

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

Injury No.: 00-176640

Employee: Kimberly A. Clark  
Employer: Don Rosner's Homestead Restaurant (Settled)  
Insurer: Truck Insurance Exchange (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: October 18, 2000  
Place and County of Accident: St. Francois County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 22, 2006, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Jack H. Knowlan, Jr., issued September 22, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of February 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

CONCURRING OPINION

I concur with the two principal legal conclusions reached by the administrative law judge: (1) that the employee is capable of performing light or sedentary work and consequently is not permanently and totally disabled; and (2)

the employee failed to establish and/or prove any Second Injury Fund liability.

The administrative law judge set forth the legal standards to follow in order to determine if an employee is permanently totally disabled. The administrative law judge thoroughly weighed the evidence presented by the employee, two medical experts and two vocational experts, and determined that the employee was capable and is capable of performing light or sedentary work, and is not permanently and totally disabled.

To recover from the Second Injury Fund, employee had the burden of proof that she had a pre-existing permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. *Lammert v. Vess Beverage Inc.*, 968 S.W.2d 720 (Mo. App. E.D. 1998). The law requires that the primary injury combined with actual and measurable pre-existing disabilities. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 215 (Mo. App. E.D. 1999), that existed at the time of the primary injury. *Tidwell v. Kloster Co.*, 8 S.W.3d 585, 589 (Mo. App. E.D. 1999).

Acceptance or rejection of medical is generally for the Commission. *Houston v. Roadway Express Inc.*, 133 S.W.3d 173, 179 (Mo. App. S.D. 2004). Moreover, the Commission is free to disbelieve uncontradicted and unimpeached testimony. *Id.* (citing *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525, 527 (Mo. banc 1993)). However, where the record is devoid of conflicting evidence or testimony, "the reviewing court may find the award was not based upon disbelief of the testimony of the witnesses." *Id.* (quoting *Corp v. Joplin Cement Co.*, 337 S.W.2d 252, 258 (Mo. banc 1960)). The Commission may not disregard and ignore competent, substantial and undisputed evidence of witnesses who are not shown by the record to have been impeached. *Id.*

In the instant case, employee principally attempted to meet her burden of proof to establish Second Injury Fund liability based on her testimony at trial, and the evaluating medical reports (not treating records) of Dr. Berkin and Dr. Levy.

Employee's testimony at trial was to the effect that she was virtually injury free with very few health problems prior to the accident occurring October 18, 2000. Based on the employee's testimony alone at trial, it would be difficult to conclude that employee had a pre-existing permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment or re-employment.

Employee also, in practicality, denied any pre-existing problems or injuries to both of the evaluating physicians, Dr. Berkin and Dr. Levy. However, several exhibits, comprised of treating medical records from various physicians and healthcare providers, clearly refute employee's trial testimony by indicating employee has suffered from chronic low back pain which has progressively worsened since she was a child. The histories contained in these treating medical records are opposite to employee's trial testimony and the self-serving histories given the two evaluating physicians.

Employee's testimony is replete with conflicts and contradictions to render her testimony untrustworthy and not credible in determining the issue of Second Injury Fund liability.

The report of Dr. Berkin also is neither persuasive nor worthy of belief to establish Second Injury Fund liability.

Employee denied any pre-existing injuries to Dr. Berkin. Dr. Berkin has a conclusory opinion that employee had a pre-existing permanent partial disability of 40% of the body as a whole at the level of the lumbar spine. Dr. Berkin states that he felt that employee's degenerative disc disease of her low back and spondylolysis were conditions that pre-existed the accident occurring October 18, 2000, and he further felt they were substantial factors contributing to her chronic lower back pain as documented in her medical records. However, Dr. Berkin did not review any treating medical records prior to the date of accident occurring October 18, 2000, as evidenced in his medical report. Dr. Berkin then further states that he felt her pre-existing condition represented a hindrance or obstacle to employment or re-employment at the time of the injury occurring October 18, 2000. This is a conclusory statement without any foundation or evidence to support it. Employee denied any problems to him and there was no history of Dr. Berkin having any facts presented to him concerning a possible hindrance or obstacle to employment or re-employment at the time the injury occurred. In fact, the only evidence presented to Dr. Berkin was that she denied any injuries when asked and there was no explanation by employee to Dr. Berkin of any possible problems she has experienced in employment or re-employment prior to October 18, 2000.

In addition, Dr. Berkin did not render a rating concerning disability attributable to the primary injury occurring October 18, 2000. Regardless, Dr. Berkin opined that employee's pre-existing disability combined with the disability to her lower back (whatever it may be as he didn't rate it) resulting from the October 18, 2000, primary injury, to create a significantly greater disability than the sum of her individual disabilities.

Due to the deficiencies contained in the medical report of Dr. Berkin, his medical opinions are unreliable to be the basis of any award concerning Second Injury Fund liability.

As to Dr. Levy, employee presented to Dr. Levy with a history of denial of any previous serious problems with her back. Dr. Levy was also of the impression that employee sustained immediate and severe pain at the time of her accident occurring October 18, 2000, and immediately sought medical attention. At trial, employee testified opposite to both of these histories utilized by Dr. Levy.

Dr. Levy was further of the opinion that employee had some pre-existing developmental back abnormalities, that caused very little problem and he considered her inability to work and her overwhelming disability to be a residual of the work related accident occurring October 18, 2000.

Dr. Levy did render a rating of 10% permanent partial disability of the body as a whole referable to her pre-existing low back condition, degenerative and chronic in nature.

Dr. Levy also apparently did not review any pre-existing treating medical records, although the gist of his opinion was that the work related accident was the overwhelming cause of her present disability in lieu of the pre-existing disability.

Since neither the administrative law judge nor the Commission are of the opinion that employee is presently permanently totally disabled, Dr. Levy's report also cannot be the basis for an award of liability against the Second Injury Fund as his opinion is that the pre-existing disability was extremely minimal in nature, i.e., a rating of 10% permanent partial disability of the body as a whole, which does not meet the statutory minimum threshold to assess Second Injury Fund liability as required by section 287.220 RSMo. Likewise, Dr. Levy did not render an opinion as to the combination of any possible pre-existing disability with the disability attributable to the primary injury.

In summary, the determination by the administrative law judge that the employee is presently able to work, and is not permanently totally disabled, is based on competent and substantial evidence in the record and there is no reason to disturb that finding. Furthermore, as to Second Injury Fund liability, due to the conflicting and contradictory evidence offered by employee in the form of her own testimony at trial, and the medical reports of two medical experts, Dr. Berkin and Dr. Levy, employee did not satisfy her burden of proof that there was a pre-existing permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment or re-employment; nor did employee establish a synergistic effect establishing Second Injury Fund liability as to permanent partial disability.

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William F. Ringer, Chairman

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Kimberly A. Clark

Injury No. 00-176640

***Employer: Don Rosner's Homestead Restaurant***

Additional Party: Second Injury Fund

Insurer: Truck Insurance Exchange

Hearing Date: July 19, 2006

Checked by: JK/kh

### **SUMMARY OF FINDINGS**

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Undetermined
3. Was there an accident or incident of occupational disease under the Law? Undetermined
4. Date of accident or onset of occupational disease? October 18, 2000
5. State location where accident occurred or occupational disease contracted: St. Francois County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee slipped and fell while emptying a five-gallon bucket.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Alleged injury to low back
14. Nature and extent of any permanent disability: Employee settled her disputed claim against the employer-insurer for 12.5% of the body as a whole.
15. Compensation paid to date for temporary total disability: Undetermined
16. Value necessary medical aid paid to date by employer-insurer: Undetermined
17. Value necessary medical aid not furnished by employer-insurer: Undetermined
18. Employee's average weekly wage: \$201.25
19. Weekly compensation rate: \$134.16
20. Method wages computation: By agreement
21. Amount of compensation payable: Employee's claim against the employer-insurer was settled by a compromise settlement agreement prior to the hearing.
22. Second Injury Fund liability: Employee's claim against the Second Injury Fund is denied.
23. Future requirements awarded: None

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

On July 19, 2006, the employee, Kimberly A. Clark, appeared in person and by her attorney, Mr. Lindell P. Dunivan, for a hearing for a final award against the Second Injury Fund. The Second Injury Fund was represented at the hearing by Assistant Attorney General, Gregg Johnson. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS:**

1. On or about October 18, 2000, Don Rosner's Homestead Restaurant was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Truck Insurance Exchange.
2. On or about October 18, 2000, Kimberly A. Clark was an employee of Don Rosner's Homestead Restaurant, and was working under the provisions of the Missouri Workers' Compensation Act.
3. On or about October 18, 2000, the employee sustained an accident that arose out of and in the course of her employment.
4. The employer had notice of the employee's accident.
5. The employee's claim for compensation was filed within the time allowed by law.
6. The employee's average weekly wage was \$201.25 and her rate of compensation is \$134.16.
7. The employee's injury was medically causally related to her accident.
8. No temporary total disability benefits were paid by the employer-insurer.

### **ISSUES:**

1. Liability of the Second Injury Fund

### **EXHIBITS:**

The following exhibits were offered and admitted into evidence:

#### Employee's Exhibits

- A. November 17, 2004 report of Dr. Shawn L. Berkin
- B. Medical records from St. Anthony's Medical Center
- C. Medical records from Washington University Pain Management
- D. Medical records from Jefferson Memorial Hospital
- E. Medical records of Dr. Michael N. Polinsky
- F. Medical records from Quality Healthcare (Dr. Bramhall)
- G. Medical records of Mineral Area Regional Medical Center
- H. Records of Farmington Hand and Physical Therapy
- I. Employee's Senior High School records from North County Senior High School in Bonne Terre, Missouri
- J. Medical records of Dr. Faisal Albanna
- K. Copy of stipulation for compromise settlement
- L. Deposition of vocational rehabilitation counselor, James E. Israel

#### Second Injury Fund Exhibits

1. April 22, 2006 report of Dr. Jerome F. Levy
2. April 17, 2006 vocational rehabilitation evaluation by James England of England and Company Rehabilitation Services, Inc.

### **FINDINGS OF FACT:**

Based on the testimony of Kimberly A. Clark, and the other evidence submitted I find as follows:

- At the time of the hearing, the employee was 33 years old. The employee graduated from High School in 1990. Starting in the 6<sup>th</sup> or 7<sup>th</sup> grade the employee was taking emotionally mentally handicapped (EMH) classes.
- The employee's job history includes work as a food server at several restaurants and employment as a certified nurse's aid for two different nursing homes.
- On October 18, 2000 the employee was employed by Don Rosner's Homestead Restaurant. While dumping a five-gallon bucket, the employee stepped on a wet floor and fell. As a result of this fall, the employee alleged that she injured her low back.

- The medical records submitted by the employee confirm that the employee had a long history of mid to low back pain. The employee sought medical treatment for her back eight days prior to her October 18, 2000 accident. The records of the employee's family physician, Dr. P. Bramhall, indicate that on October 10, 2000 the employee gave the following medical history:

Kim presented to the office today complaining of mid to lower back pain. States that she has had it for multiple years has no history of trauma. States that she did have an accident as a 16 year old, but that her back hurt even before then. States that gradually over the years, it was just getting worse all the time. States that it starts low back and eventually radiates its way up her back to about mid back (Employee's exhibit F).

- Dr. Bramhall's nurse practitioner, Donna Yates, prescribed Vioxx and Skelaxin and indicated that the if employee did not improve she should return for additional treatment (October 10, 2000 record from Employee's exhibit F).
- The medical records after the employee's October 18, 2000 accident also suggest that the employee was attributing her ongoing low back pain to her pre-existing degenerative condition rather than the October 18, 2000 accident. On November 14, 2000, the employee returned to Dr. Bramhall's office with "persistent complaints of back pain, states the Skelaxin and Vioxx has done little if any to improve her pain". The employee gave no history of a work related fall on October 18, 2000, and the medical record of Nurse Practitioner Yates clearly indicates that both the employee and Donna Yates were treating the employee's ongoing complaints of low back pain as a continuation of the problems she was experiencing in her initial visit on October 10, 2000. After a telephone consultation with Dr. Bramhall, Nurse Practitioner Yates prescribed Lorcet Plus and indicated Dr. Bramhall was planning to obtain a CT of the employee's low back (Employee's exhibit F).
- In addition to the medical histories she provided to Donna Yates, the employee also gave medical histories to other healthcare providers that failed to mention her October 18, 2000 injury. On November 16, 2000, the employee went to Mineral Area Regional Medical Center for a MRI. The radiologist recorded "clinical history is low back pain radiating into right hip. No history of injury" (Employee's exhibit G). On December 26, 2000 the employee was referred to Dr. Michael N. Polinsky, who is a neurosurgeon with NAI Ltd. in St. Louis. In Dr. Polinsky's medical record he states, "she is a 28 year old women who presents for an evaluation of low back pain. She states that this has been occurring for over ten years. This has been progressively worsening" (Employee's exhibit E). Dr. Polinsky's records contain no reference to an October 18, 2000 fall at Don Rosner's Homestead Restaurant.
- On January 10, 2001, the employee saw Dr. Anthony H. Guarino at Barnes Jewish West County Hospital Pain Management Center. Dr. Polinsky had referred the employee to Dr. Guarino for steroid injections. In Dr. Guarino's history, he recorded "this is a 28 year old white female with a ten year history of low back pain. She does not recall a specific inciting event but notes she was in a motor vehicle accident and did a lot of lifting many years ago while working as a CNA. Her problems have progressively worsened recently" (Employee's exhibit C). Once again, Dr. Guarino's medical records failed to reveal that the employee was attributing any of low back complaints to an October 18, 2000 accident.
- After conservative treatment failed to improve the employee's low back complaints, she was eventually seen by Dr. Faisal Albanna of Albanna Neurosurgical Consultants P.C. In his initial evaluation of the employee on May 24, 2001, Dr. Albanna recorded under "history of present illness": "The patient is a 28 year old female presenting to the office for an initial consultation. She reports a chronic history of low back pain, which has been progressive in nature since childhood. She describes her pain as mechanical type back pain which is aggravated with prolonged sitting, standing, lifting, bending, walking or any activity" (Employee's exhibit J). Once again the employee gave no history to Dr. Albanna of a work related injury to her low back on October 18, 2000.
- When the employee's condition failed to improve, Dr. Albanna scheduled the employee for surgery on August 24, 2001. The operative report indicates the employee had disc degeneration at the L4-5 and the L5-S1 levels with mild spondylothesis at the L5-S1. Dr. Albanna performed a decompressive lumbar microlaminectomy and fusion at the L4-5 and L5-S1 levels (Employee's B).
- The Division file indicates the employee's claim for compensation against the employer was not filed until approximately fourteen months after her alleged accident date of October 18, 2000, and four months after the surgery performed by Dr. Albanna. The original claim for compensation was filed on December 21, 2001, and the amended claim for compensation adding the Second Injury Fund was filed on October 8, 2002.
- The employee's compromise settlement agreement with the employer was admitted as employee's exhibit K. The compromise settlement agreement indicates the employer-insurer denied the employee's accident. The employer-insurer used the phrase "alleged October 18, 2000 accident", and had not paid any medical expenses or temporary total disability benefits at the time of the settlement. The disputes listed under paragraph six include accident or occupational disease, medical causation, responsibility for past and future medical, temporary total disability benefits, and the nature and extent of permanent partial or permanent total disability. To settle the employee's claim, the employer-insurer paid \$5,750.00, which was based on an approximately disability of "12.5% of the body as a whole related to the alleged low back injury" (Employee's exhibit K).
- Following her surgery by Dr. Albanna, the employee testified that she did not fully recover. The employee still has pain in her low back that radiates down both legs. The employee indicated that she still has some foot drop in her left lower extremity. Because of low back pain, the employee cannot walk very far and has difficulty standing or sitting very long. To relieve her pain, the employee indicated that she lies on her side in her recliner and uses hot packs. The employee is also taking OxyContin, Percocet and Celebrex to relieve her symptoms of low back pain.
- The employee is able to do housework for a few hours at a time, but then needs to rest. The employee indicated that if she overdoes any task then she pays for it with increased symptoms for two or three days.

- The employee has not worked since the date of her surgery. The employee is currently receiving social security disability benefits.
- When questioned about her prior back problems, the employee indicated it was “nothing that I couldn’t handle”. The employee testified that she would take Tylenol and keep going. The only treatment the employee mentioned were four visits to a chiropractor in 1994. The employee was not questioned about her visit to Dr. Bramhall’s office for low back pain eight days prior to her accident. The employee also failed to explain the fact that in her medical treatment records she attributed her low back problems to a chronic long-standing problem rather than to her October 18, 2000 accident.
- In addition to the medical records and the testimony of the employee, the parties offered medical reports from Dr. Shawn L. Berkin and Dr. Jerome F. Levy, and vocational rehabilitation reports from Mr. James M. England and Mr. James E. Israel. The employee also offered the deposition testimony of Mr. Israel.
- Dr. Shawn Berkin examined the employee on January 7, 2004, and prepared a report dated November 17, 2004. Based on his physical examination and his review of the medical records, Dr. Berkin diagnosed the employee as having a lumbosacral strain, degenerative disc disease, bilateral defects of the pars interarticularis of the fifth lumbar vertebra, and left peroneal neuropathy with left foot drop. He also noted the employee was status post decompressive lumbar laminectomy with a fusion and instrumentation at the L4-5 and L5-S1 levels (Employee’s exhibit A).
- Dr. Berkin noted the employee’s settlement of her primary low back injury for 12.5%, and rated her pre-existing back condition at 40% of the body as a whole. He concluded that the employee’s pre-existing disability to her low back was a hindrance or obstacle to her employment or re-employment, and stated that her pre-existing low back disability combined with her October 18, 2000 injury to create a significantly greater disability than the sum of her individual disabilities (Employee’s exhibit A). Dr. Berkin then deferred an opinion regarding the nature and extent of any disability resulting from any pre-existing mental or cognitive impairment to either a psychologist or a vocational counselor (Employee’s exhibit A).
- Dr. Jerome F. Levy examined the employee on April 13, 2006, and prepared a report dated April 22, 2006. Based on his examination of the employee and his review of the medical records, Dr. Levy diagnosed the employee as being status post decompressive lumbar microlaminectomy at the L4-5 and L5-S1 levels with a lateral fusion and segmental instrumentation. He also noted the insertion of an internal bone stimulator, and concluded the employee had a lumbosacral strain with a history of a pars defect and left foot drop (Second Injury Fund exhibit 1).
- Under Dr. Levy’s conclusions, he rated the employee as having a 40% permanent partial disability of her body as a whole due to the October 18, 2000 accident, and also assigned a 30% rating for the employee’s left lower extremity at the level of the ankle. It should be noted that the employee offered no testimony or other evidence to support a finding of permanent partial disability to her left lower extremity or ankle. For the employee’s pre-existing degenerative problems in her low back, Dr. Levy assigned a 10% disability. Dr. Levy then indicated, “from a strictly medical stand point, she would be capable of light sedentary work only, but she would not have the sustainability to work for a full work week. According to the vocational evaluation, she was considered not employable in the open labor market, and I would agree with that” (Second Injury Fund exhibit 1).
- The vocational rehabilitation evidence included reports from James E. Israel and James M. England Jr., as well as the deposition testimony of James E. Israel.
- Contrary to the statement of Dr. Levy, James Israel did not conclude the employee was unemployable in the open labor market. Mr. Israel first concluded that “the employee was clearly unable to return to her past job as a food service worker. She is unable to return to certified nurse’s assistant work as well” (Employee’s exhibit L, page 23). Mr. Israel’s conclusion regarding the employee’s ability to compete in the open labor market may be summarized by his repetitive use of the phrase “very substantially disadvantaged”. On page 7 of his August 31, 2005 evaluation, Mr. Levy stated, “While Ms. Clark’s medical guidelines do not categorically preclude all sedentary and light tasks, she is at a very substantial disadvantage in seeking and securing those lesser skilled jobs that exist in the local economy”. He later concluded “therefore, when considering her age of 32, education, current skills, over all physical limitations and pain combined with the job opportunities within her remaining work specifications, she is very substantially disadvantaged”. Mr. Israel added “her overall limitations, pain, educational and work back ground factors, and required work site accommodations have rendered Ms. Clark entirely unprepared vocationally and very substantially disadvantaged to compete in the open labor market” (Employee’s deposition exhibit 1 attached to Employee’s exhibit L).
- To counter the opinion of Mr. Israel, the Second Injury Fund offered a vocational rehabilitation evaluation by Mr. James M. England of England and Company Rehabilitation Services, Inc. Based on Mr. England’s review of all of the medical records and his interview with the employee, Mr. England made the following statement under his category “Summary and Conclusions”:

Ms. Clark is a younger worker who has performed in unskilled and semi-skilled work in the past. Her physical problems would appear to restrict her to the point that she could not return to nurse aid work or salad work although she could still perform entry level, unskilled, sedentary to light work that offered flexibility of movement from sitting to standing to walking around based on Dr. Berkin’s restrictions. Positions that would fall within those guidelines would include some cashiering positions, work as a small parts assembler or packer, some security positions, working as a night clerk at a motel, as an alarm monitor for a security company, etc.

Mr. England then concluded, “I have not seen any medical evidence that would lead me to believe that this woman is totally disabled from all forms of employment” (Second Injury Fund exhibit 2).

## **APPLICABLE LAW:**

- Section 287.020.7 RSMo. provides as follows:

The term “total disability” as used in this chapter shall mean the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident.

- The phrase “inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App.1992).
- The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 63, 363 (Mo.App.1992). Total disability means “the inability to return to any reasonable or normal employment”. *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s physical condition reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831, 834 (Mo.App.1993).
- Under Section 287.220.1 RSMo., the Second Injury Fund has no liability and the employer is responsible for full, permanent total disability benefits if the last injury, considered “alone and of itself” results in permanent total disability. *Roller v Treasurer of the State of Missouri*, 935 S.W.2d 739 (Mo.App.1996) and *Maas v Treasurer of the State of Missouri*, 964 S.W.2d 541 (Mo.App.1998). The Second Injury Fund is liable for permanent total disability only if “The previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability...”. RSMo. 287.220.1.

## **RULINGS OF LAW:**

### ***Issue 1. Liability of the Second Injury Fund***

The employee asserts that she is permanently and totally disabled as a result of the combination of the last injury to her low back on October 18, 2000 and her two pre-existing conditions. The pre-existing conditions include her degenerative disc disease and her alleged mentally handicapped condition.

Based on the evidence submitted, I find as follows:

1. The employee is capable of performing light or sedentary work, and is not permanently and totally disabled.

While the evidence supports a conclusion that the employee is not able to return to her prior jobs of food server or certified nurse’s assistant, both vocational experts indicate that the employee is capable of performing light or sedentary work. Although the employee’s own expert stated several times that the employee is “substantially disadvantaged”, he was not willing to state the employee is not employable in the open labor market.

Based on the equivocal nature of the vocational rehabilitation evidence and the other evidence submitted, I find that the employee is capable of performing light or sedentary work, and is not permanently and totally disabled.

2. Even if the employee is found to be permanently and totally disabled, her total disability is not the result of a combination of her last injury and her pre-existing conditions.

The medical records and the compromise settlement agreement make it clear that the employee’s low back complaints and resulting surgery were related to a long standing degenerative condition, and were not attributable to her October 18, 2000 accident. The employee’s decision to file a workers’ compensation claim was apparently a belated decision that was hotly disputed by the employer-insurer. The fact that the employer-insurer paid no medical benefits, no temporary total disability benefits and only 12.5% permanent partial disability for a two level laminectomy and fusion also supports this conclusion.

Although the employee attempted to minimize her pre-existing back complaints at the time of the hearing, the employee’s testimony was refuted by the medical histories that she gave to her treating physicians. The employee’s complaints of low back pain to Nurse Practitioner Yates eight days prior to her October 18<sup>th</sup> fall at work were identical to the complaints she made when she returned for additional treatment on November 14, 2000. After carefully reviewing all of the medical records, the administrative law judge could not find one medical history in which the employee attributed her low back pain to the October 18, 2000 accident. As previously noted, the employee consistently advised her treating physicians that her low back pain was a chronic condition that had progressively worsened since she was a child.

In addition to the lack of any medical history to support a finding that the October 18, 2000 accident contributed to the employee’s current level of disability, it is also significant that the treatment records of Dr. Albanna clearly indicate that

he was treating the employee for a long standing degenerative condition rather than for a condition that was caused by trauma. The operative record of Dr. Albanna indicates he performed surgery to correct degenerative conditions, spondylothesis and a pars defect. Neither Dr. Albanna nor any of the other treating physicians suggested that the employee's low back problems were either caused by or aggravated by her October 18, 2000 fall at work.

Although the lack of evidence to support a finding that the employee suffered any significant disability as a result of her October 18, 2000 fall seems to have escaped both the experts and the attorneys in this hearing, the compromise settlement agreement makes it clear that it did not escape the employer-insurer. The employee was paid a total of \$5,750.00 to settle a claim that potentially involved a much higher figure for extensive medical treatment, an extended period of temporary total disability, and a potential claim for either permanent total disability or a high level of permanent partial disability. This settlement should have created a "red flag" that there was some significant problem with the employee's underlying claim against the employer-insurer. The medical records of the treating physicians confirm this warning, and raise significant doubt as to the compensability of the employee's underlying claim.

Although the Second Injury Fund stipulated that the employee had an accident on October 18, 2000 that arose out of and in the course of her employment, and further stipulated that her October 18, 2000 accident was a substantial factor in causing some injury to her low back, the employee still has the burden of proof on the issue of liability of the Second Injury Fund. The medical records and the compromise settlement agreement highlight a single, unavoidable conclusion: If the employee is permanently and totally disabled, her inability to compete in the open labor market is due solely to the pre-existing congenital and degenerative conditions in her lumbar spine. There is no credible evidence to support a finding that her alleged permanent total or permanent partial disability resulted from a combination of her pre-existing conditions and her October 18, 2000 fall at work.

Based on this evidence, I find that the employee has failed to satisfy her burden of proof on the issue of permanent total disability against the Second Injury Fund. I further find that the employee has also failed to offer any credible evidence to justify an award of permanent partial disability against the Second Injury Fund. Although the compromise settlement purports to be paying 12.5% for permanent partial disability, I find that the October 18, 2000 accident did not cause a 12.5% permanent partial disability of the employee's low back, and therefore does not meet the statutory threshold level. The compromise settlement agreement is evidence that may be considered by the administrative law judge, but is not binding. In this case, the employer-insurer denied the claim and was willing to pay \$5,750.00 as a compromise to settle the case. The language in the compromise settlement agreement clearly indicate that this was an "alleged" permanent partial disability to the employee's low back, and was not an admission that is binding on the issue of Second Injury Fund liability.

The employee's claim against the Second Injury Fund must therefore be denied.

Employee: Kimberly Clark

Injury No.: 00-176640

Date: \_\_\_\_\_

Made by:

\_\_\_\_\_  
Jack H. Knowlan, Jr.  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Ms. Patricia "Pat" Secrest  
*Director*  
*Division of Workers' Compensation*