

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

Injury No.: 05-086232

Employee: James Brawley  
Employer: City of St. Louis (Settled)  
Insurer: Self-Insured c/o CCMSI (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-captioned workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480, RSMo. Having heard the oral arguments, read the briefs of the parties, reviewed the evidence and considered the whole record, the Commission modifies the award and decision of the administrative law judge dated July 13, 2009, pursuant to section 286.090, RSMo. This Commission adopts the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the decision set forth below.

The administrative law judge ordered the Second Injury Fund (SIF) to "pay permanent total disability benefits at the differential rate of \$198.25 per week beginning May 17, 2006, during those 73.5 weeks, and thereafter \$563.33 per week for as long as provided by law." The administrative law judge apparently used the date May 17, 2006, because May 16, 2006, was employee's last day of work for employer. We think it is more appropriate to use the date July 17, 2006.

Temporary benefits are intended to compensate an employee during the time the employee is healing but such benefits stop "after the condition has reached the point where further progress is not expected." *Brookman v. Henry Transportation*, 924 S.W.2d 286, 290 (Mo. App. E.D. 1996). At that point of maximum medical improvement, permanent benefits begin.

In this case, Dr. David M. Brown had performed surgery on employee's wrist on April 13, 2006. He saw employee for a follow-up visit on May 23, 2006. As of that date, employee had been unable to complete the physical therapy that Dr. Brown had previously ordered due to employee's truck breaking down. As of May 23, 2006, though, employee again had a working vehicle; and Dr. Brown ordered a series of physical therapy sessions. Dr. Brown wanted to monitor his "progress" and reevaluate him at a future appointment. Evidence from employee and others established that employee had another appointment with Dr. Brown on July 17, 2006. We have no record that further therapy was ordered. Instead, Dr. Brown appears to have released employee as of that date.

Accordingly, it is clear that Dr. Brown still had some expectation of progress or improvement for employee up through July 17, 2006. Thus, we conclude that permanent benefits should have begun on that date, not May 17, 2006.

Employee: James Brawley

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Therefore, we modify the award only to order the SIF to pay permanent total disability benefits to employee at the differential rate of \$198.25 per week beginning July 17, 2006, for 73.5 weeks, and to thereafter pay him \$563.33 per week for as long as provided by law.

The award and decision of Administrative Law Judge Kathleen M. Hart, as modified, is attached and incorporated by 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 19<sup>th</sup> day of January 2010.

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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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: James Brawley

Injury No.: 05-086232

Dependents: None

Before the  
**Division of Workers'  
Compensation**

Employer: City of St. Louis (previously settled)

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

Additional Party: Second Injury Fund (only)

Insurer: Self c/o CCMSI (previously settled)

Hearing Date: April 13, 2009 and April 20, 2009

Checked by: KMH

### 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: August 3, 2005
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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: Claimant injured his left wrist while in the course and scope of his employment.
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
14. Nature and extent of any permanent disability: 42% left wrist
15. Compensation paid to-date for temporary disability: \$7,299.56
16. Value necessary medical aid paid to date by employer/insurer? \$54,901.22

Employee: James Brawley

Injury No.: 05-086232

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$563.33/\$365.08
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

73.5 weeks of permanent partial disability from Employer (previously paid)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:  
weekly differential of \$198.25 payable by SIF for 73.5 weeks beginning  
May 17, 2006, and, thereafter, \$563.33 per week as provided by law

TOTAL: TO BE DETERMINED

23. Future requirements awarded:

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:

Phillip Tatlow

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Brawley

Injury No.: 05-086232

Dependents: None

Before the  
**Division of Workers'  
Compensation**

Employer: City of St. Louis (previously settled)

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

Additional Party: Second Injury Fund (only)

Insurer: Self c/o CCMSI (previously settled)

Checked by: KMH

A hearing was held on the above captioned matter April 13 and April 20, 2009. James Brawley (Claimant) was represented by attorney Phillip Tatlow. The Second Injury Fund (SIF) was represented by attorney Kay Osborne.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

### STIPULATIONS

The parties stipulated to the following:

1. Claimant was injured by accident while in the course and scope of his employment for the City of St. Louis.
2. Employer and Claimant were operating under the provisions of the Workers' Compensation law. Employer's liability was fully self-insured.
3. Employer had notice of the injury and a claim for compensation was timely filed.
4. Claimant's rates for TTD/PPD are \$563.33/\$365.08. Claimant was paid \$7,299.56 representing a disputed number of weeks of TTD. Claimant received \$54,901.22 in medical benefits.
5. On January 22, 2007, Claimant and Employer reached a compromise settlement regarding Employer/Insurer's liability. The settlement was approved by the Division of Workers' Compensation and represents 42% PPD to Claimant's left wrist.

### ISSUES

The parties stipulated the sole issue to be resolved by trial is the nature and extent of SIF liability.

## FINDINGS OF FACT

Based upon the competent and substantial evidence, my observations of Claimant at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Claimant is a 47 year old male who is not married and lives with his mother. His highest level of education is the 12<sup>th</sup> grade. He testified he had problems in school and attended three different high schools. He had behavioral difficulties, frequently got in trouble, drank a lot, and had conflicts with his peers. He was expelled from his first high school for absenteeism, alcohol abuse, and behavioral issues. He then went to Bayliss and flunked out during his junior year. He got into South County Technical School and testified he earned his GED. Claimant's vocational expert noted Claimant graduated from South County Technical School in 1979.
2. Claimant served in the Army from 1982-1985 as a combat engineer and truck driver. He has no additional schooling or training. He does not know how to use a computer, type or do any office work.
3. When he returned to St. Louis he had numerous unskilled labor jobs. He worked as a commercial equipment and household mover, a roofer, a concrete worker, a moving truck driver, and he did steam cleaning and restaurant cleaning. These jobs all involved heavy lifting and working with both hands.
4. Claimant worked for the St. Louis City Water Company for 18 years. He performed routine maintenance on sump pumps, boilers and chillers. He used both hands to perform his job. This was heavy work, and he had to twist and lift continuously. He often climbed ladders and carried items up ladders. He lifted pumps, jackhammers, boxes of tools, and pipes. Some of these weighed up to 100 pounds. He last earned \$21.00 per hour. He worked 40 hours a week and often worked overtime.
5. On August 3, 2005, Claimant injured his non-dominant left wrist at work. He initially treated with Dr. Kostman and was diagnosed with a comminuted distal radius fracture. Dr. Kostman performed an open reduction and joint fixation implanting plates and screws in Claimant's wrist. Dr. Kostman noted Claimant was taking Prozac, Xanax, Darvocet, and sleeping pills before his work injury. In November 2005, Dr. Kostman noted Claimant had failed to follow up for placement of a cast. He recommended Claimant seek psychiatric care. Claimant refused the cast and wanted to seek medical assistance elsewhere. He then decided to allow Dr. Kostman to cast his arm.
6. Claimant returned to work full time, and still had significant pain in his wrist. He was put on light duty shredding paper. Claimant testified he could not do this job because he had to move large stacks of paper and he was not able to lift.
7. In January 2006, Claimant treated at Advanced Psychiatric Services (APS) with Dr. Bun Tee Co and Mary Hughes. Their initial assessment indicates Claimant presented with anxiety, depression, sleep deprivation, and he was on "forced leave" after breaking his wrist. He was diagnosed with bipolar disorder, depression and anxiety. Ms. Hughes spoke to Claimant's supervisor who said Claimant was setting himself up to be

terminated if he didn't show up for work. Claimant had a severe reaction to the medications these doctors prescribed, and was hospitalized in February 2006.

8. Claimant then began seeing Dr. Brown. Due to Claimant's ongoing difficulty using his wrist and hand, Dr. Brown ordered nerve conduction studies which showed the nerves were functioning well. Claimant had significant loss of flexion which Dr. Brown opined was due to a tendon disruption.
9. Claimant was aware the doctor at APS had spoken with his supervisor, and he was aware he was in danger of being fired unless he showed up at work. He testified at trial he was taking care of his father, and Employer didn't give him time off work when his dad died March 8, 2006. Claimant does not recall if he went back to APS after his dad's death. On March 17, 2006, the doctors at APS note Claimant was distraught and not able to work due to his stress level. He told the doctors he was angry and might have to go off on someone. He was struggling with left wrist pain and the loss of his father. The doctor recommended extended leave to cope with the stress of his loss. He doesn't recall telling the doctors he was angry and might have to go off on someone. He does recall the doctors took him off work.
10. In April 2006, Dr. Brown performed surgery to repair ruptured thumb and index tendons, transfer the tendons, decompress the median nerve, and remove the hardware. He recommended physical therapy, which Claimant did not attend because his truck broke down. Claimant testified he worked on his truck using his left hand without his splint. Claimant was three weeks late returning to the doctor to have his sutures removed. Dr. Brown recommended Claimant perform one handed work only at the end of May 2006.
11. Claimant testified he tried to return to work and could not do his job anymore because he needed both hands to work. He was unable to return to work and was terminated in 2006. There is some question as to the actual termination date, but Claimant testified he was terminated May 16, 2006, and he never returned to work for Employer after June 1, 2006. He has not worked anywhere since that time due to his wrist injury and his psychiatric conditions.
12. After his termination, Claimant applied for unemployment stating he was ready to work. Claimant testified he thought he got unemployment because he was terminated. He testified he does not think he agreed he could work. He collected \$2,700.00 in unemployment benefits. Claimant testified Unemployment officers wanted to meet with him, but he couldn't make it into their office because of his wrist and back pain, and because his depression was so bad he couldn't get out. Since that time, Claimant has agreed to repay these unemployment benefits and has made some payments.
13. Claimant testified he didn't see the doctor much after his termination because he didn't know the treatment would still be covered by workers' compensation. He testified when he missed physical therapy, his TTD was cut, and he had money and transportation problems.
14. In June 2006, Claimant began seeking psychiatric treatment at the VA Hospital because he no longer had insurance after his termination. He treated with Dr. Jules who

diagnosed bipolar disorder, attention-deficit hyperactivity disorder, and anxiety. Dr. Jules noted Claimant had a history of depression, erratic sleep, and mood swings. She noted he isolates himself and says he is paranoid. She prescribed medications and psychotherapy. Claimant treated with Dr. Jules throughout 2006 and 2007.

15. Before Claimant's wrist injury, he had no major physical complaints. He had normal back pains but no treatment. He had no prior hand injuries. Claimant testified he has a long history of psychiatric problems and treatment. He has had anger issues and mood swings for many years. This caused him to have anger towards his bosses at work. He had problems with his supervisor and problems getting along with co-workers before his injury. He had anger towards any authority figure including the police and Dr. Friskel. He was on prescription medications for this condition well before the wrist injury. He has a history of difficulties with the law and assaultive behavior since he was 16 years old. He has been arrested numerous times on assault charges and spent 10 days in jail following one of his arrests. He has a history of drinking heavily until July 2005, and he has had no alcohol in the last 4 years.
16. Dr. Friskel, his primary care physician, treated his psychiatric condition from 1995 until shortly before the doctor's retirement in December 2007. At his first visit in 1995, Claimant had severe stress, difficulty doing heavy work, generalized muscle aches, trouble sleeping, marked depression, and at times missed work. Dr. Friskel diagnosed severe depression which caused Claimant interpersonal problems with work and his wife. During the course of his treatment and before his work injury, Claimant talked about suicide, said his nerves were shot, he couldn't sleep, and had severe depression.
17. Dr. Friskel testified he thought Claimant probably had bipolar disorder which means depression plus some manic behavior. His psychological stressors were trouble with his boss at work, marital problems, trouble with his son, substance abuse and later his wrist injury. Dr. Friskel prescribed various anxiety medications and antidepressants before the work injury, and none of them worked well. Dr. Friskel also occasionally took Claimant off work due to his psychiatric problems. Claimant took FMLA on several occasions, taking two to three days a month in 2004 and 2005. He testified his psychiatric conditions caused fatigue, and he was disciplined repeatedly at work.
18. Dr. Friskel opined for the ten and a half years he treated Claimant, his psychiatric condition interfered with his job, his home life, and created conflict with his boss. He never gave Claimant permanent restrictions, but testified he recommended Claimant see psychiatrists. Claimant never got much relief from psychiatrists. Dr. Friskel opined it is unlikely Claimant will be able to work because of his psychiatric problems which have been ongoing for a long time.
19. Claimant's expert, Dr. Niesen, examined Claimant and testified by deposition. He noted Claimant's long history of depression and anxiety and periods of time off work due to these conditions. Dr. Niesen noted Claimant was difficult to interview, didn't know dates, jumped around in his answers and didn't seem to realize what he was saying much of the time. He reviewed the treatment records, performed an examination and opined Claimant is totally disabled and unable to engage in any substantial or gainful activity due to a combination of his physical and mental conditions. He found Claimant is not

employable in the open labor market due to his physical injury, his limited training and past work experience, and his mental problems.

20. Claimant's vocational expert and psychologist, Vincent Stock, interviewed Claimant in June 2008. He noted Claimant had intermittent contact with his siblings and no contact with his son. Claimant told Mr. Stock he had daily auditory hallucinations, he feels watched, and he has daily generic homicidal ideas. He admitted to weekly suicidal thoughts and knows he is to call Dr. Jules if these thoughts become active. Mr. Stock administered a number of tests which indicated Claimant had imminent plans for self harm, had schizophrenia and psychotic experiences, social detachment, thought disorder, was despondent and withdrawn, and had major depression. Claimant had low educational scores, inability to concentrate and focus, impaired memory and judgment, and was dependent on his mother for orientation.
21. Mr. Stock assessed a global assessment functioning rating of 45, and opined with this low of a rating, Claimant would need significant accommodations from an employer in order to work. He diagnosed severe bipolar disorder with psychotic features, mood-congruent psychotic features, and ADHD. He rated Claimant's pre-existing and work related psychological disabilities, and opined Claimant is permanently and totally disabled as a result of the combination of his psychological impairments and his work injury. He further opined Claimant is unable to compete for or sustain full-time employment due to a combination of these factors.
22. Claimant continues to have significant problems with his left wrist. He testified every doctor he saw said he should not be working at all. He has weakness, throbbing, and a loss of sensation. He can't close the fingers to make a fist, grip or pick things up. His fingers claw and don't touch the palm of his hand. He can't use tools anymore and can't open jars or squeeze. He continues to take pain medications prescribed by his primary care doctor. He believes he can't work full time because he has no strength in his left arm, he is unable to sleep, he can't tolerate anything or anyone, he feels depressed, his medications interfere with his mood, he has back problems, he can't bend or stoop, he feels anxious, and he panics when around people.
23. Claimant testified the wrist injury added to his psychiatric condition. It increased his mood swings, anger, and irritability and threw his sleeping patterns out of proportion. Now he sometimes sleeps for three days and sometimes he doesn't sleep at night at all. He will nap and be awake all night. He is unable to have a set sleep schedule because the medications affect him differently each day. The Risperidone makes him feel like he is doing nothing.
24. Since the work injury, Claimant has been very antisocial. He lived independently until his father passed away. He started staying with his mother. She now does his laundry, cooking, and takes care of him. Claimant testified it is very difficult for him to do any shopping. He sometimes goes with his mother to the grocery store, but he gets very panicky. His mother does all the household chores and yard work. He testified he can't do much of anything.

25. He continues to treat at the VA Hospital with Dr. Jules for his psychiatric condition and Dr. Bernstein is his primary care physician. Dr. Jules took over care from Dr. Friskel upon his retirement. Claimant gets pain medications from Dr. Bernstein, and he takes numerous other medications for his mental condition. He believes these medications help him function. Claimant currently takes Dextrol for attention deficit disorder, Risperidone for bipolar disorder and schizophrenia, Fluoxetine (Prozac) for bipolar disorder for the last 10 years, Lamotrigine to stabilize his moods, Xanax for anxiety for over 10 years, and Oxycodone which he testified he took before and after his wrist injury. He has been on this combination of drugs steadily for a while now and knows how they react.
26. Claimant testified he also has constant low back pain which affects his ability to bend and stoop. His first treatment for his low back was with Dr. Bernstein at the VA. He never treated with Mr. Stock and Dr. Niesen for his low back.
27. On the first day of trial, Claimant appeared dressed very unkempt. He had an extremely flat affect. He did not make eye contact with anyone, and he had difficulty answering very simple questions. He rambled and went off on tangents. He was sweating profusely and moaned during much of the questioning. Within a few minutes of commencement of trial, he asked for a break. He then became sick and threw up. He did not appear to be exaggerating his symptoms or ailments. On the second day of trial, he appeared much more put together, but still had a vague look about him. He had difficulty answering some questions, but was not purposefully evasive.
28. Claimant's mother, Delores Brawley, also testified. Mrs. Brawley has other children who all live on their own. Mrs. Brawley testified Claimant has had a lot of problems through the years and moved in with her several times. He moved back with her after the wrist injury. Mrs. Brawley testified Claimant has always been her problem child. He has had difficulty getting along with others since he was 8 or 9 years old. He was truant in school and never wanted to be told what to do. He was expelled and flunked out of 2 high schools. He was not told at the time that he had ADD, but she believes he did and that language wasn't used then.
29. Mrs. Brawley testified Claimant has had numerous stressful situations in the past. He was married at 19 years old and had a son. He never lived with his wife during their 10 year marriage, and only saw his son once in a while. After Claimant's divorce, he married a woman with 2 daughters. This marriage also ended in divorce. Claimant later filed for bankruptcy, his son was sent to jail, and he had problems at work.
30. When Claimant was younger, he was a strong person. He played baseball, basketball and swam. He began to display anti-social behavior and could not get along with others. She never took him to a psychiatrist. He has had anger and mood swings since childhood. He has been fighting since age 16. He was a boxer and fought with other kids.
31. Before his injury, Claimant helped her around the house and had no physical limitations. Claimant was always depressed and never happy. He was easily agitated, angry, anti-social and didn't get along with his siblings or parents. He was disrespectful towards his mother and didn't come to family gatherings. After the wrist injury, he could not do

anything around the house, and his psychiatric status worsened because he could no longer do things he used to do. His medications make him sleepy and drowsy. He has erratic sleep patterns. He stays up all night and then sleeps for a couple of days. She can't communicate with him because he is in a fog. He has tremendous mood swings, is easily agitated, can't focus, and can't converse without getting irritated or angry.

## **RULINGS OF LAW**

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

**1. Claimant is permanently and totally disabled as a result of the combination of his work injury and his pre-existing psychiatric condition.**

Section 287.220 RSMO provides that in cases of permanent total disability against the Second Injury Fund, there must be a determination of the following:

1. the percentage of disability resulting from the last injury alone;
2. that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or to obtaining re-employment;
3. that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

The parties stipulated Claimant was injured while in the course and scope of his employment for Employer on August 3, 2005. The parties further stipulated Claimant sustained 42% PPD to his left wrist as a result of that injury.

While Claimant's psychiatric disabilities worsened after his work injury, he established he had significant pre-existing psychiatric disability that was a hindrance or obstacle to employment or to obtaining re-employment. Claimant's mother credibly testified he had anti-social behaviors and difficulty getting along with others since childhood. He was expelled and flunked out of two high schools. She testified he was always depressed and was never happy. Dr. Friskel's records and testimony indicate Claimant suffered from severe depression at least since 1995. Dr. Niesen and Mr. Stock also testified Claimant's pre-existing psychological condition was a hindrance or obstacle to employment. This condition clearly affected Claimant's personal relationships and caused problems at work. He testified he had anger towards his boss, had problems getting along with co-workers, and was repeatedly disciplined. He has a history of problems with the law due to his behavior. Claimant took FMLA for his psychiatric condition on several occasions during the two years leading up to his work injury.

I find Claimant's preexisting medical conditions caused a hindrance or obstacle to his employment or to obtaining re-employment. The final question is whether the combination of Claimant's injuries rendered him permanently and totally disabled.

The test for permanent total disability is whether Claimant is able to adequately compete in the open labor market given his condition. *Messex v. Sachs Elec. Co.*, 989 S.W. 2d 206, 210 (Mo. App. E.D. 1999). The pertinent consideration in this test is the determination of whether any employer in the usual course of business would reasonably be expected to employ Claimant given his condition. *Carlson v. Plant Farm*, 952 S.W. 2d 369, 373 (Mo. App. W.D. 1997).

Mr. Stock testified in his capacity as a vocational expert and a psychologist. He credibly testified Claimant is unemployable due to this limited use of his left hand, his poor achievement scores and his psychological conditions which existed before his work injury and worsened after his work injury. His employment history consists of unskilled positions. He has limited opportunities for training given his medical and psychological conditions. With a GAF below 50, Claimant has significant issues that impact his life every day. He would only be able to work with significant accommodations. An employer would need to allow him extra breaks, time to lie down, and extra time off work.

Dr. Friskel and Dr. Niesen also credibly testified Claimant is permanently and totally disabled and unable to compete in the open labor market. It is clear given my observation of Claimant, his physical limitations and his pre-existing psychological conditions, no employer in the usual course of business would reasonably be expected to employ Claimant given his condition.

Claimant was terminated May 16, 2006, and has not worked since. He received compensation from Employer at \$365.08 for 73.5 weeks. The Second Injury Fund is hereby ordered to pay permanent total disability benefits at the differential rate of \$198.25 per week beginning May 17, 2006, during those 73.5 weeks, and thereafter \$563.33 per week for as long as provided by law. The amount accrued to date shall be paid forthwith with interest as provided by law.

An attorney lien of 25 percent of all compensation awarded herein is allowed Phillip Tatlow, Claimant's attorney, for necessary legal services rendered.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

KATHLEEN M. HART  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*