

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

Injury No.: 02-149305

Employee: Donald Mayse  
Employer: Jeff Honer Roofing (Settled)  
Insurer: Continental Western Insurance (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard oral arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated April 12, 2010. This Commission adopts the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the decision set forth below.

**Discussion**

The issues stipulated in dispute at trial were: (1) whether Missouri jurisdiction is proper in this matter; and (2) the nature and extent of Second Injury Fund liability, if any.

The administrative law judge determined and concluded that: (1) Missouri has jurisdiction of this case; and (2) that employee is permanently and totally disabled as a result of the work injury in combination with his preexisting disabling conditions. The administrative law judge ordered the Second Injury Fund to pay permanent total disability benefits to employee at a differential rate of \$28.37 per week for 176 and 3/7 weeks beginning November 7, 2003, and thereafter \$368.49 per week for employee's lifetime.

We agree with the administrative law judge that Missouri jurisdiction is proper and that employee is permanently and totally disabled due to a combination of his primary and preexisting injuries. We note, however, that the administrative law judge's conclusion that the Second Injury Fund is liable at the differential rate of \$28.37 per week for 176 and 3/7 weeks is contrary to her own findings with regard to the extent of permanent partial disability resulting from the last injury. We must address this discrepancy in order to make an appropriate calculation of permanent total disability benefits from the Second Injury Fund under § 287.220.1 RSMo. That section creates the Second Injury Fund and governs calculation of its liability and provides, in pertinent part:

After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last

Employee: Donald Mayse

- 2 -

injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" ...

Under the foregoing section, the administrative law judge is tasked with determining the extent of compensation for which the employer is liable as a result of the last injury considered alone. In this case, the administrative law judge determined (and we agree) that employee sustained a total of 30% permanent partial disability of the body as a whole, which amounts to 120 weeks of compensation, as a result of the last injury considered alone. In a case such as the one at hand, where the employee is permanently and totally disabled due to a combination of the primary and preexisting injuries, the next step under § 287.220.1 is to subtract the rates for permanent total and permanent partial disability to determine the "differential rate," for which the Second Injury Fund is liable during the time period that employer pays the compensation for which it is liable as a result of the last injury. Here, the differential rate is \$28.37. Under § 287.220.1, the Second Injury Fund is liable for the differential rate for each week that employer would theoretically pay permanent partial disability payments (120 weeks in this case), and thereafter for weekly payments at the full permanent total disability rate.

Rather than use the 120 weeks of compensation for which she found employer liable as a result of the last injury, the administrative law judge used the dollar amount of employee's settlement with employer (\$60,000) to find that the Second Injury Fund must pay the differential rate for 176 and 3/7 weeks. Where the fact-finder has determined the liability of the employer for the last injury, the amount of employee's settlement with employer is irrelevant for purposes of § 287.220.1.

We conclude that the Second Injury Fund is liable to employee for permanent total disability benefits beginning November 7, 2003, at the rate of \$28.37 for 120 weeks, and thereafter at the rate of \$368.49 per week for employee's lifetime or until modified by law.

### **Conclusion**

The Commission modifies that portion of the award of the administrative law judge with regard to calculation of Second Injury Fund liability.

Employee: Donald Mayse

- 3 -

The Second Injury Fund is ordered to pay employee permanent total disability benefits beginning November 7, 2003, at the differential rate of \$28.37 per week for 120 weeks. Thereafter, the Second Injury Fund is ordered to pay permanent total disability benefits at the rate of \$368.49 per week for employee's lifetime, or until modified by law.

All other findings of fact and conclusions of law are affirmed.

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

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

The award and decision of Administrative Law Judge Rebecca S. Magruder, issued April 12, 2010, as modified, is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award and decision herein.

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of January 2011.

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

## FINAL AWARD AS TO SECOND INJURY FUND ONLY

Employee: Donald Mayse Injury No. 02-149305  
Dependents: N/A  
Employer: Jeff Honer Roofing  
Insurer: Continental Western Insurance  
Additional Party: Missouri State Treasurer as Custodian for the Second Injury Fund  
Hearing Date: March 18, 2010 Checked by: RSM/pd

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: August 9, 2002
5. State location where accident occurred or occupational disease was contracted: Kansas
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: Claimant was rear-ended while stopped at a traffic signal in the course and scope of his employment.
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, psyche, body as a whole.

14. Nature and extent of any permanent disability: 30 percent permanent partial disability to the body as a whole as to Employer/Insurer; permanent total disability as to the Second Injury Fund.
15. Compensation paid to-date for temporary disability: \$4,421.88
16. Value necessary medical aid paid to date by employer/insurer? \$9,943.49
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$552.74
19. Weekly compensation rate: \$368.49/\$340.12
20. Method wages computation: By agreement.

### COMPENSATION PAYABLE

21. Second Injury Fund liability: Yes.  
Beginning November 7, 2003, \$28.37 per week (the difference between the permanent total disability rate of \$368.49 and the permanent partial disability rate of \$340.12) for 176-3/7ths weeks (the period of time the Employer would have paid permanent partial disability of \$340.12 under Missouri law as represented by their lump sum settlement of \$60,000) and thereafter \$368.49 per week for Claimant's lifetime.

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of Mr. Frank Eppright, Employee's attorney, for necessary legal services rendered.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Donald Mayse Injury No. 02-149305  
Dependents: N/A  
Employer: Jeff Honer Roofing  
Insurer: Continental Western Insurance Company  
Additional Party: Missouri State Treasurer as Custodian for the Second Injury Fund  
Hearing Date: March 18, 2010 Checked by: RSM/pd

On March 18, 2010, the employee and the Second Injury Fund appeared for a hearing. The employee, Mr. Donald Mayse, appeared in person and with counsel, Mr. Frank Eppright. The Second Injury Fund appeared by counsel, Ms. Kimberley Fournier. At that hearing, the parties stipulated to the following:

1. that on or about August 9, 2002, Jeff Honer Roofing was an employer operating under the provisions of the Missouri Workers' Compensation Law and that its liability under said law was fully insured by Continental Western Insurance Company;
2. that on or August 9, 2002 Donald Mayse was an employee of Jeff Honer Roofing and was working under the provisions of the Missouri Workers' Compensation Law;
3. that on or about August 9, 2002, Donald Mayse sustained an injury by accident arising out of and in the course of his employment;
4. that the Employer had notice of the injury and that a claim for compensation was filed within the time prescribed by law;
5. that the average weekly wage was \$552.74 and that the applicable compensation rate is \$368.49 for permanent total and temporary total disability benefits and \$340.12 for permanent partial disability benefits;
6. that compensation has been paid by the employer under Kansas law, for temporary total disability, in the amount of \$4,421.88, which represents 12 weeks paid at the rate of \$368.49 per week;
7. that medical aid has been furnished by the employer in the amount of \$9,943.49;
8. that a Kansas settlement was entered into and approved between the Employee and the Employer on March 17, 2008 for \$60,000 representing approximately 39 percent to the body as a whole under Kansas law;
9. that if the Second Injury Fund has any liability in this case, said liability would not commence until 176-3/7ths weeks after November 7, 2003.

The two issues to be determined by this hearing are as follows:

1. whether Missouri has jurisdiction over this claim, and
2. whether there is Second Injury Fund liability under Section 287.220 RSMo 2000.

Deposition testimony of Claimant's three experts was admitted into evidence subject to the objections contained therein of the Second Injury Fund. Dr. P. Brent Koprivica, M.D., testified on behalf of the Claimant regarding the medical evaluation he performed on July 24, 2004. In addition to his extensive July 24, 2004 report, Dr. Koprivica issued several addendum reports, one dated November 4, 2004; one dated January 18, 2005; one dated July 28, 2008; and one dated October 22, 2008. Mary Titterington testified on behalf of the Claimant on April 29, 2009 regarding a December 18, 2004 report she authored as well as an October 19, 2008 report she authored. Ms. Titterington actually conducted an interview and personally evaluated the Claimant on both dates. Claimant's third expert deposition offered into evidence was that of Allan Schmidt, Ph.D., psychologist, taken on April 14, 2009. Dr. Schmidt is a clinical psychologist who examined the Claimant at his request on March 15, 2007. Dr. Schmidt issued a report on March 21, 2007 and a brief addendum on June 18, 2007.

In addition to the deposition testimony of Claimant's three experts, numerous medical records and reports were offered and admitted into evidence. The Claimant testified at the hearing, and documents regarding previous workers' compensation claims and settlements were also admitted into evidence.

The Second Injury Fund's evidence consisted primarily of the cross-examination of the three experts and cross-examination of the Claimant.

The first issue to be resolved in this case is, of course, the jurisdictional issue. I find Missouri does have jurisdiction of this case. Section 287.110.2 Although the evidence is undisputed that Claimant's 2002 accident was in the state of Kansas and that Claimant worked primarily in Kansas, I find that the contract of employment was entered into in the state of Missouri. The only evidence regarding place of contract was the Claimant's testimony. I found the Claimant to be a credible witness and found his testimony persuasive. Therefore, I make the following findings of fact and conclusions of law.

Claimant's girlfriend read to him an advertisement in the newspaper about a roofing job with Jeff Honer Roofing. Claimant phoned the Employer from his house in Excelsior Springs, Missouri; and the Employer, whose primary place of business is in Kansas, answered the phone and asked the Claimant to come to Kansas to fill out an application. Claimant testified that he then went to Kansas, filled out the application and returned to his home in Excelsior Springs, Missouri. After the Claimant left Kansas and returned to his home in Missouri, the Employer telephoned the Claimant and offered him the job. In that phone conversation, the Claimant accepted the position. I find the Employer offered the Claimant the position and the Claimant accepted the position. This was the last act to complete the contract of employment and that act occurred in the state of Missouri. I therefore find Missouri has jurisdiction. *See Liberty v. Treasurer*, 218 S.W.3d 7 (Mo. App. 2007). As with the Claimant in the *Liberty* case, *supra*, no corroborating evidence was offered to show the Claimant accepted the offer in Missouri. In the case at bar, however, I find and believe the Claimant to be a credible witness. In the *Liberty* case, the administrative law judge did not find the Claimant's testimony credible.

I suppose an argument could be made that the Claimant did not specifically state the Employer called him at home in Excelsior Springs. I could infer that the Employee had a cell

phone and was actually in the state of Kansas, driving his car in Kansas or simply in the state of Kansas for other reasons when the Employer made the phone call to the Employee offering him the job wherein the Claimant accepted. However, I cannot make such inferences when I consider the entire line of testimony regarding the jurisdictional issue. I find that the Employer called the Claimant at his home, which was clearly in Excelsior Springs, Missouri. I find that is when the Employer offered the Claimant the position and when the Claimant accepted the position from his home in Missouri. This was the last act to complete the contract of employment and that act occurred in the state of Missouri. There is no evidence that Claimant left the state of Missouri between the time he returned to his home in Missouri after having filled out the application for employment in Kansas and receiving the telephone call from the Employer at this home in Missouri by which he was hired. I therefore find that Claimant did carry his burden of proving the contract was entered into in the state of Missouri.

The next issue in the case is whether the Claimant is permanently and totally disabled as a result of the effects of his 2002 accident at work combined with preexisting permanent disabilities he had at the time of the last accident.

In order to establish Second Injury Fund liability for permanent total disability benefits under Section 287.220, the Claimant must first prove that he has a permanent disability resulting from a compensable work-related injury that is partial in nature. In other words, the Claimant must show that the effects of the last accident alone, when considered in and of themselves, would not have caused him to be permanently and totally disabled; i.e., unable to compete for gainful employment. See Section 287.220.1 RSMo 2000, Hughey v. the Chrysler Corp., 34 S.W.3d 845 (Mo. App. 2000); Mathia v. Contract Freighters, Inc., 921 S.W.2d 271 (Mo. App. 1996); Roby v. Tarlton, 728 S.W.2d 586 (Mo. App. 1987). In the case at bar, the Second Injury Fund contends that the effects of Claimant's last injury or the accident alone would have rendered the Claimant permanently and totally disabled. Employee contends that it was the combination of disabilities that caused him to be permanently and totally disabled, that the effects of the last accident were partial in degree.

In order to establish Second Injury Fund liability, Claimant must also prove that he has permanent disability predating the compensable work-related accident which is "of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the Employee becomes unemployable." Section 287.220.1 RSMo 2000; E.W. v Kansas City School District, 89 S.W.3d 527 (Mo. App. 2002) (another excellent discussion of hindrance to employment standard); Loven v. Green County and Second Injury Fund, 63 S.W.3d 278 (Mo. App. 2001) (for thorough discussion by Court of 'hindrance or obstacle' standard); Messix v. Sachs Electric Company, 989 S.W. 206 (Mo. App. 1997); Garibay v. Treasurer, 964 S.W.2d 474 (Mo. App. 1998); Wuebbling v. West County Drywall, 898 S.W.2d 615 (Mo. App. 1995). The Second Injury Fund also asserts that the Claimant failed to prove this element of his claim. Employee argues otherwise.

The final element the Claimant must prove to establish Second Injury Fund liability for permanent total disability is that the combined effect of the disability resulting from the work-related injury and the disability existing at the time of the last injury was sustained result in permanent total disability. See Karoutzos v. Treasurer, 55 S.W.3d 493 (Mo. App. 2001); Boring v. Treasurer, 947 S.W.2d 483 (Mo. App. 1997). The Claimant must establish that he is unable to return to any employment and unable to compete for any reasonable or normal employment or

occupation. He must establish that the employer in the usual course of business would not reasonably expect to employ the employee in his present physical condition, nor would he reasonably be able to expect the employee to successfully perform the work. The determination of permanent total disability focuses on the ability or inability of an employee to perform the usual duties of open labor market employment in the manner that such duties are customarily performed by the average person engaged in such employments. Gordon v. Tri-State Motor Transit, 908 S.W. 2d 849 (Mo. App. 1995). There is virtually no believable evidence in this case that the Claimant is competitive in the open labor market. Contrary to the arguments made by the Second Injury Fund, I find the evidence unquestionably demonstrates that this individual is unable to compete for gainful employment and is totally disabled under the foregoing standards.

The primary sub-issues in the case are whether the effects of the last accident in and of themselves caused the Claimant to be totally disabled and whether the Claimant had preexisting disability which was a hindrance or obstacle to his employment as is required under Section 287.220.

Claimant was injured while driving a company dump truck on or about August 9, 2002. He was stopped at a traffic signal when another company van driven by a co-worker rear-ended him. The Claimant was treated by several doctors including a Dr. Dickey, Dr. Jones and Dr. Hendler, all physicians authorized by the Employer. He was treated conservatively with medication, therapy and work hardening. An MRI was conducted as well as electrodiagnostic studies. The MRI scan performed in October 2002 revealed central disc protrusions at L4-L5 and L5-S1. The scan also revealed bilateral neuroforaminal narrowing that was mild at the L4-L5 and L5-S1 levels. The EMG studies were within normal limits. He was given an epidural steroid injection in November 2002 by Dr. Jones. Although Dr. Hendler indicated that the Claimant was at maximum medical improvement on December 6, 2002, he gave him a 50-pound restriction on lifting and carrying. He limited the Claimant to occasional bending, squatting and climbing and indicated the Claimant needed to be allowed to change positions as needed in terms of standing, walking and sitting.

Claimant attempted to return to work for a day or two after his release by Dr. Hendler but was terminated on December 9, 2002. It was the Claimant's belief that he was terminated because he could no longer do his job, but he was told he was terminated because of cursing on the job. Even though Claimant was released from treatment by the authorized treating physicians on December 6, 2002, he sought care and treatment on his own with Dr. Picket on January 8, 2003. He continued to treat on his own through November of 2003. He received additional epidural steroid injections and was referred by Dr. Picket to a chiropractor who did several chiropractic manipulations. He eventually went to Truman Medical Center where a repeat MRI scan was done as well as other electrodiagnostic studies. These studies apparently continued to show degenerative disc disease at L4-L5 and L5-S1 as well as a mild left S1 radiculopathy. He had further physical therapy in the fall of 2003 but sought no further treatment. Again, the parties agreed that the Claimant was at maximum medical improvement on November 7, 2003 and further agreed that any benefits due from the Second Injury Fund would commence on November 7, 2003.

In determining the effects of the 2002 injury, I considered the Claimant's testimony, the experts' opinions in the case as well as their findings and the results of their examinations. Claimant clearly sustained disability to his low back as a result of the car accident of 2002.

There is no question that Claimant has not worked since the accident of 2002, nor is there any question that the Claimant did not have any surgical intervention as a result of the accident. Finally, the Claimant is no longer on any kind of medication other than over-the-counter pain medication for his low back condition. Claimant testifies, however, and I find in accordance with that testimony, that he is much more limited now in his physical activities than he was before the accident of 2002. The Claimant testified that he has to lie down most days for some period of time due to the pain he experiences in his back. He described a lifestyle, necessitated by the pain he experiences, which is mostly sedentary. Although he does do some light housework including some grocery shopping, dusting and dishwashing, he does not mop the floor or run a heavy vacuum. In fact, he had to change vacuum cleaners from a heavier model to a one-pound vacuum. He no longer does sporting activities with his children and can only catch certain types of fish and does only bank fishing. Any hunting he does is primarily from a stationary position. I find that since the 2002 accident the Claimant has been unable to perform any type of repetitive lifting, bending, stooping or climbing.

Dr. Koprivica testified that the Claimant sustained permanent aggravating injury to preexisting multi-level degenerative disc disease as a result of the August 9, 2002 accident. Dr. Koprivica found that as a result of the aggravating injury of August 9, 2002 to the lumbar spine, Claimant had a 20 percent permanent partial disability to the body as a whole. Dr. Hendler found the Claimant had a 5 percent permanent partial disability to the body as a whole. In addition to the physical component of the Claimant's 2002 injury, Dr. Koprivica found that the Claimant had psychological sequelae from that injury. Dr. Koprivica opined that the Claimant had a chronic pain syndrome as well as a component of depression.

Three other mental health professionals had opinions regarding the psychological component of the Claimant's disability. I considered all of their opinions in their reports as well as the deposition testimony and cross-examination of Ms. Titterington, Claimant's vocational expert, and the deposition testimony and cross-examination of Dr. Schmidt, Claimant's psychological expert. All of the experts found that the Claimant had a chronic pain syndrome or pain disorder associated with both psychological factors and his medical condition. Two of three experts also diagnosed a depressive disorder.

Dr. John Pro, M.D., conducted an independent psychiatric evaluation at Claimant's request on October 5, 2004. Dr. Pro's opinion was that the Claimant's chronic pain disorder developed as a result of the 2002 injury to his low back. Although Dr. Pro noted that the Claimant had some chronic low back pain prior to that, Dr. Pro found that Claimant developed an incapacity only after 2002. Dr. Pro indicated that a "chronic pain syndrome implies that the pain and suffering experienced and the lowered pain tolerance go beyond what is normally expected with the degree of tissue damage that is present and are driven by psychological factors." Dr. Pro believed that psychological factors were aggravating the Claimant's pain syndrome and were made worse by his own inherent difficulty tolerating the stress of being out of work and having chronic pain. Dr. Pro indicated this was basically related to his below normal intelligence and associated limited coping skills. Obviously, the Claimant's below normal intelligence preexisted the 2002 accident; and even though Dr. Pro believed that the chronic pain syndrome was caused and sparked by the 2002 injury, he also believed that the Claimant's low normal intelligence and associated limited coping skills were part of the reason the Claimant suffered from a chronic pain syndrome. Dr. Pro did not find that the Claimant had any significant major depressive disorder. He also stated the Claimant had no preexisting

psychiatric impairment. He did, however, find the Claimant had below normal intelligence with specific reading, writing and math learning disorders. Dr. Pro rated Claimant's psychological "impairment" at "23 percent whole person." He also stated Claimant could not be expected to return to a 40-hour work week due to his pain and orthopedic impairment.

Dr. Keith Allen, a licensed psychologist, was one of the experts who believed the Claimant suffered from a depressive disorder as well as a pain disorder, a reading disorder, a mathematics disorder and a disorder of written expression. Dr. Allen did not express any opinions with regard to the cause of the Claimant's depression and chronic pain.

Allan Schmidt, the Ph.D. psychologist who examined the Claimant on March 15, 2007, reviewed numerous records and reports and performed several tests in arriving at his conclusions. He took a family and social history of the Claimant and noted in his deposition that he had to read the test to the Claimant because of the Claimant's inability to read. Based on the results of these psychological tests, Dr. Schmidt also found the Claimant had both a pain disorder and depression. He found that the Claimant had a verbal IQ of 74, which was in the fourth overall percentile, and a visual IQ of 85, which is in the sixteenth percentile. He found the Claimant's intelligence was in the borderline range between low average to mentally retarded. Because of these innate deficiencies, Dr. Schmidt opined that the Claimant would have a more difficult time learning new information than a person in the average intelligence range. Other tests indicated to Dr. Schmidt that the Claimant had extremely low math and reading skills. He found that the Claimant had a reading disorder and a written expression disorder. Dr. Schmidt explained that Claimant's reading was lower than would be expected based on his overall IQ and that was indicative of a learning disability. Dr. Schmidt noted remarkable efforts on the part of the Claimant in trying to learn to read but simply was not able to due to his learning disability.

Dr. Schmidt found that the Claimant's pain disorder was enhanced by his psychological condition which he found largely preexisted his 2002 injury. He testified that he identified chronic poor skills for dealing with stress. The reading and written expression disorders that Dr. Schmidt identified as well as Claimant's being functionally illiterate were clearly preexisting conditions. Dr. Schmidt gave the Claimant an overall psychological disability of 30 percent of which 15 percent existed prior to his injury and 15 percent as a result of his injury. He further explained that the 15 percent preexisting the injury took into account the Claimant's "low intellectual functioning, his learning disabilities, his history as what he would characterize as depression that fluctuated, general low skills in dealing with life's stresses, that sort of thing." See Deposition of Allan Schmidt, p. 12. Both Dr. Schmidt and Ms. Titterington found that Claimant had psychological disability resulting from the accident but also had preexisting psychological disability.

In order to determine both the physical as well as the psychological disability resulting from the 2002 accident, it is virtually impossible not to consider Claimant's physical and mental condition before the 2002 accident. I say this because of some of the testimony by Dr. Schmidt and Dr. Koprivica regarding the synergistic effect of the current disability when combined with the prior disability. For example, Ms. Titterington indicates that the Claimant would not be employable on the open labor market if he had to periodically lie down during the course of the day. She admitted, and the evidence clearly demonstrates, that the Claimant did not need to lie down on the job prior to the accident of 2002. However, as Dr. Koprivica pointed out in his deposition, there was a contribution of the pathology in Claimant's low back that predated the

work injury which combined with the work injury to cause many of the Claimant's problems. See Koprivica deposition, p. 36. Similarly, while the Claimant may not have had any active psychological symptomatic depression prior to 2002, he had significant learning disabilities and borderline intellectual functioning. Several of the experts addressed the fact that the Claimant's inability to deal with the effects of his physical condition was in part caused by his limited intellectual functioning. Nonetheless, the law requires that I determine the amount of disability resulting from the last accident alone.

I find based on the evidence presented that the Claimant sustained both physical and psychological disability as a result of the last accident. I find that he sustained 15 percent permanent partial disability to the body as a whole as a result of the physical injury alone. I find that he aggravated a preexisting degenerative condition to his low back and as a result of the aggravation has significant disability and limitations. I further find that the Claimant does indeed have a pain disorder as well as depression. I do not believe that the Claimant had any symptomatic and permanent depression prior to the 2002 accident. While he clearly had a very difficult childhood and dealt with taunts about his inability to read and write and perform at grade level, I do not believe there is evidence that he had any type of clinical symptomatic depression before 2002. I do believe that after the 2002 accident he, indeed, has some depression and I also find that he does have a pain disorder. I find that the extent of the pain disorder and the depression is 15 percent to the body as a whole. I make this finding based on the expert evidence presented in the case.

I do not find, however, that as a result of the 30 percent disability attributable to the last accident the Claimant would have been unable to compete for gainful employment. This is an individual who prides himself on working and would do whatever he could to be gainfully employed. I do not believe that the type of injury he sustained to his back would have limited him to the extent that it has were it not for his prior back condition. I base this conclusion on the testimony of Dr. Koprivica. I also find that the Claimant's depression and psychological response to his physical condition would not have been so severe were it not for his learning disabilities and his low intellectual capacity. I rely on Dr. Schmidt's and Dr. Pro's opinions in making this conclusion. Even with the chronic pain syndrome and depression caused by the 2002 accident, this individual could have gone back to a lighter type of work if he were able to gain vocational educational training. This individual, however, is extremely limited by his preexisting intellectual capacities and learning disabilities. This is what I find takes him out of the job market when coupled with his disabilities from the last accident.

I therefore find that the Claimant has established that he sustained permanent partial disability resulting from the last accident in the amount of 30 percent to the body as a whole. I further find that the effects of this injury, i.e., this disability, would not in and of itself prevent the Claimant from competing for gainful employment.

I also find the Claimant has established that some of his preexisting conditions were hindrances to his employment, i.e., his prior back and right knee condition, and his psychological/intellectual condition. Claimant sustained a work-related injury to his low back in 1993 for which he settled his claim for 16 percent to the body as a whole. As with the 2002 accident, he did not undergo surgery for the 1993 injury either but was treated conservatively. I find that prior to the 2002 injury the Claimant had symptomatic degenerative disc disease that was producing chronic back pain, and I further find that it impacted him vocationally; e.g., I

make these findings based on his testimony, the prior workers' compensation records admitted into evidence and the testimony of Dr. Koprivica.

Claimant also had a right knee injury which occurred while working at Jeff Honer Roofing in 1999. He was injured when he missed a rung in a ladder with his left foot and hyperflexed and injured his right knee. Again, no surgery was performed. He was identified as having a bony injury with a contusion to the medial tibial condyle and he has had chronic right knee pain that was ongoing since then. Again, based on the Claimant's testimony and the deposition testimony of Dr. Koprivica, I find that this condition was also a hindrance to his actual employment and an obstacle to reemployment. I do not find this was as significant as the prior back injury, however. The record is replete with evidence of both Claimant's prior back condition and knee condition impacting on his actual job duties as well as them being obstacles to reemployment. (E.g., Claimant had co-workers help him on ladders, carrying heavy items up for him, using 10-inch cushions to sit on roofs while others were pounding due to vibrational pain.)

I find that the Claimant had 16 percent permanent partial disability to the body as a whole referable to his lumbar condition and 15 percent permanent partial disability to the right lower extremity at the 160-week level prior to the 2002 accident.

I find, however, that the most significant disability the Claimant had prior to his 2002 injury was his low level intelligence and aptitude as well as his learning disabilities. Claimant clearly has mental learning disabilities and limitations that have significantly impacted him his entire life and in every aspect of his life. He has repeatedly tried to learn how to read and has simply been unable to. All the experts agree he is functionally illiterate and no one has suggested that he should try or is able to get further academic education and/or learn to read at this point in his life. And although I have not found that the Claimant had any depression prior to the 2002 accident, I find that a great deal of his current depression is based on the fact that he cannot return to work. Again, I find one of the major components of why the Claimant cannot return to work is his decreased intellectual capacity and learning disabilities. These learning disabilities were clearly significant hindrances to his employment. At Sheffield Steel, Claimant was unable to perform a new job because he couldn't read the job manual instructions. He was unable to read a computer-generated order form at a fast food restaurant and, thus, could not successfully perform his job as a cook. Because of his reading learning disability, Claimant's illiteracy is a permanent condition. It is not something he can change; he has tried to do so throughout his life and has been unsuccessful. This has continued to be an obstacle to his employment and reemployment.

In the case of Roby v. Tarlton, the Court upheld the Commission's finding of permanent total disability against the Employer rather than the Fund when the only resulting disability from the last accident involved a leg injury. In that case, the Claimant had a low IQ and was unable to read or write. In that case, the Claimant failed to establish that Mr. Roby's preexisting low intelligence was industrially disabling. The Administrative Law Judge found no evidence that his preexisting low intelligence adversely affected his pre-injury employment history. The Court of Appeals concluded, after its review of the record, that there was sufficient to support the Commission's decision. In that case, the Employee simply failed to establish that his low intelligence affected his earning capacity and failed to show that his low intelligence had not been a hindrance to his ability to work. The facts in this case are more similar to the facts in

Laturno v. Carnahan wherein the Court affirmed the imposition of liability on the Second Injury Fund. In Laturno v. Carnahan, 640 S.W. 2d 470 (Mo. App. 1982), the Claimant had several preexisting disabilities, the main one being a lifelong mental retardation. Expert testimony in that case established that his mental retardation had reduced him to doing simple manual tasks as an unskilled laborer and under close supervision. In that case, the Court found there was sufficient evidence to impose Second Injury Fund liability because the Claimant had established that his preexisting condition was industrially disabling. The standard applicable, as was discussed earlier in the case at bar, is not “industrial disability” but “hindrance to employment.”

Two extremely instructive cases with regard to proving that a disability is a hindrance or obstacle to employment are E.W. v Kansas City Missouri School District, 89 S.W.3d 527 (Mo. App. 2002) and Loven v. Green County, 63 S.W.3d 278 (Mo. App. 2001). In the first case, Judge Breckinridge wrote that in order to determine whether a preexisting disability constitutes a hindrance or obstacle to the employee’s employment, the Commission should focus on the potential that the preexisting injury may combine with a future work-related injury to result in a greater degree of disability than would have resulted if there had been no such prior condition. In addition, there must be a finding of the presence of an actual and measurable disability at the time the work injury is sustained. In E.W. v. Kansas City School District, the preexisting disability was also a mental disability. The Court found that the Claimant had satisfied her burden of showing that her preexisting disability was a “hindrance to her employment” and therefore reversed the finding of the Commission that had found permanent total disability against the Employer. The Court remanded the case to the Commission to assign Second Injury Fund liability for permanent total disability. In the Loven case, the Claimant’s preexisting obesity was not deemed to be a hindrance to his employment. Based primarily on the Claimant’s testimony about how his obesity had in no way had a negative effect on his employment, the Court found that the Claimant had failed to prove the presence of an actual and measurable disability at the time the work injury was sustained. The evidence in this case clearly indicates Mr. Mayse’s physical and psychological disabilities existing at the time the last accident occurred in 2002 were obstacles to his employment and would certainly have been obstacles to reemployment.

Finally, I find that the Claimant has established that he is unable to compete for gainful employment due to the effects of his 2002 injury when combined with his preexisting physical and psychological disabilities. Claimant was born on 11/17/65 and never graduated from high school. Although the Claimant thinks he received a diploma from Truman High School, the evidence in this case simply does not justify that conclusion. Both Claimant’s education and his job skills are extremely limited. He has virtually no ability to acquire more education or training. Therefore, based on the foregoing analysis regarding the Claimant’s physical condition and psychological condition, I find that it is unreasonable to expect any employer in the normal course of business to hire the Claimant or expect the Claimant to perform the duties of gainful employment. I therefore find the Second Injury Fund is liable for permanent total disability benefits in this case.

Beginning November 7, 2003, the Second Injury Fund shall pay \$28.37 per week (the difference between the permanent total disability rate of \$368.49 and the permanent partial disability rate of \$340.12) for 176-3/7ths weeks (the period of time the Employer would have paid permanent partial disability of \$340.12 under Missouri law as represented by their settlement of \$60,000) and thereafter \$368.49 per week for Claimant’s lifetime.

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of Mr. Frank Eppright, Employee's attorney, for necessary legal services rendered.

Date: \_\_\_\_\_

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

**Rebecca S. Magruder**  
*Administrative Law Judge*  
*Division of Workers' Compensation*

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

\_\_\_\_\_  
**Naomi Pearson**  
*Division of Workers' Compensation*