

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

Injury No.: 98-057227

Employee: Jack Carte

Employer: Tri-State Motor Transit

Insurer: Self-Insurer

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: August 27, 1998

Place and County of Accident: Monumental, Colorado

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. We have reviewed the evidence, read the briefs of the parties, heard oral argument, and considered the entire record. Pursuant to section 286.090 RSMo, the Commission modifies the award and decision of the associate administrative law judge dated June 13, 2005. The award and decision of Associate Administrative Law Judge Karen Wells Fisher, is attached and incorporated to the extent it is not inconsistent with the instant award.

I. Preliminary Matters

At the outset, the Commission notes the protracted history of this case, and its factual and legal complexities. There were two hearings conducted before the Division of Workers' Compensation (Division): (1) a hearing conducted October 10, 2001, resulting in the issuance of a Temporary Award dated March 15, 2002; and (2) a hearing conducted August 9, 2004, resulting in a final award issued June 13, 2005.

Subsequent to the final award issued June 13, 2005, all three parties to the claim, the employee, the employer and the Second Injury Fund, timely filed Applications for Review with the Commission.

The final award dated June 13, 2005, ordered the following amounts of compensation payable by the employer: employer was responsible for unpaid medical expenses in the amount of \$9,891.41; employer was responsible for temporary total disability benefits from June 15, 1998, through December 30, 2002; employer was responsible for permanent partial disability benefits in the amount of \$44,547.20 representing 40% permanent partial disability of the body as a whole referable to the cervical spine (400 weeks x 40% x \$278.42); and employer was determined to be responsible for future medical treatment for the purpose of surgery that the employee may need to cure and relieve him of the symptoms of his cervical spine injury.

Pursuant to section 287.220 RSMo, the Second Injury Fund was determined to be liable for permanent partial disability in the amount of \$8,770.23 representing 31.5 weeks of permanent partial disability as a result of the synergistic effect combining the disability attributable to the primary injury with the employee's pre-existing disabilities (31.5 weeks x \$278.42).

The Application for Review filed in behalf of the employer contends that the award of the associate administrative law judge was erroneous for the following reasons: (1) the time frame awarded for payment of temporary total disability to the employee was excessive; and (2) the amount of permanent partial disability awarded was excessive.

The Application for Review filed in behalf of the employee contends the award of the associate administrative law judge was erroneous based on the following reasons: (1) the evidence supports a finding that the employee is permanently totally disabled as a result of the last injury alone or, by the combined effect of the last injury alone and the employee's pre-existing disabilities; and (2) additional temporary total disability benefits are due the employee.

The Application for Review filed in behalf of the Second Injury Fund alleges that the award issued by the associate administrative law judge is erroneous for the following reasons: (1) the finding by the associate administrative law judge that employee had a measurable pre-existing disability or disabilities that constituted a hindrance or obstacle to employment triggering Second Injury Fund liability was not supported by the competent and substantial evidence; and (2) if, in fact, employee had a pre-existing disability that constituted a hindrance or obstacle to employment, none of the alleged pre-existing disabilities were sufficient to meet the statutory thresholds set forth in section 287.220 RSMo invoking Second Injury Fund liability.

The Commission affirms the determination of the associate administrative law judge that the employer is liable to employee for unpaid medical expenses in the amount of \$9,891.41; the Commission affirms the finding and determination of the associate administrative law judge that future medical is left open for the purpose of surgery that the employee may need to cure and relieve him of the symptoms of

his cervical injury; and the Commission affirms the conclusion of the associate administrative law judge that employee is not permanently totally disabled on account of this injury.

For the reasons set forth in this award and decision, the Commission reverses the associate administrative law judge's award against the Second Injury Fund. Further, the Commission modifies the associate administrative law judge's awards of temporary total disability and permanent partial disability against employer because such awards are excessive.

II. Factual Summary

In this section, the Commission will briefly outline the facts in summary fashion. As necessity dictates later in this opinion, the more pertinent, detailed and relevant facts will be emphasized as related to the specific issue being determined.

The date of birth of employee is April 25, 1937; employee attended school through approximately the sixth grade and has marginal reading and writing skills; he served in the United States Army being honorably discharged in 1957; employee underwent low back surgery in approximately 1972; in 1989 employee sustained a degloving injury to his left hand resulting in an amputation of his left middle finger; and employee suffered a "heart attack" in 1991 as well as 1995.

On April 27, 1998, employee sustained an injury due to an accident arising out of and in the course of his employment; employee was injured when he fell approximately thirteen feet, landing upright on his feet; employee had immediate onset of pain in his neck and left shoulder; and employee continued working until June 25, 1998. Employee has not worked or attempted to work since June 25, 1998.

In chronological fashion, employee's principal treatment was rendered as follows: Freeman Hospital in Joplin, Missouri; Dr. Corsolini; Dr. Budnick; Dr. Lippert; and ultimately Dr. Donich.

Mr. Wilbur Swearingin performed a vocational assessment and evaluation in behalf of the employee. Employee obtained two medical evaluations, not treatment, from Dr. Myers. On behalf of the Second Injury Fund, Dr. Belz performed a thorough, detailed, and complete review of employee's medical records, history, treatment, and MRI scans, as well as a review of the deposition testimony of the other experts, before rendering his opinions. Due to the thoroughness of the review conducted by Dr. Belz as compared to the other expert witnesses, the Commission finds Dr. Belz's subsequent opinions to be the most convincing, persuasive and worthy of belief.

III. Issues of Temporary Total Disability and Permanent Partial Disability/Permanent Total Disability

The Commission finds these issues so intertwined, they will be discussed simultaneously. The Commission emphasizes again, the reliability of Dr. Belz as to these issues, based on his thorough, complete, in depth evaluation and analysis of employee's injury, treatment, and resultant medical condition. On the contrary, the opinions rendered as to these issues by the other experts are not persuasive or convincing to the Commission, as we find their respective reviews, assessments and evaluations as well as their work-ups, to be insufficient, not comprehensive, lacking in detail, resulting in incomplete, superficial and cursory analyses.

Employee's initial treatment was principally rendered under the auspices of Dr. Budnick from July 21, 1998, inclusive of December 9, 1998. Prior to treating with Dr. Budnick, employee treated briefly with Dr. Corsolini who ordered a cervical MRI scan which was undertaken June 10, 1998.

While treating with Dr. Budnick, employee significantly improved and by October 1, 1998, Dr. Budnick released employee to return to work with the following restrictions applicable only to his left arm: no lift/carry greater than 20 pounds; no push/pull greater than 40 pounds; and employee can bend, twist, turn, kneel, squat, sit, stand, walk, ladder/stair climb and do rotational activities as tolerated. Employee was instructed to follow up in one month. Employee did not attempt to return to work.

Employee followed up with Dr. Budnick on December 9, 1998, indicating his neck pain had returned to its previous level and he wanted to settle his workers' compensation claim. At that point in time, treatment under the auspices of Dr. Budnick ceased and Dr. Budnick was of the opinion employee had obtained maximum medical improvement.

Employee did not return to work or attempt to return to work after being released by Dr. Budnick. Employee was seen and evaluated by Dr. Myers in March 1999.

Subsequently, employee came under the treating auspices of Dr. Donich. Dr. Donich initially saw employee on August 23, 1999, and as part of his treatment, Dr. Donich ordered a second cervical MRI scan which was conducted September 15, 1999. After reviewing the cervical MRI scan conducted September 15, 1999, Dr. Donich recommended a cervical discectomy and fusion.

The surgery recommended by Dr. Donich was scheduled on at least two occasions but could not be performed because employee developed a subsequent non-occupational medical condition, chronic obstructive pulmonary disease and asthma, which prevented surgery. Dr. Donich continued to monitor employee's cervical condition and Dr. Donich last saw employee December 30, 2002. At that time, Dr. Donich noted employee was clinically better as to his symptomatology, that he had improved significantly, and Dr. Donich retracted employee's need for surgery as of December 30, 2002.

Dr. Donich was of the opinion that employee was totally disabled from his initial visit of August 23, 1999, up to and including December 30, 2002. Dr. Donich was of the opinion that employee's total disability was referable to his cervical spine condition.

Dr. Belz thoroughly and meticulously reviewed employee's treatment chronology. As testified by Dr. Belz, and found to be true by the Commission, Dr. Belz had more complete information than anyone else who evaluated and treated employee and Dr. Belz spent more time evaluating employee's data than any other examiner and treater. (Transcript 933).

Dr. Belz formulated three scenarios based on employee's accident, medical treatment, and complex set of facts. Scenario No. 1 was that maximum medical improvement was attained October 1, 1998/December 9, 1998 under the treatment of Dr. Budnick. Dr. Belz noted the significant improvement of employee under the care of Dr. Budnick such that by October 1, 1998, Dr. Budnik released employee to return to work. He was to follow up in approximately one month and from October 1, 1998, through December 9, 1998, there existed minimal residual signs and symptoms of left C6 and C7 radiculopathies.

Dr. Belz was of the opinion that the MRI study of the cervical spine dated June 5, 1998, demonstrated the following: (1) mid-line posterior herniation C3-C4; (2) left posterior lateral herniation C5-C6; and (3) lateral herniation C6-C7.

As to restrictions, Dr. Belz agreed with the restrictions imposed by Dr. Budnick, but also thought it would be appropriate to add the following: (1) not to perform cervical extension in excess of 30 degrees sustained for over one-half of the work cycle; (2) not to function overhead; (3) not to look up except for occasionally as a condition of employment; (4) not to operate overhead crane; (5) not to perform high line assembly; (6) not to lift, push, and pull in excess of 25 pounds; (7) loads to be handled close to the body; and (8) no lifting from shoulder level and above.

Ultimately, as to Scenario No. 1, Dr. Belz opined employee sustained 25% permanent partial disability body as a whole referable to the cervical spine. Dr. Belz was also of the opinion that employee was not permanently totally disabled on account of the injury sustained April 27, 1998.

Scenario No. 2 commences with the treatment of Dr. Donich as of August 23, 1999. As mentioned above, Dr. Donich ordered a more current MRI of the cervical spine, which was performed September 15, 1999.

In Scenario No. 2 the radiologist, Dr. Taylor, interpreted the cervical MRI scan as follows: at the C4-5 level small central posterior disc protrusion is present; at the C5-6 level a large central and left-sided posterior disc protrusion is present with anterior spinal cord impingement and compression; at the C6-7 level, mild posterior disc bulging is present, right-hand side greater than left; ... the most significant findings at the C5-6 level.

As explained by Dr. Belz, the interpretation of the cervical MRI scan dated September 15, 1999, by Dr. Donich differs from the interpretation by Dr. Taylor, as well as the interpretation by Dr. Belz. Dr. Belz agrees with the interpretation of the radiologist and not the interpretation by Dr. Donich. Dr. Belz personally reviewed the actual films of both cervical MRI scans.

As of August 23, 1999, Dr. Belz indicates the examination performed by Dr. Donich yielded essentially the same results as the final two exams performed by Dr. Budnick on October 1, 1998, and December 9, 1998. Dr. Belz continues and states that if surgical intervention were declined, the disability opinions and restrictions would be those related to Scenario No. 1.

As Dr. Belz further explains in Scenario No. 2 the interpretation of the cervical MRI scan dated September 15, 1999, by Dr. Taylor, the radiologist, is presumed to be correct. Consequently, the most significant findings were at the C5-C6 level, thus these findings and increased symptoms and complaints, according to Dr. Belz, would reference the occupational injury occurring April 27, 1998. Accordingly, employee would not be at maximum medical improvement and would need medical management, occupational in nature. According to Dr. Belz, the progression of symptoms and imaging findings, according to the two compared MRI scans, would be occupational.

Scenario No. 3 would presume that Dr. Donich correctly interpreted the cervical MRI scan dated September 15, 1999. It demonstrated a moderate focal disc herniation at C4-5 on the left; not a large central left-sided posterior C5-6 herniation. Thus, according to Dr. Belz, under Scenario No. 3, a new non-occupational herniated disc exists at C4-5. A C4-C5 herniation would represent a subsequent non-occupational deterioration. This would not be caused, aggravated, accelerated or precipitated by the occupational injury occurring April 27, 1998.

Dr. Belz made it clear that he reviewed both cervical MRI scans and he was of the medical opinion that the injury did occur at C5-C6, as he agrees with the interpretation by the radiologist in lieu of Dr. Donich. Consequently, the treatment recommended by Dr. Donich would be occupational.

Dr. Belz also thoroughly explained employee's development of chronic obstructive pulmonary disease and asthma subsequent to April 27, 1998, and neither were a consequence of the accident occurring April 27, 1998. The chronic obstructive pulmonary disease and asthma in the opinion of Dr. Belz certainly could represent conditions, which probably are disabling. Ultimately, Dr. Belz stated there is no question employee has a disability due to his subsequent respiratory condition.

The Commission finds employee was provided treatment reasonable and necessary to cure and relieve him from the effects of his injury sustained April 27, 1998, through his last visit with Dr. Budnick dated December 9, 1998. Employer provided this treatment.

As of August 23, 1999, employee's complaints and symptoms related to his injury increased necessitating additional medical treatment. The additional medical treatment provided was rendered under the auspices of Dr. Donich. Dr. Donich treated through December 30,

2002. Employer is responsible for this medical treatment.

As to the issue of temporary total disability, the Commission concludes that the employer is responsible for temporary total disability benefits to employee for the following time frames: (1) beginning June 26, 1998 to October 1, 1998; and (2) August 23, 1999, to December 30, 2002. This comprises a time frame of 188 and 6/7 weeks and a total amount due employee of \$82,976.27 (188 and 6/7 x \$439.36).

The Commission has relied on the medical records of Dr. Budnick, and the testimony of both Dr. Belz and Dr. Donich in determining the amount of temporary total disability benefits due. In so doing, we modify the award of the associate administrative law judge, which awarded benefits from June 15, 1998, up to December 30, 2002 without interruption.

Both Dr. Budnick and Dr. Belz were of the opinion that employee could return to work with restrictions imposed as of October 1, 1998. Dr. Belz referred to these events as Scenario No. 1. Employee did not return to work and employee did not attempt to return to work.

Subsequently, Dr. Myers evaluated employee in March 1999. He sought treatment under the auspices of Dr. Donich August 23, 1999. At that time, finding credible Scenario No. 2 as depicted by Dr. Belz, the Commission finds employee's progression of symptoms and imaging findings compared and contrasted by his two cervical MRI scans, were occupational in nature and temporary total disability benefits are to recommence. Dr. Donich also agreed at that point in time that employee was temporarily totally disabled due to his cervical spine condition (although, as noted by both Dr. Belz and Dr. Taylor, the most significant level of occupational injury was C5-C6; otherwise, if the interpretation of Dr. Donich were correct, i.e., at the C4-C5 level, no workers' compensation benefits would be due, as Scenario No. 3 would be applicable, which represents a subsequent non-occupational deterioration).

Dr. Donich scheduled surgery in September 1999, however, employee's subsequent developing non-occupational condition of chronic obstructive pulmonary disease and asthma prevented the surgery from occurring. This subsequent non-occupational condition prevented future scheduled surgeries.

Ultimately, as described by Dr. Donich, employee's condition improved to the point that by December 30, 2002, Dr. Donich retracted his opinion that employee needed to undergo surgery, although it was a probability in the future.

The difficult issues to address are liability for temporary total disability between August 23, 1999, and December 30, 2002, and, subsequently, residual permanent disability. Employee's medical treatment, anticipated medical improvement and continued unemployment became intertwined with his work related injury, and employee's subsequent development of the non-occupational conditions, chronic obstructive pulmonary disease and asthma. The Commission cannot find a definitive case in Missouri as to the obligation of the employer to pay the employee temporary total disability benefits through this time frame.

The Commission has reviewed this issue with guidance from *A. Larson, Workers' Compensation Law, Desk Edition, Section 80.03[5] (2004)* in which it is stated:

"There can be such a blending between a claimant's personal ailment (or condition) and the employment-related impairment that assigning responsibility for continued unemployment to one or the other can be difficult. Generally, the difficulty is resolved in favor of the employee. Thus, in one South Carolina case, a claimant unexpectedly became pregnant and, based upon her obstetrician's advice, discontinued treatments and physical therapy for her work-related injury. Her employer's request to discontinue compensation benefits during her pregnancy was not allowed; the fact that claimant's pregnancy indirectly prolonged the period during which she was unemployable did not change the fact that it was her work-related injury, not the pregnancy, that initially rendered her unable to work."

Between August 23, 1999, and December 30, 2002, Dr. Donich was of the opinion employee was temporarily totally disabled on account of his cervical spine condition. The surgery recommended and scheduled on at least two occasions was canceled due to employee's subsequent developing personal ailment or non-occupational condition. Dr. Belz also agreed that employee needed medical management during this time frame, which was occupational in nature.

Employee's subsequent development of his non-occupational respiratory condition prolonged employee's recommended medical treatment, anticipated medical improvement and period of unemployment. The work-related injury, though, initially rendered him unable to work. Until December 30, 2002, the medical opinions were consistent that employee was unable to work on account of his injury, taking into account his treatment being prolonged due to his personal ailment.

Temporary disability awards provided by workers' compensation law, sections 287.170 RSMo and 287.180 RSMo, are not designed as unemployment compensation. *Williams v. Pillsbury, Co.*, 694 S.W.2d 488 (Mo. App. E.D. 1985).

Temporary total disability payments are intended to cover healing periods and are unwarranted beyond point at which employee is capable of returning to work. Temporary total disability awards are not intended to compensate employee after condition has reached point where further progress is not expected. *Brookman v. Henry Trans.*, 924 S.W.2d 286 (Mo. App. E.D. 1996).

The evidence reveals that even though employee's subsequent non-occupational condition prolonged the period which he was unemployable, it also reveals employee was healing and did not reach a point where no further progress was expected until December 30, 2002. Based on this continued healing the Commission determines that employee is entitled to receive temporary total disability benefits until December 30, 2002.

The Commission is convinced that employee indeed attained maximum medical improvement from the work accident on December 30, 2002. According to Dr. Belz' description of Scenario No. 2, if surgery were no longer an alternative but only a probability, Scenario No. 1 (as explained by Dr. Belz) would be applicable with his accompanying opinions as to restrictions and disability previously discussed.

If employee were not employable in the open labor market as of December 30, 2002, the Commission is convinced it was due to employee's subsequent developing condition of chronic obstructive pulmonary disease and asthma, which in combination with all of employee's then existing medical conditions, rendered the employee totally disabled. The employer is not responsible for a subsequent developing non-occupational condition that may blossom into a disability. *Wilhite v. Hurd*, 411 S.W.2d 72 (Mo. 1967).

Mr. Swearingin, employee's vocational expert, was equivocal as to the effect of employee's subsequent developing non-occupational medical conditions of chronic obstructive pulmonary disease and asthma, and his present ability to be employed in the open labor market. In answer to a question as to whether or not employee's subsequent non-occupational pulmonary conditions were disabling and became disabling since 1998, Mr. Swearingin agreed that it was certainly disabling in 1999 and the associate administrative law judge is simply going to have to decide as to its effect, i.e., at which point the subsequent developing condition became disabling.

Dr. Belz was not equivocal. The work injury alone was not totally disabling. If employee were presently unable to compete in the open labor market, the inability to compete would include his subsequent non-occupational deterioration.

As to the issue of permanent partial disability, Dr. Belz testified the residual permanent disability sustained by the employee on account of the accident occurring April 27, 1998, was permanent partial in nature, and not permanent total; i.e., 25% permanent partial disability of the body as a whole referable to the cervical spine. The Commission agrees with the assessment by Dr. Belz and as to this issue of permanent residual disability does not rely on the opinions expressed by Dr. Myers, Mr. Swearingin nor Dr. Donich. Based upon the foregoing, the Commission is of the opinion that the award of the associate administrative law judge of 40% permanent partial disability of the body as a whole referable to the cervical spine is excessive, and reduces it to 25% permanent partial disability of the body as a whole referable to the cervical spine.

IV. Liability of Second Injury Fund

Section 287.220 sets forth that if the combination of the disability attributable to the primary work injury and the preexisting disabilities result in a greater overall disability than the simple sum of the disabilities, the Second Injury Fund is liable for the difference between the sum of the disabilities and the disability resulting from their combination, provided minimum disability thresholds are met for the primary and preexisting disabilities. The pre-existing injury and the work related injury must each be assigned at least 50 weeks of compensation if it is a body as a whole injury (12½% of the body as a whole). If the pre-existing injury or the work related injury is to a major extremity, the minimum threshold is 15% permanent partial disability of that extremity.

Paraphrasing the language of the Missouri Court of Appeals, Eastern District, in the case of *Messex v. Sachs Electric Company*, 989 S.W.2d 206, 214 (Mo. App. E.D. 1999), the Commission must decide if there is competent and substantial evidence of a pre-existing disability and if there is a failure of proof any claim against the Second Injury Fund must fail. As succinctly stated by the Court at pages 214 and 215:

"When a claim is made against the Fund for permanent disability compensation, statutory language and case law make it mandatory that the claimant provide evidence to support a finding, among other elements, that he had a preexisting permanent 'disability'. Section 287.220.1; *Leutzinger v. Treasurer of Missouri, Custodian of Second Injury Fund*, 895 S.W.2d 591 (Mo.App. E.D.1995) (Emphasis added). The disability, whether known or unknown, must exist at the time the work-related injury was sustained *and* be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed. *Id.*; *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo.App. E.D.1995).

... Fund liability is only triggered by a finding of the presence of an actual and measurable disability at the time the work injury is sustained."

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim including Second Injury Fund liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968). The employee must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995).

In the instant case, employee alleges the existence of three pre-existing disabilities as of the date of the primary injury, April 27, 1998: (1) low back injury; (2) left hand injury; and (3) heart condition.

The relevant evidence concerning the issue of Second Injury Fund liability generates from the employee's testimony, and the following experts: Andrew Myers, M.D.; Norbert Belz, M.D.; and Wilbur Swearingin, a certified rehabilitation counselor.

The Commission reiterates that of the three experts -- Dr. Myers, Dr. Belz, and Mr. Swearingin -- Dr. Belz is the most credible, persuasive and worthy of belief. As previously stated, this case has a protracted history and several factual and legal complexities. The comprehensive and complete medical review of this case conducted by Dr. Belz is commendable. On the contrary, the Commission finds the review, work-up, assessment, and evaluation undertaken and conducted by both Dr. Myers and Mr. Swearingin, to be incomplete, superficial, lacking depth, and cursory in nature, rendering their opinions of little if any value.

Testimony of Employee

Subsequent to his low back surgery in 1972, employee remained off work for a year and one half to two years, ultimately returning to his occupation as an over the road truck driver. Employee testified that over the years he compensated for his back pain at work. Upon returning to work post-back surgery he was able to perform all of his job duties. Employee credibly testified that the back surgery was one of the best things he ever did and that as far as he was concerned, his back became as strong as ever, and his back was as good as anyone's back. He continued performing the duties of a physically demanding job described as "heavy haul" requiring him to lift 75-80 pounds on a regular basis. He never experienced problems while lifting that amount of weight. He continually chained and tarped his loads, which required climbing onto the truck or truck bed, lifting an 84 pound tarp and lifting 45 pound chains. He was able to carry these chains without any problems. He could reach, bend, twist, and climb, and he has never been required to return for any additional treatment subsequent to his release.

Subsequent to his left middle finger amputation, employee has lost strength in his left hand. He uses his left hand mainly as a "helper hand". He has been able to continue to perform all of his job duties as required and has never had problems with performing these activities. The left hand injury has never prevented him from performing any of his acts of employment. He presently has no pain in his left hand.

Employee suffered two apparent "heart attacks" in 1991 and 1995. However, the evidence revealed there was no heart damage. As with his other prior alleged disabilities, employee returned to his same job, and has never experienced any problems whatsoever concerning his heart while performing his employment. He has not followed up with a physician following his last release, he has not been on medication and he has no chest pain since his release.

Employee has passed all of his DOT physicals after all three injuries, and he has never been denied employment due to problems with any of the three injuries.

Testimony of Mr. Swearingin

Mr. Wilbur Swearingin testified in behalf of the employee. His vocational report was also admitted into evidence. The opinion of Mr. Swearingin was that employee's low back and left hand injuries were not disabilities of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining future employment. Mr. Swearingin had no opinion on whether employee's heart condition was a hindrance or obstacle to employment as he did not review any records pertaining to employee's heart condition, or, apparently, even discuss employee's heart condition during his assessment and evaluation.

The Commission notes also that Mr. Swearingin admitted he never reviewed nor consequently considered the medical opinions of Dr. Belz prior to rendering his vocational opinions. Since the Commission finds the medical opinions of Dr. Belz to be the most comprehensive and complete medical opinions rendered, coupled with Mr. Swearingin's admission that he never reviewed or considered the medical opinions of Dr. Belz, the vocational opinions of Mr. Swearingin are afforded little, if any, weight in our disability determinations.

Testimony of Dr. Andrew Myers

In behalf of employee, Dr. Myers performed an examination, evaluation and rating. Dr. Myers authored three medical reports and testified twice by deposition. Dr. Myers saw employee on two occasions: March 23, 1999, and March 6, 2003. Dr. Myers generated reports dated April 16, 1999, August 12, 1999, and January 12, 2004.

Dr. Myers was of the opinion that employee's three prior conditions were disabilities of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment. After his first evaluation, Dr. Myers assessed the following pre-existing permanent partial disabilities: (1) 10% to 15% permanent partial disability of the body as a whole referable to the low back condition; (2) 20% permanent partial disability of the left hand; (3) no opinion concerning the heart.

After his second evaluation, Dr. Myers assessed the following pre-existing permanent partial disabilities: (1) 15% permanent partial disability of the body as a whole referable to the low back; (2) 20% permanent partial disability of the left hand; and (3) 15% permanent partial disability of the body as a whole for employee's pre-existing heart condition.

As to his opinion that the left hand condition constituted a prior hindrance or obstacle to employment, Dr. Myers admitted that he did not review any treating medical records pertaining to the medical care and treatment on account of this injury. Dr. Myers had no history from employee as to how much he was lifting prior to the work injury and he did not question employee as to whether or not his left hand or finger injury prevented him or hindered him from performing his lifting activities. Dr. Myers admitted that as to employee's left grip strength difficulties, he could not separate what was due to the prior left finger injury and what was attributable to the work injury occurring April 27, 1998. Dr. Myers had no strength measurements of the left hand prior to April 27, 1998, to compare and contrast because he had no medical records that pre-existed April 27, 1998, injury. Furthermore, Dr. Myers agreed that he would defer to a vocational expert as to how employee's various conditions would affect employee in the open labor market. (Employee's own vocational expert, Mr. Swearingin, was of the opinion that employee's left hand injury was not disabling nor a hindrance or obstacle to employment).

Dr. Myers had no medical records to review concerning employee's prior low back condition. Employee told Dr. Myers that he was able to continue working and his low back condition never prevented him or hindered him from doing any loading or unloading activities. Dr. Myers admitted he never questioned employee about how, or if, his pre-existing lumbar condition affected him in his occupation or job prior to April 27, 1998, and Dr. Myers was not aware of employee's lifting capacity prior to April 27, 1998.

As stated above, in his second report, Dr. Myers rated employee's low back condition at 15% permanent partial disability of the body as a whole. However, Dr. Myers admitted that the increase in his low back rating was due to the increased amount of trouble or problems employee was having with his back and worsening physical exams between the two times that Dr. Myers evaluated employee in 1999 and 2003. In determining the Second Injury Fund liability, the Commission must look at the condition of the prior disability on the date of the last injury. *Lammert v. Vess Beverages, Inc.*, 968 S.W.2d 720, 725 (Mo. App. 1998). Thus, Dr. Myers' consideration of employee's worsening condition after date of the last injury was improper and renders the opinion unreliable for our purposes. (The Commission further notes that employee's vocational expert, Mr. Swearingin, was of the opinion that employee's low back injury was not disabling nor a hindrance or obstacle to employment).

As to employee's pre-existing heart condition, Dr. Myers did not address this condition in any fashion in his first evaluation of employee. Dr. Myers admitted he did not have any records concerning employee's prior heart condition at that time and employee related to Dr. Myers that he did not sustain any actual heart damage.

After Dr. Myers re-evaluated employee in 2003, Dr. Myers was then of the opinion that employee's prior heart condition was a hindrance or obstacle to employment. Dr. Myers admitted he still did not review any medical records that predated April 27, 1998. Dr. Myers admitted his opinion concerning the pre-existing heart condition was based upon the fact that employee had the condition, not necessarily, how it affected him.

Dr. Myers obtained little if any history from the employee concerning his prior conditions and their occupational effect. Furthermore, Dr. Myers did not review any treating medical records concerning any of the three prior medical conditions. The only information possessed by Dr. Myers was that the three conditions had occurred. In the opinion of the Commission, there was little if any factual basis for Dr. Myers to render an opinion as to pre-existing disability. Accordingly, the Commission finds the opinions rendered to be of no value.

Testimony of Dr. Belz

In behalf of the Second Injury Fund, Dr. Belz testified via deposition. As to the employee's prior left hand condition, Dr. Belz was of the opinion that the left hand injury indeed was an impairment, but did not constitute a disability. Dr. Belz did not believe the left hand condition was a hindrance or obstacle to employment or obtaining re-employment. Dr. Belz testified that "this loss of the finger did not constitute an impediment or obstacle to employment or re-employment at the time of the last injury of April 27, 1998 and, as such, although he was impaired, he was not disabled".

As to employee's pre-existing low back condition, Dr. Belz was of the opinion that employee's low back condition constituted a disability of such seriousness to be a hindrance or obstacle to employment or to obtaining re-employment. Dr. Belz rated his condition at 10% permanent partial disability to the body as a whole referable to the low back.

As to employee's prior heart condition, Dr. Belz was of the opinion that it did not constitute a prior disability of such significance to be a hindrance or obstacle to employment or to obtaining re-employment. Dr. Belz stated: "he, in fact, worked under no restrictions referencing the heart ... through April 27, 1998 and, in fact, demonstrated no disability ...".

Comparing, contrasting and weighing the above evidence, the Commission finds the testimony of Dr. Belz the most credible, trustworthy and convincing. Dr. Belz is unequivocal after his comprehensive review of the medical records that employee's pre-existing heart condition and pre-existing left hand condition were not disabling. The Commission finds that neither of these two conditions, employee's left hand condition and employee's heart condition, were actual and measurable disabilities at the time the work injury was sustained of such seriousness to constitute a hindrance or obstacle to employment or re-employment. Thus, there can be no award against the Second Injury Fund based upon the alleged pre-existing disabilities involving employee's left hand and heart condition.

As to employee's pre-existing low back condition, the Commission does find that the low back condition resulted in a pre-existing 10% permanent partial disability of the body as whole. The 10% permanent partial disability to the body as a whole is insufficient to meet the minimum statutory threshold of 12.5% permanent partial disability of the body as whole. Accordingly, the Second Injury Fund has no liability under Section 287.220 RSMo.

V. Conclusion

Based on the foregoing, the Commission concludes and determines that the Second Injury Fund has no liability because of this injury. The finding by the associate administrative law judge that the Second Injury Fund has any liability because of this injury is reversed.

As to the issue of temporary total disability the finding of the associate administrative law judge is modified as follows: employer has liability for temporary total disability benefits in the amount of \$82,976.27 representing a time frame of 188 and 6/7 weeks as follows: June 26, 1998 to October 1, 1998; and August 23, 1999 to December 30, 2002 (188 and 6/7 x \$439.36).

As to the issue of permanent partial disability, the award of the associate administrative law judge is modified as follows: 25% permanent partial disability of the body as a whole referable to the cervical spine or a lump sum amount of \$27,842.00 (400 x 25% x \$278.42).

The amount of compensation payable representing unpaid medical expenses in the amount of \$9,891.41 is affirmed.

The determination that future medical be left open for the purpose of surgery that the employee may need to cure and relieve him of the symptoms of his cervical injury is affirmed. Employer is responsible for this future medical care and treatment.

The Commission further approves and affirms the associate 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 19th day of June 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge is supported by competent and substantial evidence and should be affirmed. I would adopt the award and decision of the administrative law judge as my own.

I dissent from the Commission's decision to reduce the award of permanent partial disability and temporary total disability against employer/insurer. I also dissent from the majority's decision to reverse the award of permanent partial disability against the Second Injury Fund. In particular, I strongly disagree with the majority's analysis of employee's preexisting finger amputation and heart condition. The majority concluded that employee's amputated finger and heart condition did not constitute hindrances or obstacles to employment or reemployment. The majority relied on the opinions of Dr. Belz in making its findings.

To determine whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, we must focus on the potential that the pre-existing injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there was no such prior condition. *E.W. v. Kan. City Sch. Dist.*, 89 S.W.3d 527, 537 (Mo. App. 2002). Any preexisting injury which could be considered a hindrance to an employee's competition for employment in the open labor market should trigger second injury fund liability. *Leutzinger v. Treasurer of Mo. Custodian of the Second Injury Fund*, 895 S.W.2d 591 (Mo. App. 1995).

As regards employee's amputated finger, employee credibly described the limitations the loss of his finger imposes on the use of his left hand. Employee described that he uses his left hand only as a helper hand. He testified he has lost strength in his left hand. He can no longer use his left hand to carry even moderately heavy items such as a bucket of water. Employee modified the way he worked to accommodate for the loss of strength in his left hand. Employee's testimony about his limitations with his left hand established that employee experienced actual obstacles to his employment. Undoubtedly, employee's inability to use his left hand as more than a helper hand is a hindrance to employment in any position requiring heavy lifting involving both hands.

As regards to his heart condition, employee testified that the condition caused him to tire easily. As a result, he was unable to drive as long as he could before he developed the heart conditions. Again, employee's testimony regarding the effects of his heart condition established that employee experienced actual obstacles to his employment as a result of the condition.

The majority errs in concluding that these limitations did not constitute a hindrance or obstacle to employment or reemployment as of the date of employee's work injury.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission modifying the award and decision of the administrative law judge.

John J. Hickey, Member

AWARD

Employee: Jack Carte

Injury No. 98-057227

Dependents: N/A
Employer: Tri-State Motor Transit
Additional Party: Second Injury Fund
Insurer: Self-Insurer
Hearing Date: August 9, 2004

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by:

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 27, 1998
5. State location where accident occurred or occupational disease was contracted: UNKNOWN
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:
LOADING TRUCK
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: NECK AND BODY AS A WHOLE
14. Nature and extent of any permanent disability: 40 PERCENT BODY AS A WHOLE
15. Compensation paid to-date for temporary disability: UNKNOWN
16. Value necessary medical aid paid to date by employer/insurer? UNKNOWN
17. Value necessary medical aid not furnished by employer/insurer? \$9891.41
18. Employee's average weekly wages:
19. Weekly compensation rate: \$439.36/\$278.42
20. Method wages computation: Agreed

COMPENSATION PAYABLE

21. Amount of compensation payable:
Unpaid medical expenses: \$9891.41
weeks of temporary total disability (or temporary partial disability)
weeks of permanent partial disability from Employer
weeks of disfigurement from Employer
22. Second Injury Fund liability: YES -- SEE AWARD
TOTAL: UNKNOWN
23. Future requirements awarded: YES

Said payments to begin AUGUST 28, 1998 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:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jack Carte Injury No: 98-057227
Dependents: N/A
Employer: Tri-State Motor Transit
Additional Party: Second Injury Fund
Insurer: Self-Insurer Checked by:

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

AWARD ON HEARING

A third and final hearing was held in the above case on August 9, 2004. The employee appeared in person and with attorney, William Francis. The employer/insurer appeared through their attorney, Greg Carter. The Second Injury Fund appeared through Assistant Attorney General, Karen Johnson. The issues presented to the Court at this hearing were:

1. Past medical.
2. Past temporary total disability from June 15, 1998, through the present.
3. The nature and extent of any permanent disability.
4. Liability of the employer/insurer for future medical.
5. The extent of any Second Injury Fund liability.

The facts in this case are as previously stated in the prior awards. Since the last temporary hearing the employee has not been able to receive medical clearance for surgery awarded due to his nonwork-related health conditions.

The claimant testified at the hearing. He indicated that he had continued to see Dr. Donich since the last hearing. He still has problems with his neck and has a sensitive bulge on the back of his neck. He stated that he has pain up the back of his neck into his shoulder, that it hurts to walk and that he cannot sleep well. He testified that the anesthesiologist has not cleared him and will not put him under for surgery due to his complications with his asthma. The employee last worked for TRISM. He has a 5th to 6th grade education and no high school diploma or GED. He can read and write some. He spent three years in the military from 1954 to 1957 during which time he drove a truck and he received an honorable discharge.

In 1972 he had the L4-5 disk removed and after that went back to truck driving. He made some accommodations in his work habits. He lifted lighter loads, did not jump and he dragged his tarps instead of carrying them. He also worked at a slower pace. He indicated that after that surgery he had normal pain and for that he took aspirin.

In 1989 he suffered an injury to his hand. A cable broke and degloved the middle finger on his left hand. It is now removed after three surgeries. He indicates that he uses this hand as a helper hand.

In 1991 the employee also had a heart attack. He was hospitalized and released, after which he indicated he tired more easily. In 1998 he had a second myocardial infarction and an angioplasty. He quit for a time and went on social security disability.

The injury in the case at hand occurred in April of 1998. The employee indicates that after the initial surgery he was offered light duty at the TRISM guard shack, but testified that it was too painful for him to sit on the stool and that he had to open two doors to go check drivers in and out. They finally took him off this job. His testimony is that on June 15, 1998, they told him to empty his truck and leave the premises. At this point in time the employee has two ways to relieve his pain. He lays down or takes aspirin. He indicates he has pain when walking down into his arm and while sitting he feels better with his head bent down. His daily activities are limited. In a typical day he gets up walks around and watches TV. He further testified that he has had no injury since April of 1998.

Wilbur Swearingin, a vocational rehabilitation expert, also testified at the hearing. He had seen additional records since the last hearing, but indicated that the employee has no transferable job skills and cannot be retrained due to his low academic skills. Mr. Swearingin testified that it is not reasonable to expect an employer to hire this man and that the 1998 cervical injury caused his inability to work. He also indicated that the employee's age at this time is also a factor. Mr. Swearingin also indicated that he had not seen all the medical records or depositions in this case, but that his opinion at the time of the hearing was the same as he had expressed in his October 2001 deposition.

The claimant's girlfriend, Roberta Wright, also testified at the hearing. She indicated that before 1998 he did not have too many problems, but that his asthma bothered him a lot. She stated that currently he aches constantly and has to turn his whole body in order to see to the side. She also said that he cries out in pain sometimes while just sitting and he is up and down all night long. She also said he is worse in cold weather and that he is developing a hump from leaning his head forward.

The employee further submitted a deposition of Dane J. Donich, M.D., the treating neurosurgeon, and a second deposition of Andrew I. Myers, M.D., who performed the employee's independent medical exam and rating in this case.

The Court has also reviewed the deposition testimony of Norbert T. Belz, M.D., the deposition testimony of Wilbur Swearingin, vocational rehabilitation expert, and the prior deposition testimony of Andrew Myers as entered into evidence at the October 10, 2001, temporary hearing.

I am relying on the report and deposition testimony of Dane Donich, the treating neurosurgeon in this case for certain conclusions. As a certified neurosurgeon and the only neurosurgery specialist whose opinion is in evidence, I find him to be credible. Dr. Donich had originally recommended an anterior cervical discectomy, fusion, and plating for the employee based upon a repeat MRI scan performed in September 1999. Dr. Donich further indicated that as of the first time he saw the employee on August 23, 1999, he was temporarily and totally disabled from employment and that status had not changed during the time the he saw the employee. Dr. Donich saw the employee on December 30, 2002, at which time he indicated that he was clinically better in terms of his symptoms and had improved significantly and was no longer in miserable, terrible pain. Dr. Donich retracted the recommendation for surgery at that point because he had improved without surgery although he testified that at some time in the future the employee will need surgery.

It is the opinion of Dr. Andrew Myers that the employee has certain preexisting disabilities and he has assigned percentages to those disabilities. As a rating physician, I find the opinions of Dr. Myers to be credible. The injury to the employee's low back which occurred in 1972 resulting in surgical intervention was assigned a 15 percent permanent partial disability of the body as a whole by Dr. Myers. Additionally, he assigned a 20 percent permanent partial disability at the 175 week level for the 1988 injury to the employee's middle finger and hand. Additionally, he assigned a 15 percent permanent partial disability of the body as a whole as a result of the employee's prior myocardial infarctions and 1995 angioplasty. He further indicates that there would be a combined level of disability of approximately 10 percent in addition to those disabilities given. He further concludes that the employee is permanently and totally disabled as a result of all the injuries combined, but has indicated that with surgery the employee could return to truck driving as long as he was not required to load or unload. He assigns no additional disability for the employee's asthmatic condition. Dr. Myers has assigned a permanent disability rating as of a second examination with employee of 50-55 percent of the body as a whole. Dr. Myers also indicates that the employee was totally disabled from June 1998 due to the substantial pain caused by the serious injuries to his neck. As a result of that chronic pain he felt that he was unable to work even in a light-duty position.

In the August 9, 2001, report of Dr. Norbert Belz certain permanent impairment and disability ratings were assigned to the employee's current and preexisting injuries. Dr. Belz has indicated that the employee demonstrated a 10 percent disability to the body as a whole in regard to the 1972 low back injury. In addition Dr. Belz determined that the employee demonstrated a 26 percent impairment of the left wrist as a result of the 1988 finger injury and that there is no disability or impairment in regard to the myocardial infarctions in 1992 and 1995. Dr. Belz indicates that the back injury in 1972 does constitute a prior industrial disability and an impediment to employment but that the left hand injury does not constitute such. Also, the myocardial infarctions of 1992 or 1995 treated by angioplasty did not create a prior industrial disability. Therefore, Dr. Belz also indicates that there is no interaction between the injuries resulting in an enhanced disability. He further indicates that it is possible that the employee would need additional medical treatment, but if in fact that surgery is not obtained, then the permanent disability as a result of this injury would be assigned at 25 percent permanent partial disability to the body as a whole.

After reviewing the evidence submitted in this case not only as of the hearing on August 9, 2004, but also that submitted on October 10, 2001, I find that the claimant has sustained a 40 percent to the body as a whole permanent partial disability as a result of the accident on August 27, 1998, and order that the employer/insurer pay that benefit to the employee. I further find that the employee has incurred reasonable and necessary medical expenses as a result of the August 27, 1998, injury which is to be paid by the employer/insurer directly to the health care providers as indicated in Exhibit O in the amount of \$9,891.41.

I also find and order to be paid by employer/insurer temporary total disability benefits for a period from June 15, 1998, to December 30, 2002, the date on which Dr. Dane Donich indicated that the employee's condition had improved and he no longer recommended surgery. I also find that the employee had incurred certain prior injuries resulting in disability that was industrially disabling. Those injuries along with the current disability resulting from the accident on August 27, 1998, combine in such a way as to create a 10 percent loading factor. Those prior disabilities I find to be 15 percent of the body as a whole for the 1972 lumbar injury; 20 percent of the hand as a result of the 1988 finger loss injury; and 15 percent of the body as a whole for the 1992 and 1995 myocardial infarctions and resulting angioplasty. I order the Second Injury Fund to pay this benefit to the

employee. I further find and order that future medical be left open for the purpose of surgery that the employee may need to cure and relieve him of the symptoms of this cervical injury. I order the employer/insurer be responsible for this medical treatment. However, the employee will be required to obtain the medical clearance and the recommendation for that surgery or other treatment at his own expense.

I find that the attorney, William Francis, be entitled to a 25 percent attorney fee for his services in this case.

Date: _____

Made by: _____

Karen Wells Fisher
Associate Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation