

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

Injury No.: 03-115905

Employee: Claude Russell  
Employer: Proctor & Gamble (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.<sup>1</sup> Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the (ALJ) dated August 24, 2010, as supplemented herein.

**Preliminaries**

In an award dated August 24, 2010, the ALJ found that employee is permanently and totally disabled as a result of his November 11, 2003, primary injury combining with his preexisting disabilities. The ALJ found the Second Injury Fund liable for employee's permanent total disability benefits.

The Second Injury Fund filed an Application for Review on September 8, 2010, alleging that the ALJ erred as a matter of law in ruling that employee is permanently and totally disabled and unemployable in the open labor market because employee was actually fully employed and able to work at the time of the final hearing. Along with its Application for Review, the Second Injury Fund also filed a Motion to Submit Additional Evidence. The additional evidence the Second Injury Fund requested to submit consisted of copies of Internet websites allegedly supporting the Second Injury Fund's contention that employee was fully employed.

The Commission issued an order remanding this matter to the Division of Workers' Compensation (Division) with directions to set this matter for a supplemental hearing for the purpose of allowing the Second Injury Fund to offer evidence regarding employee's alleged employment with Peoria Friendship Missionary Baptist Church. The Division was further directed to afford employee a full opportunity to challenge the new evidence by objection, cross-examination and presentation of rebuttal evidence.

The remand hearing was conducted on March 25, 2011, and the transcript from said hearing was forwarded to the Commission.

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2003 unless otherwise indicated.

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The primary purpose of this supplemental opinion is to address the evidence submitted at the remand hearing and to make a determination as to whether the Second Injury Fund established that employee is employable in the open labor market.

It should be noted that the Commission admitted into evidence all of the exhibits offered at the March 25, 2011, remand hearing. Said exhibits were fully reviewed and considered by the Commission.

### **Findings of Fact**

The Second Injury Fund offered copies of Internet websites to support its contention that employee has been employed as a full-time pastor since October 16, 2008.

One page printed from the Peoria Friendship Missionary Baptist Church website states that “[o]n October 16, 2008, [employee] was called to pastor Peoria Friendship M. B. Church...” Another page printed from the website shows a picture of employee with his title listed as “Pastor.”

The other evidence the Second Injury Fund offered was from a website entitled “Black Preaching Network.” The printed pages submitted as evidence indicate that employee has a profile on the web-based network.

Employee concedes that he has been a pastor since 1979. He has served several churches during his life. He preached when he was employed as a full-time employee at Proctor & Gamble, and he has continued to preach after the primary injury. However, employee testified that due to his physical condition, he has only been able to preach on a sporadic basis since his back injury in 2003. He testified that he is not physically able to handle the duties of a full-time pastor. Therefore, he only preaches at the church on a part-time basis. Employee stated that when he is physically able to be present at Peoria Friendship Missionary Baptist Church, he is only there for approximately nine hours during a week. Employee also testified that there are five other ministers at the church.

Employee testified that he volunteers his time at the church and the only money he receives from the church is reimbursement for his expenses. Employee’s Joint Federal Income Tax Return for 2010 shows that he does not receive any income from the church.

Dr. Musich’s medical records show that he was aware that employee was a Baptist Minister. Dr. Musich found employee to be permanently and totally disabled. Vocational expert, Ms. Shea, specifically found that employee’s “pain level and functional limitations prevent [him] from even doing the pastoral work he was performing.”

### **Conclusions of Law**

In determining whether the Second Injury Fund’s additional evidence supports its argument that employee is not permanently and totally disabled, we turn to *Brown v. Treasurer of Missouri*, 795 S.W.2d 479 (Mo. App. 1990). In *Brown*, the Court stated that

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“[t]otal disability means the inability to return to any reasonable or normal employment, it does not require that the employee be completely inactive or inert.” *Id.* at 483.

We find that while employee may volunteer his time to Peoria Friendship Missionary Baptist Church on a part-time basis, employee’s physical condition prevents him from being able to engage in any reasonable or normal employment. Both Dr. Musich and Ms. Shea were aware of employee’s experience as a pastor and yet they concluded that he is permanently and totally disabled and unemployable in the open labor market.

We do not believe that the web information offered by the Second Injury Fund supports a finding that employee is employed as a full-time pastor. Instead, we find employee’s testimony credible that he is physically unable to work as a full-time pastor and, at most, he spends nine hours per week volunteering his time to the church. We specifically find that this does not constitute reasonable or normal employment in the open labor market.

We find that the overwhelming weight of the evidence supports the ALJ’s conclusion that employee is permanently and totally disabled as a result of his November 11, 2003, primary injury combining with his preexisting disabilities.

**Award**

For the foregoing reasons, the Commission affirms the award and decision of the ALJ, as supplemented herein.

The award and decision of Chief Administrative Law Judge Lawrence C. Kasten, issued August 24, 2010, is affirmed, and is attached and incorporated by this reference.

The Commission further 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.

Given at Jefferson City, State of Missouri, this 2<sup>nd</sup> day of September 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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Curtis E. Chick, Jr., Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Claude Russell Injury No. 02-155101 &  
03-115905  
Employer: Proctor & Gamble (Settled)  
Additional Party: Second Injury Fund  
Appearances: Christopher Wagner, attorney for employee, and Cliff Verhines, attorney  
for the Second Injury Fund.  
Hearing Date: April 28, 2010 Checked by: LCK/rf

**SUMMARY OF FINDINGS**

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? On or about December 10, 2002 and November 11, 2003.
5. State location where accident occurred or occupational disease contracted: Cape Girardeau County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: 2002 case: Repetitive use of left arm and elbow. 2003 case: Lifting during an FCE which injured the low back and neck.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left arm at elbow in the 2002 case. Body as a whole referable to neck and low back in the 2003 case.
14. Nature and extent of any permanent disability: 2002 Case: See Rulings of Law. 2003 case: 22.5% of the body as a whole referable to the low back and 12.5% of the body as a whole referable to the neck against the employer. Permanent total disability against the Second Injury Fund.
15. Compensation paid to date for temporary total disability: 2002 case none. 2003 case \$62,090.40.
16. Value necessary medical aid paid to date by employer-insurer: \$4,750.00 in 2002 case. \$160,746.99 in 2003 case.
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: Not determined.
19. Weekly compensation rate: 2002: \$649.32 per week for permanent total disability and \$340.12 for permanent partial disability. 2003: \$662.55 for permanent total disability and \$347.05 per week for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable:
  - 2002 Case: \$3,112.10 against the Second Injury Fund.
  - 2003 Case: Permanent total disability against the Second Injury Fund.
22. Second Injury Fund liability: \$3112.10 in the 2002 case. Permanent total disability in the 2003 case.
23. Future requirements awarded: None in 2002 case. See Rulings of Law in 2003 case.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Christopher A. Wagner.

## **FINDINGS OF FACT AND RULINGS OF LAW**

On April 28, 2010, the employee Claude Russell appeared in person and with his attorney, Chris Wagner, for a hearing for a final award. The Second Injury Fund was represented by Assistant Attorney General Cliff Verhines. The parties agreed that one award could be issued for both cases. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS**

1. Proctor and Gamble was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was duly qualified as a self-insured employer.
2. On December 10, 2002 and November 11, 2003, Claude Russell was an employee of Proctor and Gamble and was working under the Workers' Compensation Act.
3. On or about December 10, 2002 and November 11, 2003, the employee sustained accidents arising out of and in the course of his employment.
4. The employer had notice of the employee's accidents.
5. The employee's claims were filed within the time allowed by law.
6. In the 2002 case, the rate of compensation is \$649.32 per week for permanent total disability benefits and \$340.12 per week for permanent partial disability. With regard to the 2003 case, the rate of compensation for temporary total disability and permanent total disability is \$662.55 per week. The rate of compensation for permanent partial disability is \$347.05 per week.
7. The employee's injuries were medically causally related to the accidents.
8. The employer paid \$4,750.00 in medical aid in the 2002 case. The employer paid \$160,746.99 in the 2003 case.
9. The employer did not pay any temporary disability in the 2002 case. In the 2003 case the employer paid \$62,090.40 in temporary disability for 94 weeks beginning on November 24, 2003 and continuing through September 12, 2005.

### **ISSUES**

1. Liability of the Second Injury Fund for permanent partial disability in Injury number 02-155101.
2. Liability of the Second Injury Fund for permanent partial disability or permanent total disability in Injury number 03-115905.

### **EXHIBITS**

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Stipulation for Compromise Settlement in Injury number 02-155101.

- B. Stipulation for Compromise Settlement in Injury number 03-115905.
- C. Medical records of the employee.
- D. The deposition of Dr. Musich that includes his December 22, 2005 report and CV.
- E. The deposition of Susan Shea that includes her report and CV.

Second Injury Fund's Exhibits

- 1. The May 4, 2009 deposition of Claude Russell.

**WITNESS:** Claude Russell, the employee.

**BRIEFS:** The employee filed his brief on May 28, 2010. The Second Injury Fund did not file a brief.

**FINDINGS OF FACT:**

The employee is 57 years old. During high school he loaded laundry on trucks for delivery and worked at AAA Motor Club. After high school, he obtained an Associate Degree in Accounting with a minor in electronics at a Junior College. He worked for the City of Carbondale Illinois from 1976-1979 and ran a printing press. He went to Southern Illinois University for accounting but did not get a degree. During college he worked nights at Tuck Industries. He has a theology degree from Arkansas Baptist College. He worked as a full time pastor from 1979-1986. In 1986, he started working at Proctor & Gamble (P&G) as a line operator. The last seven years he was a forklift operator. He was last employed at P&G in August of 2005.

The employee testified that in 1979, he injured his back while lifting. He had ultrasound therapy but never completely recovered. In 1988, he had left knee surgery to repair torn ligaments. His knee still gets stiff and is hard to move; and bothers him with weather changes. Prior to 2002, he had several hernia surgeries.

1999:

The employee testified that in 1999 he had a low back injury at work.

In June of 1999 the employee went to St. Francis Medical Center for left-sided back pain after he picked up a load on a forklift, and twisted. It was noted that the employee had prior lower lumbar injuries and in 1979 had a CT scan that showed a protruding disc.

A September MRI showed a left disc herniation at L4-5 that abutted and displaced the L4 nerve root with likely significant mass effect upon the nerve root and a minimal disc bulge at L5-S1. In October Dr. Gold noted that the employee had a large left-sided lateral disc herniation. In November Dr. Gold performed a discectomy at L4-5. At the end of November, the employee was admitted to the hospital due to increasing intractable left leg pain. An MRI showed paraspinal fluid at L4-5 which perhaps represented a hematoma. In December, a MRI showed a

possible hematoma from L4 to L5-S1. The employee was admitted for pain control and a MRI showed the hematoma had diminished in size.

2000:

In January, the employee was diagnosed with postoperative radicular pain. In March, the employee had three epidural steroid injections. Due to low back and right leg pain the employee had a MRI in May which showed mild desiccative signal in the L4-5 disc and similar changes with a disc bulge at L5-S1 with a suspected annular tear. In June, a myelogram and post-myelogram CT scan showed no evidence of disc herniation and the ventral defect at L5-S1 was thought to be a bulging disc.

In July, Dr. Gocio reviewed the myelogram and MRI scans which showed a large central protrusion of L5-S1 and degenerative disc changes at L4-5 and L5-S1. The impression was lumbar instability L4-5 and L5-S1 with L5-S1 disc protrusion. Dr. Gocio performed a lumbar discogram in August which showed a probable L5-S1 disc herniation and disc bulge at L4-5. The post discogram showed the position of the disc was compatible with an annular tear/herniation.

In September, the employee saw Dr. Chaudhari for pain management due to low back, right hip and right groin pain. Dr. Chaudhari diagnosed failed back syndrome with neuropathic and nociceptive pain. Dr. Chaudhari prescribed pain medications and ordered bilateral sacroiliac joint blocks, bilateral L3-4 thru L5-S1 facetal blocks and L5-S1 epidural block, and right piriformis block. In October, Dr. Chaudhari stated that the employee had failed back syndrome and was disabled. The employee continued to treat with Dr. Chaudhari for pain management through the end of 2000.

2001:

In June, Dr. Straubinger assessed failed back syndrome. The employee was tolerant to his current duties as a lift driver and should consider radiofrequency ablation. In September, Dr. Chaudhari diagnosed failed back syndrome; facetal arthrosis at L3-4, L4-5 and L5-S1; and neuropathic and nociceptive pain. He performed a left SI joint injection, left piriformis injection and L5-S1 epidural. The pain medications were continued.

On September 12, Dr. Chaudhari performed bilateral L3-4, L4-5, L5-S1 facetal blocks, a L5-S1 epidural block, and a right piriformis block due to intractable low back pain. On September 18, the employee was given L2-3, L3-4, L4-5, L5-S1 and S1-2 facetal neurolysis; sacroiliac joint neurolysis with radio frequency; and a piriformis block and epidural block at L5-S1. In October, Dr. Chaudhari performed a right L3-4, L4-5, L5-S1 and S1-S2 facetal neurolysis; SI joint neurolysis by radio frequency; and a piriformis block.

The employee testified that the therapy, pain management, and epidural injections helped with the leg pain and he did not have pain all of the time. After each back injury, he returned to

work with no permanent restrictions. He had to have help moving material around due to the nature of the job and injury.

At the end of October the employee developed severe chest pain that radiated into the left arm. He was admitted at St. Francis Medical Center. Dr. Law placed stents in the mid left anterior descending coronary artery and the proximal left anterior descending coronary artery. The discharge diagnosis was resolved unstable angina, coronary artery disease with stent placement twice in the left anterior descending coronary artery, moderate coronary disease involving the left circumflex coronary artery; and longstanding back problems.

2002:

In June, the employee saw Dr. Law for a follow up of the stent procedure. The employee testified that he was released by Dr. Law but still had heart problems. He had a heart attack in July of 2007. He does not have as much strength or stamina and gets out of breath.

The employee testified that in December of 2002, he started losing feeling in his left arm and hand and had a burning sensation due to steering the forklift with his left hand.

In December, Dr. Deisher diagnosed cubital tunnel syndrome. The employee saw Dr. Straubinger for left upper extremity discomfort with a cubital tunnel and wrist component.

2003:

In January Dr. Deisher stated that the employee's nerve conduction test was consistent with severe motor and sensory delay across the elbow. In February, Dr. Deisher performed a left cubital tunnel release with anterior transposition. In March, he ordered therapy. At the end of March, Dr. Deisher stated that given the severity of the operative findings it was taking him longer to recover. In April, Dr. Deisher released the employee to work with no limitations. The employee testified that after Dr. Deisher's surgery and therapy he did not get the full use of his arm. In May of 2003, he lost function in his left arm and drove a forklift into a wall.

The employee saw Dr. Straubinger on May 27. Two days ago the employee had a sudden sharp pain in the left elbow, reached over with his right hand to grab his left elbow, lost control of the forklift and struck a metal upright safety pole which was pushed over striking a wall and causing structural damage. Dr. Straubinger ordered cervical x-rays due to neck pain.

The employee saw Dr. Deisher in June. While at work the employee developed a sharp pain in the left elbow, lost control of the forklift he was driving and ran into a concrete wall. Dr. Deisher ordered repeat EMG/nerve conduction studies which showed mild left ulnar neuropathy at the elbow and a normal nerve conduction study of the left median nerve.

In July, Dr. Mackinnon performed revision surgery to the left ulnar nerve for recurrent cubital tunnel syndrome. Dr. Mackinnon noted that the nerve looked dreadful. In October, Dr. Mackinnon noted that the employee's pain was decreased but he had continued hypersensitivity

of the left ulnar nerve distribution. After physical therapy, he was released to unrestricted duty on November 9.

The employee testified that he returned to 12 hour shifts but was not allowed to drive a forklift and had temporary restrictions. He worked one day but his supervisor told him that he should not work until he had an FCE. He was sent for an FCE on November 11. During the FCE he felt a loud pop in his back when he was lifting and pulling.

On November 11, 2003, a note from Mid America Rehab showed that during the FCE, the employee was lifting, grabbed his low back and reported a pop and severe pain in his low back. A lumbar MRI on November 12 showed prominent disc signal reduction with a disc protrusion encroaching on the left on the S1 nerve root at L4-5 and a posterior annular tear with intrusion on the anterior dural sac at L5-S1.

On November 13, the employee saw Dr. Straubinger for a low back injury. The November 12 MRI showed the previous L4-5 surgery with a disc protrusion on the left side encroaching the S1 nerve root; and an annular tear at L5-S1. There was enhancing fibrosis at L4-5 with residual or recurrent disc fragment impinging on the exiting nerve root. Dr. Straubinger diagnosed low back pain with similar radicular features to the left side status-post 1999 low back intervention at the L4-5 level, with a new encroaching disc fragment and possible scarring.

On December 3 the employee saw Dr. Robson. An MRI showed a recurrent left-sided herniated disc at L4-5. After the 1999 L4-5 discectomy, he returned to work with a ten pound weight limit which was lifted after an epidural steroid injection in April of 2001. The employee had no problem with his low back or radiating leg pain since he returned to regular duty in April of 2001. Past surgery history was left knee surgery in 1988, back surgery in 1999 and two surgeries on his ulnar nerve. Dr. Robson recommended an epidural injection with an L4 nerve root block on the left which was done on December 9 for the recurrent L4-5 disc. On December 16, Dr. Robson stated that the L4-5 injection did not give any long term relief and he recommended an L4-5 discectomy and fusion.

The employee went to the emergency room on December 29 for left shoulder and left-sided neck pain. The cervical MRI showed that since the employee's previous examination a new left C5-6 disc herniation had occurred that appeared to compress the exiting nerve root. On December 30, the employee saw Dr. Straubinger for neck pain radiating to the left upper extremity. Ten days after the FCE the employee began having neck pain. An MRI showed a C5-6 herniation. Dr. Straubinger diagnosed neck pain, cervical disc disease, and radicular features consistent with the C5-6 dermatome.

#### 2004:

On January 8, Dr. Robson reviewed the December 29, 2003 cervical MRI which showed a left-sided disc herniation at C5-6. On January 15, Dr. Robson noted that the employee had increased neck pain radiating to the left arm. Dr. Robson stated that the employee would likely

require a C5-6 discectomy and fusion. Dr. Robson was not comfortable performing the low back surgery scheduled on January 30 until he was evaluated by Dr. Kennedy.

The employee saw Dr. Kennedy on January 16 for severe neck pain radiating into the arm. The MRI demonstrated a C5-6 disc herniation on the left with impingement of the nerve root. Dr. Kennedy recommended neck surgery and to defer the lumbar fusion. On January 21, Dr. Kennedy performed a microdiscectomy and fusion at C5-6. The employee testified that after the neck surgery, he had some stiffness and his range of motion was not as good as before.

On February 18, Dr. Mackinnion thought the left ulnar nerve was regenerating and the atrophy had improved. She was optimistic that as the nerve regenerated his sensation would improve. If not, he would be a candidate for a nerve transfer.

On March 1 Dr. Robson and Dr. Kennedy performed a lumbar laminectomy and discectomy at L4-5 with a posterior interbody fusion with a cage, bone graft and Steffee instrumentation. On May 12 Dr. Robson stated that the employee had light leg pain which is new since his last visit but his pre-operative leg pain was gone.

The employee had therapy from May 18 until October 15. A cervical CT on August 19 showed the C5-6 fusion and a mild disc protrusion at C3-4. In mid September, Dr. Kennedy noted that the employee would benefit from trigger point injections and Dr. Robson ordered a lumbar CT with reconstruction which did not show definite evidence of a solid fusion.

On September 29 Dr. Robson stated the employee had pseudoarthrosis and the employee's options were to accept the current conditions with permanent restrictions in the sedentary to light range or to consider the possibility of hardware removal, exploration of fusion and re-bone grafting. In October, the employee's symptoms had escalated to the point where he had been on bed rest for the last few days. He had severe low back pain and left greater than right posterior hamstring soreness. Due to the severity of the symptoms and decrease in function, Dr. Robson recommended surgery.

Due to pseudoarthrosis at L4-5, Dr. Robson performed a hardware removal and exploration of the L4-5 fusion on November 17, 2004. He performed a revision of the fusion with right iliac crest bone marrow aspiration, Helios bone graft substitute and Steffee instrumentation at L4-5. On November 26 Dr. Robson and Dr. Arenos performed an anterior exposure of the L4-5 discectomy; removal of the previously implanted cage; an anterior interbody fusion of L4-5 using a bone graft; and an application of plates and screws of L4 thru L5. The employee continued to treat with Dr. Robson the rest of 2004.

#### 2005:

In March, the employee saw Dr. Peoples, a neurologist for cutaneous neuropathic pain over the left lower abdominal wall next to his scar which was not coming from the lumbar or thoracic spine. He prescribed Neurontin and a Lidoderm patch. In April, Dr. Peoples increased the Neurontin and continued the Lidoderm patch.

In May, the employee saw Dr. Graham for superficial neuropathy secondary to the abdominal incision. Dr. Graham prescribed medications. Dr. Peoples noted the employee reported no significant improvement. He was released with no work restrictions from the abdominal cutaneous neuropathy and abdominal pain. The employee had increased back pain. Dr. Robson stated that the May 24 CT scan showed a solid fusion and referred him to Dr. Graham for pain management. The employee had physical therapy beginning on May 31 for his fusion and was discharged on June 30.

On June 1 Dr. Graham changed the medications for abdominal pain. On June 17, Dr. Robson did not have any additional treatment to offer. The employee had a permanent restriction in the sedentary work range (ten pound lifting limit and no repetitive bending, stooping, twisting or awkward positions and brief hourly position changes). Dr. Robson stated that the employee was at maximum medical improvement. The employee saw Dr. Graham in July and August. On September 12, 2005 the employee had no significant change and was taking Elavil for sleep. Dr. Graham stated the employee was at maximum medical improvement and to obtain Elavil from his private physician.

The employee testified that after he was released by Dr. Graham he never returned to work. Dr. Robson put permanent restrictions of no bending, twisting or lifting, and to only perform a sit down job. In his deposition, the employee testified that he was last employed at P&G in August of 2005, and was terminated because there was no work within his restrictions.

#### Opinions:

The employee saw Dr. Musich on December 22, 2005. On exam Dr. Musich found a 35% diminished cervical mobility in all fields. There was mild paresthesias to light touch and pin prick of the C5-6 dermatomal distribution. With regard to the left elbow, there was paresthesias to light touch and pin prick over the scarred surface and adjacent soft tissue. There was paresthesias to light touch and pin prick over the ulnar nerve distribution from the elbow level distally. The employee had increased pain symptoms with movement. Left straight leg raising was positive and paresthesias was over the left L4-5 dermatomal distribution. The left knee jerk reflex was absent. Lumbar mobility demonstrated a loss of 60% in flexion/extension in lateral flexion bilaterally due to aggravated low back pain. The employee frequently moved around the examination room in order to obtain a more comfortable position.

Dr. Musich did not rate disability for the employee's left knee or heart condition. It was his opinion that the employee suffered a pre-existing disability of 15% of the person as a whole referable to his lumbosacral spine prior to December of 2002. It was Dr. Musich's opinion that as a result of the December of 2002 injury the employee sustained a permanent partial disability of 50% of the left upper extremity at the elbow. It was Dr. Musich's opinion that as a result of the November of 2003 injury, the employee sustained a permanent partial disability of 35% of the person as a whole referable to his cervical spine; and an additional permanent partial disability of 60% of the person as a whole referable to the lumbosacral spine.

It was Dr. Musich's opinion that the combination of the disabilities is significantly greater than their simple sum and will continue to produce a chronic hindrance in his routine activities of daily living. It was Dr. Musich's opinion that the employee should continue to observe permanent restrictions placed upon him by his treating physician and that the employee should refrain from repetitive flexion and extension of the left elbow. It was Dr. Musich's opinion that the employee is permanently and totally disabled due to a combination of all of the disability in conjunction with permanent restrictions and chronic pain symptoms.

The deposition of Dr. Musich was taken on March 3, 2009. With regard to the 1999 low back surgery, the employee recovered and was capable of performing his routine job without restriction or accommodation. The employee told him that his low back was fine and he experienced absolutely no radiculopathy during 2001 through November of 2003.

The employee met with Susan Shea on May 8, 2008, and her deposition was taken on February 20, 2009. Ms. Shea stated the employee performed his forklift operator job at P & G from January of 1986 until November of 2003 with no medical restrictions. In her vocational summary and opinions, Ms. Shea stated that the employee was 55 years old with a two year degree in electronics and additional college hours in the field of personnel management. He has worked in skilled and semi-skilled positions throughout his vocational career; and is capable of skilled work from a cognitive viewpoint. The employee developed left upper extremity pain in 2002 which started a chain of medical events which resulted in two surgeries on the left upper extremity, two lumbar back surgeries not including the 1999 surgery and a cervical spine surgery. These conditions have resulted in permanent restrictions at less than the sedentary work level and pain issues which preclude work.

It was Ms. Shea's opinion that the employee is unemployable in the competitive job market of the national economy. Factors for her opinion include the employee's job history has involved work that has primarily involved use of both upper extremities; problems with the left upper extremity caused him to wreck his forklift; the employee is over 50 years old which causes adjustments to new training or types of work to be more difficult; the employee has postural limitations that exclude him from performing either a sedentary or light work; his lifting restrictions places him at less than sedentary work; the employee's pain level and functional limitations prevent him from even doing pastoral work he was performing; the employee's left upper extremity pain of 7/10 on a continuing basis precludes all work; the employee's has had six surgeries that provided disincentive to any typical employer. In summary, the employee is an older worker who has undergone six surgeries. He has an unacceptable level of pain and restrictions that limit him to less than sedentary work. It is highly unlikely that any typical employer would even consider such an individual for hire.

#### Settlements:

In Injury Number 02-155101 the employee settled his claim against the employer for 15% of the left elbow. In Injury Number 03-115905 the employee settled his claim for approximately 22.5% of the lumbar spine and 12.5% of the cervical spine.

Current Condition:

The employee testified that he has not worked since his employment at P&G ended. He has applied at a couple of churches as a pastor, as a substitute teacher at Cape Girardeau public schools, and at the hospice association but has not worked due to his health. He would have trouble working as a pastor because it requires a lot of visitation, meetings, and standing; and he has trouble standing and sitting for a long time. His medication affects doing that job and as a substitute teacher. With regard to working at Hospice, that would entail driving around to visit and do counseling. He cannot drive as far or long as used to. He is also concerned with the dependability factor. He applied for these jobs because he has always been independent, has worked all of his life and feels like he needs to do something.

In his May of 2009 deposition, the employee testified that he has done intermittent speaking engagements as a minister and has received \$50.00 to \$300.00. The last time he did a speaking engagement was a month prior to the deposition at a church in Chicago. He was paid \$175.00. During the last 10 months before the deposition, he was paid for four engagements.

At the hearing, the employee testified that he has done some speaking engagements. He averages three to four speaking engagements a year and is not paid except for travel or lodging. The engagements are usually in Missouri. He has problems sitting due to neck and back pain, and has trouble going up and down stairs. He can drive a car but usually with the speaking engagements, someone else drives or the transportation is provided.

The employee testified that his typical day is getting up at 5:00 or 5:30 a.m. He makes sure that he gets everything done prior to going downstairs because he has trouble going up and down stairs. He makes coffee, reads and watches television. He no longer mops, dusts and vacuums. He has trouble bending his back. His wife and daughter take care of the house. He has done some accounting work for the family business. The employee cannot sit down for a long time, has to move around, and can only stand for a short length of time. The time spent lying down depends on how much pain he is in and what medication he takes. The employee lies down pretty much every day for four hours at once.

With regard to his left hand, half of his hand is numb and tingling. He has coldness in his arm and hand. Sometimes he wears a glove even in the summer. He has a prickly sensation in his small and ring fingers that goes up his arm. He has trouble gripping tightly and sometimes items will slip out of his hand. He has back pain 24 hours a day which is worse at times. He has pain from his back down the front of his legs. He takes Percocet everyday and Lyrica every night. The employee is still seeing a doctor and attending pain management. He uses a cane due to his back and leg.

**RULINGS OF LAW:**

***Issue 1. Liability of the Second Injury Fund for permanent partial disability in Injury number 02-155101.***

The employee has requested an award of permanent partial disability against the Second Injury Fund for a combination of the primary left elbow injury and his pre-existing low back condition that required surgery.

Primary Injury:

Based on the evidence, I find that the primary injury to the employee's left elbow resulted in a 15% permanent partial disability of the left elbow at the 210 week for a total of 31.5 weeks of compensation.

Pre-existing low back condition:

The employee injured his back in 1979 and in 1999. In 1999, the employee had a discectomy at L4-5 and developed a hematoma. In 2000, the employee had several epidural steroid injections for low back and right leg pain. Due to continued problems, the employee had a MRI, a myelogram, a post-myelogram CT scan, and a lumbar discogram. The employee was diagnosed with failed back syndrome with neuropathic and nociceptive type of pain. Dr. Chaudhari prescribed pain medications and ordered various types of injections. He continued with pain management through the rest of 2000. In September and October of 2001, the employee continued to receive pain management in the form of medications and injections including radio frequency due to low back pain. The employee testified that due to his low back, he had to have help moving material around due to the nature of the job and injury.

It was Dr. Musich's opinion that the employee suffered a pre-existing disability of 15% of the person as a whole referable to his lumbosacral spine. It was Dr. Musich's opinion that the combination of the disabilities was significantly greater than their simple sum and would continue to produce a chronic hindrance in his routine activities of daily living.

Based on the evidence, I find that the employee's pre-existing low back condition was of such seriousness as to constitute a hindrance or obstacle to employment or obtaining re-employment. I find that the pre-existing low back condition resulted in a 15% permanent partial disability of the body as a whole referable to the low back for a total of 60 weeks of compensation.

Conclusion:

I find that the employee's pre-existing low back condition and the last injury to the left elbow combined synergistically to create a total disability of 100.65 weeks. This total disability is based on a loading factor of 10%. After deducting the disability that existed prior to the last injury (60 weeks) and the disability resulting from the last injury considered alone (31.5 ) from

the total disability attributable to all injuries or conditions existing at the time of the last injury (100.65 weeks), the remaining balance to be paid by the Second Injury Fund is equal to 9.15 weeks. The Second Injury Fund is therefore directed to pay to the employee the sum of \$340.12 per week for 9.15 weeks for a total award of permanent partial disability equal to \$3,112.10.

***Issue 2. Liability of the Second Injury Fund for permanent partial disability or permanent total disability in Injury number 03-115905.***

The employee is claiming that he is permanently and totally disabled. The term “total disability” in Section 287.020.7 RSMo, means inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. The phrase “inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. See Kowalski v/ M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1992). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. See Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo. App. 1992). Total disability means the “inability to return to any reasonable or normal employment.” An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. See Brown v. Treasurer of State of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990).

The question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person’s present physical condition, reasonably expecting the employee to perform the work for which he or she entered. See Reiner at 367, Thornton v. Haas Bakery, 858 S.W.2d 831, 834 (Mo. App. 1993), and Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995). The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo.

The first question that must be addressed is whether the employee is permanently and totally disabled. If the employee is permanently and totally disabled, then the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a combination of the pre-existing injuries and conditions and the employee’s compensable work-related accident and injury. Under Section 287.220.1, the pre-existing injuries must also have constituted a hindrance or obstacle to the employee’s employment or re-employment.

There is both medical and vocational evidence that addresses whether the employee is permanently and totally disabled. Dr. Robson put the employee on permanent restriction in the sedentary work range which is a ten pound lifting limit and no repetitive bending, stooping, twisting or awkward positions and brief hourly position changes. It was Dr. Musich’s opinion that the employee should continue to observe those permanent restrictions and should refrain from activities that require repetitive flexion and extension of the left elbow. It was Dr. Musich’s opinion that the employee is permanently and totally disabled and that the employee has permanent restrictions at less than the sedentary work level and pain which precludes work. It was Ms. Shea’s opinion that the employee is unemployable in the competitive job market of the

national economy. The employee has an unacceptable level of pain and restrictions that limit him to less than sedentary work. It is highly unlikely that any typical employer would even consider such an individual for hire.

Based on a review of all the evidence, I find that the opinions of Dr. Musich and Ms. Shea are credible regarding whether the employee is permanently and totally disabled.

In addition to both the medical and vocational evidence, I find that the employee was a very credible and persuasive witness on the issue of permanent total disability. The employee offered detailed testimony concerning the impact his condition has had on his daily ability to function at home or in the work place. His testimony supports a conclusion that the employee will not be able to compete in the open labor market. The employee was observed during the hearing. He was using a cane and exhibited behavior and physical patterns including moving around in his chair, standing up and sitting down which support a finding that the employee is suffering from a significant level of pain and discomfort. Dr. Musich noted that the employee frequently moved around the examination room in order to obtain a more comfortable position. The testimony and observed behavior of the employee were important on the issue of permanent total disability.

Based on the credible testimony of the employee and the supporting medical and vocational rehabilitation evidence, I find that no employer in the usual course of business would reasonably be expected to employ the employee in his present condition and reasonably expect the employee to perform the work for which he is hired. I find that the employee is unable to compete in the open labor market and is permanently and totally disabled.

Given the finding that the employee is permanently and totally disabled, it must be determined whether the primary injury alone and of itself resulted in permanent total disability. There is no evidence that the primary injury alone caused the employee to be permanently and totally disabled. All of the evidence was that the employee was permanently and totally disabled due to a combination of injuries and conditions.

It was Dr. Musich's opinion that as a result of the November 11, 2003 accident, the employee sustained a permanent partial disability of 35% of the person as a whole referable to his cervical spine; and a permanent partial disability of 60% of the person as a whole referable to the lumbosacral spine. A Stipulation for Compromise Settlement was entered into by the employee and the employer-insurer and approved by the Division. The amount was \$48,587.00 which was based upon an approximate disability of 22.5% of the body as a whole referable to the lumbar spine and 12.5% of the body as whole referable to the cervical spine. I find that as a result of the last injury, the employee sustained permanent partial disability. Based upon the evidence, I find that as a direct result of the last injury the employee sustained a permanent partial disability of 22.5% of the body as a whole referable to his lumbar spine and 12.5% of the body as whole referable to the cervical spine. I find that the employee's last injury alone did not cause the employee to be permanently and totally disabled.

The next issue to be addressed is whether the employee's pre-existing conditions were a hindrance or obstacle to his employment or re-employment.

With regard to his low back, the employee injured his back in 1979 but did not completely recover. In 1999, the employee had a second low back injury and had a L4-5 discectomy. After surgery he continued to have low back and right leg pain and was diagnosed with failed back syndrome with neuropathic and nociceptive type of pain. He continued to receive treatment in 2000 and 2001 in the form of epidural steroid injections; additional diagnostic tests including an MRI, a myelogram, post-myelogram CT scan, and a lumbar discogram; pain medications; and various types of injections including radiofrequency. Due to his low back condition, the employee had to have help moving material due to the nature of the job and injury.

With regard to his December of 2002 work-related left elbow injury, the employee had a left cubital tunnel release with anterior transposition. He then had a revision surgery to the ulnar nerve due to recurrent left cubital tunnel syndrome. Dr. Musich found numbness over the scarred surface, the adjacent soft tissue, and the ulnar nerve distribution of the elbow; and pain with movement. Dr. Musich stated that the employee should refrain from activities that require repetitive flexion and extension of the left elbow. The employee testified that his left small finger, ring finger, hand and arm was numb, tingling, and cold; and he has trouble gripping tightly and items slip out of his hand.

It was Dr. Musich's opinion that the employee had a 15% permanent partial disability of the body as a whole due to his pre-existing low back condition and 50% permanent partial disability of the left upper extremity at the level of the elbow as a result of the December of 2002 injury. It was Dr. Musich's opinion that the disabilities produced a chronic hindrance in his routine daily activities.

Based on a review of the evidence, I find that the employee's pre-existing conditions regarding his low back including surgery and his left elbow including the two surgeries constituted a hindrance or obstacle to his employment or to obtaining re-employment.

It was Dr. Musich's opinion that the combination of the disabilities was significantly greater than their simple sum; and that the employee is permanently and totally disabled due to a combination of all of the disabilities in conjunction with permanent restrictions and chronic pain symptoms.

Ms. Shea stated that the employee's surgeries to the left upper extremity; the surgeries to his low back; and the cervical spine surgery have resulted in permanent restrictions at less than the sedentary work level and pain issues which preclude work. It was Ms. Shea's opinion that the employee is unemployable in the competitive job market. The factors that led to her opinion include the employee's work primarily involved the use of both upper extremities; the problems with the left upper extremity caused him to wreck his forklift; the employee's postural limitations exclude him from performing sedentary or light work; his lifting restrictions places him at less than sedentary work; the employee's pain level and functional limitations prevent him from

doing pastoral work; the employee's severe left upper extremity pain; and the six surgeries that provide disincentive to any typical employer.

I find that the employee's low back and left elbow injuries/conditions combined synergistically with the primary injury to the low back and neck to cause the employee's overall condition and symptoms. Based on the evidence, I find that the employee is permanently and totally disabled as a result of the combination of his pre-existing injuries/conditions and the conditions caused by the November 11, 2003 injury.

On September 12, 2005, Dr. Graham stated that the employee had no significant change in his condition and the employee was at maximum medical improvement; and the employer-insurer stopped paying temporary total disability benefits. I find that the employee was in his healing period and had not reached the point where further progress was not expected until September 12, 2005.

Notwithstanding the fact that the employee settled his claim against the employer-insurer for a lump sum, I find that for the purpose of determining liability of the Second Injury Fund, the permanent partial disability of 35% of the body (22.5% of the lumbar spine and 12.5% of the cervical spine) would have been payable in 140 weekly installments commencing on September 13, 2005 at the end of the healing period, and continuing through May 20, 2008. Since the compensation rate for permanent partial disability is less than the amount payable for permanent total disability under Section 287.200, RSMo, the Second Injury Fund is liable for the difference between what the employee is receiving for permanent partial disability from the employer-insurer and what he is entitled to receive for permanent total disability under Section 287.220.1 RSMo. The difference between the permanent total disability rate of \$662.55 per week and the permanent partial disability rate of \$347.05 per week is \$315.50 per week. The Second Injury Fund is therefore ordered to pay to the employee the sum of \$315.50 per week for 140 weeks commencing on September 13, 2005 and ending on May 20, 2008. Commencing on May 21, 2008, the Second Injury Fund is responsible for paying the full permanent total disability benefit to the employee at the rate of \$662.55 per week.

These payments for permanent total disability shall continue for the remainder of the employee's lifetime or until suspended if the employee is restored to his regular work or its equivalent as provided in Section 287.200 RSMO. Section 287.200.2 RSMo mandates that the Division "shall keep the file open in the case during the lifetime of any injured employee who has received an award of permanent total disability". Based on this section the Division and Commission should maintain an open file in Injury Number 03-115905 for purposes of reviewing the status of the employee's permanent disability pursuant to Section 287.200 RSMo.

#### **ATTORNEY'S FEE:**

Christopher Wagner, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

**INTEREST:**

Interest on all sums awarded hereunder shall be paid as provided by law.

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

Made by:

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Lawrence C. Kasten  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Naomi Person  
*Division of Workers' Compensation*