

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

Injury No.: 03-134451

Employee: Charles Hager
Employer: Steelweld Equipment Company (Settled)
Insurer: Liberty Mutual 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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 4, 2011, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued October 4, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 9th day of August 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Charles Hager Injury No.: 03-134451
Dependents: N/A Before the
Employer: Steelweld Equipment Company (Settled) **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Liberty Mutual Insurance Company (Settled) Jefferson City, Missouri
Hearing Date: August 12, 2011 Checked by: EJK/ch

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: May 1, 2003
5. State location where accident occurred or occupational disease was contracted: Franklin County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The claimant, a commercial painter, sustained an abdominal hernia while pushing heavy objects at work.
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: abdominal hernia
14. Nature and extent of any permanent disability: 7 ½% Permanent partial disability to the body as a whole referable to an abdominal hernia
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: None

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$477.56
- 19. Weekly compensation rate: \$318.37
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Settled

22. Second Injury Fund liability: No

None

TOTAL:

None

23. Future requirements awarded: None

Said payments to begin as of December 28, 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: Ronald D. Edelman, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Charles Hager	Injury No.: 03-134451
Dependents:	N/A	Before the
Employer:	Steelweld Equipment Company (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Liberty Mutual Insurance Company (Settled)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK/ch

This workers' compensation case requires a determination of Second Injury Fund liability arising out of a work related injury in which the claimant, a commercial painter, sustained an abdominal hernia while moving a heavy object at work. The issues for determination are (1) Accident, (2) Occupational disease, (3) Medical causation, and (4) Second Injury Fund liability. The evidence compels an award for the defense.

At the hearing, the claimant testified in person and offered depositions of Robert P. Poetz, M.D., and James M. England, medical reports from Raymond F. Cohen, D.O., public records from the Missouri Workers' Compensation, and voluminous medical records. The defense offered depositions of the claimant and Russell C. Cantrell, M.D.

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. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

This claimant, a commercial painter, is now 66 years of age. He testified that in May 2001, about ten years ago, he felt a pop and pain in his groin area while pushing on a heavy truck body. In late 2001 and early 2002, both Dr. Enkvetchakuhl and Dr. Bennett, who surgically repaired the claimant's left inguinal hernia, did not diagnose a right hernia. On May 19, 2003, he went to his personal physician, Dr. Modad, and a nurse practitioner, Tammy Watz, who assessed and verified that the claimant had a right inguinal hernia. See Exhibit G.

On June 6, 2003, the claimant's employer terminated his employment. See Exhibit G. The claimant testified that after repeated requests to his supervisor to see a doctor he was "written up" for not painting the trucks properly on 3 consecutive days and then fired. He testified that in the 22 years that he had worked for this employer, he had never been previously cited or written up for job performance. The claimant testified that he applied for and received unemployment compensation for 6 months. During this time he applied for employment but was not hired. He testified that he had no medical insurance and was unable to secure medical treatment for his injury. He applied for and received Social Security disability and qualified for Medicare. He was then able to obtain medical treatment.

On September 27, 2004, Dr. Michalik diagnosed right inguinal hernia and performed surgery to repair the right hernia with mesh on October 15, 2004. He listed a medical history: "The patient is a 59 year-old-male with a known right inguinal hernia over the past four years. It is slowly increasing in size and is occasionally hurting." See Exhibit F. He released the claimant from medical care on December 28, 2004. See Exhibits E, F. The claimant settled the instant claim on the basis of a 7 ½% permanent partial disability referable to the right inguinal hernia alleged in this claim. See Exhibit B.

Pre-existing Conditions

The claimant had multiple pre-existing permanent partial disabilities based on his testimony, medical records, records from the Division of Workers' Compensation, and testimony and reports from Dr. Poetz and Dr. Cantrell. In 1979, the claimant underwent a C4-5 hemilaminectomy and decompression of the nerve root and testified that he had ongoing neck and left arm complaints over the years thereafter. In 1983, the claimant suffered injuries in a motor vehicle accident. He suffered fractured ribs, chest contusion, fractured clavicle, and head of the left humerus. He underwent a splenectomy as a result of the injuries. He testified that he had chest and left arm pain thereafter. He had heightened susceptibility to disease and took precautions to avoid illness.

In 1993, the claimant suffered a work related injury, and Dr. Boland ultimately performed discectomy for a herniated disc at C6-7. See Exhibits A, Injury No. 93-177235; L, M. The claimant settled his workers' compensation claim on the basis of a 20% permanent partial disability to the neck and 2% of left shoulder. The Second Injury Fund claim settled based on pre-existing disability of 15% of the left shoulder. Apparently no pre-existing disability was recognized for the 1979 C4-5 discectomy surgery.

In 1997, the claimant injured his right shoulder and right elbow suffering a right shoulder impingement and right lateral epicondylitis. Dr. Koo performed a right lateral epicondylar debridement and epicondylectomy. Further surgery was recommended, but the claimant declined. The primary claim was settled on the basis of a 16% permanent partial disability to the right shoulder and a 20% permanent partial disability to the right elbow. The claimant settled his Second Injury Fund claim on the basis of pre-existing permanent partial disabilities of 20% of the neck and 15% of the left shoulder. See Exhibit A, Injury No. 97-079395, Injury date 7/16/1997.

On May 12, 1999, the claimant injured his left leg and knee suffering a left medial meniscus tear. See Exhibit A, Injury No. 99-057906. On October 7, 1999, Dr. Nogalski performed a partial menisectomy and chondroplasty of the medial femoral condyle and lateral tibial plateau. He had physical therapy at ProRehab in Sullivan. See Exhibits T, U, V. The claimant settled the primary claim on the basis of a 22.5% permanent partial disability to the left knee. The Second Injury Fund claim was settled on the basis of a pre-existing disability of 16% permanent partial disability to the right shoulder, 20% permanent partial disability to the right elbow, 20% permanent partial disability to the neck and 15% permanent partial disability to the left shoulder. See Exhibit A.

On September 15, 2000, the claimant injured his arms at work and was diagnosed with bilateral epicondylitis and bilateral carpal tunnel syndrome. He settled his workers' compensation claim on the basis of a 15% permanent partial disability to each elbow and an additional 10% for multiplicity. See Exhibit A, Injury No. 00-118804.

On June 5, 2001, the claimant suffered a work related injury to the left groin and left shoulder from pushing on truck bodies. See Exhibit A, Injury No. 01-058556. From June 5, 2001, to August 9, 2001, the claimant received medical advice from Unity Corporate Health for a bilateral groin strain. See Exhibit I. On September 18, 2001, Dr. Michalik examined him for left inguinal pain and assessed the claimant with bilateral inguinal hernias. See Exhibit E. On December 19, 2001, Dr. Enkvetchakuhl diagnosed left inguinal hernia and stated "No hernia on the right." See Exhibit J (12/19/2001 visit.) On December 21, 2001, Dr. Bennett examined the claimant and stated, "His left groin was hurting him, and he saw at least four doctors over the past six months. He finally has been diagnosed with a left inguinal hernia. ... His examination shows a reducible, left inguinal hernia. ... In my opinion, he has a left inguinal hernia." See Exhibit H. Dr. Bennett surgically repaired the hernia on January 2, 2002. See Exhibit H.

He also complained of neck and left shoulder pain to Dr. Enkvetchakuhl. He was seen by Dr. Boland his prior treating physician and surgeon. Dr. Boland diagnosed a C5-6 disc herniation based on an October 16, 2001 MRI. He recommended continued follow-up on February 11, 2002. In July 2002, he ordered physical therapy. See Exhibit L. The workers' compensation claim was settled on the basis of a 12.5% permanent partial disability to the body as a whole and stated that the "settlement includes any injuries to the neck/left shoulder through date of settlement". The primary settlement did not indicate an apportionment or designate whether it was for the left inguinal hernia or for the neck and left shoulder. The Second Injury Fund claim was settled reciting primary injury liability of "12.5% BAW (neck)." The Second Injury Fund settlement listed prior disability of 22.5% of the left knee, 16% of the right shoulder, 20% of the right elbow, 20% body as a whole neck and 15% of the left shoulder. See Exhibit A.

Based on the multiple workers' compensation settlements the claimant suffered the following permanent partial disabilities before May 2003:

Permanent Partial Disability	Weeks
32.5% of the neck	130
22.5% of the left knee	36
16% of the right shoulder	37.12
15% of the left shoulder	34.8
35% of the right elbow	73.5
15% of the left elbow	31.5
20% of the left thumb	12
7.5% of the groin (left side)	30
Total	384.92

In summary, the claimant has three herniated discs in his cervical spine, and two of them have been surgically repaired. He has had multiple surgeries and diagnoses to his upper

extremities with additional surgery recommended but declined by claimant. He has had surgery to his left knee. He has had surgery for first the left and then a right inguinal hernia. The claimant had substantial pre-existing permanent partial disabilities before May 2003.

At the time of the May 2003 injury, the claimant was a 58 year old commercial spray painter for this employer at the time of the injury and had worked for this employer from 1981 through June 2003, priming, painting, caulking, and undercoating truck bodies that were placed on telephone company service trucks. The work was full time at least eight hours per day and forty hours per week. The truck bodies weighed about 2000 pounds. He was required to forcefully push and pull on the bodies to position them and move them from cradles to dollies and hold them in position while they were chocked. Usually other employees assisted in maneuvering and positioning the truck bodies. He used mechanical hoists to lift the truck bodies. He operated paint guns, caulking guns, and undercoating guns throughout his shift. This work was hand and arm intensive, repetitive, and required forceful grasping and operation of the guns. See Exhibit Z.

The claimant testified that he had ongoing problems that he has had over the course of his career and specifically from 1974 through the 2003 work injury from the multiple disabilities and prior injuries discussed above. He testified that the multiple injuries to his upper extremities made it increasingly difficult in a cumulative way for him to perform his work. His neck injuries complicated and exacerbated the multiple problems with his arms, hands, elbows, and shoulders through the time of the primary injury. His knee injury significantly diminished his ability to stand, walk, squat, or kneel or remain on his feet for any length of time. The claimant testified that his inguinal hernias significantly limit his lifting. The claimant testified that he only attempts to lift perhaps 15 pounds. He can stand for only about 10 minutes. He can walk a few blocks. He can sit for perhaps an hour. He can't bend, squat, kneel, or arise from a kneeling or squatting position without pulling himself up on something. He no longer drives long distances. He has neck and left arm pain. He has numbness and tingling in his hands and fingers. He drops items that he is trying to grasp or hold. He has difficulty going up steps. He complained to the vocational expert and examining physician of interrupted sleep. He said he spent most of his time in a recliner when interviewed by Mr. England. He has an 8th grade education and no other formal vocational training. He does not have a GED. He has been employed in laboring and factory jobs throughout his adult life.

James M. England

James England, a certified vocational counselor, interviewed and evaluated the claimant on January 18, 2006. He reviewed medical records and administered vocational testing revealing that the claimant scored at the 6th grade level in reading and 5th grade level in math. He reviewed his vocational history and opined that the claimant had no transferable skills at the sedentary or light level. Based on Dr. Poetz' restrictions and restrictions suggested by earlier examining physicians, he opined that the claimant was able to function at less than a full range of sedentary or light activity and was functioning at only an elementary school level academically. He opined that the claimant is permanently and totally disabled due to the combination of his physical problems and his poor academics and limited formal education. See Exhibit D.

COMPENSABILITY

The claimant has the burden to establish that he has sustained an injury by accident arising out of and in the course of her employment, and the accident resulted in the alleged injuries. Choate v. Lily Tulip, Inc., 809 S.W.2d 102, 105 (Mo.App. 1991).

Claimant must establish a causal connection between the accident and the injury. Claimant does not, however, have to establish the elements of her claim on the basis of absolute certainty. It is sufficient if she shows them by reasonable probability. "Probable means founded on reason and experience which inclines the mind to believe but leaves room for doubt." The Commission's awards on disability claims are not solely dependent on medical evidence given by expert witnesses, but its findings are to be judged on the basis of the evidence as a whole. The testimony of the claimant, or other lay witnesses, as fact within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of the disability, especially when taken in connection with, or where supported by, some medical evidence. The Commission is authorized to base its findings and awards solely on the testimony of the claimant; her testimony alone, if believed, constitutes substantial evidence. Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 198, 199 (Mo.App. 1990).

Where the performance of duties of an employee leads to physical breakdown or a change in pathology, the injury is compensable. Wolfgeher v. Wagner Cartage Service, 646 S.W.2d 781, 784 (Mo. banc 1983). However, there are statutory limitations on compensability:

An injury is compensable if ... work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor. ... Ordinarily, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment. An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent ... that the employment is a substantial factor in causing the injury; and
- (b) It can be seen to have followed as a natural incident of the work; and
- (c) It can be fairly traced to the employment as a proximate cause; and
- (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. Section 287.020, RSMo 1994.

At the hearing, the claimant testified that that he "felt something pop" in his right groin when he was pushing a motor vehicle body at work in May 2003. The claimant also testified in his deposition to a popping incident that occurred in his paint booth while lifting bodies. See

claimant deposition, page 74. The claimant's forensic medical expert testified that the claimant had a pre-existing groin strain from 2001 that became an inguinal hernia in May 2003 and that his work as a commercial painter was a substantial factor causing the claimant's hernia and resulting disability.

The defense argues in its brief that the claimant's forensic expert's findings are inconsistent with the claimant's testimony and that the claimant's right-sided hernia did not occur at work in May 2003, but actually occurred at the time of the claimant's left inguinal hernia in 2001:

Claimant has not met his burden of proving he sustained a compensable work related injury in May 2003. Claimant testified twice, in his deposition and at hearing, that he had a specific popping incident in his right groin in May of 2003. There is nothing in any of the treatment records to substantiate a specific incident which caused a hernia. Claimant's rating doctor, Dr. Poetz, did not have a history of a specific incident, but instead rated a repetitive trauma injury. However, he was unaware that claimant had been previously diagnosed with a right hernia, nor was he aware that claimant's problems with his right hernia continued to worsen after he left Steelweld in 2003. According to Dr. Michalik's records, the claimant has had a right inguinal hernia since 2001. That hernia continued to worsen, increasing in size, over the subsequent 4 years. Claimant himself testified that his right hernia continued to worsen between 2003 and the time of his surgery in 2004. See defense brief.

The medical history contains some inconsistent evidence submitted by the parties. The claimant's testimony that he developed a right inguinal hernia from a sudden pop is inconsistent with most of the medical records. The claimant also testified that the right hernia occurred in 2001 and that the left hernia occurred in 2003. The evidence suggests that the medical records are more indicative of the actual medical history than the claimant's testimony. On the other hand, Dr. Poetz' medical history is consistent with the vast majority of the medical records. The defense points out that there are one or two medical entries showing a right inguinal hernia in 2001. The first is a hand written note from September 18, 2001, in which Dr. Michalik examined the claimant for left inguinal pain and made an "assessment" of bilateral inguinal hernias. See Exhibit E. However, this is inconsistent with the weight of the other medical records showing that the claimant had a bilateral groin strain that developed into an inguinal hernia on the left side. Significantly, the operating surgeons found an inguinal hernia on the left side and surgically repaired the condition. It is also counter intuitive that the claimant would perform a heavy labor intensive position for many months without having the condition surgically repaired. The other entry suggesting that the claimant had a history of a right inguinal hernia in 2001 is from Dr. Michalik who surgically repaired the right hernia with mesh on October 15, 2004. He listed a medical history: "The patient is a 59 year-old-male with a known right inguinal hernia over the past four years. It is slowly increasing in size and is occasionally hurting." See Exhibit F. The operative note does not state the source of his medical history, however the prior medical records are far more reliable than the claimant's verbal history in this case. In fact, one of the claimant's treating physicians, Dr. Enkvetchakuhl, diagnosed left inguinal hernia and stated "No hernia on the right" on December 19, 2001. See Exhibit J (12/19/2001 visit.)

Dr. Cantrell, the defense forensic medical expert, opined that the hernia was not a sudden event, but was a progressive disorder unrelated to the claimant's work for this employer. Dr. Poetz' theory is that the claimant's work was a series of events happening suddenly and violently that was a substantial factor causing the hernia. Certainly under the law after August 2005, Dr. Poetz' theory might be inconsistent with Missouri Law. However, this case is governed by the law before August 2005 and based on the weight of the credible evidence, the claimant has met his burden of proving that he sustained a compensable right inguinal hernia from his work and that the resulting disability is compensable.

SECOND INJURY FUND

"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. 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).

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 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. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 48 (Mo.App. W.D. 2007).

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, RSMo 1994, contains four distinct steps in calculating the compensation due an employee, and from what source:

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 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).

Based on the evidence as a whole, the claimant suffered 7 ½% permanent partial disability from his right-sided hernia in May 2003. Mr. England's finding that the claimant is unemployable in the open labor market and therefore permanently and totally disabled as of January 18, 2006, is unchallenged. Dr. Poetz opined that the claimant was permanently and totally disabled as of his examination on January 21, 2005, due to his multiple physical impairments. None of the evidence supports a finding that the claimant was permanently and totally disabled solely as a result of his 2003 inguinal hernia on the right.

The defense denies liability arguing (1) that the claimant is permanently and totally disabled due to a deterioration of the claimant's other disabilities and (2) that the claimant's right inguinal hernia does not pose any restrictions that contribute to the other disabilities that are severe and progressive. Looking to the first proposition, the claimant testified that his pre-existing permanent partial disabilities relating to his neck and knees had deteriorated after this accident. See claimant deposition, pages 82, 100-102. At the time of the deposition, the claimant couldn't "hardly walk, it hurts when I walk for a long distance." See claimant deposition, page 102. He testified that his neck condition has gotten worse each year. See claimant deposition, page 82. According to the claimant's testimony, the claimant's work required him to be on his feet constantly, and it is difficult to conclude that he could have performed the work if he could not walk. This suggests that his preexisting permanent partial

disabilities substantially deteriorated after the claimant's May 2003 hernia and before Dr. Poetz examined him in January 2005. This may explain why the claimant's work substantially exceeded Dr. Poetz' restrictions regarding standing and walking and why the permanent partial disability found by Dr. Poetz substantially exceeded that reflected on the workers' compensation settlements in evidence and approved by the Division of Workers' Compensation. See Dr. Poetz deposition, pages 42, 43.

In addition, Dr. Poetz testified that the claimant "is permanently and totally disabled as a direct result of his September 15, 2000, May 1, 2003, and June 4, 2003, work-related injuries combined with his pre-existing injuries and educational background." See Dr. Poetz deposition, page 26. In his report, he opined that the claimant suffered a herniated nucleus pulposus C5-6 with left cervical radiculopathy on June 4, 2003, from repetitive trauma at work and had 25% permanent partial disability to his cervical spine directly resulting from the occurrence. See Dr. Poetz medical report attached to Dr. Poetz deposition. Based on Dr. Poetz' conclusions, the claimant's permanent total disability resulted from a severe neck injury after the date of this injury combined with the claimant's extremely severe pre-existing permanent partial disabilities. A 25% permanent partial disability to the cervical spine seems to be a severe disability that Dr. Poetz contends was an important element of the cause of the claimant's permanent total disability. A herniated nucleus pulposus in the claimant's neck would seem to be a much more severe disability than a hernia for which the claimant testified that he had no restrictions resulting from the hernia. In addition, the claimant testified that his condition has deteriorated every year and Dr. Poetz examined the claimant in December 2005. Total disability preventing reasonable employment must be more than post-accident worsening of pre-existing disabilities.

In a Second Injury Fund case, proof of the condition is not proof of causation. By unambiguous language, the legislature has imposed potential liability on the Second Injury Fund for claimants who, "at the time of the last injury," had some partial disability. § 287.220.1, RSMo Supp.1987. The ALJ or Commission is to consider the "degree ... of employee's disability that is attributable to all injuries or conditions *existing at the time the last injury was sustained....*" By her argument the claimant would have us expand § 287.220.1 to impose liability for any worsening of a claimant's pre-existing disability occurring after the last injury was sustained without regard to whether the last injury contributed to or aggravated the pre-existing condition. This we decline to do. Such interpretation would not promote the purpose of the Second Injury Fund. The Second Injury Fund provides compensation for previously existing disabilities, not increased disabilities caused by post-accident worsening of pre-existing diseases when that worsening was not caused by or aggravated by the last injury. The view urged by the claimant would convert the Second Injury Fund to a form of health insurance which it is not. Lawrence v. Joplin R-VIII Sch. Dist., 834 S.W.2d 789, 793 (Mo.App. S.D. 1992)

Based on the evidence submitted, the claimant's permanent total disability resulted from substantial pre-existing permanent partial disabilities and deterioration of those pre-existing after the date of injury and a subsequent, very substantial permanent partial disability to the claimant's cervical spine.

The defense's second argument is that the claimant's right inguinal hernia does not pose any restrictions that contribute to the other disabilities that are severe and progressive. The evidence supporting that position is substantial. First, the claimant testified at the hearing that he believed he could not go back to work due to problems with his hands, arms, neck, and legs but did not mention his hernia. Second, he testified in his deposition that he had no restrictions regarding his hernia. See claimant deposition, page 85. Third, Mr. England had no medical records in his file regarding the claimant's right hernia, and the claimant never mentioned an injury to his right inguinal hernia to Mr. England nor gave him a history of any ongoing complaints due to his right inguinal hernia. See England deposition, pages 36, 37, 41, 46. Fourth, Dr. Michalik, the operating surgeon, showed no permanent restrictions in his records. See Exhibit E. His last note, dated December 28, 2004, states "no pain." See Exhibit E. Fifth, the claimant reported to Dr. Cantrell that after his hernia surgery he had no ongoing difficulty other than infrequent transient pain in his groin. See Dr. Cantrell medical report 6/27/07. Finally, Dr. Poetz reported that the claimant's complaints, limitations, or restrictions from both surgeries were "numbness from my right hernia and my pain has increased since I've been off work." See Dr. Poetz deposition, page 44. The conclusion from that evidence is that the claimant's complaints, limitations, and restrictions from his right hernia were minimal, may have been in effect since the prior hernia on the left side in 2001, and pale in consideration of the immense pre-existing conditions that deteriorated after he stopped working. The claimant's minimal complaints, limitations, and restrictions from his right hernia were not a factor causing the claimant's total disability.

In reviewing the claim, the claimant is not eligible for an award for additional permanent partial disability from the Second Injury Fund, because the disability from the last injury alone does not meet the statutory threshold.

Based on the weight of the credible evidence, the claim against the Second Injury Fund is denied for the reasons stated above.

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