

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

Injury No.: 05-083644

Employee: Robert Smyth  
Employer: Oscar Wilson Engine & Parts, Inc. (Settled)  
Insurer: American Home Assurance Co. (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 section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 1, 2010. The award and decision of Administrative Law Judge Edwin J. Kohner, issued September 1, 2010, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 17<sup>th</sup> day of March 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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DISSENTING OPINION FILED  
John J. Hickey, Member

Attest:

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Secretary

Employee: Robert Smyth

### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be reversed and permanent total disability benefits should be awarded.

First, there is no dispute that employee suffered an accident that arose out of and in the course of his employment on March 29, 2005, and that he is now permanently and totally disabled. The issue is whether employee's permanent and total disability is the result of his primary injury standing alone, or whether it is the result of his primary injury combining with his preexisting disabilities. It is my opinion, based on the evidence as a whole that employee's permanent and total disability is the result of his primary injury combining with his preexisting disabilities.

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

In evaluating the last injury alone, the ALJ pulled various opinions from different experts to arrive at the conclusion that employee's permanent and total disability is solely the result of the last injury. I disagree with the ALJ's analysis and conclusion with regard to this issue.

While there is significant evidence in the record that employee suffered substantial permanent disability from the last injury alone, none of the experts opined that employee was permanently and totally disabled solely as a result of the last injury. The last injury involved a serious low back injury and significant subsequent psychiatric problems. It is clear from the record that prior to the last injury employee had preexisting back problems and psychiatric problems as well. The credible evidence establishes that employee was permanently and totally disabled following the last injury, but it was because of the last injury combining with his preexisting disabilities.

For the foregoing reasons, I disagree with the administrative law judge's conclusion that employee is permanently and totally disabled as a result of the last injury alone. I find that the great weight of the evidence establishes that employee is permanently and totally disabled as a result of the injuries from the March 29, 2005, accident combining with his preexisting disabilities. As such, I would reverse the award of the administrative law judge denying Second Injury Fund liability.

I respectfully dissent from the decision of the majority of the Commission.

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John J. Hickey, Member

## AWARD

Employee:	Robert Smyth	Injury No.:	05-083644
Dependents:	N/A		Before the
Employer:	Oscar Wilson Engine & Parts, Inc. (Settled)		<b>Division of Workers'</b>
Additional Party:	Second Injury Fund		<b>Compensation</b>
Insurer:	American Home Assurance Co. (Settled)		Department of Labor and Industrial
Hearing Date:	June 23, 2010		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	EJK/ch

### 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: March 29, 2005
5. State location where accident occurred or occupational disease was contracted: St. Charles 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:  
The employee fell off a ladder while conducting an inventory.
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, Psychological
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: \$6,126.16
16. Value necessary medical aid paid to date by employer/insurer: \$43,927.25

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Robert Smyth

Injury No.: 05-083644

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$541.77
- 19. Weekly compensation rate: \$361.18/\$354.05
- 20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Settled

22. Second Injury Fund liability: No

TOTAL:

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: Nicholas B. Carter, Esq.

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

Employee:	Robert Smyth	Injury No.: 05-083644
Dependents:	N/A	Before the
Employer:	Oscar Wilson Engine & Parts, Inc. (Settled)	<b>Division of Workers'</b>
Additional Party:	Second Injury Fund	<b>Compensation</b>
Insurer:	American Home Assurance Co. (Settled)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK/ch

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant, a telephone parts technician, suffered low back injury when he fell off a ladder during a parts inventory. The issues for determination are (1) Medical causation, and (2) Second Injury Fund liability. The evidence compels an award for the claimant for medical expenses, future medical care, temporary total disability benefits, and costs.

At the hearing, the claimant testified in person and offered deposition of Thomas F. Musich, D.O., Dean L. Rosen, Ph.D., and Timothy G. Lalk, and voluminous medical records. The defense offered depositions of Russell C. Cantrell, M.D., and Wayne A. Stillings, M.D., medical records from Daniel L. Kitchens, M.D., and a copy of the claimant's workers compensation settlement with the employer in this case.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri.

### **SUMMARY OF FACTS**

On March 29, 2005, the claimant fell off the second rung of a ladder he was climbing to perform an inventory for his employer. He landed on his back side and sustained injuries to his back, hips, and thigh. He went to the St. Joseph West Emergency Room with severe pain, sharp, aching, and throbbing, pain when walking. He was diagnosed with contusion of the right hip and a concussion without loss of consciousness. On March 31, 2005, the claimant followed up with Dr. Chad Smith, his regular treating physician, but continued to work.

On April 26, 2005, he saw Dr. Graven, with mid and low back pain, leg numbness, and tingling along with pain. In his medical report Dr. Graven described a fall one month prior to his evaluation. Dr. Graven also noted a subjective medical history of mid and low back pain that is getting worse as time passes status post work trauma. At that time Dr. Graven also noted complaints of left leg numbness, tingling, and pain. He noted a positive straight leg raise on the left and tenderness to palpation at the level of L1. Dr. Graven recommended a lumbar MRI and prescribed a Medrol Dosepak and Ultracet for pain.

On June 3, 2005, a lumbar MRI revealed a likely acute or subacute superior end plate compression fractures at levels T-12 and L1 with disc bulging at L4-5 to a greater extent than L3-4. The test also revealed disc bulging with central protrusion at L5-S1. On August 29, 2005, a lumbar myelogram and post myelogram CT scan revealed a mild diffuse annular disc bulging at L4-5 with soft tissue interface between the extraforaminal left L4 nerve root and adjacent intervertebral disc which is slightly more prominent than the right side. The report suggested the presence of a left foraminal and extraforaminal disc protrusion, or possibly a small disc herniation. The report also revealed a spinal canal that was mildly narrowed with central canal stenosis and a posterior central disc protrusion at L5-S1.

On October 10, 2005, a lumbar discogram identified pain with injection at L3-4 at pressures greater than 100 psi. Morphology of the disc during discography was normal. At L4-5 the patient reported pain with injection of that disc at 65 psi. The pain was similar in location and quality of the pain experienced at home on a daily basis. The morphology of the disc during discography was degenerated with extravasation of dye into the epidural space. That study identifies persistent post traumatic L4-5 disc pathology which is consistent with low back pain and left lower extremity radiculopathy. On April 13, 2006, Dr. Graven reported, "Mr. Smyth's work related injury is causally related to his need for surgery". See Exhibit A-8. Following the abnormal lumbar discogram, Dr. James Coyle, Dr. Daniel Kitchens, and Dr. Russell Cantrell examined the claimant. These three physicians opined that the claimant suffered from pre-existing degenerative disc disease, that the primary injury was in the nature of a sprain/strain, and recommended conservative treatment.

#### Preexisting Conditions

Before the March 29, 2005, accident, the claimant had a myriad of preexisting conditions. In 1992, he underwent treatment for trigeminal neuralgia. He underwent a right micro vascular decompression and suboccipital craniotomy of the fifth cranial nerve on January 28, 1992. He also underwent a left total hip replacement for avascular necrosis on September 9, 1994. In March 1995 he underwent a right total hip arthroplasty due to osteoporosis of the right hip. In March 1996 the claimant was hospitalized a week for depression and underwent treatment until the current day for same. He was diagnosed with cluster headaches in 2002 and still suffers from same. In April 2002, he was diagnosed with diffuse coronary artery disease for which he still receives treatment. A December 6, 2004, MRI revealed no abnormalities at the L2-3, L3-4, or L4-5 level. A very small central disc bulge was noted at L5-S1 without lateralization and with no spinal stenosis. See Exhibit B-2, Page 2. On January 6, 2005, the claimant underwent revision right total hip arthroplasty for a painful and unstable right total hip. The claimant had returned to work two weeks before his injury on March 29, 2005. The claimant testified that each of the above conditions either previously caused him to miss work or affected his ability to work or function fully in the work place.

#### Dr. Musich

Dr. Musich examined the claimant on November 2, 2006, and on April 25, 2008, took a medical history, and reviewed extensive medical records. He opined that the March 2005 accident was the prevailing factor causing the claimant's low back disability and compelling extensive medical care. See Dr. Musich deposition (Exh D), pages 7, 8. Dr. Musich opined that

the claimant suffered a 75% permanent partial disability to his low back from the occurrence. See Exhibit B-2. He opined that the claimant suffered from no preexisting permanent partial disability from his low back assuming that the condition was completely asymptomatic. See Exhibit B-2. Dr. Musich opined that the claimant suffered from a 15% preexisting permanent partial disability due to the claimant's surgically treated trigeminal neuralgia, a 35% preexisting permanent partial disability due to the claimant's right hip, and a 20% preexisting permanent partial disability due to his left hip. See Dr. Musich deposition, Exhibit D.

Dr. Cantrell

Dr. Cantrell examined the claimant on January 21, 2009, and opined that the claimant's back complaints were not related to his March 2005 accident, found no disability to the back for the primary injury and found disability for preexisting permanent partial disabilities of seven percent (7%) of the lumbar spine, fifteen percent (15%) of the left hip, twenty percent (20%) of the right hip, and ten percent (10%) of the body as a whole for trigeminal neuralgia. He also opined that if the claimant were considered permanently and totally disabled, he would consider this due to a combination of factors including a history of chronic bilateral hip pain status post hip replacement, trigeminal neuralgia, psychiatric diagnoses of depression and anxiety and to include his subjective complaints of back pain for which there does not appear to be any objective evidence of injury referable to his March 29, 2005, work injury. See Exhibit B-6.

Dr. Rosen

Dr. Rosen examined the claimant on March 31, 2008, and opined that he was suffering from long standing depression, for which he was treated, including hospitalization, all preceding his work injury of March 29, 2005, and he noted that his current depressive symptoms and resulting impairment intensified since his 2005 work injury due to chronic pain he experienced and the resulting impairments in mobility and loss of role function, since he was no longer the primary support of his family. See Exhibit E, Page 8. He also opined that the claimant's March 29, 2005, work related injury was the primary or prevailing factor causing further impairment with regard to depression in Robert Smyth. Dr. Rosen opined that the claimant's depression represented a fifty percent (50%) permanent partial disability of the whole person and that of the fifty percent (50%) disability rating twenty-five percent (25%) was preexisting and twenty-five percent (25%) due to the exacerbating factors of his 2005 work injury. He further found that these impairments were permanent in nature. See Exhibit E, Page 9.

Dr. Stillings

Dr. Stillings examined the claimant on June 11, 2009, and opined that he had substantial preexisting psychiatric disability. He opined that the claimant suffered from polysubstance abuse as an adolescent with associated one percent (1%) permanent partial psychiatric disability of the body as a whole. He found chronic major depression and associated ten percent (10%) permanent partial psychiatric disability of the body as a whole. He also diagnosed a personality disorder with an associated five percent (5%) permanent partial psychiatric disability of the body as a whole and conduct disorder traits with an associated one percent (1%) permanent partial psychiatric disability of the body as whole. Dr. Stillings found no permanent partial disability with regard to the March 9, 2005, accident. See Dr. Stillings deposition, pages 15-16. Dr.

Stillings opined that the claimant suffered from a personality disorder which consists of dependant schizoid, avoidant depressive personality traits. See Dr. Stillings deposition, page 17. Dr. Stillings testified that the claimant's treating psychiatrist, Dr. Anderson, was willing to support an application for disability due to ongoing psychiatric problems in August 2002. Dr. Stillings testified that it is hard to imagine that somebody with his level of a major depressive disorder and chronic pain disorder preexisting the work occurrence that it wouldn't have an adverse effect on his work productivity, pace and persistence, his ability to get along with others, his relationships at work, and things that are part of the everyday work situation. See Dr. Stillings deposition, page 40.

### **MEDICAL CAUSATION**

"The claimant in a workers' compensation case has the burden to prove all essential elements of her claim, including a causal connection between the injury and the job." Royal v. Advantica Rest. Group, Inc., 194 S.W.3d 371, 376 (Mo.App.W.D.2006) (citations and quotations omitted). "Determinations with regard to causation and work relatedness are questions of fact to be ruled upon by the Commission." Id. (citing Bloss v. Plastic Enters., 32 S.W.3d 666, 671 (Mo.App.W.D.2000)). Under the statute [in effect at the time of this accident], "[a]n injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability." § 287.020.2. On the other hand, "[a]n injury is not compensable merely because work was a triggering or precipitating factor." Id. "Awards for injuries 'triggered' or 'precipitated' by work are nonetheless proper *if* the employee shows the work is a 'substantial factor' in the cause of the injury." "Thus, in determining whether a given injury is compensable, a 'work related accident can be both a triggering event and a substantial factor.' Royal, 194 S.W.3d at 376 (quoting Bloss, 32 S.W.3d at 671).

"[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence." Elliot v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D. 2002). Accordingly, where expert medical testimony is presented, "logic and common sense," or an ALJ's personal views of what is "unnatural," cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) ("The commission may not substitute an administrative law judge's opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert."). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath, supra. Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of preexisting disability and its extent, the proof of causation is not within the realm of lay understanding nor -- in the absence of expert opinion -- is the finding of causation within the competency of the administrative tribunal. Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175, 176 (Mo.App. E.D. 1995). This requires claimant's medical expert to establish the probability claimant's injuries were caused by the work accident. McGrath, supra. The ultimate importance of the expert testimony

is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Id.

Dr. Musich examined the claimant on November 2, 2006, and on April 25, 2008, took a medical history, and reviewed extensive medical records. He opined that the March 2005 accident was the prevailing factor causing the claimant's low back disability and compelling extensive medical care. See Dr. Musich deposition (Exh D), pages 7, 8. Dr. Rosen examined the claimant on March 31, 2008, and opined that the claimant suffered from major depression due to his 2005 work related injury. See Exhibit B-3. On the other hand, Dr. Cantrell examined the claimant on January 21, 2009, took a medical history, and opined that the work related accident was "not a substantial factor in the cause of his current and ongoing lumbar back pain and bilateral lower extremity pain and parasthesias." See Exhibit B-6. Dr. Kitchens examined the claimant and opined that the claimant suffered no disability from the work related accident. See Exhibit III. Dr. Stillings examined the claimant on June 11, 2009, and opined that the claimant's disability resulted from preexisting conditions. See Dr. Stillings deposition, page 15.

The claimant's treating surgeon, Dr. Graven, examined the claimant and treated his condition for eleven months after the accident opined:

It is my opinion that the patient's fall probably exacerbated his degenerative disk disease in the lumbar spine. This has been confirmed by lumbar discography. He is also noted to have disk protrusion and/or bulging at L4-5 and L5-S1 without thecal effacement. Therefore, I do believe that Mr. Smyth's work-related injury is causally related to his need for surgery. However, it is not solely responsible as I do believe he had a degenerative condition prior to his fall. See Exhibits A-8, A-14.

Given the wide range of medical opinions relating to this complicated medical condition, Dr. Graven's findings appear to be the most candid and based on the entire situation over a longer time period. Based on the entire record, the claimant sustained his burden of proving medical causation under standards stated above.

### **SECOND INJURY FUND**

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

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

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

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

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

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

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

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

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

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

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is “permanent” if “shown to be of indefinite duration in recovery or substantial improvement is not expected.” Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). The test for permanent, total disability is the worker's ability to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 48 (Mo.App. W.D. 2007). Generally, where two events, one compensable and the other non-compensable, contribute to the claimant’s alleged disabilities, the claimant has the burden to prove the nature and extent of disability attributed to the job related injury. Strate v. Al Baker’s Restaurant, 864 S.W.2d 417, 420 (Mo.App. E.D. 1993); Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. E.D. 1991).

#### Disability from Work Related Accident

The evidence presents many different views of the claimant’s condition. Looking to the claimant’s work related injury, Dr. Musich opined that the claimant suffered a 75% permanent partial disability to his low back from the occurrence. See Exhibit B-2. He opined that the claimant suffered from no preexisting permanent partial disability from his low back assuming that the condition was completely asymptomatic. See Exhibit B-2. Dr. Cantrell opined that the claimant suffers from a preexisting 7% permanent partial disability to his low back and that the occurrence resulted in no additional permanent partial disability. See Exhibit B-6. The claimant settled his workers’ compensation claim against the employer in this case on the basis of 21% permanent partial disability of the low back. See Exhibit IV.

Based on Mr. Lalk’s findings, the claimant is unemployable in the open labor market. See Lalk deposition, pages 6, 7. He testified, “In terms of his vocational history, as he reported it to me, and the factors that have affected his ability to work, I would have to say that one of the prevailing factors, or the prevailing factor appears to be that [March 29, 2005] incident. Because after that incident, he developed symptoms at a level that prevents him from working.” See Lalk deposition, pages 7, 8.

Q. You were asked ... about a lot of prior problems that Mr. Smyth had, including his hips and his psychiatric condition, and ... migraines, and problems with his arms. But even if you disregard those problems that Mr. Smyth had, the symptoms that he relates to you from the primary injury would be sufficient to render him unemployable in the open labor market; is that right?

A. If by primary injury you’re talking about his low back symptoms, that is correct. See Lalk deposition, pages 26, 27.

None of the other experts opined that the claimant suffered total disability as a result of the last injury alone or from a combination of the last injury and the claimant’s preexisting permanent partial disabilities. However, Mr. Lalk’s opinion is certainly consistent with the

findings of Dr. Musich that the claimant suffered a 75% permanent partial disability to his low back from the last accident alone and Dr. Rosen's finding that the claimant suffered a 25% psychological permanent partial disability from the last accident. The combination of these two serious permanent partial disabilities supports Mr. Lalk's opinion that the claimant's disabilities from the March 2005 accident alone resulted in the claimant's inability to compete in the open labor market, completely disregarding any preexisting permanent partial disabilities. The uncontradicted evidence supports a finding that the claimant is unemployable in the open labor market and therefore permanently and totally disabled as a result of the disabilities from his March 29, 2005, accident at work.

### Preexisting Permanent Partial Disabilities

To complete the record, an analysis of the evidence compels an analysis of the claimant's extensive preexisting permanent partial disabilities. Based on the evidence, the claimant suffered from various preexisting permanent partial disabilities. Dr. Musich opined that the claimant suffered from a 15% preexisting permanent partial disability due to the claimant's surgically treated trigeminal neuralgia, a 35% preexisting permanent partial disability due to the claimant's right hip, and a 20% preexisting permanent partial disability due to his left hip. See Dr. Musich deposition, Exhibit D. Dr. Cantrell opined that the claimant suffered from a preexisting 7% percent permanent partial disability to his low back from a mechanical etiology and preexisting degenerative disc disease. He also opined that the claimant suffered from a 15% preexisting permanent partial disability of the left hip from his avascular necrosis and hip replacement, a 20% preexisting permanent partial disability of the right hip from his avascular necrosis, hip replacement, and revision surgery, and a 10% preexisting permanent partial disability of the person as a whole relating to his trigeminal neuralgia and a chronic history of intermittent facial pain controlled in part by Tegretol. See Exhibit B-6. Dr. Cantrell's findings are not contradicted by any other evidence.

The claimant also suffered from preexisting psychological permanent partial disabilities according to Dr. Stillings and Dr. Rosen. Dr. Stillings opined that the claimant suffered from a 19% percent preexisting psychological permanent partial disability, and Dr. Rosen opined that the claimant suffered from a 25% preexisting psychological permanent partial disability. See Dr. Stillings deposition, pages 15, 16, and Exhibit B-3. Based on the evidence, the claimant suffered from a 22 ½% preexisting psychological permanent partial disability, a 7% preexisting percent permanent partial disability to his low back, a 12 ½% preexisting percent permanent partial disability due to his trigeminal neuralgia and intermittent facial pain, 17 ½% preexisting permanent partial disability of the left hip from his avascular necrosis and hip replacement, and a 27 ½% preexisting permanent partial disability of the right hip from his avascular necrosis, hip replacement, and revision surgery. The evidence supports a finding that many of the claimant's permanent partial disabilities constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed and continue to produce a chronic hindrance in his routine activities of daily living. See Dr. Musich deposition (Ex. D), page 12.

### Conclusion

However, since the claimant is unemployable in the open labor market as a result of the disabilities from his March 2005 accident combined with his age, education, and past relevant work history, the Second Injury Fund bears no liability in this case.

Made by: /s/ EDWIN J. KOHNER  
EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

This award is dated and attested to this 1<sup>st</sup> day of September, 2010.

/s/ NAOMI L. PEARSON  
*Naomi L. Pearson*  
*Division of Workers' Compensation*