

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

Injury No.: 07-093138

Employee: Tammy L. Sickmiller
Employer: Timberland Forest Products, Inc.
Insurer: Missouri Wood Industry Insurance Trust
c/o Cannon Cochran Management Service
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and briefs, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge (ALJ) dated November 3, 2011.

Preliminaries

On September 28, 2007, employee injured her back at work while picking up a wooden pallet. Employee proceeded to final hearing of her claims against employer and the Second Injury Fund.

The ALJ awarded permanent partial disability against employer for employee's low back injury and enhanced permanent partial disability against the Second Injury Fund. Employee appealed to the Commission alleging that the ALJ erred in denying her claim for permanent total disability benefits. Employee alleges that she is either permanently totally disabled as a result of the last injury alone, or as a result of the last injury combining with her preexisting disabilities. Employee also alleges that the ALJ erred in denying her claims for past medical expenses, future medical care, and costs under § 287.560 RSMo.

Findings of Fact

On September 28, 2007, employee injured her back at work while picking up a wooden pallet. Employee was diagnosed with a lumbosacral strain and abdominal wall strain.

Employee was off work for approximately one month following the work injury. Employee returned to work following her release from treatment, but continued to have severe pain in her back and had trouble performing her work duties. Employee was forced to miss multiple days of work due to her ongoing back pain. On the advice of her treating health care professional, Dr. Rakestraw, employee left her job with employer on June 26, 2008. Employee has not worked since that date.

Following her work separation, employee had an MRI of her lumbar spine. The MRI obtained on July 2, 2008, revealed mild degenerative bulging, a posterior annular margin tear at L4-5, and mild facet joint hypertrophy at L3-4, L4-5, and L5-S1.

¹ Statutory references are to the Revised Statutes of Missouri 2007 unless otherwise indicated.

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Employee received two epidural steroid injections to her lower back, but they did not help relieve her pain. Employee stated that she still experiences sharp pains in her lower back and “[m]ost of the time [her] legs go numb.” Employee currently uses a prescribed cane to walk. Employee did not have any problems with her back prior to the September 28, 2007, injury. Employee is currently taking Skelaxin, Carisoprodol, and Tramadol for her back pain. She has gained approximately 145 pounds since the primary injury. She believes that she has gained this weight because she cannot walk or sit for extended periods of time.

At the time of the primary injury employee suffered from significant preexisting psychological disability. Employee’s preexisting psychological disability stems from being raised in a dysfunctional family environment, subsequently experiencing significant marital problems with her first two husbands, and losing custody of her children. Employee testified that she began having suicidal thoughts in 2000 or 2001 after she lost custody of her children.

Employee also suffered from preexisting bilateral carpal tunnel syndrome. She had a surgical release for her right wrist, but not for her left wrist. Employee testified that her hands continue to give her difficulty, particularly in cold weather. She indicated that her hands “freeze up.”

Employee testified that the primary injury to her back caused a lot of marital problems with her third husband. They are now divorced. Employee stated that her back injury prevented her from cooking, completing chores outside, and “ruined [her] marriage sexually.” Employee stated that she is unable to do things for herself due to her lower back pain. Employee experiences crying spells on and off every day. She did not experience these crying spells prior to the primary injury. Employee has been hospitalized three or four times since the primary injury due to suicidal thoughts. Employee testified that her suicidal thoughts stem from her hatred of having to rely on other people to do things for her.

Employee testified that all of the medical treatment she received from St. John’s Hospital and the various doctors to treat her lumbar spine was the product of the primary injury on September 28, 2007. Employee further stated that the medical bills identified in employee’s Exhibit EEE were the result of those visits. The medical bills related to employee’s lower back treatment from St. John’s Hospital amount to \$7,501.00.

On April 1, 2009, employee saw Dr. Bennoch for the purpose of an independent medical evaluation. Dr. Bennoch opined in his report that as a result of the primary injury employee needed further treatment for her back, including a neurosurgical evaluation and aggressive pain management. Because Dr. Bennoch believed employee needed further treatment, he did not provide a disability rating for her low back at that time. Dr. Bennoch did, however, provide ratings for employee’s other disabilities. Dr. Bennoch opined that employee had a total of 20% impairment of the body as a whole attributable to severe depression, of which 15% he apportioned to preexisting depression, and 5% he apportioned to worsening depression secondary to the work-related back injury. Dr. Bennoch also assigned 20% impairment to the right upper extremity rated at the right wrist and hand, and 10% impairment to the left upper extremity rated at the left wrist and hand due to preexisting bilateral carpal tunnel syndrome.

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In addition to Dr. Bennoch's opinion regarding the degree of impairment resulting from the preexisting bilateral carpal tunnel syndrome, Dr. Mutchler, a treating physician, provided a rating. Dr. Mutchler opined that employee suffered a permanent partial impairment of 13% of the whole person as a result of her right upper extremity injury.

On November 19, 2009, employer sent employee to Dr. Olive. Dr. Olive initially concluded that employee's back pain was unrelated to the work injury. However, upon further consideration, Dr. Olive opined that the work injury was indeed related and causing the back pain.

Dr. Lennard saw employee on May 6, 2010, for the purpose of an independent medical evaluation. Dr. Lennard diagnosed major depression and lumbar strain. Dr. Lennard opined that employee had reached maximum medical improvement following the work injury and assigned a rating of 10% permanent partial disability of the body as a whole attributable to her lumbar spine, of which he attributed 5% to the work injury and 5% to non-work-related degenerative changes. Dr. Lennard opined that employee needed further treatment for her depression.

Dr. Bennoch examined employee for a second time on August 18, 2010. Dr. Bennoch diagnosed a traumatic low back injury, which resulted in an L5-S1 nerve impingement. Dr. Bennoch opined in his report that if employee receives no further therapy, she is at maximum medical improvement. He opined that the primary injury of September 28, 2007, was the prevailing factor in causing 40% impairment to the body as a whole referable to the lumbar spine. With respect to employee's psychological disability, Dr. Bennoch referred to his opinions listed in his April 2009 report (listed above).

Dr. Bennoch opined that the combination of employee's impairments creates a substantially greater impairment than the total of each separate injury/illness and a loading factor should be added. Dr. Bennoch went on to state that in his opinion, employee was temporarily totally disabled from the time of the injury up until the time of the August 18, 2010, exam. Finally, Dr. Bennoch opined that employee is permanently and totally disabled secondary to the primary injury alone.

Dr. Franks, a clinical psychologist, saw employee on two separate occasions and issued reports after each visit. Dr. Franks first saw employee on June 5, 2009. He diagnosed employee with major depressive disorder, which had significantly deteriorated since the September 28, 2007, work injury. After his initial evaluation, Dr. Franks assigned a 20% impairment rating for employee's psychological disability, "with 10% attributable to her injury and 10% attributable to preexisting factors."

Dr. Franks saw employee again on November 29, 2010. At the second exam, Dr. Franks noted that employee was highly agitated, tearful, and emotional. Dr. Franks altered his initial ratings slightly and opined that employee had a total psychological impairment of 25%, with 15% caused by the work injury and 10% preexisting. Dr. Franks testified that the prevailing factor in causing employee to initially develop depression and personality disorder preexisted the work injury, but that the work injury was the prevailing factor in causing those conditions to deteriorate. Dr. Franks testified that employee's three

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psychologically-related hospitalizations in 2008 were necessary to cure and relieve the effects of the work injury. However, Dr. Franks conceded that employee's preexisting psychological disability contributed to those hospitalizations as well.

The medical records and corresponding medical bills submitted by employee reflect that she incurred medical expenses of \$14,923.05 as a result of her psychiatric hospitalization with Jefferson Memorial Hospital, and \$11,229.05 as a result of her two psychiatric hospitalizations with Poplar Bluff Regional Medical Center.

Dr. Franks did not feel that employee was permanently totally disabled purely from a psychological perspective, but admitted that he would not expect an employer to hire and retain someone who has crying spells on a daily basis.

Another psychologist, Dr. Halfaker, reviewed employee's records, met with employee, and provided a comprehensive psychological assessment of employee's condition. Dr. Halfaker testified that the major area of disagreement between him and Dr. Franks relates to the influence of the September 28, 2007, work injury on employee's psychological condition. Dr. Halfaker disagrees with Dr. Franks' assessment that employee's major depressive disorder was worsened by the work injury. Dr. Halfaker believes it is not so much that the work injury worsens employee's depression, but that her psychological problems (major depression disorder and borderline personality disorder) interfere with her medical condition. Dr. Halfaker believes that her preexisting psychological condition worsens her ability to recover from and deal with her low back injury. Dr. Halfaker did not feel that employee's psychological condition was materially different from before the work accident. Dr. Halfaker agreed that employee does have some chronic pain, but her psychological factors predispose her to over-reporting or magnifying her symptoms.

Dr. Halfaker provided the following in his report:

In this case, it is thought to be obvious that there is significant preexisting psychological disability associated with her history of depression, anxiety, and personality disorder. Most, if not all, of that psychological disability appears to carry forward into the post 9/28/2007 injury period and interferes with her ability to recover from that injury. As such, I would apportion very little to no permanent partial disability of the person as a whole as arising from the 9/28/2007 injury in isolation. It continues to be my opinion that whatever degree of psychological disability is determined to be present it would be 95%-99% preexistent to the work related injury at question in this case.

Dr. Halfaker further provided, however, that "[he] could see how the 9/28/2007 injury in this case could serve as a contributing factor for the need for psychotherapy, but would view it as being 5% or less related to the need [due to the] her chronic, ongoing, long-term history of a need for psychotherapy that existed well before the work-injury of 9/28/2007...."

Vocational expert, Mr. England, evaluated employee on March 24, 2011. Mr. England opined that employee was permanently and totally disabled, based upon her psychological

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disability alone. Mr. England opined that “[h]er psychiatric difficulties certainly appear to be based on a combination of preexisting problems as well as those she has exhibited since the injury.” Mr. England did not opine as to whether employee would be permanently and totally disabled based upon her prior psychological disability in combination with physical disabilities from the work injury.

Discussion

Medical Causation

Section 287.020.6 RSMo defines “total disability” as the “inability to return to any employment....”

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

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

We find, as did the ALJ, that employee is permanently and totally disabled and unable to compete in the open labor market. However, we disagree with the ALJ’s conclusions as to the causation of employee’s permanent and total disability.

The ALJ concluded that the primary injury did not cause employee any additional psychological disability and that employee’s permanent total disability is the result of her preexisting psychological disabilities deteriorating after the primary injury due to circumstances unrelated to the work accident. These findings are not supported by the competent and substantial evidence.

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

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) the employer’s liability is considered in isolation – ‘the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability’; (2) Next, the degree or percentage of the employee’s disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the

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combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund.

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

With respect to the last injury, neither party has challenged the ALJ's finding that employee sustained 12.5% permanent partial disability of the body as a whole referable to the lumbar spine. We affirm the ALJ's finding as to the nature and extent of employee's permanent and partial disability referable to the lumbar spine.

The primary issue on appeal concerns whether the last injury caused any additional psychological disability. Employee argues that the last injury did cause additional psychological disability and that employee is permanently and totally disabled as a result of the physical and psychological disabilities caused by the last injury alone, or as a result of her physical and psychological disabilities from the last injury combining with her preexisting disabilities.

Employee's testimony alone undoubtedly illustrates that the primary injury caused a significant amount of additional psychological disability. The back injury prevented employee from doing the activities she was previously able to do and, in turn, caused a significant amount of stress on her and her marriage. This lack of activity also played a role in her gaining approximately 145 pounds after the work injury. Employee's back pain and associated lack of physical activity contribute to employee's daily crying spells and her overall state of depression.

In addition to employee's testimony, nearly every expert opined that the work injury caused at least some additional psychological disability. Dr. Franks opined that the primary injury caused as much as 15% additional psychological impairment. Dr. Halfaker, on the other hand, believed that the primary injury had much less of an impact on employee's overall psychological impairment, but still opined that it could have contributed to as much as 5% of her need for additional psychotherapy. Dr. Bennoch opined that the majority of employee's psychological impairment was preexisting, but that the primary injury contributed to an additional 5%. Lastly, Mr. England opined that employee's preexisting psychological problems combine with those she has exhibited since the injury to render employee unemployable in the open labor market. Mr. England did not specify that the psychological problems employee has exhibited since the injury were caused by the work injury, but because there are no medical causation opinions to the contrary, we conclude that his opinion does, in fact, attribute said psychological problems to the work injury.

Dr. Bennoch is the only expert who opined that employee is permanently and totally disabled solely as a result of the last injury. Based upon our review of the records, we do not find this opinion persuasive. We find, based upon the medical records, medical and vocational expert reports, medical and vocational expert testimony, employee's testimony, and the record as a whole that as a result of the primary injury employee sustained 12.5% permanent partial disability of the body as a whole referable to the lumbar spine, and 10% permanent partial disability of the body as a whole referable to increased psychological

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problems. In addition, we find that the physical and psychological disabilities caused by the primary injury combine with her preexisting physical and psychological disabilities to render employee permanently and totally disabled.

We find that employee reached maximum medical improvement on August 18, 2010 (the date of Dr. Bennoch's second exam).

Past Medical Expenses and Future Medical Care

In addition to employee's claim for permanent total disability benefits, she also seeks reimbursement for past medical expenses and future medical care.

Section 287.140.1 RSMo provides that "in addition to all other compensation paid to the employee ..., the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury."

The Court in *Martin v. Mid-America Farm Lines*, 769 S.W.2d 105 (Mo. 1989) held that when a claimant credibly testifies that his/her visits to hospitals and various doctors were the product of a work injury and provides medical bills identified as being related to and the product of said injury, and when the bills relate to the professional services rendered as shown by the medical records in evidence, a sufficient factual basis exists for the Commission to award compensation. *Id.* at 111-12. The Court noted, however, that the employer may challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. *Id.*

In this case, we find that employee "credibly detailed the mechanism of [her] injury and provided credible evidence of [her] medical treatment to cure and relieve the effects of those injuries." In addition, we find that employee provided medical bills reflecting the treatment received and provided credible testimony that the medical bills do, in fact, relate to and are the product of the work-related injury. We further find that employer failed to show that the medical expenses incurred were not related to the injury in question.

For the foregoing reasons, we find that employee shall be awarded reimbursement for the past medical expenses reasonably necessary to cure and relieve her from the effects of the injury. Based upon the medical bills submitted by employee (without objection), we find that employee shall be awarded and employer shall be liable for past medical expenses in the amount of \$33,653.10.²

As provided above, employee also requested future medical care to cure and relieve her from the effects of the injury. In order to be awarded future medical care, the employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo. App. 1984). However, conclusive evidence is not required. It is sufficient if

² \$33,653.10 = (\$7,501 (St. John's Hospital) + \$14,923.05 (Jefferson Memorial Hospital) + \$11,229.05 (Poplar Bluff Regional Medical Center)).

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employee shows by reasonable probability that he or she is in need of additional medical treatment. *Bowers v. Highland Dairy Co.*, 132 S.W.3d 260, 270 (Mo. App. 2004).

We find, based upon the record as a whole, that employee met her burden of showing by reasonable probability that she will need ongoing psychological care to cure and relieve her from the effects of the primary injury. Therefore, we find that employee shall be awarded and employer shall provide such future psychological care reasonably required to cure and relieve her from the effects of the primary injury.

Costs

Employee claims that she should be awarded costs under § 287.560 RSMo. That section provides, in relevant part, as follows:

[I]f the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

We exercise our discretion under § 287.560 RSMo, with great caution and only where the case for costs is clear and the offense egregious. See *Nolan v. Degussa Admixtures, Inc.*, 276 S.W.3d 332, 335 (Mo. App. 2009).

We find that employee failed to meet its burden of proving that employer defended this claim without reasonable ground. Costs should only be invoked where the employer offers “absolutely no ground, reasonable or otherwise,” for refusing benefits clearly owed to a claimant because his injury was indisputably work-related. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. banc 2003). In this case, employer refused employee benefits because it believed, based upon reasonable ground, that the treatment employee requested was not related to the work injury. Employer’s refusal to provide benefits was not egregious and, therefore, we deny employee’s claim for costs under § 287.560 RSMo.

Award

We modify the award of the ALJ. Employee is permanently and totally disabled due to the combination of the disability from her September 28, 2007, work injury with her preexisting disabilities.

Beginning August 19, 2010, and continuing for 90 weeks³, the Second Injury Fund shall pay to employee the difference between employee’s PTD rate and her PPD rate. Because both employee’s PTD rate and PPD rate are \$270.11, there is no difference for the Second Injury Fund to cover for the 90 weeks attributable to the primary injury. However, after said 90 weeks, the Second Injury Fund shall be liable for employee’s weekly PTD benefit of \$270.11 for the remainder of employee’s life, or until modified by law.

³ The work injury resulted in permanent partial disabilities of 50 weeks (lumbar spine) and 40 weeks (additional psychological disability). Therefore the total PPD attributable to the work injury is 90 weeks.

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In addition, employee is awarded and employer shall be liable for past medical expenses of \$33,653.10. Employer shall also provide to employee future psychological care reasonably required to cure and relieve her from the effects of the injury.

Employee's claim for costs under § 287.560 RSMo is denied.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued November 3, 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 ALJ's allowance of attorney's fee as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 29th day of August 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Tammy L. Sickmiller

Injury No. 07-093138

Dependents: Not Applicable

Employer: Timberland Forest Products, Inc.

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

Insurer: Missouri Wood Industry Insurance Trust
c/o Cannon Cochran Management Service

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

Hearing Date: September 7, 2011

Checked by: VRM/ps

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: September 28, 2007.
5. State location where accident occurred or occupational disease was contracted: West Plains, Howell County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was picking up a wood pallet when she felt pain in her abdomen and back.
12. Did accident or occupational disease cause death? No. Date of death? Not applicable.
13. Part(s) of body injured by accident or occupational disease: Low back.

- 14. Nature and extent of any permanent disability: Permanent Partial Disability.
- 15. Compensation paid to-date for temporary disability: \$26,200.67.
- 16. Value necessary medical aid paid to date by employer/insurer? \$10,544.72.
- 17. Value necessary medical aid not furnished by employer/insurer? None.
- 18. Employee's average weekly wages: \$405.16.
- 19. Weekly compensation rate: \$270.11.
- 20. Method wages computation: Agreement.

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

From Employer/Insurer:

12.5 percent permanent partial disability to the body as a whole
attributable to the back, equaling 50 weeks at the rate of \$270.11 =

\$13,505.50.

- 22. Second Injury Fund liability:

21.75 weeks of enhanced permanent partial disability x \$270.11 =

\$ 5,874.89

TOTAL: \$19,380.39

- 23. Future requirements awarded: None.

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

FINDINGS OF FACT AND RULINGS OF LAW:

Employee: Tammy L. Sickmiller

Injury No. 07-093138

Dependents: Not Applicable

Employer: Timberland Forest Products, Inc.

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

Insurer: Missouri Wood Industry Insurance Trust
c/o Cannon Cochran Management Service

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

Hearing Date: September 7, 2011

Checked by: VRM/ps

INTRODUCTION

The undersigned Administrative Law Judge convened the Final Hearing on September 7, 2011, in West Plains, Missouri. Claimant appeared with her attorney, Randy Alberhasky. Patricia Musick appeared on behalf of Timberland Forest Products, Inc., and its insurer, Missouri Wood Industry Insurance Trust, in care of Cannon Cochran Management Service (hereinafter referenced collectively as Employer). Assistant Attorney General Cara Harris represented the Treasurer of Missouri as Custodian of the Second Injury Fund (the Second Injury Fund). The parties stipulated to the following facts.

STIPULATIONS

1. The parties stipulated to a compensation rate of \$270.11 for the purposes of temporary total, permanent partial and permanent total disability compensation.
2. The parties stipulated that medical expenses in the amount of \$10,544.72 had been paid by the employer and insurer.
3. The parties stipulated that temporary total disability compensation had been paid in the amount of \$26,200.67.
4. The parties stipulated that venue was proper in Howell County, that Claimant was a covered employee of the employer at the time of the accident, that a compensable accident occurred on September 28, 2007, that the employer was operating subject to the Missouri Workers' Compensation Law and fully insured and that notice was timely given and the claim timely filed.
5. The parties also stipulated the following were the sole issues for resolution:

ISSUES

- A. What is the nature and extent of any permanent disability?
- B. Are the employer and insurer liable for unpaid medical expenses?

- C. Is the employee is entitled to future medical care?
- D. Is the employee is entitled to costs for the first hearing?
- E. Does the Second Injury Fund have any liability?

EXHIBITS

Temporary/Partial Hearing Exhibits:

The following exhibits were offered and received into evidence at the Temporary Hearing and remain a part of this record, unless otherwise noted.

Records:

- A. General Surgery Clinic - OMC
- B. Southern Missouri Community Health Center
- C. St. John's Health Center-Springfield
- D. West Plains Surgical Associates (also marked as Dr. Olive deposition exhibit "A")
- E. Ozarks Medical Center
- F. Southern MO Community Health Center
- E. Poplar Bluff Reg. Medical Center
- F. West Plains Imaging
- G. Ozarks Medical Center
- H. Ozarks Neurosurgical Assoc.
- I. OMC Neuroscience Center, 2 pages, Nerve Conduction Study
- L. SW Physical Medicine & Rehabilitation
- M. Physical Therapy Specialists Clinic, 20 pages, uncertified (**Excluded**)
- N. Springfield Physical Medicine
- O. Southern MO Orthopaedic
- P. Lake Orthopedic Group
- Q. OMC Behavioral Healthcare
- R. West Plains Family Clinic
- S. Ferrell Duncan Clinic
- T. University of Missouri Hospital Clinics
- U. Smith Glynn Callaway Clinic

Reports:

- V. Dr. Rakestraw Report to Employer, Work Status, 2/13/2008 thru 8/12/2008
- W. Dr. Shane Bennoch, M.D., CV & Reports

Miscellaneous:

- X. Claim
- Y. Answer, Employer/Insurer
- Z. Answer, Second Injury Fund of Missouri
- AA – LL & 3 Correspondence
- NN. Attorney Contract
- OO. Costs
- 1. Employer's Wage Statement
- 2. Medical Report – Dr. Jordan

4. Deposition – Dr. Olive
5. Employer’s 52-Week Wage Statement

Employee’s Exhibits – Final Hearing

Employee offered the following additional exhibits at the Final Hearing. These were received into evidence unless otherwise noted:

Correspondence:

- SS. Medical records disclosure letter dated 3/22/2010
- TT. Medical records disclosure letter dated 4/6/2010
- UU. Medical records disclosure letter dated 4/7/2010
- VV. Medical records disclosure letter dated 6/14/2010
- WW. RSMo. § 287.210 letter dated 8/27/2010
- XX. Notice of expert testimony at hearing letter dated 10/5/2010
- YY. RSMo. § 287.210 letter dated 12/21/2010

Records:

- ZZ. Jefferson Regional Medical Center
- AAA. Poplar Bluff Regional Medical Center
- BBB. St. John’s Hospital

Medical Bills:

CCC. Jefferson Regional Medical Center	\$14,923.05	
DDD. Poplar Bluff Regional Medical Center,	\$11,229.05	
EEE. St. John’s Hospital,	\$ 7,501.00	Total: \$33,653.10

Psychological Reports:

- FFF. Dr. Kent Franks report 10/28/2009 and CV (Also marked as LLL.)
- GGG. Dr. Kent Franks report 11/29/2010
- HHH. Tom Nixon, LCSW 1/11/2010 Medical Questionnaire Concerning the Nature and Severity of an Individual’s Mental Impairment (**Excluded**)

Depositions:

- III. Deposition of Dr. Shane Bennoch 1/31/2011
- JJJ. Deposition of James M. England, Jr.
- KKK. Deposition of Dr. Dale Halfaker

Employer’s Exhibits – Final Hearing

Employer/Insurer offered the following additional exhibits at the Final Hearing which were received into evidence:

Depositions:

6. Tammy Sickmiller 2/17/2010
7. Tammy Sickmiller 9/30/10
8. Dr. Dale Halfaker
9. James England

10. Dr. Ted Lennard

Medical Records:

- 11. Dr. Jeffrey Mutchler
- 12. Dr. Jeffrey Woodward
- 13. Ina Bates
- 14. Dr. Earl Solon
- 15. Dr. Gregory Rakestraw
- 16. Poplar Bluff Regional Medical Center
- 17. Ozarks Medical Center
- 18. Behavioral Health Care
- 19. Southern Missouri Community Health Center

The Second Injury Fund offered no exhibits.

FINDINGS OF FACT

Tammy Sickmiller is a high school graduate in her early forties. She is a thrice divorced mother of three, but she lost custody of her children long before the last work accident. She has had a life riddled with abuse, first as a child, and later in her marriages. She has held jobs mostly as a laborer or in production type work. She worked more the five years for Employer's sawmill, but on September 28, 2007, she hurt her back picking up a wooden pallet. She was temporarily and totally disabled for about a month. She returned to work and continued working about eight more months. On the advice of her treating health professional, she left work on June 26, 2008. She has not worked since.

The detailed facts of this physical injury are in the Temporary/Partial Award issued by the Division of Workers' Compensation on April 14, 2010. The Temporary/Partial Award directed Employer/Insurer to provide medical treatment for Claimant's back. The back injury is now at maximum medical improvement and has been rated by physicians for Employer and Claimant. Claimant was treated conservatively. She is not a surgical candidate.

The previous Temporary/Partial Award made no provision for ongoing psychological treatment based on a finding that there was no credible medical or professional testimony tying Claimant's depression or other psychological condition to the work accident. It is uncontroverted that Claimant suffered from preexisting psychological problems. Now at Final Hearing, Claimant seeks an Award of permanent and total disability from either Employer or the Second Injury Fund. Claimant alleges she is unable to work due to the residual disability to her back and her psychological condition(s).

Two facts are abundantly clear: 1) Claimant currently is incapable of working in the open labor market, and 2) the back disability, alone, does not prevent her from working. But, determining the liability of the parties is a most difficult task in this case due to the multitude of conflicting opinions. For instance, Dr. Franks, a psychologist, testified live at the Final Hearing on Claimant's behalf. He points the finger solely at Employer, concluding that the work-related back injury caused the exacerbation of Claimant's psychological state to such a degree that she

no longer can work. The Second Injury Fund agrees with Dr. Franks as his testimony, if believed, would alleviate the Fund of any liability. Employer has tendered the opinion of Dr. Halfaker, also a psychologist, who testified by deposition that the prevailing factor in Claimant's psychological impairment is not the work accident. A vocational expert, Mr. England, believes Claimant is totally disabled from the psychological impairment, and not as result of the physical injury or any combination of disabilities.

The Medical Evidence

A lumbar MRI obtained on July 2, 2008, revealed mild degenerative bulging and posterior annular margin tear at L4-5, and mild L3-4, L4-5, and L5-S1 facet joint hypertrophy, the latter associated with right S1 lateral recess encroachment. Employer sought the opinion of Dr. Paul Olive, an orthopedic surgeon. He initially concluded that Claimant's back pain was unrelated to the work injury. Upon further consideration, Dr. Olive opined that the work injury was indeed related and causing pain. Employer authorized additional treatment with Dr. Olive. Neither Dr. Olive, nor any other spine surgeons who have seen Claimant, suggest that she has any medical condition for which surgery would be appropriate. Medical records and credible expert opinions indicate, and I find, that the degree of pain Claimant states she is experiencing is out of proportion to the type of injury she sustained.

Dr. Ted Lennard examined Claimant on May 6, 2010. He noted that Claimant had back pain, memory loss, excessive sleeping, fatigue, anxiety, depression and thoughts of suicide. She was on several medications for depression and pain. She was overweight and seldom made contact, crying throughout the exam. Her affect was depressed and she scored an 80 percent on the disability index, which is crippling. Her back depression score was "extremely" depressed and she scored "severe" anxiety. Dr. Lennard diagnosed Ms. Sickmiller with major depression and lumbar strain. He assigned a 10 percent permanent disability rating for her back, of which he attributed 5 percent to the work injury and 5 percent to non-work-related degenerative changes.

Dr. Lennard assigned no functional limitations for the back injury, and concluded that it was unlikely any form of treatment, including medications, would alter Claimant's subjective complaints of pain. He said in deposition on May 19, 2011, that Claimant was in need of psychiatric care. He had not reviewed any records or depositions of Dr. Halfaker or Dr. Franks, and deferred to psychological opinions.

Dr. Bennoch

Dr. Shane Bennoch assigned a 15 percent permanent partial impairment due to preexisting depression, 20 percent of the right upper extremity at the wrist for preexisting right carpal tunnel syndrome, and 10 percent of the left upper extremity at the wrist for preexisting left carpal tunnel syndrome. He said these preexisting disabilities posed a hindrance or obstacle to employment. He said if the Administrative Law Judge found that Claimant was not permanently and totally disabled, she would still have an additive effect from the preexisting disabilities.

Dr. Bennoch assigned a 40 percent permanent partial impairment to the whole body rated at the lumbar spine as a result of the 2007 work accident. He said the 2007 work accident was the

prevailing factor in causing that 40 percent impairment. Dr. Bennoch believed Claimant had a separate impairment based on the worsening depression from her accident, although he performed no psychological testing as such testing is outside his area of expertise. He did not believe Claimant's physical condition was going to improve. He believed Claimant was at maximum medical improvement. Dr. Bennoch believed Claimant could benefit from chronic pain medications such as Duragesic patches, as well as the use of a cane for balance.

Dr. Bennoch further opined that Claimant was incapable of working in the open labor market based on the disabilities stemming from the last injury, alone. He said if "you could wave a magic wand and remove her back pain" she still had depression. Dr. Bennoch did not believe Claimant was malingering based on his physical examination, although he had noted some exaggeration during his examination of Claimant on April 1, 2009. He was convinced, however, that Claimant has true low back pain. But when it came to the issue of whether Claimant's chronic pain was made worse by her depression, Dr. Bennoch responded:

- A. The question I had tried to answer was, "Does the depression make her pain worse?" It may. You just can't tease that out.

(Ex. III, p. 53).

Having reviewed all of the evidence in this case, I find that the degree of disability to the low back lies somewhere in between the ratings of Dr. Lennard and Dr. Bennoch. The evidence certainly does not substantiate a finding that Claimant is permanently and totally disabled from the back injury, alone. This is substantiated from the objective medical evidence. I find that Claimant has a 12.5 percent permanent partial disability to the whole body attributable to the lumbar spine from the primary or last injury.

Preexisting Wrist/Hand Injuries

In her September 30, 2010 deposition, Claimant testified that she suffered bilateral carpal tunnel syndrome as a result of her work for Marathon, a previous employer. She had a surgical release on the left wrist but not on the right. She also was diagnosed with Reflex Sympathetic Dystrophy and had a trigger finger release on the right ring and right middle fingers. Claimant testified that now her hands continue to give her difficulty, particularly in cold weather. She said her hands "freeze up." (Ex. 7, p. 18). Although Claimant performed full-time repetitive work for Employer, she did so with the aid of braces. As of the date of a September 30, 2010 deposition, Claimant was taking no prescription pain medicine. She took other medications for her psychological condition, her underactive thyroid, and for sleep.

In addition to Dr. Bennoch's opinion regarding the degree of disability resulting from the preexisting bilateral carpal tunnel (noted above), Dr. Jefferey J. Mutchler, a treating physician, provided a rating (Ex. H). Dr. Mutchler opined Claimant suffered a permanent partial disability of 13 percent to the whole person as a result of her right upper extremity injury. Given all of the circumstances, I accept Dr. Bennoch's opinion as to the degree of disability. Thus, only the right arm disability meets statutory threshold for imposing enhanced permanent partial disability. I accept Dr. Bennoch's opinion that the preexisting disability to the right upper extremity (equal to

20 percent at the 175-week level) was sufficiently severe to pose a hindrance or obstacle to employment or reemployment. Such disability combines synergistically with any permanent partial disability from the last work injury in 2007.

The Psychologists' Opinions

A. Dr. Kent Franks

Dr. Franks, a clinical psychologist, testified live at the Final Hearing. Dr. Franks originally saw the Claimant on June 5, 2009, and issued his first report five months afterwards on October 28, 2009. He saw Claimant the second time on August 19, 2010, and issued his second report three months later on November 29, 2010. As noted below, Dr. Franks dramatically changed his opinion between these two reports.

According to Dr. Franks, Claimant's parents separated when she was 11 or 12. They had fought often and were physically and verbally abusive to Claimant. Claimant constantly fought with her siblings. She has no relationship with any of them. She reported sexual abuse to Dr. Franks by both her father's brother-in-law, and a maternal uncle. In addition to the physical, verbal, and sexual abuse, Claimant also reported a family history of substance abuse by her mother and older brothers. Claimant reported that she personally had a multi-year period of drinking in both her twenties and her early thirties, and experimented with marijuana at age 35.

Claimant reported to Dr. Franks that her first husband left her for another woman. Her second husband physically abused her son, and the children were removed from the home. Claimant does not have a close relationship with any of her three children. Claimant's second husband was unfaithful and left her. Her third husband cheated on her, per the Claimant, and as such, they were separated and living apart. As of the date of the Final Hearing, Claimant had divorced her third husband. Dr. Franks said the family should be a source of support. The fact that Claimant has no familial support contributes to her feelings of isolation and depression.

Dr. Franks diagnosed Claimant with a major depressive disorder, borderline personality disorder, and both medical and psychosocial stressors. In his final report, Dr. Franks added that Claimant suffered from a pain disorder. He believed the psychological factors had been contributing to Claimant's chronic pain since 2007. He did not believe Claimant was malingering. At the Final Hearing, Dr. Franks opined that Claimant was not totally and permanently disabled from a psychological standpoint. Rather, Claimant had a 25 percent permanent partial disability to the body attributable to psychological problems, with 15 percent of that amount attributable to the last work injury. He believed Claimant's preexisting major depression and personality disorder had the potential to be a hindrance or obstacle to her employer before this last work accident "to some degree." He believed that even before the last accident, Claimant required a job where she had minimal social demands and interaction with the public. Dr. Franks further indicated that her injury while with Employer was the prevailing factor in causing the Claimant's pain disorder, and an "aggravating factor" in her major depressive disorder.

Even though Dr. Franks opined at the Final Hearing and in his second report that it was the last accident which was the prevailing factor causing an exacerbation of Claimant's psychological

problems, he admitted he had no employment history for Claimant for large chunks of time. He admitted that in 2000 Claimant had a major depressive episode. He conceded that when Claimant was hospitalized in 2008, she reported *two* previous psychiatric hospital admissions. He conceded that when Claimant was hospitalized at Jefferson Memorial from August 28, 2008 through September 4, 2008, she made no pain complaints until September 3, 2008, the day before she left the facility.

On cross-examination, Dr. Franks acknowledged that in his initial report of October 28, 2009 he did not find the work injury was the prevailing factor in Claimant's psychological conditions. In fact, causation-related opinions were conspicuously absent in his original report. But he admitted that at the time of his initial report, he believed the causation of Claimant's present psychological conditions was "fairly equal." Dr. Franks then conceded that even now it was hard to weigh what was the cause of Claimant's depression:

- Q. And throughout the medical records it's –I mean, it's really – you know, I've reviewed the same medical records you have. You'd agree with me that there is just as much evidence of discussion about her depression being caused by abusive marital relations as there is about pain complaints?
- A. Well, it's hard to try and weigh, because the records are so voluminous.
- Q. Right.
- A. But certainly there is a prominent discussion. I wouldn't want to try and say one was more than the other.

Asked what changed between his original and second evaluations that would account for his causation opinion and new diagnosis of pain disorder, Dr. Franks responded that after the second evaluation he felt he knew Claimant better, and believed that the pain was going to follow a long-term chronic course and he did not believe Claimant had a pain disorder of this magnitude in the past. Dr. Franks said Claimant's psychiatric presentation is worse now than it was prior to September 28, 2007, which he attributes to the September 28, 2007 injury. Dr. Franks disagreed with Dr. Halfaker's opinion (detailed below). Dr. Franks did not believe Claimant's preexisting depression was causing her not to recover from her physical injury.¹

B. Dr. Dale Halfaker

Dr. Halfaker stated in his deposition that the Claimant was suffering from a somatoform disorder, whereby her psychological problems are playing a role in the onset, maintenance, and exacerbation of the physical symptoms. He described the somatoform disorder as causing Claimant's physical problems to appear "magnified beyond that which might be expected based on the objective indicators of injury." (Ex. 8, p. 11).

¹ Although Dr. Franks believed Claimant exhibited better emotional control between his two evaluations of her, Claimant appeared to this Administrative Law Judge to be much more emotionally distraught than at the Hardship Hearing. Claimant openly cried throughout the entire Final Hearing that lasted several hours.

Dr. Halfaker agreed with Dr. Franks that Claimant suffered from major depressive disorder, which he found to be recurrent. He agreed that Claimant had a personality disorder that includes significant borderline features, although he also found present dependent and self-defeating features. Dr. Halfaker disagreed with Dr. Franks' opinions as they related to the influence of the September 28, 2007 work injury.

My recall of Dr. Franks' report is that he felt that her major depressive disorder was worsened by the work injury, and I think, ultimately, my opinion is that it's not so much that the work injury worsens her depression, but the clear indications in the records that I reviewed suggest some significant chronic, ongoing psychological factors that I think the causality goes the other direction, that her psychological problems, her major depression, especially her borderline personality disorder features, interfere with her medical condition.

I'm trying to say it simply. So instead of the injury worsening her depression, I think her depression and personality disorder worsen her ability to recover from and deal with her injury.

(Ex. 8, p. 13).

Dr. Halfaker noted that Claimant's history included physical and sexual abuse in her family, spousal abuse, and prior significant psychotherapy and medication management by a psychiatrist. He said she had fairly consistent diagnoses of depression, anxiety, and something related to personality disorder well in advance of the September 28, 2007 injury. Dr. Halfaker also found through various testing that Claimant was malingering. He said the MMPI-2 profile, in particular, was invalid on the basis of over reporting or symptom magnification. "So that ultimately, really, there's confluence in the data to suggest symptom magnification." (Ex. 8, p. 17). Dr. Halfaker believed Dr. Franks' failure to deal with the symptom magnification or over-reporting seemed to render Dr. Franks' evaluation incomplete (Ex. 8, p 15). Dr. Halfaker agreed that Claimant does have chronic pain, but her psychological factors predispose her to over-reporting or magnifying her symptoms. Dr. Halfaker agreed that the 2007 work injury was "a factor" in Claimant's current psychological disability, but only about three to five percent of all factors. He ultimately concluded that the workplace injury was not the prevailing factor giving rise to the psychological diagnosis that he identified.

Dr. Halfaker did not believe that Claimant's level of psychological disability had changed significantly from before as opposed to after the work injury in 2007. He said that while there was a bit of fluctuation in her emotional condition prior to the injury (Ex. 8 p. 26-27), there were times when Claimant functioned better or needed more or less treatment. While Dr. Halfaker believed Claimant needed ongoing therapy and potentially psychiatric hospitalization, he suggested that it would be in the same pattern as before the work accident in 2007.

Medical Records Relating to Mental Health Issues

A. Records before September 27, 2007

Claimant was under psychological care, and had exhibited mental health problems well before the September 2007 work accident. Most telling is a medical record entry made by Dr. Mutchler on May 17, 1999, after Claimant had undergone surgery for a repetitive trauma injury. Claimant insisted on seeing Dr. Mutchler on an “emergency basis,” complaining that she could not work and could not open her hand unless someone physically did it for her. Dr. Mutchler examined Claimant at that time and found “absolutely no mechanical, structural or neurologic reason for this.” (Ex. 3). Dr. Mutchler noted that Claimant breaks down, is extremely tearful, and has done poorly given the conditions she has had. He recommended at that time that Claimant have an MMPI “to determine the emotional components and subconscious, unconscious, psychological contribution to her poor response to treatment.” (Ex. 3). This conduct, documented by Dr. Mutchler in 1999, appears substantially similar to what Claimant has exhibited after the September 28, 2007 work accident; i.e.: her degree of physical complaint is not substantiated by the objective medical evidence.

Claimant underwent psychological evaluation at Ozarks Medical Center Behavioral Health on January 26, 2000, more than seven years *prior to* the work injury. At that time, Claimant indicated that she had been having problems with depression for about two years, which would have had its onset in 1998. Claimant was diagnosed with dysthymic disorder and personality disorder. She began treating with Dr. Earl Solon, a psychiatrist, who diagnosed major depressive disorder and prescribed medication.

On February 24, 2000, Dr. Solon commented that Claimant’s depression had worsened. Inpatient care was discussed. Claimant continued therapy with Dr. Solon and therapist Ina Bates through April 2000. Her complaints focused on her family situation, especially her relationship with her husband. At this time, Claimant’s diagnoses were: major depressive disorder, recurrent, severe without psychotic features. Dr. Solon recommended hospitalization for inpatient therapy on April 5, 2000.

Dr. Hugh G. Harris, who had been consulted to determine whether Claimant needed a repeat carpal tunnel release, noted in his records that Claimant had an “extensive neuropsychiatric history.” (Ex. 3, entry of July 11, 2001).

B. Records after September 27, 2008

On June 10, 2008, Dr. Rakestraw noted that Claimant had multiple signs and symptoms of depression but was unwilling to take medication. This was near the time that Claimant last worked for Employer.

A Request for Service form dated July 11, 2008, indicates that Claimant’s presented the following problems, none of which even suggest work relatedness:

- Marital problems
- Tearful – Thyroid difficulty
- Married several – past panic attacks
- Husband talks about how attractive neighbor women are
- Off work – obsessive compulsive tendency
- Suggested marital counseling
- Gave crisis hotline number
- Depressed
- Attempted to kill self in past
- Past nightmares
- Fear of heights, spiders
- Anger
- Physical and sexual abuse as a kid or an adult
- No energy
-

Then on July 15, 2008, Claimant was seen at Ozarks Medical Center complaining of depression and suicidal thoughts. In an “Application to Court for 96 Hour Detention, Evaluation and Treatment/Rehabilitation,” the admitting physician stated that Claimant was taking narcotics for chronic pain, was very depressed, feeling hopeless, and had thoughts of ending her life. Although there are some references to back pain, a thorough review of her mental health treatment records clearly indicate that Claimant’s chief complaints were domestic problems. As Claimant reported on July 15, 2008, her husband “comes and goes as he pleases and I start thinking he’s cheating.” (Ex. I, 7/15/2008).

Claimant was admitted to the hospital, and then transferred to Poplar Bluff Medical Center for inpatient psychiatric treatment. Claimant treated with Dr. Raymond Knowles, who noted a significant history of previous psychiatric treatment, including three years of which were court ordered and an additional two years of Claimant’s own volition. Claimant focused on her relationship with her husband, the lack of marital intimacy, and Claimant’s jealousy and suspicion of her husband’s unfaithfulness. Dr. Knowles indicated that marital counseling would be appropriate, as well as Claimant’s acceptance of the fact that her marriage failed with the absence of marital intimacy. Dr. Knowles clearly related Claimant’s psychological condition to her marital problems and concern that if her marriage dissolves, she has no financial support.

Plan:

This unfortunate woman can hardly be helped in the absence of the husbands [sic] abnormalities being confirmed and, if so, his accepting treatment. Marital counseling would appear to be a sine qua non of her treatment. She will be given antidepressants and tranquilizers but she needs to accept the inevitability of the fact that her marriage has failed with the absence of marital intimacy. Her problem is that she has no place to go, no income and is dependent only on the hopefully positive outcome of her Worker’s Compensation situation.

(Ex. 16, 7/16/2008). The above entry demonstrates that Claimant’s psychological condition is related to her marital discourse. Her concern about her lack of support if her marriage dissolves could be an incentive for the malingering and over-reporting found by Dr. Halfaker.

Dr. Knowles also discussed in the discharge note Claimant's marital problems, but never links Claimant's psychological problems to her work injury. On August 17, 2008, Claimant was seen again at Ozarks Medical Center complaining of major depression and suicidal ideations. Claimant's complaints again primarily focused on her deteriorating relationship with her husband. Claimant was transferred to Jefferson City and hospitalized for inpatient psychological treatment for one week with a possible diagnosis of bipolar disorder.

Claimant subsequently began treating on an inpatient basis at Ozarks Medical Center Behavioral Health for her psychological problems. A September 22, 2008 note indicates that Claimant's clinical presentation was "highly consistent with previous episodes of care which met diagnostic criteria for Major Depressive Disorder, Severe. She cries easily, can't sleep, has obsessive thoughts about her husband sleeping [around], she has occasional thoughts of suicide and expresses feelings of hopelessness and helplessness." Claimant was referred for psychiatric inpatient treatment.

Claimant continued treatment with Behavioral Healthcare, receiving numerous therapy sessions with her treatment focused primarily on her family situation. For example, on October 21, 2008, the focal issue for the session is noted as "the status of her relationship with her husband." On November 17, 2008, the focal issue is noted as Claimant's "relationship with her spouse and her future plans." Claimant's complaints continued to focus on her relationship with her husband, especially in regard to marital intimacy, sexuality, abuse and jealousy (*See, generally*, Ex. I). There are only rare references in the treatment notes to a work injury.

Vocational Opinion

Vocational expert James England evaluated Claimant at the request of Employer on March 24, 2011. He testified by deposition on April 25, 2011. Mr. England believed Claimant's primary impediment to working was her psychological disability. "I just don't think that's she's going to be able to work because of the degree of the psychiatric impairment." (Ex. 9, p. 16). He opined that even in the absence of any physical problems, Claimant was totally disabled due to her psychiatric condition. He believed from a purely physical standpoint, Claimant was capable of sedentary work, if psychological issues were excluded. Mr. England agreed that Claimant had a preexisting psychological condition that could be a hindrance to work because she seemed to gravitate more toward jobs that were less socially involved. But, he readily agreed on cross-examination that based on his review of the medical records and Claimant's presentation when he examined her, that Claimant mental condition since September 2007 was getting worse, no matter what the cause.

Credibility Findings

I find Dr. Halfaker's opinion on causation to be more credible and persuasive than that of Dr. Franks. Having reviewed all of the medical evidence, I find that that Claimant's psychological problems existed long before the work accident in September 2007, but have deteriorated since that time due to circumstances unrelated to the work accident. I further accept the vocational opinion of Mr. England as credible, that Claimant is not capable of working on the open labor

market due to her psychological or psychiatric condition, alone, without consideration of any physical disability.

CONCLUSIONS OF LAW

A claimant in a workers' compensation case bears the burden of proving all the essential elements of the claim, including causation. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. Ct. App. 2002), *overruled on other grounds Hampton v. Big Boy Steel Erectors*, 121 S.W.3d 220 (Mo. banc 2003). The test for medical causation is provided in §287.020.3 RSMo Cum Supp 2007², which states that “[a]n injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability.” §287.020.3(1) RSMo, The “prevailing factor” is “defined to be the primary factor, in relation to any other factor.” §287.020.3(1) RSMo. In this case, Claimant must prove not only that she suffers a permanent disability, but that the September 28, 2007 work accident was the prevailing or primary factor in relation to any other factor in causing her disability. For the reasons discussed below, Claimant has demonstrated that she has sustained a permanent *partial* disability as a result of the work accident on September 28, 2007, relating to her back injury. She has failed to prove that her work accident is the prevailing factor in causing her psychological condition.

Claimant's Physical Condition

Claimant sustained a work injury to her low back that resulted in a permanent partial disability. Having reviewed all of the medical records and opinions of the expert witnesses, I have found and conclude that Claimant sustained a 12.5 percent permanent partial disability to the low back as a result of her work accident while lifting a pallet on September 28, 2007. Employer is liable for \$13,505.50 in permanent partial disability (50 week x \$270.11 per week).

Claimant's Psychological Condition.

The record contains abundant evidence establishing that Claimant's psychological problems are unrelated to and preexist the work injury. Dr. Franks initially found the Claimant to have a 20 percent permanent partial disability, apportioning one-half of that amount to the workplace injury and one-half to preexisting factors (Ex. FFF, p. 24). He acknowledged at Final Hearing that he did not find the workplace injury was the prevailing cause in the Claimant's psychological condition in his report of October 28, 2009. Then, in his report of November 29, 2010, Dr. Franks added a new diagnosis of “pain disorder associated with both psychological factors and a general medical condition,” and also increased his rating from his prior report. He opined that Claimant now has a 25 percent permanent partial disability to the body as a whole, with 15 percent being attributed to the workplace injury, and 10 percent attributed to preexisting factors (Ex. GGG, p. 14.) But even Dr. Franks admitted at the hearing that it was hard to evaluate how much of Claimant's psychological condition was attributable to domestic circumstances and how much was attributable to the work accident.

² Because this injury occurred on September 28, 2007, all future statutory references are to the law as it existed on that date.

The evidence establishes that Claimant suffered major depression and other mental or psychological problems years before the work injury. Such problems required extensive psychiatric treatment in the past and continue to need treatment now. Having reviewed the multitude of medical records, as well as all of the evidence, I find and conclude that neither the work accident, nor Employer's purported delay in treating Claimant's back injury, was the prevailing factor in Claimant's post-accident psychological condition or disability. In short, Employer has no liability for the psychological condition.

Future Medical Treatment

Based on Dr. Lennard's opinion, I find and conclude that there is no medical treatment that would cure or relieve the effects of Claimant's work injury. Future medical treatment is denied.

Past Medical Treatment

I conclude that Claimant has failed to prove that Employer is liable for any past medical bills. Employer provided reasonable treatment for the back. Employer is not liable for any other treatment. I deny reimbursement of Claimant's past medical bills.

Costs

Employee has iterated her request for costs, including attorney fees, due to Employer's purported denial of additional treatment without reasonable grounds, pursuant to § 287.560 RSMo. Claimant has tendered no new evidence. For the same reasons as I denied costs in the Temporary/Partial Award, I again deny costs here. I fail to find credible evidence that Employer without good reason denied any treatment to Claimant.

I specifically reject Claimant's contention that had she not been denied treatment recommended by Dr. Jordan within a month of her injury, she would be working today. Claimant contends that because she was denied treatment for her physical injuries for more than two years, lost her job, and then was left to dwell in depression and chronic pain without treatment, she has been rendered unemployable. The problem with that alleged scenario is that Employer *did not callously* ignore Claimant.

Claimant received initial authorized medical treatment for her back and potential hernia. She went back to work for nearly eight months. She then was referred to Dr. Olive, a board certified orthopedic specialist. Once Dr. Olive realized that he had missed a significant fact in his records review, he altered his opinion on causation. Thereafter, Employer immediately provided additional treatment for the back. But, as found in the original Temporary/Partial Award, there is no credible evidence that Claimant's psychological condition was the fault of Employer.

Second Injury Fund Liability

The Second Injury Fund's liability is based on the four-part test set forth in *APAC Kansas, Inc. v. Smith*, 227 S.W.3d 1, 3 (Mo. App. W.D. 2007):

We first consider the liability of the employer in isolation by determining the degree of the employee's disability due to the last injury. Then the degree of the employee's disability attributable to all injuries is determined; followed by a deduction of the degree of preexisting injury from the total disability following the last injury. The balance of liability is assigned to the Second Injury Fund. In order for the preexisting disability to be eligible for Second Injury Fund liability, the preexisting disability must be of such seriousness that it constituted a "hindrance or obstacle to employment or to obtaining reemployment." § 287.220.1. [case citations omitted].

The Second Injury Fund is liable for Permanent Total Disability if the disability from the last work injury and the preexisting disabilities together result in total disability.

[E]xcept that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund"....

§ 287.220.1 RSMo.

Mr. England's vocational opinion was that Claimant was permanently and totally disabled due to her psychological condition, alone. His review of the evidence was that Claimant's physical conditions did not preclude Claimant from working. Moreover, he believed Claimant's mental health had deteriorated. Dr. Franks' opinion is contradictory in part, but at the Final Hearing he did testify that Claimant's psychological condition had become worse since the work accident. He found Claimant had only a 10 percent permanent partial disability existing at the time of the last accident. Dr. Bennoch found that Claimant's preexisting psychological disability was 15 percent. Dr. Halfaker did not believe the condition was worse, rather he believed Claimant went through episodes of needing more or less treatment, including hospitalizations.

Claimant is not permanently and totally disabled as a result of the combination of preexisting permanent partial disabilities and the disability from the last accident. Claimant is permanently and totally disabled because of her deteriorating psychological condition that is unrelated to the work accident. The Second Injury Fund's liability is fixed as of the last injury. It has no liability for worsening of prior conditions. *Lawrence v. Joplin R-VIII Sch. Dist.*, 834 S.W.2d 789, 793 (Mo. App. S.D. 1992).

To recover enhanced permanent partial disability from the Second Injury Fund, Claimant must demonstrate that she had a preexisting permanent partial disability that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15 percent for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo. App. E.D. 2008). To

recover permanent partial disability benefits from the Second Injury Fund, she must prove that the last injury, combined with her preexisting permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant met this burden.

I find and conclude that Claimant had a preexisting 15 percent permanent partial disability to the body as a whole attributable to psychological conditions, including depression. This meets the statutory threshold. Although there is some evidence to the contrary, based on the whole record, including evidence that Claimant narrowed her jobs to those where she did not have to interact with people, I find that this preexisting disability did pose a hindrance or obstacle to employment or reemployment. I further find and conclude that the preexisting psychological disability combined synergistically with the primary injury.

As I previously noted in the above Findings, Claimant had preexisting physical disability to her right arm (20 percent at the wrist). This also meets the statutory threshold. Accepting Dr. Bennoch's opinion, this degree of disability combines synergistically with the physical disability from the last accident.

I further find that the combination of the preexisting disabilities with the disability from the last accident should be enhanced by 15 percent. Therefore, using a 15 percent loading factor, the Second Injury Fund is liable for \$5,874.89. Its liability is calculated as follows:

15% x 400 = 60 (preexisting psychological disability)
20% x 175 = 35 weeks (preexisting right wrist due to CTS, trigger finger, & RSD)
12.5% x 400 = 50 weeks (primary injury to low back)
Simple sum = 145 week x 15% load = 21.75 weeks
21.75 weeks x \$270.11 = \$5,874.89.

In summary, Claimant is entitled to \$13,505.50 from Employer, and \$5,874.89 from the Second Injury Fund. Of these amounts, Claimant's attorney Randy Alberhasky is entitled to a lien of 25 percent as a reasonable fee for necessary legal services rendered to Claimant.

By: /s/Victorine R. Mahon
Victorine R. Mahon
Administrative Law Judge
Division of Worker's Compensation