

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

Injury No.: 05-134229

Employee: David Taube
Employer: North Missouri Construction (Settled)
Insurer: Cincinnati Insurance Company (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 June 25, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Rebecca S. Magruder, issued June 25, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 19th day of January 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

**FINAL AWARD DENYING COMPENSATION
as to Second Injury Fund Only**

Employee: David Taube Injury No: 05-134229
Dependents: N/A
Employer: North Missouri Construction (Settled)
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Insurer: (Settled)
Hearing Date: May 20, 2010
Briefs Filed: June 10, 2010 Checked By: RSM/cy

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: October 21, 2005
5. State location where accident occurred or occupational disease was contracted: Hardin, Carroll 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 was pulling a tarp full of dirt when he fell on the ground.
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: Claim as to Employer/Insurer previously settled for for 32% permanent partial disability body as a whole; Second Injury Fund has no liability under §287.220.
15. Compensation paid to-date for temporary disability: \$8,448.32 in temporary total disability benefits.
16. Value necessary medical aid paid to date by employer/insurer? \$13,750.49
17. Value necessary medical aid not furnished by employer/insurer? Unknown
18. Employee's average weekly wages: \$396.00
19. Weekly compensation rate: \$264.00/\$264.00
20. Method wages computation: Stipulation
21. Amount of compensation payable: None
22. Second Injury Fund liability: None
23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Taube Injury No: 05-134229
Dependents: N/A
Employer: North Missouri Construction (Settled)
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Insurer: (Settled)
Hearing Date: May 20, 2010
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The above Claim was heard on May 20, 2010. Mr. David Taube (hereinafter Claimant) and the Second injury Fund stipulated to all issues in the case except for the nature and extent, which includes the sub-issue of the nature and extent of permanent disability resulting from the October 21, 2005 accident.

Claimant's evidence consisted of:

His testimony; and Exhibits A through JJ which consist of: the claim, and amended claim for compensation; the answers and receipts of claims for compensation; the stipulation for compromise settlement with the Employer/Insurer; the reports and depositions of Dr. Koprivica; the report and deposition of Dr. Caffrey; the reports and depositions of Mary Titterington, all of the medical records from the treating physicians; Meadville R-IV School Transcript; and records from the Social Security Administration. Claimant's Exhibits A through JJ were admitted into evidence.

The Second Injury Fund's Evidence consisted of:

The deposition testimony of the Claimant, admitted into evidence as Second Injury Fund's Exhibit 1.

Claimant is alleging injury to his low back and body as a whole, which occurred when he was pulling a tarp loaded with dirt and debris. As a result of this injury, Claimant alleged that he

was permanently and totally disabled. Claimant also alleged pre-existing psychological disability and a learning disability of written expression.

David Taube is a 58-year-old man who resides at 5 Mulberry Street, Hale, Mo., a small town thirty miles north of Chillicothe. He completed the 9th grade at Meadville High School and left school in the 10th grade after an argument with a coach and the principal. He does not have a GED despite an attempt to obtain one. His work history consists of heavy exertion labor jobs. He was employed with North Missouri Construction for the 25 years preceding his primary work injury, initially as a general laborer or hand digger until he was promoted to job foreman, working alongside 2-3 co-workers laying telephone cable underground. This involved operating backhoes, bulldozers, as well as various other machinery to dig into the ground and to lay the cable. At times, he and his crew were required to engage in hand-digging when necessary. During the winter when the ground was frozen and he was laid off, he drew unemployment and did dry-wall/carpentry work.

On 10/12/05, Mr. Taube sustained a minor injury to his low back when, while attempting to pull a telephone pole out of the ground, the pole fell over, and he fell over with it to the ground. Thereafter, he saw his chiropractor, Dr. Bonnette, who administered chiropractic manipulation. He took a day off and then returned to his regular job with no restrictions.

Then, on 10/21/05, Mr. Taube sustained a second and significant injury to his low back when he was attempting to help pull a tarp full of dirt when he fell down again. He testified that it felt like someone "hit him in the back with a ball bat," and the pain was so bad that he was crying. The pain was in the small of his back at the belt-line, and radiated into both legs. He described the back and leg pain as excruciating to the extent that he could not even walk. He was helped up and into the truck, drove 60 miles to the office and reported the injury to the employer. He again saw Dr. Bonette who performed another manipulation. The 10/21/05 injury occurred on a Friday. Mr. Taube stayed at home all weekend, and on Monday morning when he went to get up, he could not move. He described crawling along the floor until his daughter came over to assist him up. He then called his superintendent and told him that he needed to see a doctor, and was summarily laid off.

Mr. Taube was eventually referred to Dr. Goddard on 12/22/05, who ordered an MRI scan which was performed on 12/29/05 and revealed diffuse bulging at L5-S1 with central protrusion. There was a minimally protruded herniated central disk at L4-L5, more to the left than the right. Dr. Goddard recommended neurosurgical evaluation on 1/6/06. Mr. Taube was then seen by Ann Lee, M.D. on 2/1/06, who noted spasm and ongoing complaints for which she recommended a Medrol-Dosepak and conservative management. His care and treatment were then directed to Dr. Drisko, who examined him on 3/7/06 and diagnosed symptomatic spinal stenosis and recommended conservative management with physical therapy, which Claimant apparently did not tolerate. A functional capacity evaluation was performed on 4/27/06: he demonstrated good effort, and was limited to light physical demand level of activity. Overall, the prognosis was poor. Dr. Drisko released him at maximal medical improvement on 5/9/06 with permanent

restrictions based on the functional capacity evaluation. Apparently, Dr. Drisko offered surgical intervention, but Mr. Taube was not willing to undergo surgery. His smoking history had a negative impact on the prognosis of the outcome of any proposed back surgery, and Claimant was unwilling to quit smoking. Dr. Drisko prescribed a TENS unit, which at times alleviated a portion of his back pain and made him somewhat more comfortable, but never completely took away his pain.

On May 27, 2007 Mr. Taube was evaluated by neurosurgeon, Stephen L. Reintjes, M.D. Dr. Reintjes noted “Interestingly, I discussed the possibility of physical therapy or surgery to correct his problem. He refuses both physical therapy and surgery” (Exhibit T).

P. Brent Koprivica, M.D. testified on behalf of the Claimant. In his initial deposition of 3/13/08, Dr. Koprivica did not assess any liability to the Second Injury Fund (Exhibit FF, 21-22), as he did not identify any disabilities predating the 10/21/05 primary injury which constituted a hindrance or obstacle to Mr. Taube’s employment or re-employment if he were to become unemployed. Dr. Koprivica opined that the Claimant was permanently and totally disabled solely as a result of the 10/21/05 primary injury.

Vocational expert Mary Titterington initially opined in her 2/27/08 deposition that Mr. Taube is unemployable on the open labor market and, thus, permanently and totally disabled solely due to the restrictions stemming from the 10/21/05 last accident, his extreme pain behaviors, his emotional lability from the primary injury as well as his low academic and intellectual functioning and his limited education. She also admitted that there were no prior disabilities which would constitute a hindrance or obstacle to his employment, and that no prior restrictions had been imposed on Mr. Taube’s work (Exhibit HH, 68 & 73). She also admitted that his educational background and low intelligence level did not present an obstacle or hindrance to his ability to obtain or perform his jobs prior to 10/21/05 (Exhibit HH 73). At that time, Ms. Titterington did not identify any learning disabilities in David Taube.

The employer then engaged the services of psychologist Patrick Caffrey, who diagnosed in Mr. Taube a learning disability of written expression; a pain disorder associated with both psychological factors and a general medical condition, chronic; and dysthymic disorder, a form of depression; and low back pain (Exhibit JJ, 18). He opined that he considered the learning disorder of written expression a hindrance or obstacle to Mr. Taube’s employment. However, Dr. Caffrey admitted that the learning disability did not actually negatively affect Claimant in any of his past employment, as Mr. Taube was never required to write reports, letters, or documents in his past work (Exhibit JJ, 76-77). Dr. Caffrey also opined that the chronic pain disorder resulted from the pain associated with the 10/21/05 primary injury, noting that Mr. Taube’s first complaint was “My back is killing me, I wish I was home in my recliner.” (Exhibit JJ, 53-54).

Thereafter, Mary Titterington confirmed such learning disability of written expression in her second report and deposition of 12/14/09, opining that Mr. Taube’s learning disability, intellectual ability, emotional lability, his personality impairments as well as his physical

restrictions and his extreme pain behaviors stemming from the primary injury render him unemployable in the open labor market (Exhibit II, 17-18). However, she acknowledged that the learning disability of written expression did not hinder or limit Mr. Taube in his previous employment, as he did not have to fill out any reports, documents, etc. in that employment (Exhibit II 27-28).

Likewise, Dr. Koprivica gave a second deposition in May of 2010, opining that based upon Dr. Caffrey's opinion in his report and deposition, and Mary Titterington's new opinion in her updated report and deposition, Mr. Taube is permanently and totally disabled as a result of a combination of the pre-existing learning disability of written expression and the restrictions and effects stemming from the primary injury. However, Dr. Koprivica also agreed that the learning disability of written expression did not limit or hinder Mr. Taube in any of his previous employment since he was not required to render any written reports, etc. in those jobs.

In a Missouri workers' compensation case, the law clearly provides that the employee has the burden of proving all material elements of the claim. Fischer v. Archdiocese of St. Louis-Cardinal Richter Institute, 793 S.W.2d 195 (Mo. App. E.D. 1990). It is the claimant's burden to prove "not only causation between the accident and the injury, but also that a disability resulted and the extent of such disability." Griggs v. A.B. Chance Company, 503 S.W.2d 697 (Mo. App. W.D. 1973). Further, "proof of permanency of injury requires reasonable certainty." *Id.* This proof must be based on competent and substantial evidence and not merely on speculation. Moriarty v. Treasurer of the State of Missouri, 141 S.W.3d 69 (Mo. App. E.D. 2004).

The dispositive issue in this case is the extent of disability resulting from Claimant's 10/21/05 accident. Mr. Taube is claiming he is permanently and totally disabled under the Missouri Workers' Compensation Law and, further, that his permanent and total disability results from the combination of the disability resulting from the accident on October 21, 2005 and permanent disability from his preexisting learning disability of written expression.

At issue in this case is the liability of the Second Injury Fund. The Missouri Supreme Court in the case of Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966) explained the procedure which must be undertaken when there is a dispute as to whether the employer or the Second Injury Fund is liable for permanent total disability benefits. The Court explained that the first consideration is the disability resulting from the last injury alone. Otherwise, the words in §287.220 "considered alone and of itself" were meaningless. Therefore, a claimant's pre-existing disabilities are irrelevant until employer's liability for the last injury is determined. And if a claimant's last injury in and of itself renders a claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. *See* Huey v. Chrysler Corporation, 34 S.W.3d 845 (Mo.App. 2000); Keysior v. TransWorld Airlines, 5 S.W.3d 195, 201 (Mo.App. 1999); Maas v. Treasurer of Missouri, 964 S.W.2d 541 (Mo.App. 1998); Roller v. Treasurer of Missouri, 935 S.W.2d 739, 741 (Mo.App. 1996).

In order to determine whether an individual is permanently and totally disabled under the Missouri Workers' Compensation Law it is necessary to consider the claimant's age, education, occupational history and job skills, as well as his physical condition in determining his ability to compete in the open labor market. Mr. Taube is currently 58 years of age, and completed the 9th grade. He has not obtained a GED. His work history consisted of heavy exertion labor jobs. He was employed with North Missouri Construction for the 25 years preceding his primary injury in a general laborer/hand digger position until he was promoted to job foreman, working alongside co-workers laying telephone cable underground. See generally Claimant's testimony.

Section 287.020.7 RSMo. 2000 defines total disability as an "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 terms "any employment" means "any reasonable or normal employment or occupation." Brown vs. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo App. 1990). The Missouri Courts have repeatedly held that the test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether the employer in the usual course of business would reasonably be expected to employ the employee in his present physical condition. See e.g. Faubion v. Swift Adhesives Co., 869 S.W.2d 839 (Mo App. 1994); Hines v. Conston of Missouri #852, 857 S.W.2d 546 (Mo App 1993); Lawrence v. R-VIII School District, 834 S.W.2d 789 (Mo app 1992); Carron v. St. Genevieve School District, 800 S.W.2d 64 (Mo App. 1991); Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195 (Mo App. 1990). The critical question is whether employer could reasonably be expected to hire the claimant, considering her present physical condition, and reasonably expect her to successfully perform the work. Forshee v. Landmark Excavating and Equipment, et al, No.85582 (Mo app. E.D. 2005); Sutton v. Vee Jay Cement Contracting Company, 37 S.W.3rd 803, 811 (Mo App. 2000). Total disability means the inability to return to any reasonable or normal employment. It does not require that the employee be completely inactive or inert. Isaac v. Atlas Plastic corporation, 793 S.W.2d 165 (Mo app. 1990); Kowalski v. M.G. Metals and Sales, Inc., 631 S.W.2d 919 (Mo App. 1982). The following factors are to be considered in determining whether an individual is permanently and totally disabled: the claimant's physical condition, including his limitations and capabilities, his age, education and occupational background and skills. See generally Brown v. Treasurer of Missouri, 795 S.W.2d 479 (Mo App. 1990); Issac, 793 S.W.3d 165 (MO App. 1990); Reve v. Kindell's Mercantile Company, Inc., 793 S.W.2d 917 (Mo App. 1990); Laturno v. Carnahan, 640 S.W.2d 470 (Mo App. 1982); Patchin v. National Supermarkets, Inc., 738 S.W.2d 166 (Mo App. 1987).

In every case where permanent disability is an issue, the claimant's physical limitations and impairments are a critical part of the evidence and analysis. The initial relevant issue is the claimant's disability caused by the injury in the work-related accident. The credible testimony of a claimant concerning work-related functioning can constitute competent and substantial evidence. See Hampton v. Big Boy Steel Erection, 121 S.W.3 220, 223-224 (Mo. Banc 2003).

Mr. Taube testified that following the 10/21/05 lumbar injury, he has constant low back pain which has a profound affect on nearly every aspect of his life. As a result of his back and

leg pain stemming from the injury, he is unable to stand for more than five minutes without support, but can stand a little longer, 10-15 minutes, if he can lean his body weight on a cart or firm surface. Due to his low back and leg pain, he is only able to walk less than one block and he tries to avoid concrete if at all possible, as he is afraid that his leg will give out and he will fall as he has on numerous occasions, twice hitting his head. Sometimes, when he has gone out for the mail, he feels as if he is not going to be able to make it back to the house because his legs turn "rubbery". He testified that when he walks to his daughter's house less than a block away, he has to stop three times and lean up against a tree and rest before he is able to move on. He is able to sit for only short periods and needs a comfortable chair to alleviate his back and leg pain. Due to his back and leg pain stemming from the 10/21/05 injury, Mr. Taube spends 95% of his day in his recliner chair or reclining on his couch.

Due to his back pain stemming from the 10/21/05 injury, Mr. Taube has substantial difficulty sleeping through the night; if he lies on his side, his back hurts; if he lies on his stomach, his back hurts; if he lies on his back, his back hurts. He reported to Mary Titterington that, due to his pain, he has trouble staying asleep and wakes on some nights as many as twenty times; he is constantly tossing and turning and rarely is in one position more than fifteen minutes; he never feels rested and believes that his total sleeping in an average night is two to three hours. He has to limit his driving to short distances due to his back and leg pain. In addition, he needs to use the TENS unit which was prescribed by Dr. Drisko in order to lessen his back pain. Whereas, Mr. Taube had none of these problems prior to the 10/21/05 primary injury. He never had any low back or leg pain before 10/21/05. He testified that he could stand, walk and sit for as long as he needed to prior to the injury. In fact, he admitted on cross that prior to 10/21/05, there were numerous days that he walked ten miles a day in his work. Prior to 10/21/05, Mr. Taube did not have any difficulty sleeping through the night, nor did he have to lie down during the day. Further, he did not have any problems driving prior to the 10/21/05 injury, nor did he have to use a TENS unit. He had no problems performing any of his heavy exertion level job duties prior to the 10/21/05 injury. He testified that he always received good performance evaluations and regular raises before 10/21/05, and he was never criticized for poor performance. Further, he never missed time from work for low back problems or needed any assistance or accommodation with his work prior to 10/21/05. In addition, he was never disciplined, demoted, or terminated prior to the primary injury for failing to perform his job properly. As a result of the 10/21/05 lumbar injury, Mr. Taube was found eligible for Social Security disability benefits.

Since the 10/21/05 lumbar injury, Mr. Taube is no longer able to engage in any of the hobbies he engaged in prior to the injury. Due his pain and functional limitations, he is no longer able to fish, hunt, or trap; he can no longer go turkey or deer hunting because he cannot sit, stand, or walk for the time required to engage in those activities. At hearing, he testified "I'm doing lucky to climb in and out of the tub." As a result of the 10/21/05 primary injury, Mr. Taube is not able to do any yard work; his daughter and son in law have to come over and do it for him as it causes him too much pain. Due to his pain from the 10/21/05 injury he is unable to do his own laundry; his daughter has to come over and do that for him as well. However, he was always able to engage in his hobbies and perform his yard work as well as laundry and other household

chores prior to the injury. Since the injury, if he goes to a barbeque and sits at a picnic table, he has so much back and leg pain that he has to just get up and go home because he cannot sit and enjoy the picnic. However, he never had that problem before the 10/21/05 injury. Since the injury, he can't even go to watch his granddaughter play softball because it causes him so much pain. But he never had that problem before the 10/21/05 injury. Mr. Taube testified that it is the 10/21/05 injury which is keeping him from doing all of the things he was able to do before the injury, and that the injury has changed his life entirely for the worse. He felt that it is the pain and limitations he experiences from the 10/21/05 injury which is keeping him from working, and if he had not sustained the 10/21/05 primary injury, he would still be working for North Missouri Construction today.

Claimant's testimony is supported by the 9/6/05 report and the 3/13/08 deposition of Dr. Koprivica. I find Dr. Koprivica's testimony in that first deposition to be credible and adopt his original opinions in this case. Claimant's expert, Dr. Koprivica, conducted a physical examination of Claimant and reviewed medical records in conjunction with rendering his written report. When Dr. Koprivica examined David Taube on 9/5/06, he complained of constant low back pain; that when he tried to do activity, the pain became worse; that he was very limited in his ability to walk and because of that, he tried to avoid walking because as he walked, he would lose the ability to walk and would fall to the ground; and that his sitting tolerance was reduced (Exhibit FF, 10-11). Dr. Koprivica found that the 10/21/05 injury resulted in severe symptomatic spinal stenosis, as documented in the lumbar MRI scan.

Dr. Koprivica confirmed David Taube's assessment of his physical limitations, opining that the Claimant was subject to numerous restrictions due to the 10/21/05 injury. He opined that Mr. Taube should avoid frequent or constant lifting or carrying activities, and as a maximum, he can lift or carry up to 20 pounds; he should avoid bending at the waist, pushing, pulling or twisting; he should attempt to do these activities on a very rare occasion; he should avoid all squatting, crawling, kneeling or climbing as well except on a rare occasion. Posturally, Dr. Koprivica opined that Mr. Taube will need ad lib ability to change posture; he is extremely limited in his walking tolerances; captive standing intervals should be limited to less than thirty minutes with support; he would be able to stand for shorter durations of time if support is not provided; captive sitting interval maximums of thirty minutes with the flexibility of getting up whenever necessary. Dr. Koprivica testified that at the time he wrote his 9/5/06 report, it was his opinion that, assuming that a vocational expert supported that Mr. Taube is permanently and totally disabled, such permanent and total disability is based on and resulting from the symptomatic spinal stenosis attributable to the 10/21/05 work injury, considered in isolation, in and of itself. (The report states the 10/12/05 injury, but by the time of his deposition, Dr. Koprivica made the correction to the 10/21/05 injury. The 10/12/05 injury was dismissed as to the Employer and the Second Injury Fund, and the Employer settled the 10/21/05 injury for 32% BAW).

In his 3/13/08 deposition, Dr. Koprivica confirmed that, after reviewing Mary Titterington's opinion that Mr. Taube is unemployable in the open labor market due to the

restrictions stemming from the primary injury, his opinion did not change from his 9/5/06 report, and reiterated that Mr. Taube was permanently and totally disabled solely due to the 10/21/05 injury considered alone, in and of itself. Dr. Koprivica had also issued an addendum report of 11/16/07 endorsing Mary Titterington's opinion and reiterating his original opinion that Mr. Taube is permanently and totally disabled solely as a result of the 10/21/05 primary injury. I agree with both Dr. Koprivica's and Mary Titterington's original opinions and find that David Taube's permanent and total disability results solely from the effects of the 10/21/05 primary injury. I also find in accordance with Dr. Koprivica's opinion that the Claimant should be limited to those restrictions imposed by Dr. Koprivica, and that all of these restrictions are due to the primary injury of 10/21/05.

I also find in accordance with Mary Titterington's original opinion, which also confirmed all of Claimant's physical complaints and limitations resulting from the 10/21/05 primary injury. She noted that in her observance of Claimant, Mr. Taube was able to sit or stand much less than thirty minutes, which was less time than Dr. Koprivica's restrictions allowed. "I never saw him stand 30 minutes or sit for 30 minutes. Obviously, not walk for 30 minutes. It was much less than that." (Exhibit HH, 69). She opined that the sleep patterns that Mr. Taube described he lived with and how his difficulty sleeping limited his daily functioning would certainly have a negative impact on him vocationally (Exhibit HH, 70). She further opined that given Mr. Taube's presentation of being in pain and constantly moving and changing positions to relieve his pain, there is no expectations that any employer "in the reasonable course of events would hire him in the open labor market." When asked by the Second Injury Fund's counsel on cross examination: "His presentation of being in pain and his constant moving to relieve his pain, from this presentation would you agree that there is really no expectation that an employer in the reasonable course of events would hire him in the open labor market," she responded: "Absolutely. As he presented, especially during the last half hour to an hour, no, they would not hire him." (Exhibit HH, 71). Further, Ms. Titterington noted: "If we look at Dr. Koprivica's restrictions where he states that he must be able to ad lib, rotate between sitting, standing, and walking. If we look at that and his presentation of the significant pain when he was with me of rotating literally constantly, you can't do any work with the way he was presenting during that last hour that he was with me. You could have a Ph.D. and you are not going to be able to stay on task and work at an acceptable level." (Exhibit HH, 62).

When the relevant statutes and case law are applied to the facts of this case, based upon all of the evidence, the medical records, Claimant's testimony at hearing, and the medical and vocational testimony, I find and believe that David Taube is unemployable in the open labor market and permanently and totally disabled. I find that such permanent total disability results from the October 21, 2005 injury considered alone and in isolation.

I find that Claimant is permanently and totally disabled from any reasonable or normal employment or occupation as a result of his low back injury on October 21, 2005. As a result of the pain and limitations resulting from that accident, Claimant is subject to significant restrictions. Given those restrictions, as well as Claimant's age (58), Claimant's limited

educational background (only completed ninth grade), and limited job skills (heavy labor only), I find that no reasonable employer in the open labor market would employ Claimant.

The original testimony of Dr. Koprivica and Ms. Titterington verify that Claimant is unemployable because of these conditions and limitations. Because the last injury on October 21, 2005 in and of itself renders the Claimant permanently and totally disabled, the Second Injury fund has no liability. Landman v. Ice Cream Specialties, Inc., 107 S.W. 3d 240, 248 (Mo. Banc 2003).

Although Mr. Taube was diagnosed by Dr. Caffrey with a learning disability of written expression, as well as discussing a laundry list of other pre-injury psychological limitations, I do not need to reach or consider these preexisting conditions because the overwhelming effects of the primary injury take Mr. Taube out of the labor market and render him permanently and totally disabled in and of themselves.

I make the following findings for the record in case of a remand, and in answer to Claimant's arguments in his brief. I was persuaded by the evidence that Claimant has had a lifelong learning disability diagnosed by Dr. Caffrey as a disorder of written expression. I was persuaded by this evidence that this disorder did indeed constitute a hindrance to employment or reemployment within the meaning of §287.220 RSMo. 2000. Again, the fact that the evidence demonstrated that the disorder of written expression was in fact a preexisting permanent condition and was a hindrance to employment is irrelevant because I have found that the Claimant is permanently and totally disabled as a result of the effects of the last accident alone. For the record, however, I note that Dr. Caffrey addressed a number of other preexisting tendencies or problems the Claimant had which had affected him throughout his life. I was not persuaded that any of these conditions were disorders or disabilities. I was persuaded that the Claimant had a low average IQ, however, I do not find that a low average IQ is the same as mental retardation or a learning disability. I do not find that a low average IQ is tantamount to a disability. Next, Dr. Caffrey commented and discussed the Claimant's tendency to exaggerate his "fixed thinking" and his "irrational thinking," his limited ability to tolerate frustration, his feelings of hostility towards others, his prior dependence on alcohol, and his interest in complaining about his pain rather than taking responsibility for himself for getting better, which included eating. As examples of the latter, Dr. Caffrey noted that the Claimant refused to take the advice of healthcare providers, which included quitting smoking or at least drastically reducing smoking and pursuing other conservative measures to less conservative measures (i.e. surgery) for his back injury. Although Claimant argues that many of these issues or problems listed above are the result of Claimant's personality disorders and defects, I was not persuaded by these arguments or the line of testimony Claimant pointed out in his brief. I simply do not find that any of the above enumerated characteristics constitute permanent disorders or disabilities over which the Claimant has limited or no control. Again, these findings are irrelevant to my holding in this case in that I did not even need to address these issues because I found that the effects of the last accident caused Claimant to be permanently and totally disabled. I made these

findings for the record in the event the case is remanded and to address the arguments raised in Claimant's brief.

In this case, Claimant did not meet his burden of proving that liability for permanent and total disability rests with the Second Injury Fund. When pertinent case law and the relevant statutory authority are applied to the facts in this case, it is clear that David Taube is permanently and totally disabled and unable to compete in the open labor market strictly due to the 10/21/05 injury considered alone, in and of itself. All of the substantial and competent evidence demonstrates that his inability to access the open labor market results from the effects of the 10/21/05 injury and treatment necessitated therefrom in isolation. Therefore, such permanent and total disability is the result of the 10/21/05 injury in and of itself. Thus, there is no Second Injury Fund liability for permanent total disability in this case.

Made by: _____

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

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

Naomi Pearson
Division of Workers' Compensation