

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

Injury No.: 03-064982

Employee: William Russell, deceased
Former Claimant: Mary Russell, deceased
Claimants: Ryan S. Russell, Seth W. Russell and Lacey J.Hodges
Employer: Fisher Environmental Controls, Inc. (Settled)
Insurer: Missouri Employers Mutual Insurance Co. (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. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the award and decision of Chief Administrative Law Judge Robert J. Dierkes. 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

On October 19, 2004, employee, William Russell, filed his claim for compensation. On January 29, 2008, an administrative law judge issued an order finding that employee has died and substituting employee's surviving widow, Mary Russell, as the claimant in this matter.

At the hearing before the administrative law judge on November 16, 2010, the parties stipulated the following issues in dispute: (1) the nature and extent of employee's disability, if any; (2) employer/insurer's liability, if any, for permanent partial disability benefits or permanent total disability benefits; (3) the liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits; (4) the rights, if any, of Mary Russell to receive permanent total disability benefits; (5) whether Mary Russell is the only person entitled to receive any benefits in the event they are awarded; and (6) the amount, if any, of attorney's fees due to attorney Donald Heck.

The administrative law judge made the following findings and conclusions: (1) employee was not permanently and totally disabled prior to his death; (2) employee sustained a 35% permanent partial disability of the body as a whole as a result of the L5-S1 disc herniation from the primary injury; (3) Mary Russell is entitled to receive permanent partial disability benefits awarded; (4) the Second Injury Fund is not liable for any benefits; and (5) no attorney fees are awarded to Donald Heck.

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Mary Russell submitted a timely Application for Review alleging the administrative law judge erred: (1) by applying an improper ability to compete standard to determine whether employee was permanently and totally disabled; (2) by making findings contrary to the overwhelming weight of the evidence; and (3) in finding there is no synergistic effect between the preexisting disability and primary disability.

On February 25, 2011, Mary Russell filed a Notice of Dismissal indicating her desire to dismiss this claim with prejudice with respect to employer. On March 3, 2011, the Commission granted Mary Russell's request.

On February 6, 2012, the alleged natural children of William and Mary Russell filed a Suggestion of Death and Motion to Substitute Parties indicating Mary Russell has died and requesting that they be added as substitute parties. The Commission denied that Motion. On March 14, 2012, the alleged natural children of William and Mary Russell filed a second Suggestion of Death and Motion to Substitute Parties. On May 31, 2012, the Commission issued an order finding that Mary Russell died on May 27, 2011, that Ryan S. Russell, Seth W. Russell, and Lacey J. Hodges are the natural children of Mary Russell, and that, as successors to the rights of Mary Russell under § 287.580, they are entitled to proceed as the claimants in this matter.

For the reasons set forth below, the Commission modifies the award and decision of the administrative law judge.

Findings of Fact

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact on the issues disputed at the hearing. We adopt and incorporate those findings to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings of fact pertinent to our modification herein.

Permanent total disability

We disagree with the administrative law judge's finding that employee was not permanently and totally disabled before he died. This is because we do not believe employee's work activities following the primary injury amounted to reasonable employment in the open labor market.

The courts have stated there is no hard-and-fast rule regarding an employee's performing some work after the last injury while also pursuing a claim for permanent total disability. *Molder v. Mo. State Treasurer*, 342 S.W.3d 406, 414 (Mo. App. 2011). Instead, the courts have indicated that we should look at the specific facts surrounding the post-injury work to see whether it amounts to actual competitive employment in the open labor market, as opposed to sporadic, irregular work such as short-term or part-time jobs arranged through family, friends, or an especially accommodating employer. *Id.* The latter circumstances are not preclusive of a finding that the employee is permanently and totally disabled, as they do nothing to demonstrate the employee can compete in the open labor market. In the end, "whether a particular employee is permanently and totally disabled is a factual,

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not a legal, question. Our inquiry into permanent-total disability is a factual one: whether [employee] is employable.” *Id.* at 409.

Here, both of employee’s attempts at working were short-term. The first was installing HVAC controls at a residential hall at the University of Missouri for Controlco. This amounted to a month or two of on-and-off work; employee described his activities during this time period as follows: “I helped put conduit on the air handlers, pulled the wire and landed the panels.” Employee also credibly testified (and we so find) that he was in a lot of pain at that time and was trying to do as little physical work as he possibly could. Notably, employee did this work in mid-to-late summer 2003, before Dr. Coyle’s revision discectomy at L5-S1 in February 2004. Employee credibly testified that his pain got worse after this surgery. Consequently, the Controlco work is not especially relevant to the issue of permanent total disability, because employee’s medical condition changed afterward.

The other work employee performed was to organize an LLC with his son and operate it for six months. Employee’s physical duties with the company included overseeing work and doing some panel landing, which employee described as “just sitting on a stool and putting wires in and landing them.” Employee testified the company closed its doors because he was in too much pain; employee’s wife testified it was a combination of factors including the son’s interest in becoming a firefighter and the doctors telling employee he was not going to get any better. We find that employee stopped working for the LLC due to a combination of his doctors telling him his pain would not get any better and because his son wanted to pursue other interests. The courts have addressed the question whether helping to run a small family business amounts to competitive employment. See *Minnick v. South Metro Fire Protection Dist.*, 926 S.W.2d 906, 911 (Mo. App. 1996). In finding an employee’s work helping his wife with a property management business did not preclude a finding employee was totally disabled, the *Minnick* court reasoned as follows: “[Employee’s] performance of sporadic, low-stress work after his injury thus does not show that he was necessarily capable of competing on a steady basis outside of the protected environment of a small-scale husband-wife business venture where one can often work at his or her own pace and rely upon the assistance of family members.” *Id.* We believe the same reasoning applies here.

We also disagree with the administrative law judge’s concerns related to some potential inconsistencies between employee’s subjective complaints and the objective medical findings by treating physicians. Employee’s debilitating levels of low back and left leg pain are well documented and Dr. Farid, the treating pain management specialist, credibly testified that he believed employee’s pain complaints were genuine. Dr. Farid saw employee numerous times from May 7, 2004, until December 27, 2004, and thus had a unique vantage point to evaluate employee’s presentation and subjective complaints during the course of employee’s post-surgery treatment. Crediting Dr. Farid on this point, we do not perceive a credibility problem requiring some (now impossible) explanation from employee.

Ultimately, we find Dr. Volarich’s testimony that employee was permanently and totally disabled most credible. We find employee reached maximum medical improvement following the work injury on December 28, 2004. We find Dr. Volarich’s rating of

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preexisting permanent partial disability of the low back somewhat high in light of employee's testimony that he had a good result following the 1982 or 1987 low back surgery such that he "completely forgot about it" for a number of years. However, we are convinced employee suffered some permanent partial disability referable to that injury and surgery. Employee and his wife both consistently and credibly testified (and we so find) that employee guarded his back following that surgery by self-limiting his lifting to 20 pounds and also took aspirin for pain when he worked too hard. We find that employee suffered a preexisting 10% permanent partial disability of the body as a whole referable to the 1982 or 1987 low back injury and surgery. We find credible Dr. Volarich's testimony that this condition amounted to a hindrance to employee's employment or reemployment.

Conclusions of Law

Liability of the Second Injury Fund

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a hindrance or obstacle to employment:

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

Although employee's self-imposed lifting restriction and guarding allowed him to work without difficulty for many years, as the foregoing quotation makes clear, the focus of our inquiry is not on whether the low back condition caused employee problems with his work in the past. Instead, we ask whether the low back injury had the potential to combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of this condition. We have found that employee suffered a preexisting 10% permanent partial disability of the body as a whole referable to the low back. We have also credited Dr. Volarich's testimony that this condition did constitute a hindrance to employee's employment or reemployment.

We conclude that employee's preexisting low back disability was serious enough to constitute a hindrance or obstacle to employment for purposes of § 287.220 RSMo. This is because we are convinced a cautious employer could reasonably perceive employee's low back condition as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995). Accordingly, the claimants have satisfied the threshold showing under § 287.220 RSMo, in that employee suffered from a preexisting permanent and partially disabling condition

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of his low back serious enough to constitute a hindrance or obstacle to employee's employment or reemployment at the time he sustained the primary injury in this matter.

We now proceed to the question whether claimants met their burden of establishing employee was entitled to compensation from the Second Injury Fund. Section 287.220.1 RSMo provides, in relevant part, as follows:

If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, ... the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" ...

The foregoing section requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, and not the Second Injury Fund, is responsible for the entire amount of compensation. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). We have adopted the administrative law judge's finding that, as a result of the last injury, employee sustained a 35% permanent partial disability of the body as a whole referable to the low back. Dr. Volarich opined that employee is permanently and totally disabled as a result of the permanent disability resulting from his work injury in combination with his preexisting low back disability, and we have found Dr. Volarich credible.

Accordingly, we conclude that employee is permanently and totally disabled due to a combination of his preexisting disabilities in combination with the effects of the primary injuries. Claimants have met their burden of establishing Second Injury Fund liability for employee's permanent total disability under § 287.220.1.

Compensation owing to claimants

The administrative law judge concluded that employee's surviving widow, Mary Russell, is entitled to employee's permanent total disability benefits under *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007). The Second Injury Fund did not appeal this determination. We affirm and adopt the administrative law judge's conclusion that the holding of *Schoemehl* applies to this claim, such that Mary Russell is included in the definition of "employee" under the applicable version of § 287.020.1, and thus was entitled to employee's permanent total disability benefits for her lifetime.

We have determined employee reached maximum medical improvement on December 28, 2004. We have determined employer is liable for 140 weeks of permanent partial disability benefits owing to the last injury. The difference between the stipulated

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rates for permanent total and permanent partial disability is \$235.37. Accordingly, beginning December 28, 2004, the Second Injury Fund is liable for permanent total disability benefits in the amount of \$235.37 per week for 140 weeks, and thereafter at the rate of \$575.49 per week, until May 27, 2011, the date Mary Russell died.

Claimants Ryan S. Russell, Seth W. Russell, and Lacey J. Hodges, the natural children and successors to the rights of Mary Russell under § 287.580 RSMo, having been properly substituted to proceed as the claimants in this matter by virtue of our order dated May 31, 2012, are entitled to equal shares of the compensation awarded herein.

Award

We modify the award of the administrative law judge on the issue of Second Injury Fund liability. The Second Injury Fund is liable for employee's permanent total disability, and claimants are entitled to the benefits awarded herein.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued January 24, 2011, is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award, and decision herein.

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 30th day of August 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	William Russell (Deceased)	Injury No. 03-064982
Dependents:	Mary Russell, substituted claimant	
Employer:	Fisher Environmental Controls, Inc.	Before the DIVISION OF WORKERS' COMPENSATION
Insurer:	Missouri Employers Mutual Insurance Co.	Department of Labor and Industrial Relations of Missouri
Add'l Party:	Second Injury Fund	Jefferson City, Missouri
Hearing Date:	November 16, 2010	

Checked by: RJD/cs

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: May 27, 2003.
5. State location where accident occurred or occupational disease was contracted: Columbia, Boone County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee and a co-worker were standing on ladders trying to position an actuator weighing over 100 pounds when Employee injured his back.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Low back.
14. Nature and extent of any permanent disability: 35% permanent partial disability of the body as a whole.
15. Compensation paid to-date for temporary disability: \$14,880.53.
16. Value necessary medical aid paid to date by employer/insurer? \$42,962.16.

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17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$863.23.
19. Weekly compensation rate: \$575.49/\$340.12.
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable from Employer:

140 weeks of permanent partial disability benefits:	\$47,616.80
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22. Second Injury Fund liability: NONE.
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:

Truman Allen

Employee: William Russell (Deceased)

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: William Russell (Deceased)

Injury No: 03-064982

Dependents: Mary Russell, substituted claimant

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Fisher Environmental Controls, Inc.

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Missouri Employers Mutual Insurance Co.

Add'l Party: Second Injury Fund

Checked by: RJD/cs

ISSUES DECIDED

An evidentiary hearing was held in this case on November 16, 2010 in Columbia. Employee William Russell died on September 14, 2006 of causes unrelated to his work injuries. On January 29, 2008, Mary Russell, surviving spouse of William Russell, was ordered substituted as Claimant in this case. Mary Russell appeared at the hearing personally and by counsel, Truman Allen; Employer, Fisher Environmental Controls, Inc., and Insurer, Missouri Employers Mutual Insurance Company, appeared by counsel, Scott Pool; the Second Injury Fund appeared by counsel, Neel Mookerjee, Assistant Attorney General. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on December 17, 2010. The hearing was held to determine the following issues:

1. The nature and extent of William Russell's permanent disability, if any (Claimant alleges that Mr. Russell was permanently and totally disabled prior to his death);
2. The liability of Employer, if any, for permanent partial disability benefits or permanent total disability benefits;
3. The liability of the Second Injury Fund, if any, for permanent partial disability benefits or permanent total disability benefits;
4. The rights, if any, of Mary Russell to receive permanent total disability benefits;
5. Whether any person(s) other than Mary Russell is entitled to receive benefits in this case; and
6. The determination of the amount of attorney's fees, if any, due to Donald Heck, William Russell's former attorney.

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STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue is proper in Boone County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Employer paid \$42,962.16 in medical benefits;
6. That Employer paid \$14,880.53 in temporary total disability ("TTD") benefits, for the period January 28, 2004 through May 24, 2004, and for the period October 26, 2004 through December 27, 2004;
7. That William Russell's average weekly wage was \$863.23, resulting in compensation rates of \$575.49/\$340.12;
8. That William Russell sustained an accident arising out of and in the course of his employment with Fisher Environmental Controls, Inc. on May 27, 2003;
9. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation herein;
10. That Missouri Employers Mutual Insurance Company fully insured Fisher Environmental Controls, Inc. for Missouri Workers' Compensation purposes at all relevant times; and
11. That Mary Russell is the appropriate party to receive any permanent partial disability benefits awarded.

EVIDENCE

The evidence consisted of the deposition testimony of William Russell (now deceased) taken September 8, 2005; the "live" testimony of substituted Claimant Mary Russell, as well as the deposition testimony of Mary Russell taken January 6, 2010; the deposition testimony of Dr. James Coyle taken August 2, 2005, as well as Dr. Coyle's narrative reports of various dates; the deposition testimony of Dr. David Volarich taken April 25, 2008, as well as Dr. Volarich's narrative report dated October 19, 2007; the deposition testimony of Dr. Reza Farid taken April 7, 2005; medical records; certificate of marriage of William Russell and Mary (Ballmann)

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Russell; certificate of death of William Russell; and a portion of the deposition testimony of Dr. David Robson.

DISCUSSION

William Russell was born on September 14, 1957 and died on September 14, 2006 from causes unrelated to his May 27, 2003, injury. Mr. Russell worked for Fisher Environmental Controls, Inc. ("Employer") from 1997 to 2003. His work involved adjusting heating, ventilation, and air conditioning (HVAC) systems in large commercial buildings. The job required him to properly set the temperature and humidity of newly installed equipment.

William Russell testified, via deposition, that on the date of the primary injury, May 27, 2003, he was installing equipment in the mechanical room of a dormitory at the University of Missouri-Columbia. Russell and another employee were attempting to position a certain piece of equipment ("actuator") they planned to install. The actuator measured five feet in length and weighed over 100 pounds. Both Russell and the other employee were on ladders maneuvering the piece when Russell twisted his back. Russell reported to University Hospital for his back pain on that day. On the day following the injury, Russell went to his family doctor by his own initiative. His doctor placed him on light duty and he continued to work for Employer until July 2003.

From the date of the May 2003 injury through February 2004, Russell was prescribed conservative treatment by various doctors. Dr. Kinderknecht diagnosed Russell with "lumbar annular tear and aggravation of preexisting lumbar disc disease." The treatments provided during this timeframe did not decrease Mr. Russell's back pain or alleviate the radiating symptoms. In February 2004, Dr. Coyle performed surgery for "revision microscopic lumbar discectomy L5-S1." Dr. Coyle placed Russell at maximum medical improvement in October 2004 and opined he had a 10% permanent partial disability as a result of the May 27, 2003, injury.

William Russell testified to his prior work history. Following graduation from high school, he worked in a factory, worked as a vacuum salesman, and obtained a real estate license between the years of 1976 and 1982. In the early 1980's he began doing residential plumbing. He first worked for Red's Plumbing for about four years, then for Engineered Water Systems for about two years.

Mr. Russell next worked for Ron Wood's Plumbing performing commercial plumbing jobs. After a year there, he next worked for Central Missouri Plumbing, also performing commercial plumbing. He worked for about nine years at this job, eventually becoming a foreman. After Central Missouri Plumbing, Mr. Russell worked for Questec, a company also in the commercial plumbing business. After a couple of years there, he began working for Fisher performing temperature control services on HVAC systems. It was while working for Fisher that Mr. Russell sustained his primary injury.

As noted above, Mr. Russell continued to work for Fisher following his primary injury until he was terminated sometime in July 2003. Following several weeks of receiving

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unemployment benefits, he next worked for Controlco, performing similar HVAC services he had performed while employed with Fisher. The job at Controlco was for a specific project and Russell ceased working once the project was complete. Mr. Russell testified that at some time subsequent to working for Controlco, he and his son formed a LLC named Central Controls. The company was in existence for around six months and performed HVAC jobs similar to jobs he performed for Fisher and Controlco. He last worked in late 2004 on a project for Central Controls.

Mr. Russell testified to a prior injury to his back in 1987. The injury occurred while Russell was working for Red's Plumbing and was assigned to use a sledgehammer to break part of a concrete foundation so drain pipes could be installed. After performing this task for a number of days his back was in considerable pain. The diagnosis for that injury was a herniated nucleus pulposus at L5-S1. That injury ultimately required surgical intervention, and Russell underwent a discectomy at L5-S1 and a laminotomy at L4-5.

Following the surgery Mr. Russell first returned to work in a limited fashion, spending the majority of his work time directing another worker how to complete the various plumbing jobs. Gradually, he returned to completing the duties of his job, although he limited the amount he would lift alone to 20 pounds. He testified to experiencing some residual pain in the time following the injury and recovery, but stated the pain largely resolved with treatment by a chiropractor. Within a year following the surgery, Russell testified he "had completely forgotten about [the surgery]" and was "100 percent for many years."

Aside from the back injury requiring surgery in 1987, Mr. Russell required no other surgeries prior to the injury on May 27, 2003. At some time in 1999, he received treatment for bursitis in his right elbow with the symptoms resolving after a few weeks.

Mr. Russell testified to his daily activities following his May 27, 2003, back injury. He would spend the majority of the day alternating between lying down and sitting around his residence. His daily activities consisted of watching television and reading books. About three to four times a week he would walk about a mile. He did not do any yard work after his May 27, 2003, injury and testified that he did no other physical activities, aside from the 20-30 minute walks, since the date of his most recent injury. Mrs. Mary Russell testified at hearing that she drove William to all doctor's appointments because it was not safe for William to drive.

Prior to the May 27, 2003 injury William Russell testified to his activities outside of work. He maintained his yard and kept several head of cattle. Following the May 2003 injury Mr. Russell ceased both of these activities because of difficulties related to the injury. He also enjoyed hunting and fishing prior to his May 2003 injury, but following that injury he attempted to continue these activities but was precluded because of the pain. Mary Russell testified at the hearing that William would not babysit their grandchild because he was concerned with his physical ability to hold and carry the child. Prior to the May 2003 injury Mr. Russell performed various maintenance tasks around his house, but was no longer capable of doing so following that injury.

Dr. David Volarich reviewed Mr. Russell's medical records in October 2007 for the purposes of providing a disability rating. Dr. Volarich opined Russell had a 50% permanent

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partial disability of the body as a whole “due to the recurrent disc herniation at L5-S1...[and] disc protrusions at L3-4 and L4-5” as a direct result of the May 27, 2003, injury. For the prior back injury, Dr. Volarich found a 25% permanent partial disability of the body as a whole, rated at the lumbosacral spine “due to the disc herniation at L5-S1 that required discectomy, as well as the laminotomy at L4-5.” Dr. Volarich opined that William Russell was permanently and totally disabled as a direct result of the May 27, 2003 injury in combination with the preexisting back injury.

Upon cross examination by the Second Injury Fund, Dr. Volarich agreed that he did not reviewed any records related to Mr. Russell’s lumbar spine prior to his 2003 injury. Additionally, Dr. Volarich stated that between the time Russell recovered from his first back surgery and the time of his injury in 2003, he did not review any x-rays or MRIs, and there was no indication that Mr. Russell was recommended to undergo any surgical intervention prior to his 2003 injury. Additionally, Dr. Volarich conceded that Mr. Russell did not take any prescription pain medication prior to his 2003 injury for back problems, did not miss work on a regular basis because of low back pain, and worked at a heavy labor job without accommodations or restrictions.

Before the May 2003 accident, William Russell and his son Ryan worked together for Employer. Ryan’s true interest was and is fire fighting, and he served on a voluntary fire department while he worked with his father for Employer. Ryan would leave the job at times to respond to a fire call which caused conflict between William and Ryan. Ryan felt obligated to work with his father because his father was unable to do some of the more physical work because of back pain. Ryan would do more of the heavy work so William Russell could continue to work in HVAC and control installation.

Dr. Reza Farid is a physical medicine and rehabilitation specialist at Rusk Rehabilitation Center in Columbia. Dr. Farid began working with William Russell in May 2004 at the request of Insurer. Dr. Farid testified by deposition taken in April 2005, approximately 17 months prior to Mr. Russell’s death. Dr. Farid diagnosed Mr. Russell with failed back syndrome. Dr. Farid was prescribing Oxycontin and other medications for Mr. Russell’s pain. Dr. Farid initially placed Mr. Russell on sedentary work duty status, then later opined that he was totally unable to function in a work environment due to his pain. Dr. Farid testified that Russell’s complaints of pain appeared to be excessive in light of numerous diagnostic tests showing no neurologic deficits. Dr. Farid testified that Mr. Russell’s complaints of drop foot symptoms were not borne out by the diagnostic testing and were also inconsistent with his clinical presentation. Dr. Farid also testified that Russell was reluctant to engage in any physical activity that might be inconsistent with his claimed disability status. Nevertheless, Dr. Farid testified that he believed Mr. Russell’s pain complaints, which is why he made the diagnosis of “failed back syndrome”; the pain complaints are also the basis of Dr. Farid’s opinion that Russell was permanently and totally disabled.

William Russell and substituted claimant Mary Russell were married on July 7, 1979 and lived together as husband and wife until William Russell’s death. Mary Russell is thus a total dependent of William Russell pursuant to Section 287.240. The evidence was clear that there were no other individuals who would qualify as William Russell’s total dependent at the time of his injury on May 27, 2003.

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Mrs. Mary Russell is claiming that William Russell was permanently and totally disabled prior to his death, and was entitled to permanent total disability benefits from either Employer-Insurer or Second Injury Fund prior to his death. As it is clear that William Russell's death was from causes other than the work-related injury of May 27, 2003, Mrs. Mary Russell claims that she is entitled to permanent total disability benefits during her lifetime pursuant to *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. banc 2007). Based upon the date of William Russell's work-related accident, and the pendency of the claim at the time of William Russell's death, Mrs. Mary Russell would be entitled to William Russell's permanent total disability benefits. See *Taylor v. Ballard R-II School District*, 274 S.W.3d 629 (Mo. App. W. D. 2009).

Permanent total disability is alleged. Under section 287.020.7, "total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The test for permanent and total disability is whether a claimant is able to competently compete in the open labor market given his or her condition and situation. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 210 (Mo.App. E.D.1999). When the claimant is disabled by a combination of the work-related event and pre-existing disabilities the responsibility for benefits lies with the Second Injury Fund. Section 287.220.1 RSMo. If the last injury in and of itself renders a claimant permanently and totally disabled the Second Injury Fund has no liability and the employer is responsible for the entire compensation. *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

On the issue of permanent total disability, this is a close case. William Russell continued to work for Employer (albeit on a light duty basis) for several weeks post-accident until he was terminated. He then worked a large project for another employer, Controlco. Subsequently William Russell and his son formed a new company, Central Controls. He worked on projects for Central Controls for several months post-surgery. William Russell's work for Controlco is evidence of his post-injury ability to compete in the open labor market. While William Russell's work for Central Controls is not direct evidence of his ability to compete in the open labor market, as a principal of Central Controls, he was able to convince potential clients of his company's ability (and thus his *personal* ability) successfully to complete the projects. Thus, I believe William Russell's work for Central Controls offers additional insight into William Russell's post-injury, post-surgery ability to compete in the open labor market. According to William Russell's deposition testimony, as well as Mary Russell's hearing testimony, William Russell's decision to discontinue the work of Central Controls was motivated equally by two factors – William Russell's continued pain problems *and* Ryan Russell's desire to pursue a full-time career in firefighting. Thus, it is reasonable to conclude that William Russell would have continued his work with Central Controls (despite his pain) had his son Ryan continued in the business.

Dr. Farid's opinion that William Russell was permanently and totally disabled was based solely upon Mr. Russell's pain complaints. I conclude that Dr. Volarich's opinion that Mr. Russell was permanently and totally disabled was, similarly, largely based upon Mr. Russell's pain complaints. From a medical standpoint, it is clear that Mr. Russell's pain complaints were in excess of what would normally be expected, considering his diagnostic testing and his clinical condition. There is certainly some evidentiary basis for reasonable concern that Mr. Russell

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may have been overstating his pain complaints, and understating his residual physical abilities, in order to enhance his disability claim. In some cases, such concerns can be alleviated by the administrative law judge's observations of the employee's demeanor at the hearing and a determination of the employee's credibility. Because of William Russell's death, there was no such opportunity in this case. Despite the testimony of Doctors Volarich and Farid to the contrary, I find it more reasonable than not to conclude that William Russell was able to compete in the open labor market prior to his death and therefore not entitled to permanent total disability benefits.

I find that William Russell sustained a permanent partial disability of 35% of the body as a whole as a result of the May 27, 2003 work accident. This entitles substituted Claimant, Mary Russell, to 140 weeks of permanent partial disability benefits at the rate of \$340.12, totaling \$47,616.80.

As to whether substituted Claimant is entitled to permanent *partial* disability benefits from the Second Injury Fund, I note that William Russell had a permanent partial disability to his low back prior to the May 27, 2003 work accident. In *Searcy v. McDonnell Douglas*, 894 S.W.2d 173 (Mo. App. E.D. 1995), the employee was seeking either permanent total disability benefits or permanent partial disability benefits from the Second Injury Fund for the combination of two back injuries. The *Searcy* court upheld the denial of benefits from the Fund, noting (in regard to the denial of permanent partial disability benefits): "Indeed, as a general rule where the first and second injuries are to the same part of the body, as in this case, the second supplements the first rather than combining to create a greater disability than the sum of the two." A similar factual situation was presented in *Uhlir v. Farmer*, 94 S.W.3d 441 (Mo. App. E.D. 2003). In *Uhlir*, the Court retreated somewhat from the holding in *Searcy*, stating (at page 444):

In *Searcy*, we stated that, *as a general rule*, where the first and second injuries are to the same part of the body, the second supplements the first rather than combining to create a greater disability than the sum of the two. 894 S.W.2d at 178. However, no such limitation is present within the text of Section 287.220 itself. Section 287.220 provides that when a worker's preexistent injury, in combination with the primary work injury; is substantially greater than that which would have resulted from the last injury, considered alone and of itself, ... the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund.... No same body part limitation is present within the statute. (Italics in the original.)

My reading of *Uhlir* is that if there is medical evidence of a synergistic effect between the preexisting disability and the disability attributable to the work-related injury, even though both are to the same part of the body, then permanent partial disability benefits should be ordered from the Second Injury Fund. I have examined the testimony of Dr. Volarich, and I do not find any mention of such a synergistic effect in this case. Therefore, I find no basis for Second Injury Fund liability.

Donald Heck, William Russell's former attorney in this case, requested that a portion of the attorney's fees in this matter be awarded to him. Section 287.260.1 states, in part:

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All attorney's fees for services in connection with this chapter shall be subject to regulation by the division or the commission and shall be limited to such charges as are fair and reasonable and the division or the commission shall have jurisdiction to hear and determine all disputes concerning the same.

Donald Heck received notice of the November 16, 2010 hearing in this case. This was his opportunity to have the division "hear and determine" his "dispute" regarding his attorney's fees. Mr. Heck did not appear at the hearing, and thus did not present any evidence on the issue of his entitlement, if any, to attorney's fees in this case.

A claimant has the right to discharge any attorney subject to the attorneys' rights, under certain conditions, to be paid a fee. (Citations omitted.) Contract recovery is not proper if the attorney fails to complete the terms of a contingent fee contract. Thus, once termination of the lawyer-client relationship has occurred before completion of a contingent fee contract, the lawyers' only recovery could be in quantum meruit for benefits conferred. (Citation omitted.) There must be evidence to support a finding that an attorney has conferred some benefit to his client. Section 287.260 provides "reasonable attorney's fees for services in connection with the proceedings for compensation *if the services are found to be necessary.*" Section 287.260 RSMo 1994 (emphasis in the original). The determination of a fair and reasonable fee involves a balancing of many interests. The fee certainly cannot be arbitrarily set and must be supported by evidence in the record regarding the necessity, reasonableness, and fairness of the fee.

Kuczvara v. Continental Baking Co., 24 S.W.3d, 712, 715 (Mo. App. E.D. 1999). As Mr. Heck has presented no evidence regarding the necessity, reasonableness and fairness of his claimed fee, any attempt to set such a fee would be arbitrary. Under the circumstances, I cannot award a fee to Donald Heck in this matter.

FINDINGS OF FACT

In addition to those facts to which the parties stipulated, I find the following facts:

1. William Russell sustained an injury to his low back in the work accident of May 27, 2003;
2. William Russell continued to work for Employer on a light duty basis after the May 27, 2003 accident, until terminated by Employer in July 2003;
3. William Russell was hired by Controlco, Inc. later in 2003; William Russell completed a large project while working for Controlco;
4. After working for Controlco, William Russell and his son Ryan started a business called Central Controls; Central Controls worked on several projects through October 2004;
5. William Russell's decision to discontinue the work of Central Controls was based upon his continuing pain from the May 27, 2003 accident and upon Ryan Russell's decision to pursue a full-time career in firefighting;

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6. As a direct result of the May 27, 2003 accident, William Russell underwent surgery in February 2004;
7. William Russell was not employed after October 2004 until his death, nor did he seek additional employment;
8. William Russell died on September 14, 2006 from causes unrelated to his May 27, 2003, injury;
9. For approximately thirty months prior to his death, William Russell was taking Oxycontin and other medications for pain;
10. Prior to his death, William Russell was able to compete in the open labor market;
11. William Russell sustained a herniated disc at L5-S1 as a result of the work injury of May 27, 2003;
12. William Russell reached maximum medical improvement from his May 27, 2003 injuries prior to his death;
13. William Russell sustained a permanent and partial disability, prior to his death, as a result of the work injury of May 27, 2003.

RULINGS OF LAW

In addition to those legal conclusions to which the parties stipulated, I make the following rulings of law:

1. Despite the work-related accident and injury to William Russell's low back on May 27, 2003, and despite a preexisting permanent partial disability to his low back, William Russell was able to compete in the open labor market prior to his death;
2. William Russell was not permanently and totally disabled;
3. William Russell sustained a permanent partial disability of 35% of the body as a whole as a result of his L5-S1 disc herniation from the May 27, 2003 work-related accident;
4. Prior to his death, William Russell was entitled to 140 weeks of permanent partial disability benefits from Employer-Insurer at the weekly rate of \$340.12, totaling \$47,616.80;
5. As stipulated, substituted Claimant Mary Russell is entitled to receive the permanent partial disability benefits awarded herein;
6. The claim against the Second Injury Fund is denied; and
7. No attorney's fees may be awarded to Donald Heck, William Russell's former attorney.

ORDER

Fisher Environmental Controls, Inc. and Missouri Employers Mutual Insurance Company are ordered to pay Mary Russell the sum of \$47,616.80 for permanent partial disability benefits.

The claim against the Second Injury Fund is denied.

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Claimant's attorney, Truman Allen, is allowed 25% of all benefits awarded as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon. No attorney's fees are awarded to Donald Heck.

Date: January 24, 2011

Made by: /s/Robert J. Dierkes

ROBERT J. DIERKES
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Naomi Pearson
Naomi Pearson
Division of Workers' Compensation