

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

Injury No.: 07-125071

Employee: Jimmy Dotson  
Employer: Dotson Trucking, LLC (Settled)  
Insurer: Missouri Employers Mutual (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 § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 4, 2011. The award and decision of Chief Administrative Law Judge Lawrence C. Kasten, issued August 4, 2011, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 30th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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James Avery, Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Jimmy Dotson Injury No. 07-125071  
Dependents: N/A  
Employer: Dotson Trucking, LLC (settled)  
Additional Party: Second Injury Fund  
Insurer: Missouri Employers Mutual (settled)  
Appearances: Gary Matheny, attorney for employee.  
Gregg Johnson, Assistant Attorney General for the Second Injury Fund.  
Hearing Date: March 30, 2011(commenced) Checked by: LCK/rf  
May 3, 2011 (completed)

**SUMMARY OF FINDINGS**

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? On December 28, 2007.
5. State location where accident occurred or occupational disease contracted: Iron County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.

10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee slipped, fell and injured his lower back.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Low back and body as a whole.
14. Nature and extent of any permanent disability: 20% permanent partial disability of the body as a whole referable to the low back.
15. Compensation paid to date for temporary total disability: \$6,829.20
16. Value necessary medical aid paid to date by employer-insurer: \$2,392.04
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$3,000.00
19. Weekly compensation rate: \$663.95 for temporary total and permanent total disability. \$389.04 for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: Permanent total disability against the Second Injury Fund.
22. Second Injury Fund liability: Permanent total disability against the Second Injury Fund.
23. Future requirements awarded: See Rulings of Law.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Gary Matheny.

## **FINDINGS OF FACT AND RULINGS OF LAW**

On March 30, 2011, the employee, Jimmy Dotson, appeared in person and with his attorney, Gary Matheny, for a hearing for a final award. The Second Injury Fund was represented at the hearing by Assistant Attorney General Gregg Johnson. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issue that was in dispute. These undisputed facts and issue, together with the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS**

1. Dotson Trucking, LLC was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and was fully insured by Missouri Employers Mutual.
2. On December 28, 2007 Jimmy Dotson was an employee of Dotson Trucking, LLC and was working under the Workers' Compensation Act.
3. On December 28, 2007 the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$3,000.00. The rate of compensation for temporary total and permanent total disability is \$663.95 per week. The rate of compensation for permanent partial disability is \$389.04 per week.
7. The employee's injury was medically causally related to the accident.
8. The employer-insurer paid \$2,392.04 in medical aid.
9. The employer-insurer paid \$6,829.20 in temporary total disability benefits. The time period paid was 10 2/7 weeks from January 7, 2008 through March 18, 2008.

### **ISSUE**

1. Liability of the Second Injury Fund for permanent total or permanent partial disability.

### **EXHIBITS**

#### Employee's Exhibits

- A. Medical records of Missouri Highlands Health Care.
- B. Medical records of Cardiology Diagnostic.
- C. Medical records of Dr. Daud.
- D. Medical records of Open MRI.
- E. Medical records of Barnes Jewish West County Hospital.
- F. Medical records of Mineral Area Regional Medical Center.
- G. Medical records of Dr. Bernardi.
- H. Medical records of Dr. Bernardi.
- I. Report of Dr. Berkin.
- J. Deposition of Timothy Lalk with his CV and report.

- K. Stipulation for Compromise Settlement in Injury Number 07-125071.
- L. Medical records of Dr. Kunkel/Central Missouri Pain Management. (The record was left open for the submission of this exhibit. The exhibit was received and admitted into evidence on May 3, 2011 and the record was closed.)

Second Injury Fund's Exhibits

- I. Deposition of Sherry Browning including her CV and Vocational Report. (The record was left open for admission of this exhibit which was received and admitted into evidence on April 8, 2011.)
- II. Page 41 of the employee's deposition taken on March 20, 2009.

Judicial notice of the contents of the Division's files for the employee was taken.

**WITNESS:** Jimmy Dotson.

**BRIEFS:** No briefs were filed.

**FINDINGS OF FACT:**

The employee lives in Bixby Missouri. He operated Dotson Trucking LLC for about 15 years, and stopped operating the business in December of 2007. He was the owner/operator of a dump truck. He maintained the truck which included changing tires, motor, transmission, rear end, greasing, and oil changes. With heavy maintenance, his son George Dodson helped him. Over time, he needed more and more help from his son working on his truck due to his medical conditions and injuries prior to December 28, 2007.

The employee testified that he had injured his right arm while operating a saw mill. He cut it open from his elbow to his wrist, and has a surgical scar. His right arm, which is his dominate arm, is sensitive to cold, it falls asleep, and is weak. After the right arm injury, he changed the way he did maintenance and used his left arm most of the time. He had no strength in his right hand, loss of feeling and had problems with fine finger manipulation.

Approximately 8-10 years ago, Dr. VanNess performed left knee surgery. After the surgery, his knee was weak, he had pain, and it locked up. He had knee stiffness if he used it and it hurt to stretch it out all the way. His knee affected his lifting, and he put more weight on his right side. He had problems with squatting due to his knee not straightening up. His knee affected his ability to do his job.

The employee testified that in 2006, he had left arm pain which went up to his head and neck. He had a heart attack and was air evacuated to Cape Girardeau. He had two stents placed. Prior to December of 2007, he was weak and was tired all of the time. He had trouble working in the heat. Especially in hot weather, his son started helping more with truck maintenance including putting brakes on, changing tires, greasing and changing oil. Physically, the employee was not doing as much in hot weather like he used to. Since he was self employed, he worked

his own schedule. After his heart problems, he changed his schedule. When he got tired he would stop working and if he was driving, he would pull over, rest and take naps.

Prior to December 28, 2007, the employee had chronic obstructive pulmonary disease, and had problems with his lungs and ability to breath. The employee had shortness of breath and was short of wind if he did anything. He was on inhalers and a BiPap breathing machine that was prescribed by his family doctor. He used Albuterol an inhaler four times a day. Lifting a tire or motor caused him shortness of breath. The shortness of breath slowed him down at work, and caused him to take breaks and rely on his son for maintenance work. Since he was self-employed, he could take longer to do something and could slow down,

Prior to the December of 2007, accident, he worked 8-12 hours which depended on how he felt each day. He drove five days a week and sometimes on Saturday. On Sunday, he did maintenance on his truck. His body was going downhill including his breathing and his heart. He slept a couple of hours around noon about three to four times a week. He started working around 4-5 a.m. and stopped working usually around 4 p.m. He made sure he was home at lunch to sleep. In his deposition, the employee stated that prior to December of 2007 he never had to take a nap a lot in the daytime. At the hearing, the employee testified that he could not remember that he said that in his deposition.

The employee had low back surgery about 20-25 years ago. After that he continued to have low back pain, and his back was never right. His back and ankle were weak which affected how many truck loads he did.

On December 28, 2007, the employee had an accident at work. He was greasing his truck and changing the oil. He slipped, fell and hit the ground and injured his lower back. He had pain and discomfort to the left side of the low back which radiated into the left leg to his foot.

The employee saw Dr. Trone on December 28, 2007 for an emergency room follow-up. The employee had gone to the emergency room and had a negative EKG and cardiac enzymes. He was treated for bronchitis and prescribed a Z-Pak but was no better. The employee had chest pain/discomfort and was feeling chest congestion. On examination, his lungs had wheezing with decreased breath sounds. Dr. Trone diagnosed acute bronchitis, lumbago, and disc degeneration.

On January 4, 2008 a lumbar MRI showed a disc herniation on the left at L4-5 and L5-S1 and also disc desiccation at L4-5 and L5-S1.

The employee saw Dr. Bernardi on January 15, 2008. In the medical information intake sheet, it was noted that the employee had prior surgeries on his left foot, right arm, back and heart. The employee had heart disease, arthritis, and asthma. With regard to present or past cardiac/pulmonary symptoms, the employee had chest pain, shortness of breath, wheezing and cough. Dr. Bernardi noted that the employee had two prior lumbar spine procedures about twenty five years ago; and was getting along very well with his back until December 28, 2007. On that date, the employee was coming down from the cab of his truck, lost his balance and landed on his left leg. He had pain in his low back and by the next morning had back pain with

left-sided buttock and leg pain which has been persistent. The employee had a very significant history for coronary artery disease and was status-post coronary stent placements. The employee said that he had persistent known coronary blockage and upper inner scapular pain.

Dr. Bernardi reviewed the lumbar MRI which showed a left-sided herniated disc at L4-5 that appeared to narrow the left L4-5 lateral recess and compress the left L5 nerve root. At L5-S1 there was degenerative disc disease with substantial loss of disc height. There was a disc bulge at L5-S1 but he was not particularly impressed by the presence of a disc herniation and the left S1 nerve root did not appear to be compromised. Post operative changes appear to be present on the left side in the form of a hemilaminotomy. Dr. Bernardi thought the employee had left-sided radiculopathy secondary to the L4-5 disc herniation. The employee's pain was quite classic for a symptomatic L4-5 disc herniation. There appeared to be positive root tension signals; and weakness in his left L5 innervated muscles. Dr. Bernardi thought the employee's best option was surgery due to pain that had not improved with steroid injections and activity modifications; and demonstrable weakness on his neurologic examination. The employee is self employed and was anxious to return to work as quickly as possible. The best non-surgical option would be a series of L5 epidural injections that would give a 30-40% chance of improvement. Due to the previous surgery and scar tissue, the epidural injections may not be effective. The injections would likely require him stopping and restarting his Plavix on three separate occasions. With surgery he would need to stop the Plavix on one occasion. The problem with surgery is the cardiac risk. Dr. Bernardi requested a consultation with his cardiologist for an assessment of his cardiac risk; and possible cardiac clearance for a lumbar laminectomy.

On January 28, 2008 the employee saw Dr. Viahovich for coronary artery disease. The employee had a prior history of coronary heart disease with stents to his mid and then subsequently his proximal LAD which was approximately a year and a half ago. He had a catheterization in January of 2007 that showed the stents to be patent. In recent months he has had arm, neck and back pain with mild chest discomfort. On January 28, the employee underwent an adenosine thallium and the preliminary review suggested only scar tissue from the previous infarct. The past medical illnesses included asthma and COPD. Past cardiac illnesses were coronary artery disease and he was status-post myocardial infarction. Prior surgical procedures were back surgery, hernia repair and left knee surgery. The employee had prior trauma to the left foot with a chainsaw, trauma to his right arm and a perforated esophagus. In February of 2003, the employee had a placement of a LAD stent; another stent in July 2006; and a cardiac catheterization on the left side in June of 2006. Dr. Viahovich diagnosed coronary artery disease probably stable at that time; and shoulder and arm pain that he suspected was musculoskeletal. The employee was to follow-up with Dr. Trone for back pain. Dr. Viahovich okayed the low back surgery; and the employee should be off Plavix for a few days prior to surgery.

The employee testified that surgery was scheduled and when he was at the hospital getting ready for surgery, he had breathing problems, and did not have surgery. He was released from the hospital and sent to Dr. Daud, a pulmonologist. Dr. Daud did breathing tests and he was told he would never have surgery.

The employee was scheduled for surgery on February 7, 2008 at Barnes Jewish West County Hospital. On that day, Dr. Bernardi noted a past medical history of heart disease, hypertension, arthritis, asthma, and coronary artery disease. In the review of systems there was shortness of breath and wheezing. In the initial pre-op assessment for nursing and anesthesia, the medical history showed occasional chest pains, coronary artery disease and the January 2006 heart attack. Also noted was irregular heart rate with occasional palpation, chronic bronchitis and sleep apnea. Dr. Bernardi cancelled the surgery, no anesthesia was administered, and the employee was discharged.

The employee saw Dr. Daud on February 7 after being referred by Dr. Bernardi to give his advice and opinion regarding pre-operative pulmonary clearance and COPD. Dr. Daud noted that the employee had a history of a myocardial infarction with a stent placed in July of 2006 by Dr. Viahovich, high cholesterol and ongoing tobacco abuse. The employee fell and developed lower back pain which had been persistent along with pain over the posterior pelvis involving the left buttock and pain that radiated down the posterior left leg. Dr. Bernardi had diagnosed a disc herniation at L4-5 and recommended a lumbar discectomy/decompression. The employee was cleared by his cardiologist after a stress test revealed no evidence of ischemia. The employee was set for surgery that day and was in the pre-operative holding area when he had breathing difficulties and the surgery was cancelled. The employee was told that his lungs were "in bad shape" and he needed to see a pulmonologist before proceeding with surgery.

The employee described frequent shortness of breath and is only able to walk approximately 200 feet on a flat surface without stopping. He described a dry cough that was occasionally productive of yellow phlegm. The employee had frequent episodes of wheezing and chest tightness. The employee had a pulmonary function test performed a couple of years ago at Des Peres Hospital but did not know the results. The employee had back surgery twenty five years ago along with other orthopedic surgeries. Dr. Daud stated the employee had heavy and ongoing tobacco use and a history of heart attack and stents. The employee likely had some degree of COPD and judging by his very poor exercise tolerance, Dr. Daud was concerned that the employee may have significant exacerbation. Dr. Daud ordered a chest x-ray, spirometry and arterial blood gas; and requested the results of the prior pulmonary function testing. The chest x-ray identified the coronary artery stent; the lungs were hyperinflated with mild linear bibasilar atelectasis and/or scar; and there was a compression deformity of an upper thoracic vertebral body. The impression was obstructive airway disease with linear bibasilar atelectasis and/or scar; coronary artery stent; and compression deformity of the mid to upper thoracic vertebral body. Dr. Daud performed a pulmonary screening interpretation which showed that the lung flow was reduced throughout. There was a clear and significant response to the bronchodilator and severe obstruction of the flow volume loop. Dr. Daud diagnosed a severe obstruction.

Dr. Daud prescribed a course of steroids and Symbicort and refilled Albuterol. He strongly recommended the employee stop smoking cigarettes. Dr. Daud stated that the surgery was on hold until the breathing was improved; but even so the employee was likely going to have a moderate to severe risk of developing a pulmonary complication to include postoperative pneumonia, atelectasis, prolonged ventilation, and hypoxemia which was due to his poor functional status, diagnosis and ongoing tobacco abuse.

On February 16, 2008 the employee went to the emergency room at Mineral Area Medical Center due to chest pain, shortness of breath and wheezing. The past medical history showed coronary artery disease and COPD. On physical exam, the employee had wheezes to the mid left chest and mid right chest and the lungs were diminished throughout. The EKG was consistent with the previous old anterior and inferior myocardial infarction and no acute ischemic changes seen. X-rays of the chest showed chronic COPD changes, essentially unchanged from the last exam on record.

The employee saw Dr. Daud on February 20 for severe COPD that was treated with Symbicort, Albuterol MDI and nebulization; a history of myocardial infarction and was status-post multiple PTCA/stents; and lumbar disc disease. The employee had been hospitalized for two days over the weekend due to his lungs with coughing, wheezing and shortness of breath. The employee was still coughing and wheezing and using a nebulizer twice and the MDI two to four times daily. Dr. Daud noted diffuse wheezes throughout the lungs, and diagnosed COPD with exacerbation. Dr. Daud prescribed an additional inhaler and Prednisone; and encouraged the employee to stop smoking. The employee was not cleared for surgery at present and it was doubtful that the employee would be able to tolerate anesthesia.

On February 20 Dr. Viahovich noted the employee had gone to the emergency room a few days ago with a typical chest pain and subsequent EKGs and enzymes were negative. The employee had been admitted to Missouri Baptist for his back surgery but was told that he had lung problems and could not have surgery. He went to a pulmonologist who put him on Prednisone and Spiriva. On exam, the employee had slight scattered rales but no clear cut wheezing. Dr. Viahovich stated the employee's coronary artery disease was stable at the time; and a recent stress test did not show any ongoing ischemia.

On March 6 Dr. Daud stated that the employee had severe COPD, a history of MI, ongoing tobacco abuse and lumbar disc disease. The employee had shortness of breath which tends to occur daily with associated chest tightness and wheezing. The employee stopped Spiriva and was to continue to taper steroids. The employee would try to quit smoking but was not interested in any prescription treatment.

On March 18, 2008 Dr. Bernardi stated that the employee was not medically cleared for surgery mainly due to significant pulmonary problems; and it was very unlikely that the employee was going to be cleared for surgery. The only other treatment option which would not be truly viable would be a set of lumbar epidural steroid injections but the employee was not interested in having those done. At that point, Dr. Bernardi thought the employee was at maximum medical improvement and rated the employee with 10% permanent partial disability of the body as a whole due to the December 28, 2007 work injury. On May 4, 2008 Dr. Bernardi stated that the MRI showed mild degenerative disc disease and a disc herniation at L4-5. He did not factor the degenerative disc disease into his 10% disability rating. The disability rating was based entirely on the lumbar radiculopathy.

The employee settled his claim against the employer-insurer in April of 2009 for 20% permanent partial disability of the body as a whole referable to the low back.

On June 1, 2010 the employee went to Central Missouri Pain Management. The employee had mid thoracic pain radiating around to his chest which had been ongoing for about a month after lifting heavy boxes during moving. An MRI in May showed an acute T8 fracture and chronic fractures at T5 and T7. The employee had ongoing low back and leg complaints since falling out of a truck. He had low back surgery at least twenty five years ago. Another lumbar spine surgery was scheduled but his lungs were too bad for surgery and it was cancelled. Diagnosed were lumbar radiculopathy, back pain and pain and numbness in the entire left leg. Chronic obstructive pulmonary disease was also diagnosed. The employee had severe chronic obstructive pulmonary disease and emphysema obvious on examination. He uses oxygen as needed especially at bedtime. The employee had coronary artery disease with five stents placed. The employee has tried Valium, Prednisone for his lungs, Skelaxin, MS Contin for his back and Vicodin. The employee had severe lung disease obvious by exam and had a stent placed within the last six months. The employee needed to get clearance from the pulmonologist regarding his lung disease as to whether he can be sedated for a kyphoplasty and get clearance from his cardiologist regarding Plavix. If cleared, a T8 kyphoplasty would be performed for the T8 compression fracture. Lumbar epidural steroid injections were discussed.

In June, a kyphoplasty of the T8 vertebral body was performed for a compression fracture. In September, a left lumbar epidural injection at L4 and at L5 was performed. In October and November, lumbar epidural steroid injections were performed. On October 7, an EMG was performed for left leg pain/numbness. In the history it was noted that the employee had several lumbar surgeries in the remote past. He had ongoing back pain and since the end of 2007 had left leg pain and numbness which was progressing. Past history was chronic obstructive pulmonary disease/asthma, tobacco abuse, osteoporosis with prior compression fracture, and multiple spinal surgeries. The test results showed no evidence of active left lumbosacral radiculopathy and possible left ankle dorsiflexor weakness.

In January of 2011 a radio frequency thermocoagulation of the left L5 dorsal root ganglion was performed. In February, a left facet joint block at L3-4, L4-5 and L5-S1 was performed. In March, a left sacroiliac joint injection was performed.

On May 7, 2008 the employee saw Dr. Berkin. The employee injured his lower back twenty five years ago while lifting logs and had three back surgeries by Dr. VanderLugt. On examination, there was a ten centimeter scar noted in the mid line. The range of motion was reduced in flexion, extension and right and left lateral flexion. There was positive straight leg raising for lower back pain at forty five degrees of elevation of the right leg and thirty degrees of the left leg. As a result of the December 28, 2007 accident, Dr. Berkin diagnosed a lumbar strain and herniated discs at L4-5 and L5-S1. Dr. Berkin put restrictions of avoiding excessive squatting, stooping, turning, twisting, lifting and climbing. If he was unable to undergo surgery for the low back injury; he recommended a series of epidural steroid injections. He should be permitted frequent breaks to avoid exacerbation of his symptoms or further injury to his back. It was Dr. Berkin's opinion that as a result of the December 28, 2007 accident, the employee sustained a 30% permanent partial disability of the body as a whole at the lumbosacral spine.

With respect to the pre-existing conditions, it was Dr. Berkin's opinion that the employee had a 25% permanent partial disability of the body as a whole due to the pre-existing cardiac disease. Due to the chronic obstructive pulmonary disease, Dr. Berkin rated the employee at 25% permanent partial disability of the body as a whole. The employee had left knee surgery by Dr. VanNess and surgery by Dr. VanderLugt on his left foot after a chainsaw injury. On examination of the left knee, there was a nine centimeter scar. The Achilles' reflex was absent on the left. There was decreased sensation over the anterior surface of the left knee and over the left lower leg. It was Dr. Berkin's opinion that the employee had a 25% permanent partial disability of the left lower extremity at the knee. The employee had a prior injury to his right arm while operating a saw mill and underwent surgery. There was a twenty seven centimeter scar over the volar surface extending from the antecubital fossa of the right elbow into the right wrist. There was decreased sensation over the volar surface of the right forearm and right hand. Dr. Berkin rated the employee at 20% of the right upper extremity at the level of the elbow.

It was Dr. Berkin's opinion that the pre-existing disabilities represented a hindrance or obstacle to employment or re-employment at the time of the December 2007 injury. He felt that the disability resulting from the December 2007 injury created a significantly greater disability than the sum of his individual disabilities and a loading factor should be applied. Based on the nature and extent of his disabilities, coupled with his age and limited education, it was Dr. Berkin's opinion that the employee was not capable of competing for or maintaining gainful employment in the open labor market.

The employee saw Timothy Lalk for a vocational rehabilitation evaluation on August 7, 2008. Mr. Lalk's deposition was taken on January 28, 2011. The employee was open and cooperative throughout the interview but his speech and responses were slow which Mr. Lalk stated was a sign of fatigue. The employee is 54 years old and left school during the ninth grade; and has not made any attempt to obtain a GED and had no vocational or technical training. On the Wide Range Achievement Test, the employee scored at the fourth grade level on reading and at the sixth grade level on arithmetic. On the reading comprehension portion of the Adult Basic Learning Examination, the employee scored at a 4.8 grade level. Mr. Lalk stated that the scores indicated that the employee would not be a candidate for training at the post secondary level; and he did not think the employee could acquire skills to do a sedentary job.

The employee indicated he needs to move slowly and rest frequently during the day. After getting up at five or six in the morning, he needs to go to bed around noon or 1:00 p.m. and sleep for two to three hours because he is worn out and his low back pain has increased. Mr. Lalk stated that there is no employment where an employer would be expected to provide the accommodation the employee would need in order to rest and control his symptoms during a typical work day. Mr. Lalk cannot recommend any vocational rehabilitation services unless the employee can improve the control of his symptoms and increase his stamina so that he is able to function at a sedentary level or greater during a full work day on a regular basis. It was Mr. Lalk's opinion that the employee is not able to secure and maintain employment in the open labor market and would not be able to compete for any position. Mr. Lalk did not believe the employee would be able to sustain any type of employment as he would not meet the

expectations of any employer in his performance of duties by persisting through tasks through a full work day.

It was Mr. Lalk's opinion that the pre-existing medical conditions relating to the chronic obstructive pulmonary disease, right elbow, left knee and cardiac disease have been a hindrance or obstacle to employment or re-employment in the open labor market. The primary problem is the shortness of breath and the fatigue that would accompany the COPD and would be the most limiting factor. The employee had been able to work with those conditions but he was working in a job that was doing primarily sedentary work for most of the time interrupted by short periods of activity where he had to lift some heavy objects and do maintenance on his truck. The employee would not be able to do work throughout a full work day in which he would have to stand for a long periods, squat and do a lot of walking, and perform extended periods of lifting, reaching, pushing or pulling with his upper extremities. Those jobs would not be available to him due to his cardio pulmonary condition.

It was Mr. Lalk's opinion that the employee is unemployable in the open labor market as a result of the combination of his pre-existing partial disabilities primarily of the COPD and the work injury to his low back that occurred on December 28, 2007. The employee described problems with fatigue which he attributed to his breathing condition and problems with his low back and both of those conditions limit his activity during the day. Mr. Lalk stated the medical records substantiate that the employee's conditions were significant enough to interfere with his vocational rehabilitation. If the employee's need to lie down and take naps only developed after his back injury, it was Mr. Lalk's opinion that the employee's exhaustion and need to rest during the day due to his fatigue was from his low back condition and that kept him from working.

The employee saw Sherry Browning for a vocational evaluation on September 17, 2010. Her deposition was taken March 18, 2011. The employee sat in an office chair with one break during the three hour interview. As the interview progressed he leaned more on his right side and appeared somewhat uncomfortable. He wheezed and gasped occasionally. The employee reported having no conditions that inhibited his abilities prior to the 2007 back injury and described some changes in his physical abilities. He continued to work at a physically demanding job and repair and maintain his truck without any physician or self imposed restrictions or accommodation with the exception of alternate use of his hands while driving.

The employee's work was very physical, and the employee had a limited formal education. Testing was somewhere around the fourth grade level which is slow but is considered basically functional. The employee's prior work was very physical, and due to the pain and limitations, Ms. Browning did not think the employee could work in heavy, medium or light jobs. It was Ms. Browning's opinion that the employee is not employable in the open labor market as a result of the December 2007 back injury and subsequent functional limitations and chronic pain. The employee has a herniated L4-5 disc with radicular pain and compression on L5. The limitation sequelae coming from the December 28, 2007 injury was significant enough to keep the employee out of the work force. Her opinion is based upon the amount of pain associated with the back injury.

Ms. Browning stated that it was clear that the employee has had a number of pre-existing medical conditions some of which are ongoing but she did not believe these conditions were a hindrance to employment at the time of the back injury. Those conditions include less range of motion in his left ankle; and injuring his arms years ago where he would switch hands driving. There was nothing with those conditions which inhibited his employment. The pre-existing conditions did not appear to have any real effect at all. He could work in a job that was medium to heavy labor five to six days a week, drive hundreds of miles, and lift a hundred to a hundred and fifty pounds and repair his truck on Sundays. The employee was able to do extremely heavy physical work.

Ms. Browning stated that due to his limited education, achievement scores, work history doing physical jobs and a back injury and ongoing herniation that is not going to be repaired, the employee cannot work. When asked if he was unemployable in the open labor market due to the combination of the primary injury and his pre-existing disability, Ms. Browning stated that it was not a combination, because the employee has a herniated disc that is not going to be repaired and he is not going to be able to go back to work after the December 28, 2007 accident.

The employee testified that currently he has severe back pain down his left leg which is sometimes severe enough that he can hardly walk. The pain affects his ability to stand for any length of time. He can stand for about five minutes before he has to sit down. When he sits down he has to keep adjusting his position. He can sit thirty to sixty minutes before he needs to walk around. If he bends too far he cannot get up and will sometimes needs assistance to get up. He does not do any squatting or bending if he does not have to. He gets up around five or six in the morning and by noon or one o'clock he has to sleep a couple of hours due to his low back. Normally he sleeps in a recliner. After December 28, 2007, the employee stopped his trucking business and did not go back to work. He is on social security disability. The employee's worst problem is low back pain which goes down the left leg into the foot. His left foot does not work as it should. The pain does not go away. The employee stated that he is unable to work due to a combination of his primary back injury and his pre-existing disabilities

## **RULINGS OF LAW:**

### ***Issue 1. Liability of the Second Injury Fund for permanent total disability or permanent partial disability.***

The employee is claiming that he is permanently and totally disabled. The term "total disability" in Section 287.020.7 RSMo, means inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. See Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. See Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo. App. 1992). Total disability means the

“inability to return to any reasonable or normal employment.” An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. See Brown v. Treasurer of State of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990).

The question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person’s present physical condition, reasonably expecting the employee to perform the work for which he or she entered. See Reiner at 367, Thornton v. Haas Bakery, 858 S.W.2d 831, 834 (Mo. App. 1993), and Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995). The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo.

The first question to be addressed is whether the employee is permanently and totally disabled. If the employee is permanently and totally disabled, then the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a combination of the pre-existing injuries and conditions and the employee’s compensable work-related accident and injuries. Under Section 287.220.1 RSMo, the pre-existing injuries must also have constituted a hindrance or obstacle to the employee’s employment or re-employment.

I find that the employee was a very credible and persuasive witness on the issue of permanent total disability. The employee offered testimony concerning the impact his condition has had on his daily ability to function at home or in the work place. His testimony supports a conclusion that the employee will not be able to compete in the open labor market. The employee was observed during the hearing and exhibited behavior and physical patterns including trouble getting out of the chair several times and walking gingerly and slowly.

The observations of vocational experts Tim Lalk and Sherry Browning confirm my observations during the hearing. Mr. Lalk stated that the employee exhibited signs of fatigue. Ms. Browning stated that the employee leaned more on the right side; appeared to be uncomfortable; and wheezed and gasped occasionally. The testimony and observed behavior of the employee were important on the issue of permanent total disability.

It was Dr. Berkin’s opinion that the employee was not capable of competing for or maintaining gainful employment in the open labor market. It was Mr. Lalk’s opinion that the employee is not able to secure and maintain employment in the open labor market and would not be able to compete for any position; and was unemployable in the open labor market. It was Mr. Browning’s opinion that the employee cannot work and is not employable in the open labor market.

Based on a review of all the evidence, I find that the opinions of Dr. Berkin, Mr. Lalk, and Ms. Browning are credible and persuasive on whether the employee is permanently and totally disabled. Based on the credible testimony of the employee and the supporting medical and vocational rehabilitation evidence, I find that no employer in the usual course of business would reasonably be expected to employ the employee in his present condition and reasonably expect the employee to perform the work for which he is hired. I find that the employee is unable to compete in the open labor market and is permanently and totally disabled.

Given the finding that the employee is permanently and totally disabled, it must be determined whether the primary injury alone and of itself resulted in permanent total disability.

It was Dr. Bernardi's opinion that as a result of the December 28, 2007, that the employee had sustained a 10% permanent partial disability of the body as a whole. He did not factor into that rating the employee's degenerative disc disease. It was Dr. Berkin's opinion that as a result of the December 28, 2007 accident, the employee sustained a 30% permanent partial disability of the body as a whole at the level of the lumbosacral spine. It was Ms. Browning's opinion that the employee is not employable in the open labor market as a result of the December 28, 2007 back injury. The employee's herniated L4-5 disc with radicular pain and compression on L5 was not going to be repaired and that was significant enough to keep the employee out of the work force. The employee settled his claim against the employer-insurer for 20% permanent partial disability of the body as a whole referable to the low back.

Based upon the evidence, I find that the opinions of Dr. Bernardi and Dr. Berkin are persuasive and credible and are more credible and persuasive than the opinion of Ms. Browning regarding the extent of the disability from the last injury alone. I find that as a result of the last injury, the employee sustained permanent partial disability. Based upon the evidence, I find that as a direct result of the last injury the employee sustained a permanent partial disability of 20% of the body as a whole referable to the low back. I find that the employee's last injury alone did not cause the employee to be permanently and totally disabled.

The next issue to be addressed is whether the employee had pre-existing permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment or re-employment.

With regard to his low back, since his surgery the employee continued to have low back pain. His back and ankle were weak which affected how many truck loads he did.

With regard to his right arm which was his dominate arm, it had loss of strength, loss of feeling and problems with fine finger manipulation. He started using his left arm most of the time, and changed the way her performed maintenance on his truck. Dr. Berkin rated the employee at 20% of the right upper extremity at the level of the elbow.

With regard to his left knee, it was painful, stiff, weak, and locked up. The knee affected his lifting, and he put more weight on his right side. He had problems with squatting and it affected his ability to do his job. It was Dr. Berkin's opinion that the employee had a 25% permanent partial disability of the left lower extremity at the knee.

With regard to his cardiac problems, he was weak and was tired all of the time. He had trouble working in the heat, and his son started helping more with truck maintenance especially in hot weather. Due to the heart problems, he changed his schedule. When he got tired he would stop working and if driving, he would pull over to rest. It was Dr. Berkin's opinion that the employee had a 25% permanent partial disability of the body as a whole due to the pre-existing cardiac disease.

With regard to his chronic obstructive pulmonary disease, the employee had shortness of breath and was short of wind if he did anything. He was on inhalers and a BiPap breathing machine. Doing manual labor caused shortness of breath which slowed him down at work, and caused him to take breaks and rely on his son for maintenance work. Due to the chronic obstructive pulmonary disease, Dr. Berkin rated the employee at 25% permanent partial disability of the body as a whole. The employee's credible testimony was that prior to the December of 2007 accident at times he took naps during the day due to his heart and lung conditions.

It was Dr. Berkin's opinion that the pre-existing disabilities represented a hindrance or obstacle to employment or re-employment at the time of the December 2007 injury. It was Mr. Lalk's opinion that the pre-existing medical conditions relating to the chronic obstructive pulmonary disease, right elbow, left knee and cardiac disease have been a hindrance or obstacle to employment or re-employment in the open labor market. Ms. Browning stated that it was clear that the employee has had a number of pre-existing medical conditions some of which are ongoing but she did not believe those conditions were a hindrance to employment at the time of the back injury.

Based on a review of the evidence including the credible testimony of the employee, I find that the opinions of Dr. Berkin and Mr. Lalk are persuasive and credible and are more credible and persuasive than the opinion of Ms. Browning on whether the employee's pre-existing conditions were a hindrance or obstacle to employment or reemployment. I find that the employee's pre-existing conditions and permanent partial disabilities including the cardiac disease, chronic obstructive pulmonary disease, left knee problems, and right arm problems constituted a hindrance or obstacle to his employment or to obtaining re-employment.

It was Ms. Browning's opinion that the employee is not employable in the open labor market as a result of the December 2007 back injury alone. It was Dr. Berkin's opinion that the disability resulting from the December 2007 injury created a significantly greater disability than the sum of his individual disabilities and a loading factor should be applied. Based on the nature and extent of his disabilities, coupled with his age and limited education, it was Dr. Berkin's opinion that the employee was not capable of competing for or maintaining gainful employment in the open labor market. It was Mr. Lalk's opinion that the employee is unemployable in the open labor market as a result of the combination of his pre-existing partial disabilities and the work injury to his low back that occurred on December 28, 2007.

I find that the opinions of Dr. Berkin and Mr. Lalk are persuasive and credible, and are more persuasive and credible than the opinion of Ms. Browning. I find that the employee's pre-existing injuries, conditions and disabilities to his body as a whole referable to the cardiac disease and chronic obstructive pulmonary disease; the left knee; and right arm combined synergistically with the primary injury to the body as a whole referable to the low back to cause the employee's overall condition and symptoms. Based on the evidence, I find that the employee is permanently and totally disabled as a result of the combination of his pre-existing injuries/conditions and the conditions caused by the December 28, 2007 accident and injury.

On March 18, 2008 Dr. Bernardi stated that the employee was not medically cleared for surgery mainly due to significant pulmonary problems; and it was very unlikely that the employee was going to be cleared for surgery. Dr. Bernardi stated that the employee was at maximum medical improvement. The insurer stopped paying temporary total disability benefits on March 18, 2008. I find that the employee was in his healing period and had not reached the point where further progress was not expected until March 18, 2008.

I find that for the purpose of determining liability of the Second Injury Fund, the permanent partial disability of 20% of the body as whole referable to the low back would have been payable in 80 weekly installments commencing on March 19, 2008, at the end of the healing period, and continuing through September 30, 2009. Since the compensation rate for permanent partial disability is less than the amount payable for permanent total disability; the Second Injury Fund is liable for the difference between what the employee is receiving for permanent partial disability from the employer-insurer and what he is entitled to receive for permanent total disability under Section 287.220.1 RSMo. The difference between the permanent total disability rate of \$663.95 per week and the permanent partial disability rate of \$389.04 per week is \$274.91 per week. The Second Injury Fund is therefore ordered to pay to the employee the sum of \$274.91 per week for 80 weeks commencing on March 19, 2008 and ending on September 30, 2009. Commencing on October 1, 2009 the Second Injury Fund is responsible for paying the full permanent total disability benefit to the employee at the rate of \$663.95 per week.

These payments for permanent total disability shall continue for the remainder of the employee's lifetime or until suspended if the employee is restored to his regular work or its equivalent as provided in Section 287.200 RSMO.

### **ATTORNEY'S FEE**

Gary Matheny, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

### **INTEREST**

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

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Lawrence C. Kasten  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*