

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

Injury No.: 03-004378

Employee: Slobodanka Zilic
Employer: SBI, Inc. aka Schroeder & Tremayne, Inc.
Insurer: Pacific Indemnity Co.
c/o Chubb Group
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: January 22, 2003
Place and County of Accident: St. Louis City

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 10, 2007. The award and decision of Administrative Law Judge John K. Ottenad, issued April 10, 2007, 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 4th day of December 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Slobodanka Zilic

Injury No.: 03-004378

Dependents: N/A
Employer: SBI, Inc. aka Schroeder & Tremayne, Inc.
Additional Party: Second Injury Fund
Insurer: Pacific Indemnity Co. C/O Chubb Group
Hearing Date: December 14, 2006

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

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: January 22, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis City
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was a sewer for Employer who injured her left elbow, left knee and low back when she twisted, slipped and fell as she was moving a full box to the pallet.
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: Left Elbow, Left Knee and
Body as a Whole—Low Back
14. Nature and extent of any permanent disability: 25% of the Left Elbow, 25% of the Left Knee, 12.5% of the
Body as a Whole referable to the Low Back, and a
10% multiplicity load factor
15. Compensation paid to-date for temporary disability: \$9,943.89
16. Value necessary medical aid paid to date by employer/insurer? \$50,964.66

Employee: Slobodanka Zilic Injury No.: 03-004378

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$452.00
19. Weekly compensation rate: \$301.33 for TTD/ \$301.33 for PPD
20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

156.75 weeks of permanent partial disability from Employer

\$47,233.48

22. Second Injury Fund liability:

None

\$0.00

TOTAL:

\$47,233.48

23. Future requirements awarded: None

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Slobodanka Zilic	Injury No.:	03-004378
Dependents:	N/A	Before the	
Employer:	SBI, Inc. aka Schroeder & Tremayne, Inc.	Division of Workers'	
		Compensation	
Additional Party:	Second Injury Fund	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Pacific Indemnity Co. C/O Chubb Group	Checked by:	JKO

On December 14, 2006, the employee, Slobodanka Zilic, appeared in person and by her attorney, Mr. Ray B. Marglous, for a hearing for a final award on her claim against the employer, SBI, Inc. aka Schroeder & Tremayne, Inc., and its insurer, Pacific Indemnity Co. C/O Chubb Group, as well as the Second Injury Fund. The employer, SBI, Inc. aka Schroeder & Tremayne, Inc., and its insurer, Pacific Indemnity Co. C/O Chubb Group, were represented at the hearing by their attorney, Mr. John P. Kafoury. The Second Injury Fund was represented at the hearing by Assistant Attorney General Eileen Ruppe Krispin. Also present and participating in the hearing was Claimant's daughter, Amela Zilic, who was serving as a Bosnian translator for these proceedings. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of facts and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about January 22, 2003, Slobodanka Zilic (Claimant) sustained an accidental injury arising out of and in the course of her employment that resulted in injury to Claimant's left elbow, left knee and low back.
- 2) Claimant was an employee of SBI, Inc. aka Schroeder & Tremayne, Inc. (Employer).

- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage of \$452.00, resulting in applicable rates of compensation of \$301.33 for total disability benefits and \$301.33 for permanent partial disability (PPD) benefits.
- 7) Employer paid temporary total disability (TTD) benefits in the amount of \$9,943.89, representing a period of time from January 22, 2003 to September 9, 2003, or 33 weeks.
- 8) Employer paid medical benefits totaling \$50,964.66.
- 9) Claimant reached maximum medical improvement on September 9, 2003.

ISSUES:

- 1) Is Claimant's alleged psychiatric condition medically causally related to the injury at work on or about January 22, 2003?
- 2) Is Claimant entitled to future medical care related to this injury for the psychiatric condition only?
- 3) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?
- 4) What is the liability of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Deposition of Samuel Bernstein, Ph.D., with attachments, dated December 4, 2006
- B. Deposition of Wayne Stillings, M.D., with attachments, dated June 12, 2006
- C. Deposition of Shawn Berkin, D.O., with attachments, dated August 8, 2006
- D. Certified medical treatment records of Health South
- E. Certified medical treatment records of Des Peres Hospital
- F. Certified medical treatment records of Unity Corporate Health
- G. Medical treatment records of Pain Treatment Center, Inc. (Dr. John Graham)
- H. MRI of the lumbar spine dated July 25, 2003

Employer/Insurer Exhibits:

1. Medical treatment records of The Orthopedic Center of St. Louis (Dr. David Brown)
2. Medical treatment records of The Orthopedic Center of St. Louis (Dr. Mark Miller)
3. Deposition of Edwin Wolfgram, M.D., with attachments, dated June 20, 2006
4. Certified medical treatment records of Dr. Maret

Second Injury Fund Exhibits:

Nothing submitted at the time of trial

Note: Exhibits A, B, C, and 3 were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence. Specifically on the Seven Day Rule objections, the party making that objection did not then request a continuance to reconvene the deposition after having had a chance to review the new opinion, and thus that objection was effectively waived.

FINDINGS OF FACT:

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational opinion and deposition, and the medical records, as well as my personal observations of Claimant at hearing, I find:

- 1) **Claimant** is a 57 year old, currently unemployed individual, who last worked for Schroeder & Tremayne (Employer) as a sewing machine operator on January 22, 2003. She had worked for Employer from September 1998 until the date of her injury.
- 2) Claimant testified that she was born in Capljina, Yugoslavia (Bosnia) and lived there from birth until 1993. She testified that she finished elementary school and three years of high school, but then left school and went to work. She worked for 5 ½ years at a factory knitting sweaters with a machine, but left that job because she got married. She received no special work training in Bosnia. After getting married, she was a homemaker, raising her three children.
- 3) I observed that Claimant became visibly upset and very tearful when she was describing how her life changed because of the war between Croatia and Bosnia over religion. Since she was a Muslim, she said that her family was targeted by the authorities. She described that grenades were constantly falling, and they often had no food. She would huddle with her three children in the basement to protect them from the grenades. Claimant said the Croatian army came and took her husband away to a concentration camp. She said it was over a month before she knew his whereabouts. She said there was no food to be purchased since the stores were robbed. She testified that her Muslim neighbors shared what they could. Finally, Claimant said the authorities came and forced her to sign over everything they owned (specifically, the house) to get her husband out of the concentration camp. Having nowhere to live now in Bosnia, she and her family traveled to Germany in 1993, where they lived for 5 years. She said she did not work in Germany. Then she came with her family to the United States, and settled in St. Louis. She said they brought nothing with them when they came over here to America.
- 4) Claimant said her first job in St. Louis was packing diapers, which she did for 1 ½ to 2 months. Then she got the job sewing at Schroeder & Tremayne in September 1998, and worked there until the day of her injury, January 22, 2003.
- 5) Claimant testified that she missed work because of what she had gone through in Bosnia. She said she not only missed some days because of bad nightmares, but she also had to leave early because she was feeling bad. She said her problems included an inability to sleep at night because of nightmares of trucks coming to pick up children and women to take them away. She also had nightmares of the army coming into the house with guns. She testified she has had constant nightmares of the soldiers since coming from Bosnia. She said, at times, she felt like she could not be around people. She just did not feel well. She said she would sometimes ask to go home when she was feeling this way, even if she did make it into work.
- 6) Medical treatment records from **Dr. Maret at BJC Medical Group** (Exhibit 4) begin with an examination dated February 18, 2002. There was a question of hypertension and hyperlipidemia, but no complaints of chest pain, shortness of breath or focal neurologic symptoms. She did complain of aching in her hands and also interestingly noted "occasional left elbow and left knee pain when after a fall." She did have dyspnea on exertion and noted her smoking history. She had additional follow-up appointments on September 30, 2002, October 28, 2002, and December 16, 2002. She was given medication for the hyperlipidemia which she did not take, and medication was also eventually recommended for the hypertension. She also continued to smoke despite the doctor's directive to stop. The records then document three examinations after her work injury on January 22, 2003. The last one dated June 20, 2003 noted no complaints referable to the smoking or hypertension. Her hypertension was under "excellent control" and her hyperlipidemia was "well controlled." There were absolutely no complaints or references in the records to nightmares, trouble sleeping, flashbacks or any other psychological problems related to her experiences in Bosnia.
- 7) On January 22, 2003, Claimant testified she was sewing, and was then taking a full box to put it on the pallet, when she twisted, slipped and fell as she was moving the box. She said she hurt her arm (left elbow), leg (left knee) and low back. She testified she went for therapy at Health South. She said she was diagnosed with an elbow fracture and had surgery performed by Dr. Brown. Her knee was also hurting her and was swollen. She said she could not walk on it. Because of those complaints, she also had surgery on the knee, but she said the surgery did not help her knee at all. She said she also received injections for her low back from Dr. Graham, a pain specialist.
- 8) Medical records from **Unity Corporate Health** (Exhibit F) document the initial treatment Claimant received on the day of the injury, January 22, 2003. After X-rays, Claimant was diagnosed with a questionable, undisplaced slightly impacted fracture of the radial head of the left elbow. On January 22, 2003, she was given a long arm splint at **Health South** (Exhibit D) to keep the elbow at 90 degrees of flexion following the diagnosis of a

fracture after her fall at work. She was also diagnosed with a contusion of the left knee. She was referred to Dr. Brown for further treatment on the elbow, but continued to see the doctors at Unity through February 28, 2003 for the left knee. During that time she was prescribed medications and given a course of physical therapy for the knee. An MRI of the knee performed on February 26, 2003 was read as negative, and she was diagnosed with a continued contusion of the left knee. However, because of her continued complaints, she was referred to Dr. Miller for further evaluation of the knee. None of these records contain any indication of, or diagnosis of, low back problems related to the injury.

- 9) Medical records from **The Orthopedic Center of St. Louis (Dr. David Brown)** document Claimant's initial visit there on January 24, 2003, at which time she described a consistent history of injury to her left elbow. (Exhibit 1) She was diagnosed with a nondisplaced left radial head fracture. By the time of her next visit on February 7, 2003, the fracture was more displaced and Dr. Brown was recommending surgery.
- 10) Claimant was taken to surgery by Dr. David Brown at **Des Peres Hospital** (Exhibit E) on February 13, 2003 for a left radial head excision to treat her displaced left radial head fracture. Initially Dr. Brown was going to perform an open reduction and internal fixation, but because the fracture was severely comminuted, he opted for the radial head excision instead.
- 11) Claimant had a course of physical therapy at **Health South** (Exhibit D) for the left elbow following her elbow surgery from March 6, 2003 through May 9, 2003 with a discharge note dated June 6, 2003. By the end of her elbow therapy, the records documented left elbow range of motion within normal limits, improved functioning and fewer complaints.
- 12) Following surgery, Claimant continued to follow-up with **Dr. Brown** for her left elbow. (Exhibit 1) The notes show steady progress with decreasing complaints, and increasing motion in the left elbow. On June 11, 2003, Claimant only complained of occasional soreness in the left elbow. She had a full active range of motion and no point tenderness. Dr. Brown released her from care for the elbow and indicated no further treatment was necessary. Dr. Brown then last saw her on December 14, 2004 with complaints of diffuse nonspecific elbow pain. Claimant had an MRI of the elbow that was completely normal. Dr. Brown wrote, "From an anatomical point of view, there is no good explanation for Ms. Zilic's diffuse pain." She was kept at a full duty release with no restrictions on the elbow. Finally, on December 20, 2004, Dr. Brown issued a final rating on the elbow of 12% permanent partial disability.
- 13) Following her initial course of treatment on the knee at Unity Corporate Health, Claimant came under the care of Dr. Mark Miller. The records from **The Orthopedic Center of St. Louis (Dr. Mark Miller)** document treatment she received there for the left knee beginning on March 5, 2003. (Exhibit 2) Dr. Miller initially made a differential diagnosis of a patellofemoral contusion versus a tear of the posterior horn of the medial meniscus. After a course of physical therapy, when Claimant was still not doing well with her knee complaints, Dr. Miller recommended a diagnostic arthroscopy.
- 14) Claimant was taken to surgery by Dr. Mark Miller at **Des Peres Hospital** (Exhibit E) on April 25, 2003 for a partial lateral and medial meniscectomy and chondroplasty to treat her anterior horn medial meniscus tear, lateral meniscus tear, grade 2 chondromalacia of the patella and grade 2-3 chondromalacia of the trochlea in the left knee.
- 15) Claimant continued to follow-up with **Dr. Mark Miller** following the surgery. (Exhibit 2) The notes indicated she was advancing very slowly in rehab, and as of June 5, 2003, she still had a relatively pronounced limp. The note dated June 26, 2003 is the first one to mention a complaint of low back pain radiating to the buttock and posterior thigh which escalated "in the past couple days." She walked with a marked antalgic gait, and had spasm and a positive straight leg raise test. Dr. Miller recommended an MRI to rule out left sciatica. When asked about the causation of the back complaints, Dr. Miller responded in a July 17, 2003 letter that the back complaints were causally related to the knee injury and subsequent surgery, because of the limping and disturbance of her gait pattern.
- 16) An **MRI of the lumbar spine performed on July 25, 2003** (Exhibit H) revealed mild diffuse disc bulges from L3-4 to L5-S1 without evidence of neural foraminal narrowing. There was also facet disease at the levels of L3-4 and L5-S1. The report indicated there was a loss of normal disk space height and signal at L4-5 and L5-S1 consistent with degenerative disk disease.
- 17) After the MRI was performed, **Dr. Miller** next saw Claimant on July 31, 2003. Claimant still complained of knee pain and difficulty walking, as well as radiating pain from the buttock to the posterior thigh. He confirmed that the MRI did not show any disc herniation, but it did show degenerative changes "that are independent and not related to her fall." He believed the thigh pain was from the antalgic gait pattern from the knee. Objectively, he thought her knee was progressing well with no swelling and near full range of motion. He recommended continued physical therapy for her complaints. He also recommended Synvisc injections in the knee to try to deal with her knee complaints. Claimant underwent the Synvisc injections on August 14, 21, and 28, 2003. Dr. Miller

hoped that the injections would eliminate the buttock and hip pain by eliminating the knee pain, but he noted that if it did not, then epidural steroid injections may be necessary for the back. He remained of the opinion that the degenerative disc disease in the back pre-existed the fall, but was exacerbated by it. By the time of her third injection on August 28, 2003, the note indicates Claimant was having almost no knee pain whatsoever, but still had the upper thigh and buttock pain.

- 18) Claimant had extensive courses of physical therapy at **Health South** for her left knee and low back. (Exhibit D) The records document courses of therapy for the left knee from February 5, 2003 through February 21, 2003, March 7, 2003 through April 25, 2003, and then April 28, 2003 through September 16, 2003 (with that last period following her knee surgery). Her range of motion in the knee and her pain complaints seemed to wax and wane throughout the period without any specific pattern of improvement. Finally, she had a course of physical therapy for the low back (sciatica) from October 3, 2003 through October 17, 2003 with a discharge note dated November 7, 2003. During her therapy for the low back, it appeared that she increased her range of motion and flexibility, despite indicating that her complaints basically remained the same.
- 19) Medical records from the **Pain Treatment Center (Dr. John Graham)** document an initial visit there as a referral from Dr. Miller on September 22, 2003. (Exhibit G) She was complaining of left buttock and upper thigh pain. The notes contain a history of the injury at work on January 22, 2003, and of the treatment she had received so far for the elbow and knee. The note indicates, "Elbow better, knee some better but stairs a problem." The examination of her back revealed no spasm, negative straight leg raise test, intact heel/toe, and intact neurovascular exam. She was given an epidural steroid injection at this first visit. When she was next examined on September 29, 2003, Claimant reported not seeing much change following the first injection. She was given a second injection and also given a course of physical therapy for her complaints. At her last examination with Dr. Graham on October 6, 2003, she again reported no improvement from the injections, so no more injections were given. Dr. Graham released her from his care and recommended that she continue to follow-up with Dr. Miller. In his hand-written note from that date, he wrote "MMI" (maximum medical improvement).
- 20) **Dr. Mark Miller** issued his final report dated December 10, 2003. (Exhibit 2) He noted his last physical examination of Claimant occurred on October 22, 2003. At that time, Claimant indicated her knee pain had improved, but she still had buttock and thigh pain, which Dr. Miller believed was coming from multiple level disc disease in her low back. The physical examination revealed no effusion in the knee, symmetric range of motion, and mild loss of muscle strength. He rated her as having 12% permanent partial disability of the left knee. He also confirmed that she was released back to work without restrictions with respect to the knee.
- 21) Claimant said the doctor told her she could not do her old job. On cross-examination, Claimant said she did not remember both doctors releasing her to work without restrictions, because she was still hurting. She also did not remember being released to use a sewing machine again. After she was released from care, the company laid her off. She said she tried to work elsewhere, and even applied for unemployment, which she received for about 2 months. However, she was not offered any jobs, since she does not speak English. Claimant acknowledged on cross-examination that when she applied for and received unemployment compensation, she was ready, willing and able to work. She has not worked anywhere since her injury.
- 22) She said she felt hopeless and helpless at that time. She was the sole supporter of herself and her husband. She said her husband got sick with cancer in 2001 and had surgery to remove cancer of the throat. She admitted this made her depression worse.
- 23) She said she cannot concentrate or learn English to pass the citizenship test. She said she did attend the International School for English, but she could not comprehend it.
- 24) In terms of her current complaints, Claimant testified that her left elbow still hurts and she has lost some rotating motion. She said her elbow complaints affect her lifting ability. With regard to her left knee, Claimant said she cannot bend it, and she has pain and a popping sound in it. She said the complaints affect her ability to walk. Because of the continuing pain in her back, she said she is always moving to try to find a comfortable position. Because of all of her complaints, she said, "My life is ruined." She said she is "not a normal person" because she cannot walk, sit or pick things up normally. She acknowledged that the pain makes her depression worse. She said she is sadder because she cannot work. During her testimony, I did observe Claimant to be holding her back while sitting. She also moved very slowly to get up from a sitting position.
- 25) The deposition of **Dr. Shawn Berkin** was taken by Claimant on August 8, 2006 to make his opinions in this case admissible at trial. (Exhibit C) Dr. Berkin is an osteopathic physician with a general family practice. He examined Claimant on one occasion, March 16, 2004, at the request of Claimant's attorney, and then generated one report dated November 2, 2004. He provided no treatment for Claimant.
- 26) Dr. Berkin took an extensive history from Claimant regarding the injury at work on January 22, 2003 and her treatment subsequent to that injury for the left elbow, left knee and low back. Regarding a history of past injuries, the report indicates, "The patient denied any history of fractures or prior injuries." Therefore, Dr. Berkin did not

assign any pre-existing permanent partial disability for any pre-existing conditions. In her listing of present complaints, Claimant certainly did report pain in the elbow, knee and low back, as well as knee swelling and popping, and trouble sleeping because of her pain. The report contained no description in that section of nightmares or any other psychological complaints from Claimant. Physical examination of the low back revealed spasm, tenderness and markedly decreased range of motion. However, there was normal muscle tone and bulk in the lower extremities and normal reflexes. Other than this examination of the lower extremities in connection with the low back exam, I did not find any specific examination results on the left knee. The report contained no description of findings in the knee or range of motion testing, or anything else for that matter. Dr. Berkin testified that he did not note any swelling of the knee or any crepitus (popping). The examination of the left elbow revealed tenderness, but no ligamentous instability, and no swelling. Range of motion testing revealed full flexion and extension but some loss of either pronation or supination (the report is not clear in that regard).

- 27) Dr. Berkin opined the injury on January 22, 2003 was a substantial factor in the injuries to the left elbow, left knee and low back. He explained in his deposition that with regard to the low back, he basically agreed with Dr. Miller that due to her altered body mechanics when walking after the injury and surgery, she developed lower back symptoms. He rated her as having permanent partial disability related to the January 22, 2003 injury of 40% of the left elbow, 40% of the left knee and 30% of the body as a whole referable to the lumbar spine for a strain involving multiple bulging lumbar discs. He also testified that when considering the disabilities together, the overall disability exceeds the simple sum. He provided a number of recommendations including physical restrictions and treatment recommendations. He did not provide an opinion that she was permanently and totally disabled, despite the restrictions he put on her, and he deferred providing any opinions on her emotional and psychological status.
- 28) Claimant testified she saw her own doctor, Dr. Svrakic, at Barnes-Jewish one time in 2003 for depression when she had insurance. She said she went there because he spoke her language and she could talk to him about her hopelessness and pain. She said he gave her some pills to help. She said she was unable to continue to see him because she lost her insurance.
- 29) The deposition of **Dr. Wayne Stillings** was taken by Claimant on June 12, 2006 to make his opinions in this case admissible at trial. (Exhibit B) Dr. Stillings is a board certified psychiatrist. He examined Claimant on one occasion, April 20, 2004, at the request of Claimant's attorney, and then generated one report with that same date. He provided no treatment to Claimant.
- 30) Dr. Stillings took a history of complaints from Claimant including problems with the left hand, left knee, left forearm, and low back. According to the report, she also complained of depression that began after her injury in January 2003, and worsened when she did not make a good recovery. Her complaints included sleep disturbance, crying spells and feelings of helplessness, hopelessness and worthlessness. He took a history from her that included a description of her experiences of being caught up in the war in Bosnia, and her reported complaints following that including nightmares, flashbacks and avoidance symptoms. The report indicates that around mid-1995, many of these complaints abated, but they have been reactivated since her injury and inability to work. Her history also included the description of an additional personal stressor regarding her husband's health (throat cancer), and his inability to work and provide support for the family. Claimant described one prior visit with a psychiatrist, but she could not remember his name and needed prompting to remember what medications he prescribed. There were no medical records available from this visit for Dr. Stillings to review. The mental status examination was positive for displayed psychological distress when discussing Bosnia or her work injury. He found that her mood was significantly depressed. There were a number of elements of the examination that could not be assessed accurately because of her language barrier. The MMPI-2 also resulted in an invalid profile because of the language barrier.
- 31) Dr. Stillings diagnosed pre-existing PTSD, which was reactivated by the January 2003 work injury, and also major depressive disorder, single episode, related to the January 2003 work injury. He rated permanent partial disability for the January 22, 2003 injury of 25% of the body as a whole related to the depression and 6.25% of the body as whole related to the aggravation of her PTSD. He also rated 18.75% of the body as a whole related to the pre-existing PTSD. He recommended a treatment regimen of medications and psychotherapy to "prevent clinical deterioration in her psychiatric condition." He also opined, "From a psychiatric standpoint she is permanently and totally disabled due to the aforementioned diagnoses in combination with her physical limitations, impoverished cultural background, inability to speak English and her age." When asked on cross-examination if there was any reason why she was unable to learn English, Dr. Stillings responded that her depression impaired her ability to acquire new knowledge, but "that isn't totally preclusive."
- 32) The deposition of **Dr. Edwin Wolfgram** was taken by Employer on June 20, 2006 to make his opinions in this case admissible at trial. (Exhibit 3) Dr. Wolfgram is a board certified psychiatrist. He examined Claimant on one occasion, May 2, 2005, at the request of Employer's attorney. He generated one report dated May 12, 2005. He provided no treatment to Claimant.
- 33) Dr. Wolfgram took a history from Claimant including her prior general health issues (obesity, hypertension,

hyperlipidemia, and smoking), her prior mental health issues from the Bosnia War, and the effects of the injury at work on January 22, 2003. He reviewed an extensive collection of medical treatment records, and noted from his review that none of the treating physicians or therapists mentioned symptoms suggestive of PTSD or major depression. He confirmed that no medical records for her one-time visit to a psychiatrist (as referenced by Dr. Stillings) were made available to him for review. On his examination, Dr. Wolfgram found that she displayed a wide range of emotions, and he agreed with Dr. Stillings that she was under psychological distress when discussing her work injury and Bosnian War experiences. He found she was “animated, spontaneous, and expansive as she registered her problems.”

- 34) Dr. Wolfgram diagnosed an Adjustment Disorder with mixed anxiety and depressed mood, chronic; a Pain Disorder associated with psychological factors, chronic; Posttraumatic Stress Disorder, chronic; and Nicotine Dependence. With regard to the first diagnosis, he explained that the stressors causing this are withdrawal and inactivity. He also explained that, “Her cultivation of a dysfunctional state as part of the litigation process has added to her pain.” He opined that, “the desire to enhance the litigation process by an apparent dysfunctional state” is an additional stressor for her. He opined that the pre-existing clinical conditions including the obesity, hypertension, degenerative spine disease, smoking and PTSD placed Claimant in a state of compromised health. He also believed the language barrier was an added problem. Although he knew of “no precise rating scale for the identified collection of problems”, he suggested 30% permanent partial disability secondary to those conditions, except for the PTSD which he testified did not reach a level of clinical significance before the work injury and so did not have any permanent partial disability associated with it. He did not believe Claimant had any psychiatric permanent partial disability related to the injuries of January 22, 2003, and he also did not believe Claimant had any work restrictions from a psychiatric standpoint. Although he discussed Claimant’s need for therapy and medications to treat her overall physical condition, he was clear in his testimony that she did not need any psychiatric treatment related to the work accident on January 22, 2003. The suggestion of treatment was more directed to her overall physical condition and the pre-existing clinical conditions described above. Dr. Wolfgram did not express an opinion as to whether or not Claimant is able to learn English.
- 35) Claimant testified that she would like help from a doctor for her mental condition. She admitted that she has had no treatment over the last three years for her elbow, knee or low back. She also has no braces, nor a cane, to help her walk. She said she had seen her family doctor for high blood pressure medications and for Lipitor, but she has not seen him lately since she has no insurance.
- 36) The deposition of **Samuel Bernstein, Ph.D.** was taken by Claimant on December 4, 2006 to make his opinions in this case admissible at trial. (Exhibit A) Dr. Bernstein is a licensed psychologist and vocational expert. He met with Claimant on one occasion, July 20, 2006, at the request of Claimant’s attorney, and then generated one report with that same date. He provided no treatment or rehabilitation/vocational services to Claimant.
- 37) Dr. Bernstein wrote in his report and testified that although Claimant’s daughter was there as an interpreter, he was also able to communicate with her in German, since both he and the Claimant knew some German. He agreed with Dr. Stillings that she had depression and posttraumatic stress disorder. He testified that Claimant had prior back problems before the January 22, 2003 injury, which he felt were a hindrance or obstacle to employment, and which were exacerbated by this injury. He testified that because of her weight and her bad back, “she would have [pre-existing] problems in terms of bending, torsional, and lifting.” He also noted in his report that she had hypertension for a long period of time which is not under control because of a lack of medication due to insurance reasons. When asked about limitations from an orthopedic standpoint that he took into account, he testified that Dr. Brown placed a 25 pound weight lifting restriction on her elbow. He described in his report a number of symptoms that he attributed to the left hand from the primary work injury. He noted based on her vocational history that she was an unskilled worker.
- 38) Dr. Bernstein opined that Claimant was unemployable in the open labor market because of the combination of a number of factors, including her age; unskilled background; work related injuries to her left elbow, left knee, low back and left wrist; her prior PTSD with depression; the exacerbated PTSD and depression after her work injury; the language barrier and limited educational skills. He testified that he had no reason one way or the other to think that she would be unable to learn English. The fact is that she is just very limited with her English. He admitted that the PTSD she had could be exacerbated by other factors such as her husband’s health.
- 39) Claimant testified on cross-examination that she did not give Dr. Bernstein any information in German, because except for a few words, she does not speak German.

RULINGS OF LAW:

Based on a comprehensive review of the substantial and competent evidence, including Claimant’s testimony, the expert medical opinions and medical records, as well as my personal observations of Claimant at hearing, and based upon the

applicable laws of the State of Missouri, I find: As a result of the January 22, 2003 accident, which arose out of and in the course of her employment, Claimant sustained a compensable injury to the left elbow, left knee and low back. As a result of the injuries to her left elbow, left knee and low back, adequately described in the records and reports of Dr. Brown, Dr. Miller, Dr. Graham and Dr. Berkin, Claimant continued to have pain, some limited motion and weakness in those body parts.

Issue 1: Is Claimant's alleged psychiatric condition medically causally related to the injury at work on or about January 22, 2003?

Under **Mo. Rev. Stat. § 287.020.2 (2000)**, an injury by accident is compensable if it is clearly work-related, and it is clearly work-related if work was a substantial factor in the cause of the resulting medical condition or disability.

Claimant bears the burden of proof on all essential elements of her Workers' Compensation case. ***Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute***, 793 S.W.2d 195 (Mo.App.E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Claimant must establish a causal connection between the accident and injury. ***Id.*** at 198. The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. ***Id.*** at 199.

In a Workers' Compensation case, expert medical testimony is not necessarily needed to establish the cause of the injury, if causation is a matter within the understanding of lay persons. ***Knipp v. Nordyne, Inc.***, 969 S.W.2d 236 (Mo.App.W.D. 1998) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). When the condition presented in a case is a sophisticated injury that requires surgical intervention or highly scientific technique for diagnosis, and especially when there is a serious question of pre-existing disability, then the proof of causation is not within the realm of lay understanding. ***Id.*** at 240.

Having reviewed and considered all of the relevant evidence on this issue, including the reports and opinions of Dr. Wolfgram, Dr. Stillings and Dr. Bernstein, I find that Claimant has failed to prove that any psychiatric condition is medically causally related to her injury at work on January 22, 2003. I reached this conclusion by further finding that the opinions of Dr. Wolfgram on this issue are more credible and persuasive than the opinions of Dr. Stillings and Dr. Bernstein.

Dr. Stillings, who examined Claimant and produced a report at the request of Claimant's attorney, concluded that Claimant had pre-existing PTSD based on her traumatic experiences in the Bosnian War and the profound effect that war had on her and her family. He assigned a significant amount of pre-existing permanent partial disability to that condition based on her description. He then diagnosed major depression and an exacerbation of her PTSD related to the work injury of January 22, 2003. Because of the language barrier (her inability to communicate in English), he could not obtain an MMPI-2 result that was valid, and he also could not accurately assess a number of the elements of the examination. Basically, he relied on the truthfulness of Claimant to accurately report her emotional state and her feelings in order to make his diagnosis.

Dr. Wolfgram, who examined Claimant and produced a report at the request of Employer, also concluded that Claimant had pre-existing PTSD based on her involvement in the Bosnian War. However, he did not believe the condition was clinically significant prior to January 22, 2003, and so he did not assign any permanent partial disability to that condition. He did not believe Claimant had any psychiatric diagnoses or disability related to the January 22, 2003 injury. Much like Dr. Stillings, he also was unable to accurately assess some elements of his examination because of the language barrier. However, instead of just relying on the truthfulness and accuracy of Claimant, he reviewed the medical treatment records in detail to compare her report of problems and her functional ability then, versus what she said she could and could not do now. It was in the context of that comparison that he opined, "Her cultivation of a dysfunctional state as part of the litigation process has added to her pain." While he did note some psychiatric diagnoses, he further opined that, "the desire to enhance the litigation process by an apparent dysfunctional state" is an additional stressor for her.

Although Dr. Bernstein is a licensed psychologist, he seems to parrot the opinion of Dr. Stillings on Claimant's psychiatric condition and its relationship to the work injury of January 22, 2003. So to the extent that I did not find Dr. Stillings' opinion competent and persuasive, I make that same finding with Dr. Bernstein's conclusions (based on Dr. Stillings' report). However, even to the extent that he could reach his own expert opinions on Claimant's psychiatric condition, for the same extensive reasons discussed below (which I will not repeat here), I do not find Dr. Bernstein's opinion on this issue, or any of the opinions contained in his report, to be competent, credible or persuasive evidence.

I have no doubt that Claimant had PTSD prior to the January 22, 2003 injury and both Dr. Stillings' and Dr. Wolfgram's opinions support that finding. I believe Claimant when she described the horrors she lived through in Bosnia, with soldiers entering her home, not knowing if her husband was alive or dead, huddling in the basement with the children, and having to leave everything behind to flee the country for her life. I also believe Claimant when she gets emotional and tearful recalling those events and the impact it has had on her life. However, I do not believe the prior PTSD condition was exacerbated by the work injury as Dr. Stillings has opined, nor do I believe Claimant developed a major depression as a result of that injury.

Claimant saw numerous physicians for her elbow, knee and back injuries, for almost a year period of time, but none

of them in their office notes record any problems with nightmares, flashbacks, or any symptoms of depression or PTSD at all. Even Claimant's own personal doctor, Dr. Maret, saw Claimant from February 18, 2002 through June 20, 2003 and there were absolutely no complaints or references in the records to nightmares, trouble sleeping, flashbacks or any other psychological problems related to her experiences in Bosnia or her work injury. Additionally, Claimant testified that she saw a psychiatrist on her own for treatment, and she identified him at trial, but introduced no records to show what treatment she received or what her complaints might have been. This is apparently the same psychiatrist who she mentioned to Dr. Stillings, but at that time was unable to remember his name and still provided no records. If these complaints and problems are as pervasive and troublesome as Claimant and Dr. Stillings suggests they are, then it makes no sense why there are absolutely no references to any of these complaints in any of the medical treatment records submitted into evidence.

Additionally, in reviewing the medical treatment records, I was troubled by the gross disparity in the findings between the treating physicians and therapists and then Claimant's testimony and Dr. Berkin's report. While the reports from the treating physicians described a reasonably good recovery from these injuries, and while those findings were backed up by the measurements and findings in the physical therapy records, Claimant's testimony at hearing and Dr. Berkin's report painted a vastly different picture with more significantly lost range of motion and more significant complaints. Dr. Wolfgram's assessment took this disparity into account when he concluded that she had a "desire to enhance the litigation process by an apparent dysfunctional state." He did not just blindly rely on Claimant's statements and accept them as true, but instead he measured Claimant's statements against the medical treatment records in evidence to form a comprehensive opinion of her condition, that in my estimation made sense.

Because Dr. Wolfgram's opinions are supported by the findings in the medical treatment records and because he more accurately gauged her pre-existing PTSD, as well as her current overall psychiatric condition, I find his opinions and conclusions more credible, competent and persuasive than those of Dr. Stillings and Dr. Bernstein. Thus, I find that there are no psychiatric conditions medically causally related to the injury of January 22, 2003.

Issue 2: Is Claimant entitled to future medical care related to this injury for the psychiatric condition only?

While there are certainly indications in the medical records and opinions concerning the possible need for future treatment for some of Claimant's orthopedic conditions, the parties specifically agreed that the only future treatment at issue in this case is regarding the alleged psychiatric conditions. Therefore, based on that stipulation by the parties, the only future treatment to be addressed in this award is regarding the alleged psychiatric conditions.

Pursuant to **Mo. Rev. Stat. § 287.140 (2000)**, Employer is required to furnish "such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Just as Claimant must prove all of the other material elements of her claim, the burden is also on her to prove entitlement to future medical treatment. ***Dean v. St. Luke's Hospital***, 936 S.W.2d 601, 603 (Mo.App. 1997) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Claimant is entitled to an award of future medical treatment if she shows by a reasonable probability that future medical treatment is needed to cure and relieve the effects of the injury. ***Concepcion v. Lear Corporation***, 173 S.W.3d 368, 372 (Mo.App. 2005).

Based on the competent and substantial evidence described above, and for much of the same reasoning as enumerated in the prior section, I find that Claimant is not entitled to any future medical care for any psychiatric conditions related to this injury at work on January 22, 2003. This finding is based on the fact that I have already found Claimant failed to prove that there are any psychiatric conditions medically causally related to the injury of January 22, 2003. Since there are no psychiatric conditions or diagnoses medically causally related to the injury on January 22, 2003, then no medical treatment for any psychiatric conditions or diagnoses would be related either.

Again on this issue, I find the medical opinions and report of Dr. Wolfgram more credible, competent and persuasive than those of Dr. Stillings and Dr. Bernstein. While Dr. Wolfgram agrees that Claimant may need some therapy and medications, he is clear that that treatment is not related to the injury at work on January 22, 2003. Just as in the prior section, I rely on Dr. Wolfgram's opinion in determining this issue.

Therefore, for all these reasons, as well as those enumerated in the prior section, Claimant is not entitled to any future psychiatric medical care related to this January 22, 2003 injury.

Issue 3: What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?

Issue 4: What is the liability of the Second Injury Fund?

Given that these two issues are so inter-related in this claim, and further given Claimant's allegation that she is permanently and totally disabled, I will address these two issues together.

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

Under **Mo. Rev. Stat. § 287.020.7 (2000)**, "total disability" is defined as "inability to return to any employment and not merely ... inability to return to the employment in which the employee was engaged at the time of the accident." The test for permanent total disability is claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173 (Mo.App.E.D. 1995) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

In cases such as this one where the Second Injury Fund is involved, we must also look to **Mo.Rev.Stat. § 287.220 (2000)** for the appropriate apportionment of benefits under the statute. In order to recover from the Fund, Claimant must prove a pre-existing permanent partial disability, that existed at the time of the primary injury, and which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment should employee become unemployed. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App.E.D. 1999) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Then to have a valid Fund claim, that pre-existing permanent partial disability must combine with the primary disability in one of two ways. First, the disabilities combine to create permanent total disability, or second, the disabilities combine to create a greater overall disability than the simple sum of the disabilities when added together.

In the second (permanent partial disability) combination scenario, pursuant to **Mo. Rev. Stat. § 287.220.1 (2000)**, the disabilities must also meet certain thresholds before liability against the Second Injury Fund is invoked. The pre-existing disability and the subsequent compensable injury each must result in a minimum of 12.5% permanent partial disability of the body as a whole, or 15% permanent partial disability of a major extremity. These thresholds are not applicable in permanent total disability cases.

It is first necessary to determine the nature and extent of permanent partial and/or permanent total disability against Employer. Based on the competent and substantial evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational expert, as well as based on my personal observations of Claimant at hearing, I find that Claimant is not permanently and totally disabled under the statute against Employer as a result of the last injury alone.

Of all of the medical records and expert opinions I reviewed, I only found two that provided an opinion that Claimant was permanently and totally disabled, Dr. Stillings and Dr. Bernstein. However, neither of those experts indicated that the permanent total disability was the result of the last injury alone. Therefore, I find there is no evidence in the record to substantiate a finding of permanent total disability against Employer.

I find that Claimant has successfully met her burden of proof that Employer is responsible for the payment of permanent partial disability referable to the left elbow, left knee and body as a whole (low back) related to the January 22, 2003 injury.

With regard to the left elbow, Dr. Brown, the treating doctor, rated Claimant as having 12% permanent partial disability of the elbow. Dr. Berkin rated Claimant as having 40% permanent partial disability of the left elbow. She did have a left radial head excision surgery to treat her displaced left radial head fracture. Although Claimant complained of pain, decreased rotating motion at the elbow and decreased lifting capacity, Dr. Brown's notes and the physical therapy records showed full active range of motion and a final release to work with no restrictions on the elbow. Even Dr. Berkin's examination showed no ligamentous instability, and no swelling. His range of motion testing revealed full flexion and extension but some loss of either pronation or supination (the report is not clear in that regard). On the basis of all of these findings, and Claimant's complaints, I find Claimant has 25% permanent partial disability at the level of the left elbow.

With regard to the left knee, Dr. Miller, the treating doctor, rated Claimant as having 12% permanent partial disability of the left knee. Dr. Berkin rated Claimant as having 40% permanent partial disability of the left knee. She did have a partial lateral and medial meniscectomy and chondroplasty to treat her anterior horn medial meniscus tear, lateral meniscus tear, grade 2 chondromalacia of the patella and grade 2-3 chondromalacia of the trochlea in the left knee. Claimant said she cannot bend it, and she has pain and a popping sound in it. She said the complaints affect her ability to walk. Dr. Miller's last examination of the knee revealed no effusion in the knee, symmetric range of motion, and mild loss of muscle strength.

Dr. Berkin testified that he did not note any swelling of the knee or any crepitus (popping), but I could not locate any specific findings on the knee from his examination. On the basis of all of these findings, and Claimant's complaints, I find Claimant has 25% permanent partial disability at the level of the left knee.

With regard to the low back, Dr. Berkin rated Claimant as having 30% permanent partial disability of the body as whole referable to the low back, as a result of her strain involving multiple bulging lumbar discs. Both Dr. Berkin and Dr. Miller agreed that due to her altered body mechanics when walking after the injury and knee surgery, she developed lower back symptoms. I found it significant that the low back complaints did not surface until June 26, 2003, and even then the MRI findings and Dr. Miller's notes characterize the low back changes as degenerative in nature, that were made symptomatic by the altered gait from the knee injury. Based on these causation opinions in the record, I find that Claimant sustained a low back strain that aggravated an underlying degenerative process in the back, but I do not find that the injury directly caused any of the disc bulging pathology referenced in the MRI report.

During her therapy for the low back, it appeared that Claimant increased her range of motion and flexibility, despite indicating that her complaints basically remained the same. Dr. Berkin's physical examination of the low back revealed spasm, tenderness and markedly decreased range of motion. However, there was normal muscle tone and bulk in the lower extremities and normal reflexes. Claimant testified that because of the continuing pain in her back, she is always moving to try to find a comfortable position. She said she cannot sit or walk for long periods of time. On the basis of all of these findings, and Claimant's complaints, I find Claimant has 12.5% permanent partial disability of the body as a whole referable to the low back.

Dr. Berkin also opined that when considering the disabilities together, the overall disability exceeds the simple sum. In other words, he believed there was a synergistic effect between these injuries that left Claimant more disabled as result of the combination than considering them independently of each other. Claimant testified that she had problems lifting things because of both the left arm and the low back. Her problems walking appeared to come from both her left knee and low back pain. On the basis of this testimony from Claimant and based upon Dr. Berkin's opinion referenced above, I find that the combination of these disabilities does result in a greater overall disability than the simple sum, and a multiplicity loading factor should be added. I find that Claimant is entitled to receive a loading factor of 10% ($142.5 \text{ weeks} \times 10\% = 14.25 \text{ weeks}$) from Employer for the greater overall disability she has from combining the disabilities attributable to the January 22, 2003 injury.

Therefore, I find Employer is liable for the payment of 156.75 weeks of permanent partial disability (25% of the left elbow, 25% of the left knee, 12.5% of the BAW—low back, and a 10% multiplicity load factor) as a result of the January 22, 2003 injury.

Having now established the nature and extent of the permanent partial disability attributable to the primary injury against Employer, it is now appropriate to determine whether or not Claimant has successfully met her burden of proving Second Injury Fund liability for permanent total or permanent partial disability.

Of all of the doctors and/or experts who examined and treated Claimant, there are only two that indicate Claimant is permanently and totally disabled, Dr. Stillings and Dr. Bernstein. Dr. Stillings opined that, "From a psychiatric standpoint she is permanently and totally disabled due to the aforementioned diagnoses [PTSD and major depressive disorder] in combination with her physical limitations, impoverished cultural background, inability to speak English and her age." Similarly, Dr. Bernstein, Claimant's vocational expert, opined that Claimant was unemployable in the open labor market because of the combination of a number of factors, including her age; unskilled background; work related injuries to her left elbow, left knee, low back and left wrist; her prior PTSD with depression; the exacerbated PTSD and depression after her work injury; the language barrier and limited educational skills.

On the other hand, all of the treating doctors released Claimant back to work without any restrictions. Dr. Miller indicated Claimant could work with no restrictions on the left knee. Dr. Brown indicated Claimant could work with no restrictions attributable to the left elbow. Despite his agreement that Claimant had pre-existing PTSD, Dr. Wolfgram opined that Claimant had no work restrictions from a psychiatric standpoint. Even Claimant's own rating physician, Dr. Berkin, did not provide an opinion that Claimant was permanently and totally disabled, despite placing a number of functional restrictions on her because of her complaints.

After observing Claimant at hearing, noting that she could not communicate in English without an interpreter, and after thoroughly reviewing the medical treatment records and opinions, I find that the major reason she is unable to yet obtain employment in the open labor market is her inability to communicate in English, and not any physical complaints or functional limitations from her injuries. That being the case, and since it is inappropriate here to factor in her deficient English skills as a component of any permanent total disability finding, Claimant has failed to prove that she is permanently and totally disabled against the Second Injury Fund.

From an objective standpoint, reviewing the findings in the treatment records and physical therapy notes, there certainly is some disability from the injuries to her left elbow, left knee, and low back. Claimant also certainly has some residual physical complaints as a result of these injuries. But in terms of the effect these injuries have had on her ability to work, I find the opinions of the treating doctors (Dr. Miller and Dr. Brown) competent, credible and persuasive that she

could work without restrictions as result of the knee and elbow. Even factoring in the back complaints, although Dr. Berkin assigned some restrictions, even he did not opine Claimant was permanently and totally disabled.

Additionally, as will be discussed below, Claimant certainly had PTSD pre-existing the January 22, 2003 injury as a result of her experiences in the Bosnian War. However, for many of the same reasons discussed above in prior sections, not to mention those discussed below, I again find the opinions of Dr. Wolfgram more competent, credible and persuasive than the opinions of Dr. Stillings. Specifically, I find Dr. Wolfgram's opinion that Claimant had no work restrictions from a psychiatric standpoint, credible and persuasive. I believe that opinion is bolstered by the testimony that she never received any psychiatric treatment in Germany or in the United States for her PTSD prior to the January 22, 2003 injury. It is further bolstered by the fact that there are no references in any of the medical treatment records or her family doctor's records to nightmares or any other PTSD symptoms.

In addition to not finding Dr. Stillings' opinions credible or persuasive, I also do not find Dr. Bernstein's opinions to be competent, credible or persuasive. There are too many inconsistencies and inaccuracies in his report for me to be able to rely on that report to make any findings in this case. First, he notes in the report and he testifies that since she did not speak English, he was able to obtain information from Claimant in German, as they both spoke that language. However, Claimant testified at hearing that she did not give Dr. Bernstein any information in German, because other than a few words, she does not speak German. Second, Dr. Bernstein described a prior history of back problems, and how he believed those problems were a hindrance or obstacle to her employment before the primary injury. Claimant never testified about any prior low back problems. There were also no medical records or ratings for any prior low back problems. It is completely unclear where this opinion came from, but it is equally clear that Dr. Bernstein factored this into his ultimate opinion on this case. Third, his report contained a description of left hand problems related to the January 22, 2003 injury. Claimant never testified about any left hand problems per se related to that injury. Fourth, Dr. Bernstein indicates that her long-standing hypertension is out of control, but the last report in evidence from her family doctor indicates it is under excellent control. I also did not see where he took any blood pressure readings during his meeting with her. Finally, Dr. Bernstein indicated that he took into account a 25 pound weight lifting restriction that he believed Dr. Brown placed on Claimant's left elbow. However, Dr. Brown released Claimant with no restrictions on the elbow. As a result of all of these inaccuracies, and since he took a number of these into account in formulating his ultimate conclusions in this case, I do not find his opinion competent, credible or persuasive, and I cannot rely on his report in this case.

Along with all of these other reasons for not being able to rely on the reports and opinions of Dr. Stillings and Dr. Bernstein, there is yet another reason. Both Dr. Stillings and Dr. Bernstein clearly factor into their opinions her inability to communicate in English and the effect that has on her employability. However, there is no permanent functional or mental reason why she cannot learn English, and so it is inappropriate to consider her English skills, or lack thereof, when determining her employability and the liability of the Second Injury Fund.

Courts have previously dealt with the issue of whether a pre-existing deficiency in English skills should properly be considered as a component in a finding of permanent total disability. *Karoutzos v. Treasurer of the State of Missouri*, 55 S.W.3d 493 (Mo.App.W.D. 2001) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). In *Karoutzos*, the Commission considered Claimant's deficient English skills as a component of finding him permanently and totally disabled. The Court of Appeals ruled that he was still permanently and totally disabled just considering the combination of the rest of his disabilities, but noted that, "the Commission's consideration of Karoutzos' deficient English skills as a component of finding permanent total disability was improper." *Id.* at 499. In arriving at that conclusion, the Court relied on *Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo.App.S.D. 1997). In *Tiller*, Claimant alleged illiteracy as a pre-existing permanent partial disability that he claimed combined with his primary injury to make him permanently and totally disabled. The Court in that case ruled that, "Where illiteracy is not due to inability to learn, but to lack of education, it is not a permanent partial disability for Second Injury Fund purposes." *Id.* at 866.

Essentially then, in order for conditions like illiteracy and deficient English skills, to be considered permanent partial disabilities for Second Injury Fund purposes, there must be a finding that those conditions come from a mental or physical inability to learn, instead of merely a lack of education. If those conditions merely come from a lack of education, then they are not permanent, since acquiring the additional education would correct the deficiency.

In this case, there is no doubt that Claimant has deficient English skills, and that those deficient English skills negatively impact her ability to find a job in the open labor market. However, there is not a physician opining that her deficient English skills come from a permanent functional or mental inability to learn the language. In fact, when asked on cross-examination if there was any reason why Claimant was unable to learn English, Dr. Stillings responded that her depression impaired her ability to acquire new knowledge, but "that isn't totally preclusive." Also, Dr. Bernstein testified that he had no reason one way or the other to think that she would be unable to learn English. Finally, Dr. Wolfgram did not express an opinion as to whether or not Claimant is able to learn English. Given the Court's finding then in *Karoutzos*, I find it is improper in this case to consider her deficient English skills as a component of finding her permanently and totally disabled. To the extent that both Dr. Stillings and Dr. Bernstein factored in her deficient English skills in their opinions on permanent total disability, that is yet one more reason that I find their opinions in that regard are not competent, credible or persuasive.

Therefore, since it is inappropriate here to factor in her deficient English skills as a component of any permanent total

disability finding, and since Claimant has not produced any competent, credible and persuasive medical or vocational evidence to support such a finding of permanent total disability, Claimant has failed to meet her burden of proof that she is permanently and totally disabled against the Second Injury Fund.

The last issue then is whether Claimant is entitled to some amount of permanent partial disability from the Second Injury Fund based on the combination of her primary (January 22, 2003) injury and any pre-existing permanent partial disabilities. Having thoroughly considered all of the competent and credible evidence in the record, I find that Claimant has also failed to prove an entitlement to any permanent partial disability award against the Second Injury Fund.

As noted above, for Claimant to qualify for permanent partial disability from the Second Injury Fund, she must prove that the pre-existing disabilities were permanent, were a hindrance or obstacle to employment or re-employment, and met the appropriate thresholds. If the pre-existing disabilities fail to meet any of these three criteria, then they cannot be considered for Second Injury Fund purposes. Claimant has alleged, and the medical evidence has noted, pre-existing disabilities of deficient English language skills, PTSD, and a number of clinical conditions such as obesity, hypertension, degenerative spine disease, and smoking.

Since each of these pre-existing conditions fails to meet at least one of the criteria necessary for Second Injury Fund liability, I find Claimant has failed to meet her burden of proof for her Second Injury Fund claim for permanent partial disability, and thus her Second Injury Fund claim is denied.

First, regarding her deficient English language skills, for the same reasoning described above, the condition is not permanent since there is no proof that the deficiency comes from an inability to learn the language. Rather I find the deficiency comes from a lack of education or failure to educate herself, which in either case means this is not a permanent condition. Since this condition is not permanent, it cannot be considered for Second Injury Fund purposes.

Second, regarding the PTSD, there is certainly evidence in the record that it existed prior to the primary injury, since Dr. Wolfgram, Dr. Stillings and Dr. Bernstein all diagnosed it as a pre-existing condition. However, Dr. Wolfgram did not believe there was any prior disability due to the PTSD and also did not believe Claimant was dysfunctional due to this disorder prior to the January 22, 2003 injury. Conversely, Dr. Stillings assessed pre-existing disability attributable to the PTSD, but he did note that the condition largely abated in 1995. There are no medical treatment records for PTSD prior to the primary injury, nor any indication in her personal doctor's records or the primary treating physician's records that she was having any symptoms related to PTSD prior to the primary injury. While I do believe her testimony that being involved in the Bosnian War was an extremely traumatic experience, and while I understand that she would be quite emotional remembering what happened to her and her family there, I do not believe that it was a hindrance or obstacle to employment leading up to the primary (January 22, 2003) injury, nor do I believe that any disability attributable to that condition would reach the necessary threshold of 12.5% of the Body as a Whole. In reaching this conclusion, I again find Dr. Wolfgram's opinion more credible and persuasive than that of Dr. Stillings because it is more consistent with the overall medical evidence, and I again point to the lack of any references to PTSD or PTSD symptoms in the medical treatment records. Since this condition was not a hindrance or obstacle to employment, and since it would not meet the threshold of 12.5% pre-existing permanent partial disability, it cannot be considered for Second Injury Fund purposes.

Finally, regarding the clinical conditions such as obesity, hypertension, degenerative spine disease, and smoking, I find that Claimant has failed to prove that these were hindrances or obstacles to employment or re-employment. While it is certainly true that Dr. Wolfgram provided a rating of 30% of the Body as a Whole for this collection of clinical conditions that pre-existed the primary injury on January 22, 2003, Claimant provided absolutely no testimony to explain how these conditions affected her ability to work or impeded her ability to function in the workplace. She described absolutely no pre-existing problems or complaints related to any of these conditions. Additionally, when she saw Dr. Berkin, her own rating physician in connection with this case, she denied any prior injuries and only reported a past medical history of elevated cholesterol. Therefore, he provided no opinions on pre-existing permanent partial disability, nor did he diagnose any of these pre-existing clinical conditions. Therefore, I find Claimant has failed to prove that any of these clinical conditions represented pre-existing hindrances or obstacles to employment, so they cannot be considered for Second Injury Fund purposes.

Since Claimant has failed to prove that any of the pre-existing disabilities met all three criteria for Second Injury Fund permanent partial liability (permanent, a hindrance or obstacle to employment or re-employment, and at the appropriate thresholds), Claimant has failed to meet her burden of proof and her Second Injury Fund claim for permanent partial disability is denied.

Accordingly, Employer is responsible for 156.75 weeks of permanent partial disability representing 25% of the left elbow, 25% of the left knee, 12.5% of the BAW (low back), and a 10% multiplicity load factor as a result of the January 22, 2003 injury. The Second Injury Fund claims for permanent total and/or permanent partial disability are denied pursuant to this award.

CONCLUSION:

Claimant had a compensable injury to the left elbow, left knee and low back on January 22, 2003. Claimant has failed to prove that there are any psychiatric conditions medically causally related to the injury of January 22, 2003 and thus Claimant is not entitled to any future psychiatric medical care related to this injury. Employer/Insurer is to pay 156.75 weeks of permanent partial disability benefits. The Second Injury Fund claim for permanent total and/or permanent partial disability benefits is denied since Claimant has not met her burden of proof for those claims. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Ray B. Marglous, for necessary legal services.

Date: _____

Made by: _____

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

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation