

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

Injury No.: 02-106127

Employee: James Matthews  
Employer: City of St. Ann (Settled)  
Insurer: Self-Insured (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: September 27, 2002  
Place and County of Accident: County of St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 19, 2004. The award and decision of Administrative Law Judge Edwin J. Kohner, issued November 19, 2004, 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 29<sup>th</sup> day of March 2006.

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: James Matthews Injury No.: 02-106127

Dependents: N/A Before the  
**Division of Workers'**  
Employer: City of St. Ann (Settled) **Compensation**  
Department of Labor and Industrial  
Additional Party: Second Injury Fund Relations of Missouri  
Jefferson City, Missouri  
Insurer: Self-Insured (Settled)  
Hearing Date: October 13, 2004 Checked by: EJK

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 27, 2002
5. State location where accident occurred or occupational disease was contracted: County of St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Self-Insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
The employee, a municipal building inspector, suffered a cervical and lumbar strain and contusion to his head when he fell after his stool broke.
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: Head, neck, and low back
14. Nature and extent of any permanent disability: 10% of the body as a whole referable to the neck and low back
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$2,091.96

Employee: James Matthews Injury No.: 02-106127:

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$788.46
19. Weekly compensation rate: \$525.60/\$340.12
20. Method wages computation: By agreement

### COMPENSATION PAYABLE

21. Amount of compensation payable:

Settled

22. Second Injury Fund liability: Yes No

Permanent total disability benefits from Second Injury Fund:  
weekly differential (\$185.48) payable by SIF for 40 weeks beginning  
December 5, 2002, and, thereafter, \$525.60 for Claimant's lifetime      Unknown

TOTAL:      Unknown

23. Future requirements awarded: As above.

Said payments to begin as of December 5, 2002, 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: Cynthia M. Hennessey

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	James Matthews	Injury No.:	02-106127
Dependents:	N/A	Before the	
	<b>Division of Workers'</b>		
Employer:	City of St. Ann (Settled)	<b>Compensation</b>	
		Department of Labor and Industrial	
Additional Party:	Second Injury Fund	Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Self-Insured (Settled)		
Hearing Date:	October 13, 2004	Checked by:	EJK

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a municipal building inspector, suffered a cervical and lumbar strain and contusion to his head when he fell after his stool broke. The issues for determination are (1) Permanent disability and (2) Second Injury Fund liability. The evidence compels an award for the claimant for permanent total disability benefits from the Second Injury Fund.

At the hearing, the claimant testified in person and offered depositions of James M. England, Jr., and Raymond F. Cohen, D.O., a workers compensation settlement with the employer in this case, and various medical records. The defense offered depositions of Bernard C. Randolph, M.D., and Raymond F. Cohen, D.O.

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 was alleged to have occurred in Missouri.

### SUMMARY OF FACTS

This sixty-eight year old claimant is a high school graduate, and was in the service from 1954 to 1957. He was a police officer until he injured his right wrist. He was forced to leave the police department, because he was unable rotate his wrist and unable to fire a weapon. In 1987, he began employment with this employer as a municipal building inspector. On September 27, 2002, while working as a housing inspector for this employer, the claimant suffered an injury at work when a stool broke. He fell forward, struck his head, and landed on his buttocks. The next day, he sought care at Concentra for his neck, shoulder, and low back. His left hand also began shaking considerably the day after his fall. The claimant worked, regular duty full-time as a building inspector after his fall in September 2002 until May 2003. At that time, his employer offered a retirement package

of health insurance for both him and his wife until he reached the age of seventy, which the claimant accepted. Because of his financial situation, the claimant's daughter got him a job at the auto dealership where she worked in a position created for him to accommodate his disabilities. His duties there were to watch cameras and notify the police if anyone attempted to steal any cars. This job was created for the claimant. He was unable to keep that job because of pain and he could not get comfortable.

### 2002 Accident at Work

After the fall on September 27, 2002, the claimant felt pain into his right shoulder. The next day, he sought treatment at Concentra for his neck, shoulder, and low back. His left hand was visibly shaking, and he testified that it never shook that badly before the accident. The claimant's neck condition got worse after the accident. He consulted Dr. Raskas and Dr. Guarino. He had injections in his neck, and does not recall ever having treatment for his neck before. He never received injections in his low back before the accident. His back now hurts almost everyday, however, and he has numbness into his buttocks.

The claimant testified that since the September 2002 injury, his headaches begin in the back of the neck and move to the front. He also testified that the pain is at a level of a 7-8, approximately twenty to twenty-five times per month, and that the pain is constant. When the pain in his neck flares up, it is at a higher pain scale than 7-8.

During the claimant's initial physical therapy on February 27, 2003, the claimant reported pain on the right side of his neck and behind his right ear, a catch on the right side of his low back, difficulty sleeping, and increased pain with movement. See Exhibit C10.

On February 3, 2003, Dr. Raskas examined the claimant and took a medical history that the back pain was down to an "occasional catch, which is not really much of a problem," but that the pain in the posterior neck area was most bothersome. See Exhibit C11. The neck pain radiated up to the back of his head. See Exhibit C10. The claimant felt that his handwriting and hand coordination got worse after the February 2002 event. See Exhibit C11. The only thing that he reported that relieved the pain was alcohol. See Exhibit C11.

On February 27, 2003, Dr. Guarino examined the claimant and took a history that he was in a "regular state of health with minimal to no neck pain until 9/27/02." See Exhibit C14. He informed Dr. Guarino, "his problems began at that time." See Exhibit C14. At this point, the claimant had been through six to eight weeks of physical therapy, which did not help. See Exhibit C14. The claimant also reported that the pain in his neck radiated into his shoulder and blade on the right. See Exhibit C14. His pain at this point was eight out of ten at best and nine out of ten at worst. See Exhibit C14. He reported that irritability and light sensitivity are associated with his pain. See Exhibit C14. He reported poor sleep secondary to pain. See Exhibit C10. A facet injection at C2-3 resulted in a partial reduction of pain. See Exhibit C14.

Beginning about one month after the 2002 accident, the claimant suffered from tremors and underwent an MRI to determine the cause of his tremors, but the MRI showed no significant abnormality. See Exhibits C10, C13. On February 16, 2003, the claimant reported to Dr. Schultz that he suffered from mini-strokes, but these "had no effect on him." See Exhibit C13. Dr. Schultz also noted that the claimant's memory was clear. See Exhibit C13. After this examination, Dr. Schultz determined that the claimant's tremor was likely due to Amiodarone. See Exhibit C13. The claimant began taking Amiodarone in November 2002, after the 2002 accident. See Exhibit C13.

### Preexisting Conditions

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#### Neck and Low Back

The claimant testified that while serving in Korea, he went to a military hospital with headaches after a truck accident, and still has headaches. He also testified that in the mid-1970's, he was ill, went to a hospital, and received a lumbar puncture to test for meningitis. He testified that his lower back had been in pain since then, and

that he received chiropractic treatment. Any medical records about these alleged events would seem to be unavailable, because the alleged occurrences were many years ago. However, the claimant did not report this history of headaches or low back pain to Dr. Cohen, Dr. Randolph, or Mr. England, his vocational expert. Dr. Cohen did not rate any preexisting permanent partial disability relative to a history of headaches or low back pain. Instead, he testified that the claimant had preexisting asymptomatic degenerative joint disease at the neck and low back. See Dr. Cohen deposition, page 13. Dr. Cohen testified that the claimant had no prior history of any problems in his spine before the primary work injury. See Dr. Cohen supplemental deposition, page 4. Dr. Cohen rated the claimant's permanent partial disability referable to his degenerative disc disease at two percent of the cervical spine and two percent of the lumbar spine. See Dr. Cohen deposition, page 13. Dr. Randolph rated the claimant's preexisting degenerative disease and arthritis at three percent of the cervical spine and three percent of the lumbar spine. See Dr. Randolph deposition, page 15.

#### Right Wrist

In 1975, the claimant fell off a horse, suffered a severe completely displaced fracture of the distal radius in his right wrist, and underwent a closed reduction. See Exhibit C4. In March 1976, Dr. Frumson rated the permanent partial disability at twenty-one percent of the right wrist. See Exhibit C4. Mr. Matthews can no longer supinate the right wrist, and he uses his left arm for most activities. See Dr. Cohen deposition, page 9. Dr. Cohen rated the permanent partial disability at the right wrist at thirty percent with no restrictions. See Dr. Cohen deposition, page 13.

#### Heart and TIA's

The claimant was a "blue baby," born with a hole in his heart. See Dr. Cohen deposition, page 9. The claimant has had a surgical procedure to fix this hole. See Dr. Cohen deposition, page 9. Before he had this surgery, he had shortness of breath while he was in track in high school. See Dr. Cohen deposition, page 9. He testified that he always had problems with shortness of breath. He also had difficulty doing things like climbing stairs. See Dr. Cohen deposition, page 9.

In June 1996, the claimant went to the emergency room reporting two episodes of transient numbness involving the right arm and right side of his face, and difficulty expressing himself. See Exhibit C5. The exam at that time showed that he was alert, fully oriented, speech clear and appropriate with no evidence of any aphasia or dysarthria. See Exhibit C5.

Dr. Penilla prescribed coumadin and followed the claimant very closely with regard to the TIA. See Exhibit C9. On May 21, 2002, Dr. Penilla reported that the claimant had done very well without any recurrent neurological events. See Exhibit C9. Dr. Penilla also reported that the claimant was asymptomatic and active, and was still working as long as 10-12 hours a day. See Exhibit C9. The past medical history at this time listed chronic headaches, hypertension, and arthritis in the toes. See Exhibit C5. There was no history noted of back pain, shoulder pain, or difficulty sleeping. The claimant testified that he has had problems remembering things since the TIA's. His wife also testified that he had problems with memory after the TIA's and before the primary injury. Dr. Cohen gave no restrictions relative to the cardiac condition, mini strokes, or TIA's but rated the cardiac disorders at twenty-five percent of the body as a whole. See Dr. Cohen deposition, page 13.

#### Right Elbow

While working as a police officer, the claimant fell while chasing a suspect, fractured his right elbow, and underwent a closed reduction for that injury. See Dr. Cohen deposition, page 9. Dr. Cohen rated the permanent partial disability at the right elbow at twenty percent with no restrictions. See Dr. Cohen deposition, page 13.

#### Left Ankle

The claimant had a closed reduction on his left ankle because of a fracture he experienced while stepping

into a hole. See Dr. Cohen deposition, page 9. He currently experiences pain in the posterior aspect of the left ankle. See Dr. Cohen deposition, page 9. He testified that he also experiences swelling. In August of 1975, Dr. Frumson noted that the ligaments in the ankle appeared stable. See Exhibit C4. Dr. Cohen rated the claimant's permanent partial disability of the ankle at twenty percent and gave no restrictions relative to the left ankle. See Dr. Cohen deposition, page 13.

### Left Knee

The claimant testified that he fell off of a horse in the 1970's and fractured his left leg. In August 1975, Dr. Frumson reported that the ligaments in the knee appeared stable. See Exhibit C4. In August 1998, the claimant slipped while going down some stairs twisting left knee sideways as his other leg slipped down a few stairs. See Exhibit C2. The claimant noted immediate pain over the medial and inferior portion of his left knee but did not feel any popping sensation. See Exhibit C2. His knee swelled, and he treated it with ice and elevation. See Exhibit C2. An x-ray revealed no fractures or dislocation. See Exhibit C2. The claimant reported that any weight-bearing activity causes pain, but ice, elevation, pain medications, and taking weight off of the knee help relieve the pain. See Exhibit C2. The claimant denied any prior pain or injuries to his knees. See Exhibit C2. The claimant underwent an MRI, which revealed a medial collateral ligament tear, possible tear, or laxity of the medial retinaculum and a large joint effusion. See Exhibit C2. The claimant received medication and physical therapy. See Exhibit C2. In November 1998, he was released to work full duty. See Exhibit C2. The claimant testified that his left knee pain caused him difficulty bending, stooping, and getting in and out of his car. Dr. Cohen reported that the claimant has constant pain in the knee, which is increased with kneeling, standing, or stooping. See Dr. Cohen deposition, page 10. Dr. Cohen rated the permanent partial disability of the knee at thirty percent and gave no restrictions relative to the left knee. See Dr. Cohen deposition, page 13.

### Depression

The claimant testified that he had emotional problems after he left the police force. He did not want to leave the force, but felt that he had to because of his wrist injury. This caused some emotional problems and depression. The claimant's spouse testified that the claimant was depressed after he left the police force, but that he was not depressed while he was employed. The medical records revealed no findings or clue of clinical depression before the 2002 accident.

### Other Conditions

In addition, the claimant testified that he suffered from preexisting conditions in his right shoulder, right knee, and right ankle for which the forensic experts found no preexisting permanent partial disability. Each condition will be discussed briefly.

In January 1997, the claimant slipped on some icy stairs while inspecting a building landing on his outstretched right hand. See Exhibit C3. He experienced shoulder pain, and x-rays revealed significant degenerative arthritis. See Exhibit C3. In September 1997, Dr. Emmanuel, reported that the claimant had difficulty sleeping on his right shoulder, decreased range of motion, and pain with his arm in an overhead fashion. See Exhibit C3. Dr. Emmanuel performed an injection in September 1997. See Exhibit C3. There was no evidence of any further treatment of that shoulder injury. The claimant testified that before the 2002 injury, his shoulder hurt so badly that he could not sleep at night. None of the forensic experts commented on this condition. After the claimant injured his left knee, he testified that he used his right knee more, and that as a result he experienced right knee pain. Dr. Cohen did not note right knee pain, nor did he provide a rating for the right knee. In 1969, the claimant fractured his right ankle, which was treated with a cast, and healed well according to x-rays. See Exhibit C4. By 1975, He had degenerative arthritis with nearly full range of motion. See Exhibit C4.

### Dr. Cohen

On October 22, 2003, Dr. Cohen examined the claimant and took a medical history that as a result of the September 2002 injury, the claimant had pain in his neck, right ear, right shoulder and low back. See Dr. Cohen deposition, page 8. He also subsequently developed a tremor. See Dr. Cohen deposition, page 8. The claimant denied any prior similar complaints. See Dr. Cohen deposition, page 8. In reviewing medical records, Dr. Cohen

noted that the claimant had no prior history of any problems in his spine before the September 2002 work injury. See Dr. Cohen supplementary deposition, page 4. The claimant reported that since hitting his head at work, he has had some memory loss, he is frequently irritable, and he becomes drowsy quite easily. See Dr. Cohen deposition, page 8. The claimant also reported that since the accident, he has pain in his neck and low back, and that if he has to get down on his hands and knees, he needs help getting up. See Dr. Cohen deposition, page 8. Since the accident, he can no longer do any heavy lifting, has a constant pulling like sensation in the neck, and headaches three to four times a week. See Dr. Cohen deposition, page 8. His headaches begin in the cervical spine and radiate up to the head. See Dr. Cohen deposition, page 8. Finally, since the accident, the claimant takes Celebrex, which helps him sleep and reduce the pain somewhat. See Dr. Cohen deposition, page 8.

Dr. Cohen opined that the claimant had several preexisting permanent partial disabilities: thirty percent of the right wrist, twenty percent of the right elbow, thirty percent of the left knee, and twenty-five percent of the body as a whole referable to the claimant's cardiac disorders. See Dr. Cohen deposition, page 13. He opined that these disabilities combined with the primary work-related injury to create a greater overall disability than their simple sum and that his preexisting conditions or disabilities were a hindrance or obstacle to his employment or his reemployment. See Dr. Cohen deposition, page 13.

Relative to the September 2002 injury, Dr. Cohen diagnosed multiple trauma, including cervical and lumbar myofascial pain disorder, and aggravation of his preexisting but clinically asymptomatic degenerative joint disease of cervical and lumbar spine. See Dr. Cohen deposition, page 11. He also diagnosed headaches secondary to the neck injury. See Dr. Cohen deposition, page 11. Dr. Cohen testified that the September 2002 injury was a substantial factor in his disability, and that the claimant had a twenty percent permanent partial disability of the cervical spine, and a twenty percent permanent partial disability to the lumbar spine. See Dr. Cohen deposition, page 12. As a result of the 2002 accident, Dr. Cohen restricted the claimant from any type of work in which he has to do any bending, lifting, stooping, or twisting, and from lifting more than five to ten pounds. See Dr. Cohen deposition, page 12. Dr. Cohen testified that the claimant is permanently and totally disabled from his prior employment as a building inspector or any type of labor work, but that it is possible that he could be employed in a sedentary occupation. See Dr. Cohen deposition, page 4.

#### Dr. Randolph

Dr. Randolph examined the claimant three times between October 31 and December 5, 2002, and took a prior medical history of preexisting arthritis of multiple parts of the body, knee injuries, chronic shoulder problems, right wrist fracture, hypertension, cerebral vascular disease, pneumonia, cholecystectomy, abdominal hernia repair, and cardiac surgery. See Dr. Randolph deposition, pages 6-7. He did not report headaches, problems sleeping, or depression. Dr. Randolph diagnosed strain injuries to the cervical and lumbar spine and contusion to his head relative to the September 2002 injury. See Dr. Randolph deposition, page 10. He opined that the claimant was capable to return to work full duty. See Dr. Randolph deposition, pages 10-11. Dr. Randolph rated the claimant's permanent partial disability relative to his September 2002 work injury at one percent of the cervical spine and one percent of the lumbar spine. See Dr. Randolph deposition, page 15.

#### Mr. England

Mr. England evaluated the claimant on July 12, 2004 and testified that the claimant seemed tired and depressed, and that he cried several times. See England deposition, page 8. The claimant's primary physical complaint was the pain in his neck and low back. See England deposition, page 10. He had to change positions a lot during the day, and intermittently would recline for pain control. See England deposition, page 10. The pain would go from his low back occasionally down into his right leg to about ankle level. See England deposition, page 10. He couldn't stay in one position very long, but he also had trouble being very active without increasing the pain. See England deposition, page 10. He also had complaints of headaches and knees, left more than right. See England deposition, page 10. The claimant reported that his sleep was broken up often by pain at night, that he was tired during the day, and that he has become more introverted because of his depression. See England deposition, page 14.

Mr. England opined that the claimant's inability to sit for more than about twenty minutes was due to the primary injury. See England deposition, page 20. Mr. England found no indication that the claimant had any emotional problems before September 2002. See England deposition, page 20. Dr. Cohen testified that the restrictions of no bending, lifting, stooping or twisting, and no lifting more than five to ten pounds were all restrictions related to the primary injury. See Dr. Cohen supplementary deposition, page 5. Mr. England testified that the claimant would be unemployable in the open labor market if he had restrictions of no bending, lifting, stooping, or twisting, and no lifting more than five to ten pounds, and if he had problems sleeping at night and trouble with his emotions. See England deposition, page 21.

### **RULINGS OF LAW**

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

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

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

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

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

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

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

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

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

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

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).

Relative to the September 2002 injury, Dr. Cohen diagnosed multiple trauma, including cervical and lumbar myofascial pain disorder, and aggravation of his preexisting but clinically asymptomatic degenerative joint disease of cervical and lumbar spine. See Dr. Cohen deposition, page 11. He also diagnosed headaches secondary to the neck injury. See Dr. Cohen deposition, page 11. Dr. Cohen testified that the September 2002 injury was a substantial factor in the claimant's disability, and that the claimant had a twenty percent permanent partial disability of the cervical spine, and a twenty percent permanent partial disability to the lumbar spine. See Dr. Cohen deposition, page 12. As a result of the 2002 accident, Dr. Cohen restricted the claimant from any type of work in which he has to do any bending, lifting, stooping, or twisting, and from lifting more than five to ten pounds. See Dr. Cohen deposition, page 12. Dr. Cohen opined that the claimant had several preexisting permanent partial disabilities: thirty percent of the right wrist, twenty percent of the right elbow, thirty percent of the left knee, and twenty-five percent of the body as a whole referable to the claimant's cardiac disorders. See Dr. Cohen deposition, page 13. He opined that these disabilities combined with the primary work-related injury to create a greater overall disability than their simple sum and that his preexisting conditions or disabilities were a hindrance or obstacle to his employment or his reemployment. See Dr. Cohen deposition, page 13. Dr. Cohen testified that the claimant is permanently and totally disabled from his prior employment as a building inspector or any type of labor work, but that it is possible that he could be employed in a sedentary occupation. See Dr. Cohen deposition, page 4. Dr. Randolph also examined the claimant and diagnosed strain injuries to the cervical and lumbar spine and contusion to his head relative to the September 2002 injury. See Dr. Randolph deposition, page 10. He opined that the claimant was capable to return to work full duty. See Dr. Randolph deposition, pages 10-11. Dr. Randolph rated the claimant's permanent partial disability relative to his September 2002 work injury at one percent of the cervical spine and one percent of the lumbar spine. See Dr. Randolph deposition, page 15. The claimant settled the claim against the employer in this case on the "basis of ten percent permanent partial disability to the body as a whole referable to the neck, shoulders, and low back." See Exhibit D.

The weight of the evidence supports a conclusion that the claimant sustained permanent disability from the accident and that the settlement with the insurer, approved by a legal advisor, is a credible conclusion that the claimant sustained a ten percent permanent partial disability from the 2002 accident. However, if the claimant became unemployable in the open labor market as a result solely of the last accident when combined with the claimant age, education, and past relevant work history, then this employer bears liability for permanent total disability benefits. This is so, because our law is, "If the employee's last injury in and of itself rendered the employee permanently and totally disabled, the Fund has no liability; the employer is responsible for the entire amount of compensation." Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 248 (Mo. banc 2003); Paul Birdsong v. Waste Management and Insurance Company of the State of Pennsylvania, et al., Slip Op. Case No. 25996 (Mo.App. S.D. October 26, 2004). "For this reason, pre-existing disabilities are irrelevant" if the last injury in and of itself rendered the claimant unemployable in the open labor market without regard to his preexisting permanent partial disabilities. Id.

The claimant in this case contends that the last injury in and of itself did not render the claimant unemployable in the open labor market without regard to his preexisting permanent partial disabilities. In order to prove that the claimant was totally disabled from any work due to a combination of preexisting and accident related permanent partial disabilities, the claimant submitted a prima facie case based on credible documentary and forensic evidence. A prima facie case is a case with legally sufficient evidence to support an award unless the evidence is disproved. The evidence that the claimant submitted is summarized as follows: Based on the settlement with the employer, the claimant suffered a ten percent permanent partial disability to the body as a whole from the work related accident. He retired with an insurance inducement from his employer eight months after the accident and testified that he could no longer do his job. Dr. Cohen testified that the claimant could not return to his prior position as a housing inspector.

With respect to the claimant's employability in the open labor market, Mr. England, a vocational expert, testified:

Q Mr. England, I believe you stated that Mr. Matthews' inability to do a job in the open labor market would be as a result of a combination of all of his preexisting conditions as well as in combination with the September 2002 injury; is that correct?

A I think that's correct.

Q Okay. So, that September 2002 injury in and of itself is not the sole cause of his inability to do any job?

A I don't think based on my understanding of his functioning, no because he had to give up a career before because of a hand injury. He had knee problems that over the years that, to favor his knees, then he started bending more; and it aggravated his back. I mean there were a lot of different things that happened to this man over time. And from what he described to me, it became more and more difficult even before the primary injury. Just doing things, like getting in and out of the car aggravated his back and knees, and that he was having difficulty just getting through the day even before the last injury was my understanding. See England deposition, pages 20, 21, 22.

As stated above, this constitutes a prima facie case for the claimant.

In its well-written brief, the defense argues two alternate contrary conclusions that the Second Injury Fund has no liability to the claimant. First, the defense argues that the claimant "is not employed because he simply chose to retire. According to his own rating doctor, his physical restrictions do not keep him from performing sedentary work. Mr. Matthews is not permanently and totally disabled." However, this conclusion is contrary to the conclusions of the sole vocational expert that testified. "I felt that considering his age, the combination of the impairments that he appeared to be experiencing, the problems it was giving him with a day-to-day functioning, I thought as a whole looking at his situation, I did not believe that he would be able to competitively sustain himself in a regular employment setting." See England deposition, pages 16, 17. Mr. England is a vocational expert, and his conclusion on this question appears to be supported by the weight of the evidence and based on the kinds of factors that vocational experts use to address employability. Therefore, the first defense argument is rejected, because it is not supported by the weight of the evidence.

The second argument offered by the defense is that the claimant's unemployability resulted solely from the claimant's age, education, past relevant work history, and the limitations and restrictions from the last accident only. If the defense argument is sustained, the Second Injury Fund bears no liability under the principles discussed above. To support its position, the defense cites a different portion of Mr. England's testimony. It argues that the claimant's sleep and emotional disorders resulted from the last accident alone:

Before the hearing, Mr. Matthews never made any preexisting spine complaints. The evidence shows that the pain that makes Mr. Matthews unable to sleep is from the primary injury. Mr. Matthews also testified that he had depressive symptoms before the primary injury. However, there are no records, which reflect that Mr. Matthews had any significant clinical depression. Even his wife testified that while he was working as a building inspector, he had no depressive complaints. Mr. Matthews never reported to Dr. Cohen or Mr. England that he was depressed or emotional before the injury in September of 2002. If Mr. Matthews is unemployable, it is because of his physical restrictions, his inability to sleep, and his depressive symptoms. All of these restrictions and complaints are due to the primary injury. Mr. Matthews' unemployability is due to the last injury alone. Defense Brief.

In support of this argument, Mr. England testified that the claimant is "probably not" employable in the open labor market if the claimant's "restrictions are no bending, lifting, stooping, or twisting, and not to lift more than five to ten pound, can't sit for more than twenty minutes, has problems sleeping at night and trouble with his emotions." See England deposition, pages 20, 21. Although the experts generally agree that the claimant developed these physical restrictions from the 2002 accident, the difficulty with this argument is that the defense included two additional vague conditions in its hypothetical question ("problems sleeping at night and trouble with his emotions") that are not pin pointed by the evidence as to medical history, diagnosis, prognosis, and etiology. Sleep disorders, emotional disorders, and depression are complicated conditions that are rarely subject to lay evaluation.

Mr. England did not have information to determine whether the claimant's "problems sleeping at night and trouble with his emotions" were a result of the accident or a preexisting condition. See Mr. England deposition, page 20. Neither medical expert, Dr. Cohen or Dr. Randolph, diagnosed or even mentioned the two conditions. The testimony from the claimant and his spouse and the medical records offer episodes of these conditions before and after the 2002 accident. The defense has not produced sufficient evidence to prove that the claimant suffered "problems sleeping at night and trouble with his emotions" as a result of the 2002 accident at work.

Thus, this aspect of Mr. England's testimony lacks foundation and relevance, and it is not probative of the

question at hand. Had the defense inquired whether the claimant was employable in the open labor market given his age, education, past relevant work history, and his restrictions of “no bending, lifting, stooping, or twisting, and not to lift more than five to ten pounds, can’t sit for more than twenty minutes,” (without regard to emotional or sleeping problems) an affirmative response would have secured a finding that the impact of the last accident was so severe that the claimant is unemployable solely from the last accident. From a lay perspective, one could surmise that the answer would be affirmative given the claimant’s age of sixty-eight years and his physical restrictions. However, this is speculation. Legal decisions should be based on the evidence, especially given the extensive forensic opinions of record in this case.

In order to analyze the evidence in this case, a detailed review of the facts of record is important to determine the legal implication of the claimant’s “problems sleeping at night and trouble with his emotions” with respect to the claimant’s claim for permanent total disability benefits. A decent respect for the rights of each party demands that these conditions be evaluated as the evidence portrays them. Mr. England addressed these two conditions in his interview with the claimant. However, neither of the medical experts identified a sleep disorder or emotional condition at all and did not identify either as a permanent partial disability. The conclusion from the evidence is that the claimant suffered episodes of these disorders both before and after the accident, but the evidence fails to show that they were permanent disorders or they met the threshold standards referenced in the statute to be “permanent partial disabilities of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed.”

Before the accident, the claimant’s loss of sleep appears to surface in the records regarding his shoulder injury in January 1997. See Exhibit C3. In January 1997, the claimant slipped on some icy stairs while inspecting a building landing on his outstretched right hand. See Exhibit C3. He experienced shoulder pain, and x-rays revealed significant degenerative arthritis. See Exhibit C3. In September 1997, Dr. Emmanuel, reported that the claimant had difficulty sleeping on his right shoulder, decreased range of motion, and pain with his arm in an overhead fashion. See Exhibit C3. Dr. Emmanuel performed an injection in September 1997. See Exhibit C3. There was no evidence of any further treatment of that shoulder injury. The claimant testified that before the 2002 injury, his shoulder hurt so badly that he could not sleep at night. None of the forensic experts commented on this condition. None of the other medical documentation discussed lack of sleep. Moreover, Dr. Cohen did not identify the sleeping disorder or the shoulder condition as a preexisting permanent partial disability. In addition, Dr. Cohen did not identify any sleeping, mood, or emotional disorders when he examined the claimant on October 22, 2003, about a year after the accident. When Mr. England interviewed the claimant in July 2004, he commented on sleeping and emotional disorders. Mr. England testified:

He was a really nice guy, very good personality; but at the same time, he came across as very tired. He appeared very depressed. He cried several times while he was here in the interview. Those were probably the most noticeable things that I made note of. See England deposition, page 8.

Looking at the emotional disorder, none of the other medical records identified the source of this condition, but the claimant testified that he suffered from an emotional disorder after he left the St. Louis Police Department in 1975. His spouse testified that the claimant has been depressed since he retired in May 2003. Evaluating the claimant after the accident on July 12, 2004, Mr. England testified that the claimant seemed tired and depressed, and that he cried several times. See England deposition, page 8. The claimant reported that his sleep was broken up often by pain at night, that he was tired during the day, and that he has become more introverted because of his depression. See England deposition, page 14. Thus, the condition surfaced before and after the accident, but the evidence does not identify the extent or permanency, if any, of the condition.

Section 287.220, RSMo 2000, places special legal importance on permanent partial disabilities of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. In order to consider the impact of these conditions, the law apparently requires a determination whether the conditions meet that level of impact. Given the evidence, the sleeping disorder and emotional disorder appear to be conditions that do not qualify as permanent partial disabilities of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. The claimant did not testify that the sleep and emotional disorders were of such seriousness to constitute a hindrance or obstacle to employment or to obtaining reemployment if he became unemployed. Based on their extensive experience and training, the forensic experts would certainly have so identified the conditions as

permanent partial disabilities of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, if the conditions met that criteria. Further, the record is unclear whether the claimant's sleep disorder and emotional disorder were permanent conditions or merely episodes in his life and is also unclear regarding their relationship to the depressed and exhausted affect described by Mr. England. From a lay perspective, the evidence presented fails to establish that the extent of the sleep disorder or emotional disorder either before the accident or after the accident and whether those disorders became permanent disabilities as opposed to episodes and transient conditions. Likewise, the evidence fails to sustain a finding that these conditions resulted from the accident, because the testimony and medical records disclose prior episodes of each.

While the undersigned might speculate otherwise, the evidence compels a conclusion that the claimant is permanently and totally disabled as a result of his permanent partial disability from the 2002 accident combined with his age of sixty-eight years, high school education, past relevant work history, and his preexisting permanent partial disabilities to his right wrist, right elbow, left knee, and cardiac disorders. This is based on the claimant's prima facie case discussed above, based largely on expert forensic medical opinion evidence. Therefore, the claimant is awarded permanent total disability from the Second Injury Fund.

Date: \_\_\_\_\_ Made by: \_\_\_\_\_

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

A true copy: Attest:

\_\_\_\_\_  
Gary J. Estenson  
*Acting Director*  
*Division of Workers' Compensation*