

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

Injury No.: 03-093780

Employee: Rodney Northcross  
Employer: Painters District Council No. 2  
Insurer: TIG Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 5, 2010. The award and decision of Administrative Law Judge Matthew D. Vacca, issued February 5, 2010, 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 14<sup>th</sup> day of April 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

# AWARD

Employee: Rodney Northcross

Injury No.: 03-093780

Dependents: N/A

Employer: Painters District Council No. 2

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Amerisure Insurance Company

Hearing Date: November 17, 2009

Checked by: MDV; mk

## 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 29, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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 alleged employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Injured in an auto accident.
12. Did accident or occupational disease cause death? No Date of death?
13. Part(s) of body injured by accident or occupational disease: Right shoulder, neck, head and psyche
14. Nature and extent of any permanent disability: 30% shoulder, 5% BAW
15. Compensation paid to-date for temporary disability: \$17,888.85
16. Value necessary medical aid paid to date by employer/insurer? \$31,773.34

Employee: Rodney Northcross

Injury No.: 03-093780

- 17. Value necessary medical aid not furnished by employer/insurer? \$6,934.00
- 18. Employee's average weekly wages: Maximum
- 19. Weekly compensation rate: 662.55/347.05
- 20. Method wages computation: Agreed

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses:	\$6,934.00
89.6 weeks of permanent partial disability	\$31,095.68
	(Per Stipulation)

22. Second Injury Fund liability: Yes No Open

23 weeks of permanent partial disability from Second Injury Fund	\$7,982.00
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<b>TOTAL:</b>	<b>\$46,011.68</b>
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23. Future requirements awarded: None

Said payments to begin immediately 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: Robert Merlin, Jr. and Ray Marglous

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

Employee:	Rodney Northcross	Injury No.: 03-093780
Dependents:	N/A	Before the
Employer:	Painters District Council No. 2	<b>Division of Workers' Compensation</b>
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Amerisure Insurance Company	Checked by: MDV; mk

**ISSUE PRESENTED**

Pursuant to 8 CSR 20-3.050 (1), (2), and (3) these two claims are consolidated for hearing but two separate awards will issue. The master proceeding is designated in the earlier file and the entire transcript will remain in that file.

In the earlier claim, Injury Number 03-093780, the issues presented for resolution are the subrogation interest of the Employer and the Second Injury Fund in Claimant’s third party settlement, unpaid medical bills, the nature and extent of any permanent disability versus the Employer and Second Injury Fund. In the later case the issues presented for resolution are the nature and extent of any disability versus the Second Injury Fund, the primary case having been previously settled.

**FINDINGS OF FACT**

1. Claimant was born March 11, 1950. He has been married to Pamela Northcross for 23 years. He has six children, one of whom lives at home, Tari Ashland Northcross, age 21. The Claimant received his GED from Beaumont High School in the 1970s. He had dropped out previously as a sophomore in 1966. He underwent union and foreman training as a drywaller and taper. He also has taken some basic computer classes for starters and has had some blueprint reading training. Claimant believes that he reads and writes averagely and has basic math skills. He is 6’3” tall and 255 pounds. Claimant applied for Social Security disability in 2005 and was awarded benefits in 2007. Claimant worked until the end of 2004 as a drywaller/taper.
  
2. When Claimant was 21 years old he was accepted into an apprentice union program. It was called the drywall finisher program. It was through the Painters Union and began in November of 1969. Claimant apprenticed for two years and became a journeyman in 1971 as a drywall finisher. Claimant’s job duties are essentially to hang drywall, tape and finish walls for the painters to paint. He has worked in that capacity for 38 years prior to the events that transpire here. Claimant would cover walls from the floor to the ceiling with drywall as well as the ceiling itself. The Claimant would use joint compound and

tape to finish seams. He would make three applications with sanding in between in preparation for the painters.

3. Claimant's job duties would require him to stand all day, eight hours a day. They would have to cover every inch of the drywall including covering up screws. It would require him to walk on and utilize steep angles, walk on ladders, climb up ladders, stand on benches, scaffolding and reach, grasp, perform overhead work and the work was extremely physically demanding within the time limits that were required by the Employer.
4. Claimant generally worked out of a union hall. From March 1 to January 2, 2002, he worked for TJ Weiss and then became a union organizer for the union where he would recruit nonunion drywallers into the union. This is a much easier job especially as Claimant got older. He was the first African American to hold the job of union organizer. In this capacity, Claimant's job was driving to various job sites and talking to drywallers and tapers and trying to persuade them to join the union. Every three years the union had an election and Claimant lost his job with the last election. The new union boss came in and eliminated the old union organizers and picked new people.
5. Prior to this job as a union organizer, Claimant had injuries to his left knee, right wrist and left wrist. Claimant ceased being a union organizer in October of 2003, and went to work for Accent Development as a foreman in January of 2004. Foreman was a less physical job. Claimant worked three months for Accent as a drywaller foreman but found the work difficult to perform. He had shoulder surgery for the first injury in April of 2004, and planned to go back to work but never did. Claimant worked for approximately three months in this foreman capacity.
6. Prior to the claimed primary injuries herein, Claimant injured his right wrist in the early 1990s. He developed carpal tunnel syndrome and had surgery. It took his right wrist a long time to heal but he came back to work able to work as before, except he experienced numbness and tingling. His hands were a little bit weaker than they were prior to the surgery and the numbness and tingling slowed Claimant down. He became a little bit anxious about how this disability affected his job. Claimant experienced left knee bursitis with swelling of the knee and underwent a surgery for a tear and removal of fluid in the 1980s. He also developed a Baker's cyst as a teenager. The knee became painful when Claimant would climb, kneel, step up on the bench or use scaffolding and Claimant worried about his physical ability to continue his job.
7. Claimant had not been reprimanded up to the time of his knee surgery or hassled in any way due to his slowness but testified that he was "questioned" about his work performance. Claimant says he was depressed before he became the union organizer. His son had killed his daughter-in-law and went to prison and Claimant's son-in-law committed suicide on Claimant's front porch. Claimant was depressed and said that he went to work to escape from his problems.

8. In the August 2003 claim, Claimant was working in his capacity as a union organizer driving to a job site to persuade drywallers to join the union. He was driving on West Florissant Road on a rainy day when a lady crossed in front of Claimant from the left and stopped in the intersection. Claimant testified he was reaching for his cell phone at the time and was distracted. His eyes were on the phone looking away from the road when the two vehicles collided. Claimant was taken by ambulance to Barnes-Jewish Emergency Room. He was provided x-rays and pain prescriptions and was told to follow-up with his primary physician and continues to report regularly to his job. He injured his neck, head and back.
9. In his 2003 claim, Claimant requests medical benefits past due in the amount of \$4,296.00. Claimant had asked the Employer for treatment and told the Employer about the emergency room visit and asked for further treatment on his neck, forehead and knee. The Employer did not send Claimant for further treatment right away to any physician so he went to Dr. Droege for about one month from September 10, 2003 to September 27, 2003, and incurred a bill of \$1,153.00.
10. Dr. Droege wasn't alleviating Claimant's symptoms and the Employer sent him to see Dr. Hulsey who recommended an MRI and surgery. Dr. Hulsey's treatment caused Claimant to incur \$2,638.00 in medical bills from Forest Park Hospital. By the time Claimant saw Dr. Hulsey he was no longer working as a union organizer and had gone to work for Accent Development.
11. When Claimant was working overhead for Accent he would develop pain in his neck and back. It was typical to work overhead especially at angles and with ceilings. Claimant found work very difficult. He could perform no overhead lifting and underwent shoulder surgery on April 15, 2004. The Claimant thought he would be able to heal and go back to work but the surgery did not solve his problem. He was not able to reach and stretch as he was able to before the surgery. Dr. Hulsey released the Claimant nine months later in the fall of 2004, but Claimant still experienced neck popping, weakness, difficulty lifting, and the shoulder had atrophied with regard to the opposite shoulder. He experienced pain on any overhead lifting and had very decreased range of motion. Claimant's head, back and neck continued to bother him as they had prior to the surgery and then when combined with the shoulder surgery as a result of the accident, Claimant was unable to keep up with his job.
12. The second claim developed while Claimant was at Accent Development. His left wrist began to hurt as it had done years before. Claimant had a prior carpal tunnel surgery on the left wrist and a prior knee surgery. Claimant found that he had to use his left hand more because his right shoulder was injured in the car accident in 2003 as a union organizer and so now the left was getting worse as a result of overwork. Claimant's left wrist started to tingle, went numb and would be symptomatic from the wrist up into the arm. Claimant would sometimes drop work tools and product and would have to stop sometimes. It felt like a bullet in his arm.
13. Claimant saw Dr. Ponnuru, his primary care physician. A nerve conduction study was performed under Dr. Ponnuru's guidance and Claimant was diagnosed with bad carpal

tunnel syndrome on the left. Claimant did not undergo surgery because he had no insurance and since he has received Social Security he does not need the surgery because the wrist doesn't hurt as much when he's not working.

14. Claimant feels depressed and worthless because he cannot work for a living.
15. Claimant says that he tried to obtain work with contractors and work through the union hall but was unable to get hired in his physical condition. Claimant testified that it's not just one thing physically keeping him from working it's multiple things keeping him from working; his left knee, left hand, right shoulder, gout and his feet are all causing him to be unable to work. He testified he has not looked for any other drywall jobs because he knows he cannot do them.
16. Dr. Hulsey doesn't believe Claimant has any limitations keeping him from working. Dr. Schlafly says he is not disabled but he does have some disabilities.
17. Claimant has undergone a microdiscectomy after all of the events that have been recounted here. This was after all the accidents and his feet feel numb and the surgery did not help him and he doesn't feel that he is able to use his hands for eight hours or sit for eight hours. He believes that hands, his knee, and his shoulder have rendered him unable to work without even having to consider his post accident back condition.
18. John Stephen Dolan testified as Claimant's vocational expert. He testified that Claimant has too many limitations to enable him to compete with the able-bodied for jobs that were available. Claimant cannot perform his work on a sustained and regular basis and there are too many other able-bodied persons without disabilities for Claimant to find a job where there are too few jobs. Mr. Dolan believes that Claimant is permanently and totally disabled as a result of a combination of his injuries.
19. The parties stipulated that Employee sustained a 30 percent permanent partial disability to his right shoulder and a 5 percent disability to the body as a whole referable to neck injuries and psychiatric injuries assuming that the Employee is not found to be a permanent total solely as a result of the August 29, 2003 incident.
20. The Employee had a third party case against the driver responsible for his 2003 motor vehicle accident when he was working as a union organizer and was struck with his vehicle. The case settled for \$100,000 prior to the settlement or trial of the Workers' Compensation claim. Attorney's fees in that matter were \$40,000 and expenses were \$597.00 leaving a balance of \$59,103.00 net recovery from the settlement.
21. That claim was settled on May 9, 2005. There was no finding of comparative fault on the part of the Employee prior to or at the time of that settlement. There was a post hoc determination of fault four months later.

**RULINGS OF LAW**

1. The Claimant is not permanently and totally disabled as a result of the August 29, 2003 accident while working for Painters District Council No. 2; therefore, pursuant to Claimant's agreement with the Employer his disability is assessed at 30 percent of the right shoulder and 5 percent of the body as a whole for psychiatric injury, neck and back injuries.
2. Claimant is entitled to \$4,296.00 in unpaid medical bills for treatment following his accident with the Employer for Dr. Droege's treatment and Dr. Hulsey's treatment and the diagnostic tests ordered by Dr. Hulsey at Forest Park Hospital for past benefits in the amount of \$4,296.00.
3. Preexisting the injury herein Claimant sustained a 25 percent permanent partial disability measured at the level of the left hand for preexisting carpal tunnel syndrome. He also suffered from a 25% percent permanent partial disability of the left knee. The right shoulder injury and the left carpal tunnel syndrome and left knee are working in a synergistic fashion to create uncompensated disability payable against the Second Injury Fund based on a .15 loading factor for a total of 23 weeks of disability at the permanent partial disability compensation rate of \$347.05 per week or \$7,982.
4. Pursuant to §287.150, the *Ruediger* case and the cases interpreting that section the subrogation should be dealt with as following: The Employer has paid \$29,662.19 in benefits prior to settlement. The gross recovery in the auto accident case was \$100,000. The attorney's fees and expenses were \$40,597.00 with a net recovery of \$59,403.00. Therefore, the subrogation amount of \$49,659.12 is divided by the \$100,000 gross recovery for a ratio of \$496.59. The net recovery of \$59,403.00 x the ratio of \$496.59 comes to \$29,522.69 due to the Employer. Thus, the balance of the recovery, \$59,403.00 - \$29,522.69 due to the Employee is \$29,880.31. According to the statute, this is a credit pending against further obligations of the Employer for compensation.
5. As a result of the 2004 case, Claimant has sustained upper extremity disability of 20 percent at the 232 week level or 26.5% at the wrist (46.4 weeks). The Claimant did not become permanently and totally disabled following this 2004 accident. Preexisting this 2004 accident Claimant sustained a 30 percent permanent partial disability of the right shoulder (69.6 weeks), a 5 percent permanent partial disability from the body as a whole for injuries to his psyche, his neck and his back, a 25% permanent partial disability to the left knee (40 weeks) and 25 percent preexisting left hand carpal tunnel syndrome (43.75). The 20 percent left extremity disability (46.4 weeks) as a result of the primary injuries combines with the prior 30 percent right shoulder (69.6) and 25% left knee injury (40 weeks) in a synergistic fashion, thus, represented by a loading factor of .2 to provide an additional 31.2 weeks of permanent partial disability assessable against the Second Injury Fund. The left carpal tunnel syndrome (primary) does not combine in a synergistic fashion with the prior left carpal tunnel syndrome as disability is cumulative as to that part. The prior left carpal tunnel syndrome has not been included, therefore, for this calculation.

- 6. In 2003, Claimant has a 30 percent permanent partial disability of the shoulder (69.6) on the primary plus a 25% preexisting carpal tunnel syndrome (43.75 weeks) and 25% left knee disability (40 weeks), which combine in a synergistic fashion but represented by a faction of .15 for 23 weeks of disability.

**DISCUSSION**

Like several physicians, I believe Claimant is unable to return to his former work as a drywaller, but I think he is not totally disabled from all work from the injuries under consideration. His spinal surgery may change the equation, but it is not up for consideration herein as it was a post accident condition. Also, I have considered the claim for psychological injury from the murder and suicide affecting Claimant’s family. While these events are tragic, I don’t think they constitute permanent disabilities from working. In fact, Claimant testified he liked to go to work to get away from thinking about these tragedies.

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

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

Matthew D. Vacca  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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

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

Injury No.: 04-081094

Employee: Rodney Northcross  
Employer: Accent Development, Inc. (Settled)  
Insurer: Amerisure Insurance Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo<sup>1</sup>. We have reviewed the evidence and considered the whole record and we find 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, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the February 5, 2010, award and decision of administrative law judge Matthew D. Vacca. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

**Preliminaries**

By this claim, employee alleges he sustained work-related carpal tunnel syndrome. Employee settled his claim with his employer in this matter. The matter proceeded to trial on employee's claim against the Second Injury Fund. The administrative law judge awarded enhanced permanent partial disability against the Second Injury Fund based solely on employee's physical injuries.

As a result of the 2004 case, Claimant has sustained upper extremity disability of 20 percent at the 232 week level or 26.5% at the wrist (46.4 weeks). The Claimant did not become permanently and totally disabled following this 2004 accident. Preexisting this 2004 accident Claimant sustained a 30 percent permanent partial disability of the right shoulder (69.6 weeks), a 5 percent permanent partial disability from the body as a whole for injuries to his psyche, his neck and his back, a 25% permanent partial disability to the left knee (40 weeks) and 25 percent preexisting left hand carpal tunnel syndrome (43.75). The 20 percent left extremity disability (46.4 weeks) as a result of the primary injuries combines with the prior 30 percent right shoulder (69.6) and 25% left knee injury (40 weeks) in a synergistic fashion, thus, represented by a loading factor of .2 to provide an additional 31.2 weeks of permanent partial disability assessable against the Second Injury Fund. The left carpal tunnel syndrome (primary) does not combine in a synergistic fashion with the prior left carpal tunnel syndrome as disability is cumulative as to that part.

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2000 unless otherwise indicated.

Employee: Rodney Northcross

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The prior left carpal tunnel syndrome has not been included, therefore, for this calculation.

Award p. 7.

We adopt the administrative law judge's finding that employee sustained a 26.5% permanent partial disability at the level of his left wrist as a result of his work-related carpal tunnel syndrome. We clarify that the weeks of permanent partial disability this percentage represents is 46.375 weeks.

We disagree with the administrative law judge's conclusions regarding the nature and extent of employee's psychiatric disability. We also disagree with his conclusions regarding employee's overall disability and the Second Injury Fund's liability.

### **Psychiatric Injuries**

Employee claims he is entitled to permanent total disability from the Second Injury Fund. Employee's claim for permanent total disability is largely based upon the testimony of Dr. Stillings, a psychiatrist who concluded employee sustained psychiatric injury as a result of his work-related injuries. Not surprisingly, employer asked a psychiatrist – Dr. Smith – to evaluate employee after receiving the report of Dr. Stillings. Both psychiatrists testified by deposition in this matter. Remarkably, neither psychiatrist is mentioned in the administrative law judge's award. Instead, the following excerpt repeats all the administrative law judge said about employee's alleged psychiatric/psychological injury:

...I have considered the claim for psychological injury from the murder and suicide affecting Claimant's family. While these events are tragic, I don't think they constitute permanent disabilities from working. In fact, Claimant testified he liked to go to work to get away from thinking about these tragedies.

Award p. 8.

Without discussion, the administrative law judge concludes that the tragic events that have occurred in employee's life do not "constitute permanent disabilities from working." The administrative law judge's conclusion is nonsensical. Employee makes no allegation that the tragic events he experienced are themselves disabilities. Employee alleges that the tragic events caused him psychological injury and resulting disability.

The psychological effect to employee from experiencing the traumatic events involving the non-natural deaths of his family members cannot be said to be clear, simple or well recognized by lay persons and certainly is not a matter within the expertise of the administrative law judge or this Commission. See *Wright v. Sports Associated*, 887 S.W.2d 596, 600 (Mo. 1994). We will consider the expert psychiatric opinions in reaching our conclusion regarding the alleged psychiatric injuries.

Employee: Rodney Northcross

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### Expert Psychiatric Opinions

#### *Dr. Wayne Stillings*

Dr. Stillings, a board-certified psychiatrist, evaluated employee on January 30, 2006. Before meeting with employee, Dr. Stillings sent employee to take the Minnesota Multiphasic Personality Inventory II (MMPI II). Dr. Stillings then reviewed employee's medical records, analyzed employee's MMPI II results, performed a mental status examination of employee and interviewed employee. Dr. Stillings diagnosed employee with five Axis I psychiatric conditions:

1. Parent/child relational problem (eldest son sent to prison for accidentally killing his wife, limited access to his two grandchildren).
2. Parent/child relational problem (second oldest daughter whose husband suicided on the porch of Mr. Northcross' home).
3. Depressive disorder due to general medical condition (right shoulder injury and left CTS).
4. Anxiety disorder due to right shoulder and left CTS.
5. Pain disorder associated with both psychological factors and right shoulder injury and left CTS.

Dr. Stillings assessed employee as having a Global Assessment of Functioning (GAF) score of 52, meaning employee has moderate impairment and moderate symptoms from a psychological standpoint.

Dr. Stillings testified that employee's work injuries of 2003 and 2004 were substantial factors in causing employee's depressive disorder, anxiety disorder and pain disorder. Dr. Stillings believes that employee's inability to continue working as a drywall finisher after a 30-year stable work history in the field was very emotionally damaging to employee.

Dr. Stillings offered his opinions on employee's psychiatric disabilities, as summarized below:

Employee is 30% permanently partially disabled of the body as a whole due to his depressive disorder, with 15% of the permanent partial disability attributable to his development of carpal tunnel syndrome and 15% preexisting the carpal tunnel syndrome.

Employee is 25% permanently partially disabled of the body as a whole due to his anxiety disorder, with 12.5% of the permanent partial disability attributable to his development of carpal tunnel syndrome and 12.5% preexisting the carpal tunnel syndrome.

Employee is 20% permanently partially disabled of the body as a whole due to his pain disorder, with 6.67% of the permanent partial disability

Employee: Rodney Northcross

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attributable to his development of carpal tunnel syndrome and 13.33% preexisting the carpal tunnel syndrome.

Employee had a preexisting permanent partial psychiatric disability of 5% of the body as a whole attributable to the parent/child relational problem resulting from his son's incarceration and employee's estrangement from his grandchildren.

Employee had a preexisting permanent partial psychiatric disability of 5% of the body as a whole attributable to the parent/child relational problem resulting from his son-in-law's suicide.

Dr. Stillings believes that all of employee's psychiatric conditions are hindrances or obstacles to his employment. He explained that when someone has more than one psychiatric disorder, the sum of the total disabilities is often greater than the simple sum. Dr. Stillings opined that employee is permanently and totally disabled solely from a psychiatric standpoint. Dr. Stillings believes employee will need future medical care for his psychiatric conditions, particularly in the form of antidepressant medications and psychiatric visits.

*Dr. Stacey L. Smith*

Dr. Smith is a board-certified psychiatrist. Dr. Smith interviewed employee on August 10, 2006, at the request of employer/insurer for the purpose of providing an independent medical evaluation. At the time of the evaluation, Dr. Smith had not seen employee's medical records. Dr. Smith did not have Dr. Stillings' report or any test results, nor did she administer any testing of her own.

After speaking with employee for one-hour and 50 minutes – and without the benefit of employee's medical records or testing – Dr. Smith issued her first independent medical evaluation report consisting of 11 pages. Dr. Smith diagnosed no Axis I psychiatric conditions. Dr. Smith opined that employee had no psychiatric disorders or disabilities. She further found that employee had no psychiatric disorders pre-existing his 2003 and 2004 work injuries.

Dr. Smith then received employee's medical records as well as the reports of Dr. Hulse, Dr. Schlafly, and Dr. Stillings. Dr. Smith issued her second independent medical evaluation report consisting of 20 pages, nine of which summarize the medical records and reports she reviewed. Dr. Smith's expert psychiatric opinions did not change by even one word after she reviewed all of the medical records and reports.

After considering the competing psychiatric opinions, we find the opinions of Dr. Stillings to be more persuasive. In addition to interviewing employee, Dr. Stillings reviewed medical records and the MMPI II results *before* he formed his opinions regarding diagnosis, causation and disability. Dr. Smith reviewed employee's medical records *after* forming her opinions on diagnosis, causation and disability. And even after she reviewed the medical records and expert reports, her opinions did not change one word.

Employee: Rodney Northcross

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Dr. Stillings' opinions carry more weight because they are based upon more thorough review and consideration than the opinions of Dr. Smith. We accept Dr. Stillings' opinions regarding the causation of, and disability resulting from, employee's psychiatric conditions.

### **Permanent Disability**

Dr. Hulseley treated employee for his 2003 shoulder injury. He offered an opinion that employee could return to his regular work without restriction after his recovery from his shoulder surgery. Dr. Hulseley offered no opinions regarding restrictions or disability related to employee's carpal tunnel syndrome or psychiatric conditions. Consequently, Dr. Hulseley's restrictions and opinion are of little value in determining the nature and extent of Second Injury Fund liability in this case and we give them no weight.

Dr. Schlafly evaluated employee and offered opinions regarding his physical restrictions and disabilities. Dr. Schlafly imposed physical restrictions with regards to employee's 2003 shoulder injury and the carpal tunnel syndrome in this claim. He recommended employee perform no overhead reaching or lifting with his right arm and that employee avoid forceful gripping, pushing, lifting and pulling. We accept Dr. Schlafly's restrictions as appropriate in light of employee's conditions of ill.

Two vocational experts opined that employee is permanently and totally disabled considering the restrictions, diagnoses and opinions of Dr. Schlafly and Dr. Stillings. Mr. John Dolan testified that when he met with employee, employee had a sad affect. Mr. Dolan considered employee's education, work experience, academic skills, lack of transferable skills, as well as the restrictions imposed by Drs. Schlafly and Stillings, and concluded that employee is not able to compete in the open labor market. Mr. James England also testified that based upon the restrictions imposed by Drs. Schlafly and Stillings, employee is totally disabled from a vocational standpoint.

We conclude that even if we were to consider only the combined effect of employee's preexisting and primary psychiatric disabilities, employee would be unable to compete in the open labor market. When we also factor in his preexisting and primary physical disabilities, we are persuaded that no employer would reasonably be expected to hire employee in his current condition. We conclude that employee is permanently and totally disabled due to a combination of his preexisting physical and psychiatric disabilities along with the physical and psychiatric disabilities from his carpal tunnel syndrome.

### **Second Injury Fund Liability**

#### Generally

"Section 287.220 creates the Second Injury Fund and sets forth when and the amount of compensation that shall be paid from the fund in 'all cases of permanent disability where there has been previous disability.'" <sup>2</sup> "In order to be entitled to Fund liability, the claimant must establish either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the

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<sup>2</sup> *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000) (citations omitted).

Employee: Rodney Northcross

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two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself.”<sup>3</sup>

#### Hindrance or Obstacle

“Liability of the Second Injury Fund is triggered only ‘by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.’”<sup>4</sup> To implicate the Second Injury Fund, the employee must have an actual and measurable preexisting disability at the time the work injury is sustained of such seriousness as to constitute a hindrance or obstacle to employment.<sup>5</sup> “To determine whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, ‘the Commission should focus on the potential that the pre-existing injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there was no such prior condition.’”<sup>6</sup>

Based upon the testimony of employee and the opinions of Drs. Schlafly and Stillings, we find that employee has proven that disabilities related to his knee, shoulder, and some of his psychiatric conditions pre-existed the diagnosis of the carpal tunnel syndrome for which employee’s primary claim was filed. We further find that these preexisting conditions were a hindrance or obstacle to employee’s employment or re-employment.

#### Calculation of Liability

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

“[W]here a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). If the compensation to which the employee is entitled for the new injury is less than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. § 287.220.1.”<sup>7</sup>

We have already determined that employee is permanently and totally disabled and that employee sustained a permanent partial disability equal to 46.375 weeks

<sup>3</sup> *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo. App. 2004) citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo. App. 2001).

<sup>4</sup> *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo. App. 2002), citing *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 215 (Mo. App. 1999), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

<sup>5</sup> Section 287.220.1 RSMo.

<sup>6</sup> *E.W.*, 89 S.W.3d at 537, citing *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997).

<sup>7</sup> *Vaught v. Vaughts, Inc./Southern Mo. Constr.*, 938 S.W.2d 931, 939 (Mo. App. 1997) (citations omitted), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Employee: Rodney Northcross

attributable to his work-related carpal tunnel syndrome. Thus, 46.375 weeks of permanent partial disability would have been employer's liability for permanent partial disability under our findings and conclusions herein. The Second Injury Fund is liable for the payment of the remainder of employee's permanent total disability benefits.

Employee never returned to work after he had surgery to repair the torn rotator cuff he suffered in his 2003 injury. Dr. Hulsey placed employee at maximum medical improvement from the shoulder injury on December 6, 2004. Because employee reasonably opted not to seek a surgical release of his left carpal tunnel, we find that employee reached maximum medical improvement from his condition of carpal tunnel syndrome on December 6, 2004, as well.

**Award**

We modify the award of the administrative law judge.

Employee is entitled to permanent total disability benefits from the Second Injury Fund. For the period beginning December 7, 2004, and continuing for 46.375 weeks, the Second Injury Fund owes to employee the weekly amount of \$315.50. Thereafter, the Second Injury Fund shall pay to employee a benefit of \$662.55 weekly for his lifetime, or until modified by law.

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.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued February 5, 2010, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 14<sup>th</sup> day of April 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

# AWARD

Employee: Rodney Northcross

Injury No.: 04-081094

Dependents: N/A

Employer: Painters District Council No. 2

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Amerisure Insurance Company

Hearing Date: November 17, 2009

Checked by: MDV;mk

## 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: February 2, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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 alleged employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Developed carpal tunnel syndrome.
12. Did accident or occupational disease cause death? No Date of death?
13. Part(s) of body injured by accident or occupational disease: Left hand
14. Nature and extent of any permanent disability: 20% at the level of the left wrist
15. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? 0

Employee: Rodney Northcross

Injury No.: 04-081094

- 17. Value necessary medical aid not furnished by employer/insurer? 0
- 18. Employee's average weekly wages: \$994.00
- 19. Weekly compensation rate: \$662.55/\$347.05
- 20. Method wages computation: Agreed

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

35 weeks of permanent partial disability from Employer	Previously settled
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22. Second Injury Fund liability: Yes

31.2 weeks of permanent partial disability from Second Injury Fund	\$10,827.96
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<b>TOTAL:</b>	<b>\$10,827.96</b>
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23. Future requirements awarded: None

Said payments to begin immediately 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: Rob Merlin, Jr. and Ray Marglous.

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

Employee:	Rodney Northcross	Injury No.: 04-081094
Dependents:	N/A	Before the
Employer:	Painters District Council No. 2	<b>Division of Workers'</b>
		<b>Compensation</b>
		Department of Labor and Industrial
		Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Amerisure Insurance Company	Checked by: MDV; mk

**ISSUE PRESENTED**

Pursuant to 8 CSR 20-3.050 (1), (2), and (3) these two claims are consolidated for hearing but two separate awards will issue. The master proceeding is designated in the earlier file and the entire transcript will remain in that file.

In the earlier claim, Injury Number 03-093780, the issues presented for resolution are the subrogation interest of the Employer and the Second Injury Fund in Claimant’s third party settlement, unpaid medical bills, the nature and extent of any permanent disability versus the Employer and Second Injury Fund. In the later case the issues presented for resolution are the nature and extent of any disability versus the Second Injury Fund, the primary case having been previously settled.

**FINDINGS OF FACT**

1. Claimant was born March 11, 1950. He has been married to Pamela Northcross for 23 years. He has six children, one of whom lives at home, Tari Ashland Northcross, age 21. The Claimant received his GED from Beaumont High School in the 1970s. He had dropped out previously as a sophomore in 1966. He underwent union and foreman training as a drywaller and taper. He also has taken some basic computer classes for starters and has had some blueprint reading training. Claimant believes that he reads and writes averagely and has basic math skills. He is 6’3” tall and 255 pounds. Claimant applied for Social Security disability in 2005 and was awarded benefits in 2007. Claimant worked until the end of 2004 as a drywaller/taper.
  
2. When Claimant was 21 years old he was accepted into an apprentice union program. It was called the drywall finisher program. It was through the Painters Union and began in November of 1969. Claimant apprenticed for two years and became a journeyman in 1971 as a drywall finisher. Claimant’s job duties are essentially to hang drywall, tape and finish walls for the painters to paint. He has worked in that capacity for 38 years prior to the events that transpire here. Claimant would cover walls from the floor to the ceiling with drywall as well as the ceiling itself. The Claimant would use joint compound and

tape to finish seams. He would make three applications with sanding in between in preparation for the painters.

3. Claimant's job duties would require him to stand all day, eight hours a day. They would have to cover every inch of the drywall including covering up screws. It would require him to walk on and utilize steep angles, walk on ladders, climb up ladders, stand on benches, scaffolding and reach, grasp, perform overhead work and the work was extremely physically demanding within the time limits that were required by the Employer.
4. Claimant generally worked out of a union hall. From March 1 to January 2, 2002, he worked for TJ Weiss and then became a union organizer for the union where he would recruit nonunion drywallers into the union. This is a much easier job especially as Claimant got older. He was the first African American to hold the job of union organizer. In this capacity, Claimant's job was driving to various job sites and talking to drywallers and tapers and trying to persuade them to join the union. Every three years the union had an election and Claimant lost his job with the last election. The new union boss came in and eliminated the old union organizers and picked new people.
5. Prior to this job as a union organizer, Claimant had injuries to his left knee, right wrist and left wrist. Claimant ceased being a union organizer in October of 2003, and went to work for Accent Development as a foreman in January of 2004. Foreman was a less physical job. Claimant worked three months for Accent as a drywaller foreman but found the work difficult to perform. He had shoulder surgery for the first injury in April of 2004, and planned to go back to work but never did. Claimant worked for approximately three months in this foreman capacity.
6. Prior to the claimed primary injuries herein, Claimant injured his right wrist in the early 1990s. He developed carpal tunnel syndrome and had surgery. It took his right wrist a long time to heal but he came back to work able to work as before, except he experienced numbness and tingling. His hands were a little bit weaker than they were prior to the surgery and the numbness and tingling slowed Claimant down. He became a little bit anxious about how this disability affected his job. Claimant experienced left knee bursitis with swelling of the knee and underwent a surgery for a tear and removal of fluid in the 1980s. He also developed a Baker's cyst as a teenager. The knee became painful when Claimant would climb, kneel, step up on the bench or use scaffolding and Claimant worried about his physical ability to continue his job.
7. Claimant had not been reprimanded up to the time of his knee surgery or hassled in any way due to his slowness but testified that he was "questioned" about his work performance. Claimant says he was depressed before he became the union organizer. His son had killed his daughter-in-law and went to prison and Claimant's son-in-law committed suicide on Claimant's front porch. Claimant was depressed and said that he went to work to escape from his problems.

8. In the August 2003 claim, Claimant was working in his capacity as a union organizer driving to a job site to persuade drywallers to join the union. He was driving on West Florissant Road on a rainy day when a lady crossed in front of Claimant from the left and stopped in the intersection. Claimant testified he was reaching for his cell phone at the time and was distracted. His eyes were on the phone looking away from the road when the two vehicles collided. Claimant was taken by ambulance to Barnes-Jewish Emergency Room. He was provided x-rays and pain prescriptions and was told to follow-up with his primary physician and continues to report regularly to his job. He injured his neck, head and back.
9. In his 2003 claim, Claimant requests medical benefits past due in the amount of \$4,296.00. Claimant had asked the Employer for treatment and told the Employer about the emergency room visit and asked for further treatment on his neck, forehead and knee. The Employer did not send Claimant for further treatment right away to any physician so he went to Dr. Droege for about one month from September 10, 2003 to September 27, 2003, and incurred a bill of \$1,153.00.
10. Dr. Droege wasn't alleviating Claimant's symptoms and the Employer sent him to see Dr. Hulsey who recommended an MRI and surgery. Dr. Hulsey's treatment caused Claimant to incur \$2,638.00 in medical bills from Forest Park Hospital. By the time Claimant saw Dr. Hulsey he was no longer working as a union organizer and had gone to work for Accent Development.
11. When Claimant was working overhead for Accent he would develop pain in his neck and back. It was typical to work overhead especially at angles and with ceilings. Claimant found work very difficult. He could perform no overhead lifting and underwent shoulder surgery on April 15, 2004. The Claimant thought he would be able to heal and go back to work but the surgery did not solve his problem. He was not able to reach and stretch as he was able to before the surgery. Dr. Hulsey released the Claimant nine months later in the fall of 2004, but Claimant still experienced neck popping, weakness, difficulty lifting, and the shoulder had atrophied with regard to the opposite shoulder. He experienced pain on any overhead lifting and had very decreased range of motion. Claimant's head, back and neck continued to bother him as they had prior to the surgery and then when combined with the shoulder surgery as a result of the accident, Claimant was unable to keep up with his job.
12. The second claim developed while Claimant was at Accent Development. His left wrist began to hurt as it had done years before. Claimant had a prior carpal tunnel surgery on the left wrist and a prior knee surgery. Claimant found that he had to use his left hand more because his right shoulder was injured in the car accident in 2003 as a union organizer and so now the left was getting worse as a result of overwork. Claimant's left wrist started to tingle, went numb and would be symptomatic from the wrist up into the arm. Claimant would sometimes drop work tools and product and would have to stop sometimes. It felt like a bullet in his arm.
13. Claimant saw Dr. Ponnuru, his primary care physician. A nerve conduction study was performed under Dr. Ponnuru's guidance and Claimant was diagnosed with bad carpal

tunnel syndrome on the left. Claimant did not undergo surgery because he had no insurance and since he has received Social Security he does not need the surgery because the wrist doesn't hurt as much when he's not working.

14. Claimant feels depressed and worthless because he cannot work for a living.
15. Claimant says that he tried to obtain work with contractors and work through the union hall but was unable to get hired in his physical condition. Claimant testified that it's not just one thing physically keeping him from working it's multiple things keeping him from working; his left knee, left hand, right shoulder, gout and his feet are all causing him to be unable to work. He testified he has not looked for any other drywall jobs because he knows he cannot do them.
16. Dr. Hulsey doesn't believe Claimant has any limitations keeping him from working. Dr. Schlafly says he is not disabled but he does have some disabilities.
17. Claimant has undergone a microdiskectomy after all of the events that have been recounted here. This was after all the accidents and his feet feel numb and the surgery did not help him and he doesn't feel that he is able to use his hands for eight hours or sit for eight hours. He believes that hands, his knee, and his shoulder have rendered him unable to work without even having to consider his post accident back condition.
18. John Stephen Dolan testified as Claimant's vocational expert. He testified that Claimant has too many limitations to enable him to compete with the able-bodied for jobs that were available. Claimant cannot perform his work on a sustained and regular basis and there are too many other able-bodied persons without disabilities for Claimant to find a job where there are too few jobs. Mr. Dolan believes that Claimant is permanently and totally disabled as a result of a combination of his injuries.
19. The parties stipulated that Employee sustained a 30 percent permanent partial disability to his right shoulder and a 5 percent disability to the body as a whole referable to neck injuries and psychiatric injuries assuming that the Employee is not found to be a permanent total solely as a result of the August 29, 2003 incident.
20. The Employee had a third party case against the driver responsible for his 2003 motor vehicle accident when he was working as a union organizer and was struck with his vehicle. The case settled for \$100,000 prior to the settlement or trial of the Workers' Compensation claim. Attorney's fees in that matter were \$40,000 and expenses were \$597.00 leaving a balance of \$59,103.00 net recovery from the settlement.
21. That claim was settled on May 9, 2005. There was no finding of comparative fault on the part of the Employee prior to or at the time of that settlement. There was a post hoc determination of fault four months later.

**RULINGS OF LAW**

1. The Claimant is not permanently and totally disabled as a result of the August 29, 2003 accident while working for Painters District Council No. 2; therefore, pursuant to Claimant's agreement with the Employer his disability is assessed at 30 percent of the right shoulder and 5 percent of the body as a whole for psychiatric injury, neck and back injuries.
2. Claimant is entitled to \$4,296.00 in unpaid medical bills for treatment following his accident with the Employer for Dr. Droege's treatment and Dr. Hulsey's treatment and the diagnostic tests ordered by Dr. Hulsey at Forest Park Hospital for past benefits in the amount of \$4,296.00.
3. Preexisting the injury herein Claimant sustained a 25 percent permanent partial disability measured at the level of the left hand for preexisting carpal tunnel syndrome. He also suffered from a 25% percent permanent partial disability of the left knee. The right shoulder injury and the left carpal tunnel syndrome and left knee are working in a synergistic fashion to create uncompensated disability payable against the Second Injury Fund based on a .15 loading factor for a total of 23 weeks of disability at the permanent partial disability compensation rate of \$347.05 per week or \$7,982.
4. Pursuant to §287.150, the *Ruediger* case and the cases interpreting that section the subrogation should be dealt with as following: The Employer has paid \$29,662.19 in benefits prior to settlement. The gross recovery in the auto accident case was \$100,000. The attorney's fees and expenses were \$40,597.00 with a net recovery of \$59,403.00. Therefore, the subrogation amount of \$49,659.12 is divided by the \$100,000 gross recovery for a ratio of \$496.59. The net recovery of \$59,403.00 x the ratio of \$496.59 comes to \$29,522.69 due to the Employer. Thus, the balance of the recovery, \$59,403.00 - \$29,522.69 due to the Employee is \$29,880.31. According to the statute, this is a credit pending against further obligations of the Employer for compensation.
5. As a result of the 2004 case, Claimant has sustained upper extremity disability of 20 percent at the 232 week level or 26.5% at the wrist (46.4 weeks). The Claimant did not become permanently and totally disabled following this 2004 accident. Preexisting this 2004 accident Claimant sustained a 30 percent permanent partial disability of the right shoulder (69.6 weeks), a 5 percent permanent partial disability from the body as a whole for injuries to his psyche, his neck and his back, a 25% permanent partial disability to the left knee (40 weeks) and 25 percent preexisting left hand carpal tunnel syndrome (43.75). The 20 percent left extremity disability (46.4 weeks) as a result of the primary injuries combines with the prior 30 percent right shoulder (69.6) and 25% left knee injury (40 weeks) in a synergistic fashion, thus, represented by a loading factor of .2 to provide an additional 31.2 weeks of permanent partial disability assessable against the Second Injury Fund. The left carpal tunnel syndrome (primary) does not combine in a synergistic fashion with the prior left carpal tunnel syndrome as disability is cumulative as to that part. The prior left carpal tunnel syndrome has not been included, therefore, for this calculation.

- 6. In 2003, Claimant has a 30 percent permanent partial disability of the shoulder (69.6) on the primary plus a 25% preexisting carpal tunnel syndrome (43.75 weeks) and 25% left knee disability (40 weeks), which combine in a synergistic fashion but represented by a faction of .15 for 23 weeks of disability.

**DISCUSSION**

Like several physicians, I believe Claimant is unable to return to his former work as a drywaller, but I think he is not totally disabled from all work from the injuries under consideration. His spinal surgery may change the equation, but it is not up for consideration herein as it was a post accident condition. Also, I have considered the claim for psychological injury from the murder and suicide affecting Claimant's family. While these events are tragic, I don't think they constitute permanent disabilities from working. In fact, Claimant testified he liked to go to work to get away from thinking about these tragedies.

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

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

Matthew D. Vacca  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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