

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

Injury No.: 06-096016

Employee: Demetris Thomas  
Employer: St. Louis County  
Insurer: Self-Insured  
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 January 4, 2011. The award and decision of Administrative Law Judge John A. Tackes, issued January 4, 2011, 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 21<sup>st</sup> day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

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

Injury No.: 07-028031

Employee: Demetris Thomas  
Employer: St. Louis County  
Insurer: Self-Insured  
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 January 4, 2011. The award and decision of Administrative Law Judge John A. Tackes, issued January 4, 2011, is attached and incorporated by this reference.

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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  
Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: Demetris Thomas

### **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 am convinced that the decision of the administrative law judge is in error and that the decision should be modified to award permanent total disability benefits from the Second Injury Fund.

Employee performed street maintenance for employer. On October 10, 2006, employee tripped over a curb and fell on his right knee, sustaining immediate and painful symptoms of injury. Employee's right knee injury required surgical intervention to repair a complete quadriceps tendon tear; employee was not released to return to work until March 29, 2007. On March 30, 2007, employee was shoveling asphalt on his second day back at work, when he felt a pain in his lower back while bent over. The pain was so bad that employee couldn't straighten his back. An ambulance transported employee to the hospital. An MRI in April 2007 revealed multi-level disk pathology, including an annular tear at L4-5 with a mild broad-based disk protrusion, and bulging disks at L2-3 and L3-4. Employee began a course of conservative treatment. While undergoing physical therapy for his low back, employee had a second surgery on his right knee to address ongoing problems. A further course of conservative treatment and physical therapy failed to resolve employee's continuing pain complaints with respect to both the right knee and his low back.

Following the work injury of March 2007, employee's level of functioning worsened significantly. Employee now takes Vicodin and Tylenol #4 to manage pain in his knee and low back; these medications cause employee to feel drowsy and unable to focus and prevent him from driving. Employee uses a cane and walks with a limp. Employee can only stand for a few minutes without a brace on his knee and only ten minutes with a brace. Employee can only walk about 50 feet at a time and elevates his knee when sitting. Employee can't get a full night's sleep because his pain wakes him up. Being unable to sleep at night keeps employee from being able to stay awake during the day. Employee stopped working in January 2008, and has not worked since. Beginning in February 2008, employee began treating with a psychiatrist who put him on antidepressants.

In his appeal to this Commission, employee argues he is permanently and totally disabled due to a combination of his disabilities and limitations stemming from the October 2006 and March 2007 work injuries. Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent, total disability benefits, employee must establish that: (1) he suffered from a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

Dr. Thomas Musich evaluated employee and opined that the disabilities resulting from employee's work injuries combine in such a way as to produce an overall disability much greater than their simple sum. Dr. Musich opined that employee suffers from a

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70% permanent partial disability of the right knee as a result of the work injury of October 10, 2006, and a 25% permanent partial disability of the low back referable to the work injury of March 29, 2007.

James England also evaluated employee and provided his expert vocational opinion that employee is permanently and totally disabled as a result of the combination of his disabilities stemming from the two work injuries. Mr. England noted that employee's permanent restrictions limit him to light work only. Mr. England opined that employee's "physical presentation," which Mr. England specified as employee's need to use a crutch and leg brace to get around, as well as his awkward gait and difficulty sitting, would make him an unattractive candidate for employment. Mr. England opined that these problems would "cause employers to essentially pick virtually any other candidate for entry level jobs over this man." Tr. 525. Mr. England further explained that employee's inability to sit or stand for any length of time presents a serious obstacle to employment or any kind of vocational rehabilitation. Mr. England was the only vocational expert to testify in this matter, and his opinion stands unopposed on the record.

Nevertheless, the administrative law judge rejected Mr. England's unopposed vocational expert opinion, although it's difficult to discern exactly why, because the administrative law judge's rationale is not very clearly articulated in his award:

The conclusions of the vocational rehabilitation counselor are not persuasive. He indicates that Claimant, who completed college courses, is (only) functioning at a fifth or sixth grade level but in his report indicated that the sixth grade level where Claimant tested in math was higher than most that have been out of school for some time. He further indicates that Claimant is suitable for unskilled, entry level sedentary employment but his "physical presentation alone" would cause employers to pick "virtually any other candidate." I did not find Claimant's physical presentation to match the description given by the VRC.

*Award*, page 11.

Is the administrative law judge trying to say that he doesn't find Mr. England's ultimate opinions worthy of belief because of some perceived (but, as the record plainly reveals, nonexistent) inconsistency in Mr. England's testimony related to employee's math skills? Or is the administrative law judge trying to say that Mr. England isn't credible because, when the administrative law judge applies his own lay vocational opinion to employee's physical presentation, he is convinced that employee looks, to him, like someone an employer would hire? It's worth noting that the latter rationale, like the first, is not supported by any evidence in the record: employee continued to need a crutch or a cane and a leg brace at the time of hearing and continued to have trouble sitting or standing for any length of time. In the end, I can't make sense of these comments, and I'm convinced that the administrative law judge's analysis is simply too arbitrary to justify his rejection of the only expert testimony on the issue. As a result, I'm concerned that the majority, by affirming the foregoing unscientific (and unsupported) musings, has engaged in error as a matter of law.

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[T]he Commission may not arbitrarily disregard and ignore competent, substantial and undisputed evidence of witnesses who are not shown by the record to have been impeached, and the Commission may not base their finding upon conjecture or their own mere personal opinion unsupported by sufficient competent evidence.

*Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 179 (Mo. App. 2004), quoting *Corp v. Joplin Cement Co.*, 337 S.W.2d 252, 258 (Mo. banc 1960).

I am convinced the overwhelming weight of the evidence establishes that employee is permanently and totally disabled due to a combination of his disabilities stemming from the October 2006 and March 2007 work injuries.

The test for permanent total disability is whether the worker is able 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.

*Treasurer of the State - Custodian of the Second Injury Fund v. Cook*, 323 S.W.3d 105, 110 (Mo. App. 2010) (citations omitted).

The administrative law judge's award fails to explain how an individual who suffers from constant right knee and low back pain and who, in order to control his pain, must now take daily doses of medications that interfere with his ability to focus will be able to compete for jobs in the open labor market. Indeed, the administrative law judge appeared to wholly ignore the impact of employee's daily regimen of Vicodin and the narcotic Tylenol #4, despite the unopposed testimony from both Dr. Musich and Dr. Nogalski that these medications will result in employee being sleepy and lethargic during work hours and adversely affect his ability to maintain a normal work schedule. The administrative law judge also failed to explain how an individual who can't obtain a normal night's sleep and can't drive is expected to compete in the open labor market. Especially where, as here, the administrative law judge has supplanted the only expert opinions in the case with his own, it would have been helpful to have *some* kind of rationale or explanation as to how employee remains capable of competing for jobs despite these limitations. But the award provides none.

In sum, I wholly disagree with the administrative law judge's (and the majority's) choice to throw out the unopposed vocational expert testimony from Mr. England. I would credit that testimony and find that employee met his burden under § 287.220 RSMo, of establishing that he is permanently and totally disabled due to a combination of the October 2006 and March 2007 work injuries. I would modify the decision of the administrative law judge and award permanent total disability benefits from the Second Injury Fund.

Because the majority has determined otherwise, I respectfully dissent.

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Curtis E. Chick, Jr., Member