

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

Injury No.: 03-102872

Employee: Joe Edwards
Employer: Honeywell International Inc. (Settled)
Insurer: Zurich North America Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision reversing the April 14, 2010, award and decision of the administrative law judge.

Preliminaries

The only issue at the hearing was the nature and extent of Second Injury Fund liability, if any.

The administrative law judge found that employee's permanent total disability is a result of the physical residuals from his primary injury and subsequent 2004 injury at home, and not a combination of employee's primary injury and preexisting disabilities. Given these findings, the administrative law judge determined that there is no Second Injury Fund liability.

Employee submitted a timely Application for Review with the Commission alleging the administrative law judge erred in the following ways: (1) the administrative law judge could not assign a different percentage of permanent partial disability where employee settled his claim with employer for a specific percentage of disability and the administrative law judge took judicial notice of the settlement; (2) the administrative law judge's findings regarding the injury at home were based on hearsay; (3) the Second Injury Fund did not produce a medical expert to contradict the testimony of employee's expert; and (4) the administrative law judge's findings on the issue of permanent total disability were contrary to the evidence of employee's preexisting disabling conditions.

For the reasons set forth in this award and decision, the Commission reverses the award of the administrative law judge.

Findings of Fact

Preexisting conditions

Employee has cervical neck problems stemming back to 1979. In October 2001, employee sought treatment for radicular-type neck pain. Employee's symptoms included tingling in the right arm, severe pain, and trouble with activities such as taking his shirt off, lifting objects overhead, and lying supine. An MRI on October 5, 2001, revealed degenerative changes including bulging discs at C5/C6 and C6/C7 with impingement. Employee's treatment included physical therapy, epidural injections, and intermittent prescriptions for medications such as Vicodin, Hydrocodone, and Celebrex.

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Employee missed work and declined a lot of overtime due to his neck pain and radicular symptoms. Dr. Stuckmeyer opined that employee's preexisting cervical spine condition resulted in a 20% permanent partial disability of the body as a whole.

Employee has other preexisting injuries and conditions, such as a childhood right arm injury; low back injuries in 1979, 1980, 1997, and 2000; and a left foot injury in November 2002. Employee testified that these other injuries and conditions did not really hinder or prevent him from doing his job, however, his right arm injury did affect the way he held power tools and left him with a loss of grip strength and pain. Dr. Stuckmeyer assigned a 20% permanent partial disability of the right elbow referable to employee's preexisting right arm condition.

We find Dr. Stuckmeyer credible and adopt his ratings with regard to employee's preexisting cervical spine and right arm disabilities.

Primary injury

On August 15, 2003, employee was at work rolling paper up from the floor. In the process of performing a bending and twisting motion, employee hurt his back. An MRI on October 2, 2003, revealed a herniated disc at L4-5. Employee received epidural injections and was warned by his doctor not to go back to the same job. Notwithstanding the doctor's warnings, employee worked full duty between August 15, 2003, and his surgery on February 11, 2004. On the latter date, employee underwent an L4-L5 microdiscectomy performed by Dr. Jackson. He was released to return to work with restrictions on July 16, 2004. Employee worked various light duty jobs until September 2004, when employer informed him he could no longer do his old job due to his restrictions. Employer offered employee a job as a console operator but employee didn't take it because he didn't think he could do it.

In November 2004, employee reinjured his back getting up from a sofa. He sought treatment and was ultimately referred to Dr. Takacs, who recommended a second surgery. Employee opted for epidural injections instead. At the time of hearing, employee was still receiving epidural injections and was on Oxycodone and Fentanyl patches.

On April 27, 2007, an administrative law judge approved employee's settlement of his claim against employer for the August 15, 2003, injury for "15 to 16%" permanent partial disability of the body as a whole.

Dr. Stuckmeyer opined that the November 2004 incident flowed from the same chain of events as the August 2003 work injury and opined that employee sustained a 40% permanent partial disability of the body as a whole as a result of the work injury. The Second Injury Fund offered no evidence to contradict Dr. Stuckmeyer's opinion. We disagree with the administrative law judge that a stray comment in employee's settlement agreement with employer is more reliable than the testimony of the sole medical expert in this case. Likewise, we find no medical relevance in employee's admissions that employer denied liability and refused to pay any compensation for the November 2004 event. These factors are not probative on the issue of medical

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causation and do not permit us to disregard the uncontradicted and unimpeached medical testimony on the record.

We find Dr. Stuckmeyer credible. We find that the November 2004 sofa incident was a continuation of the August 2003 work injury.

After an exhaustive search of the medical record (necessitated due to both parties' failure to cite or otherwise direct us to any evidence of employee's date of maximum medical improvement for the primary injury), it appears to us that there is no record of any treatment for employee's lumbar spine after April 27, 2005. Dr. Laughlin's note for that date mentions positive results from two recent epidural steroid injections at L4-5, notes the doctor's opinion that employee needs to undergo surgery, and states: "We opted not to do anything else." This evidence, combined with employee's testimony that he opted not to undergo surgery, is sufficient to convince us that employee was at maximum medical improvement on April 27, 2005.

We find that employee reached maximum medical improvement from the work injury on April 27, 2005. We adopt Dr. Stuckmeyer's opinion that employee sustained a 40% permanent partial disability of the body as a whole as a result of the work injury.

Permanent total disability

Both Dr. Stuckmeyer and Mr. Cordray testified that employee is permanently and totally disabled due to a combination of the disability from his primary injury and his preexisting disabling conditions. The Second Injury Fund offered no expert testimony contra.

We find Dr. Stuckmeyer and Mr. Cordray credible. We find that employee is permanently and totally disabled due to a combination of his primary injury and his preexisting disabilities.

Conclusions of Law

Second Injury Fund's Liability for Permanent Disability

Generally

"Section 287.220 creates the Second Injury Fund and sets forth when and the amount of compensation that shall be paid from the fund in 'all cases of permanent disability where there has been previous disability.'" *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000) (citations omitted). "In order to be entitled to Fund liability, the claimant must establish either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself." *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo. App. 2004) citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo. App. 2001).

Hindrance or Obstacle

"Liability of the Second Injury Fund is triggered only 'by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.'" *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo. App. 2002), citing *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 215 (Mo. App. 1999). To implicate the Second Injury Fund, the employee must have an actual and measurable preexisting disability at the

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time the work injury is sustained of such seriousness as to constitute a hindrance or obstacle to employment. Section 287.220.1 RSMo.

We acknowledge that employee performed extremely heavy work for employer up until September 2004, despite pain and difficulty related to his cervical spine and right forearm. Nevertheless, we disagree that this evidence compels a finding that employee did not suffer from preexisting disabling conditions. “[T]he 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.” *Loven v. Greene County*, 63 S.W.3d 278, 287 (Mo. App. 2001). We have found that employee suffered from preexisting disabling conditions of his cervical spine and right forearm. Given the potential for both conditions to combine with work-related injuries to create greater disability than in their absence, we conclude that both conditions were hindrances or obstacles to employment as of August 13, 2005.

Given the foregoing, we conclude that employee has met his burden of proving the presence of actual and measurable disabilities at the time the work injury was sustained.

Calculation of Liability

Having determined that the Second Injury Fund is implicated in this matter, we must determine the amount of Second Injury Fund liability.

[W]here a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). If the compensation to which the employee is entitled for the new injury is less than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. § 287.220.1.

Vaught v. Vaughts, Inc./Southern Mo. Constr., 938 S.W.2d 931, 939 (Mo. App. 1997) (citations omitted).

We have found that employee is permanently and totally disabled as a result of the combination of his preexisting disabling conditions and the effects of the primary injury. Accordingly, the Second Injury Fund is liable for permanent and total disability benefits. Because employee reached maximum medical improvement on April 27, 2005, and sustained a 40% permanent partial disability of the body as a whole attributable to the work injury, the Second Injury Fund is liable for weekly payments of \$282.33 (the difference between the stipulated permanent partial and permanent total disability

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rates), commencing April 27, 2005, and following thereafter for 160 weeks. The Second Injury Fund will then be liable for weekly payments of \$629.38 for employee's lifetime, or until modified by law.

Award

We reverse the award of the administrative law judge.

Employee is entitled to permanent total disability benefits from the Second Injury Fund. For the period April 27, 2005 to May 21, 2008, the Second Injury Fund owes to employee the weekly amount of \$282.33. Beginning on May 21, 2008, the Second Injury Fund shall pay to employee a benefit of \$629.38 weekly for his lifetime, or until modified by law.

Jerry Kenter, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

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

The award and decision of Administrative Law Judge Mark S. Siedlik, issued April 14, 2010, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 13th day of January 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Joe Edwards Injury No. 03-102872
Dependants: NA
Employer: Honeywell International Inc.
Additional Party: Treasurer of the State of Missouri as Custodian of the Second Injury Fund
Insurer: Zurich North America Insurance Company
Hearing Date: February 11, 2010
Checked by: MSS/cy

FINDINGS OF FACTS AND RULINGS OF LAW

1. Are any benefits awarded herein?
2. Was the injury or occupational disease compensable under Chapter 287?
3. Was there an accident or incident of occupational disease under the law?
4. Date of accident or onset of occupational disease: 4/28/2005
5. State location where accident occurred or occupational disease was contracted:
6. Was above employee in employ of above employer at the 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 was contracted: Employee worked as a welder and was exposed to fumes and dust from welding, sandblasting and chemicals, grinding and metal cutting which caused respiratory disability.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Respiratory system, body as a whole.

- 14. Nature and extent of any permanent disability:
- 15. Compensation paid to-date for temporary disability:
- 16. Value necessary medical aid paid to date by employer/insurer?
- 17. Value necessary medical aid not furnished by employer/insurer?
- 18. Employee's average weekly wages:
- 19. Weekly compensation rate:
- 20. Method wages computation: Comparable employee - RSMo. ' 287.250.1(5).

COMPENSATION PAYABLE

- 21. **Benefits Currently Due**
 - Medical Expenses**
 - Medical Already
 - Incurred.....N/A
 - Less credit for expenses already paid.....N/A
 - Total Medical Owing.....N/A
 - Temporary Disability**
 - Total TTD Owing.....None
 - Costs of Recovery**
 - Employee's Attorney's Fees (25% of).....N/A
 - Total Costs of
 - Recovery.....N/A
 - Ongoing Benefits**
 - Medical Care**.....N/A
 - Temporary Disability until employee reaches MMI.....N/A
 - Total Ongoing
 - Benefits.....N/A
 - Total Award**.....N/A
- 22. Second Injury Fund liability: N/A
 - 0 weeks of permanent partial disability from Second Injury Fund..... N/A
 - Permanent total disability benefits from Second Injury Fund N/A
 - weekly differential (--) payable by SIF for -- weeks beginning and, thereafter, for Claimant's lifetime.....N/A
- 23. Future requirements awarded: None

AWARD

Employee: Joe Edwards Injury No. 03-102872
Dependants: NA
Employer: Honeywell International Inc.
Additional Party: Treasurer of the State of Missouri as Custodian of the Second Injury Fund
Insurer: Zurich North America Insurance Company
Hearing Date: February 11, 2010

Checked by: MSS/cy

On February 11, 2010, the employee and the Second Injury Fund appeared for final hearing. The employee, Mr. Joe Edwards, appeared in person and with counsel, Mr. Jerry Kenter. The employer, Honeywell International Inc., previously settled its claim with the employee. The Second Injury Fund appeared by counsel, Ms. Kimberley Fournier. The evidence consisted of live testimony of the employee, medical records and deposition testimony.

The following exhibits were offered by Mr. Edwards and admitted :

- Exhibit A: Dr. Stuckmeyer report 6/11/08
- Exhibit B: Work restriction dated 7/16/04
- Exhibit C: Physical Requirements/Transport Fabricator
- Exhibit D: Report of Injury
- Exhibit E:
- Exhibit F: Stipulation for Compromise Settlement with Employer
- Exhibit G: Terry Cordray report dated March 27, 2009
- Exhibit H: Claimant's medical records
- Exhibit I: Deposition of Terry Cordray
- Exhibit J: Deposition of James Stuckmeyer

DISCUSSION OF EVIDENCE

Based upon the evidence and the live testimony, I find the following:

Mr. Joe Edwards (Employee) is a 56 year old man who smokes and currently resides in Lee's Summit, Missouri. Mr. Edwards has a high school degree and a certificate from a two year aircraft mechanics program.

Joe Edwards work history includes residential construction with Weaver Construction, cabinet production with Shamrock Cabinets, cedar box production with Cedar Novelty Company, house boat driver with Timber Shores Development company, plumbing, working in a saw mill, plastic fabrication, assembly, and a general machinist.

Prior to 2003, Mr. Edwards alleges to have had disabling conditions. Mr. Edwards had therapy for and epidural injections in his cervical spine for degenerative changes in 2001 (Exhibit J page 11, lines 4-25) Despite his allegation that he was having pain and difficulty with his neck at work, Mr. Edwards was under no doctor's restrictions for cervical spine prior to 2003. As a child Mr. Edwards had surgery on his right forearm wherein part of his bone was removed ultimately causing one of his arms to be longer than the other. Again, Mr. Edwards was under no doctor's care or restriction prior to his 2003 work injury for the use of his arm. Mr. Edwards specifically testified that his arm did not hinder his job prior to 2003. Terry Cordray, Mr. Edward's vocational expert, specifically testified that Mr. Edwards had undergone a vocational rehabilitation program for his arm when he was a child, and appeared that he was able to perform his jobs without problems with reference to the arm. (Exhibit I, page 12-13 and page 48) Mr. Edwards has sustained previous low back injuries in 1979, 1980, 1997 and 2000. Terry Cordray opined that Mr. Edwards had "fully recovered" from those back injuries. (Exhibit I; page 46) Lastly, in November of 2002, Mr. Edwards injured his left foot while in the course and scope of employment. He received minimal care for that injury and went back to work full time/full duty, (Exhibit I; page 12) without restriction as it applied to the foot performing the heavy work previously discussed.

Dr. Stuckmeyer, Mr. Edward's rating physician, admitted on cross examination that Mr. Edwards was under no doctors restrictions, was on no medications, was working full time and was required to lift up to 400 pounds at his job with Honeywell prior to his 2003 work injury. (Exhibit J; page 18) Nor did Dr. Stuckmeyer in his report (Exhibit A) place any restrictions on Mr. Edwards for his "pre-existing" cervical spine, lumbar spine foot, or arm conditions. (Exhibit J; page 19)

In August of 2003, Mr. Edwards was working as a transport fabricator for Honeywell International Inc., "Employer." Mr. Edwards was employed by Honeywell for a total of 26 years.

While employed by Honeywell, Mr. Edwards performed heavy construction. Honeywell builds weapon hauling trailers for the US government. The job required overhead work, drilling screwing, lifting up to 400 pounds and riveting. (Exhibit J page 6; lines 4-13) His primary job included working on tires and breaks. He was required to get in awkward postures in order to remove the tires, wheels and brake drums to inspect them.

On August 15, 2003, while in the course and scope of employment, Mr. Edwards injured his back while bending over to roll paper that was on the floor. Following the injury, Mr. Edwards continued to work full time, full duty, and even some overtime for Honeywell. He began having tingling in his legs and feet and pain that went down to his waist.

An MRI was ordered that indicated an extruded disk at L4-5. (Exhibit J; page 7, lines 14-25) Mr. Edwards underwent a series of three epidurals which failed to offer relief. During treatment, Mr. Edwards continued to work full time. In February of 2004, Mr. Edwards underwent an L4-5 microdiscectomy performed by Dr. Jackson, then physical therapy. (Exhibit J; page 8 lines 1-14) Mr. Edwards was released from care on 7/16/04 with the restrictions of avoiding bending, twisting, pushing, pulling and heavy lifting. Mr. Edwards returned to work for Honeywell in September of 2004 after his release. At this time, he was working light duty, however, he testified that occasionally Honeywell would expect that he perform some of his "regular" job duties. He continued working this "light duty job" on a full time basis, and some occasional over time.

In November of 2004, Mr. Edwards re-injured his low back while rising from his sofa while at his home. Following that incident, Mr. Edwards underwent epidurals and then a second surgery was performed by Dr. Tackas. He wore a TENS unit for three months. He continues to get treatment for the pain since that injury, continues to receive epidural injections, and has not been back to work since the 2004 incident at home.

Currently, Mr. Edwards takes oxycodone and fentanyl patches. The fentanyl is the strongest pain medication that exists, (Exhibit J page 10; lines 4-17) Dr. Stuckmeyer indicated that these medications impede Mr. Edwards activities of daily living. (Exhibit J page 7) The patches cause side effects which include lack of concentration, nausea, blurred vision, and withdrawal like symptoms. Terry Cordray agreed that difficulty with concentration and being alert did not appear to be a problem for Mr. Edwards before his 2003 work-related injury. (Exhibit I; page 57) Mr. Edwards currently requires the use of a cane for ambulation. He now has sleep that is interrupted every 15 minutes. Terry Cordray testified that this type of sleep interruption and resultant chronic fatigue would impact Mr. Edwards' ability to work an 8 hour day. (Exhibit I; page 26-7) Mr. Edwards now naps "all day" according to his own testimony, a practice that expressly prevents him from being unemployable on the open labor market.

CONCLUSIONS AND FINDINGS

Mr. Edwards' permanent and total disability is as a result of the physical residuals from his primary injury and his subsequent 2004 injury at home, and not a combination of his primary injury and pre-existing disabilities.

A court must examine the whole record to determine if it contains sufficient competent and substantial evidence to support the award, i.e., whether the award is contrary to the overwhelming weight of the evidence. *Hampton v. Big Boy Steel Erection*, 121 SW 3d 220, 222-223 (Mo. Banc 2003)

When there are opinions of medical experts that are conflicting, the fact finding body determines whose opinion is most credible. The fact finder may reject all or part of an expert's testimony. *Bennett v. Columbia Health Care* 134 S.W.3d 84 (Mo.App WD 2004), citing *Kelley v. Banta & Stude Constr. Co.*, 1 SW 3d 43, 48 (Mo. App. ED 1999).

I find that there is substantial and credible evidence to indicate employee's primary injury combined with his subsequent 2004 back injury have caused his permanent and total disability.

I find that Dr. Stuckmeyer's opinion that the June 2004 back injury while Mr. Edwards was rising from the couch at home was the "same chain of events" as the 2003 work injury (Exhibit I; page 9) lacks credibility.

Mr. Edwards admitted on cross examination that the employer refused to pay for the additional surgery that he underwent as a result of this June 2004 injury and moreover, there was no compensation paid to Mr. Edwards from the employer for this alleged "ongoing" injury to his back. (See Exhibit F, page 2 where the Stipulation expressly discusses this issue) I find that Mr. Edwards is bound to the stipulation he entered into with Honeywell (Exhibit F) under *Connley v. Treasurer of the State of Missouri*, 999 S.W. 2d 269, 274 (Mo. App. E.D. 1999). In *Connley* the court held that a settlement approved by an ALJ is conclusive and irrevocable, and when approved a settlement of workers' compensation claim is the basis of res judicata and estoppel by judgment. Since Mr. Edwards signed, and the judge approved the stipulation for settlement (Exhibit F) he cannot, for purposes of the trial against the Second Injury Fund, now allege that his 2004 back injury was part of his 2003 work injury. Exhibit F specifically indicates the 2004 injury occurred at home rather than being work related.

Mr. Edwards was performing incredibly heavy work for Honeywell before his 2003 work injury, full time, without restriction, and without the need for medication or assistive ambulatory devices. Following his 2003 work injury and the 2004 aggravating injury at home, Mr. Edwards suffers with extreme pain, walks with a cane, requires heavy doses of narcotic pain medication, has extreme sleep disruption, cannot perform his usual activities of daily living, naps daily, and has difficulty with concentration.

With reference to Mr. Edwards' pre-existing disabilities, he was under no doctor's care, on no narcotic pain medication, was working full time, and had no restrictions imposed on him for any of his alleged prior disabilities before the 2003 work-related injury occurred. In fact, Mr. Edwards was performing extremely heavy work for Honeywell-including lifting up to 400 pounds . He was employed by Honeywell for 26 years and received good evaluations with the employer.

I find that employee is permanently and totally disabled as a result of his 2003 work injury plus the subsequent 2004 aggravation. The test for permanent total disability is the worker's ability to compete in the open labor market. *ABB Power T & D Co. v. Kempker et al.* (Mo. App. W.D. 2007) citing *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo. App. 2000). The critical question is whether in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. *Id.* at 4, citing *Gassen v. Liebengood*, 134 S.W.3d 75 (Mo.App. W.D. 2004)

Under the Missouri Worker's Compensation Act total disability is defined as the inability to return to any employment. *Messex v. Sachs Elec. Co.*, 989 S.W.2d. 206, 210 (Mo. App. E.D.

1999). The words "inability to return to any employment" mean that the employee is unable 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." *Kowalski v. M-G Metals and Sale*, 631 S.W.2d. 919, 922 (Mo. App. S.D. 1982). The primary determination for permanent total disability is whether the employee is able to compete in the open labor market. *Messex*, 989 S.W.2d. at 210. A determination of permanent total disability focuses on the ability or inability of the employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employment. *Gordon v. Tri-State Motor Transit*, 908 S.W.2d. 849 (Mo. App. S.D. 1995). There are many factors that may be considered in this assessment including a claimant's physical and mental condition, age, education, job experience and skills in order to determine whether a claimant is permanently and totally disabled. See *Tiller v. 166 Auto Auction*, 941 S.W.2d. 863 (Mo. App. S.D. 1997).

Due to the 2003 work-related injury combined with the 2004 aggravating injury sustained while at home, Mr. Edwards suffered from such overwhelming pain complaints and physical restrictions that he has never returned to work in the open labor market.

I find it important to note that following his 2003 work injury, Mr. Edwards continued to work for Honeywell. Albeit an accommodated, light duty position, Mr. Edwards continued to be employed in the open labor market at that time. In *Jason Rector v. Gary's Heating and Cooling and the Treasurer of the State of Missouri as Custodian of the Second Injury Fund*, 293 SW3d 143 (Mo. Ct. App. SD 2009) the employee injured himself in 2004, went back to his place of employment and performed work on a part time basis, was accommodated by the employer, and was taking high doses of narcotic pain medication during the day. The employee then injured himself again on the job in 2005. The administrative law judge found that the employee was "able to work" following the 2004 injury and the combination of the 2004 and 2005 injuries rendered the employee permanently and totally disabled. The Court of Appeals affirmed the findings of the administrative law judge. Given the part-time, accommodated work that the employee was performing in the Rector case, the Court essentially found the employee to be employable on the open labor market prior to his 2005 work injury. Similarly, in *Miller v. State Treasurer*, 978 S.W. 2d 808 (Mo. App. 1998), the Court refused affirm the Commission's finding that the employee's pre-existing condition alone rendered her permanently and totally disabled as she continued to work before the primary injury occurred.

In the case at hand, it was not until the 2004 aggravation that Mr. Edwards stopped working in the open labor market. I do not find that Mr. Edwards was unemployable, thus permanently and totally disabled under *Rector* and *Messex* until after his 2004 back injury at home. That is not the responsibility of the Second Injury Fund.

Based on the foregoing, I find that Mr. Edwards is unemployable in the open labor market as a result of his 2003 work injury and his subsequent 2004 aggravation. For the reasons stated above, I find that Mr. Edwards current permanent and total disability is the result of his 2003 work-related injury combined with his 2004 injury rather than as a result of his 2003 work-

Issued By DIVISION WORKERS' COMPENSATION
Employee: Joe Edwards

Injury No. 03-102872

related injury in combination with any pre-existing disabilities. Thus, I find no Second Injury Fund liability.

Made by: _____
Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this _____ day of _____, 2010 by:

Naomi Pearson
Division of Workers' Compensation