

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

Injury No.: 05-142344

Employee: Gina Bommarito
Employer: Nike, Inc. (Settled)
Insurer: Old Republic 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 10, 2008. The award and decision of Administrative Law Judge Edwin J. Kohner, issued November 10, 2008, 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 25th day of March 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Gina Bommarito Injury No.: 05-142344
Dependents: N/A Before the
Employer: Nike, Inc. (Settled) **Division of Workers'**
Compensation
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Old Republic Insurance Company (Settled)
Hearing Date: October 2, 2008 Checked by: EJK/cmh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - 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
 - Date of accident or onset of occupational disease: February 15, 2005
 - 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
 - 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 claimant, a machine operator, developed carpal tunnel syndrome in her left wrist.
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: left wrist
 - Nature and extent of any permanent disability: 20% Permanent Partial Disability to left wrist

15. Compensation paid to-date for temporary disability: \$1,019.78
16. Value necessary medical aid paid to date by employer/insurer: None

Employee: Gina Bommarito

Injury No.: 05-142344

17. Value necessary medical aid not furnished by employer/insurer? None

- Employee's average weekly wages: \$764.84

19. Weekly compensation rate: \$509.89/\$354.05

20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: Settled

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$155.84) payable by SIF for 35 weeks beginning February 9, 2006,
and, thereafter, \$509.89 for Claimant's lifetime

Total: Unknown

23. Future requirements awarded: As above

Said payments to begin as of February 9, 2006, 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: C. Dennis Barbour, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Gina Bommarito

Injury No.: 05-142344

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Nike, Inc. (Settled)

Department of Labor and Industrial

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant, machine operator, developed carpal tunnel syndrome. The sole issue for determination is Second Injury Fund claim liability. The evidence compels an award for the claimant for permanent total disability benefits.

At the hearing, the claimant and her son testified in person, and the claimant offered depositions of Jerry R. Meyers, M.D., and James E. Israel, personnel records from Nike, Inc., and medical records from Thomas E. Albus, M.D., B.J.C. Health Center, and St. Joseph Health Center Wentzville. The defense offered a deposition of James M. England, Jr., and a copy of a workers' compensation settlement.

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 occupational disease was contracted in Missouri.

SUMMARY OF FACTS

This forty-eight year old production worker developed carpal tunnel syndrome and suffered a twenty percent permanent partial disability to her left wrist as a result of her work. The claimant also suffers from a substantial preexisting permanent partial disability from a cerebral aneurysm from October 1988 and a stroke in December 1988. She filed a workers' compensation claim seeking permanent total disability benefits against the Second Injury Fund due to the permanent partial disability from her work related carpal tunnel syndrome in combination with the preexisting permanent partial disability from her right sided hemiparesis (severe but not complete paralysis) which affects, among other things, her right upper and lower extremities, her mental capacity and ability to talk.

Preexisting Conditions

The claimant dropped out of high school in the eleventh grade for personal reasons and began working as a maid at a local hotel. She does not have any post high school education or training. She married Steve Kaba but cannot recall the date or even the year when they divorced. Two children were born of that marriage. She then met and lived with Steve Brown and had twins around July 1988.

In October 1988, the claimant suffered a cerebral aneurysm requiring admission to St. Joseph Hospital in Wentzville, Missouri (f/k/a Doctor's and then Crossroads Hospital). The hospital discharged her on December 22, 1988, but readmitted her on December 24, 1988, with a diagnosis of "right hemiparesis and slurred speech post craniotomy for a left posterior cerebral communicating artery aneurysm..." On January 4, 1989, the hospital discharged her with a diagnosis of "severe infarction left parietal area due to angiospasm post craniotomy, aneurysm" and transferred her to St. Joseph Hospital in St. Charles where she underwent rehabilitation for the residuals associated with that stroke. See Exhibit C. One immediate consequence of the stroke was that she could not identify her children. She had to relearn her alphabets with her twins who were then 6-8 months old. She currently experiences difficulty processing information, reading, writing, performing basic math, speaking and understanding other matters.

She received assistance from the Division of Vocational Rehabilitation (which maintains records for 5 years) sometime in the early 1990's which helped her retrain for potential employment. With the Division's help she obtained a job with Centaur Janitorial which placed her at a local company where she worked from

1994 to 1999 as an office cleaner/custodian. Her duties included cleaning restrooms, break rooms, lunchrooms, and offices. Her job accommodated her in terms of allowing her to work at her own pace on certain tasks such as cleaning restrooms but not with other tasks such as cleaning the lunchroom which needed to be cleaned within an allotted time. She relied upon her co-employee to clean the lunch room in the time allotted. She is right hand dominant and compensated, to some degree, the deficiency of the right upper extremity by relying upon the left upper extremity for jobs, such as vacuuming, that would normally be done using her right dominant hand. She worked with another individual, usually a man, who was responsible for performing the "heavy work" such as emptying the mop bucket and assisting her with other cleaning. She testified that the accommodations were due to her right side paralysis.

In April 1999, she began working for this employer which produces plastic inserts for shoes and other products. She worked three (3) shifts at twelve (12) hours per shift (but paid for 40 hours) and eventually began working overtime resulting in an average of about 50 hours per week. Her regularly scheduled work shifts were Friday-Sunday 5:15 p.m. to 5:00 a.m., were less physically demanding, and did not require as much production as other shifts. Likewise, the overtime time shifts were less demanding. She worked shifts that did not require as much production and could accommodate her decreased dexterity, lifting capacity, motor skills, and other limitations from her right sided paralysis. In addition, other employees assisted her when necessary because of her limitations. They assisted her by doing the heavier lifting, by swapping machines from a high production machine to a lower production machine when necessary or by helping her on her assigned machine whenever she fell behind in production.

Her job title was "blow molder operator." There were 18 machines in her department, but she was restricted from using about 10 of those machines due to her physical limitations, such as decreased lifting capacity and bimanual dexterity, from the right sided paralysis. One machine to which she was assigned required her to repeatedly insert plastic pieces 12 to 14 inches in length and weighing a few ounces to a couple of pounds into a machine which then cut the plastic into smaller pieces. Another machine was a grinder which ground up the unused plastic. See Exhibits D, H, M. The 2004 Skills List Evaluation outlines nineteen skills and attributes of the blow molder position. See Exhibit D. A legend provides a visual grading system the supervisor utilizes when assessing an employee's competency regarding these skills and attributes. The highest grade that the claimant achieved was that of a "beginner" on any of the skills and attributes required by her job. According to the legend a "beginner" is one who can only perform the job with supervision. She received the lowest grade possible in the category that required her to be familiar with the business terminology and to know the names, location and intended uses of the various machines in her department. She also received the lowest grade possible in the category involving loading parts into the machine and keeping pace with the speed setting at maximum as well as with the correct labeling and packaging procedures. This is consistent with her testimony concerning why she chose certain shifts and the need for assistance from fellow employees.

2005 Wrist Injury

In January 2005, the claimant developed numbness and difficulty with fine motor skills in her left hand and so advised her employer who instructed her to go to her personal physician, Dr. Grus. See Exhibit B. On February 14, 2005, Dr. Grus examined the claimant and observed that the claimant's left hand was slightly swollen with decreased grip strength. His impression was tendonitis of the left arm consistent with a work related condition and referred the claimant to Dr. Thomas Albus, an orthopedic surgeon. See Exhibit A. The claimant advised her employer of the medical developments and filed under the Family Medical Leave Act on February 16, 2005.

Dr. Albus examined the claimant on March 11, 2005, and opined that the history and physical exam were compatible with carpal tunnel syndrome. On March 29, 2005, a nerve conduction study revealed an "abnormal nerve conduction study consistent with advanced carpal tunnel syndrome." On April 8, 2005, Dr.

Albus examined the claimant, found that her left hand was “significantly symptomatic,” and recommended surgery, which “[is] done primarily to prevent the progression of symptoms ... [and that]... no guarantees as to complete remission of presenting symptoms can be made.”

On April 12, 2005, Dr. Albus performed a left carpal tunnel release. On April 22, he removed the sutures and gave her a wrist immobilizer. He returned her to work effective on May 2, 2005 (sic May 12) to return on an as needed basis. He cautioned her that “time will tell what the ultimate relief of symptoms will be.” See Exhibit A.

She returned to work on May 12, 2005, but her employer would not allow her to work, because the proper forms were not completed. After that, she returned to work but pursuant to Dr. Albus’ recommendation she limited her work schedule to 3 days per week at 12 hours per day to prevent aggravation of her residual symptoms. She testified that the surgery reduced her symptoms but did not alleviate them. She continued to have numbness, decreased grip strength, compromised bi-manual dexterity, decreased fine motor skills and lack of endurance which were all aggravated when operating whatever machine she was assigned to work and consequently affected her production.

She missed time from work after returning in May 2005. On January 27, 2006, her employer advised her of her “performance” deficiency with regards to attendance. See Exhibit L. An “Occurrence” is triggered by tardiness or absenteeism and from June 15, 2005, to December 11, 2005, she incurred four (4) “full occurrences” and three (3) “one-half occurrences.” Consequently the “machinery was understaffed causing a higher work load for others, machinery was not put into production causing loss of income to the company in potential sales, and/or [Nike was] unable to start machinery on time.” Likewise, the Coaching for Excellence Review performed in 2006, after she had been working 6-7 months post surgery, outlines other problems. See Exhibit M. According to that report, she could only provide minimal assistance to change over from older to newer machinery; her verbal and written communication skills were not effective; she was unable to keep pace with production on various machines; and, she was unable to perform all the skills and tasks of her position.

She testified that due to her physical condition and the limitations performing her job on the older and the newer machines, she filed for Family Medical Leave Act in December 2005, which was backdated by the company to November 2005. See Exhibit F. On April 14, 2006, the claimant’s employer advised her that the employer cannot make accommodations under the ADA. See Exhibit I.

On January 31, 2006, the employer requested Dr. Grus to respond to certain questions concerning the employee’s ability to work in accordance with the ADA. He responded that she has right arm and leg weakness and impairment that limits a major life activity and that she should refrain from a number of activities including grasping, pushing and pulling, reaching and carrying. See Exhibit H. He noted that her disability could pose a threat of harm to her and others but that it was possible reasonable accommodation could be made for her. See Exhibit H.

From April 2006 to July 2007, the claimant’s employer performed two evaluations/assessments to see if an accommodation could be made, based in part upon an Occupational Therapist observing employee work, the employee’s supervisor, and conversations with the claimant. See Exhibits I and K. The assessments concluded that the claimant could not perform the functions of her position with or without accommodation. See Exhibit K. As the evidence indicates, she was tested on the older and newer machines.

Dr. Meyers

Dr. Jerry Meyers, a board certified general surgeon, examined the claimant on April 11, 2007, and observed that the claimant limped on the right side held her right hand in a claw-like position. See Dr. Meyers’

deposition, pages 7, 9, 13. He found a marked weakness in the right upper extremity and the right lower extremity. See Dr. Meyers' deposition, pages 13, 14. The left hand showed decreased grip strength and diminished motor function. See Dr. Meyers' deposition, page 13. He testified that with advanced carpal tunnel syndrome, a person can have significant muscle wasting in her hand and that "...she had already shown some signs of weakness and fine motor skills in the right (sic, left) hand." See Dr. Meyers' deposition, pages 13-15. After describing limitations involving the lower extremity such as walking and climbing, he testified that "this lady is now a one-armed person for all intents and purposes....So she now has to compensate by relearning to use her left hand, which she isn't good at." See Dr. Meyers' deposition, page 14. She obviously had difficulty with processing information. See Dr. Meyers' deposition, pages 15-16. He opined that the stroke residuals posed an obstacle or hindrance to employment and that the claimant could not now work because of the combination of the residuals associated with the stroke and the carpal tunnel syndrome. See Dr. Meyers' deposition, page 16. He opined that it would not be reasonable for an employer to employ her in her present physical condition reasonably expecting her to perform the work for which she had been hired and that her inability to perform a given task on a sustained basis is due to the residuals associated with the stroke in combination with the left carpal tunnel residuals. See Dr. Meyers' deposition, pages 16, 17, 23-27.

James Israel

James Israel, a certified vocational counselor, certified vocational evaluator, and licensed professional counselor, evaluated the claimant's employability in the open labor market on August 14, 2007. He testified that the claimant's complaints involved both the residuals from the stroke and the limitations associated with her left carpal tunnel syndrome. See Israel deposition, pages 15-16. He did not test her ability to read or perform basic math but noted the obvious difficulty with reading, performing basic math computations and speaking. See Israel deposition, page 17. He testified that the use of her hands was a significant issue since all her prior work history involved jobs requiring hand use including fine motor skills and dexterity. Accordingly, he administered the Purdue Pegboard test to assess her ability to use her hands. See Israel deposition, page 19. He testified that the test was incomplete, because she had to discontinue the testing due to increased discomfort and poor coordination. See Israel deposition, pages 19-20.

Mr. Israel opined that the claimant's last position fell within the light and unskilled categories and found no transferable skills. See Israel deposition, page 23. He testified that due to the physical limitations associated with the stroke, the only jobs she could realistically perform would be in the light and sedentary exertion categories as defined by the Department of Labor and that the available jobs in those categories are further diminished due to the lack of reliable use and mobility of the left hand and that the remaining available jobs in the unskilled or semi-skilled, light or sedentary categories do not afford the degree of accommodations her overall physical abilities now require. See Israel deposition, pages 23, 24. Based on the claimant's age, limited education, lack of skills, overall physical limitations and pain, he concluded that she was very substantially disadvantaged when compared to others in the work force and that "...both prior and primary ...injuries and conditions ...route her from the employment market." See Israel deposition, pages 23-26. He opined that the residuals associated with the stroke were an obstacle and impairment to gainful employment. See Israel deposition, pages 28-29. He testified that as an unskilled worker, her hands are what she had to offer prospective employers but because she now has limitations on both hands, she is completely unprepared for employment. See Israel deposition, pages 26, 27. He opined that she is entirely vocationally unable to compete in the open labor market and that if she obtained a job, it would be untenable that she could sustain or adapt to a job with all the combined limitations. See Israel deposition, page 27. He concluded that she could not compete in the open labor market due to both the carpal tunnel syndrome and her stroke. See Israel deposition, pages 26-28.

James England

In September 2008, Mr. England, a certified vocational rehabilitation counselor, evaluated the claimant's potential to work after reviewing the claimant's deposition, medical records, and other documents. See England deposition, pages 7-8. He opined that the claimant was employable in the open labor market. He opined that she was employable as an office cleaner/janitor or performing the job with Nike with some physical limitations. See England deposition, pages 10-13. He based his opinion on two assumptions. First, he assumed that "she didn't have any permanent partial problems with the left wrist" and, second, he assumed that she had successfully returned to work for this employer for 6-7 months after the carpal tunnel surgery. See England deposition, pages 11, 12, 40. In the alternative, he also opined that if the claimant is unemployable, her employability relates to her preexisting condition. He based the conclusion on a decision of the employer's long term disability insurance company to extend long term disability benefits to the claimant. See England deposition, page 13. Each of these points will be summarized below.

Mr. England opined that the claimant could return to work as a janitor or as a machine operator for her last employer, because he assumed she did not have any impairment of the left hand based upon Dr. Albus discharging her without restrictions. See England deposition, page 11. He assumed that since she did not have any left hand impairment from the carpal tunnel syndrome and that she could therefore resume her prior employment. See England deposition, page 11. He also testified that at the time of discharge, Dr. Albus did not know if her symptoms would be relieved or whether she would have any problems performing her job as a result of the carpal tunnel syndrome. See England deposition, pages 32-34. Mr. England opined that if the claimant has decreased grip strength, decreased sensation, or inability to sustain repetitive motion then she suffers a functional impairment of the left hand. He opined that if a person has functional difficulty with one hand and then injures the other hand, there would be a synergistic effect; and, that the combination of the two disabilities would combine to create a greater disability than their simple sum. See England deposition, pages 21-22.

With regard to returning to work after the surgery, he assumed that she "successfully" returned to work because she worked about 6-7 months before taking leave. However, he was unaware that she was unable to keep up with the pace of production. He opined that the claimant's return to work would be considered unsuccessful if the claimant was unable to keep up the pace. See England deposition, pages 30-31. He was unaware of the assessments that Nike performed. He testified that the claimant had trouble processing information and answering questions, and thus she would be excluded from jobs requiring those functions such as with secretaries or other jobs requiring precise information. See England deposition, pages 7-17, 48, 49. He testified that the claimant is apparently unable to perform jobs that require her to act independently or without supervision as evidenced by the 2004 review. See England deposition, pages 49-51. He testified that the claimant is excluded from employment in the medium to heavy exertion levels because of the stroke. See England deposition, page 28. He testified that this employer accommodated her due to the stroke, such as lifting. See England deposition, pages 28-29. He testified that the claimant would not be employable as an office cleaner if she cannot lift weight, has difficulty grasping objects, or has difficulty operating a vacuum cleaner because of the combination of the residual disabilities from the stroke and the carpal tunnel syndrome. See England deposition, pages 36-38.

He also opined that she is not permanently and totally disabled because she is receiving long-term disability benefits. He reasoned that an insurance company will not pay long-term disability benefits if the person has a workers' compensation injury and therefore, since she is receiving long-term disability benefits then she must be totally disabled due only to the stroke and not as a result of the combination of the stroke and carpal tunnel syndrome. See England deposition, pages 13-14. However, he also testified he did not review any documents from the company that is paying the long-term disability and does not know the true basis for payment. See England deposition, pages 15-17.

SECOND INJURY FUND

"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in '[a]ll cases of permanent disability where there has been previous disability.'" For the Fund to be liable for permanent total disability benefits, the claimant 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. Section 287.220.1, RSMo 2000. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined..."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 50 (Mo.App. W.D. 2007).

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. *Id.* at 48. Missouri courts require that the permanent nature of an injury be shown to a reasonable certainty and that proof may not rest upon surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo. App. S.D. 1997). A disability is "permanent" if it is 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).

Based on the above, the following factors will be reviewed: (1) the extent of disability from the 2005 work related injury, (2) the extent of the claimant's preexisting permanent partial disabilities, (3) whether the disability from the last injury synergistically combines with the preexisting permanent partial disabilities, (4) whether the claimant is employable in the open labor market, and (5) whether the synergistic combination results in the claimant's permanent total disability.

The record suggests that the claimant suffered a twenty percent permanent partial disability from the 2005 work related injury. See Exhibit II. This is consistent with the claimant's testimony that her left hand suffers from loss of sensation, burning, numbness, and weakness. This is also consistent with Dr. Meyers' findings that the claimant has decreased strength in her left wrist, decreased fine motor skills, and increased pain with increased activity. See Dr. Meyers' deposition, page 12. He reported that the claimant reported difficulty when she had to lift a gallon of milk. See Dr. Meyers' deposition, page 12. He found decreased grip strength, minimal pinched diminishment, an aching pain in the left hand, swelling, and burn sensation. See Dr. Meyers' deposition, page 13. He found her small motor function was in tact but diminished with no swelling or obvious muscle wasting. See Dr. Meyers' deposition, page 13. She seemed to have full range of motion in the left hand. See Dr. Meyers' deposition, page 13. None of the evidence supports a finding that the disability from the 2005 work related injury in and of itself resulted in the employee's permanent total disability.

The claimant suffered from a substantial preexisting partial disability resulting from the residual effects of her 1988 stroke. She held her hand in a claw-like fashion and walked with a limp. She testified that she received extra time and assistance in performing some of her job duties. She was physically unable to work certain machinery for this employer and received assistance with her job duties due to her stroke residuals. She had difficulty answering questions and spoke with a muffled voice. The vocational experts both testified that the impairment associated with the stroke affected her in the jobs she performed but also excluded her from competitive employment for other jobs. Mr. Israel opined that the residual effects of her stroke were a hindrance or obstacle to employment. See Israel deposition, pages 28-29. Mr. England opined that a prospective employer would perceive that the stroke had the potential to combine with a work related injury

so as to create a greater disability and that it is certainly possible the prospective employer would be reluctant to hire that person. He opined that a prospective employer is more likely to hire a person who does not have physical limitations over someone who does. See England deposition, pages 45, 47. Dr. Meyers testified that it would be “foolhardy” for a prospective employer to hire her because of the increased risk to the employee as well as increased risk of liability for the prospective employer. See Dr. Meyers’ deposition, pages 15-16. The conclusion is that the restrictions and limitations from the 1988 stroke constitute a preexisting permanent partial disability and an obstacle or hindrance to employment or reemployment. None of the experts opined as to the extent of the claimant’s preexisting permanent partial disabilities. Based on the evidence as a whole, the claimant suffered preexisting permanent partial disabilities of sixty percent to her right leg at the hip and one hundred percent to her right wrist.

The disability from the claimant’s left carpal tunnel syndrome combines with the disability associated with the stroke, based on the findings of all of the forensic experts. Mr. England testified that if a person has functional impairment with one hand and then suffers functional impairment of the other hand, there is a synergistic effect. He testified that the pre-existing impairment combines with the impairment associated with the new injury so as to create a greater disability. See England deposition, pages 21-22. Dr. Meyers testified that due to her stroke, she was essentially a one-armed person and that she wasn’t very good at using it and that her inability to sustain tasks was due to the combination of the stroke and the left carpal tunnel syndrome. See Dr. Meyers deposition, page 17. Mr. Israel testified that she could only work in the light and sedentary exertion categories because the residuals of the stroke precluded her from working in the other exertion categories and she cannot compete for those jobs due in large measure to the fact that she now has limitations on both hands. He testified, “both prior and primary...injuries and conditions...route her from the employment market.” See Israel deposition, page 26. Mr. Israel opined that she can not compete in the open labor market due to both the carpal tunnel syndrome and her stroke. See Israel deposition, pages 26, 27, 28. The evidence supports a finding that the disability from the claimant’s left carpal tunnel syndrome combines with the disability associated with the stroke.

The weight of the evidence supports a finding that the claimant is unemployable in the open labor market and that no employer reasonably would be expected to hire the injured worker, given her present physical condition. Dr. Meyers and Mr. Israel examined the claimant, reviewed her medical history, and opined that she was unemployable in the open labor market. Their conclusions are supported by the weight of the evidence. The claimant’s disabilities from her 1988 stroke severely impact her employability. For instance, the claimant testified that she has significant impairments affecting activities of daily living such as cooking, cleaning, driving, and washing her hair due to the diminished condition of her right hand. Likewise, this affected her in the jobs she obtained and in the performance of those jobs as outlined above. These factors included her speech, difficulty with processing information, and difficulty with walking, bending, stooping, and balancing. Both of the vocational experts opined that the claimant acquired no transferable skills from her prior employment, because all of the claimant’s previous jobs were unskilled. The claimant’s disability from the stroke relegated her to working in the light or sedentary exertion levels.

One thing an unskilled worker has to offer in these light or sedentary exertion levels of employment is the ability to use one or both hands. In this case, the claimant had preexisting limitations of the right hand due to the stroke and now has limitations in her left hand due to the carpal tunnel syndrome. These conditions were further compounded because of her decreased grip strength, decreased fine motor skills, and decreased dexterity associated with the left hand and attributable to the carpal tunnel syndrome in her left wrist.

Consequently, the one thing she had to offer is now not possible which precludes her from working in the light and sedentary levels. The conclusion is that the left carpal tunnel combines with the residuals of the stroke, particularly the residual of the right upper extremity, to create permanent total disability.

However, the defense offered expert testimony to the contrary. Mr. England testified that the claimant could return to this employer or work as a janitor/office cleaner based on two assumptions: (1) that “she didn’t have

any permanent partial problems with the left wrist” and (2) that she had successfully gone back working for this employer for about 6-7 months after the carpal tunnel surgery. See England deposition, pages 11, 12, 40. Looking at the first assumption, none of the physicians established any formal restrictions relating to the claimant’s left hand. On the other hand, none of the physicians opined that the claimant had no restrictions in her left hand. More to the point, no one asked the question. However, Dr. Meyers noted significant diminution of function in the claimant’s left hand well after the occurrence. Dr. Meyers’ findings and the claimant’s poor performance of her job duties when she returned to work after the surgery are inconsistent with Mr. England’s assumption that she did not have any functional impairment of the left hand secondary to the carpal tunnel. Indeed, it was only after the development of the carpal tunnel syndrome that the claimant was unable to perform her job duties, which had previously been accommodated or modified due to limitations associated with the stroke, and evidenced by her employer’s job reviews and assessments. Mr. England testified that if she had functional disability of the left hand, this would combine with the functional disability of the right hand to create a synergistic effect. He testified that the office cleaning job would be contraindicated, particularly if she did not receive assistance from others to perform tasks such as disposing of the trash, operating a vacuum cleaner and if she had difficulty with lifting and grasping. Likewise, Mr. Israel testified that the use of the hands is what the employee had to offer prospective employers but now she had limitations on both hands which affect her prospects for employment. In addition, her overall physical presentation at the hearing, including her hands, causes her to be unable to compete in the open labor market. The evidence supports a finding that the claimant’s disability from her work related carpal tunnel syndrome caused her substantial functional limitations in the use of her left hand.

Looking at Mr. England’s second assumption, that the claimant successfully returned to work with this employer after her carpal tunnel release, the evidence supports a conclusion that the claimant’s return to work with this employer after the surgery was not successful. Before developing carpal tunnel syndrome, the claimant’s preexisting conditions limited her capability of working for this employer on only eight of this employer’s eighteen machines. On those machines, the claimant received numerous accommodations from her employer. She chose shifts that did not require as much production, were physically less demanding, accommodated her limitations, and received assistance from co-employees. While the 2004 review characterized her competency as that of a “beginner”, she was still able to perform the essential functions of her job. However, after the carpal tunnel release, the claimant’s supervisor noted that she could not keep up with production. When she returned to work, she was unable to perform the assigned tasks. The claimant testified that her performance after returning to work after the carpal tunnel release was too slow to maintain an acceptable pace to maintain her employment. She was unable to work on either the new machinery or the older machinery due to the combination of her pre-existing and primary conditions. Her employer attempted to accommodate her and performed two (2) evaluations. The ultimate conclusion was that she could not work with or without accommodations. The evidence supports a finding that the claimant’s return to work was not successful.

Mr. England’s alterative conclusion was that the claimant’s current overall disability could not be a result of her work related injury, because the claimant received long-term disability benefits from her employer’s long-term disability insurance program. He testified, “[I]t’s normally awarded different form comp, because usually, LTD in non work-related and has to do with, you know, a health problem that the person has that may be from at home or a disease process or whatever.” See England deposition, page 13. However, he also testified that his conclusion was speculative, because he had not reviewed the insurance contract, the insurer’s decision, or the actual forms submitted by the parties. See England deposition, pages 14-17. Outsourcing a quasi-judicial decision to an insurance company without examination of the documents constitutes rendering a decision without substantial evidence to support the decision.

The defense argues in its well written brief:

On May 2, 2005, Dr. Albus released Ms. Bommarito back to work with no restrictions for her hands. The

records show that Dr. Albus advised Ms. Bommarito to return as needed, but she did not ever return for treatment. Vocational expert James England testified that given Dr. Albus' full release, Ms. Bommarito could return to her job at Nike or to her previous employment at MEMC. And in fact, Ms. Bommarito did return to work following her release from Dr. Albus.

The evidence suggests that other factors influenced Ms. Bommarito's termination from Nike, in particular new machines and information from Ms. Bommarito's doctor concerning her stroke. Ms. Bommarito testified she returned to work at Nike for about 9 months after her release from Dr. Albus' care. Ms. Bommarito did not leave her employment at Nike until February 2006. Ms. Bommarito told Dr. Meyers that she was replaced by Nike because they had retooled and changed over to new machinery that she could not use. (Ex. p.11) She testified that when she returned to work following her carpal tunnel surgery there were a lot of new machines at Nike. The Nike personnel records show that Ms. Bommarito was tested on the new machines in January 2006, when it was noted that she was of minimal assistance on the change over, her verbal and written skills were not effective, she was unable to keep pace with production on various processes in the department, and unable to perform all the skills necessary for her job. (Ex. M)

Thus, the defense argues that the claimant had a successful return to work after recovering from her work related carpal tunnel release and was technologically displaced. Had the claimant had no functional diminution in the use of her left hand, had favorable personnel reviews, and a glowing work record from May 2005 to January 2006, this conclusion would have merit. However, the evidence appears to be to the contrary, because the claimant's return to work appears to have been unsuccessful with substantial time off work and surveys showing that the claimant could not successfully perform the skills required.

The weight of the evidence supports a finding that the claimant is unemployable in the open labor market as a result of a combination of a twenty percent permanent partial disability from her work related injury in 2005 and her preexisting permanent partial disability from a stroke in 1988. The claimant is therefore awarded permanent total disability benefits from the Second Injury Fund.

Date: November 10, 2008

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

A true copy: Attest:

/s/ JEFFREY W. BUKER
Jeffrey W. Buker
Director
Division of Workers' Compensation