

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

Injury No.: 06-134271

Employee: Shirley (Bowen) Smith  
Employer: Dannie Gilder, Inc. (Settled)  
Insurer: Commerce & Industry Insurance Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modification set forth below.

**Discussion**

*Permanent total disability*

The administrative law judge considered the issue whether the Second Injury Fund is liable for permanent total disability benefits. That inquiry required the administrative law judge to apply § 287.220.1 RSMo and determine (1) whether employee suffered a permanent partial disability as a result of the last compensable injury, and (2) whether that disability combined with employee's prior permanent partial disability to result in total and permanent disability.

The administrative law judge found employee's expert opinion evidence from Dr. David Volarich and Susan Shea to be lacking persuasive force, and found that employee's disability from the last injury does not combine with her prior permanent partially disabling conditions to result in total and permanent disability. The administrative law judge then went a step further, however, and found that employee is permanently and totally disabled due to "the subsequent substantial deterioration of her physical and psychiatric condition after [the primary injury] due to the diagnosis of and treatment for breast cancer." *Award*, page 20. In rendering this affirmative factual finding, the administrative law judge expressly relied, in part, upon his own lay opinion that employee's breast cancer caused her to suffer the medical condition of depression.

We defer to the administrative law judge's assessment of the weight to be given to the expert opinions; for this reason we will not disturb his conclusion that the Second Injury Fund is not liable for permanent total disability benefits. But we must disclaim his additional findings regarding alternative reasons why employee may be unable to compete in the

Employee: Shirley (Bowen) Smith

- 2 -

open labor market.<sup>1</sup> We simply find that employee's permanent partial disability resulting from the last injury does not combine with employee's prior disability to result in total and permanent disability, and conclude therefore that the Second Injury Fund is not liable for permanent total disability benefits.

Enhanced permanent partial disability

The parties agree, in their briefs, that if the Commission approves the administrative law judge's award of permanent partial disability benefits against the Second Injury Fund, the award must be modified in order to conform to the decision in *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, 414 S.W.3d 455 (Mo. 2013), wherein the Supreme Court of Missouri held that, to trigger Second Injury Fund liability for permanent partial disability benefits, only one of an employee's preexisting permanent partially disabling conditions must meet the applicable threshold under § 287.220.1, and that thereafter all of an employee's permanent partially disabling conditions (including those below threshold) are to be included when calculating Second Injury Fund liability. *Id.* at 466-67.

Here, the administrative law judge left out of his calculations employee's permanent partial disability resulting from the primary injury referable to the left elbow, as well as employee's preexisting permanent partial disability referable to the left elbow. We defer to (and hereby adopt) the administrative law judge's ratings as to these and employee's other permanent partially disabling conditions, as well as his finding that a 20% load factor is appropriate to account for the synergistic combination of these conditions.

Accordingly, we recalculate Second Injury Fund liability for permanent partial disability benefits as follows: 47.25 weeks (27% permanent partial disability of the right wrist/hand at the 175-week level) + 10.5 weeks (5% of the left elbow at the 210-week level) + 21 weeks (10% of the left elbow) + 160 weeks (40% of the body as a whole referable to the spine) = 238.75 x the 20% load factor = 47.75 weeks of enhanced permanent partial disability. At the stipulated permanent partial disability rate of \$376.55, the Second Injury Fund is liable for \$17,980.26 in permanent partial disability benefits.

**Conclusion**

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability. Employee is entitled to, and the Second Injury Fund is hereby ordered to pay, \$17,980.26 in permanent partial disability benefits.

The award and decision of Administrative Law Judge Lawrence C. Kasten, issued November 13, 2013, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

---

<sup>1</sup> See, e.g., *Abt v. Miss. Lime Co.*, 388 S.W.3d 571 (Mo. App. 2012), where the Commission affirmed and adopted an award rejecting expert opinion evidence regarding the cause of an employee's permanent total disability in favor of a theory that the employee was permanently and totally disabled owing to subsequent deterioration. In reversing the Commission, the *Abt* court noted that "[r]ather than choosing one of the medical opinions, the Commission made a finding that is not consistent with any medical opinion in the record." *Id.* at 581.

Employee: Shirley (Bowen) Smith

- 3 -

The Commission approves and affirms the administrative law judge's allowance of an 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 26<sup>th</sup> day of August 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

---

John J. Larsen, Jr., Chairman

---

James G. Avery, Jr., Member

---

Curtis E. Chick, Jr., Member

Attest:

---

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Shirley Bowen Smith Injury No. 06-134271  
Dependents: N/A  
Employer: Dannie Gilder, Inc. (settled)  
Additional Party: Second Injury Fund  
Insurer: Commerce & Industry Insurance Company (settled)  
Appearances: Joe Rice, attorney for the employee.  
Jon Lintner, attorney for the Second Injury Fund.  
Hearing Date: August 7, 2013 Checked by: LCK/rm

**SUMMARY OF FINDINGS**

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? November 30, 2006.
5. State location where accident occurred or occupational disease contracted: Jackson, Mississippi.
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 happened or occupational disease contracted: The employee was involved in a motor vehicle accident.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Right wrist, right long finger and left elbow.
14. Nature and extent of any permanent disability: 27% permanent partial disability of the right wrist and hand and 5% permanent partial disability of the left elbow.
15. Compensation paid to date for temporary total disability: \$12,361.72
16. Value necessary medical aid paid to date by employer-insurer: \$15,243.33.
17. Value necessary medical aid not furnished by employer-insurer: N/A.
18. Employee's average weekly wage: \$709.28.
19. Weekly compensation rate: \$472.85 for temporary total disability and permanent total disability and \$376.55 for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: \$15,608.00 against the Second Injury Fund.
22. Second Injury Fund liability: \$15,608.00.
23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the employee 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 employee: Joe Rice.

## **STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW**

On August 7, 2013, the employee, Shirley Bowen Smith, appeared in person and with her attorney, Joe Rice for a hearing for a final award. The Second Injury Fund was represented at the hearing by Assistant Attorney General Jon Lintner. The parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS:**

1. Dannie Gilder, Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Commerce & Industry Insurance Company.
2. On November 30, 2006, Shirley Bowen Smith was an employee of Dannie Gilder, Inc. and was working under the Workers' Compensation Act.
3. On November 30, 2006, the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$709.28. Her rate of compensation for temporary total disability and permanent total disability is \$472.85 and her rate of compensation for permanent partial disability is \$376.55.
7. The employee's injury was medically causally related to the accident.
8. The employer-insurer paid \$15,243.33 in medical aid.
9. The employer-insurer paid \$12,361.72 in temporary disability benefits for 26 1/7 weeks of compensation with the last date of payment being September 24, 2010.

### **ISSUES:**

1. Liability of the Second Injury Fund for permanent total disability or permanent partial disability.
2. Dependency under Schomehl v. Treasurer of the State of Missouri. (This issue was withdrawn by the employee in her proposed Award).

### **EXHIBITS:**

#### Employee Exhibits:

- A. Medical records of Heartland Family Physicians (Dr. Icaza)
- B. Medical records St. Francis Medical Center.
- C. Medical records of Dr. Chabot.
- D. Medical records of Dr. Oliveri Ph.D.
- E. Medical records of Dr. Doll.
- F. Medical records of Dr. Peeples.
- G. Medical records of Dr. Gibbs.

- H. Report of Dr. Zoffuto.
- I. Medical records of Immediate Healthcare.
- J. Medical records of Orthopaedic Associates.
- K. Medical records of The Hand Center.
- L. Certificate of Marriage of Gary Wayne Smith and Shirley Mae Bowen.
- M. Not offered.
- N. Demand letter for medical treatment.
- O. Report of Dr. Schlafly.
- O-1. Medical records of Dr. Schlafly.
- O-2. Report of Dr. Schlafly.
- O-3. Medical records of Dr. Schlafly.
- O-4. Deposition of Dr. Schlafly.
- S. Medical records of Dr. Robles.
- T. Stipulation for Compromise Settlement in Injury Number 04-105039.
- U. Stipulation for Compromise Settlement in Injury Number 06-134271.
- V. Report of Dr. Volarich.
- V-1. Curriculum Vitae of Dr. Volarich.
- V-2. Deposition of Dr. Volarich.
- W. Vocational Report of Susan Shea.
- W-1. Curriculum Vitae of Susan Shea.
- W-2. Deposition of Susan Shea.

Second Injury Fund Exhibits:

1. Report of James England.

Judicial Notice of the contents of the Division's files for the employee were taken.

**BRIEFS:**

The employee filed her proposed Award on September 23, 2013. The Second Injury Filed its Brief on October 29, 2013.

**WITNESSES:**

Shirley Bowen Smith and Gary Smith.

**STATEMENT OF THE FINDINGS OF FACT:**

The employee testified that her maiden name is Bowen. She is currently married to Gary Smith. She had previously been married. She lives in Jackson and presently is not employed. She was born on June 9, 1949. She has three children. None of them were living with her at the time of the primary accident on November 30, 2006. She graduated from high school and had been employed at a lot of places. She cannot remember all of her jobs but it included working in stores. She eventually started working at Gilster Mary Lee driving a truck.

The employee testified that on September 24, 2004, she was employed for Gilster and was involved in a tractor trailer accident. Her former husband was driving the truck and she was in the sleeper compartment. As a result of the accident, she hurt her neck, shoulder, arms, head, upper back and lower back.

The employee saw Dr. Straubinger on October 4, 2004, for left shoulder, neck and head pain. Cervical x-rays showed mild to moderate spondylosis; minimal retrolisthesis of C3 on C4; and a possible fracture of an anterior osteophyte at the inferior endplate of C5. An x-ray of the left elbow was negative. Dr. Straubinger ordered a cervical MRI on October 7. Dr. Straubinger referred the employee to Dr. Doll. The October 11 cervical MRI showed a central to left disc protrusion at C5-6 with mild to moderate impingement on the dural sac and left nerve root with mild left neural foraminal narrowing. On October 14, Dr. Doll diagnosed a cervical strain; cervical spondylosis with disc protrusion to the left at C5-6; possible anterior osteophyte fracture at the inferior endplate of C5; and left shoulder and arm pain. He ordered physical therapy, medications, and work restrictions. The October 27 left shoulder MRI showed degenerative changes at the AC joint with bursitis and minimal effusion.

On November 1, 2004, Dr. Doll noted headaches and double vision; pain and paresthasias down her left arm; and low back pain. A November 3 CT of the head showed no significant abnormality. The history included head pain and short term memory loss. Dr. Peebles, a neurologist, examined the employee on November 8, for ongoing headaches with memory and concentration problems that could be consistent with a possible traumatic brain injury. He prescribed medication and recommended a neurocognitive evaluation. On November 17, the employee had improvement in her headaches and double vision, but still had persistent neck pain and left shoulder pain. Dr. Doll injected her left shoulder and recommended cervical traction.

Dr. Doll ordered a cervical CT/myelogram on December 2, 2004. On December 6, Dr. Peebles noted that the employee had an impossibly voluminous number of subjective symptoms while the objective examination was unremarkable. He again recommended a neurocognitive evaluation. On December 10, Dr. Doll noted that the December 8 CT/myelogram showed some compression of the thecal sac at C5-6 which may touch and cause mild encroachment of the anterior cervical cord; minimal disc protrusion at C6-7 with mild encroachment of the anterior thecal sac; and disc space narrowing at C5-6 with protrusion and herniated disc causing moderate compression of the thecal sac and cervical cord. Dr. Doll diagnosed persistent cervical pain with mild spondylosis and prescribed a Medrol Dosepak and continued cervical traction.

On January 5, 2005, Dr. Doll noted improvement and referred her to work conditioning. On January 17, Dr. Doll stated that the work conditioning caused more pain in the low back and left lower extremity. He ordered physical therapy.

Michael Oliveri, PhD, performed a neuropsychological evaluation on February 4, 2005. His impression was atypical neurocognitive profile not diagnostic of acquired brain-behavior dysfunction. The employee exhibited a nonspecific disorder of attention and concentration; and clinical anxiety within the context of persisting pain complaints likely contributing to somatic symptoms. Her pain symptoms appeared to be interfering with higher level cognitive function.

Dr. Oliveri did not see a convincing picture of residual acquired brain-behavior dysfunction; and suggested a trial of treatment for clinical anxiety in conjunction with pain management.

On February 4, 2005, Dr. Doll ordered physical therapy. Dr. Peeples, on February 11, noted the neurocognitive exam showed no dysfunction and diagnosed a somatoform pain condition. Dr. Peeples allowed the employee to return to work without restrictions with regard to her neurological function. On February 18, Dr. Doll noted ongoing neck pain that radiated to her left arm and referred her to Dr. Chabot. On February 24, Dr. Peeples noted continued headaches.

On March 21, 2005, Dr. Chabot performed cervical corpectomies, and an anterior cervical fusion at C5-6 and C6-7 with anterior cervical plating. The post operative diagnosis was herniated disc at C5-6 and spinal stenosis and disk degeneration at C5-6 and C6-7.

Dr. Doll saw the employee on July 15, 2005, for lower back and lower extremity complaints. Dr. Doll noted that when he was treating her before, the employee had sporadic low back pain with occasional bilateral lower extremity pain and paresthesias. Dr. Doll noted the upper extremity nerve conduction study was normal, but an EMG was not performed due to patient tolerance and behavior. The April 14 lumbar MRI showed mild diffuse degenerative changes of the lumbar discs with mild loss of disc space. There was no evidence of herniation and very minimal disc bulging. Dr. Doll diagnosed diffuse mechanical low back pain with sporadic left lower extremity pain and mild lumbar spondylosis which required no further therapy or diagnosis, and agreed with the permanent 20-pound lifting restriction of Dr. Chabot. Discussed was Dr. Chabot's prescribing Xanax and Elavil to assist with her anxiety during her course of recovery.

The employee saw Dr. Gibbs on November 22, 2005, for neck pain and numbness extending from the left shoulder into the left biceps; and left sided low back and leg pain with numbness that seemed to follow an S1 dermatome pattern. Dr. Gibbs ordered a myelogram and CT of her lumbar spine and cervical spine and repeat EMG/NCS studies.

The December 14 cervical spine myelogram/CT scan showed the previous fusion at C5-6 and C6-7; and disc bulges at C3-4 and C4-5 without significant spinal canal or neuroforaminal stenosis. The lumbar spine myelogram/CT scan showed no significant spinal canal or neuroforaminal stenosis with disc bulges at L2-3, L3-4 and L4-5. The nerve conduction study without EMG on December 16, 2005, showed bilateral carpal tunnel syndrome mild on the right and mild to moderate on the left.

On January 3, 2006, Dr. Gibbs reviewed the myelogram and noted ongoing complaints of neck pain into her left shoulder and biceps with interscapular pain, as well as low back pain. Dr. Gibbs recommended pain management and SI joint injections. The employee declined that treatment and Dr. Gibbs placed her at maximum medical improvement and allowed her to return to work without restrictions.

On April 21, 2006, it was Dr. Zoffuto's opinion that as a result of the September 27, 2004 motor vehicle accident the employee sustained a 35% permanent partial disability of the cervical spine, 15% of the left upper extremity, and 15% of the low back and left lower extremity.

The employee testified that after having the neck surgery, she had trouble moving and turning her head; and had problems leaning back. Her neck affected her ability to drive the truck and with cranking the dolly/landing gear on the trailers. Due to loss of motion, she had trouble backing to the dock and if she needed to look around she would get out of the truck to see. She had continued back problems including when she drove. She always put a pillow or something behind her back, and would stop driving and get out of the truck to rest. She left early on trips because she had to stop so much. Her back hurt if she sat very long. She took pain medications for her back.

On August 24, 2006, the employee settled her claim in Injury Number 04-105039 with a date of injury of September 27, 2004, for 30% permanent partial disability of the body as a whole referable to the cervical spine, 10% permanent partial disability of the body as a whole for the low back and left lower extremity and 10% of the right upper extremity with a 10% loading factor.

The employee testified that she quit working at Gilster Mary Lee, but did not remember if it was due to her back. She started driving for Dannie Gilder which involved less lifting and stacking with better trucks. She continued to have confusion and memory problems since the wreck in 2004.

The employee testified that on November 30, 2006, she was driving a tractor trailer in Jackson, Mississippi. A truck in front of her stopped and she attempted to stop, but hydroplaned on the slushy water. She went over concrete and her right hand was jammed by the gear shift. She hit her head and the left side of her body. She thought she had broken her thumb and thought she had torn something in her arm.

The employee went to Immediate Health Care on December 4, 2006, for pain in her right arm, right thumb, left arm, and neck. She was diagnosed with a right thumb contusion, and a possible fracture of the olecranon. X-rays were ordered, and she was treated with an Ace wrap and Ibuprofen. On December 12, an x-ray of her left elbow showed a possible small non-displaced fracture of her olecranon and an x-ray of her right thumb showed mild degenerative osteoarthritic changes. An MRI of her left elbow performed on December 22, showed a small soft tissue contusion to her posterior elbow, marked extensor tendinopathy with a small partial thickness tear, a moderate radial collateral ligament sprain, a mild ulnar collateral ligament sprain, and a mild sprain of the distal brachialis tendon insertion with minimal effusion. An MRI of her right thumb on December 27, 2006 showed likely tendinopathy of the flexor pollicis longus, possible capsular sprain at the interphalangeal joint of the right thumb, possible underlying Y pulley injury, and mild right thumb osteoarthritis.

The employee testified that after the injury she continued to work at Dannie Gilder for a couple of months, and then drove for Buchheit's.

The employee saw Dr. Ritter on January 5, 2007, for her right thumb and left elbow. The review of systems was positive for intermittent numbness and tingling in her hands. Dr. Ritter diagnosed localized flexor tenosynovitis of her right thumb, consistent with a contusion from the steering wheel, as well as localized pain in her left extensor muscle origin at her elbow. He

prescribed Ibuprofen, a wrist splint, work restrictions, and physical therapy. On January 26, Dr. Ritter noted only minimal progress in physical therapy and continued work restrictions.

On February 16, Dr. Ritter noted improvement in her thumb symptoms, but ongoing left elbow pain. He diagnosed left lateral epicondylitis and a right thumb contusion, injected her elbow and released her to work at the light to medium level.

On March 9, Dr. Ritter noted ongoing pain with wrist extension against resistance, but allowed her to return to work without restrictions with continued physical therapy. The employee returned to Immediate Health Care on March 16, with left sided low back pain that radiated to her left buttock after she had lifted 20 pounds in physical therapy. She was prescribed Naproxen and Skelaxin. On March 30, the coccyx pain was still present. She was returned to work, the Skelaxin was discontinued and the Naproxen was continued.

On March 30, 2007, Dr. Ritter noted low back pain possibly from lifting in physical therapy. She had low back pain and numbness in her buttock that had resolved. She had no exacerbation of pain in her right thumb or elbow. She was allowed to resume full activities. Dr. Ritter released her from care on May 7, 2007.

The employee testified that after the treatment from Dr. Ritter, she went back to truck driving, but had trouble holding things and trouble shifting. She requested a truck with an automatic transmission, but did not get one. She quit her job and stopped driving trucks because she was afraid to drive and afraid she would kill somebody. In 2007, the employee started working at Walmart as a greeter and cashier. It was hard to work but she could do it and she knew that she would not hurt anybody. She worked four to five hours a day four to five days a week and worked about 25 hours a week. She continued to get worse working at Walmart. Her hands and fingers got worse, she dropped things, and her finger got numb.

The employee returned to Dr. Ritter on December 17, 2007, for numbness and tingling in her right thumb and tips of her fingers, with instability in her right thumb IP joint. X-rays of the thumb were normal. Dr. Ritter diagnosed resolved right thumb contusion and ordered a nerve conduction/EMG. Dr. Ritter thought her neurogenic complaints were not clearly related to the accident.

The employee saw Dr. Schlafly on December 16, 2008. He noted the November 30, 2006 motor vehicle accident. The employee had ongoing numbness in her right hand with some mild residual pain in her left elbow with no low back complaints. Dr. Schlafly diagnosed right carpal tunnel syndrome and a ganglion cyst; and opined that the November 30, 2006 motor vehicle accident was the prevailing factor for her carpal tunnel syndrome. He also diagnosed a left elbow contusion from the November 30, 2006 accident and rated 5% of the elbow. It was Dr. Schlafly's opinion that the combination of disabilities create a synergistic effect between the prior cervical spine and the primary disability of the right hand giving a combined effect greater than the simple sum of the components and create an obstacle or hindrance to employment. It was Dr. Schlafly's opinion that the employee should not drive a truck until the right carpal tunnel syndrome was treated.

A temporary hearing was held on December 7, 2009, in Injury Number 06-134271 before the Honorable Maureen Tilley. The issues that were presented were medical causation with regard to right sided carpal tunnel and additional medial treatment of the right wrist. On April 5, 2010, Judge Tilley issued a temporary award ordering the employer-insurer to furnish additional medical aid under the direction and control of Dr. Schlafly.

The employee testified that her right arm continued to get worse until Dr. Schlafly operated on it. Prior to the surgery she had a hard time lifting and her finger hurt all the time. Her job included greeting customers, answering the phones and folding shirts. Walmart let her have a chair to sit in at times. The other employees tried to help out with lifting.

On May 7, 2010, Dr. Schlafly noted that the employee was currently working as a clerk and greeter at Walmart; continued the diagnosis of right carpal tunnel syndrome and recommended surgery. On June 1, 2010, Dr. Schlafly performed an open right carpal tunnel release. On June 28, the employee had catching of her right long finger and Dr. Schlafly injected her finger. The injection did not give relief and on July 12, 2010, Dr. Schlafly recommended surgery. On August 25, 2010, Dr. Schlafly performed a right long finger trigger release.

The employee testified that she was still working for Walmart when Dr. Schlafly performed right carpal tunnel surgery and then right and left trigger finger releases when she was working at Walmart. She was off work for the surgeries. She wanted to keep her job and was told she would be fired if she did not go back. She returned to work but had trouble performing her job due to the right wrist. She dropped items all of the time and her manager would help lift anything over 10 pounds. She worked in jewelry, but had trouble with clasps. When she worked returns the customers lifted the items. Walmart allowed her to work light duty and then told her to work the registers, but she would not have to lift items. She thought she could get by and hoped that she would get better.

Dr. Schlafly noted that the employee was at maximum medical improvement on December 27, 2010.

The employee testified that she was diagnosed with breast cancer and was scheduled for a double mastectomy in January of 2011. Her mother, aunt and two sisters all had breast cancer; and her mother and aunt died from it. She quit working at Walmart on January 4, 2011, prior to her double mastectomy because she was really hurting and knew she was going to get fired. She thought if she got fired, then Walmart would not rehire her. She said it was almost a blessing to leave Walmart because she was having a hard time, and was getting reprimanded a lot. She had trouble remembering things including not taking money off on coupons and she dropped many items. The employee thought if she was off long enough she would get better and then could continue to work and keep her job. During her testimony about being diagnosed with cancer, the employee got very emotional. She stated that the cancer was actually a break for her and thought that her right hand would get better.

On January 28, 2011, the employee told Dr. Schlafly that she had had major surgery on January 12, 2011. Dr. Schlafly again stated that the employee was at maximum medical improvement. It was his opinion that the employee had a 25% permanent partial disability of the

right long finger at the 35 week level for the right long trigger finger and a 25% permanent partial disability of the right wrist due to the work related right carpal tunnel syndrome. It was Dr. Schlafly's opinion that the employee was not fit for employment as a truck driver.

The employee testified that after Dr. Schlafly released her at the end of January of 2011, she had reconstruction surgery a few months later.

The employee started treating with Dr. Robles an oncologist on January 31, 2011. He noted that on January 12, 2011 the employee had a bilateral mastectomy with reconstruction as a result of having newly diagnosed Stage I breast cancer. On February 21, Dr. Robles noted that the employee was very anxious and was tremulous throughout the examination. Dr. Robles stated that the oncotyping results showed a low risk of recurrence and that she would not benefit from chemotherapy and did not need radiation. He noted that the employee would be a good candidate to start Arimidex therapy. Dr. Robles noted that the employee was crying and she stated she was crying out of happiness.

The employee returned to Dr. Robles on March 22, 2011, after being on Arimidex for a month. She was not tearful that day and appeared less anxious. The employee was scheduled to have the expanders removed and implants placed. Dr. Robles stated that the employee was clinically in complete remission of Stage I breast cancer and was tolerating the Arimidex well.

On December 6, 2011, the employee settled her claim against the employer-insurer in Injury Number 06-134271 with a date of injury of November 30, 2006. The settlement was based on 22.5% permanent partial disability of the right wrist, 22.5% permanent partial disability of the right long finger at the 35 week level, and 5% permanent partial disability of the left elbow.

The employee testified that her right hand is not better since she left Walmart. The trigger finger does not catch like it did, but there is loss of motion. She cannot close her right hand all the way and cannot make a tight fist. She has trouble doing anything with her right hand. Her husband does the chores. Due to her right hand, her husband helps her with her necklace. She can rake coins off table with her right hand, but cannot pick it up off the table. The employee stated that she does not like herself anymore, she is ruining her husband's life, and she cannot stand it. She is taking medicine for cancer and is also taking Ambien and Paxil for her nerves. Sometimes she will forget to take the medication but did take them morning of the hearing. If she does not take the medication she cannot think very well.

The employee's husband, Gary Smith testified. He met the employee in August of 2006. When he started dating the employee she had trouble sitting for long periods such as ballgames or movies. They were married on November 17, 2007. She has had neck problems since he met her and she has to turn her whole body and not her neck. After the November 30, 2006 accident, the employee had trouble picking up things, and it is still hard to open cans and doors, and do chores. The treatment with Dr. Ritter did not help her right hand and her hand got worse while she was waiting for more treatment. She continued to try to work and she was using her arm and left hand due to problems with her right hand. She started taking a sleeping pill after the surgery by Dr. Schlafly. The surgery did not improve her right hand and she stopped using her hand.

Before she left Walmart, she had trouble with pulling or gripping; and with opening restaurant doors. She can put clothes in the washer, but she has to pull out the wet towels. The employee does some cooking and lifting, but she still drops things. She is not able to use both hands and does not do any work outside. She does not drive much anymore. Her neck gets stiff. He usually helps with grocery shopping because she has trouble putting items in the cart and trouble pushing the carts. She has a hard time writing names with her right arm.

Mr. Smith testified that the employee is very emotional which he attributes to her cancer. Before the cancer, she did not have problems with talking or communicating. The cancer affected her more emotionally and not as much physically. Even though the cancer doctor says she only has 1% chance of the cancer reoccurring, she is afraid that she will die and leave him and her grandchildren. He tries to sympathize with her, but does not know what she is going through.

### Opinions:

The employee saw Dr. Volarich on June 24, 2011, but he could not complete the examination due to time constraints. The employee returned on June 5, 2012. On examination, the employee was depressed and her affect was flat. She has difficulty remembering past events. The strength in the shoulders was diffusely weak bilaterally due to a combination of shoulder and joint complaints as well as upper pectoralis chest wall pain from her mastectomy reconstructions and scarring. The biceps, triceps and forearms were weak bilaterally. In the lower extremities the hip girdles are weak bilaterally due to back and hip girdle pain. The quadriceps, hamstrings, and calves were weak bilaterally due to diffuse pain. The employee moved very slowly and carefully. She was unable to tandem walk because of poor balance and complaints of dizziness.

In the cervical spine, the employee had a mild loss of flexion; and substantial loss of extension; right lateral flexion; left lateral flexion; right rotation, and left rotation. In the lumbar spine the employee had substantial loss of flexion and extension; and moderate loss of right lateral flexion, and left lateral flexion.

There was a 25% loss of motion in the right shoulder and a 30% loss of motion in the left shoulder with circumduction (evaluates motion in all six planes). Impingement, apprehension, clunk, Adson's, and O'Brien's tests are difficult to perform due to shoulder pain and lost motion. The right elbow had moderate loss of supination. The right wrist had substantial loss of flexion, extension, and ulnar deviation; and moderate loss of radial deviation. The right hand Finkelstein's was difficult to perform due to pain and lost motion in the right wrist. Dexterity of the fingers was slow on the right. Adduction and opposition of the right thumb was restricted 40-50% due to thenar eminence pain. There was thenar atrophy in the right and left hands; and hypothenar atrophy in the right hand. There was triggering of the right ring finger. The grind test was positive in the right thumb at the CMC joint.

It was Dr. Volarich's opinion that pre-existing the November 30, 2006 accident the employee had the following conditions and disabilities that were a hindrance or obstacle to employment or reemployment:

1. A 35% permanent partial disability of the body as a whole rated at the cervical spine due to the disc herniation at C5-6 and spinal stenosis at C6-7 that required anterior cervical discectomy with fusion and instrumentation at C5-6 and C6-7. The rating accounts for ongoing pain, lost motion, and recurrent upper extremity paresthesias along the C6 and C7 nerve roots;
2. A 15% permanent partial disability of the body as a whole rated at the lumbar spine due to her chronic lumbar syndrome causing ongoing back pain and lost motion.
3. A 15% permanent partial disability of the left upper extremity rated at the left shoulder due to chronic left shoulder strain causing lost motion and pain.

Dr. Volarich also diagnosed a pre-existing closed head trauma with residual neurocognitive defects, but did not rate that disability.

It was Dr. Volarich's opinion that as a direct result of the November 30, 2006 accident the employee sustained a 25% permanent partial disability of the right upper extremity rated at the wrist due to the post traumatic carpal tunnel syndrome that required open carpal tunnel release. The rating accounts for ongoing pain, paresthesias, weakness, and limited use of the dominant hand; a 25% permanent partial disability of the right hand long finger rated at the metacarpophalangeal joint due to the triggering that required trigger release; and a 15% permanent partial disability of the left upper extremity rated at the elbow due to the contusion causing mild lateral epicondylitis which in turn caused some ongoing pain and weakness in the non dominant arm. It was his opinion that there may be a small amount of disability in the cervical spine and lumbar spine as a result of the minor increases in discomfort that returned to baseline, but this disability is considered too small to quantify.

It was Dr. Volarich's opinion that the employee had psychiatric disorders with disability but he deferred to a psychiatric evaluation for assessment.

It was Dr. Volarich's opinion that subsequent to the November 30, 2006 accident that the employee had disability as a result of the breast cancer, bilateral mastectomies and breast reconstructions with decreased motion in both shoulders from scarring, contractures, and pain in the pectoralis muscles bilaterally.

It was Dr. Volarich's opinion that the combination of her disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness, and a loading factor should be added.

Dr. Volarich recommended that the employee undergo vocational evaluation and assessment to determine if she is able to return to the open labor market in any capacity in the future. He noted that the employee was 62 years old (advanced age), has an education limited to graduation from high school, has worked as a truck driver or clerk the majority of her recent work career, and has been unable to get back to work since January 4, 2011. If vocational assessment was able to identify a job for which she is suited he had no objection with her attempting to return to work based on the limitations listed below. If the vocational assessment is unable to identify a job for which she is suited, then it is his opinion that she is permanently and

totally disabled as a direct result of the work related injuries of November 30, 2006, and her preexisting medical conditions.

Dr. Volarich stated that his opinion regarding permanent total disability does not include subsequent disability that may be related to her breast cancer and surgical repairs. Dr. Volarich deferred to psychiatry to determine if she had any preexisting psychiatric disorders before the November 30, 2006 work injury.

For limitations of the right hand, Dr. Volarich stated that the employee should attempt to perform activities of daily living only. Her right upper extremity was essentially useless with no effective grip, minimal pinch, and severe pain with any motion of the wrist, thumb, or fingers. With reference to the left elbow, she can perform tasks to tolerance. With regard to work and other activities referable to her spine prior to November 30, 2006, the employee would have been advised to bend, twist, lift, push, pull, carry, climb and perform similar tasks to tolerance; to handle weights to tolerance, assuming proper lifting techniques; to handle weight over her head or away from her body, and carry weight over distances or uneven terrain to tolerance; to maintain fixed positions including both sitting and standing to tolerance; and to change positions as needed to maximize comfort and rest when needed. For the left shoulder prior to November 30, 2006, limitations were not required.

The deposition of Dr. Volarich took place on November 27, 2012. In evaluating the employee he attempted to exclude any disabilities or impairment that she may have had due to the breast cancer or the treatment for that in reaching his conclusion as to her employability. Dr. Volarich did not think the employee was going to be employable and was permanently and totally disabled as a direct result of the work related injuries of November 30, 2006 in combination with her preexisting medical conditions. His opinion regarding her disabilities did not include any subsequent disability related to the breast cancer or surgical repairs.

Dr. Volarich testified that the employee did not report that fixed positions were a big problem and he did not note that she was fidgeting or getting up and walking around for every 15 minutes. If she was, he would have made a note of it. The employee did not tell him that due to her low back that she had trouble sitting or standing for an 8 or 10 hour day. He would defer to vocational assessment regarding her returning to work as long as she adhered to the limitations he set forth. Prior to November of 2006, neither extremity required any sort of physician imposed restrictions.

It was Dr. Volarich's opinion that the employee was depressed, her affect was flat, she had difficulty remembering past events, and had signs and symptom of being depressed. She was working as a driver up to the November 30, 2006 injury and for some time after that. It did not appear that she was severely depressed leading up to November 30, 2006. Around 2007 she started working at Walmart which was a less intensive job. She continued working there for about four years until early 2011. It was Dr. Volarich's opinion that the employee was employable in the open labor market in 2007 when she was hired by Walmart. It was his opinion that when he saw her in June of 2011 and in June of 2012 the employee was not employable. The employee left work in early January of 2011 just a few days before she had a double mastectomy related to her breast cancer and had breast reconstruction surgery later.

On August 22, 2012, the employee saw Susan Shea for a vocational evaluation. The employee was accompanied by her husband Gary Smith. Ms. Shea noted that the employee cried over the frustration of not being able to remember most of the information she was asked about. The employee was cooperative but simply could not remember much at all. She said that she had a headache and had taken her medication which made her forgetful. Ms. Shea noted that the employee became near hysterical when she talked about the motor vehicle accident of 2006; and cried that someone could have been killed. Her presentation was that of an individual who is suffering from the effects of trauma.

Ms. Shea noted that the employee returned to work after the November of 2006 injury, and went to work at Walmart as a greeter and cashier. She was diagnosed with Stage I breast cancer and underwent surgery in January 2011. She has not been able to return to any type of work since that time. The employee had a prior injury in 2004 with cervical surgery, permanent limitations, and ongoing pain. She was potentially struck on her head and due to memory and other cognitive problems, she underwent a neuropsychological evaluation. The evaluator did not diagnose her as having neurological or biological cognitive disorder, but suggested that she was affected by psychological issues. Psychological issues of anxiety and depression are documented throughout the records. Ms. Shea noted that after reviewing the records and meeting with the employee that it was interesting that she was able to return to work as often as she did.

It was Ms. Shea's opinion that the employee is unemployable and unable to compete in the open job market. Ms. Shea listed numerous factors that add to her inability to be employed:

1. The employee is clearly affected by psychological trauma and presented as an individual who clearly is unemployable.
2. As per physician's report, the employee is limited in the use of her upper dominant extremity. Any work for which she would be qualified would require use of this extremity.
3. She cannot stand long enough at one time, or throughout the day to allow for light work.
4. She cannot sit long enough throughout the day or at one time to perform sedentary work.
5. Light work or sedentary work for which the employee would be qualified would require the use of both upper extremities beyond what she would be able to perform.
6. The employee's pain, anxiety and depression would not allow her to work as a greeter, or in any manner which includes being with the public.
7. The employee is at retirement age.
8. The employee has numerous medical issues which make it unlikely that the typical employer would consider her for employment.
9. The transferable skills analysis was unable to indicate jobs to which her past work would transfer, that she was still capable of performing.

In summary, Ms. Shea stated that the employee is 65 years old and is anxious and depressed. She has pain and limitation in her right upper extremity and has had two surgeries.

She has pain in her left elbow, neck and low back. She has headaches on occasion. It is highly unlikely that any potential employer would consider such an individual for hire.

It was Ms. Shea's opinion that the employee's disability and lack of ability to be employed is due to a combination of the effects of her work related injury of November 30, 2006, her work injury of September 27, 2004, and potentially other events and conditions. Ms. Shea stated that it was evident that the events appear to build upon each other. Ms. Shea stated that she is not a physician, and cannot comment on the causation of her overall disability.

Ms. Shea's deposition was taken on December 18, 2002. Ms. Shea testified that the presentation of the employee was of someone who was suffering from the effects of trauma. From strictly a vocational standpoint such an individual would not be likely hired or would definitely not be hired if they approached a job interview or a potential employer with the same type of presentation. Her presentation was very negative for being reemployed.

Ms. Shea testified that the employee had pain from the 2004 injury and the 2006 injury, and someone who is having pain to any degree is apt to have problems vocationally due to absence, inability to maintain pace, inability to get along with others and inability to understand and carry out instructions. Ms. Shea detected cognitive problems with regard to her ability to understand and carry out instructions, which would affect her ability. The cognitive problems were present prior to the November 30, 2006 injury.

Ms. Shea testified that even though it was her opinion that the employee was not able to work in any capacity, she performed a transferable skills analysis to see if her skills would transfer to any work of a lighter nature. The analysis indicated that there was no work that her skills would transfer to that she would be able to perform and which takes into consideration the pain and disability she has from the right arm, left shoulder, cervical and lower back. It was her opinion that the employee is not employable.

Ms. Shea testified that the diagnosis of breast cancer with surgery could certainly have some effect on the employee's preexisting depression, but it was her opinion that the employee was disabled without any consideration of the cancer. Ms. Shea agreed that after the November of 2006 motor vehicle accident that the employee worked for about four years at Walmart before she left in January of 2011 just before her January 12, 2011 mastectomy; and after that did not return to any work. Ms. Shea was asked if the reason the employee left work in January of 2011, was because she was having a double mastectomy surgery or if it was due to some other reason. Ms. Shea believed that she was having difficulties doing the work at all and was performing the work with some modifications. The employee told Ms. Shea that it was causing her additional pain and it was just too difficult to continue.

Mr. James England issued a Vocational Rehabilitation Evaluation report on February 11, 2013. He reviewed the medical records and doctors' reports which document the evaluation and treatment she has undergone, as well as depositions of Dr. Schlafly, Dr. Ritter and the deposition of Ms. Smith that was taken in August of 2008 as well as the report of Susan Shea.

Mr. England noted that in spite of the ongoing symptoms in her neck, she continued to drive until after the accident of November 30, 2006. When she could no longer drive, she worked as a cashier and greeter at Walmart. During that time, she did not miss any days from work and had no physician-imposed restrictions. Mr. England noted that at the time of her deposition the employee was only taking over-the-counter medication such as ibuprofen. The employee says that she is no longer able to drive as far now at a time because of numbness in her right hand. After the neck surgery from the 2004 accident, she had less range of motion and still got an occasional headache but was functioning better than before the treatment.

At the time of the employee's deposition in August of 2008, the employee was working part-time as a cashier for Walmart in Cape Girardeau. She was working around 25 hours a week and continued to work at Walmart until she was diagnosed with breast cancer and was going to undergo surgery in January of 2011.

Mr. England noted that Dr. Ritter released the employee to return to work without any restrictions. Dr. Schlafly did not place any specific restriction other than saying that she could not return to truck driving. Dr. Volarich felt she would be able to perform activities of daily living only and with regard to the left elbow she could perform tasks to tolerance. The employee told Dr. Volarich that after the hand surgeries, she returned to work as a cashier and greeter at Walmart. She did not miss any days from work and had no physician imposed restrictions and continued in that work until her cancer treatment, after which she had not returned to any type of work.

It was Mr. England's opinion that the employee is a 63-year-old woman with a high school education who has performed a variety of work in the past. After the primary injury she returned to work for several years as a cashier working without restriction according to what she indicated to Dr. Volarich. Since the development of cancer and treatment, including mastectomies, she has not gone back to any other work and apparently now has some psychiatric impairment as well. Mr. England did not believe that the pre-existing conditions prevented her from returning to her regular work as a truck driver. Since the primary injury she was able to successfully go back to work for about a three-year or so period until the development of cancer, which resulted in further surgery and apparent depression. It was Mr. England's opinion that if the employee is now disabled it would appear to be due to problems that have occurred since the primary injury as she was able to compete for and sustain alternative employment for several years up to the development of the cancer.

**RULINGS OF LAW:**

***Issue 1. Liability of the Second Injury Fund for permanent total disability or permanent partial disability.***

**Permanent Total Disability:**

The first question to be addressed is whether the employee is permanently and totally disabled.

It was Dr. Volarich's opinion that the employee was not employable and was permanently and totally disabled. Dr. Volarich saw the employee on June 24, 2011 and June 5, 2012. It was his opinion that the employee was depressed, her affect was flat, and she had signs and symptoms of being depressed.

Ms. Shea saw the employee on August 22, 2012. She noted that the presentation of the employee was of someone who was suffering from the effects of trauma. From a vocational standpoint such an individual would not likely be hired or would definitely not be hired if they approached a job interview or a potential employer with the same type of presentation. Her presentation was very negative for being reemployed. It was Ms. Shea's opinion that the employee is unemployable and unable to compete in the open job market.

I observed the employee during the hearing. Throughout her testimony, the employee had a difficult time answering questions. She lost her train of thought and at times answered the same questions twice. The employee got very emotional during her testimony and had trouble communicating and speaking. She requested a break to regain her composure. During cross examination the employee's husband sat next to her to be supportive.

Based on a review of the evidence, and my observations of the employee, I find that no employer in the usual course of business would reasonably be expected to employ the employee in her present condition and reasonably expect the employee to perform the work for which she is hired. I find that at the time of the hearing the employee was unable to compete in the open labor market.

The next issue that must be determined is whether the employee was permanently and totally disabled from the employee's pre-existing conditions in combination with the November 30, 2006 primary injury or whether the employee was permanently totally disabled due to her overall disability after her subsequent diagnosis and treatment of breast cancer.

In order to find the Second Injury Fund liable for permanent total disability, there must be a pre-existing permanent partial disability that combined with a disability from a subsequent work related injury to create permanent and total disability.

It was Dr. Volarich's opinion that the employee is permanently and totally disabled and not employable as a direct result of the work related injuries of November 30, 2006, in combination with her preexisting medical conditions. Dr. Volarich stated that his opinion regarding permanent total disability did not include subsequent disability that may be related to her breast cancer and surgical repairs. In evaluating the employee, he attempted to exclude any disabilities or impairment that she may have had due to the breast cancer or the treatment for that in reaching his conclusion as to her employability.

It was Ms. Shea's opinion that the employee's permanent disability and lack of ability to be employed is due to a combination of the effects of her work related injury of November 30, 2006, her work injury of September 27, 2004, and potentially other events and conditions. Ms. Shea stated that the events appear to build upon each other. It was Ms. Shea's opinion that the

employee was disabled without any consideration of the cancer. Ms. Shea further stated that she is not a physician, and cannot comment on the causation of the employee's overall disability.

I find that the opinions of Dr. Volarich and Ms. Shea regarding the cause of the employee's permanent total disability are substantially adversely affected by the following:

The employee continued to work until January 4, 2011.

According to the Notice of Commencement/Termination of Compensation Form filed with the Division of Workers' Compensation, the employer-insurer paid temporary total disability benefits from December 1, 2006 until March 8, 2007, while the employee was being treated by Dr. Ritter. The employer-insurer paid two additional periods of temporary total disability from June 1, 2010 until July 25, 2010, and August 25, 2010 through September 22, 2010 after the surgeries by Dr. Schlafly.

Other than those periods of temporary total disability, the employee worked for Dannie Gilder, Buchheit's, and Walmart after the November 30, 2006 accident and injury. The employee worked at Walmart from 2007 until January 4, 2011.

The employee stopped working one week prior to surgery for breast cancer.

The employee continued to be employed and worked for Walmart until approximately one week prior to her double mastectomy which was performed on January 12, 2011.

All of the opinions that the employee was permanently and totally disabled were after the employee's diagnosis of and treatment for cancer in January of 2011.

When Dr. Schlafly released the employee on January 28, 2011, it was his opinion that the employee was not fit for employment as a truck driver, but he did not opine that the employee was permanently and totally disabled. It was not until after the diagnosis and treatment for cancer that Dr. Volarich and Ms. Shea opined that the employee was permanently and totally disabled. It was Dr. Volarich's opinion that the employee was employable in the open labor market in 2007 when she was hired by Walmart. It was Dr. Volarich's opinion that when he saw the employee in June of 2011 and in June of 2012, the employee was not employable. In August of 2012, Ms. Shea opined that the employee was permanently and totally disabled.

The subsequent diagnosis and treatment of the cancer was traumatic to the employee and affected her emotionally.

When the employee saw Dr. Robles her oncologist in February of 2011, he noted that the employee was very anxious, was tremulous throughout the examination; and cried.

Dr. Volarich stated that the employee was depressed, her affect was flat, and she had signs and symptoms of being depressed. It did not appear to him that the employee had severe depression leading up to November 30, 2006.

It was Ms. Shea's opinion that the diagnosis of breast cancer with surgery could certainly have some effect on the employee's pre-existing depression. Ms. Shea noted that the employee was anxious and depressed. From strictly a vocational standpoint such an individual would not likely be hired or would definitely not be hired if they approached a job interview or a potential employer with the same type of presentation. Her presentation was very negative for being reemployed.

During her testimony regarding her cancer, the employee got very emotional. Throughout her testimony, the employee had a difficult time answering questions, she lost her train of thought, at times answered the same questions twice, and had trouble communicating and speaking.

Mr. Smith testified that the employee is very emotional which he attributes to her cancer. Before the cancer, she did not have problems with talking or communicating. The cancer affected her more emotionally and not as much physically.

The subsequent surgery and treatment for cancer affected the employee physically.

Dr. Volarich noted that the employee had weakness in her shoulders due to a combination of shoulder and joint pain as well as upper pectoralis chest wall pain from her mastectomy reconstructions and scarring. It was Dr. Volarich's opinion that subsequent to the November 30, 2006 accident, the employee had disability as a result of the employee's breast cancer, bilateral mastectomies and breast reconstructions with decreased motion in both shoulders from scarring, contractures, and pain in the pectoralis muscles bilaterally.

Mr. England stated that according to Dr. Volarich, the employee returned to work after the primary injury for several years and worked without restriction. Since the development of cancer and treatment, including mastectomies, she has not gone back to any work and apparently now has some psychiatric impairment as well. Since the primary injury she was able to successfully go back to work for about a three-year or so period until the development of cancer. The cancer resulted in surgeries and apparent depression. It was Mr. England's persuasive opinion that the employee's disability was due to problems that have occurred since the primary injury as she was able to compete for and sustain alternative employment for several years up to the development of the cancer.

The evidence overwhelmingly indicates that the employee was not permanently and totally disabled until the subsequent substantial deterioration of her physical and psychiatric conditions as a result of the diagnosis of and the treatment of her breast cancer. I find that the opinions of Mr. England are very persuasive and more persuasive than the opinions of Dr. Volarich and Ms. Shea as to the cause of the employee's permanent total disability.

There is no question that the diagnosis and treatment of breast cancer was devastating to the employee. There is no question that the employee is permanently and totally disabled. However, the employee's inability to work and compete in the open labor market is due to the subsequent substantial deterioration of her physical and psychiatric condition after the November 30, 2006 accident and injury due to the diagnosis of and treatment for breast cancer. I find that

the employee failed to meet her burden of proof that her permanent total disability resulted from a combination of her pre-existing conditions and her November 30, 2006 accident and injury.

I find that the employee's permanent total condition was not the result of her pre-existing condition combined with the November 30, 2006 accident and injury. After carefully reviewing all of the evidence, I find that the employee failed in her burden of proof that the Second Injury Fund is responsible for the employee's permanent total disability. The employee's claim against the Second Injury Fund for permanent total disability is hereby denied.

**Permanent Partial Disability:**

In the alternative, the employee has requested an award of permanent partial disability against the Second Injury Fund. Based on the evidence submitted, I make the following rulings:

**Primary Injury:**

I find that the primary injury to the employee's right wrist, right hand, and right long finger resulted in a 27% permanent partial disability of the right wrist and hand at the 175 week level for a total of 47.25 weeks of compensation. I find that the primary injury to the left elbow resulted in a 5% permanent partial disability. I find that does not meet the minimum statutory threshold of 15% of a major extremity and shall not be included for Second Injury Fund liability.

**Pre-Existing Left Elbow Condition:**

I find that the employee's pre-existing left elbow condition resulted in a 10% permanent partial disability of the left elbow. I find that does not meet the minimum statutory threshold of 15% of a major extremity and shall not be included for Second Injury Fund liability.

**Pre-Existing Spinal Condition:**

I find that the employee's pre-existing spinal condition constituted a hindrance or obstacle to employment or obtaining re-employment. I find that the pre-existing spinal condition resulted in a 40% permanent partial disability of the body as a whole at the 400 week level for a total of 160 weeks of compensation.

**Conclusion:**

I find that the employee's pre-existing spinal condition and the primary injury to the right hand and wrist combined synergistically to create a total disability of 248.70 weeks. This total disability is based on a loading factor of 20%. After deducting the disability that existed prior to the last injury (160 weeks) and the disability resulting from the last injury considered alone (47.25 weeks) from the total disability attributable to all injuries or conditions existing at the time of the last injury (248.70 weeks), the remaining balance to be paid by the Second Injury Fund is equal to 41.45 weeks. The Second Injury Fund is therefore ordered to pay to the

employee the sum of \$376.55 per week for 41.45 weeks for a total award of permanent partial disability equal to \$15,608.00.

***Issue 2. Dependency under Schomehl v. Treasurer of the State of Missouri.***

In her proposed Award, the employee withdrew Issue 2. Based on this, this Issue is now moot and shall not be ruled upon.

**ATTORNEY'S FEE:**

Joe Rice, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

**INTEREST:**

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

---

Lawrence C. Kasten  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*