

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

Injury No.: 11-056595

Employee: Deborah Tedder  
Employer: State of Missouri, Department of Corrections  
Insurer: Missouri Office of Administration,  
Central Accident Reporting Office  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

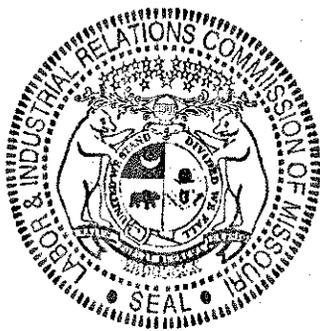
The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 26, 2018. The award and decision of Administrative Law Judge, Suzette Carlisle, issued April 26, 2018, 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 11<sup>th</sup> day of April 2019.

LABOR AND INDUSTRIAL RELATIONS COMMISSION





Robert W. Cornejo, Chairman

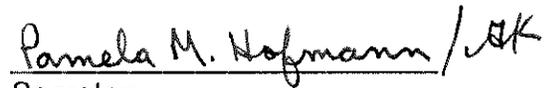
DISSENTING OPINION FILED

Reid K. Forrester, Member



Curtis E. Chick, Jr., Member

Attest:

  
Secretary

Employee: Deborah Tedder

### DISSENTING OPINION

I have read the briefs of the parties and reviewed the whole record. I have considered all of the competent and substantial evidence based on record as a whole. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I find the employee has failed to prove any psychiatric disability medically causally related to her July 26, 2011, slip and fall at work. Employee has further failed to establish that she is permanently and totally disabled (PTD) either due to the primary injury alone or in combination with prior disabilities.

#### Medical Causation of Employee's Diagnoses of Post-Traumatic Stress Disorder, Traumatic Brain Injury and Post-Concussion Syndrome

The majority relies on the testimony of employee and employee's witness Dr. Jay L. Liss to find employee's July 26, 2011, slip and fall to be the prevailing factor in her diagnoses of post-traumatic stress disorder (PTSD), traumatic brain injury, and post-concussion syndrome. In so finding, the majority discounts the testimony of employer's expert, psychiatrist Dr. Jennifer Brockman. This analysis is incorrect in that the weight of the evidence supports the opinion of Dr. Brockman and shows inconsistencies in employee's testimony.

Employee testified that in September of 2011, *two months after her work injury*, she began having crying spells, headaches, mood swings, anxiety and nightmares about being trapped. Employee met with counselor Nancy Daugherty four times through employer's Employee Assistance Program. Ms. Daugherty did not encourage employee to seek other professional help. In late 2011, psychiatrist Dr. Michael Oliveri performed a neuropsychological evaluation and opined that employee had no indications of changes in her higher cognitive functions. Dr. Oliveri found no permanent partial disability related to employee's July 26, 2011, work injury and found employee's "level of subjective somatic and cognitive complaint is not consistent with the nature of the injury, or the natural history of the condition."<sup>1</sup>

Employee sought no further psychiatric treatment until 2015, even though she testified she was still having crying spells, depression, and anxiety attacks. Her primary care doctor did not refer her for further treatment, though employee testified she told him about these ongoing symptoms. Employee's primary care records note insomnia, memory issues, and anxiety but reference other triggers, such as "family health, children" in addition to the "legal battle" over employee's compensation claim.<sup>2</sup> Employee continued to take Zoloft, as she had prior to the July 26, 2011, work injury.

In early 2015, employee saw counselor Sandra McIntosh on February 12, 2015. Ms. McIntosh's record of that visit diagnosed major depression and anxiety and noted that employee had taken Zoloft for a long time. In March 2015, employee saw nurse practitioner Nancy McNail who noted employee began taking Zoloft in 2002 "due to

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<sup>1</sup> Transcript, 484-485.

<sup>2</sup> *Id.* 881.

Employee: Deborah Tedder

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being pre-menopausal and having some depression.”<sup>3</sup> Employee began treating with psychologist Melinda Fox in January of 2016. That same year, she sought treatment from Dr. Bello Adejoh who noted employee “self-reports a diagnosis of PTSD [sic] and TBI [traumatic brain injury].”<sup>4</sup>

Dr. Liss evaluated employee in April 2015 and diagnosed a traumatic brain injury with cognitive dysfunction and post-concussion syndrome. He discounted Dr. Oliver’s assessment, instead opining that PTSD was a disease that worsened over time and that employee’s July 26, 2011, fall caused neurological disruption because the brain reconfigures with a trauma type occurrence.

Dr. Jennifer Brockman evaluated employee in November 2015. Dr. Brockman diagnosed moderate depression, major depressive disorder, and panic disorder, but did not believe employee had PTSD or a traumatic brain injury. Dr. Brockman opined that in order for there to be PTSD “There has to be an actual life-threatening event” and did not find that in this case.<sup>5</sup> She explained, “[W]hile recognizing [employee’s] history of psychiatric symptoms, the timeline of symptom development and her reported work performance while on light duty suggests that matters beyond her injury of July 26, 2011. . . are the prevailing factors in her current presentation and need for treatment.”<sup>6</sup>

Noting the gap in treatment, Dr. Brockman also stated, “It would be puzzling why somebody wouldn’t seek psychotropic medication or further treatment beyond what she did if she had continued to have severe symptoms.”<sup>7</sup> Dr. Brockman also noted that employee told her “something bad could have happened *I realized it when I watched the video* [emphasis added].”<sup>8</sup> Employee testified that she did not view the video until approximately one year after the injury. Regarding her employment, Dr. Brockman noted that employee said, “I still would have went back if they let me.”<sup>9</sup>

The evidence in this case, when looked at collectively, supports the opinion of Dr. Brockman and not Dr. Liss. Employee testified that she began having symptoms after the work injury, and sought counseling. However, after a few months of counseling, she sought no further psychiatric treatment for three years, despite testifying that her symptoms continued and no primary care referral was forthcoming. The records of employee’s doctor and the counselors she later saw are inconsistent as to her reports of ongoing symptoms. She reported some psychiatric symptoms, but was consistent in her account of the type, duration, and frequency of her symptoms. Finally, employee asserted she would have gone back to work if they would have let her, to working *in the same environment employee claims caused her PTSD*.

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<sup>3</sup> Transcript, 1148

<sup>4</sup> *Id.* 1280.

<sup>5</sup> *Id.* 1507.

<sup>6</sup> *Id.* 1563.

<sup>7</sup> *Id.* 1503.

<sup>8</sup> *Id.* 1559.

<sup>9</sup> *Id.*

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Based on all of the evidence presented, Dr. Brockman's opinion is more complete and persuasive than Dr. Liss, and employee has not met her burden of proof that the injury of July 26, 2011 resulted in psychiatric injury. Consistent with this finding, employee is not entitled to past or future medical and pharmaceutical expenses related to her alleged psychiatric conditions.

*Nature and Extent of Employee's Permanent Disability Related to the July 26, 2011, Work Injury*

In any case involving the Second Injury Fund, the first question to be determined is the nature and extent of disability from the last injury alone. *Roller v. Treasurer of the State of Missouri*, 935 S.W.2d 739, 741 (Mo. App. 1996). Employer admits liability for permanent partial disability relating to employee's left knee, left elbow, and head relating to her slip and fall at work on July 26, 2011.

The employee 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 the Second Injury Fund*, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent and substantial evidence and may not rest on surmise or speculation. *Griggs v. A. B. Chance Oc.*, 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. The Commission is not bound by the medical testimony and may consider all the evidence, including the testimony of the employee, 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).

Under § 287.020.6, "total disability" is defined as "inability to return to any employment and does not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." The test for permanent total disability benefits is whether the worker is able to compete in the open labor market. *Carkeek v. Treasurer*, 352 S.W.3d 604, 608 (Mo. App. 2011) (internal citations omitted). Total disability does not require that an employee be completely inactive or inert. *Id.* But a claimant has the burden of proving that an employer would not be expected to hire him or her in the ordinary course of business, given his or her present physical condition. *Id.* Employment in the open labor market includes part-time work. See *Brashers v. Treasurer*, 442 S.W.3d 152 (Mo. App. 2014); see also *Stewart v. Zwiefel*, 419 S.W.3d 915 (Mo. App. 2014).

The record includes varied restrictions for employee's physical injuries. Dr. David Brown provided no restrictions for employee's left elbow. However, Dr. Raymond Cohen stated that employee should do no work involving repetitive work with the left elbow, no reaching or lifting greater than 7.5 pounds, and no work in which the left elbow would be bumped against a hard object. Regarding employee's left knee, Dr. Lyndon Gross gave permanent restrictions in the medium work level, kneeling and crawling occasionally, and no restraint of prisoners. Dr. Cohen stated that employee should avoid work involving kneeling, squatting, climbing, ladder work, crawling, or

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walking on uneven surfaces. Dr. Robert Hagan provided no work restrictions for employee's headaches. Dr. Cohen recommended an employer allow employee to lie down or go home if she has a bad headache.

Dr. Cohen initially opined that employee's prior left finger injury and the injuries sustained on July 26, 2011, combined to be greater than the simple sum and that the employee was permanently and totally disabled. In three supplemental reports, Dr. Cohen reaffirmed this opinion, even after reviewing Ms. Delores Gonzalez's opinion and Dr. Liss' opinion. Like Dr. Cohen, Ms. Gonzalez opined that employee was not employable due to the combination of her July 26, 2011, injury in combination with her preexisting injuries. Ms. Gonzalez noted that her opinion was unchanged after reviewing Dr. Liss' psychiatric report. However, in her deposition she inconsistently opined that the last injury alone was enough to render employee permanently and totally disabled.<sup>10</sup> Dr. Brockman found that employee had no psychiatric work restrictions, but Dr. Liss found employee to be permanently and totally disabled. The opinions of Drs. Liss and Cohen, and Ms. Gonzalez are not credible.

Vocational expert James England found that under her treating physicians' restrictions, employee could perform a wide variety of entry-level positions as well as security guard work. Even assuming Dr. Cohen's restrictions, Mr. England opined that he still thought the employee could perform some of her past work. From a psychiatric perspective, assuming Dr. Brockman and Dr. Oliveri's reports, employee has no psychiatric disability.

Employee testified that she continues to have symptoms in her left elbow, left knee, headaches and psychiatric symptoms. Employee testified that in 2014, she attempted to go back to work at Walmart and in a security position for the Department of Mental Health, but did not obtain either position. She acknowledged that the Senior Center offered her a job, but testified she turned the position down because it was going to involve lots of standing and personal interaction. She alleged she did not believe she could work, based on her symptoms.

The records tell a different story: In August of 2015, employee's psychiatric nurse practitioner Ms. McNail recorded the following statements by employee in her office notes:

I'm gonna have a pity party. I started volunteering at the Senior Center in Bonne Terre. Friday, the Director called her into her office and offered her the job of preparing food for home bound [sic] patients. She is able to take multiple breaks during the morning and goes off by herself instead of socializing with the few Senior Citizens that are there. Though she wanted to try this, her attorney absolutely told her she could not do this. She finally felt like she was "worthy and contributing," so not taking this position, really deflated her ego.<sup>11</sup>

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<sup>10</sup> *Transcript*, 360.

<sup>11</sup> *Id.*, 1267.

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In addition to differing stories about a job offer, employee's testimony regarding her volunteer work is also inconsistent. In January of 2016, employee told therapist Melinda Fox that she "does volunteer at the Bonne Terre Senior Center five hours per day/five days per week."<sup>12</sup>

Further, while employee appeared eager to return to work when she first met with Mr. Tim Kaver, Mr. England's business partner, she later returned and was unwilling to participate. At her last visit with Mr. Kaver, employee arrived with a statement her attorney prepared, which listed in part, "I will take no action to jeopardize my Social Security Disability Income Benefits;" "I am not interested in your help as I believe I am totally disabled;" and "as to any specific participation today you should contact my attorney."<sup>13</sup> Based on these representations, Mr. Kaver ceased contact with employee.

The opinions of vocational experts Mr. England and Mr. Kaver, Dr. Gross, Dr. Brown, and Dr. Hagan are more credible and more persuasive than those of Dr. Cohen, Dr. Liss, Ms. Gonzalez, and employee. The medical records and opinions demonstrate that employee is not permanently and totally disabled. The records also reveal that while employee testified that she did not attempt to find further work after two interviews, she was in fact volunteering significantly more than she testified to, and turned down work offers within her restrictions at the advice of counsel to avoid affecting her social security disability. Based on the credible evidence in the record, this employee is not credible and is trying to game the system for secondary gain. Her conduct should not be rewarded with an award of permanent total disability, either attributable to the primary injury alone or in combination with prior disabilities. Employer should only be liable for permanent partial disability for injuries sustained to employee's left knee, left elbow, and head related to her July 26, 2011, accident.

Because the majority finds otherwise, I respectfully dissent.



Reid K. Forrester, Member

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<sup>12</sup> *Id.* 1236.

<sup>13</sup> *Id.* 1764-1765.

**AWARD**

Employee: Deborah A. Tedder Injury No.: 11-056595

Dependents: N/A

Employer: State of Missouri, Department of Corrections

Additional Party: Missouri State Treasurer - Custodian of the  
Second Injury Fund (Denied)

Insurer: Missouri Office of Administration,  
Central Accident Reporting Office

Hearing Date: January 24, 2018

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

Checked by: SC

**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: July 26, 2011
5. State location where accident occurred or occupational disease was contracted: Farmington, 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:  
While exiting a utility closet at work, Claimant tripped on a mat, fell, and sustained physical and mental injuries.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left elbow, left knee, head, and psychological injuries
14. Nature and extent of any permanent disability: Permanent total disability against the Employer
15. Compensation paid to-date for temporary disability: \$1,111.58
16. Value of necessary medical aid paid to date by employer/insurer? \$62,654.35

- 17. Value necessary medical aid not furnished by employer/insurer? 3,435.18
- 18. Employee's average weekly wages: \$604.80
- 19. Weekly Compensation rate: \$403.20
- 20. Method wages Computation: Based on Section 287.250.1 (See pages 31-32)

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses:	3,435.18
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Permanent total disability benefits from Employer beginning July 17, 2011,  
and continuing for Claimant's lifetime

22. Second Injury Fund liability: Denied

TOTAL:	TO BE DETERMINED
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23. Future requirements awarded: See the award, page (See pages 30-31)

Said payments to begin 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 22.5% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Kenneth Seufert.<sup>1</sup>

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<sup>1</sup> In addition to attorney fees, during the hearing Claimant testified that Mr. Seufert is entitled to reimbursement for out of pocket expenses totaling \$11,054.48 (See Exhibit 41).

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Deborah A. Tedder	Injury No.: 11-056595
Dependents:	N/A	Before the
Employer:	State of Missouri, Department of Corrections	<b>Division of Workers'</b>
Additional Party:	Missouri State Treasurer - Custodian of the Second Injury Fund (Denied)	<b>Compensation</b> Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Missouri Office of Administration, Central Accident Reporting Office	

**STATEMENT OF THE CASE**

On January 24, 2018, Ms. Deborah A. Tedder ("Claimant") appeared in person at the St. Francois County Courthouse, before the undersigned administrative law judge from the Division of Workers' Compensation ("DWC"). A hearing was held for a final award to determine the liability of the State of Missouri, Department of Corrections ("Employer"), Central Accident Reporting Office ("CARO") ("Insurer"), and the Second Injury Fund ("SIF") for Claimant's past medical expenses, future medical care, and permanency. Venue is proper and jurisdiction properly lies with the DWC.

At the hearing, attorney Kenneth Seufert represented the Claimant. Assistant General Rachel Harris represented the Employer.<sup>2</sup> Assistant Attorney General Matthew Kinkaide III represented the SIF. The record closed after presentation of all the evidence. Court Reporter Sande Meyer transcribed the proceeding. The parties submitted a Memorandum of Law on February 23, 2018.

**STIPULATED FACTS**

At the start of the hearing, the parties stipulated that the following facts existed on July 26, 2011:

1. Claimant was employed by the Employer in St. Francois County, located in Missouri;
2. Claimant and Employer operated under the Missouri Workers' Compensation Law;<sup>3</sup>
3. Employer's liability was fully insured by CARO;
4. Employer received proper notice of an accident;
5. A Claim for Compensation was timely filed;
6. Claimant missed work from July 27, 2011 to August 15, 2011 (2 6/7 weeks), totaling \$1,111.58;
7. Employer paid medical benefits totaling \$62,654.35;

<sup>2</sup> Any reference in this award to the Employer also refers to the Insurer, unless otherwise stated.

<sup>3</sup> All references in this award are to the 2008 Revised Statutes of Missouri (Supp.), unless otherwise stated.

8. Employer paid mileage totaling \$621.38;
9. Claimant's left knee, left elbow and head injuries are medically causally related to the accident but not the alleged psychiatric injury; and
10. Claimant reached maximum medical improvement ("MMI") on July 16, 2013.

### ISSUES

The parties identified the following issues for disposition:

1. Is Claimant's claim for psychiatric injuries medically causally related to her July 26, 2011 work injury? (Yes)
2. Is the Employer liable for past medical expenses for psychiatric treatment? (Yes)
3. Is the Employer liable medical treatment for future psychiatric and pain management needs? (Yes for psychiatric treatment but not pain management)
4. What is Claimant's average weekly wage ("AWW") rate? (\$604.80)
5. What is the nature and extent of the Employer's liability for permanent partial disability ("PPD") or permanent total disability ("PTD") benefits, if any? (PTD)
6. What is the nature and extent of SIF liability for PPD or PTD benefits, if any? (Denied)

### EXHIBITS

Claimant's Exhibits	Description	Admitted	Withdrawn
1A	Raymond Cohen, M.D. Report (11-26-12)	Yes	
1B	Dr. Cohen's Supplemental Report (4-30-14)	Yes	
1C	Dr. Cohen's Supplemental Report (9-8-14)	Yes	
1D	Dr. Cohen's Curriculum Vitae	Yes	
1E	Dr. Cohen's Supplemental Report (8-10-15)	Yes	
1F	Records provided to Dr. Cohen	Yes	
1G	Dr. Cohen's deposition	Yes	
1H	Dr. Cohen's supplemental report (7-27-16)	Yes	
1I	Notice of Intent to Submit Medical Report of Dr. Cohen	Yes	
2A	Ms. Delores Gonzalez's Report (8-15-14)	Yes	
2B	Ms. Gonzalez's Curriculum Vitae	Yes	
2C	Ms. Gonzalez's Supplement Report (7-29-15)	Yes	
2D	Records provided to Ms. Gonzalez	Yes	
2E	Ms. Gonzalez's Deposition	Yes	
3	Medical History of Ms. Deborah Tedder for 7-26-11 injury	Yes	
4	Report of Injury	Yes	
5	Claim for Compensation	Yes	
6	Video of work accident (7-26-11)	Yes	
7	Dr. Sunil Chand's Medical records (2003-2011)	Yes	
8	Medical records – DWC	Yes	
9	Medical records – Midwest Health Group	Yes	

	(1-9-12 to 6-18-12)		
10	Claimant's educational history	Yes	
11	Claimant's work history	Yes	
12A	Medical records – Midwest Health Group (8-22-12 to 2-11-14)	Yes	
12B	Medical records – Midwest Health Group (8-6-13 to 12-29-14)	Yes	
13	Standard Insurance Company Long Term Disability Insurance	Yes	
14	Medical records -Midwest Cardiovascular	Yes	
15	Medical records Robert R. Hagan, M.D. (4-8-13 to 7-6-16)	Yes	
16A	Medical report – Jay L. Liss, M.D. (4-27-15)	Yes	
16 B	Questionnaire for Ms. Tedder – Dr. Liss (4-27-15)	Yes	
16C	Medical records – Dr. Liss	Yes	
16D	Deposition – Dr. Liss (4-28-16)	Yes	
17	Curriculum vitae of Dr. Liss	Yes	
18	Psychological report – Ms. Jannette Cross, Ph.D. (6-20-14)	Yes	
19	Psychological records – Ms. Sandra McIntosh (2-5-15)	Yes	
20	Records – Ms. Nancy McNail (3-11-15 to 6-24-15)	Yes	
21	Pharmax Pharmacy records (6-9-14 to 6-24-15)	Yes	
21A	Pharmax Pharmacy records (1-1-13 to 1-10-18)	Yes	
22	N/A	No	Withdrawn
23	N/A	No	Withdrawn
24	N/A	No	Withdrawn
25	N/A	No	Withdrawn
26	Medical records – Midwest Health Group (3-4-15 to 6-17-16)	Yes	
27	Potosi Rural Health Clinic – Ms. Melinda Fox (1-28-16 to 6-13-16)	Yes	
28	Austin Plaza Primary Care/Mental Health (7-24-15 to 7-1-16)	Yes	
29	Social Security Administration Notice of Award (12-3-16)	Yes	
30	Mental Residual Functional Capacity Assessment – Dr. Liss	Yes	

	(9-26-16)		
31	Dr. Cohen's restrictions for Ms. Tedder	Yes	
32	N/A	No	Withdrawn
33	Code of Professional Conduct for Rehabilitation Counselors Mr. James England Jr's deposition (4-27-17)	Yes	
34	Medical report Richard B. Chusak, M.D. (8-6-01)	Yes	
35	Medical records Midwest Health Group (8-25-16 to 12-27-17)	Yes	
36	Medical records -- Bello A. Adejoh, M.D. (9-16-16 to 12-28-17)	Yes	
37	Records, Ms. Melinda Fox, LCSW (5-8-17)	Yes	
38	Midwest Orthopedic Pain & Spine (9-25-17 to 12-27-17)	Yes	
39	Medical bills for services provided by: Ms. Sandra McIntosh Ms. Nancy McNail Ms. Sandra Mitkos Dr. Bello Adejoh Ms. Melinda Fox	Yes	
40	Payroll records -- Missouri State Employees' Retirement System for Ms. Tedder	Yes	
41	Mr. Kenneth A. Seufert's out of pocket expenses to represent Ms. Tedder	Yes	

<b>Employer's Exhibits</b>	<b>Description</b>	<b>Admitted</b>	<b>Withdrawn</b>
A	Deposition --Jennifer Brockman, M.D., CV, (Reports dated 11-23-15, 12-15, 15, and 5-11-16)	Yes	
B	Deposition -- Mr. James England Jr. (4-27-17), CV and report dated 5-18-16	Yes	
C	Deposition -- Mr. Tim Kaver 8-16-17 -- CV, exhibits, and letters	Yes	
D	Report -- Robert Hagan, M.D. (7-16-13)	Yes	
E	Report -- Lyndon Gross, M.D. (2-27-12)	Yes	
F	Report -- David Brown, M.D. (11-22-11)	Yes	

Claimant's exhibits 1-21A, 26-31, and 33-41 are admitted without objection. Prior to the start of the hearing, Claimant's Exhibits 22-25 and 32 were withdrawn. Employer's exhibits A-F

are admitted. Claimant objected to the admission of Employer's Exhibit C, the deposition and records of Mr. Kaver.<sup>4</sup> The SIF offered no exhibits.

To the extent there are marks or highlights contained within the exhibits, they were made prior to becoming a part of this record and were not placed there by the undersigned administrative law judge. Any objections made during the deposition or the hearing, but not ruled on during the hearing or in this award are now overruled. Claimant requested the judge to take judicial notice of any DWC records not admitted into evidence. The SIF objected to judicial notice of any medical records that contain hearsay in the DWC records. The objection was sustained.

### **SUMMARY OF THE EVIDENCE**

#### ***Witness 1 - Claimant- background***

At the time of the hearing, Claimant was 59 years old and lived with her spouse Greg in a two-story home. Claimant graduated high school in 1976 in Mobile, Alabama. Claimant is left-hand dominant. For one semester, Claimant studied general classes at the University of Utah. In 1998, she earned a certificate as a nurse's assistant and became licensed in Missouri. However, she never worked as a nurse's assistant in Missouri. Claimant has four adult children and seven grandchildren.

#### ***Work history***

Claimant served in the United States Army from 1976 to 1979 as a Sergeant E-5 and telecommunications specialist, where she worked with teletypes, radio to telephone communications, and hand-held equipment. Claimant received an honorable discharge. Most of the skills she acquired in the military are not transferable to another position.

After the military, Claimant worked as a switchboard operator in 1980 and as a certified nursing assistant at Highland Manor Nursing Home in Salt Lake City, but she was not certified. From 1983 to 1984 she worked for Gen Com as an operator and receptionist. From 1984 to 1987 Claimant worked in San Diego on the switchboard and performed general office work, payroll and placed orders. From 1987 to 1999, Claimant stayed home to raise her children.

From 1999 to 2012, Claimant worked for the State of Missouri as a corrections Officer I ("CO-1") in the Farmington Correctional Center. She was responsible for the safety of staff, the public and inmates (offenders). She performed pat downs, typed reports, and investigated violations. Claimant last worked as a CO-1 on February 23, 2012.

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<sup>4</sup> During Mr. Kaver's deposition and at the hearing, Claimant objected to the admission of Exhibit C because it violated privileged communication between Claimant and Mr. Kaver, without evidence that she waived the privilege. Therefore, Claimant asserts the communication is in violation of the Code of Ethics for Rehabilitation Counselors and inadmissible (Exhibit 33). The Employer contends this is an ongoing case, therefore, no privilege exists. The Exhibit was admitted over the Claimant's objections. Claimant made an offer of proof which was preserved on the record.

*Pre-existing medical condition*

In April 2001, Claimant sustained a comminuted fracture to the distal phalanx of her left index finger when it was crushed between a metal door and door frame at work. Claimant, a left hand dominant employee, made accommodations at work. Her typing skills decreased from 60 words per minute to 20. Claimant wrote more slowly. She had numbness from the tip to the second knuckle of her left index finger, and changes in temperature were painful. It was difficult to pat down offenders because her left finger stuck out. To relieve pain, Claimant used over-the-counter Tylenol once or twice a week as needed, changed her grip, learned to unlock doors with her right hand, and used different fingers to type.

Leading up to the 2011 injury, she missed no additional time from work, had no physician-imposed restrictions, and sought no additional medical treatment for her left index finger. Claimant settled the case for 40% PPD of the left index finger.

Before the July 26, 2011 accident, Claimant was hospitalized for headaches related to hypertension. Sunil Chand, M.D., Claimant's primary care physician, prescribed medication for high blood pressure, which caused headaches. The headaches stopped before the July 26, 2011 work injury.

From 2003 to 2011, Dr. Chand prescribed Zoloft for Claimant as a hormone replacement therapy for night sweats, irritability, and hot flashes. She is not a candidate for hormone replacement therapy due to the risk of developing breast cancer.<sup>5</sup>

Occasionally Dr. Chand prescribed Elavil to regulate her sleep habits when she worked the night shift.<sup>6</sup> Claimant testified she did not suffer from depression, anxiety and stress before July 26, 2011, to the extent she did after the 2011 work accident.

*The July 26, 2011 work injury*

On July 26, 2011, Claimant's work shift began at 7:00 a.m. An hour later, Claimant walked to the "D-Wing" to look for a breathing apparatus container located in a locked utility closet inside "the bubble." Offenders performed tasks in the area. Claimant unlocked the door and did not recall seeing anything on the floor outside the closet. After she exited the closet, she secured the door, and observed the offenders around her as she walked. Claimant's right foot touched something on the concrete floor, and it did not move. Claimant fell on her left side, supported herself with her right hand, and dropped the keys. Claimant does not have full recollection of the event. Offender Greer returned her keys and Officer Snow, her co-worker, smiled at her. Two mental health nurses responded. Twenty minutes later, Claimant was transported to the emergency room at Parkland Health Center.

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<sup>5</sup> The evidence reflects Claimant has a family history of breast cancer and Zoloft was prescribed before July 2011. However the records do not reflect Zoloft was prescribed for hormone imbalance.

<sup>6</sup> Dr. Chand's medical report dated July 14, 2011, states he prescribed Elavil in the past for anxiety Claimant experienced at work. A July 13, 2011 report states Dr. Chand treated Claimant for depression and refilled Zoloft medication. Records in evidence reflect a history of "last 1 yr. very stressed, traumatic erratic life changes at home since husband got ill last year..." Dr. Chand diagnosed anxiety on 7/13/11. Medical records show Claimant was diagnosed with fibrocystic breast disease.

### *Injuries related to the work injury*

Claimant sustained injuries to her left elbow, left knee, and head, and she developed crying spells, severe depression, anxiety, and panic attacks. X-rays taken at Parkland Health Center on the day of injury, revealed a left radial head fracture and left knee patellar fracture. A CT scan of her head was normal. An abrasion was noted on her forehead. She was treated and released.

#### *1. Left elbow*

On August 3, 2011, David Brown, M.D., performed an open reduction internal fixation of the radial head. Screws and wires remain. Dr. Brown prescribed physical therapy, and returned Claimant to work with restrictions, on August 16, 2011. Dr. Brown released Claimant on November 22, 2011, without limitations. When Claimant returned to work, her left arm continued to hurt and swell. Currently, she takes no prescription medication for her physical injuries. Current left arm complaints: Claimant is unable to perform repetitive work, lift over her head, lift over twenty pounds, and she has limited ability to crochet and quilt. The pain level is a 3 with 10 being severe. She has pain when weed trimming; and she no longer plays with her grandchildren on the playground.

#### *2. Left knee*

Claimant gave Lyndon Gross, M.D., a description of the fall when she tripped over a mat. On August 3, 2011, Dr. Gross performed surgery to reduce the left knee patellar fracture, with screws and wire. In October 2011, Dr. Gross continued Claimant on limited duty for her left knee. At work she read policy and procedure manuals, sorted mail, and stamped envelopes. Her left knee complaints included swelling, pain, and limited range of motion, and she walked with a limp. To relieve pain at work, she elevated her knee and walked to relieve stiffness. Dr. Gross released Claimant from care and imposed the following permanent restrictions: no offender take-downs, and no squatting or kneeling. Claimant testified take downs are an essential job function for a CO-1.

In October 2017, Claimant sought orthopedic treatment from Midwest Orthopedic Pain and Spine, and received a cortisone injection. By November, pain and swelling had resolved. Now, there is a bump on her left knee cap, with pain being a 3 out of 10. She has left knee pain on a daily basis, which increases with activity. To relieve pain, she rests, uses heat, massage, and takes Tylenol Extra Strength or Aleve. She can no longer push or pull more than 25 pounds. The knee pops and swells. She has difficulty climbing stairs. She cannot climb on her hands and knees. She rests every two hours for 30 to 40 minutes per day. She used to do light duty lifting, but her children do the lifting now. Claimant and her husband share household chores.

She elevates her left knee on a daily basis and uses ice as needed. Weather changes cause the left knee to swell. At home, she no longer goes into the attic and basement because the stairs are too steep to climb since her left knee injury. Prior to July 26, 2011, Claimant had no left knee pain.

### ***3. Headaches***

After the July 26, 2011 work injury, Claimant began to experience headaches. Headaches start at the top, left side of her head and radiate to her left eye. To gain relief, she moves to a dark room to rest. She uses a pillow over her head to block out light and eliminate noise. Headaches can last up to 45 minutes per day and as long as three hours. She may sleep during this time. Currently, Claimant has headaches three to four times a week. They improve with rest, medication, and a dark room. She does not take prescription medication for headaches.

### ***Insomnia***

For five years leading up to 2011, Dr. Chand prescribed medication for insomnia that Claimant took as needed, due to her work schedule. After the July 26, 2011 work injury, Claimant had sleep disruptions and insomnia that left her tired in the morning.

### ***Medical treatment – physical injuries***

On July 26, 2011, Parkland Health Center provided Claimant's initial medical treatment. X-rays revealed fractures of the left elbow and left kneecap. Her left elbow was splinted and her left knee was placed in a knee immobilizer. A CT scan of her head was negative.

On August 3, 2011, Dr. Gross, performed an open reduction, internal fixation to Claimant's left displaced patellar fracture. Dr. Gross ordered physical therapy through PRORehab and work conditioning. On August 22, 2011, Dr. Gross returned Claimant to work with limited walking, squatting or kneeling. In January 2012, a work conditioning evaluation revealed Claimant had no significant limitations except for difficulty restraining an inmate.

A February 2012 functional capacity evaluation revealed Claimant could work in the medium work level, with occasional kneeling and crawling, but no physical inmate take-downs. On February 14, 2012, Dr. Gross released Claimant at MMI to work at the medium demand level with no inmate restraint or use of defensive tactics, and only occasional kneeling and crawling. No left knee rating is in evidence.

Claimant treated with Tanya Kennedy, RN, FNP-C, at Midwest Orthopedic Pain and Spine, and received a left knee injection on September 25, 2017.

On August 3, 2011, David M. Brown, M.D., performed an open reduction and internal fixation of Claimant's displaced radial head. Physical therapy was ordered. Dr. Brown returned Claimant to work, one handed duty, on August 16, 2011. He released Claimant at MMI on October 18, 2011, with no restrictions and rated 5% PPD of the left elbow.

Robert R. Hagan, M.D. STL Plastic & Hand Surgery, examined Claimant in April 2013 with a history of pain to the knee and head, diminished appetite, weight loss, crying spells, mood swings, and lack of concentration, sleep problems, and persistent headaches. Diagnostic and therapeutic injections were made at the C2 and C3 levels. In July 2013, Dr. Hagan released Claimant at MMI from a neurocognitive standpoint, with no further treatment recommendations. The headaches improved until December 2013.

*Expert medical opinion -- physical injuries*

Raymond F. Cohen, D.O. is a board certified neurologist. Dr. Cohen performed an independent medical evaluation on November 26, 2012, reviewed Claimant's medical records, wrote four reports and testified at the request of Claimant's attorney. At the time of the first evaluation, Claimant participated in vocational rehabilitation.

Claimant gave the following history of complaints related to the fall: headaches, increased left elbow pain with weather changes; numbness and tingling to the left index, long and ring fingers, and increased symptoms with activity, left knee swelling, a knot on her left knee, and decreased ability to walk distances. In addition, she reported inability to crawl or kneel, trouble getting up from the floor. Climbing stairs and driving long distances caused increased pain. The left knee pops and becomes painful with kneeling or squatting. To relieve pain, she elevates her leg.

Claimant gave Dr. Cohen a history of pre-existing diabetes, hypertension, crush injury to her left index finger, and anxiety.

For the primary injury, examination of the left elbow revealed weakness with extension and flexion, and decreased range of motion. The left knee examination revealed decreased flexion, weakness, pain, mild swelling and fluid.

Dr. Cohen reviewed the video of the fall and observed Claimant "trip over an object which appears to be a mat and falls and extends her arms. She falls and strikes her head on the concrete surface. She appears to have the head bounce off the concrete."

For the primary injury, Dr. Cohen diagnosed and rated the following medical conditions:

1. Multiple trauma from slip and fall at work;
2. Mild traumatic brain injury;
3. Post-concussion syndrome -- 30% PPD, BAW -- Head,
4. Left knee fracture -- 30% PPD of the left knee; and
5. Left displaced radial head fracture -- 35% PPD of the left elbow.

Dr. Cohen opined Claimant had achieved MMI on July 6, 2013, when Dr. Hagan released her from the work-related injuries she sustained on July 26, 2011. (See the above).

Dr. Cohen imposed the following work restrictions:

For the left upper extremity: Avoid repetitive use of the left arm at the elbow, no reaching/lifting over 7.5 pounds with the left arm, no work that would bump or strike the left elbow.

For the left knee: No kneeling, squatting, crawling, climbing ladders or walking on uneven surfaces and no repetitive extension or kicking with the left leg.

For the headaches related to the July 26, 2011 work injury, Dr. Cohen recommended Claimant lie down as needed or go home if she could not find relief from lying down.

For the pre-existing left index finger/left hand injury: Avoid repetitive work with the left hand and left index finger; and avoid work that exposed her left hand and index finger to hard hits and firm objects.

Examination of the pre-existing left index injury revealed atrophy of the distal joint and nail, weakness of the left finger, and a lack of sensation at the distal joint. Dr. Cohen concluded the pre-existing left index finger injury was a hindrance or obstacle to Claimant's employment or reemployment and rated 35% PPD of the left hand. Furthermore, the pre-existing finger condition combined with the primary work injury to create more disability than the simple sum of the conditions and a 20% loading factor should also apply.

Dr. Cohen concluded Claimant was PTD because of her combined disabilities, and he deferred to a vocational expert about available jobs in the open labor market within the restrictions he imposed. However, during cross-examination, he opined if Claimant did not have a hand injury, she would be PTD because of the last injury alone. On redirect, Dr. Cohen testified he would defer to a vocational expert's opinion if the expert opined the need to lie down would make a person unable to compete for employment or sustain work.

Dr. Cohen recommended Claimant see a neurologist or headache specialist for chronic headaches associated with photophobia. Finally, Dr. Cohen recommended ongoing medication for headaches and pain to Claimant's left elbow and left knee.

Dr. Cohen deferred to a mental health professional regarding Claimant's diagnosed post-traumatic stress disorder. However, Dr. Cohen recommended prescription medications and other forms of treatment for Claimant's anxiety and depression related to the July 2011 work injury.

On April 30, 2014, Dr. Cohen submitted the first supplemental report after reviewing medical records from Midwest Health Group and Midwest Cardiovascular, Inc. Dr. Cohen concluded the treatment Claimant received was unrelated to the 2011 work injury. In addition, the treatment did not change his position that Claimant was PTD before any subsequent condition developed.

On September 8, 2014, Dr. Cohen submitted a second supplemental report after review of Ms. Delores Gonzalez's vocational evaluation. Dr. Cohen maintained his opinion that Claimant was PTD because of her pre-existing disability and primary work injury on July 26, 2011. Further, any subsequent condition Claimant developed after July 26, 2011 was not relevant because she was already PTD.

Dr. Cohen reviewed Dr. Jay Liss' report. Dr. Liss diagnosed a psychiatric injury and post-traumatic stress disorder related to post-concussion syndrome and traumatic brain injury. Dr. Cohen wrote a third supplemental report dated August 10, 2015, and concluded Claimant was unable to return to employment in the open labor market or receive vocational counseling or education. Dr. Cohen concluded his opinion remained the same as the prior three reports.

On July 27, 2016, Dr. Cohen submitted a fourth supplemental report to evaluate the synergistic effect of Claimant's pre-existing left index finger injury with her primary work-related injury on July 26, 2011. Dr. Cohen concluded the left index finger affected Claimant's left hand.

Dr. Cohen concluded limitations from injuries to the left finger and left elbow make it more difficult for Claimant to push, pull, lift or twist with the left upper extremity. Also, the combined disability between her left index finger injury, left elbow, left knee, and traumatic brain injury exceeds the simple sum of this disability.

In November 2012, Dr. Cohen diagnosed posttraumatic headaches as a part of the posttraumatic concussion, and recommended more treatment, which the Employer provided.

#### *4. Psychological injuries*

About two months after the fall, Claimant developed emotional symptoms. She cried for no apparent reason, developed headaches (left side of her head to her eye), mood swings, stress and anxiety around offenders, and she refused to go behind "the gate." In a recurrent nightmare, Claimant felt trapped in a "wing" at work with offenders surrounding her.

Claimant contacted the Employee Assistance Program ("EAP"), through the State of Missouri, and requested services for her symptoms. Claimant received four visits of "talk therapy" from Ms. Nancy Daugherty, a counselor with Supportive Solutions by JMN, LLC, between September 2011 and November 2011.

Claimant did not believe her "wing officer" responded fast enough, and the control room officer did not lock down the area, which allowed offenders to move about. Ms. Daugherty concluded Claimant "appeared to have Post Traumatic Stress Disorder ("PTSD"), and identified these problem areas: anger, depression, and worry/anxiety.<sup>7</sup> Ms. Daugherty stated Claimant stopped receiving counseling because she could not afford to pay for it.

After treatment ended with Ms. Daugherty in November 2011 Claimant did not seek consistent psychiatric treatment again until 2015 except for consultation with her PCP. Claimant testified she was embarrassed to seek treatment, did not think she was that sick, and could not afford treatment.

In December 2011, Dr. Oliveri, Ph.D. examined Claimant who had a history of crying spells, mood swings, lack of concentration, weight loss, and an inability to sleep. However, Dr. Oliveri did not prescribe treatment for Claimant's symptoms.

Claimant changed PCP's and began to treat through Midwest Health Group on January 17, 2012. The diagnosis included depression and Zoloft was prescribed in June 2012. Claimant continued treatment through August 2013. Symptoms were constant for chest pains and crying spells.

On February 23, 2012, Employer advised Claimant her services were no longer needed and offered her a resignation or termination. Her termination caused Claimant's symptoms to increase.

Claimant applied for long-term disability benefits from the Missouri State Retirement System. From October 2013 until January 2015, Claimant received long-term disability through the MOSER'S State Retirement Program. In 2015, Claimant's benefits terminated after a ruling

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<sup>7</sup> Ms. Daugherty stated PTSD was common when intense fear and hopelessness were present.

that she could return to work. On appeal, Claimant's benefits were reinstated. She will continue to receive long-term disability benefits until she reaches retirement age.

In January 2014, Claimant's symptoms included anxiety, and forgetfulness. Claimant treated with Midwest Health Group in January, February and May 2014. She had a history of increased symptoms for depression, joint pain to her left elbow and left knee, and post-concussion symptoms.

During 2014, Claimant continued to experience crying spells, headaches, anxiety, withdrawal, and panic attacks but did not take any medication. She attributes her weight loss to a loss of appetite from the fall and psychiatric problems. In 2014, additional psychiatric treatment was recommended but Claimant did not pursue it. At that time, Claimant treated with her PCP and thought she would receive a referral for service. Now, she is embarrassed that she did not follow up.

Dr. Jennifer Brockman offered no psychiatric treatment so Claimant pursued it on her own. Claimant testified the costs were incurred because of psychological injuries she sustained as a result of the July 26, 2011 work injury.

Prior to 2011, Claimant did not receive treatment for mental illness from a psychiatrist, psychologist or nurse practitioner. Claimant did not receive counseling for depression, insomnia, mood disorder, anxiety, or personality and stress disorder from a counselor, social worker, mental health worker or Dr. Chand.

#### *Treatment for psychological injuries*

For psychological injuries, Claimant treated with Magellan Health Services through EAP from September 20, 2011 through November 4, 2011, and was diagnosed with Axis I - Post Traumatic Stress Disorder ("PTSD"), Axis III – Severe accident, Axis IV – Laid off from work.<sup>8</sup> She met with Ms. Nancy Daugherty, a counselor with Supportive Solutions by JMN. Claimant reported a recurring nightmare where she was falling in prison and laid in front of the prisoners. She felt humiliation as she went in and out of consciousness. Her coworkers were slow to help her. She had to have surgery and painful physical therapy. She felt fear and trauma. A plan was established to decrease her anger and frustration over a six month period. Medical records show Claimant was to return in two weeks but no additional records are in evidence. Ms. Daugherty stated Claimant could no longer afford to pay for treatment.

In December 2011, Michael V. Dr. Oliveri, Ph.D., performed neuropsychological testing, reviewed medical records, and provided an evaluation about Claimant's head trauma. Claimant reported the following complaints since the fall at work; headaches, decreased appetite, weight loss, crying spells, and mood swings, trouble with staying on task, short-term memory problems, knee pain, poor concentration, and sleep limited to four hours per night. Claimant's spouse gave Dr. Oliveri a history that she complained of being tired, moody, tearful, and had memory deficits.

Test results revealed the following: 1) Higher level brain function. No change in cognitive function. Normal learning, memory, etc. 2) Somatoform Disorder, NOS – insistent

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<sup>8</sup> Other information contained in the document was partially not visible.

with the injury. Not related to the July 26, 2011 injury, 3) Depressive Disorder, NOS, pre-dating the July 2011 injury. Dr. Oliveri recommended treatment for the pre-existing condition. He found no neuropsychological injury five months after the July 26, 2011 work injury.

In January 2012, Claimant treated with Ms. Diane Radosevich, a nurse practitioner with Midwest Health Group with complaints of insomnia for the past two years, depressed mood and headaches. Medications include Zoloft, an antidepressant and Vasotec an antihypertensive drug.<sup>9</sup>

In August 2012, Claimant's sleep continued to be disrupted. At the time, her stressor was unemployment. Medical history was positive for anxiety/stress. Medication included Zoloft and Vasotec. The September 2012 appointment was negative for anxiety, depression and sleep disturbances.

Claimant treated with Ms. Melinda K. Fox, LCSW with Potosi Rural Mental Health, from January 28, 2013 to June 13, 2016. Claimant reported she stopped taking her medication and hoped to handle the situation without it. She cried during the first session. Claimant expressed anger at missing her psychiatric appointments to attend her husband's medical appointments. She does not believe he is supportive. Claimant becomes anxious when she encounters former coworkers, and does not want to interact with them. After review of the video she felt inmates were walking all around her and could have taken her keys and beaten her to death or drug her into the utility closet and beaten her to death. She loved her job and was forced to resign. Ms. Fox diagnosed Axis I PTSD (Post Traumatic Stress Disorder) Symptomatic.

In August 2013, Claimant's emotional reaction to stress included chest pain, palpitations, and crying spells. Emotional triggers were listed as family health, children, unemployment, and legal battle for more than two years. The Zoloft prescription was increased to affect Claimant's emotional reaction to stress.

In January 2014, Claimant reported memory loss which started six months earlier. Claimant was anxious, agitated and tearful. Medical records reflect Claimant experienced multiple depressed episodes in the past.

On June 20, 2014, Jannette Cross, Ph.D. performed an evaluation in conjunction with Claimant's application for Social Security Disability benefits. Claimant gave a history of problems with memory, headaches, left knee pain, a sense of worthlessness, anger, crying spells, limited ability to crochet, insomnia, anxiety, and lack of concentration. Dr. Cross diagnosed the following: Axis I Depressive Disorder NOS, Axis II – deferred, Axis III Deferred, Axis IV – Unemployment, Axis V – GAF = 68. Dr. Cross recommended psychotherapy but Claimant did not receive the therapy. Initially, benefits were denied. However, on appeal, Claimant's benefits were approved.

During 2014, Claimant continued to experience crying spells, headaches, anxiety, withdrawal, and panic attacks but did not take any medication. She attributes her weight loss, loss of appetite and psychiatric problems to the fall. Additional psychiatric treatment was

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<sup>9</sup> The record contains no medical report that Claimant was prescribed Zoloft for menopausal symptoms or anything other than depression.

recommended but Claimant did not pursue it. At that time, Claimant treated with her PCP and thought she would receive a referral but she did not.

In February 2015, Claimant treated with Midwest Health Group, and through Ms. Sandra McIntosh, a social worker, with complaints of crying, depression, headaches, insomnia, hyper-vigilance, and fatigue, which began after the July 2011 work injury and increased after she resigned. Claimant expressed concern that her spouse may have Alzheimer's symptoms and does not take care for himself. Before the 2011 work injury, Claimant did not have crying spells. Ms. McIntosh diagnosed major depression and anxiety disorder.

Medication reduced the nightmares, and Claimant felt better until she ran into coworkers at several events and became upset. She went to her craft room and shut the door. Claimant treated with Ms. McNail and Dr. Bello Adejoh at Austin Plaza Primary Care between July 2015 and July 2016. She reported another spot was found on her bladder. Claimant was educated on the use of Abilify in conjunction with Viibryd. However, Abilify was not prescribed. Psychotherapy was recommended.

Claimant treated with Diane Radosevich again for post-concussion syndrome from the July 26, 2011 trauma with complaints of headaches, depression, memory loss and insomnia from March 2015 to November 2016. Ms. Angelica Lappe, a nurse practitioner, treated Claimant. Medications for psychological treatment included Zoloft, Viibryd,<sup>10</sup> Vilazodone HCl, Zolpidem Tartrate, Ambien, Abilify, and Klonopin. Dr. Gully prescribed medication that affects mood.

On October 28, 2015, Ms. Sandra Mitkos, FNP, diagnosed depression with anxiety, active. Ambien was prescribed, stopped and resumed several times between October 7, 2015 and December 9, 2015.

On March 31, 2016, Dr. Adejoh treated Claimant with a history of being fearful from flash-backs and nightmares. Counseling was provided and clonazepam was prescribed. Dr. Adejoh diagnosed PTSD and a mild neurocognitive disorder caused by traumatic brain injury. Claimant's GAF was 60. On July 1, 2016, Dr. Adejoh discontinued Ambien, Prazosin, and Aripiprazole. From September 16, 2016 to December 8, 2016, Dr. Adejoh treated Claimant for PTSD and mild neurocognitive disorder caused by Claimant's traumatic brain injury.

Claimant treated with Ms. Melinda Fox on May 8, 2017, and she released Claimant to follow up with her PCP as needed. Claimant does not take prescription medication for her knee or elbow. She had not been seen in a year. Anger resurfaced after she attended her husband's retirement party. Diagnosis made: PTSD, symptomatic. Ms. Fox demonstrated various ways for Claimant to cope with her feelings.

### *Residual psychological complaints*

Claimant cries four to five times per day, with or without triggers. Claimant still has problems sleeping. She wakes up two to three times during the night due to nightmares. Recently, Claimant saw Officer Snow and she wanted to talk to him but he ignored her. She started breathing heavy and cried.

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<sup>10</sup> Ms. Radosevich, N.P, changed Claimant's medication from Zoloft to Viibryd.

Her mood changes quickly from happy to sad. When she is happy she can complete a task. But when she is sad she cannot focus. Sometimes her mind will not stop thinking. She has a recurring nightmare about the fall: She performs her job in a room. She left the room and fell. Offender Greer handed her the keys she dropped. Officer Snow smiled at her. The recurrent nightmare involves her being trapped in a housing unit and no one comes to assist her.

During the day, Claimant volunteers to deliver meals to clients at the Bon Terre Center ("Center") through the Meals on Wheels program, for one hour twice a week, for seven clients on Monday and eight clients on Thursday. Sometimes she volunteers more hours if needed.<sup>11</sup> Claimant spends time with her grandchildren and performs household tasks. She spends five to six hours per day managing her symptoms. She has good days and bad days. When bad days come she is in bed. Even on good days she can end up isolating herself due to knee pain, a headache or any trigger.

After the injury on July 26, 2011, Claimant never worked as a CO-1 again. After Claimant's termination, she sought vocational rehabilitation training but they had no services except to sort beads at NCII, so she did not engage their services. Claimant applied for security officer positions with the Department of Mental Health, and Walmart, but she was not hired.

After the 2011 work injury, Claimant became fearful she would fall again and be left alone. She tries to avoid the Farmington area for civic activities. She avoids shopping at local stores during shift change to avoid running into former coworkers.

Claimant seeks permanent total disability benefits based on injuries she sustained from the July 26, 2011 work injury alone and when combined with her finger injury. In addition, Claimant seeks future psychiatric treatment.

The Social Security Administration determined Claimant became disable April 29, 2013. She began receiving Social Security benefits in October 2013 totaling \$1,022.00 per month.

If successful, Claimant agreed to pay Mr. Seufert 22.5% of any compensation she is awarded plus reimbursement of his out of pocket expenses totaling \$11,054.48. (See Exhibit 41).

#### *Expert psychological opinions*

Jay L. Liss, M.D. is board certified in psychiatry, neurology and forensic examination. He performed an independent medical evaluation ("IME") on April 27, 2015, reviewed medical records, reviewed the video-tape of the accident, administered a test, wrote a report and testified at the request of Claimant's attorney.

Based on a review of the evidence, Dr. Liss concluded Claimant had problems with cognitive function and memory. Her history revealed evidence of confusion and deterioration of functionality.

A questionnaire administered to Claimant identified the following symptoms: Altered sleep, anxiety, social isolation, mood swings (including irritability, sensitivity, interference,

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<sup>11</sup> The center offered Claimant a paid position that involved lifting and standing but she declined.

dysfunctional relationships, crying, altered appetite, a sense of hopelessness, and lack of concentration).

Dr. Liss found no evidence Claimant had a pre-existing psychiatric condition. Zoloft, an antidepressant medication, was used for Claimant's hormonal dysfunction to prevent side effects, including cancer.<sup>12</sup>

Based on Claimant's presentation and cognitive function, Dr. Liss diagnosed a traumatic brain injury and Post Trauma Stress Disorder ("PTSD"). He defined PTSD as emotional and physical findings related to anxiety and depression. PTSD is a disruption in the chemistry of the brain. It is the result of unpredictable, unexpected traumatic stress or a flush of adrenaline or other hormones into the nervous system. The condition worsens over time. Diagnostic tests do not identify the problem.

On September 26, 2016, Dr. Liss administered a Mental Residual Functional Capacity Assessment to Claimant. Based on Claimant's response, Dr. Liss concluded Claimant suffered traumatic brain injury with post-concussion syndrome associated with post trauma syndrome. He concluded Claimant could no longer work or receive vocational training because of the fall in July 2011. Dr. Liss diagnosed anxiety, depression and PTSD, and concluded Claimant was 100% PTD on a psychiatric basis.

Dr. Liss attributed Claimant's psychiatric condition to her fall at work on July 26, 2011. Dr. Liss found no cure for PTSD but recommended on-going psychiatric medication supervised by a psychiatrist or psychiatric nurse practitioner and psychotherapy to ease the effects of the condition. Treatment should continue for the foreseeable future. Dr. Liss discounted Dr. Oliveri's findings because he believed Claimant was prematurely evaluated.

Jennifer E. Brockman, M.D., is board certified in psychiatry and neurology. She performed an IME on November 2, 2015, reviewed medical records, wrote two reports and testified at the request of the Employer.

Claimant reported Employer terminated her because of her physical injuries. She reported the following emotional problems after the July 26, 2011 work injury: decreased energy, concentration, and appetite, and increased headaches. Claimant was not sure if she lost consciousness after the fall. Dr. Brockman did not review the video of Claimant's fall.

For several years after the 2011 injury, Claimant took the following psychotropic medications prescribed by her nurse practitioner; Viibryd, Abilify, Klonopin, and Ambien.

Before 2011, Claimant denied having psychiatric symptoms or taking psychiatric medication for symptoms. She took Zoloft for hot flashes and amitriptyline for sleep problems related to night shift work.

During examination, Claimant denied suicidal thoughts and no evidence was found of psychosis. Claimant was a good historian and exhibited good concentration and effort. Insight was fair to good, and her thinking patterns contained guilt and disappointment. Depressive

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<sup>12</sup> On cross-examination, Dr. Liss did not recall reviewing a medical account that Claimant was prescribed Zoloft for a hormone imbalance.

symptoms exhibited by Claimant include low mood, changes in sleep, apathy, anhedonia, guilt, decreased energy, and poor concentration.

Dr. Brockman found no pre-existing psychiatric disability. She diagnosed the following:

- I. Major depressive disorder moderate, chronic
- II. Panic disorder

Symptoms exhibited by Claimant of a panic disorder include self-reported anxiety with somatic symptoms, i.e. heart rate, respiration, etc. Dr. Brockman opined Claimant's poor memory and concentration relate to depression and anxiety, not PTSD.

Dr. Brockman opined:

"However, given the nature of her presentation and her prior treatment, it's my opinion that in relation to the injury specifically of July 26, 2011, she has reached maximum medical improvement in regard to her psychiatric symptoms."

About medical causation, Dr. Brockman further opined the work injury on July 26, 2011 was not the "prevailing causative factor" for Claimant's current psychiatric presentation; therefore, she assigned no disability. Dr. Brockman based her opinion on several factors. After the July 2011 work injury, Claimant performed her light-duty assignments. In 2015, Claimant told Dr. Brockman that psychiatric symptoms did not limit her ability to work; therefore, Dr. Brockman concluded Claimant's psychiatric symptoms started "either after her termination or after a substantial length of time." In addition, Dr. Brockman noted it was three or four years between the July 26, 2011 work injury and when Claimant developed symptoms and sought psychotropic treatment. The delayed treatment suggests Claimant was either asymptomatic or did not have significant problems during the gap in treatment.

Dr. Brockman referred to other factors that may contribute to Claimant's current presentation of major depression, i.e.; unemployment, multiple medical conditions and Claimant's perception of the Employer's response to her injury. Dr. Brockman concluded Claimant loved her job and became depressed when she could no longer perform it. Claimant lost her identity and felt shame and other symptoms related to not working.<sup>13</sup> Claimant was diagnosed with cancer in 2015 and started taking psychotropic medication around the same time. Claimant believed the Employer took too long to respond to her fall

Dr. Brockman opined Claimant would need future medical treatment but concluded:

"And lastly I found her need for psychiatric treatment, including psychotropic medication use and psychotherapy, to be independent of the work-related accident of July 26, 2011."

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<sup>13</sup> Claimant told Dr. Brockman she was fearful about running into co-workers at Walmart because she would be perceived as a "slug."

Dr. Brockman disagreed with Dr. Liss' diagnosis.<sup>14</sup> Claimant did not report to her many of the symptoms she reported to Dr. Liss. A patient would not describe symptoms using the words reported by Dr. Liss. In addition, Dr. Liss' diagnoses were inconsistent with Dr. Oliveri's findings from neuropsychological testing. The symptoms Dr. Liss diagnosed as PTSD are not listed in the DSM-5. In addition, the symptoms listed by Claimant's counsel during deposition apply to major depression and bipolar disorder.<sup>15</sup>

In a supplemental report, Dr. Brockman expressed concern because Claimant told her she planned to refuse chemotherapy and she may succumb to the cancer. Later, Dr. Brockman learned Claimant was in remission. This incident caused Dr. Brockman to question Claimant's skill as a historian "because one typically does not go from saying I'm going to refuse chemotherapy to I'm in remission."

Dr. Brockman further concluded Claimant had reached MMI from the psychiatric symptoms she sustained after the fall on July 26, 2011. However, she recommended psychiatric medication and psychotherapy for the foreseeable future for moderate depression and panic disorder unrelated to the fall at work in July 2011.

In a second supplemental report, Dr. Brockman did not impose work-related restrictions. She did recommend vocational testing and rehabilitation, and a return to work if, possible.

#### *Past expenses –psychiatric treatment*

Dr. Jeanette Brockman offered no psychiatric treatment so Claimant sought treatment on her own. Claimant paid for psychological treatment and medication totaling \$3,435.18.

Claimant seeks reimbursement for payments she made to the following providers for psychological treatment totaling \$2,714.61: Ms. Sandra McIntosh, Ms. Nancy McNail, Ms. Sandra Mitkos, Ms. Melinda Fox, and Dr. Adejoh.<sup>16</sup>

Claimant presented prescription expenses from Pharmax Pharmacy contained in Exhibit 21 which total \$217.13 and Exhibit 21A which total \$503.44 for a combined total of \$720.57.

Claimant testified the expenses were incurred because of psychological injuries she sustained from the July 26, 2011 work injury.

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<sup>14</sup> Dr. Brockman defined "PTSD" as "a life-threatening experience in which your integrity as a human is compromised and you believe there's a potential or a real threat of death." An actual life threatening event must occur that compromises a person's integrity. Dr. Brockman concluded Claimant did not experience this.

<sup>15</sup> The symptoms discussed during cross-examination include: Headaches, anxiety, depression, cognitive dysfunction, memory, mood swings, sleep disorder, socially withdrawn, personality changes, irritability, sensitivity, interferes with relationships, spontaneous crying and changes in appetite. Dr. Brockman related the symptoms to Claimant's depression and anxiety.

<sup>16</sup> See Exhibit 39

***Subsequent medical conditions***

In 2015, Claimant was diagnosed with bladder cancer. A transurethral resection was performed in April 2016.

In November 2016, Claimant was found passed out in a parking lot. She had become dizzy and walked out to her car to eat. After she fell on the parking lot, Claimant reported "feeling strange, associated with true loss of consciousness, slurred speech, unsteady gait, and weakness that began approximately 1 week." (November 21, 2016). During examination on November 29, 2016, Claimant reported blurred vision, double vision, nausea, slurred speech, and vertigo. Ms. Diane Radosevich, a nurse practitioner, diagnosed a "fall with head trauma and subarachnoid bleed, 11/19/16, staples out, no drainage."

In June 2017, Claimant reported to Ms. Gina Heberlie, a nurse practitioner, that she had a seizure, lost consciousness, had blurred vision, and dizziness from a hypoglycemic attack. Claimant hit her head and staples had to be removed. Claimant reported this happens because she does not eat often enough.

***Witness 2 – Ms. Lisa Burch***

Ms. Burch testified on behalf of the Employer. Since 2013, Ms. Lisa Burch has worked at the Farmington Correctional Center as a Senior Office Support Assistant. Her job duties include maintenance of payroll records for employees, handling workers' compensation claims, new-hire orientation, entering employee personal information into the computer, and handling other personnel issues that involve employee pay, including; promotions, raises, and payroll time.

Employee data is input into the Mayers Computer system "system" by the correctional facility. Data includes employee appointment dates, transactions about pay, and records of all employment with the State of Missouri. Ms. Burch retrieves payroll information from the system. However, she does not input the data, and does not know who does.

Ms. Burch testified CO-1's earn a base salary. They are paid on the 15<sup>th</sup> and last workday of each month. At the time Claimant was injured, her base salary was \$1,191.50 semi-monthly.

CO-1's may work overtime. Overtime is paid from federal, state and holiday time worked. Employees may request overtime pay in the same period it is accrued, or up to six months later; provided they have at least 20 hours of accrued overtime by the end of the pay period the request is made. To receive overtime pay, employees submit a leave slip. Ms. Burch enters the data into the computer and initiates "comp payouts." Employees can accrue up to 80 hours of overtime without requesting approval from central office. She reconciles payments each month.

Twice a year the State of Missouri requires "mandatory Comp Payouts." In January CO-1's and CO-2's have mandatory comp payouts. In June all CO's have mandatory comp payouts.

Exhibit 40 is a printout labeled Missouri State Employees' Retirement System ("MOSERS") which reflects Claimant's semi-monthly earnings for the period ending December

31, 2008 through March 31, 2012. According to Mr. Seufert, the document was provided by the State of Missouri and used to calculate Ms. Tedder's long term disability benefits. Ms. Burch does not work for MOSERS.

Exhibit 40 include the 13 weeks of earnings prior to Claimant's July 26, 2011 work injury; from April 16, 2011 to July 15, 2011. The earnings in dispute are for the period ending June 15, 2011:

1. The period ending July 15, 2011 - Claimant received - \$1,191.50 gross pay;
2. The period ending June 30, 2011 - Claimant received - \$1,191.50 gross pay;
3. **The period ending June 15, 2011 - Claimant received - \$1,904.79 gross pay (Emphasis added)**

Ms. Burch testified Claimant's gross pay for the period ending June 15, 2011 was \$1,904.79 and included mandatory overtime earned during the 13 weeks before Claimant was injured. Ms. Burch testified she knew this because she looked at Claimant's leave slips. However, the document that contains this information was not produced during the hearing.<sup>17</sup> Ms. Burch has no personal knowledge about Claimant's payroll for the period ending June 15, 2011. She cannot determine Claimant's average weekly wage for the 13 weeks before July 26, 2011.

#### *Other evidence - the video-tape*

A video of Claimant's fall shows her tripping over a mat at 8:00:01 a.m. on July 26, 2011, and falling to the floor. She attempted to get up and then remained motionless on the floor for several minutes. An inmate immediately called for help, recovered Claimant's keys, and gave them to her. A short time later, a prison employee arrived on the scene. A number of employees arrived after that, including one person that attempted to administer aid, while another fanned Claimant. The helpful inmate remained close by Claimant until a half dozen or more prison personnel arrived. Other inmates observed from a distance but continued on with their activities. Prison personnel continued to come and go, while a core group remained with Claimant. The ambulance arrived with a gurney and Claimant was removed from the accident scene at 8:21:50 a.m.

#### *Expert vocational opinions*

Mr. James M. England Jr., is a rehabilitation counselor licensed in Missouri. He interviewed Claimant on February 24, 2016, reviewed medical records, wrote a report and testified at the request of the Employer. He did not review the video-tape of the accident, or reports from Janette Cross, Ph.D., Sandra Macintosh, Nancy McNail, and the mental residual functional capacity assessment administered by Dr. Liss.<sup>18</sup>

<sup>17</sup> Ms. Harris presented a document to Ms. Burch that she planned to label "Exhibit G" for Ms. Burch to testify about Claimant's wage rate and payroll codes used. Mr. Seufert objected to the admission of the document based on hearsay. Ms. Harris responded she did not believe the document needed to be certified and Ms. Burch could testify to how she uses the document. The objection was sustained for any information Ms. Burch did not have firsthand knowledge about, and overruled for firsthand knowledge she possessed. Mr. Seufert made an offer of proof that Ms. Burch did not create the document, is not a custodian of record, and the document is not certified; therefore, the document and her testimony are inadmissible. Ms. Harris withdrew the exhibit.

<sup>18</sup> Based on the assessment results, Dr. Liss assessed "significant functional mental limitations."

During the interview, Mr. England did not notice any problems Claimant had with sitting. She expressed an interest in going back to work. Mr. England offered to help her return to work.

Mr. England relied on the academic tests performed by Ms. Gonzalez and concluded Claimant's academic skills were "excellent" and she was capable of performing a wide variety of work or learning new skills.

Claimant did not report problems with grip strength or fine motor skills related to her preexisting left index finger injury. But when Claimant typed or took down an inmate, she did not use her left index finger. Mr. England opined this adjustment could decrease her typing speed therefore, he did not recommend a clerk typist position where Claimant may type all day and need speed and accuracy. Mr. England opined the index finger is important in performing work compared to the other fingers. Claimant reported she continued to quilt despite the finger injury.

For Claimant's physical injuries, Mr. England opined Claimant cannot return to work as a CO-1 based on Dr. Gross' restrictions. However, based on the opinions of Drs. Brown and Gross, Mr. England opined Claimant can work in other types of employment, i.e. receptionist, payroll clerk, general office work, and switchboard operator; sedentary jobs she has held in the past. Other employment possibilities include security guard (light level of exertion) and an alarm monitor (sedentary level). Mr. England noted Claimant supervised two squads of soldiers in the military and up to 200 inmates in the correctional center.

Based on Dr. Cohen's restrictions, Mr. England opined the biggest problem with Claimant maintaining employment is her headaches. According to Dr. Cohen, the number and frequency of Claimant's headaches has decreased.

Based on Dr. Brockman's psychiatric opinion, Mr. England concluded Claimant could participate in vocational rehabilitation and return to work. However, she could not do so based on Dr. Liss' opinion.

Mr. England concluded as a vocational expert he cannot decide which doctor's opinion should be used. He deferred to the trier of fact to make that decision.

Ms. Delores E. Gonzalez is a vocational rehabilitation counselor and certified PTSD counselor, licensed in Missouri. On July 30, 2016 she evaluated Claimant; reviewed medical records, reviewed the video-tape of the accident, administered vocational tests, wrote two reports and testified at the request of Claimant's attorney. At the time of the interview, Claimant was 56 years old. Claimant gave a history of symptoms of depression and anxiety since 2009, treated with Zoloft. Claimant reported college credits in nurse assistance and impoverished reading skills.

Ms. Gonzalez reached the following conclusions:

**Transferable Skills:** Claimant has no transferable job skills because of "her severely reduced residual functional capacity." Also, Claimant's earlier jobs were performed more than 15 years ago, and are no longer vocationally relevant. The skills needed for the earlier jobs have changed significantly in the last 20 years because of computers.

Wide Range Achievement Test, 4<sup>th</sup> Edition ("WRAP"): Based on test scores and no consideration for physician-imposed restrictions, Ms. Gonzalez concluded Claimant could transition to a new work environment with basic reading, average sentence comprehension, spelling, and math skills.<sup>19</sup> She can perform adequately in clerical positions that require basic reading and average sentence comprehension, spelling and math computation skills.

Based on Dr. Brown's restrictions, Ms. Gonzalez concluded Claimant can return to her job as a CO-1 with no restrictions. Based on Dr. Gross' opinion, Claimant cannot return to her job as a CO-1, but she can perform the remainder of her past work duties.

Ms. Gonzalez testified Dr. Cohen is the only physician that considered all of Claimant's medical conditions when he determined disability. Dr. Cohen's restriction that Claimant be allowed to lie down when she has a headache or go home, means Claimant cannot compete in the open labor market, according to Ms. Gonzalez. It is not reasonable to expect an employer to hire Claimant with her medical conditions over a younger worker with no need for accommodations. Employers expect workers to perform in an "upright position and remain on task except for breaks given at their discretion." In addition, "accommodations such as allowing an employee to lie down or go home are not customarily given in a competitive work setting.

Further, the need to ice or heat her knee several times a day is an accommodation some employers may not be willing to accommodate. As a rule, Ms. Gonzalez testified a person would not be employable in the open labor market with this accommodation because it is a hindrance or obstacle to employment. On cross-examination, Ms. Gonzalez testified Claimant is PTD from the last injury alone. However, on redirect, she testified Claimant is PTD from the last injury alone and in combination with her pre-existing disability.

Ms. Gonzalez concluded some of Dr. Cohen's limitations "automatically eliminate" Claimant from employment; such as the recommendation to lie down or go home to relieve headaches. If the need to lie down was caused by the last injury alone, Ms. Gonzalez concluded Claimant was not employable in the open labor market on that basis alone. It would be difficult for Claimant to transfer her job skills to a different job based on her limited ability to function.

Based on medical restrictions and opinions, Ms. Gonzalez further concluded Claimant could not return to her past jobs or perform any job on a sustained basis. In addition, Ms. Gonzalez opined Claimant is not a candidate for vocational rehabilitation due to disability from her left finger and the injuries sustained at work on July 26, 2011.

After a review of Dr. Liss' report, Ms. Gonzalez wrote a supplemental report dated July 29, 2015 and stated her opinion had not changed.

When Claimant's injuries from the July 26, 2011 injury are considered in isolation, Ms. Gonzalez testified they would cause permanent total disability. However, to reach a conclusion she looks at the person as a whole. Ms. Gonzalez concluded Claimant's left index finger injury

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<sup>19</sup> WRAP test scores revealed the following: 9<sup>th</sup> grade, 8<sup>th</sup> month - Reading, above 12<sup>th</sup> grade 9<sup>th</sup> month - Sentence Comprehension, 10<sup>th</sup> grade 8<sup>th</sup> month - Spelling and 7<sup>th</sup> grade 3<sup>rd</sup> month - Math.

was a hindrance or obstacle to her employment based on problems she reported with grasping and typing. Here, the pre-existing left finger injury is "additive" to the primary injury.<sup>20</sup>

Further, at age 56, Claimant is considered advanced age, according to the Department of Labor.

Mr. Timothy Kaver, a vocational rehabilitation counselor licensed in Missouri, interviewed Claimant on October 3, 2016 to discuss her possible participation in vocational rehabilitation. Mr. Kaver is Mr. England's partner. Mr. Kaver relied on Mr. England's medical summary of physician-imposed restrictions, Claimant's interview and self-reported limitations to Mr. England, Claimant's work history, education, and Mr. Kaver's interview with Claimant. Claimant reported she had to lie down because of the headaches. Over time the number of headaches she has decreased to once or twice a week for about 30 minutes each time. Mr. Kaver decided Claimant was employable in the open labor market.

Mr. Kaver had no written authority from Claimant to discuss her vocational rehabilitation counseling sessions with her. Mr. Kaver testified he is bound to provide reports requested from referral sources, i.e. attorneys and insurance carriers. Mr. Kaver testified Claimant did not tell him she was forced to meet with him.

Claimant expressed an interest in working with older people, people with disabilities and mental challenges, dispensing medication at a nursing home as a medical technician, and customer service over the telephone. Also, Claimant wanted to upgrade her computer skills and Mr. Kaver offered a list of resources in Claimant's community where she could acquire computer training.

Based on Claimant's vocational interests, Mr. Kaver developed a vocational rehabilitation plan ("Plan") for Claimant. He concluded Claimant could work light duty/sedentary positions that allowed her to alternate between sitting and standing. In addition, the plan identified the following possible sedentary job placements based on Claimant's interests: Customer service representative (telephone), order clerk, reservationist, interviewer/intake worker, receptionist, information clerk, and general office clerk. Based on Claimant's work history, Mr. Kaver recommended security guard/sedentary post and security/camera alarm monitor.

Mr. Kaver concluded Claimant has the following transferable skills: good communication skills, strong work history, well organized and detail – oriented, supervisory experience and experience in scheduling, and security, and she has the ability to learn new skills.

However, the plan was never implemented because Mr. Kaver received a letter from Mr. Ken Seufert to Ms. Rachel Harris dated December 5, 2016. The letter stated Claimant "would no longer be working with us." Mr. Kaver stopped all communication with Claimant. Mr. Kaver submitted a copy of the plan to Ms. Harris in a letter dated January 13, 2017.

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<sup>20</sup> Claimant told Ms. Gonzalez she had anxiety and depression since 2009, but the conditions did not affect her ability to work or cause her to lose time from work before July 26, 2011. Therefore, Ms. Gonzalez concluded the medical conditions were not a hindrance or obstacle to Claimant's employment.

Mr. Kaver was informed Claimant would meet with him to obtain the plan and decide if she was interested. On March 10, 2017, Mr. Kaver met with Claimant. Claimant read aloud a written statement she prepared with the assistance of Mr. Seufert. She had been approved for Social Security Disability and did not want rehabilitation services because she is totally disabled. Also, her Employer forced her to meet with Mr. Kaver, which was unprofessional and unethical. Claimant testified Mr. Seufert advised her to sit, listen, be polite, and refer questions to him. Claimant took the plan with her to review the plan with her attorney. Mr. Kaver informed Claimant he would be happy to help if she changed her mind. In the meantime, they would no longer have contact. Mr. Kaver had no further contact with Claimant.

If the opinions of Dr. Liss and Dr. Cohen are found to be credible, Mr. Kaver concluded Claimant was unemployable from the last injury alone. If Dr. Brockman's opinion is credible, Claimant can work. He refused to comment on Ms. Gonzalez's vocational opinion.

### **FINDINGS of FACT and RULINGS of LAW**

#### **1. MEDICAL CAUSATION**

At the start of the hearing the parties stipulated Claimant's injuries to her left elbow, left knee and head are medically causally related to her July 26, 2011 work injury.

In addition, Claimant asserts her psychiatric condition is also medically causally related to her July 26, 2011 work injury. The Employer denies compensability based on delayed psychiatric treatment. Also, Claimant was prescribed Zoloft for anxiety before the work injury.

#### **LEGAL AUTHORITY**

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim ... *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968).

Chapter 287.020.2 defines "**accident**" as an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

(1) The term "**injury**" is defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "**The prevailing factor**" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. (Emphasis added)

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

Chapter 287.120. 1. States every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person. ...

To be entitled to workers' compensation benefits, the employee has the burden to prove the injury was caused by a work-related accident. *Spencer v. Sac Osage Elec. Co-op., Inc.*, 302 S.W.3d 792, 800 (Mo.App.2010). Where the right to compensation depends upon one of two conflicting medical theories, the issue is peculiarly for the [fact finder] to determine. *Id.* (Citations omitted). Determinations about causation and work-relatedness are questions of fact to be ruled upon by the [fact finder], and the reviewing court may not substitute its judgment on the weight of the evidence or on the credibility of witnesses for that of the [fact finder]. *Id.*

Where there are conflicting medical opinions, the [fact finder] may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop 'N Save Warehouse Foods Inc.*, 855 S.W.2d 460, 462 (Mo.App.1993).

After careful consideration of the entire record, Claimant's demeanor during the hearing, competent and substantial evidence presented during the hearing, and the applicable law of the State of Missouri, Claimant met her burden to show her psychiatric condition is medically causally related to the July 26, 2011 fall for the reasons discussed below.

1. Claimant's testimony is credible. She reported the same symptoms to numerous medical providers when she sought psychiatric treatment for years.
2. Dr. Liss and Dr. Brockman agree Claimant has a psychological condition that she did not have before the July 2011 fall. They agree Claimant sustained psychological injury from the 2011 fall. However, they disagree on the cause of Claimant's current psychiatric disability.
3. Dr. Liss' opinion is more persuasive that the fall caused Claimant's current psychiatric condition. He testified Zoloft was prescribed to control Claimant's hormonal dysfunction and prevent side effects, including cancer. He diagnosed PTSD and traumatic brain injury with post-concussion syndrome, and predicted it would worsen over time. Dr. Liss' opinion is consistent with Claimant's symptoms that worsened over time; headache, anxiety, depression, cognitive dysfunction, imbalance or loss of equilibrium and the ability to perform fine movements. In 2016, Claimant reported a history of frequent falls because of a loss of appetite which she related to her fall in July 2011.
4. Claimant started taking psychotropic medication around the time of her cancer diagnosis in 2015, but she began to exhibit psychological symptoms two months after her fall in 2011.
5. Dr. Brockman's opinion is not persuasive that Claimant's psychological symptoms related to the fall in July 2011 had resolved.

6. The video-tape clearly showed Claimant's fall. Her testimony is consistent with medical records in evidence that she sought counseling within two months of the fall for crying, depression, headaches, insomnia, hyper vigilance, and fatigue, and continued to seek treatment in the following years: 2011, 2012, 2013, 2015, 2016, and 2017. She did not seek treatment in 2014 because she thought her PCP would provide a referral but he did not. However, she resumed treatment in 2015, 2016 and 2017. Dr. Brockman's opinion is not persuasive that Claimant did not seek psychiatric help for three or four years.
7. In addition, Dr. Brockman diagnosed major depression based on Claimant's loss of employment and other life stressors that occurred after July 26, 2011. However, Claimant's job loss is directly related to the physical injuries she sustained to her left knee, left elbow and head when she fell exiting the utility closet on July 26, 2011. The parties do not dispute Claimant sustained these physical injuries from the fall. If Claimant was depressed because she lost her job in 2012, that happened seven months before other life events occurred.
8. Claimant would not have been equally exposed to developing psychological symptoms related to the fall outside of her employment.
9. Based on credible testimony by Claimant and persuasive testimony by Dr. Liss, I find Claimant met her burden to show the fall on July 26, 2011 was the prevailing factor that caused PTSD, traumatic brain injury, and post-concussion syndrome. Therefore, the psychological injuries she sustained are medically causally related to her fall at work on July 26, 2011.

## 2. PAST MEDICAL EXPENSES

In post-hearing briefs, Claimant contends Employer is liable for past medical expenses totaling \$3,435.18. The Employer denies liability because Claimant failed to prove the medication and medical bills were "authorized, necessary, or causally related to the primary injury." Also, no expert has connected the pharmacy and medical bills to the primary injury. In addition, the pharmacy bills included medication she took for unrelated medical conditions.

### LEGAL AUTHORITY

Where the employer with notice of an injury refuses or neglects to provide the necessary medical care, the employee may make their own selection and have the cost assessed against the employer. *Wiedower v. ACF Indus., Inc.*, 657 S.W.2d 71, 74 (Mo.App. 1983). Where an employer denies the allegations in an employee's claim, it also necessarily denies liability for medical aid to the employee and the employee may be entitled to an award for the cost of medical services. *Id.*

Citing the decision in *Wiedower*, the *Mann* Court held where the employer has initially denied liability, courts have affirmed the award of medical costs to the employee. *Id.* at 75, *Mann v. Varney Const.*, 23 S.W.3d 231, 233 (Mo.App. 2000)). The Court also noted that the insurance company may be entitled to reimbursement from the employee. *Id.* (Citations omitted).

A sufficient factual basis exists for the [fact finder] to award Compensation for past medical expenses when: (1) the claimant introduces their medical bills into evidence; (2) the claimant testifies that the bills are related to and the product of the work injury; and (3) the bills relate to the professional services rendered as shown by the medical records in evidence. *Cook v. Missouri Highway & Transp. Comm'n*, 500 S.W.3d 917, 929 (Mo.App. 2016). When these three elements are met, the burden shifts to the employer to prove some reason the award of past medical expenses is inappropriate. *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818, 823 (Mo. banc 2003) (such as the employee's liability for the medical expenses was extinguished, or that liability does not otherwise fall within other statutory provisions); § 287.270 (allowing an employer to receive a credit for medical bills paid by the employer) (Citations omitted). Claimant met her burden.

1. Claimant testified Dr. Brockman did not recommend psychiatric treatment and she sought treatment on her own. Claimant identified bills for medical treatment and medications that support her testimony that she received psychiatric treatment because of the July 26, 2011 work injury.
2. The Employer did not meet their burden to show the award was inappropriate. As discussed above, Dr. Brockman's opinion was not persuasive. In contrast, Dr. Liss testimony was persuasive that the medication and treatment Claimant received were reasonable and required to cure and relieve her from the effects of the July 2011 work injury.
3. The Employer is responsible for \$2,714.61 in past medical expenses related to Claimant's mental health treatment.
4. The Employer is responsible for \$720.57 in past pharmacy expenses related to Claimant's mental health treatment.
5. The Employer is ordered to pay medical expenses totaling \$3,435.18.<sup>21</sup>

### **3. FUTURE MEDICAL CARE**

Claimant asserts she is entitled to future medical care for psychiatric and orthopedic injuries she sustained in her fall on July 26, 2011. The Employer contends no further treatment is needed based on the opinions of Dr. Brockman and Claimant's treating physicians.

### **LEGAL AUTHORITY**

Section 287.140 states: [T]he employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. Section 287.140.1 does not require the medical

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<sup>21</sup> \$2,714.61 (Mental health treatment)  
 + \$ 720.57 (prescriptions)  
 = \$3,435.18 (Past medical expenses owed by Employer)

evidence identify specific procedures or treatments in the future. *Talley v. Runny Meade Estates, Ltd.*, 831 W.W.2d 692, 695 (Mo. App.1992).

The Claimant bears the burden to prove the need for future medical aid. *Rana v. Landstar TLC*, 46 S.W.3d 614, 622 (Mo. App. 2001).<sup>22</sup> Proof of entitlement to future medical care and treatment requires the employee show something more than a possibility that such treatment will be needed. *Id.* Claimant must show that there is a "reasonable probability" that the future treatment is necessary because of the work-related injury. *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 351 (Mo. Ct. App. 2007). Claimant met her burden.

1. Based on the persuasive opinion of Dr. Liss, Claimant needs future psychiatric treatment for PTSD, depression and anxiety to cure and relieve the effects of the July 26, 2011 work injury. The Employer is ordered to provide psychiatric treatment for injuries Claimant sustained related to the July 2011 fall at work. Dr. Brockman's opinion is not persuasive that Claimant's depression is not related to her fall in 2011.
2. Based on the opinions of Dr. Brown, Dr. Gross and Dr. Hagan, Employer is not liable for future medical treatment for Claimant's left elbow, left knee or headaches. Drs. Brown and Gross released Claimant with no recommendation for additional medical treatment.
3. Dr. Cohen recommended future medical treatment for Claimant's headaches. However, he noted the number and frequency of Claimant's headaches has decreased. Claimant told Dr. Hagan she had complete resolution of the headaches and was "extremely happy." Examination revealed normal range of motion and no tenderness of the cervical spine in the occipital region. Based on these findings, Dr. Hagan predicted Claimant would not need more treatment, discharged her from care with no restrictions, and left the door open for follow up. However, the record contains no attempt by Claimant to receive additional treatment. Employer is not liable for future medical care for Claimant's headaches related to the 2011 fall.

#### 4. AVERAGE WEEKLY WAGE

Claimant asserts her average weekly wage should be \$604.79, because overtime pay should be included in the calculating her average weekly wage. The Employer contends Claimant's average weekly wage should be \$549.92 because it is unknown when the overtime pay was earned.

#### LEGAL AUTHORITY

Section 287.250 states in part: Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:

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<sup>22</sup> Several cases in this award may have been overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. Banc 2003). No further reference will be made to the *Hampton* decision in this award.

- (1) If the wages are fixed by the week, the amount so fixed shall be the average weekly wage;
- (2) If the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve and divided by fifty-two;
- (3) If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two;
- (4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by **dividing by thirteen the wages earned** while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision; (Emphasis added)

1. Ms. Burch's testimony was credible that the payment Claimant received for \$1,904.79 for the period ending June 15, 2011, included a mandatory overtime pay out. The overtime payout included wages earned during the 13 weeks before Claimant was injured. However, Ms. Burch could not say if all the overtime pay was earned during that payroll period or at a different time.<sup>23</sup> The records in evidence do not show the pay period the \$713.29 in overtime pay was earned. Since overtime pay was earned and paid during the pay period ending July 15, 2011 and the amount is undetermined, the entire \$713.29 in overtime paid will be applied to the pay period ending July 15, 2011.
2. Based on the evidence discussed above and credible testimony by Ms. Burch, Claimant's average weekly wage is \$604.80, ( $\$7,862.29 - \text{Gross pay} \div 13 \text{ weeks} = \$604.80$  average weekly wage per week).
3. The average weekly wage results in a compensation rate of \$403.19 for TTD, PPD, and PTD benefits. ( $\$604.80 \times 2 = 1209.60 / 3 = \$403.20$ ).

##### **5. NATURE and EXTENT of EMPLOYER LIABILITY for PPD or PTD BENEFITS**

Claimant asserts she is PTD and requests this Court determine if the Employer or SIF is liable for the benefits. The Employer acknowledges they are liable for PPD benefits to Claimant's left knee, left elbow, and head related to the July 26, 2011 work injury but not PTD benefits. The SIF denies liability for PPD or PTD benefits.

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<sup>23</sup> Ms. Burch testified she obtained this information from Claimant's payroll records. However, those records are not in evidence.

## LEGAL AUTHORITY

Chapter 287.020.6 defines “total disability” as the inability to return to any employment and not merely the inability to return to the employment the employee was engaged in at the time of the accident. The central question to the determination of permanent total disability status is whether any employer in the usual course of business could reasonably be expected to employ an employee in their present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173 (Mo. App. 1995). The employee must also be able to compete for work in the open labor market. *Stewart v. Zweifel*, 419 S.W.3d 915 (Mo. App. S.D. 2014) (Citations omitted).

The first question to be decided is the nature and extent of disability from the last injury alone. *Roller v. Treasurer of the State of Missouri*, 935 S.W.2d 739, 742-43 (Mo. App. 1996). If the last injury in and of itself rendered Claimant PTD, then SIF has no liability. *Landman v. Ice Cream Specialties, Inc.* 107 S.W.3d 240, 248 (Mo. 2003). The extent and percentage of disability is a finding of fact within the special province of the fact finder. *Angus v. Second Injury Fund*, 328 S.W.3d 294, 304 (Mo.App.2010) (Citations omitted). Claimant bears the burden to prove 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). Based on the persuasive opinions of Drs. Liss and Cohen, Ms. Gonzalez, and Claimant, the Claimant met her burden.

1. The opinions of Drs. Cohen and Liss, and Ms. Gonzalez are more persuasive than the opinions of Drs. Brown, Gross, Oliveri and Brockman, Mr. England and Mr. Kaver.
2. Dr. Cohen testified Claimant was PTD as a result of her primary injury and pre-existing left hand injury. However, if Claimant's left hand injury was disregarded, Dr. Cohen opined Claimant's primary injury on July 26, 2011 was sufficient to render her PTD.
3. Dr. Cohen related Claimant's headaches to the primary injury, and recommended she lie down if the headaches worsened, or go home if lying down did not provide relief. Dr. Cohen deferred to a vocational expert's opinion about Claimant's ability to secure and maintain employment if she needs to lie down or go home during a shift. Claimant testified she has fewer severe headaches, but they are not completely gone. To relieve headaches, Claimant goes to a dark room, places a pillow over her head and rests for about 45 minutes.
4. The medical opinions of Drs. Hagan, Gross and Brown are not persuasive. Each physician examined only one aspect of Claimant's medical condition. Dr. Cohen is the only physician in the case that evaluated all Claimant's physical injuries and their impact on Claimant's ability to work. His opinion is more persuasive than the Employer's medical opinions.
5. Ms. Gonzalez testified no employer would allow Claimant to lie down or go home during the workday as needed. Some employers may have problems with Claimants applying ice and heat to her knee several times a day.
6. Ms. Gonzalez further opined Claimant is PTD from the last injury alone and in combination with her pre-existing disability. As a vocational expert she considers the entire person. She viewed Claimant's pre-existing left hand injury as additive.

7. Claimant testified more about problems with her left index finger than her left hand. Claimant did not have surgery. Leading up to July 26, 2011, Claimant did not miss additional time from work or have physician imposed restrictions for the finger or left hand. She worked full, unrestricted duty. Also, Claimant knitted and crocheted for many hours as a hobby, and these are hand-intensive activities.
8. Claimant testified her left finger injury was an obstacle or hindrance to employment or re-employment leading up to July 26, 2011. Also, a synergistic effect existed between the left index finger and her disabilities from July 26, 2011. There is some evidence to support Claimant's testimony. However, the overwhelming weight of evidence shows Claimant is PTD as a result of the last injury alone. The left index finger disability is only additive to the July 26, 2011 disability.
9. The opinions of Mr. England and Mr. Kaver are not persuasive. Mr. England did not review the video-tape and some of the psychological treatment records. Mr. Kaver did not review any treatment records, and he relied on Mr. England's incomplete summary. Mr. Kaver testified he defers to medical doctors and mental health providers. And if Dr. Cohen and Dr. Liss find Claimant PTD because of the last injury, Mr. Kaver believes it is fair to conclude they are correct.
10. Claimant's testimony is consistent with the opinions of Drs. Liss and Brockman that Claimant had no psychiatric condition before the work injury. Dr. Liss' opinion is more persuasive that Claimant is PTD from a psychiatric standpoint alone and that Dr. Oliveri's psychiatric evaluation was premature.
11. Dr. Brockman's testimony is not persuasive that Claimant's psychiatric problems resolved related to the July 2011 work injury. She did not seek psychotropic medication until after she lost her job and was diagnosed with cancer. However, Claimant lost her job because of her work injury. In addition, she developed psychological problems long before she was diagnosed with cancer.
12. Claimant's testimony is consistent with the opinions of Drs. Liss and Brockman that she did not have psychiatric problems before the work injury. Claimant testified Zoloft was prescribed as an alternative to hormone replacement for hot flashes because she was high risk for developing cancer. Medical records are consistent with Claimant's testimony about her risk for breast cancer. Dr. Liss testified Zoloft was prescribed because hormone replacement was not recommended because Claimant had breast tumors. However, after the 2011 work injury, Claimant experienced nightmares, fear of running into coworkers in public, loss of appetite, and crying spells.
13. The opinions of Dr. Cohen, Dr. Liss and Ms. Gonzalez present competent and substantial evidence to prove Claimant cannot compete in the open labor market as a result of injuries she sustained to her left elbow, left knee, head and psychiatric injury caused by her fall at work on July 26, 2011. Ms. Gonzalez concluded Claimant's past work experience was more than 15 years old and not transferable to another job. She was not a good candidate for vocational rehabilitation. Claimant needs to lie down during the day to ease her headaches. Therefore, Claimant has proven by a preponderance of the evidence that she is permanently

and totally disabled. The Employer is liable for benefits. The SIF has no liability, and the case against the SIF is denied.

14. Commencement date for PTD payments: In cases of PTD, payments should have begun when the disability began. *Kramer v. Labor and Industrial Relations Commission*, 799 S.W.2d 142, 145 (Mo.App.App.1990).
15. At the start of the hearing, the parties stipulated Claimant reached MMI on July 16, 2013. Based on this stipulation, Employer is ordered to pay PTD benefits of \$403.19 per week retroactive beginning July 17, 2013.

### CONCLUSION

1. Claimant's psychiatric condition is medically causally related to her July 26, 2011 work injury.
2. Employer is liable for past medical bills for Claimant's psychiatric treatment totaling \$3,435.18.
3. Employer is liable for future psychiatric care related to the work injury. Employer is not liable for future pain management treatment.
4. Claimant's average weekly wage rate is \$604.80.
5. Claimant is permanently and totally disabled due to the July 26, 2011 work injury. Employer is liable for PTD benefits beginning July 17, 2013.
6. The Second Injury Fund claim is denied.
7. The award is subject to a lien in favor of Claimant's as outlined in this award for legal services rendered.

I certify that on April 26, 2018,  
I delivered a copy of the foregoing award  
to the parties to the case. A complete  
record of the method of delivery and date  
of service upon each party is retained with  
the executed award in the Division's case file.

By MP

Made by:

Suzette Carlisle  
Suzette Carlisle

Administrative Law Judge

Division of Workers' Compensation

