

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

Injury No.: 00-134152

Employee: John Eagan
Employer: Missouri Terrazo Company
Insurer: One Beacon Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: August 27, 2000
Place and County of Accident: St. Louis City, 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 (ALJ) dated October 26, 2004. The award and decision of Administrative Law Judge Edwin J. Kohner, as issued October 26, 2004, is attached and incorporated by this reference.

The Commission finds that the ALJ correctly weighed and evaluated the lay and medical testimony in reaching his conclusions as to disability and causation. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522 (Mo. App. E.D. 2002); *Sullivan v. Masters Jackson Paving Co.*, 35 S.W. 3d 879 (Mo. App. S.D. 2001); *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 204 (Mo. banc 2003).

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 13th day of May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: John Eagan Injury No.: 00-134152
Dependents: N/A Before the
Employer: Missouri Terrazzo Company **Division of Workers'**
Additional Party: Second Injury Fund **Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: One Beacon Insurance Group
Hearing Date: September 20, 2004 Checked by: EJK

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: August 27, 2000
5. State location where accident occurred or occupational disease was contracted: City of St. Louis, 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:
The claimant, a terrazzo finisher, suffered low back pain while moving large pieces of broken terrazzo.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low Back
14. Nature and extent of any permanent disability:
15. Compensation paid to-date for temporary disability: 54,074.20
16. Value necessary medical aid paid to date by employer/insurer? \$149,011.27

Employee: John Eagan Injury No.: 00-134152

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$1088.32
19. Weekly compensation rate: \$599.96/\$314.26
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:
42-6/7 weeks of temporary total disability (or temporary partial disability) \$25,712.57

180 weeks of permanent partial disability from Employer	\$56,566.80
22. Second Injury Fund liability: Yes	
Permanent total disability benefits from Second Injury Fund: weekly differential (\$285.70) payable by SIF for 180 weeks beginning April 28, 2003, and, thereafter, \$599.96 for Claimant's lifetime	Unknown
TOTAL:	Unknown
23. Future requirements awarded: None	

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Frank W. Kriegel, Jr.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	John Eagan	Injury No.:	00-134152
Dependents:	N/A		
Employer:	Missouri Terrazzo Company		
Additional Party:	Second Injury Fund		
Insurer:	One Beacon Insurance Group		
Hearing Date:	September 20, 2004	Checked by:	EJK

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant, a terrazzo finisher, suffered low back pain while moving large pieces of broken terrazzo. The issues for determination are (1) Temporary disability, (2) Permanent disability, and (3) Second Injury Fund liability. The evidence compels an award for the claimant for temporary and permanent total disability benefits.

At the hearing, the claimant testified in person and offered depositions of Thomas Musich, M.D., and James M. England, Jr., voluminous medical records, and a workers' compensation settlement agreement from a prior case. The defense offered depositions of Michael Chabot, D.O., and Donna Abram, a videotape for surveillance, and an investigative report.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri.

SUMMARY OF FACTS

This forty-nine-year-old terrazzo finisher, a high school graduate, learned the terrazzo trade from his father in law after high school. The claimant's work for the some twenty-five years before his August 27, 2000, accident at work was extremely heavy in nature. In 1991, the claimant suffered a low back injury at work. The details of this injury are discussed

later.

On August 27, 2000, the claimant was removing two heavy terrazzo platforms, which had deteriorated, to transport the same to a loading area and to remove the defective terrazzo from the platforms to allow for the pouring of new terrazzo in these platforms. While using a cart to move heavy terrazzo platforms, the cart became hung up on a defect in the pavement, causing the claimant to wrench his low back. The claimant experienced immediate pain in his low back, which soon began to migrate down his buttock and into the posterior aspect of his right leg.

On September 8, 2000, the claimant went to BarnesCare and received a diagnosis of right lumbosacral strain, with lumbosacral radiculopathy and possible herniated nucleus pulposus. After conservative measures failed to provide any significant improvement, the claimant went to Dr. Samson who hospitalized the claimant on November 9, 2000, for severe back and right leg pain. Dr. Samson initially diagnosed right sciatica and suspected a herniated disc at L4-L5. A myelogram and post-myelogram CT on November 10, 2000, demonstrated a far right lateral disc extrusion at L5-6 that impinged on the right L-5 nerve root sleeve. These diagnostic films also demonstrated overall spinal canal stenosis. A series of nerve root blocks in November 2000 preceded a quick return of low back pain and right sciatica.

On January 30, 2001, Dr. Samson and Dr. Raskas performed an L5-6 posterior lumbar interbody fusion accompanied by the insertion of a metal cage, posterior lateral fusion, pedicle screw fixation, and iliac crest bone graft. The post-operative diagnosis was lateral disc displacement at L5-6 accompanied by spinal stenosis and degenerative disc disease.

In February 2001, testing revealed deep vein thrombosis of the left lower extremity as a result of the January 2001 surgery. The claimant received Coumadin for nine months and now takes a daily aspirin. Despite the surgery, the claimant continued to experience constant pain. The claimant was released from care on November 7, 2001, and the defense ceased paying temporary total disability benefits. The claimant was unable to return to work. In April 2002, Dr. Raskas ordered a repeat myelogram and post-myelogram CAT scan, revealing that posterior bone fusion had not occurred on the right and equivocal evidence of some posterior bone fusion on the left side of the fusion site. Mild to moderate dural stenosis at L3-4 and L4-5 associated with disc bulges was also noted. For second opinions, Dr. Sedgwick and Dr. Chabot opined that additional and more extensive fusion surgery would benefit the claimant. In November 2002, nerve conduction studies demonstrated electrodiagnostic findings compatible with a right L-4 and L-5 neuritis. In December 2002, epidural steroid injections did not provide any significant improvement.

On January 22, 2003, Dr. Chabot surgically removed the previously installed posterior spinal instrumentation consisting of pedicle screws and rods. Dr. Chabot explored the fusion mass at L5-6, performed a decompressive lumbar laminectomy at L3-L4 and at L4-L5, performed a posterior inter-transverse fusion at L3-L4 and L4-L5 along with a posterior spinal instrumentation using pedicle screws and rods between L-3 and L-5 bilaterally. Again, bone was taken from the claimant's hip to accomplish this extensive fusion. On April 27, 2003, Dr. Chabot released the claimant from his care. However, the claimant has not worked since his on-the-job accident of August 27, 2000.

On April 26, 2003, a functional capacity evaluation revealed that the claimant was in a great deal of pain as he attempted to perform the functional capacity evaluation tasks. Dr. Chabot testified that any movement the claimant had in his lumbar spine immediately before the functional capacity evaluation tasks was reduced. See Dr. Chabot deposition, pages 14-18. Immediately before the functional capacity evaluation, the administrator observed that the claimant enjoyed five degrees of lumbar extension as opposed to the normal of twenty-five degrees. When extension was tested after the FCE tasks, the claimant had zero degrees of extension. Likewise, the claimant who had enjoyed twenty percent of the anticipated normal as concerns left lateral flexion and right lateral flexion was reduced to zero degrees of lateral flexion in either direction after the functional capacity evaluation testing. In short, the performance of tasks produces an increase in the claimant's pain and a dramatic decrease in what little lumbar mobility the claimant has after his major back surgeries.

At the hearing, the claimant testified that his pain was constant and was of the same degree and character as it had been prior to the first fusion surgery by Dr. Samson and Dr. Raskas and the second fusion surgery by Dr. Chabot. The claimant testified that the pain at the time of the hearing was no different than the pain from November 7, 2001 to September 14, 2002, nor any different than the pain he has been experiencing since the time that Dr. Chabot released him from his care on April 27, 2003.

The claimant testified that he is unable to sleep more than an hour or so at a time at nighttime because of his back pain and consequently, does not enjoy more than three hours of sleep each night. The claimant testified that he makes up his sleep deficit during the daylight hours. His incessant pain becomes unendurable if he maintains a position too long. Therefore, the claimant must change his position from recumbent to standing to sitting, all throughout the day. The claimant finds that lying on the floor in a fetal position produces for a while some degree of respite from his pain, but that even in that position, the claimant remains in pain. He testified that he is unable to perform routine chores at home and depends upon his family.

A video shows claimant working on his truck on November 21, 2003. See Exhibit 2. The claimant worked

on the truck engine for sixty minutes during which time he was slowly bending or leaning over the truck. At one point, the claimant was also able to bend slowly all the way over at the hips to retrieve something from off the ground. Although his gait was slow, the claimant did not appear to favor his back nor did he appear to have any difficulty working in the stooped position. The claimant testified that he did not have sufficient funds to repair the truck and was changing an alternator belt, which he had done on other occasions. The claimant testified that he was able to get the belt tightened and took the truck to a friend's house. The claimant left in the truck after the repair. When the claimant returned he carried in several small bags of what appeared to be lightly packed groceries without assistance. The claimant testified that he was not aware that he was being videotaped.

Pre-existing Condition

On June 21, 1991, the claimant sustained an injury to his lower back while picking up a floor buffer. On July 3, 1991, a lumbosacral spine CT from L3 through S1 revealed a lateral disc herniation at L4-5. See Exhibit P. On July 12, 1991, a lumbar myelogram revealed spinal stenosis at L4-5. See Exhibit P. Claimant declined surgery, under went physical therapy, and returned to work full duty with no restrictions. See Exhibit Q. On March 1, 1994, the claimant settled his Workers' Compensation case based on a twenty percent permanent partial disability of the low back. See Exhibit O.

The claimant testified that he was motivated to go back to work. He testified that after the 1991 injury he experienced occasional back pain; however, it was not constant and usually did not radiate into his leg. The claimant testified that on some days when he could not do heavy lifting at work, he would push the floor grinder. The claimant testified that he had no limitations before the work related accident.

Dr. Musich

On September 19, 2003, Dr. Musich examined the claimant and noted that the claimant's low back demonstrated a twenty centimeter vertical midline scar over the lumbosacral spine, in addition to both right and left iliac crest scars. Lumbar mobility, as measured by Dr. Musich at that time, demonstrated that the claimant's surgeries had caused him to be in a normal erect position at 12 degrees flexion. Maximum flexion of the lumbosacral spine was 31 degrees with pain; maximum extension was nine degrees with pain; right lateral flexion was seven degrees with pain and left lateral flexion was 9 degrees with pain. Dr. Musich noted dermatomal paresthesia of the right calf and lateral foot to light touch and pinprick. Right straight leg raising produced a positive result. Dr. Musich opined that the primary work related injury was causally related to the claimant's persistent low back pain and right lower extremity symptoms. See Dr. Musich deposition, page 12. Dr. Musich further opined that the primary work related injury resulted in a sixty-five percent permanent partial disability above the preexisting disability the claimant was awarded in before the August 2000 accident. See Dr. Musich deposition, page 13. Dr. Musich concluded to a reasonable degree of medical certainty that the claimant is totally and permanently disabled as a result of his lumbar pathology. See Dr. Musich deposition, page 13.

He testified that the claimant is permanently and totally disabled due to a combination of the prior injury and the current injury. See Dr. Musich deposition, pages 14, 15, 23. Dr. Musich also testified that given the claimant's complaints since August 27, 2000, of constant low back pain, right leg pain, chronic weakness in his right leg, inability to lift heavy amounts, inability to stand no more than 10 minutes, inability to sit no more than 30 minutes or walk no more than 4 city blocks, as well as Dr. Chabot's restrictions of lifting no more than 45 pounds with limited squatting and bending and given that Claimant has had two surgeries resulting in a 3-level fusion, the claimant could be permanently and totally disabled due to the primary work injury alone. See Dr. Musich deposition, page 23.

Dr. Chabot

Dr. Chabot performed a decompressive laminectomy and fusion at the L5-L6 level which included L3-4 and L4-5. See Exhibit M and Dr. Chabot deposition, page 9. Dr. Chabot opined that the claimant reached maximum medical improvement on April 23, 2003, and that the claimant could be gainfully employed in the medium work classification, with lifting not to exceed forty-five pounds. See Dr. Chabot deposition, pages 11 and 12. Dr. Chabot further opined that the claimant sustained a twenty-seven percent permanent partial disability as to the body as whole with fifteen percent attributable to the first fusion and twelve percent attributable to the second fusion. See Dr. Chabot deposition, pages 12 and 20.

Donna Abram

Donna Abram, a vocational rehabilitation counselor, interviewed the claimant on December 22, 2003, and opined that the claimant was still employable in the open labor market. See Abram deposition, page 8 and deposition Exhibit 2. Ms. Abram opined that the claimant scored extremely poorly in several tests concerning problem solving and abstract thinking. See Abram deposition, pages 19-24. Ms. Abram did not take into consideration the claimant's degree, frequency, and duration of pain in forming her conclusions concerning the claimant's employability. See Abram deposition, page 26.

James England

James England, a vocational rehabilitation counselor, interviewed the claimant on November 13, 2003, and opined that at the claimant's current level of functioning he would be permanently and totally disabled and unable to sustain any type of work activity on a consistent basis. See England deposition, pages 30 and 31. Mr. England testified that if the claimant had prior complaints to his back and ongoing problems before the 2000 accident, those conditions would contribute to his permanent total disability and his inability to compete in the open labor market. See England deposition, page 34. Mr. England also testified that with the claimant's current symptoms and complaints he would be considered permanently and totally disabled due to the primary injury alone. See England deposition, page 42. Ultimately, he testified, "I think a lot of that is really questions more for the doctors to deal with than me, because there's medical evidence in here right after the primary injury that ... he ... had all kinds of arthritis and degenerative problems. I don't know how much of it is due to one or the other or whatever. I mean, that's really a medical question, not a vocational one." See England deposition, pages 43, 44. He testified that he would defer to the doctors on their opinions as to "how much was due to this and how much was due to that type of thing." See England deposition, page 44. He testified that his job was to just assess the claimant's overall disability. See England deposition, page 44.

TEMPORARY DISABILITY

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury. Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.170.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id.

Temporary total disability awards are designed to cover the employee's healing period, and they are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. When further medical progress is not expected, a temporary award is not warranted. Any further benefits should be based on the employee's stabilized condition upon a finding of permanent partial or total disability. Shaw v. Scott, 49 S.W.3d 720, 728 (Mo.App. W.D. 2001).

In this case, the defense paid temporary total disability benefits from October 15, 2000, through November 7, 2001, and from September 15, 2002, through May 8, 2003. The evidence compels a finding that the claimant was totally disabled and engaged in a healing period from October 15, 2000, through April 27, 2003. Although Dr. Raskas opined on November 7, 2001, that the claimant had reached maximum medical improvement, the claimant began a new treatment plan shortly thereafter including a myelogram, a post-myelogram CT scan of his lumbar spine, electrodiagnostic tests by Dr. Yadava, a consult by Dr. Sedgwick, epidural injections and ultimately Dr. Chabot's extensive lumbar fusion. The attempts to improve the claimant's medical condition suggest that Dr. Raskas' view that the claimant had reached maximum medical improvement as of November 7, 2001, was not well taken based on the weight of the evidence. The claimant is awarded temporary total disability benefits from November 8, 2001 through September 14, 2003, 44-3/7 weeks, and the defense is entitled to a credit of 1-4/7

weeks, for payments from April 28, 2003, through May 8, 2003. Thus, the claimant is awarded a net 42-6/7 weeks of temporary total disability benefits.

PERMANENT DISABILITY

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

The standard for determining whether Claimant was permanently and totally disabled is whether the person is able to compete on the open job market, and the key test to be answered is whether an employer, in the usual course of business, would reasonably be expected to employ the person in his present physical condition. Joulzhouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997). "Total disability" is defined as 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. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

In this case, the claimant has a severe low back disability imposing restrictions and limitations on his ability to work. Dr. Musich opined that the claimant suffered a sixty-five percent permanent partial disability from the 2000 work related injury. See Dr. Musich deposition, page 13. Dr. Chabot further opined that the claimant sustained a twenty-seven percent permanent partial disability as to the body as whole with fifteen percent attributable to the first fusion and twelve percent attributable to the second fusion. See Dr. Chabot deposition, pages 12 and 20.

Before the 2000 accident, the claimant sustained an injury to his lower back on June 21, 1991, while picking up a floor buffer. On July 3, 1991, a lumbosacral spine CT from L3 through S1 revealed a lateral disc herniation at L4-5. See Exhibit P. On July 12, 1991, a lumbar myelogram revealed spinal stenosis at L4-5. See Exhibit P. The claimant declined surgery, under went physical therapy, and returned to work full duty with no restrictions. See Exhibit Q. On March 1, 1994,

the claimant settled his Workers' Compensation case based on a twenty percent permanent partial disability of the low back. See Exhibit O. The rating on the settlement is very credible, based on the claimant's limitations discussed above and the diagnoses. Based on the evidence as a whole, the claimant suffered a forty-five percent permanent partial disability to his low back from the 2000 accident. The claimant has a sixty-five percent permanent partial disability to his low back overall.

SECOND INJURY FUND

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).

2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).

6. In cases arising after August 27, 1993, the extent of both the preexisting permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) The employer's liability is considered in isolation - "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability;" (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). The standard for determining whether Claimant was permanently and totally disabled is whether the person is able to compete on the open job market, and the key test to be answered is whether an employer, in the usual course of business, would reasonably be expected to employ the person in his present physical condition. Joultzhouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997). Generally, where two events, one compensable and the other non-compensable, contribute to the claimant's alleged disabilities, the claimant has the burden to prove the nature and extent of disability attributed to the job related injury. Strate v. Al Baker's Restaurant, 864 S.W.2d 417, 420 (Mo.App. E.D. 1993); Bersett v. National Super Markets, Inc., 808 S.W.2d

In this case, Based the claimant suffered a forty-five percent permanent partial disability to his low back from the 2000 accident. The claimant has a sixty-five percent permanent partial disability to his low back overall.

However, Dr. Musich opined that the claimant is permanently and totally disabled as a result of his back condition. Dr. Chabot opined that pain can be of such a character and of such frequency and duration that it would in fact render it impossible for its sufferer to engage in work in the open labor market. See Dr. Chabot deposition, pages 18-19. Mr. England, a vocational rehabilitation counselor, interviewed the claimant on November 13, 2003, and opined that the claimant's incessant pain and sleep difficulties permanently and totally disabled him from work in the open labor market. Donna Abram, another vocational rehabilitation counselor, interviewed the claimant on December 22, 2003, and opined that the claimant was still employable in the open labor market. See Abram deposition, page 8 and deposition Exhibit 2. Ms. Abram opined that the claimant scored extremely poorly in several tests concerning problem solving and abstract thinking. See Abram deposition, pages 19-24. Ms. Abram did not take into consideration the claimant's degree, frequency, and duration of pain in forming her conclusions concerning the claimant's employability. See Abram deposition, page 26. The defense offered a videotape of the claimant performing various light tasks in a slow manner. However, the defense elected to not cross-examine the vocational experts regarding the contents of the videotape. From a lay perspective, the tasks performed by the claimant appear to be consistent with the restrictions imposed by Dr. Chabot, medium work classification, with lifting not to exceed forty-five pounds. See Dr. Chabot deposition, pages 11 and 12.

The real question is whether the claimant suffers incessant pain and has sleep difficulties that compel him to sleep for much of the day. The claimant testified that he does, and the defense offered no evidence to the contrary. The claimant need not be totally inert to be considered totally disabled under our workers' compensation law. The essential test is whether the claimant is employable in the open labor market. Dr. Musich so testified. The vocational experts testified that if the claimant suffers from extensive pain and sleeps for much of the day due to lack of sleep, the claimant is unemployable and therefore permanently and totally disabled. The evidence supports such a finding.

The next question is whether the last injury was so devastating that the claimant is unemployable solely due to the effects of the last accident alone. At one point, Mr. England so testified. However, he also testified that if the claimant had prior complaints to his back and ongoing problems before the 2000 accident, those conditions would contribute to his permanent total disability and his inability to compete in the open labor market. See England deposition, page 34. Mr. England also testified that with the claimant's current symptoms and complaints he would be considered permanently and totally disabled due to the primary injury alone. See England deposition, page 42. Ultimately, he testified, "I think a lot of that is really questions more for the doctors to deal with than me, because there's medical evidence in here right after the primary injury that ... he ...had all kinds of arthritis and degenerative problems. I don't know how much of it is due to one or the other or whatever. I mean, that's really a medical question, not a vocational one." See England deposition, pages 43, 44. He testified that he would defer to the doctors on their opinions as to "how much was due to this and how much was due to that type of thing." See England deposition, page 44. He testified that his job was to just assess the claimant's overall disability. See England deposition, page 44.

Looking to the medical evidence, the only expert medical evidence to analyze the source of the claimant's total disability was that of Dr. Musich who testified that the claimant is permanently and totally disabled due to a combination of the prior injury and the current injury. See Dr. Musich deposition, pages 14, 15, 24. However, Dr. Musich also testified that given the claimant's complaints since August 27, 2000, of constant low back pain, right leg pain, chronic weakness in his right leg, inability to lift heavy amounts, inability to stand no more than ten minutes, inability to sit no more than thirty minutes or walk no more than four city blocks, as well as Dr. Chabot's restrictions of lifting no more than forty-five pounds with limited squatting and bending and given that Claimant has had two surgeries resulting in a three-level fusion, the claimant could be permanently and totally disabled due to the primary work injury alone. See Dr. Musich deposition, page 23. Dr. Chabot offered no medical opinion on the effect of the last injury alone regarding the claimant's employability.

While the issue is not one sided, the weight of the evidence compels a finding that the claimant is unemployable as a result of a combination of the work related injury and the preexisting permanent partial disability, and not solely from the last accident alone. The forensic experts obviously had a difficult time considering that Mr. England deferred to the physicians, and Dr. Musich testified that the contrary was possible. However, Dr. Musich's testimony that the claimant is unemployable as a result of a combination of the work related injury and the preexisting permanent partial disability was based on medical certainty and was more definite. See Dr. Musich deposition, pages 13, 14. On the other hand, his testimony that the disability from the last injury alone caused the total disability was not based on a reasonable degree of medical certainty. See Dr. Musich deposition, page 23. Instead, Dr. Musich testified that it was a mere possibility. Therefore, the claimant is awarded permanent total disability benefits from the Second Injury Fund.

Date: _____

Made by: _____

EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Gary J. Estenson
Acting Director
Division of Workers' Compensation