found that once she was there, she was all right.

- 13) Medical treatment records from **Barnes-Jewish Hospital** (Exhibit M) document Claimant's admission to that facility from July 26, 1993 to August 2, 1993 for treatment for a major depressive episode. According to the records, Claimant began having serious depressive symptoms in March 1993 due to the dissolution of a long-term relationship with a bisexual male who was living with her. She had attempted to throw herself out of a window to commit suicide, and had recurrent suicidal ideation. However, even prior to that, for the prior year and a half, Claimant was treating for depression with her doctor, who prescribed an array of medications. She attributed much of her low mood during this time to changes and increased stress at work. At the time she was discharged from care in the psychiatric unit on August 2, 1993, she was improved from the medications and counseling she received while there. The notes indicate that she was to take a brief hiatus from work to adjust emotionally to the events of her recent past.
- 14) She noted that because of a change in her work situation in July 2001, she began to miss quite frequently. She estimated that when she missed work on account of her mental condition, she would generally miss more than a week at a time. Claimant testified that she missed approximately five weeks of work around January 2002 because of her mental issues. This was about the same time that she first received the bipolar diagnosis. Claimant testified that although she generally received regular raises and good performance reviews, she was put on probation in late 2002 and was feeling more depressed leading up to the time of the 2003 injuries.
- 15) Medical treatment records from **St. Louis Behavioral Medicine Institute** (Exhibits G and V) document the treatment (counseling) Claimant received there from February 7, 2002 through October 28, 2002. At the outset of Claimant's treatment there, Claimant reported having symptoms consistent with mania/hypomania, anxiety and depression, including difficulties with concentration, memory and decision making, racing thoughts, mood swings and panic attacks. She reported having problems at work with confrontations with others starting in July 2001. She apparently had difficulties dealing with the younger techs and did not feel like her supervisor was backing her up. These notes contain numerous references to problems or difficulties Claimant was having at work or with work. These records also reference a diagnosis of bipolar disorder. The consistent diagnosis in the early records is major depression, recurrent, moderate. In May 2002, that diagnosis was changed to bipolar disorder, most recent episode depressed, moderate.

- 16) I observed that as she was testifying about her depression and mental health issues, as well as the ways in which those issues affected her at work, she became very emotional and visibly upset. Her hands began to shake as she testified.
- 17) Claimant testified that she believed her mental issues were definitely a hindrance or obstacle to her employment, because she found that it was a constant struggle to perform her job with her depression and physical pain complaints. As a result of the depression, Claimant testified that it was harder to concentrate. She said that it affected her self-esteem and made her feel like a “nothing.” She described panic attacks when it would be hard to breathe and she would feel as if she was going to die. She said that she went into the bathroom at work and cried a lot. Claimant testified that she got in trouble and missed promotions and advancement at work because of the mental issues and her missing work. She believed that stress at work was a trigger for her mental complaints, as were department policy changes. Claimant said that she continued to treat with a psychiatrist and a cognitive therapist during this time. Claimant noted that she experienced these same types of problems up until the time of her injuries at work in 2003.
- 18) Claimant testified that she was also diagnosed with vertigo or dizziness in the 1990s, for which she was out of work for several weeks. She said that she was given medications and she performed exercises to try to control it. She noted that she was unable to work whenever she was experiencing vertigo. Claimant testified that she has continued to have some of these problems since the diagnosis and she believed that it was a hindrance or obstacle to employment. She also believed that it affected her mental or psychiatric state and made her more depressed.
- 19) Medical treatment records from **University Medical Consultants** (Exhibit F) document a number of visits and treatment Claimant received for a variety of conditions from January 23, 1997 through November 14, 2002. At her first visit to this facility on January 23, 1997, among other things, Claimant complained of problems with depression, dizziness and lumbar disc disease. According to the reports, her vertigo worsened through July 9, 1997, but then was under good control by November 2, 1998. Dizziness was not mentioned in the records again until August 8, 2002, however, it was not felt to be vertigo at that point, but rather a migraine equivalent. These records contain a number of visits and treatment with medications for low back pain from July 15, 1998 through November 14, 2002. In early 2002, Claimant received treatment for a cervical strain and cervical radiculopathy into both arms. There are also regular references throughout the records to problems with and treatment for depression.
- 20) The medical treatment records of **Dr. Cynthia Florin** (Exhibit U) document the extensive treatment (counseling and medications) that Claimant has had with her from January 29, 1997 through February 5, 2004. The records span the range of emotions from Claimant doing very well and handling her life and stress appropriately, to Claimant thinking about suicide every day and having significant psychiatric

complaints. Many of the stress complaints driving her psychiatric conditions throughout 2001 and 2002 seem to center around problems she was having at work.

- 21) Claimant testified that on March 18, 2003, she had to use one of the heaviest cassettes for the treatment she was administering, when the cassette slipped and she developed neck and back pain when she caught the cassette before it hit the patient. She said that she did not finish working that day, but went immediately to her supervisor and then to the clinic. **Employer's report of injury** (Exhibit SIF I) containing a consistent history of this injury at work was filed on this same date. She said she came into work the next day, but she had to leave because of her complaints. She was not sure if she received any treatment for her low back between that initial visit on March 18 and a week later when she saw Dr. Mannis. Claimant testified that she had radiating pain down both legs. She received physical therapy and injections, but her back never stopped hurting up until the time of her next injury. She said that she was off work for approximately five weeks following this injury.
- 22) Medical treatment records from **Dr. Charles Mannis at Metropolitan Orthopedics** (Exhibit SIF II) document the examinations and treatment he provided to Claimant from March 25, 2003 through July 7, 2003. He prescribed physical therapy and medications to treat her cervical, thoracic and lumbar strains. She was kept off work for a period of time, but after she returned to work, she reported an increase in right leg numbness when she saw Dr. Mannis on May 9, 2003. On account of that complaint, Dr. Mannis ordered a lumbar MRI to rule out disc pathology. The MRI taken at **Missouri Baptist Medical Center** (Exhibit SIF III) on May 19, 2003 showed degenerative disc disease and mild stenosis at L4-5 with a small central protrusion of the disc at that level. Dr. Mannis confirmed that there was no disc rupture, but because of her lumbar radiculopathy complaints, he recommended an epidural steroid injection. On June 9, 2003, Dr. Mannis records that she had the injection from Dr. Graham on June 5, 2003 and she noticed almost complete relief of her complaints with the injection, but that is incorrect based on Dr. Graham's records as detailed below. Finally, by July 7, 2003, Dr. Mannis reports that Claimant has been working regularly and has improved overall, with some residual low back pain, but no leg pain.
- 23) Medical treatment records from **BarnesCare** (Exhibit E) document the physical therapy Claimant received at that facility for her neck and low back from March 27, 2003 through April 17, 2003. The records contained a fairly consistent history of the injury at work on March 18, 2003, as well as diagnoses of a cervical strain and lower back syndrome. During this time, Claimant seemed to be improving with the treatment, with decreased complaints and improved function of the neck and back.
- 24) Dr. Mannis referred Claimant to **Dr. John Graham at Pain Treatment Center, Inc.** (Exhibit T) for an epidural steroid injection. Dr. Graham examined Claimant on June 2, 2003. She complained of low back and right leg pain from her work injury on March 18, 2003. Dr. Graham agreed that she may benefit from an epidural steroid injection, but he suggested that it be done under fluoroscopic guidance because of her body habitus and morbid obesity. He kept her on the same medications, therapy and work restrictions. According to the records, when the injection was scheduled later in

June, Claimant could not get off work and then by the time it was rescheduled, Claimant cancelled the appointment because she had the injection elsewhere.

- 25) Claimant testified that when she returned to work in April 2003, she was working under restrictions from the doctor of no lifting over 20-25 pounds and limitations on the number of hours she could work as well. She said this injury slowed her down and made it more difficult for her to work. She was in pain, had problems stooping and walking all day long. Claimant testified that she believed this injury, and the continued complaints from it, created a further hindrance or obstacle to her employment. She noted that it also impacted her mental state, in that, she was “totally freaking out.”
- 26) Claimant testified that she sustained another injury at work for Employer on July 14, 2003, when a tall chair on wheels she was attempting to sit on slipped out from under her, causing her to fall to the floor on her back. **Employer’s report of injury** (Exhibit SIF I) containing a consistent history of this injury at work was filed on July 15, 2003. Once again, she developed low back and neck pain. Claimant testified that she was taken by ambulance from Mallinckrodt to the emergency room. She said that she was diagnosed with a cervical strain and she was still in treatment for this second injury, when her third and final injury at work occurred. Claimant noted that she missed a few days from work following this second injury. She said that it worsened her complaints and made it more difficult to stand, stoop, bend and lift.
- 27) The medical treatment records from **Barnes-Jewish Hospital** (Exhibits J and L) document her admission to the emergency room on July 14, 2003, when she slipped off a chair, hitting her head and buttock on the floor, while at work. She was complaining of head and right buttock pain. Claimant was diagnosed with a cervical strain and a buttock contusion, for which she was given medication and discharged home.
- 28) Claimant testified that she suffered her third back injury at work for Employer on July 28, 2003, when she was holding a pillowcase into which one of the heavy cassettes was to be inserted. Claimant said that a new student dropped the heavy cassette into the pillowcase, jerking Claimant’s back and causing increased pain complaints. Claimant testified that she treated with Dr. Tate, who prescribed medications and a trigger point injection. Claimant testified that she was given further limitations of no lifting over 10 pounds at first and she never returned to work following this injury. She said that eventually she had a functional capacity evaluation that permanently limited her lifting to 50 pounds, and although she was released to go back to work in December 2004, she was unable to perform the work she had previously done. Claimant testified that she continued to see Dr. Prather into 2005 for injections.
- 29) Claimant received initial medical care following this last injury at **St. Louis Orthopedic, Inc.** from **Dr. Sandra Tate** (Exhibit W). Dr. Tate’s report dated July 30, 2003 contains the history of the three separate accidents at work for Employer, but the specific dates and mechanism of injury are a bit jumbled. Claimant reported low back pain and intermittent numbness in the right leg. Dr. Tate found negative

Waddell's symptom magnification indicators. She assessed low back pain and right piriformis syndrome. She administered a trigger point injection into the right piriformis muscle. Dr. Tate indicated that it was difficult to state whether this was due to her July 28, 2003 injury or her July 14, 2003 fall. She recommended physical therapy and work restrictions. By August 6, 2003, Dr. Tate reported that Claimant still had low back and right buttock complaints, but she was improved with the injection and physical therapy. Dr. Tate administered another trigger point injection and continued the physical therapy. When Claimant was still reporting complaints in this region on August 21, 2003, Dr. Tate thought a repeat MRI of the lumbar spine was appropriate. Throughout these examinations, there are no specific cervical complaints and the examinations of the cervical spine and upper extremities are objectively normal.

- 30) Claimant had a repeat MRI of the lumbar spine performed at **Missouri Baptist Medical Center** (Exhibit SIF III) on August 26, 2003. The overall impression of the MRI was mild stenosis at L4-5 and "no change from 5/19/03." However, in the body of the report, there is a notation that there is more central focal posterior protrusion at L4-5, but still no lateralizing disc protrusion. The report characterizes the changes at L4-5 as "degenerative disc disease."
- 31) Following the MRI, **Dr. Sandra Tate** (Exhibit W), on September 4, 2003, confirmed the presence of degenerative disc disease and a degenerative disc protrusion at L4-5. She noted that Claimant had a functional capacity evaluation, which was basically invalid due to perceived lack of effort. Waddell's symptom magnification indicators were now all positive. Dr. Tate diagnosed low back pain with pre-existing degenerative disc disease. She placed Claimant at maximum medical improvement and released her with a permanent lifting restriction of no lifting greater than 50 pounds, related to her degenerative joint disease and not her work injury. She did not believe further treatment was needed.
- 32) Additional medical treatment records from **BarnesCare** (Exhibit E) document the physical therapy Claimant received at that facility for her low back from July 30, 2003 through August 28, 2003. The records contained a history of the slip off the chair on July 14, 2003, as well as the additional back injury while putting the cassette into a sleeve on July 28, 2003 while at work for Employer. Claimant complained of constant low back pain with some occasional complaints radiating into her lower extremities. She was consistently diagnosed with lower back syndrome. The records documented some improvement with the therapy. Claimant had a functional capacity evaluation on September 3, 2003, followed by a period of work conditioning from October 13, 2003 through October 23, 2003. She complained of low back pain and weakness in her legs and only slightly increased her functional ability to work during this course of treatment.
- 33) Additional medical treatment records from **Dr. Charles Mannis at Metropolitan Orthopedics** (Exhibit SIF II) document an examination on October 3, 2003 at which time she provided a consistent history of her two additional low back injuries at work. She noted that she had improved a lot since her course of physical therapy. The

physical examination at that time revealed normal gait, residual tenderness in the thoracic and lumbar regions, no spasm, complete motion in all planes and no neurological deficits. Dr. Mannis found no significant objective abnormalities. He diagnosed thoracic and lumbar syndrome. He recommended a repeat functional capacity evaluation (FCE) and release back to work with or without restrictions, depending on the results. By October 8, 2003, the FCE showed she was able to work in the medium work demand level, but that would not allow her to return to her prior job for Employer, so he ordered the course of work conditioning referenced above.

- 34) Claimant testified that in October 2003, she was admitted to the hospital for 10-12 days for her psychiatric condition. She said that her self-esteem was tied up in her job and she felt like that was all taken away from her as a result of her injuries. She said that she was suicidal and she was going to hang herself in the garage. She testified that she noticed an increase in psychiatric complaints after the first injury in 2003 and it just got worse with each of the succeeding injuries. Claimant testified that her increased pain, as well as her inability to work, contributed to her deteriorating mental condition. She said that she received electroshock therapy at the hospital during that admission.
- 35) Medical treatment records from **Barnes-Jewish Hospital** and **Dr. Harold Wolff** (Exhibits H, M and SIF IV) document treatment Claimant received for bipolar affective disorder and depression from October 27, 2003 through November 11, 2003. This inpatient hospitalization was apparently precipitated by an emergency room visit to **Barnes-Jewish Hospital** (Exhibit J) on October 21, 2003 when Claimant was fearful of losing her job and threatened to commit suicide. According to the hospital records, Claimant was first diagnosed with depression in 1992 and had her first hospitalization for that condition in 1993. She continued to treat as an outpatient since that time, but began to have more difficulty at work starting in February 2002, which caused her to miss five weeks from work. She was first diagnosed with bipolar affective disorder at that time and suffered another manic episode in December 2002. Since March 2003, Claimant reported that she has been primarily depressed with suicidal thoughts and that her complaints have been progressively worsening. The week prior to this admission in 2003, Claimant stopped taking her medications with the belief that she would then have enough initiative to kill herself. As a result of her worsening depression and significant suicidal ideation, Claimant was admitted for electroconvulsive therapy (ECT). Claimant received six ECT treatments during this hospitalization and was discharged with an improvement noted in her overall psychiatric condition. She was to continue to take medications and follow up with her primary psychiatrist.
- 36) **Dr. Charles Mannis at Metropolitan Orthopedics** (Exhibit SIF II) last examined Claimant on January 16, 2004. He noted that her work conditioning was interrupted by the hospitalization for depression, but she indicated to Dr. Mannis that "she is able to work." She still reported some pain with certain activities, but denied any radiation into the extremities. The physical examination at that time revealed normal gait, no tenderness or spasm, full range of motion in all planes and no neurological deficits. He opined that Claimant was capable of working her normal duties without restriction

and released her from care at maximum medical improvement. He did not think she needed any further medical treatment. He opined that her symptoms were causally related to the March 2003 injury. Based on diagnoses of cervical, thoracic and lumbar strains, Dr. Mannis rated Claimant as having 1-2% permanent partial disability of the body as a whole referable to the March 2003 injury.

- 37) Additional medical treatment records from **University Medical Consultants** (Exhibit F) document a visit on September 23, 2003, when Claimant provided a history of her three back injuries from earlier that year at work. Claimant reported that her back was getting stronger in physical therapy and she wanted her work restrictions lifted so that she could get back to work for Employer. When she returned on December 9, 2003, there was very little discussion of any low back problems, and, in fact, the musculoskeletal examination was normal, but there was extensive discussion of her recent hospitalization for depression and the treatment she was continuing to receive for that condition. The last visit in these records is dated February 2, 2004, at which time Claimant still complained of some low back discomfort for which she was given medication. She was also diagnosed with type 2 diabetes. The report indicated that she was actively seeking other employment.
- 38) In the records of **Dr. Cynthia Florin** (Exhibit U), dated March 26, 2004 is a handwritten note from the doctor to Claimant's attorney indicating that Claimant has been a patient for the past 12 years. Dr. Florin opines that Claimant's current serious psychological symptoms are greatly exacerbated by her work-related injuries and their consequences. She further opines that Claimant is in need of extensive psychiatric treatment.
- 39) Medical treatment records from **Dr. Heidi Prather at the Orthopaedic Surgery Division of Washington University Medical School** (Exhibit Q) document an initial visit on August 9, 2004, when Claimant was seeking additional medical treatment for her low back complaints. Claimant reported her three injuries at work in 2003, gave a history of the medical treatment she had received thus far, and complained of progressive, constant low back pain and associated, intermittent leg pain and numbness, right greater than left. Her physical examination revealed a positive bilateral straight leg raising test and decreased sensation in the right leg. She looked at the MRI and found degenerative disc changes at L4-5 and L5-S1. Dr. Prather diagnosed low back pain with probable intermittent L5 radicular symptoms. She recommended physical therapy and consideration of an L5 nerve root injection in six weeks if no progress was made. At her follow-up appointment on November 18, 2004, Claimant reported that she was making progress in therapy and so physical therapy was continued. In the next note dated January 6, 2005, Claimant reported that she was "working more" and that was increasing her pain. She also reported a "recent exacerbation" that increased her complaints after she had been doing well. She was given medication and continued in physical therapy. Apparently her complaints did not markedly improve, because on February 14, 2005, Dr. Prather performed a fluoroscopically guided right S1 transforaminal epidural steroid injection.

- 40) The last record from **Dr. Heidi Prather** (Exhibit Q) is a letter she wrote to Claimant's attorney dated May 4, 2005. The letter details the history of the three work injuries and the treatment Dr. Prather had provided to Claimant up to that point. She was asked whether the treatment she provided to Claimant was related to the 2003 work injuries. Dr. Prather responded that she "would not be able to tell you which injury was related to which part of her pain complaint."
- 41) Claimant and Employer entered into an agreement to resolve the March 18, 2003 Claim (Injury No. 03-021846) by **Stipulation for Compromise Settlement** (Exhibit X) for \$17,006.00, or 12.5% permanent partial disability of the body as a whole referable to the low back. According to the Stipulation, Employer paid \$8,201.54 in medical benefits and \$11,316.72 for 17 weeks of temporary total disability. The Second Injury Fund Claim was left open on the Stipulation. This Stipulation was approved by Administrative Law Judge Cornelius Lane on October 5, 2007.
- 42) Claimant and Employer entered into an agreement to resolve the July 28, 2003 Claim (Injury No. 03-072820) by **Stipulation for Compromise Settlement** (Exhibit Y) for \$17,352.50, or 7.5% permanent partial disability of the body as a whole-back and 5% permanent partial disability of the body as a whole-psychological. According to the Stipulation, Employer paid \$4,960.25 in medical benefits and \$5,614.37 for 8 weeks of temporary total disability. The Second Injury Fund Claim was left open on the Stipulation. This Stipulation was approved by Administrative Law Judge Cornelius Lane on October 5, 2007.
- 43) Claimant testified that her current complaints include radiating pain down her arms and legs. She said that it is difficult to get in and out of a car. She said that she does not take pain medication because she cannot afford it.
- 44) Claimant testified that she looked for work for approximately nine months. She submitted approximately 150 applications, but she received no interviews and she was never hired by anyone. She applied for clerk positions at gas stations and quick shops, as well as radiation therapy jobs. Claimant testified that she did work part-time at Litchfield Oncology. She said that a friend helped her get the job. Claimant said that she did paperwork and treated patients. They called her into work as needed. She said the job was difficult for her. She had to take breaks and she needed assistance at times to do the job. Basically, she said that she did the brainwork and others did the physical aspects of the job. She admitted that she applied for unemployment compensation for a time because she wanted to work, but she just could not find a job. She tried to obtain employment through Missouri Works, but she never received any job offers. Claimant admitted that her depression worsened for a time when she lost her job and could not find another one. She said that she quit looking for work because of her depression. She was tired of feeling like she was not worth anything.
- 45) The deposition of **Dr. Shawn Berkin** (Exhibit C) was taken by Claimant on August 27, 2007 to make his opinions in this case admissible at trial. Dr. Berkin is an osteopathic physician, who is board certified as a family physician and as an independent medical examiner. He examined Claimant on one occasion, June 8,

2004, at the request of her attorney and he issued one report dated June 20, 2005. He reviewed medical records provided by Claimant's attorney concerning her injuries that are the subject of these Claims. Claimant reported present complaints to Dr. Berkin of pain, tenderness, tightness and muscle spasms in the low back with pain extending into the right leg, and pain in the neck that radiates into the right arm. Dr. Berkin's physical examination of Claimant's neck revealed decreased range of motion in the cervical spine with midline tenderness and palpable muscle spasm to the left, but no swelling and normal upper extremity examinations with normal muscle bulk, tone and deep tendon reflexes. His examination of Claimant's low back revealed decreased range of motion in the lumbar spine with midline tenderness and palpable muscle spasm to the left, but normal lower extremity examinations with normal muscle bulk, tone, strength and deep tendon reflexes.

- 46) For her injury on March 18, 2003, **Dr. Shawn Berkin** (Exhibit C) diagnosed lumbosacral and cervical strains for which he rated Claimant as having permanent partial disabilities of 10% of the body as a whole referable to the cervical spine and 15% of the body as a whole referable to the lumbosacral spine. For the injury on July 14, 2003, he diagnosed a recurrent lumbosacral strain for which he rated Claimant as having an additional 15% permanent partial disability of the body as a whole referable to the lumbosacral spine. For the injury on July 28, 2003, he diagnosed a recurrent lumbosacral strain and bulging of the L4-L5 disc for which he rated Claimant as having an additional 25% permanent partial disability of the body as a whole referable to the lumbosacral spine. Dr. Berkin also rated pre-existing permanent partial disabilities of 15% of the body as a whole referable to the lumbosacral spine for the prior disc from 1984 treated with chemonucleolysis and 15% of the body as a whole referable to the cervical spine for the 1995 neck injury. He opined that the pre-existing disabilities represented a hindrance or obstacle to employment and that the combination of all of the disabilities resulted in a significantly greater disability than the sum of the disabilities added together, so a loading factor should be applied. Dr. Berkin deferred to a psychiatrist for ratings and opinions concerning her psychiatric conditions. He suggested some additional treatment and activity restrictions were appropriate, including a 20-pound floor to waist lifting restriction, a 10-pound waist to shoulder lifting restriction, avoiding repetitive squatting, kneeling, stooping, turning, twisting, climbing or lifting and avoiding prolonged walking, standing or sitting, but he offered no opinion on whether or not Claimant was capable of continuing to work or permanently and totally disabled.
- 47) On cross-examination from the Second Injury Fund, Dr. Berkin admitted that he had not reviewed the reports or the actual MRIs from May and August of 2003. Despite attributing the L4-5 disc bulge to the July 28, 2003 injury, he further admitted that since he had not seen the MRI reports or films, he was unaware that the MRIs showed no change between May and August 2003. When asked whether he was aware that all of the various ratings he gave for Claimant's low back conditions equaled 70% of the body as a whole for a basically, conservatively treated low back, Dr. Berkin seemed genuinely surprised. He responded, "Really? Well, then I guess that's what she had, I guess."

- 48) The deposition of **Dr. Wayne Stillings** (Exhibit B) was taken by Claimant on March 29, 2007 to make his opinions in this case admissible at trial. Dr. Stillings is a board certified psychiatrist. He examined Claimant on one occasion, July 15, 2004, at the request of her attorney and he issued his main report with that same date. He reviewed medical records provided by Claimant's attorney concerning her injuries that are the subject of these Claims and he also administered various tests. He reached the following diagnostic impression of Claimant: Axis I: (1.) Parent-child relational problem (emotional abuse by father), (2.) Bipolar I disorder, most recent episode, depression, severe and chronic and (3.) Pain disorder associated with both psychological factors and a general medical condition (multiple low back injuries); Axis II: None; Axis III: Per record review; Axis IV: Financial loss of job, significant psychiatric disorder, interaction with the legal system; and Axis V: GAF=48. Dr. Stillings opined that the three work injuries from 2003 are substantial factors in causing Claimant to develop the pain disorder and that they significantly aggravated her pre-existing bipolar I disorder. Dr. Stillings rated Claimant as having pre-existing permanent partial disabilities of 25% of the body as a whole related to her bipolar I disorder and 5% of the body as a whole related to her emotional abuse by her father. He also rated Claimant as having permanent partial disabilities of 20% of the body as a whole related to her pain disorder and 40% of the body as a whole related to the aggravation of her pre-existing bipolar I disorder, which he attributed to the three work injuries in 2003. He suggested that ongoing treatment was necessary for her psychiatric conditions.
- 49) Dr. Stillings testified that he believed her longstanding, chronic and severe psychiatric problems represented a hindrance or obstacle to employment and he noted that because of her motivation and cognitive function, she was able to fight through them and keep employment for as long as she did. He suggested, however, that eventually "they wear down and they wear out, so, and I think that's the case for this unfortunate lady." Although Dr. Stillings offered no opinion in his reports about whether Claimant was employable, he testified that with a GAF score of 48, individuals are generally not employable. Dr. Stillings testified that he was unable to break down or divide the ratings between the three work injuries because they occurred so close together and they all affected the same part of the body. Regarding Claimant's need for future medical treatment, Dr. Stillings interestingly testified, "that bipolar disorder has a tendency to deteriorate over time despite interceding work injuries or other factors." So although he believed she needed treatment on account of the aggravation of her condition from the work injuries, he also acknowledged that as she got older she would gradually deteriorate and increasingly need treatment anyway, even if she had not had the work injuries.
- 50) On cross-examination, Dr. Stillings admitted that he had not originally diagnosed a pre-existing pain disorder. Despite the long history in the medical records of pain to various parts of her body and psychiatric complaints going back into the 1990s, he had originally opined that the pain disorder was all attributable to the three work injuries in 2003 because Claimant told him that those were the most significant events. After being presented with a brief recount of the various complaints and problems from the pre-existing medical treatment records, Dr. Stillings agreed that it

was fair to say Claimant had a pre-existing pain disorder and further agreed that 5% of the original 20% disability he assigned to the pain disorder also pre-existed the three work injuries. He remained unable to divide the 15% associated with the pain disorder between the three work injuries from 2003. Dr. Stillings was also cross-examined extensively about the fact that Claimant missed approximately 25% of her scheduled work time in 2002, before the work injuries, primarily because of psychiatric issues. Dr. Stillings indicated that would not be inconsistent with her bipolar disorder. Dr. Stillings confirmed that he could not break down the 40% for the aggravation of the bipolar disorder between the three injuries because they were too close in time and “virtually impossible” to separate. He agreed, however, that none of the injuries in and of themselves were responsible for Claimant’s inability to work, rather, he believed it was the combination of everything. Dr. Stillings further testified that he believed Claimant’s hospitalization in October 2003 was the direct result of the work injuries causing her mental condition to deteriorate and her stopping all her medications for the days leading up to that hospitalization was only a minor factor. Dr. Stillings believed Claimant when she told him her mental state deteriorated after each work injury in 2003, despite the records showing that there was no change ordered in her medications after those initial work injuries by her treating psychiatrist.

- 51) The deposition of **Dr. Michael Jarvis** (Exhibit D) was taken by Employer on January 7, 2005 and submitted into evidence by Claimant, to make his opinions in this case admissible at trial. Dr. Jarvis is a psychiatrist and associate professor at Washington University School of Medicine, who is board certified in psychiatry. He examined Claimant on one occasion, August 9, 2004, for a little over 3.5 hours (including breaks) at the request of Employer’s attorney and he issued one report dated August 24, 2004. He reviewed medical records concerning her injuries/conditions and treatment that are the subject of these Claims. He reached the following diagnostic impression of Claimant: Axis I: Major depression, recurrent, severe and social phobia; Axis II: Avoidant personality disorder; Axis III: Sleep apnea, history of esophageal ulceration, headaches, diet-controlled diabetes mellitus, history of hypertension, history of DVT (secondary to oral birth control pills) with resultant pulmonary embolism, familial peripheral neuropathy, history of cervical strain, back pain, leg pain and other pains, chymopapain injection for L5-S1 disc, morbid obesity and hypertestosteronemia; Axis IV: Relationship and sexual issues, family issues, particularly concerning her father and childhood verbal abuse, and chronic self-esteem issues; Axis V: GAF (global assessment of functioning) of 50-60. Dr. Jarvis did not diagnose bipolar disorder because he said that with only a couple of isolated potential manic episodes, he was not able to substantiate such a diagnosis based on what he saw and reviewed. He opined that all of the diagnoses on Axis I, II and IV pre-existed the work injuries in 2003. Dr. Jarvis further noted that all of the diagnoses on Axis III, except for the back and thigh pain, also pre-existed the 2003 injuries.
- 52) Dr. Jarvis testified that Claimant relayed a significant part of her depression (95%) to not getting her job back, but she did not attribute any part of her depression to back or leg pain. He testified that her injuries at work in 2003 were not a substantial factor in her psychiatric diagnoses, and he further clearly noted that he did not believe the work

injuries aggravated her depression either. While he agreed that Claimant needed psychiatric care to manage her depressive symptoms (which she had needed and received for a number of years prior to the work injuries), he did not believe she needed any psychiatric care related to these injuries, nor did he think she suffered from any psychiatric permanent partial disability on account of these 2003 injuries. Dr. Jarvis did not impose any psychiatric restrictions on her ability to work, and, in fact, opined that he strongly encouraged her to work. On cross-examination, Dr. Jarvis agreed that the pre-existing major depression could have been a hindrance or obstacle to employment. He explained that a GAF of 50-60 puts Claimant in the bottom 10% for an individual's ability to function in society. He also noted that while pain cannot cause depression, it can aggravate its treatment.

- 53) The deposition of **Dr. Edwin Wolfgram** (Exhibit SIF V) was taken by the Second Injury Fund on December 18, 2008 to make his opinions in this case admissible at trial. Dr. Wolfgram is a board certified psychiatrist. He never examined Claimant, but only performed a records review and issued his report dated August 19, 2008. Dr. Wolfgram essentially opined that Claimant had a longstanding major depressive disorder. He diagnosed major depression, recurrent, severe, a social phobia and somatization disorder, with a significant tendency to present with physical complaints. He placed her GAF at 60. He also opined that Claimant had no psychiatric disability that preceded the 2003 injuries, as well as no psychiatric disability associated with the 2003 injuries. He found Claimant had no psychiatric disability as of the time of his review of the records. He believed she was capable of working. In the course of his testimony, Dr. Wolfgram also noted that he believed he was capable of giving medical/orthopedic opinions and he said that he considered himself a vocational expert too. Dr. Wolfgram testified that he did not necessarily consider major depression to be a hindrance or obstacle to employment, and, in fact, he thought it could be an asset to an individual's ability to function.
- 54) The deposition of **Mr. James England** (Exhibit A) was taken by Claimant on November 14, 2007 to make his opinions in this case admissible at trial. Mr. England is a certified vocational rehabilitation counselor. He met with Claimant on one occasion, November 10, 2004, at the request of her attorney and he issued one report dated May 16, 2006. Mr. England also reviewed medical treatment records provided by Claimant's attorney and confirmed her past work history and jobs. Essentially, Mr. England opined that if you just consider her physical complaints and conditions, then she could still be able to perform sedentary to light work. He further opined that when you combine her physical and psychiatric conditions, he did not believe she was employable in any setting on a consistent basis. However, he further noted that with GAFs of 50 or less from Drs. Stillings and Jarvis, Mr. England believed that she would not be employable in the open labor market based on her psychiatric condition alone.
- 55) At the current time, Claimant testified that physically and mentally she just cannot work 40 hours a week in a job. She said that she tends to stay away from people mostly. She testified that her current functional abilities include walking 3-4 city blocks at most before she has to rest, standing for only 20 minutes before pain sets in

and 30 minutes before she must sit down, sitting for only 30-45 minutes before she must stand and stretch and lifting no more than 20-25 pounds. Claimant said that when she is driving for any distance she must stop and stretch at rest stops. She said that her depression is about the same as it has always been. Claimant further testified that she did not believe she could work because she has no concentration, she has physical and mental limitations and she has no skill sets to allow her to work in the modern world.

56) I observed that when Claimant was testifying at the hearing, she stood up to take a break after approximately an hour of sitting on the stand. I also observed that she became very tearful when she testified about her FMLA benefits running out and the loss of her job after the third accident.

57) On cross-examination, Claimant testified that she thought her memory of the events and the treatment she received was as good as what is documented in the written records. Regarding her work for Employer, Claimant testified that everyone had a partner, but everyone helped each other out when needed. She testified that Barnes had a "family atmosphere" which provided her the help she needed at times. She confirmed that prior to her injuries in 2003, she had some psychiatric problems, but they were mostly controlled by medications and therapy. She said that there were times when things were better, but it was very up and down with her depression and bipolar. She confirmed that her depression now is about the same as it was at the time of her injuries, with some up-and-down periods that required hospitalizations.

58) In terms of subsequent injuries or conditions, Claimant testified that she was in the hospital for 10-12 days in July 2009 for a heart condition, atrial fibrillation. She was placed on some medications and continues to see a doctor for checkups for this condition. Claimant was also hospitalized in 2009 because of mental problems surrounding her aunt trying to commit suicide and her sister having a stroke on the table during surgery and being paralyzed on one side. She was also involved in an automobile accident in April 2006 when a lady turned into her and totaled her car. Claimant said she went to the hospital and had two broken ribs. She was given OxyContin for back, neck and arm pain. Claimant noted that her back complaints returned to their pre-car accident level after her treatment in 2006.

RULINGS OF LAW:

Based on a comprehensive review of the substantial and competent evidence described above, including Claimant's testimony, the expert medical and vocational opinions and depositions, the medical records, and the Stipulations for Compromise Settlement between Claimant and Employer, as well as based on my personal observations of Claimant at hearing, and based on the applicable statutes of the State of Missouri, I find:

Given the nature of this Claim and the evidence submitted, these three issues in this case can be effectively addressed at the same time.

Issue 1: Did Claimant sustain an accident?

Issue 2: Did the accident arise out of and in the course of employment?

Issue 3: Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to her alleged accident at work on or about March 18, 2003?

Since this is a Second Injury Fund only case, it is important to note that under **Mo. Rev. Stat. § 287.220.1 (2000)**, in order to qualify for Second Injury Fund benefits, Claimant must prove the presence of pre-existing permanent partial disability, along with a “subsequent **compensable injury** resulting in additional permanent partial disability... [emphasis added].” In other words, if the primary injury against Employer is not a **compensable** injury, then the Second Injury Fund Claim fails.

Claimant bears the burden of proof on all essential elements of her Workers' Compensation case. ***Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute***, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. ***Id.*** at 199.

Claimant alleges that she sustained an accidental injury involving her low back, neck and body as a whole that was medically causally related to her employment for Employer. Under **Mo. Rev. Stat. §287.020.2 (2000)**, the word “accident” is defined 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.” “Arising out of employment” means that a causal connection exists between the employee's duties and the injury for purposes of workers' compensation. ***Cruzan v. City of Paris***, 922 S.W.2d 473 (Mo. App. E.D. 1996) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). An injury is compensable only if it is clearly work related, and an injury is clearly work related only if work was a substantial factor in the cause of the injury and the resulting medical condition. However, an injury is not compensable if work was merely a triggering or precipitating factor. **Mo. Rev. Stat. §287.020.2 (2000)**. Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. ***Kelley v. Banta & Stude Construction Co., Inc.***, 1 S.W.3d 43 (Mo. App. E.D. 1999)

Having thoroughly reviewed all of the evidence regarding Claimant's low back and neck injury, I find that Claimant has met her burden of proving the presence of an accident that arose out of and in the course of her employment. I find very little dispute in the records and testimony in evidence that Claimant was using one of the heaviest cassettes for the treatment she was administering, when the cassette slipped and she developed neck and back pain when she caught the cassette before it hit the patient on March 18, 2003. The medical treatment records and reports are replete with this consistent history of the accident at work on March 18, 2003.

Despite finding that Claimant did, in fact, sustain an accident in the course and scope of her employment for Employer on March 18, 2003, the real issue here revolves around what, if any, parts of Claimant's low back, neck or psychiatric pathology, symptoms and diagnoses are medically causally related to this accident, as opposed to her prior or subsequent injuries, or ongoing pre-existing low back, neck and psychiatric problems. Claimant alleges that her increased neck, low back and leg complaints, as well as her increased psychiatric problems, are medically causally related to the accident on March 18, 2003. On the other hand, the Second Injury Fund asserts that Claimant failed to prove that this March 18, 2003 accident resulted in any new or additional diagnoses or disability referable to the neck, low back and body as a whole.

With regard to the neck and low back part of this Claim from this accident, there are four physicians who offered opinions on Claimant's condition and whether her continued problems and complaints are medically causally related to this accident on March 18, 2003. Dr. Charles Mannis, who treated Claimant following the March 18, 2003 and July 28, 2003 accidents, and who had a history of all three of the 2003 accidents at Claimant's work, opined on January 16, 2004 that her symptoms were causally related to the March 2003 injury. He diagnosed cervical, thoracic and lumbar strains and rated Claimant as having 1-2% permanent partial disability of the body as a whole referable to the March 2003 injury. Dr. Sandra Tate, who treated Claimant beginning on July 30, 2003, but who had a history of the three accidents at work in 2003 (although the specific dates and mechanisms of injury are a bit jumbled), opined that it was difficult to state whether her low back and right leg complaints were due to her July 28, 2003 injury or her July 14, 2003 fall. Dr. Heidi Prather, who treated Claimant in 2004-05, said that she could not tell which injury was related to which part of her pain complaint. Finally, Dr. Shawn Berkin, who examined Claimant only one time at the request of her attorney, diagnosed lumbosacral and cervical strains for which he rated Claimant as having permanent partial disabilities of 10% of the body as a whole referable to the cervical spine and 15% of the body as a whole referable to the lumbosacral spine, medically causally related to the March 18, 2003 injury. Dr. Berkin also assessed separate diagnoses and ratings for the two subsequent 2003 injuries as well.

Having thoroughly reviewed the opinions and conclusions of these physicians and having compared them to the rest of the medical evidence in the record, I find that of these four opinions, Dr. Charles Mannis provides the most competent, credible and reliable opinion of the four on the medical causation of Claimant's condition. Dr. Mannis was Claimant's treating orthopedic doctor after the March 18, 2003 injury and then again following the July 28, 2003 injury. He not only examined and treated Claimant multiple times throughout the course of these injuries, but he had the benefit of reviewing the MRI and other physical therapy and work conditioning records concerning her low back. Given the extent of his involvement in the treatment in this case, I find that Dr. Mannis was in the best position to render a competent, credible and reliable opinion on medical causation and on the assignment of permanent partial disability among the various 2003 work injuries. I further find that his opinions are consistent with, and supported by, the rest of the medical evidence in the record. To the extent that Dr. Mannis opined that Claimant's ongoing symptoms and body as a whole permanent partial disability was medically causally related to the March 18, 2003 injury, and not the two subsequent 2003 injuries, I find that Dr. Mannis' opinions support Claimant's contentions regarding the medical causation issue on the March 18, 2003 injury.

I find that Dr. Sandra Tate's and Dr. Heidi Prather's opinions that they are unable to determine which of the low back complaints or diagnoses are related to which of the 2003 accidents, does not help Claimant meet her burden of proof, since Dr. Tate and Dr. Prather were unable to specifically medically causally relate Claimant's complaints and diagnoses to the March 18, 2003 injury.

I further find that Dr. Berkin's medical causation opinions, and his division of the permanent partial disability attributable to the various injuries, are not competent, credible or reliable since he failed to review key pieces of medical evidence in the course of formulating his opinions and, thus, those opinions lack merit when compared to the other medical evidence in the record. Dr. Berkin admitted in his deposition that he never reviewed the two low back MRIs from 2003 or the reports of the radiologists who read those MRIs in the course of formulating his opinions. Yet, despite not reviewing those key pieces of evidence, somehow, he was able to formulate the medical causation opinion and the ratings of disability that attributed the L4-5 disc bulge to the July 28, 2003 injury, as opposed to one of the prior injuries or Claimant's pre-existing low back condition. Had Dr. Berkin reviewed those MRIs, he might have seen that the L4-5 small central disc protrusion was present on the first MRI taken on May 19, 2003, well before the July 28, 2003 injury. Further, had he reviewed the MRIs, he might have seen the radiologist's opinion following the second MRI on August 26, 2003 that he saw "no change from 5/19/03." Even Claimant's complaints of low back pain and intermittent right leg numbness predate the July 28, 2003 injury. In light of these MRIs and the history of Claimant's complaints as contained in the medical treatment records, it is completely unclear to me how Dr. Berkin could attribute the L4-5 disc, and the rating attendant to that condition, to the July 28, 2003 injury. Quite simply, I do not place any value on Dr. Berkin's opinions as a result of these discrepancies. Therefore, I find that Dr. Berkin's opinions in this matter cannot be used to support any findings or conclusions as they are not competent, credible or reliable.

In addition to the neck and low back component of the March 18, 2003 case, Claimant has also alleged psychiatric diagnoses and disability that she attributes to that accident at work. There are three physicians who have offered opinions on whether the work injuries in 2003 have caused any additional diagnoses and disability, medically causally related to those work accidents. Dr. Edwin Wolfgram conducted a records review on behalf of the Second Injury Fund and concluded that, not only did Claimant have no psychiatric disability attributable to the 2003 injuries, but, in his opinion, Claimant had no psychiatric permanent partial disability at all. Dr. Michael Jarvis performed a psychiatric examination on behalf of Employer and testified that her injuries at work in 2003 were not a substantial factor in her psychiatric diagnoses, and he further clearly noted that he did not believe the work injuries aggravated her depression either. He did not think she suffered from any psychiatric permanent partial disability on account of these 2003 injuries. Finally, Dr. Wayne Stillings performed a psychiatric examination on behalf of Claimant and concluded that the three work injuries from 2003 are substantial factors in causing Claimant to develop the pain disorder and that they significantly aggravated her pre-existing bipolar I disorder. He believed the work injuries were responsible for an amount of psychiatric disability, but Dr. Stillings confirmed that he could not break down the diagnoses and disability between the three injuries because they were too close in time and "virtually impossible" to separate.

Having thoroughly reviewed the opinions and conclusions of these physicians and having compared them to the rest of the medical evidence in the record, I find that of these three opinions, Dr. Michael Jarvis provides the most competent, credible and reliable opinion regarding Claimant's psychiatric condition. In reviewing Dr. Jarvis' report and testimony, I am impressed with the thorough nature of his review of the records and the extensive amount of time he spent with Claimant to formulate his conclusions in this matter. I find that his conclusions are most consistent with the rest of the psychiatric medical evidence in the record.

Contrary to my finding on the credibility of Dr. Jarvis' conclusions, I find that Dr. Edwin Wolfgram's report and testimony is wholly without merit. I find that of the three psychiatric opinions, his is the least competent, credible and reliable. Dr. Wolfgram's apparent assertions that he is somewhat of an orthopedic/medical expert, as well as a vocational expert, undercuts the credibility that could otherwise be attributed to his psychiatric opinions. Further undercutting the credibility of his opinions in this case was his testimony that Claimant had absolutely no disability referable to her psychiatric condition (whether from her work injuries or pre-existing), despite therapy, medications, hospitalizations and missed work over ten years, and his opinion that major depression could actually be an asset to an individual's ability to function, not necessarily a hindrance or obstacle to employment. I should also mention that while I thought there were a number of objections contained in Dr. Wolfgram's deposition that should probably be sustained, it was difficult, if not impossible, to rule on the individual objections because of the amount of running objections, rephrasing of questions and discussions between the attorneys on the record. Therefore, rather than trying to rule on individual objections, given my overall finding that Dr. Wolfgram's testimony was not credible, I will simply not consider any of the findings and conclusions he offered in the matter as I reach my ultimate conclusions.

With regard to the opinions offered by Dr. Wayne Stillings, I find that they are not as competent and reliable as the opinions and conclusions described above from Dr. Jarvis. I find that his review of the medical records was not as thorough as Dr. Jarvis causing him to have to amend some of his opinions at the deposition when he was presented with the information he should have already found when he reviewed the treatment records. For example, Dr. Stillings apparently relied heavily on Claimant's assertion to him that her pain complaints really began in earnest after the 2003 injuries. Therefore, he diagnosed and rated a pain disorder solely attributable to the 2003 injuries in his report. However, during the deposition, when he was presented with the longstanding pain complaints in the pre-existing medical records he had allegedly already reviewed, he amended his opinion making some of the pain disorder and a portion of the rating, pre-existing the 2003 injuries.

However, even if Dr. Stillings' opinions were viewed in the most favorable light possible for Claimant, his ultimate opinions on medical causation and any disability associated with the 2003 injuries do not help Claimant meet her burden of proof in this case, because Dr. Stillings was unable to divide up or apportion the diagnoses and ratings of disability between the three 2003 work injuries. While he was able to divide up what amounts of disability were attributable to pre-existing conditions as opposed to the 2003 work injuries, Dr. Stillings quite clearly testified that he could not break down the diagnoses and disability between the three 2003 injuries because they were too close in time and "virtually impossible" to separate.

In *Goleman v. MCI Transporters*, 844 S.W.2d 463 (Mo. App. W.D. 1992) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003), the employee had two injuries to his low back, one in 1987 and one in 1988, while working for the same employer. The employee failed to produce medical evidence allocating the nature and extent of the disability he sustained attributable to each of the accidents. His doctor testified that it would be speculative for him to try to differentiate between the two injuries as far as being the cause of the employee's back problems. In light of this evidence, the Court held that it was the employee's burden of proof to show the percentage of permanent partial disability attributable to each accident, and only expert medical testimony would be sufficient to satisfy this burden. Since the employee did not provide such expert medical testimony, he failed to meet his burden of proof. The Court also considered and rejected the employee's argument that it did not matter if the disability was apportioned since both injuries were work related and from the same employer. Essentially, each separate case must be proven on its own merits.

Given the evidence in the record described above, Claimant has failed to meet her burden of proving the medical causation and nature and extent of the permanent partial disability attributable to her psychiatric condition referable specifically to the March 18, 2003 injury. Although Dr. Stillings testified that Claimant suffered a total of 55% permanent partial disability of the body as a whole referable to all three 2003 work accidents, he testified that he was unable to apportion that disability between the three accidents. If the medical expert in this case is unable to apportion that disability between the three accidents, then clearly it is beyond the realm of lay understanding and I am also then not able to make that apportionment in this case.

Therefore, I find Claimant did suffer an accident in the course and scope of her employment at work for Employer on March 18, 2003. Further, based on the credible opinions of Dr. Mannis, I find Claimant met her burden of proof to show that she developed neck and low back complaints and disability medically causally related to that accident on March 18, 2003. However, since Claimant was unable to present competent and credible psychiatric evidence on medical causation and the apportionment of disability between this accident and her subsequent accidents, I find that Claimant failed to meet her burden of proving any psychiatric condition or disability is related to the March 18, 2003 accident.

Issue 4: What is the appropriate average weekly wage and rates of compensation for this case?

Claimant's average weekly wage, and the applicable rates of compensation, must be calculated under **Mo. Rev. Stat. § 287.250 (2000)**. Case law dictates that in applying this section, you start with subsection 1 of § 287.250.1 and move numerically through the 7 numbered subsections until you find the one that applies to the facts of the employment situation at issue in the case.

I find that since wages were not fixed by the week, the month, or the year, the first three subsections are inapplicable to this case. Since the wages were apparently fixed by hour, subsection 4 could apply. However, there is no evidence in the record to show what her specific wages were for the 13 weeks prior to her date of injury, so it would be impossible to use

subsection 4 to calculate the average weekly wage and rates of compensation. Subsection 5 would not apply since Claimant was employed for more than two weeks. Subsection 6 would not apply since the hourly wage has been fixed. Therefore, I find that none of the subsections of Mo. Rev. Stat. § 287.250.1 can be used in calculating the rates in this case.

Instead, I will rely on **Mo. Rev. Stat. § 287.250.4 (2000)** for calculating the appropriate average weekly wage and the applicable rates of compensation in this case. Given the evidence in this case, I find that the average weekly wage cannot be fairly and justly determined by the formulas provided in the earlier subsections of the statute, and I further find that based on the unclear nature of what was actually paid, that I will go outside of those formulas for determining an average weekly wage and rates of compensation that is just to both parties.

By her own testimony, Claimant acknowledged that she was paid \$31.50 per hour at the time she suffered her three injuries at work in 2003. She also testified that she worked full time, at least 40 hours per week, and oftentimes some overtime as well. However, it would be pure speculation to try to determine at this point how much overtime she may or may not have worked leading up to the time of her March 18, 2003 injury. Therefore, I find that Claimant earned an average weekly wage of \$1,260.00 per week (\$31.50 x 40 hours per week) at the time of her accident on March 18, 2003.

Having calculated Claimant's average weekly wage at \$1,260.00, it is then appropriate under **Mo. Rev. Stat. § 287.170 & 287.190 (2000)** to multiply that average weekly wage by 66 2/3% to determine the appropriate rates of compensation for temporary total disability and permanent partial disability. Using this statutory formula, I find that the amounts exceed the statutory maximums for those rates and, so, the maximum rates of compensation in effect for the date of injury apply. I find that Claimant is entitled to a rate of \$649.32 for total disability benefits and \$340.12 for permanent partial disability benefits.

Issue 5: What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this injury?

Issue 6: What is the liability of the Second Injury Fund?

Given the nature of this Claim and the evidence submitted, these final two issues in this case can be effectively addressed at the same time.

Although the issue above regarding permanent disability is pled in the alternative, permanent partial or permanent total disability, I find that there is no competent, credible or reliable evidence in the record to support the proposition that Claimant was permanently and totally disabled based on the March 18, 2003 injury standing alone. Similarly, I find no competent, credible or reliable evidence in the record to suggest that Claimant is permanently and totally disabled based on the combination of the March 18, 2003 injury (without the two subsequent 2003 work injuries) and Claimant's alleged pre-existing disabilities. Therefore, I find that Claimant is not entitled to any permanent total disability benefits from the Second Injury Fund pursuant to this March 18, 2003 accident, and we are only left, then, with an allegation of

permanent partial disability benefits from the Second Injury Fund on account of this accident on March 18, 2003.

Under **Mo. Rev. Stat. § 287.190.6 (2000)**, “permanent partial disability’ means a disability that is permanent in nature and partial in degree...” The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert testimony may be required when there are complicated medical issues. *Id.* at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the Claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. *Fogelson v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

Pursuant to **Mo. Rev. Stat. § 287.220.1 (2000)**, if an employee has a pre-existing disability of such seriousness to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and if the pre-existing disability and the subsequent compensable injury each result in a minimum of 50 weeks of compensation for a body as a whole injury or 15% permanent partial disability to a major extremity, and if the combined disability is substantially greater than that which would have resulted from the last injury alone, then Employer is only responsible for payment for the disability from the last injury, that disability and any amount of pre-existing disability is subtracted from the total, and the Second Injury Fund shall pay Claimant compensation based on the balance left (or greater combination).

Specifically, Claimant must prove that there was a pre-existing permanent partial disability whether from a compensable injury or otherwise and also prove that the pre-existing disability was of such seriousness so as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed. *Karoutzos v. Treasurer of the State of Missouri*, 55 S.W.3d 493 (Mo. App. W.D. 2001) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). In determining liability for the Second Injury Fund, the nature and extent of the permanent partial pre-existing condition has to be proven by a reasonable degree of certainty. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo. App. E.D. 1999) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Expert opinion evidence is necessary to prove the extent of the pre-existing disability. *Id.* at 215. Additionally, Claimant must prove that the primary compensable injury combines with the pre-existing disability to create a substantially greater overall disability than the sum of the disabilities considered independently. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173 (Mo. App. E.D. 1995) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

The first step in the process is determining the amount of permanent partial disability Claimant sustained in connection with the primary neck and low back injury. Dr. Mannis, Claimant’s treating physician, opined that Claimant had 1-2% permanent partial disability of the body as a whole related to diagnoses of cervical, thoracic and lumbar strains. Medical treatment

records documented Claimant's complaints of pain in the low back and intermittent right leg problems. While Claimant did initially suffer strains to the neck and low back, it is clear from Claimant's testimony and the medical treatment records, that the low back condition was more significant than the cervical condition. Additionally, the MRI from May 19, 2003 showed a small central disc protrusion at L4-5. Although there are also ratings in evidence from Dr. Berkin and Dr. Stillings, for the reasons described above in the medical causation section, those ratings and opinions cannot be used in determining the permanent partial disability attributable to the March 18, 2003 accident. Claimant then settled her Claim against Employer by Stipulation for Compromise Settlement for \$17,006.00, or 12.5% permanent partial disability of the body as a whole referable to the lumbar spine.

Accordingly, based on the competent and credible evidence in the record, I find Claimant has 12.5% permanent partial disability of the body as a whole referable to the lumbar spine medically causally related to the March 18, 2003 accident that she sustained while working for Employer.

Since this is a permanent partial disability claim against the Second Injury Fund, and not a permanent total disability claim, the thresholds referenced above are applicable. Accordingly, I find that the body as a whole disability at the level of the lumbar spine meets the applicable threshold for Second Injury Fund benefits. The issue then becomes whether the pre-existing neck, low back and psychiatric injuries/conditions result in disability that meets the applicable threshold to trigger Second Injury Fund liability, and whether the disability is of such seriousness so as to constitute a hindrance or obstacle to employment, or to obtaining re-employment, if the employee becomes unemployed.

Having thoroughly considered all of the competent and credible evidence in the record, I find that Claimant has met her burden of proof to show an entitlement to a permanent partial disability award against the Second Injury Fund for the combination of the primary body as a whole referable to the low back disability and the pre-existing neck, low back and psychiatric disabilities.

Claimant described the prior injuries to her neck and low back, as well as her prior psychiatric condition, and testified to the effect those injuries/conditions had on her ability to work and the continuing problems and complaints she had as a result of them. The medical treatment records in evidence showed the various treatments that Claimant had received over the years to deal with these injuries/conditions. Although I had profound issues with Drs. Berkin and Stillings, as described above, regarding their opinions on medical causation and the ratings they assigned to the three 2003 work injuries, I do not find the same profound problems with regard to their opinions on pre-existing permanent partial disability in this case. With regard to the pre-existing disabilities referable to the neck, low back and psychiatric condition, I find that I can rely on Dr. Berkin and Dr. Stillings for their opinions on pre-existing permanent partial disability.

For Claimant's various pre-existing conditions, Dr. Berkin rated permanent partial disabilities of 15% of the body as a whole referable to the lumbosacral spine for the prior L5-S1 disc from 1984 treated with chemonucleolysis and 15% of the body as a whole referable to the cervical spine for the 1995 neck injury. Dr. Stillings testified that Claimant had pre-existing permanent partial disabilities of 25% of the body as a whole related to her bipolar I disorder, 5%

of the body as a whole related to her emotional abuse by her father and 5% of the body as a whole for her pain disorder. Both Dr. Berkin and Dr. Stillings opined that the pre-existing disabilities represented a hindrance or obstacle to employment and that the combination of all of the disabilities resulted in a significantly greater disability than the sum of the disabilities added together, so a loading factor should be applied.

On the basis of Claimant's testimony and the medical treatment records and medical opinions in evidence, I find that Claimant had pre-existing permanent partial disabilities of 12.5% of the body as a whole referable to the cervical spine, 12.5% of the body as a whole referable to the lumbar spine (L5-S1 disc) and 30% of the body as a whole referable to the psychiatric conditions. I further find that these pre-existing disabilities are of such seriousness so as to constitute a hindrance or obstacle to employment, or to obtaining re-employment, if the employee becomes unemployed.

As found above, the pre-existing disabilities to the neck, low back and psychiatric condition represented a hindrance or obstacle to employment, and the primary low back and pre-existing neck, low back and psychiatric disabilities all meet the applicable statutory threshold described above for permanent partial disability cases. Finally, consistent with Dr. Berkin's opinion on combination, I find that the pre-existing and primary injury disabilities combine to create disability that is significantly greater than the simple sum, and a loading factor should be applied. I, therefore, find that Claimant is entitled to receive 40.5 weeks of compensation from the Second Injury Fund.

In order to calculate the amount of this award from the Second Injury Fund, and consistent with Dr. Berkin's opinion that a loading factor should be assessed, I added together all of the qualifying disabilities and assessed a loading factor of 15% [12.5% of the body as a whole referable to the low back for the L4-5 disc (50 weeks) + 12.5% of the body as a whole referable to the neck (50 weeks) + 12.5% of the body as a whole referable to the low back for the L5-S1 disc (50 weeks) + 30% of the body as a whole referable to psychiatric conditions (120 weeks) = 270 total weeks of compensation times the 15% loading factor = 40.5 weeks from the Fund].

Accordingly, the Second Injury Fund is responsible for the payment of 40.5 weeks of permanent partial disability pursuant to this award, or \$13,774.86.

CONCLUSION:

Claimant sustained an accident on March 18, 2003 arising out of and in the course of her employment for Employer. The accident occurred when Claimant was using one of the heaviest cassettes for the treatment she was administering, when the cassette slipped and she developed neck and back pain when she caught the cassette before it hit the patient. Based on the credible opinions of Dr. Mannis, Claimant met her burden of proof to show that she developed neck and low back complaints and disability medically causally related to that accident on March 18, 2003. However, since Claimant was unable to present competent and credible psychiatric evidence on medical causation and the apportionment of disability between this accident and her subsequent accidents, Claimant failed to meet her burden of proving any psychiatric condition or disability is related to the March 18, 2003 accident. Claimant earned an average weekly wage of \$1,260.00 per week, entitling her to a rate of \$649.32 for total disability benefits and \$340.12 for permanent partial disability benefits.

Employer was responsible for 50 weeks of compensation (12.5% of the body as a whole referable to the lumbar spine) for permanent partial disability attributable to the March 18, 2003 injury. Claimant had pre-existing permanent partial disabilities of 12.5% of the body as a whole referable to the cervical spine, 12.5% of the body as a whole referable to the lumbar spine (L5-S1 disc) and 30% of the body as a whole referable to the psychiatric conditions. The pre-existing neck, low back and psychiatric disabilities were of such seriousness so as to constitute a hindrance or obstacle to employment or re-employment should employee become unemployed. Finally, the pre-existing and primary injury disabilities combine to create disability that is significantly greater than the simple sum, and a loading factor should be applied. The Second Injury Fund is to pay 40.5 weeks of permanent partial disability benefits, or \$13,774.86. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Robert S. Merlin and Ray B. Marglous, for necessary legal services.

Date: _____

Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation