

Issued by THE LABOR AND INDUSTRIAL RELATIONS  
COMMISSION

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

Injury No.: 02-144139

Employee: Michael Edwards  
Dependents: Barbara Edwards, Daniel Edwards and Christina Edwards  
Employer: Midwest Block and Brick, Inc.  
Insurer: General Casualty Company of Wisconsin  
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 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 November 25, 2008. The award and decision of Administrative Law Judge Edwin J. Kohner, issued November 25, 2008, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 25th day of March 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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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

## AWARD

Employee: Michael Edwards Injury No.: 02-144139  
Dependents: Barbara Edwards, Daniel Edwards, Christina Edwards Before the  
Employer: Midwest Block and Brick, Inc. **Division of Workers'**  
**Compensation**  
Department of Labor and Industrial  
Additional Party: Second Injury Fund Relations of Missouri  
Jefferson City, Missouri  
Insurer: General Casualty Company of Wisconsin  
Hearing Date: September 25, 2008 Checked by: EJK/lsn

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
  - 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
  - Date of accident or onset of occupational disease: December 24, 2002
  - State location where accident occurred or occupational disease was contracted: St. Charles 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
  - 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 suffered a severe low back injury while lifting heavy materials.
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
  - Nature and extent of any permanent disability: Permanent Total Disability

15. Compensation paid to-date for temporary disability: \$51,163.08
16. Value necessary medical aid paid to date by employer/insurer: 139,042.11

Employee: Michael Edwards

Injury No.: 02-144139

17. Value necessary medical aid not furnished by employer/insurer? None to date

- Employee's average weekly wages: \$855.41

19. Weekly compensation rate: \$570.27/\$340.12

20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

172 weeks of permanent partial disability from Employer	\$58,500.64
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Permanent total disability benefits from Employer at the rate of \$570.27 beginning December 27, 2004, for Claimant's lifetime

22. Second Injury Fund liability: No

None

Total:	Not determined
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23. Future requirements awarded: See additional Findings of Facts and Rulings of Law

Said payments to begin as of December 27, 2004, 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: Dean L. Christianson, Esq.

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

Employee: Michael Edwards

Injury No.: 02-144139

Dependents: Barbara Edwards, Daniel Edwards, Christina Edwards

Before the  
**Division of Workers'**

Employer: Midwest Block and Brick, Inc.  
Additional Party: Second Injury Fund  
Insurer: General Casualty Company of Wisconsin

**Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri  
Checked by: EJK/lsh

- This workers' compensation case raises several issues arising out of a work related injury in which the claimant injured his back, legs and left knee on December 24, 2002, while lifting heavy materials at work. The issues for determination are (1) future medical care, (2) permanent disability, (3) liability of the Second Injury Fund, and (4) dependency.

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- At the hearing the claimant testified in person and offered depositions of Mark A. Lichtenfeld, M.D., Raymond Cohen, D.O., and Timothy G. Lalk, records from the Division of Workers' Compensation, and voluminous medical records. The defense offered records of Dr. Robson and Dr. Nogalski.

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- 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 1994, because the accidents occurred in Missouri.

- **SUMMARY OF FACTS**

- This fifty-six year old claimant, a yardman for a brick and block company, has a high school education with no post high school education outside of on-the-job training and a short management course in the 1970's. He has not served in the U.S. military. Most of his past employment has involved the operation of heavy trucks and machinery.

- November 1, 2000 Injury

- On November 1, 2000, the claimant injured his left knee, hip and back when he slipped on some loose material on the ground, twisting his left knee and hip. He felt immediate sharp pain. The accident occurred at the end of the day so he went home, but he later went to Unity Corporate Health for treatment. He received a brace and a referral to Dr. Nogalski, an orthopedist. Dr. Nogalski ordered physical therapy but did not perform any surgical procedures. After this treatment claimant felt somewhat better, though he felt he still had some knee weakness along with pain and swelling. His hip was also tender at times, and he had some pain in his lower back.

- December 24, 2002 Injury

- On December 24, 2002, the claimant injured his back and legs lifting heavy materials, and he felt a pop in his back. He took it easy the rest of the day and his work ended shortly after the accident. He tried to rest for a period of days, but when he did not improve he went to the emergency room at St. Joseph's Hospital West. He received a pain shot and an MRI scan. He followed up with his family physician, Dr. Sommers, but then received a referral to Dr. Robson. Dr. Robson gave him physical therapy and ordered a myelogram and CT scan. He also referred the claimant to Dr. Hurford who performed one injection into his back. This provided no relief, so the claimant returned to Dr. Robson and underwent a fusion with hardware and screws. He testified that the surgery helped him a bit, though not a great deal. He testified that bone was taken from his left hip for the surgery and that he continues to have tenderness in his hip to this day. After the surgery, he received physical therapy and aquatic therapy.

- On April 21, 2004, the claimant felt a pop, immediate knee pain, and swelling in his left knee while performing stair steps during physical therapy for the 2002 injury. He went to Dr. Nogalski who ordered x-rays, physical therapy, and an arthrogram. Otherwise, the claimant was released without further care. Since then, the claimant has consulted his family physicians, Dr. Stacheki and Dr. Anzalone, for his knee pain.
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- During the course of treatment for his April 21, 2004, knee injury, he also continued seeing Dr. Robson for his back. Dr. Robson performed a second surgical procedure installing additional metal into his back. Grafting was taken from his right hip on this occasion, and he continues to have tenderness in the right hip. Dr. Robson eventually discharged him, and the claimant has followed up with his family physician, Dr. Anzalone, for pain medication monthly.
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- Dr. Lichtenfeld
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- Dr. Lichtenfeld diagnosed the claimant with several medical conditions. With regard to the 2000 accident, he diagnosed left knee strain with a chronic left hip strain. See Dr. Lichtenfeld, page 25. He attributed disability to these conditions at 10% of the knee and 10% at the hip. He also opined that the claimant had pre-existing permanent partial disabilities, which he indicated was as follows: 30% left knee; 45% right knee; 15% loading factor on the knees; 50% left long finger; 35% left ring finger; 25% left hand. See Dr. Lichtenfeld, pages 26-27.
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- With regard to the 2002 and 2004 occurrences, Dr. Lichtenfeld found that the claimant has atrophy in his right calf due to his injury. See Dr. Lichtenfeld deposition, page 24. He diagnosed: posterior disc bulge at L2-3; right lateralized disc bulge at L4-5 causing bilateral neural foraminal narrowing; partial nerve root cutoff of the right L4 and S1 nerve roots as noted on the June 13, 2003, lumbar myelogram; right lateralized bulging disc causing right L4 neural foraminal encroachment; status-post L4-5 laminectomy and discectomy; status-post harvesting of left iliac crest bone graft; status-post insertion of bilateral cages; status-post posterior lumbar interbody fusion with bone graft and hardware; status-post medial facetectomy; right L4 and L5 radiculopathy; pseudoarthrosis at L4-5 with no interbody or posterolateral fusion; status-post hardware removal and fusion exploration; status-post harvesting of right iliac crest bone graft; status-post laminotomy and exploration of left L5 nerve root; status-post revision of spinal fusion with right iliac crest bone graft and hardware; incitation, exacerbation and acceleration of preexisting degenerative changes in the left knee; chronic left knee strain; chondromalacia of the left knee. See Dr. Lichtenfeld, page 28. He attributed disability to these conditions at: 50% of the low back and 15% of the left knee. See Dr. Lichtenfeld, page 29.
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- He also opined that the claimant had pre-existing permanent partial disabilities: 30% left knee; 45% right knee; 15% loading factor on the knees; 50% left long finger; 35% left ring finger; 25% left hand; 20% of the body (diabetes); 15% of the body (hypertension); 20% of the body (chronic atrial fibrillation). See Dr. Lichtenfeld, pages 29-30. He opined that the claimant was permanently and totally disabled due to a combination of his injuries. See Dr. Lichtenfeld, page 38. He also testified that if a vocational expert was unable to find a job for claimant within the restrictions caused solely by the December 24, 2002, accident, then that accident alone could be said to have caused the claimant's total disability. See Dr. Lichtenfeld, pages 59-60.
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- Dr. Cohen
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- Dr. Cohen examined the claimant in 2000 and 2001 and diagnosed the claimant with several medical conditions which he attributed to the 2000 accident: chronic lumbosacral strain/sprain with myalgia; left knee effusion and pain, rule out internal derangement; and left hip myofascial pain. See Dr. Cohen, page 19. He attributed permanent partial disability to these conditions at: 30% of the left knee; 15% of the left hip; and 15% of the low back. See Dr. Cohen, pages 21-22. He also opined that the claimant had pre-existing permanent partial disabilities of 40% of the left knee and 40% of the left hand. See Dr. Cohen deposition, page 14.
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- Dr. Robson
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- Dr. Robson attributed disability to the claimant's back injury of December 24, 2002 at 30% of the

lumbar spine. See Dr. Robson medical records, Exhibit 1.

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- Dr. Nogalski
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Dr. Nogalski attributed no disability to the claimant's knee injury of April 21, 2004. See Dr. Nogalski medical records, Exhibit 2. He did attribute disability of 16% of the knee to pre-existing and degenerative changes.

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- Preexisting Disabilities
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The claimant has had numerous past injuries, most of them occurring at work. The disability from these injuries can be summarized as follows:

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• **PRE-EXISTING SETTLEMENTS AND AWARDS**

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• <b>Date of Injury</b>	• <b>Employer settlement/award</b>	• <b>Second Injury Fund settlement/award</b>
• February 18, 1992 (Exhibit U)	• small percentage re head, face, jaw and teeth	• N/A
• May 9, 1992 (Exhibit U)	• 20% left hand	• N/A
• November 30, 1993	• presumed 25% settlement (see stipulations on 10/9/99 accident)	• unknown
• October 9, 1999 (Exhibit U)	• 40% right knee	• 20% left hand, 25% left knee
• November 1, 2000 (judicial notice)	• 10% left knee and 10% left hip	• Open

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- Other pre-existing conditions include the claimant's diabetes, high blood pressure, and chronic atrial fibrillation.
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• **FUTURE MEDICAL CARE**

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• Section 287.140.1, RSMo, requires the employer to provide medical treatment as a component of an

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employee's compensation due to injury. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. 1996). The pertinent portion of the statute reads, "[I]n addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury."

Where future medical benefits are to be awarded, the medical care must of necessity flow from the accident, via evidence of a "medical causal relationship" between the injury from the condition and the compensable injury, before the employer is to be held responsible. *Modlin v. Sun Mark, Inc.*, 699 S.W.2d 5, 7 (Mo. App. 1985). It is not necessary for a claimant seeking future medical benefits to produce conclusive evidence to support the claim, but the employee need only show a need for additional medical treatment by reason of the compensable accident as a reasonable probability. A mere possibility of a need for future medical care does not constitute substantial evidence to support an award, but if a medical expert testifies as to there being a reasonable probability (founded on reason and experience which inclines the mind to believe but leaves room for doubt) for the treatment, then it may be ordered. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. 1996). "The right to obtain future medical treatment should not be denied merely because it has not yet been prescribed or recommended as of the date of the date of the workers' compensation hearing." *Mathia*, 929 S.W.2d at 277. The compensation law does not require a worker to wait until he finds himself totally disabled in order to file a claim for compensation. *Mickey v. City Wide Maint.*, 996 S.W.2d 144 (Mo.App. W.D. 1999).

The record indicates that the claimant needs further medical care with respect to conditions stemming from his back and left knee. He testified that he still suffers from back pain radiating into his legs, particularly the right leg. Dr. Robson opined that the claimant still needs ongoing pain medications. See Exhibit 1. Dr. Lichtenfeld testified that the claimant:

would benefit from treatment with anti-inflammatory medication and muscle relaxers. He might also benefit from a tapered course of oral steroids. If his pain persists a CT scan should be obtained to verify that the patient has not suffered another pseudoarthrosis at L4-5 and that his fusion is solid. The patient would also benefit from treatment with Ultram for his pain, which if not beneficial, could be replaced by a narcotic pain medication. He should also perform range of motion exercises on a regular basis for his back. If he were to undergo further treatment my rating would be subject to change. See Dr. Lichtenfeld deposition, page 33.

With regard to the left knee, he testified the claimant:

would benefit from treatment with anti-inflammatory medication. He should also use a knee brace. He might benefit from the use of a cane. Due to a combination of his injury in April 2004 as well as his preexisting injuries to his left knee [claimant] will eventually require a total knee arthroplasty for his left knee. See Dr. Lichtenfeld deposition, pages 35-36.

The defense contends that all of the medical care suggested by Dr. Lichtenfeld related to preexisting conditions. With regard to the claimant's left knee, this contention is well founded based on the record. The claimant suffered a left knee strain in this occurrence, but his preexisting disability to his left knee was thirty percent from prior surgical repairs and 10% from a 2000 left knee strain. Dr. Cohen rated the total preexisting disability at 70% having examined the claimant in 2001. See Dr. Cohen deposition, page 34. Dr. Nogalski, having treated the claimant for the preexisting conditions and for the current injury, opined that the claimant required no further medical care from this occurrence. He opined:

Mike's symptoms are probably coming from some chondral tissue that is giving him symptoms. In general though, I think the overall problem with his knee is that he has osteoarthritis and with osteoarthritic (sic) comes unstable chondral tissues that can pop. He does not have any distinct meniscal findings and I cannot identify anything that specifically argues for further arthroscopic treatment. It is felt that these types of mechanical findings would, at this point, be related to ongoing degeneration of the articular cartilage. I do not think there is anything further to treat from an acute or work related standpoint. See Exhibit B.

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- Given Dr. Nogalski's expertise, the specificity of his findings, and his ongoing observations of the claimant before and after the occurrence, his findings are clear and compelling. The claimant's medical and surgical requirements appear to result from the continuing deterioration of the claimant's left knee. The claimant is awarded no future medical care for his left knee relative to this occurrence.
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- With regard to the low back condition, none of the evidence suggests that the claimant had a preexisting condition causing his need for ongoing pain medications. None of the experts so opined. Based on reasonable probability, the evidence compels a conclusion that the claimant requires additional ongoing pain medications and monitoring of the medications by an appropriate physician to cure and relieve the effects of his low back injuries. The claimant is awarded future medical care for ongoing pain medications to be provided by a medical provider selected by the employer.

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- **PERMANENT DISABILITY**
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- 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. Joulzhouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997).

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- In this case, Dr. Lichtenfeld examined the claimant relative to the 2002 and 2004 occurrences and diagnosed: posterior disc bulge at L2-3; right lateralized disc bulge at L4-5 causing bilateral neural foraminal narrowing; partial nerve root cutoff of the right L4 and S1 nerve roots as noted on the June 13, 2003, lumbar myelogram; right lateralized bulging disc causing right L4 neural foraminal encroachment; status-post L4-5 laminectomy and discectomy; status-post harvesting of left iliac crest bone graft; status-post insertion of bilateral cages; status-post posterior lumbar interbody fusion with bone graft and hardware; status-post medial facetectomy; right L4 and L5 radiculopathy; pseudoarthrosis at L4-5 with no interbody or posterolateral fusion; status-post hardware removal and fusion exploration; status-post harvesting of right iliac crest bone graft; status-post laminotomy and exploration of left L5 nerve root; status-post revision of spinal fusion with right iliac crest bone graft and hardware; incitation, exacerbation and acceleration of preexisting degenerative changes in the left knee; chronic left knee strain; chondromalacia of the left knee. See Dr. Lichtenfeld, page 28. He attributed permanent partial disability to these conditions at: 50% of the low back and 15% of the left knee. See Dr. Lichtenfeld, page 29.

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- On the other hand, Dr. Robson opined that the claimant suffered a 30% permanent partial disability to his low back from the 2002 occurrence. See Dr. Robson medical records, Exhibit 1. Dr. Nogalski attributed no disability to the claimant's knee from the 2004 occurrence. See Dr. Nogalski medical records, Exhibit 2. He opined that the claimant suffered from a 16% preexisting permanent partial disability to his left knee from well documented preexisting conditions. See Dr. Nogalski medical records, Exhibit 2.

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- Based on this evidence, one could conclude that the claimant suffered a 40% permanent partial disability to his low back and a seven and one-half percent permanent partial disability to his left knee from the 2002 and 2004 occurrences. However, the weight of the evidence supports a finding that the claimant is unemployable in the open labor market and is permanently and totally disabled. Dr. Lichtenfeld and Mr. Lalk so testified, and the claimant's testimony is consistent with this conclusion. None of the other experts presented contradictory conclusions. A relative inquiry requires a determination as to the role of this injury relative to the 2002-2004 occurrences.

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- Two of the experts concluded that the claimant's total disability results from a combination of the limitations and restrictions from his preexisting permanent partial disabilities and the permanent partial disabilities from the

2002-2004 occurrences. Dr. Lichtenfeld so testified. See Dr. Lichtenfeld deposition, pages 38, 49. Mr. Lalk so testified. See Lalk deposition, pages 14, 15, 27. Dr. Robson and Dr. Nogalski offered no opinion at all. See Exhibits 1, 2. Given these conclusions of the experts, one would conclude that the claimant did not suffer permanent total disability *solely* as a result of his age, education, past relevant work history, and the limitations and restrictions from the *last injury*.

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- However, the same expert witnesses presented other testimony that explains their findings and leads to a different result. The specific point is that the claimant's pain syndrome resulting exclusively from the last injury alone is so severe that it alone causes the claimant to be unemployable in the open labor market when combined with the claimant's age, education, and past relevant work history without regard to the claimant's limitations and restrictions from the claimant's preexisting permanent partial disabilities. The factual evidence supports this conclusion based on the claimant's testimony and the testimony from Dr. Lichtenfeld and Mr. Lalk.
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The evidence demonstrates that the impact of the claimant's pain condition is extensive and due to the last injury. For example, the claimant's need to lie down during the course of the day due to the primary back injury is incompatible with employment in the open labor market. The claimant testified that to alleviate back pain from the primary injury he has to lie down three to five times per day.

The claimant's other symptoms and restrictions from the 2002 injury add to that injury's disabling impact. The claimant testified that he has constant back pain causing him to sleep only about 4 hours per night. He takes hydrocodone for the pain, making him drowsy and makes it difficult for him to drive. He testified that he avoids lifting and driving. He can walk only three blocks, and that "is pushing it." He can sit for only 25 minutes before he gets pulling in his shoulder and muscle spasm in his back. As a passenger, he can only ride reclined for an hour before he must get out and stretch.

The claimant's abilities before the 2002 injury highlight the extent of the limitations from the 2002 injury. The claimant worked 50 hours a week as a boom truck operator lifting up to 100 pounds before the 2002 injury. He had no trouble sitting, walking on even surfaces, or bending. He was capable of driving from St. Louis to Amarillo, Texas without stopping. He lifted weights for repetitive cardiovascular exercise five or six days a week for 45 minutes. He participated in hobbies of drag racing, water skiing, and tubing. He would walk into the woods to hunt and was able to carry his deer out and dress it. He was forced to give up his hobbies of boating, tubing, drag racing, and his hunting and fishing have been severely curtailed.

Dr. Lichtenfeld's medical restrictions for the 2002 work injury demonstrate the limiting nature of that injury. Dr. Lichtenfeld testified to the following restrictions for the 2002 back injury:

Mr. Edwards should avoid squatting, kneeling, stooping, bending and twisting. He should avoid operating any type of gas, electric, or air-powered tools. He should also avoid working in awkward positions. He should avoid working with his arms outstretched and overhead. He should avoid sitting or standing for more than 10 to 15 minutes at a time without alternating between the two positions at least three times per hour and as needed. He should avoid lifting more than 20 pounds on a one-time basis. He should avoid all repetitive lifting. Lifting should only be performed between the waist and shoulder height. The patient should perform no lifting from the ground level to the waist level, nor from the shoulder level overhead. The patient should avoid working at heights. He should also avoid driving over secondary and tertiary roads, as well as driving commercial vehicles. He should avoid loading and unloading vans and trucks. He should avoid ascending and descending stairs, inclines, and ladders. See Dr. Lichtenfeld deposition, pages 34-35.

Dr. Lichtenfeld imposed additional medical restrictions for the 2004 knee injury:

The claimant should avoid kneeling, stooping, bending, and twisting. He should avoid walking over slick and uneven surfaces including, but not limited to, ice, gravel, snow, mud and wet grass. He should avoid

ascending and descending stairs, inclines, and ladders. He should also avoid working at heights.” See Dr. Lichtenfeld deposition, page 35.

- Dr. Lichtenfeld opined that the claimant’s need to lie down during the day to control his back pain was a reasonable complaint due to his back injury. See Dr. Lichtenfeld deposition, page 59. Dr. Lichtenfeld testified that if a vocational expert was unable to find a job for claimant within the restrictions caused solely by the December 24, 2002, accident, then that accident alone could be said to have caused the claimant’s total disability. See Dr. Lichtenfeld, pages 59-60.
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- Mr. Lalk, a vocational expert so concluded, “In my experience, no employer would consider him for a new position based upon his need to lie down repeatedly.” See Lalk deposition, page 15. “Again, I tried to delineate in my report exactly why I don’t think Mr. Edwards is able to work, and as I’ve indicated, it’s entirely due to this inability to remain in one position for very long, and despite his efforts to control his symptoms by changing position from sitting to standing to walking around, he still needs to lie down. That’s the factor that’s keeping him from working.” See Lalk deposition, pages 48, 49.
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- Although the attorneys did not directly inquire whether the claimant was unemployable based on the claimant’s age, education, past relevant work history, and limitations and restrictions from the *last accident alone* without regard to the limitations and restrictions from any preexisting permanent partial disabilities, the above evidence compels that conclusion. Therefore, based on the evidence as a whole, the claimant is awarded permanent total disability from this employer.
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- **SECOND INJURY FUND**
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"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in '[a]ll cases of permanent disability where there has been previous disability.'" For the Fund to be liable for permanent total disability benefits, the claimant must establish that: (1) he suffered from a permanent *partial* disability as a result of the *last* compensable injury, and (2) that disability has combined with a *prior* permanent *partial* disability to result in total permanent disability. Section 287.220.1, RSMo 2000. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined..."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 50 (Mo.App. W.D. 2007).

The test for permanent total disability is the worker's ability to compete in the open labor market. 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 48. Missouri courts require that the permanent nature of an injury be shown to a reasonable certainty and that proof may not rest upon surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo. App. S.D. 1997). A disability is "permanent" if it is 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).

Based on the above, the following factors must be considered: (1) the extent of disability from the 2002-2004 work related injury, (2) the extent of the claimant’s preexisting permanent partial disabilities, (3) whether the disability from the last injury synergistically combines with the preexisting permanent partial disabilities, (4) whether the claimant is employable in the open labor market, and (5) whether the synergistic combination results in the claimant’s permanent total disability.

- As discussed above, the claimant suffered permanent total disability from the 2002-2004 work related injury and the Second Injury Fund bears no liability in this case.

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- **DEPENDENCY**

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- Finally, the claimant produced evidence proving that his surviving spouse, Barbara Edwards, was dependent upon him at the time of his accident of December 24, 2002. The same holds true for two of his children: Daniel Edwards and Christina Edwards. Therefore, Barbara Edwards, Daniel Edwards, and Christina Edwards were the claimant's dependents at the time of his injury.

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Date: November 25, 2008

Made by: /s/ EDWIN J. KOHNER  
EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ JEFFREY W. BUKER  
*Jeffrey W. Buker*  
*Director*  
*Division of Workers' Compensation*