

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

Injury No.: 09-020009

Employee: Diane Seldon
Employer: St. Louis Psychiatric Rehab. Center (Settled)
Insurer: C A R O (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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 21, 2014. The award and decision of Administrative Law Judge Joseph E. Denigan, issued April 21, 2014, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 16th day of September 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Diane Seldon Injury Number: 09-020009
Dependents: N/A Before the
Employer: St. Louis Psychiatric Rehab. Center (settled) **Division of Workers'
Compensation**
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Missouri Office of Administration/CARO (settled) Jefferson City, Missouri
Hearing Date: January 30, 2014 Checked by: JED

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 20, 2009
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:
Employee was pivoting on knee while changing rollers on a printing press.
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: mouth; psychiatric injury
14. Nature and extent of any permanent disability: 30% PPD of body referable to psychiatric disability; PTD
against SIF.
15. Compensation paid to-date for temporary disability: \$31,779.53
16. Value necessary medical aid paid to date by employer/insurer: \$52,639.90

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1400.00
- 19. Weekly compensation rate: \$708.46/\$404.66
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

120 weeks of PPD from Employer

(Settled)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$303.80) payable by SIF for 120 weeks beginning
October 1, 2010 and, thereafter, \$708.46, for Claimant's lifetime

Indeterminate

TOTAL:

INDETERMINATE

23. Future requirements awarded: see narrative Award.

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

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

Brian McChesney

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Diane Seldon	Injury No.: 09-020009
Dependents:	N/A	Before the
Employer:	St. Louis Psychiatric Rehab. Center (settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Missouri Office of Administration/CARO (settled)	Department of Labor and Industrial
Hearing Date:	January 30, 2014	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JED

This case involves three separate Claims for compensation. In each case, the primary injury claim against the Employer has been settled. Each case carries an allegation against the Second Injury Fund (“SIF”) which matters are the subject of this hearing. As stated, Employer/ Insurer previously settled its risk of liability. Both parties are represented by counsel. The single issue for trial in each case is the liability of the SIF. Claimant seeks permanent total disability benefits.

The testimony and exhibits in this record shall constitute the evidence in each Claim. Separate Awards issue on each Claim. These cases may be referred to as the first second and third cases respective of chronological occurrence.

FINDINGS OF FACT

Claimant, now age 64, is a registered nurse, last employed in October 2010 after almost 20 years as a charge nurse with Employer. Claimant was a licensed practical nurse for 14 years beforehand. Claimant sustained three injuries during a six month period from October 2008 to March 2009.

In the first case, Claimant was assaulted pursuant to her intervention in a patient-on-patient assault while she was assisting the patient victim. Claimant was stabbed in her left side with a pair of scissors. Her stab wound healed but she began treatment for post-traumatic stress disorder (“PTSD”) which continues through date of hearing. She remained off work until January 2009. Claimant returned to work in her position as a charge nurse. (This case is denied against the SIF. See below.)

In the second case, Claimant sustained a knee injury for which she received medical benefits and entered a settlement (Exhibit B). (This case is denied against the SIF. See below.)

In the third case, Claimant was, again, assaulted pursuant to her intervention in a patient-doctor assault in which she was punched in the mouth. She witnessed the assailant return to the doctor victim where the assault continued. Claimant reports that she simply broke down crying after the assailant was finally subdued. Claimant's physical injury was superficial but her continued treatment of PTSD was exacerbated by this incident. Claimant was diagnosed with PTSD with panic attacks and major depressive disorder. Dr. Packman placed Claimant off-work after the second assault in March 2009 from the accident date until February 1, 2010, or approximately ten months. Claimant returned to work on medical restriction against any position requiring direct patient contact. She attempted this accommodated employment until October 2010 when she retired.

Claimant's treatment for PTSD by Dr. Paul Packman for each assault case herein is undisputed in the evidentiary record. Again, Claimant's PTSD treatment was ongoing at the time of the March 2009 (second) assault and continues with Dr. Packman as of this trial date.

Medical Experts

Claimant offered the narrative report and deposition of Dr. Jay Liss, a psychiatrist as Exhibit D and [Group] Exhibit E (which is an abridged copy of the deposition and CV). Dr. Liss examined Claimant and reviewed the medical record. He reviewed the opinions of Employer's experts. He understood Claimant sustained two assault injuries and a knee injury and the parallel WC claims documents. He diagnosed post-traumatic stress disorder. He further understood Claimant had no psychiatric or psychological treatment prior to the first assault in October 2008.

Dr. Liss affirmed Claimant's ongoing treatment by periodic psychiatric examination, psychological therapy and medication. Dr. Liss emphasized that this regimen is intended to control symptoms of PTSD; there is no cure for the disease. He also explained that the disease was permanent and progressive. He assigned a GAF 30 representing severe ongoing symptoms. He assigned 75 percent PPD of the body referable to the March 2009 assault. Finally, Dr. Liss stated that the combination of the two psychiatric disabilities would exceed the simple sum of each taken alone. He found Claimant unemployable and permanently and totally disabled.

The SIF offered the deposition of Dr. Paul M. Packman, the treating psychiatrist, as Exhibit *Roman Numeral II*. Dr. Packman continues to treat Claimant currently on a periodic basis parallel to her psychological therapy and medication therapy. His notes reveal Claimant is essentially unchanged. Notes include ongoing panic attacks and her uneasiness around other people in general.

Dr. Packman declared Claimant is able to work in the nursing environment except "any psychiatric facility involving direct inpatient care." (Exhibit I, *letter dated September 16, 2011*.) These positions were not detailed. He further admitted Claimant had psychiatric disability accompanied by various psychiatric symptoms relative to her PTSD. Dr. Packman stated the PTSD was permanent and disabling. Dr. Packman purported to assign a single PPD percentage for "the work related injuries of October 23, 2008 and March 20, 2009" at 15 percent.

Vocational Opinion

Claimant offered the report and deposition of Delores Gonzales as Exhibits F and G. Ms. Gonzales is a licensed vocational rehabilitation counselor. She examined Claimant and reviewed the medical record. She relied on a diagnosis of PTSD with panic attacks; PTSD with associated anxiety, depression and compulsions; major depressive disorder. Ms. Gonzales concluded that Claimant's psychiatric disabilities prevent her from performing either her prior nursing position or any job in the open labor market. She stated Claimant exhibits a significant sense of insecurity and loss of psychological functioning. She stated that Claimant would not present well in an interview setting and that she was not capable of competitive work in the open labor market. Ms. Gonzales did not expect prospective employers to hire claimant over other candidates who do not have psychiatric impairments. Finally, Ms. Gonzalez stated Claimant's severely reduced residual functional capacity prevented re-employment.

The SIF offered the deposition of Mr. James England, licensed counselor, as Exhibit *Roman Numeral I*. Mr. England reviewed the medical record. He embraced Dr. Packman's diagnosis of PTSD and his restriction against no patient contact in nursing environments. Mr. England noted Claimant's education and experience on which he predicated employability. Although noting the nursing degree as affording flexibility in employments, he did not give examples of jobs that permitted Dr. Packman's restriction against psychiatric inpatient contact and her 20 years emphasis in psychiatric nursing (in a public facility).

Primary Injury Settlements

Claimant settled the primary assault injury of October 2008 for 17.5 percent PPD of the body referable to psychiatric injury. Claimant settled the assault injury of March 2009 for 30 percent PPD of the body referable to psychiatric injury. Each settlement indicates "open" medical treatment. Claimant continues to treat psychiatric symptoms. Claimant settled the January 2009 injury for 10 percent PPD of the left knee.

RULINGS OF LAW

Liability of the SIF

In determining SIF liability, the employee must demonstrate: "(1) the claimant has a pre-existing permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment; (2) the percentage of disability attributable to the pre-existing disability equals a minimum of 50 weeks of compensation for a body as a whole injury or 15 percent for a major extremity injury; (3) the combination of the pre-existing disability and the disability resulting from the last injury equals a minimum of 50 weeks compensation for a body as a whole or 15 percent for a major extremity; and (4) the combined disability is substantially greater than the

disability that would have resulted from the last injury alone.” Treas. of the State of Missouri v. Witte, 414 S.W.3d 455, 462 (Mo. banc 2013).¹

SIF liability is premised on synergistic combination of the primary and pre-existing disabilities. Synergy is the concept in which the current PPD and the pre-existing PPD are found, in combination, to create a “substantially greater” disability, or an increased overall disability, and for which the employer should not be held liable. Section 287.220.1 RSMo (2000).

First Case

Claimant presented substantial evidence of her assault by a patient who stabbed her. Dr. Packman’s notes reflect an understanding of this type of accident and his diagnoses of PTSD with panic attacks and major depressive disorder. In notes January 29, 2009, Claimant’s mood is described as fair and she was not irritable. As of February 16, 2009 her appetite was decreasing towards normal, her feelings of hopelessness was less and she feels less helpless and that life is worth living. Claimant still had nightmares and insomnia. She has low interest in interacting with people. Claimant had improved and returned to work at the same job. Claimant was off work 3 and 5/7ths weeks.

While neither expert expressly enunciated a PPD percentage attribution, Claimant’s testimony and her primary settlement (Exhibit A) provide sufficient basis to find 17.5 percent PPD. This is also a hindrance an obstacle to employment which is easily discerned from the permanent clinical signs and the ongoing treatment. However, there is no allegation of any disability pre-existing this October 2008 injury and, thus, no SIF liability may be found.

Second Case

Claimant testified she injured her left knee at work. She underwent conservative treatment and returned to work. Employer incurred medical expenses in the amount of \$2,550.65. Claimant had no lost time as a result of her knee injury. Claimant’s testimony and her primary settlement (Exhibit B) provide sufficient basis to find 10 percent PPD.

The allegation of pre-existing disability is limited to the October 2008 assault which is found to have a PPD of 17.5 percent which meets the threshold and is found to have been a hindrance or obstacle to employment. However, nothing in the record suggests Claimant’s knee injury combined synergistically with the pre-existing psychiatric injury. No SIF liability may be found.

¹ The analysis in Witte is lucid and illustrative of proper statutory construction. It appears the decades of practice, in which the primary injury was held to the statutory thresholds, is the result of a broader interpretation of the “fourth sentence” of 287.220.1 which excuses the misplacement of the 50-week/15% parenthetical and, thus, avoids the allowance of “below threshold injuries” in determining the amount of SIF liability. Such limitation is consistent with the 1993 legislative intent to limit recoveries against the SIF by imposing thresholds on alleged disabilities. This broader interpretation was applied by the cases overruled in Witte.

Third Case

The SIF placed liability into issue broadly, placing accident, injury and causation in issue. However, nothing in the record suggests accident and injury was actually disputed in the evidence. According to Employer's authorized treating psychiatrist's notes, Dr. Packman was treating Claimant's PTSD when the second assault occurred. Regarding causation, SIF's own expert acknowledged separate assault events, each of which resulted in permanent injury. The events and assault dates appear in the treatment record and are further described as an aggravation of the existing PTSD status and was a disruption in ongoing treatment that was intended to continue indefinitely even as Claimant had returned to work from the October 2008 assault.

After the March 2009 assault, Claimant was off work for approximately 44 and 6/7ths weeks, or until February 1, 2010. Claimant returned to work with the unusual restriction of *no patient contact*. This continued until October 2010 when Claimant elected early retirement. She testified she had hoped to work until age 67.

Claimant presented substantial evidence of her inability to work and her condition of permanent total disability. Her evidence of ongoing treatment is undisputed. Claimant's diagnosed psychiatric disabilities are easily reconciled with Claimant's work history and current condition. In this case, Dr. Liss' testimony is most easily reconciled with Claimant's testimony, work record and early retirement. While Dr. Packman treated Claimant throughout this time, his ultimate opinions fail to integrate his own "open medical" treatment beginning with the first assault and the inability of Claimant to recover and function normally both at work and home. Claimant may not have been able to work with psychiatric patients, but more important is her overall dysfunction that Ms. Gonzalez articulated. It seems reasonable that Claimant overcome these elements before alternative nursing assignments become probative of her employability. Claimant's experts were more persuasive than those of the SIF.

The reported injury herein was very serious and involved complex diagnoses and treatment. Claimant reluctantly returned to work with a *no patient-contact* restriction. The Claimant's pre-existing disability was also complex and Claimant returned to work successfully albeit with ongoing medical treatment. Dr. Liss found the March assault injury to have resulted in 75 percent PPD. While he did not expressly enunciate a PPD percentage for the October 2008 case, it may be reasonably inferred that he was aware of the Claim and reviewed administrative documents. Thus, the evidence supports a finding of PPD attribution for 17.5 percent pre-existing psychiatric PPD and a 75 percent current psychiatric PPD. This is consistent with his ultimate finding of permanent total disability.

Dr. Liss testified that Claimant's condition of permanent total disability was the result of a combination between the assault in October 2008 and that of March 2009. The significance of the combination is not easily demonstrated but is supported by Claimant's testimony and expert opinion. This combination of disabilities results in overwhelming deficits of basic skills necessary to interaction with other people. Claimant continues to have difficulty functioning at home as well as at work.

Based upon the combination of the primary work injury and the pre-existing PPD, Claimant is found to be permanently and totally disabled. The undisputed treatment record, psychiatric disabilities and vocational profile, are sufficient to predicate permanent total disability. Claimant's expert, Dr. Liss, rendered a persuasive, cogent overall narrative opinion that Claimant was permanently and totally disabled and unable to work. Separately, Ms. Gonzalez testified that insecurity and a lack of psychological functioning would prevent Claimant from finding, or sustaining, work in any competitive employment in the open labor market.

Conclusion

Accordingly, in this third case, identified by Injury Number 09-020009, on the basis of the substantial and competent evidence contained within the whole record, Claimant is found to have sustained 30 percent PPD of the body referable to psychiatric disability as a result of the primary injury. In addition, Claimant is found to have sustained permanent total disability as a result of the combination of the primary injury with the pre-existing disabilities proven herein. The SIF is liable for the differential between the PTD rate and the PPD rate for the PPD installment period and, thereafter, for Claimant's lifetime, or until Claimant is no longer permanently and totally disabled. Section 287.200 RSMo (Cum.Supp. 2009).

Date: _____

Made by: _____

JOSEPH E. DENIGAN
Administrative Law Judge