

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

Injury No.: 09-025242

Employee: Michelle Watson-Spargo  
Employer: D & W Stateline Restaurant (Settled)  
Insurer: Missouri Employers Mutual Insurance (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 1, 2010. The award and decision of Administrative Law Judge Victorine R. Mahon, issued November 1, 2010, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 21<sup>st</sup> day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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DISSENTING OPINION FILED  
Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: Michelle Watson-Spargo

### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge is in error and that the decision should be modified to award permanent total disability benefits from the Second Injury Fund.

Employee worked as a cook for employer. On January 16, 2009, employee was unloading boxes of meat from a truck. The boxes weighed about 20 pounds. Employee moved about 50 boxes when she suddenly felt severe pain in the middle of her back travelling down to the back of her knee. Employee's back pain following this injury was so severe that doctors took her off work. Employee never worked again. Employee suffered from a number of preexisting conditions of ill, including bilateral carpal tunnel syndrome which has never been surgically corrected; recurrent neck and back injuries from 1998, 2006, and 2007; and depression stemming from the 2002 death of her infant son. Employee was hospitalized at Ozark Medical Center for several days in June 2003 with a diagnosis of recurrent and severe major depression without psychosis.

Following the January 2009 work injury, employee's chronic back pain worsened. Employee now experiences constant pain that never goes away. Before the work injury, employee was on pain medications in connection with her neck and back conditions, but her doctors have now switched her to stronger narcotics, such as Percocet, methadone, and Oxycodone, to counter her increased back pain. Employee can only walk about 15 minutes without stopping, and can only sit for a few minutes before she has pain that affects her concentration. Employee used to maintain a large vegetable garden, but she is no longer able to do so. Employee's depression also took a turn for the worse following the work injury: employee no longer wanted to get out of bed and had no desire to be around other people. Employee has been, and continues to be, on a number of different antidepressant medications. Employee believes she is no longer capable of working due to her inability to handle stress, her physical restrictions and limitations, and her ongoing struggle with what she described as an "immense" and "overwhelming" clinical depression.

In her appeal to this Commission, employee argues she is permanently and totally disabled due to a combination of the last work injury and her preexisting disabling conditions. Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent total disability benefits, employee must establish that: (1) she suffered from a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

Dr. P. Brent Koprivica evaluated employee and opined that she is permanently and totally disabled due to the effects of the work injury in combination with her preexisting carpal tunnel syndrome and disability stemming from previous neck and back injuries.

Employee: Michelle Watson-Spargo

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Dr. Koprivica rated employee's preexisting conditions of ill at 25% permanent partial disability of the body as a whole referable to the lumbar spine, 15% referable to the cervical spine, and 15% to each wrist for carpal tunnel syndrome; he further indicated that each of these conditions had the potential to be occupationally limiting, or in other words, to constitute hindrances or obstacles to employment. Dr. Koprivica rated employee's disability stemming from the January 2009 injury at an additional 10% permanent partial disability of the body as a whole and provided significant work restrictions, including only occasional bending at the waist, pushing, pulling, or twisting, avoidance of awkward positions of the lumbar spine, no squatting, crawling, kneeling, or climbing, and no overhead lifting. Dr. Koprivica ultimately opined that employee should be restricted to "less than sedentary" physically demanding work, and that she must be given the freedom to sit, stand, and walk as needed. Employee's need for daily doses of strong narcotic drugs such as hydrocodone is a serious concern when it comes to the question of employee's ability to compete for jobs, according to Dr. Koprivica. The doctor explained that employee's switch to more serious types of narcotic pain medications and increased doses following the January 2009 accident was like "going from drinking one or two beers to drinking a case of beer, in how you function."

Dr. Kent Franks, a clinical psychologist, also evaluated employee and opined that employee suffers from major depression and a pain disorder which have both medical and psychological components. Dr. Franks rated employee's psychiatric disability at 25% permanent partial disability of the body as a whole, 15% of which is attributable to psychiatric conditions preexisting the January 2009 work injury. Dr. Franks believes that employee will have difficulty sustaining long term employment because her psychiatric problems prevent her from effectively integrating with peers, supervisors, and the public.

Wilbur Swearingin evaluated employee and provided an expert vocational opinion on behalf of the Second Injury Fund in this matter. Mr. Swearingin acknowledged that Dr. Koprivica's restrictions were very limiting and would prevent employee from most employment. Mr. Swearingin believes, however, that a previous emergency dispatching job provides employee a chance of returning to the workforce. Mr. Swearingin painted the picture of a job that was employee's "best choice," and "practically ... perfect," noted that, at that job, employee had an "almost ideal workstation," and that the job would be "the best match for [employee]." Mr. Swearingin's opinion is remarkable for a number of reasons, not least of which the uncontested fact that employee was *fired* from that job. When he was confronted with Dr. Koprivica's expert medical testimony that an employee taking heavy doses of narcotics is not the best candidate for handling emergency dispatch calls, Mr. Swearingin admitted it "certainly can be a consideration," but offered his lay opinion that employee seemed to handle her narcotic medications quite well. Mr. Swearingin thus sets himself against the expert medical testimony from Dr. Koprivica based solely on his personal impression that employee did not look "sleepy" when he evaluated her. As if this surface-level speculation as to the effect of employee's narcotic use were not questionable enough, the vocational expert also completely failed to explain how employee would be able to compete for and reclaim this previous job, given her worsened psychiatric condition, although he did, once again, air his non-medical, non-expert opinion that Dr. Franks' conclusions do not make

Employee: Michelle Watson-Spargo

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sense in light of his own *personal impression* of employee when she was in his office. I do not find any of Mr. Swearingin's lay impressions helpful when it comes to assessing the degree of employee's psychiatric disability.

Nevertheless, the administrative law judge relied significantly on these opinions from Mr. Swearingin when she found that employee is not permanently and totally disabled. Apart from the obvious folly in the administrative law judge's assigning more weight to Mr. Swearingin's personal impression of employee than the expert testimony from Drs. Koprivica and Franks, I wish to point out the administrative law judge applied the wrong test for permanent total disability. This is evident in the administrative law judge's rationale that, based on Mr. Swearingin's testimony, employee is "capable of employment in the open labor market." But whether employee is "capable of employment" is not the test for permanent total disability. Rather, "[t]he test for permanent total disability is whether the worker is able to **compete** in the open labor market." *Treasurer of the State - Custodian of the Second Injury Fund v. Cook*, 323 S.W.3d 105, 110 (Mo. App. 2010) (citation omitted) (emphasis added). The administrative law judge's award fails to explain how an individual who suffers from recurring and severe bouts of major depression, who, in order to control her pain must now take daily doses of strong narcotic drugs that produce an effect akin to "drinking a case of beer," and who can only work at a "less than sedentary" physical demand level will be able to compete for jobs in the open labor market. "The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition." *Id.*

In order to answer the "critical question" mandated to us by the Missouri courts, let us imagine a prospective employer with a choice between hiring two employees. On the one hand, there is employee, with all of the limitations and disabilities we have discussed. On the other, there is a candidate who is not taking daily doses of Percocet and methadone, who is not restricted to "less than sedentary" work, and who does not have a history of debilitating depression including hospitalization. When we apply the appropriate test and view the evidence in this fashion, can there be any other conclusion than that claimant is permanently and totally disabled?

In sum, I wholly disagree with the administrative law judge's (and the majority's) choice to credit the opinion of Mr. Swearingin, who never explained how employee is capable of competing for and obtaining jobs in the open labor market. I would credit the qualified, competent, and persuasive expert medical testimony of Dr. Koprivica and find that employee met her burden, under § 287.220 RSMo, of establishing that she is permanently and totally disabled due to a combination of the January 2009 injury and her preexisting conditions of ill. I would modify the decision of the administrative law judge and award permanent total disability benefits from the Second Injury Fund.

Because the majority has determined otherwise, I respectfully dissent.

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Curtis E. Chick, Jr., Member

## **AWARD**

Employee: Michelle Watson-Spargo Injury No. 09-025242

Dependents: N/A

Employer: D & W Stateline Restaurant (settled)

Additional Party: Treasurer of Missouri, as custodian of  
the Second Injury Fund

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

Insurer: Missouri Employers Mutual Insurance (settled)

Hearing Date: August 18, 2010 (Closed September 17, 2010) Checked by: VRM/sh

### **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: January 16, 2009.
5. State location where accident occurred or occupational disease was contracted: Thayer, Oregon 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: Injured low back while moving packages of frozen meat from a truck.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Back; psychological.

14. Nature and extent of any permanent disability: Permanent partial disability.
15. Compensation paid to-date for temporary disability: Not applicable.
16. Value of necessary medical aid paid to date by employer/insurer? Not applicable.
17. Value necessary medical aid not furnished by employer/insurer? Not Applicable.
18. Employee's average weekly wages: \$277.73.
19. Weekly compensation rate: \$185.15 (PTD/PPD).
20. Method of wage computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable: Primary claim is settled.
22. Second Injury Fund liability: Permanent partial disability.

50 weeks (last injury) + 272.50 weeks (pre-existing) = 322.50 weeks  
322.50 weeks x 20% load = 64.50 weeks  
64.50 weeks x \$185.15 (weekly disability rate) = \$11,942.18.

**TOTAL: \$ 11,942.18**

24. Future requirements awarded: None.

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

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

Employee: Michelle Watson-Spargo Injury No. 09-025242

Dependents: N/A

Employer: D & W Stateline Restaurant (settled)

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

Additional Party: Treasurer of Missouri, as custodian of  
the Second Injury Fund

Insurer: Missouri Employers Mutual Insurance (settled)

Hearing Date: August 18, 2010 (Closed September 17, 2010) Checked by: VRM/sh

### **Introduction**

The undersigned Administrative Law Judge conducted a final hearing in this case on August 18, 2010, in West Plains, Missouri. The claim against the employer and its insurer settled prior to the hearing. The hearing was held to determine the extent of any liability against the Second Injury Fund. Attorney Randy Alberhasky represented Michelle Watson-Spargo (Claimant). Assistant Attorney General Cara Harris represented the Second Injury Fund. Upon motion of the Second Injury Fund, the record was ordered to remain open 30 days for the receipt of additional exhibits. The exhibits were received timely and the record closed on September 17, 2010. The parties were invited to file briefs on or before October 1, 2010.

### **Stipulations**

The parties stipulated that Claimant sustained a work-related injury while employed by D & W Stateline Restaurant on January 16, 2009. There is no dispute that Claimant was a covered employee at the time of the injury and her employer was subject to the Workers' Compensation Law. Claimant's average weekly wage was \$277.73, yielding a permanent partial disability and permanent total disability rate of \$185.15. There is no dispute as to notice, statute of limitations, jurisdiction, venue, or course and scope of employment.

### **Issues**

The parties agree that the only issues are whether the Second Injury Fund has any liability and the extent of that liability. Claimant alleges that she is permanently and totally disabled as against the Second Injury Fund.

### **Exhibits**

The following exhibits were admitted:

**Medical Records**—Exhibits A through M

**Medical Bills**—Exhibits N through O

**Documents**--Exhibits P through W

**Medical Report**—Exhibit X (Dr. Kent W. Franks)

**Curriculum Vitae**—Exhibit Z (Dr. Kent W. Franks)

**Depositions**—Exhibit Y (Dr. P. Brent Koprivica, including C.V., Report, and Addendum)  
Exhibit II (Claimant Michelle Spargo – Watson)  
Exhibit I (Wilbur Swearingin, including C.V., Report, and Checklist)  
Exhibit III (Wilbur Swearingin, supplemental dated September 2, 2010)

### **FINDINGS OF FACT**

Michelle Spargo-Watson, Claimant, is 38 years of age. She currently is married.

Claimant has a high school diploma and some college education, but no degree. At one point she held an EMT license, but she allowed that licensure to expire in 2004. She maintains a CPR certification. She possesses computer skills. At one point in her life she could type 60 words per minute.

#### **Employment and Pre-Existing Medical History**

Shortly after Claimant graduated from high school she began working at Pisces Catfish Plant. The job entailed cleaning or filleting fish. It required that Claimant have her hands in ice

water for eight hours a day. While employed there five months, Claimant's hand began going numb, interfering with her sleep. The problem resolved, however, after Claimant left that employment.

From 1989 to 1992, Claimant worked at Lee's Curtain operating a sewing machine. The job gave her minor back pain for constant sitting. She left that job, gave birth to a child, and stayed home for a couple of years.

In 1997, Claimant took a job as a stocker and delivery person for O'Reilly Auto Parts. While employed there, Claimant was involved in a motor vehicle accident and suffered some neck and low back problems for which she obtained some chiropractic treatments. Claimant testified in her deposition that since that time she has had ongoing back pain. Claimant said the back problems have "just gotten worse through the years, way worse." (Exhibit II, page 19). At the same time she was working for O'Reilly, Claimant worked as a waitress at a café. Claimant said she had no problems performing her job as a waitress.

In 2000, Claimant went to work as a cook at D & W Stateline Restaurant. While employed there, Claimant was in a strained relationship and was assaulted. As a result, Claimant suffered a broken right ankle that required surgery. She missed six or eight weeks of work.

In 2001, Claimant began work as a laborer with a bridge building company tying concrete and rebar together. She worked there about ten months. The job required that she bend over most of the day, which caused her back pain. She also developed carpal tunnel syndrome, but never required surgery.

After becoming pregnant again, Claimant left the bridge construction job. The baby died and Claimant lapsed into situational depression. Claimant said the depression interfered with her concentration on various jobs. She was hospitalized due to depression after her son died. Her

treatment ended in 2003. After 2003, Claimant occasionally obtained antidepressants for short periods of time, but she received no regular psychiatric or psychological treatment until after the last accident in January 2009.

Beginning in 2002, Claimant went to work as a seasonal housekeeper at the Riverside Resort. The job required lifting which exacerbated her back pain. In 2002, Claimant also fell and broke her left ankle. It was casted, but needed no surgery. Claimant continues to have stiffness, aching, and popping in both ankles.

In 2003 and 2004, Claimant returned to work at D & W Stateline Restaurant. She said it was the same job as before and she had no difficulty performing her duties.

From 2004 to 2008, Claimant was a dispatcher with the Air Evac Life Team, working 12-hour days. She worked six consecutive days on (three at the end of one week and three at the beginning of the next week) and six days off. Claimant described her job as a 911 dispatcher as stressful. She operated several computers and a radio while dispatching air and ground ambulances. In her region alone, Claimant answered 123 calls daily, and more on holidays. During this same time period, while on her "off days" from the dispatcher job, Claimant was an EMT for Oregon County Ambulance, working 24-hour "on call" shifts.

During the four years she worked at Air Evac, Claimant experienced a flare-up of her carpal tunnel syndrome, but did not have surgery. She was in a rollover vehicular accident, but contends she suffered no injuries. She also fell off a chair at home in April 2007, resulting in an exacerbation of her back pain. She was off work two weeks as a consequence. She was treated with spinal epidural injections. She also suffered a problem in her back when she helped lift a 300-pound patient at the scene of a car accident, but she never said anything to her employer at the time.

While employed with Air Evac, Claimant worked at a multi-positional desk that could be raised and lowered. She stood when she could. Air Evac ultimately discharged Claimant because of a dispatch error and dispute with a co-worker. Claimant adamantly avers that the incident was the fault of the co-worker. At the time she left that job, Claimant stated that she was fully capable, both physically and psychologically, of performing her job duties. At the time she was working there, she was taking prescription as well as over-the counter medication for pain and depression.

After her termination, Claimant temporarily substituted for her sister in running a rural mail delivery route. She said the mail sorting duties caused her problems with the carpal tunnel. She also worked in respiratory care at a nursing home for 11 days, but was let go because she was unable to learn the job quickly enough. She then drew unemployment benefits before returning to D & W Stateline Restaurant in September 2008.

### **The Last Accident**

As a short order cook, Claimant worked full-time, five days a week from 7:00 in the morning to 3:00 in the afternoon. She stood for most of the day. She had complaints of pain in her back, problems with her hands, and she developed "tennis elbow." Therefore, she elicited help from others in some of the stocking and lifting duties. Otherwise, Claimant's physical problems did not interfere with her job. She said she missed no time from her job because of physical problems. At this same time, Claimant also was receiving osteopathic manipulation from Dr. Rakeshaw, who was Claimant's treating physician. According to Claimant, Dr. Rakeshaw prescribed multiple medications which included an antidepressant, Xanax for anxiety, Flexeril for a muscle relaxant, and ketoprofen, Norco, and methadone for pain. Claimant admitted that she had worked in the past while taking narcotics.

On January 16, 2009, Claimant was unloading a meat delivery. The boxes of meat each weighed about 20 pounds. After she had lifted about 50 boxes she experienced a sharp pain. The pain began in the middle of her back and traveled down to the back side of her knee. She could work no more that day and has not since returned to work. A subsequent MRI of the thoracic spine revealed mild to moderate kyphosis but no disk protrusions. The MRI scan of the lumbar spine performed March 11, 2009, revealed multi-level degenerative disk disease with the most significant narrowing, both central and foraminal, at L4-5. She saw Dr. Khoshyomn who recommended epidural steroid injections, but not surgery. Claimant did obtain some injections and prescription medication. Claimant has never been hospitalized for her back complaints. Before the lifting accident on January 16, 2009, Claimant said she had no plans of leaving her employment at D & W Stateline Restaurant.

### **Worsening of Claimant's Medical Condition**

Before the incident in January 2009, Claimant said she had sleep problems and was taking medication, but she got up and worked every day she was scheduled. She interacted with people such as the owners and everyone she worked with, such as waitresses. Subsequent to her work injury in January 2009, however, Claimant's depression and psychological issues have worsened. She now no longer wants to get out of bed or be around people. She testified in deposition that she is experiencing more tingling that now radiates past the knee. She has more numbness in her toes and "definitely increase in pain." (Exhibit II, page 59).

Claimant testified in deposition that prior to the last work accident she could maintain a large vegetable garden, but now she is relegated to raising a couple of cucumber and tomato plants. Her daughter assists with most household chores. Claimant is able to drive a vehicle, but

not a standard transmission. She believes that she no longer can work due to her pain, tingling or numb hands, and anxiety.

### **Expert Opinions**

**Dr. P Brent Koprivica** saw Claimant on one occasion. He found that Claimant had pre-existing disabilities to her back and neck, pre-existing carpal tunnel syndrome, and pre-existing depression. He found that the MRI of Claimant's lumbar spine in March 2009 showed more narrowing at the L4-5 level due to an annular injury. He noted that Claimant's pain level prior to January 2009 was a two or three with pain medication. Subsequent to the last accident, Claimant experiences a pain of eight, even with stronger medication.

Dr. Koprivica rated Claimant's pre-existing disabilities as 15 percent permanent partial disability to the body as a whole for her neck pain, 25 percent permanent partial disability to the body as a whole for low back pain, and 15 percent permanent partial disability to each hand for the carpal tunnel syndrome. He opined that she suffered an additional 10 percent permanent partial disability to the body as a whole related to the January 16, 2009, work accident. Of that amount, he assigned 0 to 5 percent in the thoracic and the remainder to the lumbar region.

Even though Claimant was working full time as a cook at the time of the last accident, Dr. Koprivica believed Claimant had significant pre-existing limitations.

Ms. Watson was limited in her subjective tolerances to activities and restricted from sustained or awkward postures of the cervical spine....limitations in terms of her ability to do repetitive pinching or grasping tasks....limited in terms of tolerance to vibration....limited from frequent or constant bending at the waist, pushing, pulling or twisting. She was also limited to light physical demand level of activity.

(Exhibit Y, Deposition Exhibit 1, page 18). Dr. Koprivica assigned additional restrictions as a result of the 2009 injury which he rated at 10 percent to the body as a whole. These included only occasional bending at the waist, pushing, pulling, or twisting, avoid awkward positions of

the lumbar spine, no squatting, crawling, kneeling or climbing, no overhead lifting, and restricted her to less than sedentary physically demanding work, with the ability to sit, stand and walk as needed. He found that she was not capable of employment in the open labor market due to the combination of the restrictions she had prior to January 16, 2009, and the restrictions from the accidental injury on that date.

Dr. Koprivica admitted that he had no records showing that any medical provider had placed any physical limitations on Claimant's activities prior to the January 16, 2009, injury. He admitted that Claimant clearly had not had surgery to her neck or back, nor any recommendation for surgery, prior to the injury in January 2009. He admitted that he had no record of Claimant having been hospitalized for her low back prior to January 2009. He admitted that Claimant's neck and back were neurologically intact prior to January 2009. He admitted that Claimant had no surgery, nor any recommendation for surgery, related to her carpal tunnel syndrome prior to January 2009. He admitted that he did not have actual medical records to confirm what Claimant had told him regarding the types and amounts of medication she was taking prior to January 2009. He believed that psychological factors played a role in his examination of Employee. For instance, Claimant was unable to lie flat on her back during the examination but Dr. Koprivica found no physical reason for her inability to lie down flat. He also believed that Claimant was over-reacting on his exam, but linked that to Claimant's psychological issues. Dr. Koprivica agreed that Claimant's psychological condition had deteriorated since the work injury in January 2009.

**Dr. Kent Franks** is a clinical psychologist who has been practicing in Missouri since 2004. Previously, he was employed in the State of California. He saw Claimant on only one occasion. He testified live at the hearing. He said that Claimant suffered a traumatic past

childhood which included her parents' divorce, the absence of a male role model, and sexual assaults. He also noted that Claimant had been assaulted by a boyfriend, suffered the loss of a child, experienced a psychiatric hospitalization, and had a history of drug abuse.

Dr. Franks noted that Claimant had a substantial job turnover rate, having held 9 or 10 jobs since 1997. He said that fact suggested that Claimant had difficulty sustaining long term employment due to difficulty integrating with peers and taking supervision due to her psychiatric problems. He believed Claimant would have difficulty communicating or working with co-workers and the public. He testified she could not perform supervisory work. Her concentration was poor and adversely affected by her medication. While Dr. Franks did not believe Claimant could work, he did not believe she was totally disabled solely from a psychological standpoint.

Dr. Franks agreed that Claimant's mental condition has deteriorated since the work accident and that she needed ongoing treatment. In fact, Claimant had been hospitalized in December of 2009 and January of 2010. She continues to be treated with counseling and medication. He opined that Claimant now is socially withdrawn, unable to complete normal activities of daily living, has a loss of interest in life, difficulty sleeping, and exhibits some suicidal thoughts. He believed Claimant has trouble with basic calculation and difficulty concentrating. He testified that Claimant could not handle the stress of a dispatcher job.

Dr. Franks concluded that Claimant suffered from Major Depression and Pain Disorder which had both medical and psychological components. From a psychological standpoint, Dr. Franks believed Claimant was capable of employment in a low stress, low change job. From a psychological standpoint, he assigned an overall permanent partial disability of 25 percent permanent partial disability to the body as a whole, with 15 percent of that amount pre-existing

and 10 percent from the work accident in January 2009. He said the pre-existing psychological disorders were a hindrance and obstacle to work.

On cross-examination, Dr. Franks admitted that despite Claimant's early life of traumatic events, she graduated from high school, obtained 12 hours of college credit, graduated from an EMT program, obtained the EMT license.

Dr. Franks thought Claimant had only worked part-time for Air Evac as a dispatcher (by his own testimony a very stressful position). Claimant had actually worked 36 hours per week at the Air Evac job, plus worked simultaneously as an EMT.

Although Dr. Franks indicated that Claimant did not perform well on her jobs, he admitted he had no employment records. He had no history that she missed work. Dr. Franks' only evidence of Claimant having difficulty concentrating prior to January 26, 2009, was that she was involved in two car accidents. But he did not know who was at fault in those accidents and it was possible that the accidents were not caused by focus problems. He had no evidence from either his interview with Claimant or the records he reviewed that Claimant had productivity problems, or had problems making sound decisions prior to the January 2009 accident. Even though Dr. Franks believed Claimant had problems with co-workers and supervisors, he admitted that Claimant told him that she made friends easily. He inferred that Claimant had difficulties due to short periods of employment, but he had failed to acknowledge in his report that Claimant's short-term jobs might be seasonal, temporary, or that she held more than one job at a time.

Dr. Franks testified that he had not seen the results of the tests administered by Wilbur Swearingin, the Second Injury Fund's vocational expert. He was unaware that Claimant had scored at a high school level or above on most of the WRAT-IV. He admitted he had seen

no cognitive limitations in Claimant. He did believe that if Claimant could find employment it would benefit her psychologically. He admitted that Claimant's psychological outlook worsened significantly since her January 16, 2009, accident.

### **Vocational Opinion – Wilbur Swearingin**

Wilbur Swearingin examined Claimant on December 4, 2009, at the request of the Second Injury Fund. He found that Claimant did quite well in her testing, with reading at the 11<sup>th</sup> grade, spelling at greater than the 12<sup>th</sup> grade, and math at the end of the 12<sup>th</sup> grade. He indicated that these results were consistent with Claimant's educational background and training. He believed Claimant was capable of retraining. He believed her scores would allow her to obtain a baccalaureate degree. He also found her employment history to be diverse and to be consistent with her hearing testimony.

As a part of his testing, Mr. Swearingin gave Claimant a Functional Capacity Checklist to complete. The Checklist compares those physical abilities that Claimant believes she could perform both before and after the January 2009 accident. Mr. Swearingin said the answers were interesting as Claimant perceives a large change in her ability to hear, see and talk. Her January 16, 2009, injury had nothing to do with those functions.

Mr. Swearingin noted that no physician, other than Dr. Koprivica, had placed restrictions on Claimant's physical capabilities. He noted that Dr. Koprivica's restrictions, however, were quite limiting and would prevent Claimant from returning to much of her past relevant work, with the exception of her work as a dispatch at Air Evac.

It was his opinion that the Air Evac job Claimant previously held offered her the best opportunity for gainful employment, particularly because she could alter her position from sitting and standing and there was a desk that varied in height. In reaching his conclusion, Mr.

Swearingin took into consideration the physical limitations imposed by Dr. Koprivica, as well as Claimant's history of depression. He said there had been a recent announcement that there was going to be a substantial expansion of that very industry or business in Houston, Missouri. He believed Claimant also could perform other types of radio dispatch jobs. He said she could work as a cardiac monitor technician or work in an animal hospital. Thus, even taking away the Air Evac job, he could not state that Claimant was totally disabled since there were other jobs that Claimant could perform. And even if some of the jobs needed accommodation, he said the ADA (American with Disabilities Act) requires employers with 15 or more employees to provide some accommodations. He said the accommodations Claimant needed would be "simple to do." (Exhibit I, page 39).

While Mr. Swearingin admitted that Claimant's medications could be a hindrance to her finding employment or going to school on a full-time basis, and those medications may have been a hindrance or obstacle to her employment in the past, he said some people can function adequately on medications. It depended on their tolerance.<sup>1</sup>

Mr. Swearingin reviewed Dr. Franks' report and said it did not change his opinion regarding Claimant's ability to be employed. He noted that Claimant's past history fails to support some of the findings made by Dr. Franks in the psychologist's report or testimony. For instance, Dr. Franks testified that Claimant was not a dependable worker, but a look at Claimant's overall history demonstrates that she successfully held jobs. She often held multiple jobs at one time. Some of the jobs she took she knew were temporary positions from the start. Moreover, Mr. Swearingin noted that Claimant's past history demonstrates that she was capable of working in high stress situations. And her performance on academic testing was at odds with some of Dr. Franks' opinions regarding her abilities.

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<sup>1</sup> Claimant's testimony indicates that she held employment in the past even while taking prescription medication.

## CONCLUSIONS OF LAW

Section 287.220 RSMo, creates the Second Injury Fund, and prescribes the compensation that shall be paid from the Fund in “all cases of permanent disability where there has been previous disability.” To trigger liability of the Second Injury Fund, Claimant must show the presence of an actual and measurable disability at the time the work injury is sustained, and that work-related injury is of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. *E. W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo. App. W.D. 2002), *overruled on other grounds, Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Claimant also must show “either that (1) a pre-existing disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself.” *Gasson v. Liebengood*, 134 S.W.3d 75, 79 (Mo. App. W.D. 2004).

In this case, where permanent total disability is alleged, the Administrative Law Judge must first consider the liability of the employer in isolation by determining the degree of disability due to the last injury. *APAC Kansas, Inc., v. Smith*, 227 S.W.3d 1, 4 (Mo. App. W.D. 2007). If Claimant is not permanently and totally disabled from the last accident, then the degree of disability attributable to all injuries is determined. 227 S.W.3d at 4. Permanent total disability means an employee is unable to compete in the open labor market. *Forshee v. Landmark Excavating and Equip.*, 165 S.W.3d 533, 537 (Mo. App. E.D. 2005). “The critical question is whether an employer could reasonably be expected to hire the claimant, considering his present physical condition, and reasonably expect him to successfully perform the work.” *Id.*

### **Disability from Last Accident**

Claimant's experts opined that Claimant is permanently and totally disabled as a result of the combination of disabilities and not as a result of the disabilities sustained solely from the last accident. The Second Injury Fund's expert disputes whether Claimant is permanently and totally disabled at all. No expert has suggested that Claimant is permanently and totally disabled from the last accident, alone. It is within the province of the Administrative Law Judge to determine the extent of any permanent disability. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo. App. E.D. 1998).

On October 21, 2009, Claimant settled her claim for disability with the employer for a lump sum of \$3,703.00. The stipulation for compromise settlement recites that the employer paid \$630.00 in medical expenses and no temporary total disability. No percentage of disability was recited in the stipulation. The settlement amount, if divided by Claimant's weekly permanent partial disability benefit rate of \$185.15, would calculate to 20 weeks of permanent partial disability or 5 percent of the body as a whole. This is substantially less than that opined by Dr. Koprivica (10 percent to the body as a whole for physical disabilities) and by Dr. Franks (10 percent to the body as a whole for psychological).

The stipulation for compromise settlement recites that there were numerous issues in dispute. Such fact, together with the absence of any reference to a percentage of disability, suggests that the stipulation represents a compromise of more than just the nature and extent of disability. It is also clear from the experts' testimonies and reports that Claimant's injuries were significantly greater than 5 percent to the body as a whole. I find and conclude that the stipulation for compromise settlement is not controlling; and Claimant suffered 50 weeks of

permanent partial disability from the last accident, taking into consideration both the physical and psychological components of her condition.

### **Combined Disabilities**

The inability to return to any employment means the inability to perform the usual duties of the employment in a manner that such duties are customarily performed by the average person engaged in such employment. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849 (Mo. App. S.D. 1995). In determining whether Claimant can return to employment, Missouri law allows the consideration of her relatively young age, education, along with physical abilities. *BAXI v. United Technologies Automotive*, 956 S.W.2d 340 (Mo. App. E.D. 1997). While “total disability” does not require that the Claimant be completely inactive or inert, *Sifferman v. Sears Roebuck and Co.*, 906 S.W.2d 823, 826 (Mo. App. S.D. 1996), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003), it does require a finding that the Claimant is unable to work in any employment in the open labor market, and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo. App. S.D. 2001), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003). The central question is: In the ordinary course of business, would any employer reasonably be expected to hire Claimant in his physical condition? *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. W.D. 2000), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003).

Section 287.020.6 RSMo, does not distinguish between full and part-time employment. Moreover, a person is not permanently and totally disabled simply because she must take medication and observe physician-imposed restrictions in order to return to work. *See e.g.*,

*Rector v. Gary's Heating and Cooling*, 293 S.W.3d 143 (Mo. App. S.D. 2009) (concluding that an injured employee was not permanently and totally disabled upon returning to part-time supervisory work with the aid of medication and diligent observation of the restrictions placed on him by his doctors). Further, The Second Injury Fund is not liable if post accident progression of the Claimant's pre-existing condition causes the Permanent Total Disability. *Roller v. Treasurer of the State of Missouri*, 935 S.W.2d 739, 742-43 (Mo. App. S.D. 1996), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

In this case, there is ample evidence to support a finding that Claimant is capable of working in the open labor market, albeit in a limited number of jobs. Contrary to Dr. Franks' understanding of Claimant's prior work at Air Evac, Claimant was working in a full-time dispatcher position while also working on-call as an EMT. She held that position for nearly four years. By her own testimony, at the time she left she was capable of performing her job both psychologically and physically. Dr. Franks' assertion that Claimant was not dependable or was a bad employee is simply incorrect and cannot stand as a basis for finding that Claimant is now permanently and totally disabled.

There is no doubt that Claimant has not had the easiest of lives. But she has proven to be resilient, rebounding from traumatic events of her childhood, obtaining an education, completing vocational training, maintaining her license as an EMT, and successfully working many years in a demanding position, as well as maintaining employment through most of her life.

Wilbur Swearingin had the opportunity to meet and give testing to Claimant. He is an expert in vocational rehabilitation and had a full understanding of Claimant's past work history, medical history, and physical restrictions. Based on his expertise, he determined that Claimant was capable of employment in the open labor market. While Claimant counters with Dr. Franks'

opinion, it is evident that Dr. Franks did not have an accurate understanding of Claimant's past work history, and thus I find and conclude that he exaggerated Claimant's past psychological history. Mr. Swearingin's opinions are the only ones in the case which are based upon a full and accurate understanding of the underlying facts in this case. I accept Mr. Swearingin's opinion, that Claimant is not permanently and totally disabled, as more credible and accurate than that of Dr. Franks and Dr. Koprivica. Given Claimant's age of only 38 years, her education, medical skill, skill in dispatching, and lack of surgical findings in her low back, and based on the record as a whole, I find and conclude that Claimant is not permanently and totally disabled.

### **Permanent Partial Disability**

The 50 weeks of disability assessed as a result of the last accident meets the statutory threshold set forth in § 287.220 RSMo 2000, for consideration of liability against the Second Injury Fund for permanent partial disability. I further find and conclude that Claimant's primary disability poses a hindrance and obstacle to employment or re-employment.

Based on the opinions of Dr. Koprivica and Dr. Franks, I further find and conclude that Claimant has the following pre-existing permanent partial disabilities that were a hindrance or obstacle to employment:

15 percent to the body as a whole for neck pain	60.00 weeks
25 percent to the body as a whole for back pain	100.00 weeks
15 percent to each hand for carpal tunnel syndrome	52.50 weeks
15 percent for psychological factors	<u>60.00 weeks</u>
	272.50 weeks

When the 50 weeks of disability from the last injury are added to these pre-existing permanent partial disabilities, the simple sum of all of the disabilities is 322.50 weeks. Having reviewed all of the evidence, I am convinced that these disabilities combine synergistically, and that the combined effect is significantly greater than in most cases in which a 10 or 15 percent

load is typically applied. Even though Claimant is capable of working, and she is not permanently and totally disabled, it is undisputed that she is relegated to a narrow range of employment opportunities. Therefore, I apply a 20 percent load and award Claimant 64.50 weeks of permanent partial disability against the Second Injury Fund.

Claimant's last weekly permanent partial disability rate was \$185.15. Therefore, the Award against the Second Injury Fund in favor of Claimant totals \$11,942.18.

Attorney Randy Alberhasky shall have a lien of 25 percent of the amount awarded as a reasonable fee for necessary legal work performed on behalf of Claimant.

Date: 11/1/10

Made by: /s/ Victorine R. Mahon  
Victorine R. Mahon  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ Naomi Pearson  
Naomi Pearson  
*Division of Workers' Compensation*