

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

Injury No.: 03-071311

Employee: James Hall
Employer: Ameren UE
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: March 26, 2003
Place and County of Accident: Jefferson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence, read the briefs, heard oral arguments and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 11, 2008. In addition, the Commission would like to clarify the evidence surrounding the award of temporary total disability benefits to employee.

"[T]emporary total disability" is a judicial creation that is defined by case law and not by statute. . . . Temporary total disability benefits are owed until the employee can find employment or the condition has reached the point of "maximum medical progress." Thus, temporary total disability benefits are not intended to encompass disability after the condition has reached the point where further progress is not expected.

Cardwell v. Treasurer of Mo., 249 S.W.3d 902, 909 (Mo.App. E.D. 2008) (internal citations omitted). "[T]he Commission does not have to make its decision only upon testimony from physicians; it can make its findings based on the entire evidence." *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 234 (Mo.App. 2003) (citing *Smith v. Richardson Bros. Roofing*, 32 S.W.3d 568 (Mo.App. 2000)).

Dr. Ollinger opined that employee could return to work on January 21, 2004. However, Dr. Ollinger did not believe employee's cubital tunnel syndrome was work related. The administrative law judge specifically rejected that portion of Dr. Ollinger's opinion, and found that employee's bilateral cubital tunnel syndrome was caused by employee's work. Therefore, employee was not at maximum medical improvement on January 21, 2004, because his bilateral cubital tunnel syndrome had yet to be addressed.

On March 8, 2005, Dr. Park performed left cubital tunnel release surgery on employee. Dr. Park released employee from his care on March 17, 2005. Employee was not happy with the results of that surgery, so he did not have the same surgery performed on his right elbow. Therefore, as of March 17, 2005, employee's bilateral cubital tunnel syndrome was no longer expected to improve. As such, employee reached maximum

medical improvement on that date and his total temporary disability ended.

Based on the above, the award and decision of Administrative Law Judge Carl Strange, issued March 11, 2008, is affirmed, as supplemented herein, and is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 30th day of September 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

Smith was overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: James Hall

Injury No. 03-071311

Dependents: N/A

Employer: Ameren UE

Additional Party: Second Injury Fund

Insurer: Self-Insured

Hearing Date: December 28, 2007

Checked by: CS/kh

SUMMARY OF FINDINGS

- Are any benefits awarded herein? Yes
- Was the injury or occupational disease compensable under Chapter 287? Yes
- Was there an accident or incident of occupational disease under the Law? Yes
- Date of accident or onset of occupational disease? March 26, 2003
- State location where accident occurred or occupational disease contracted: Jefferson County, Missouri
- Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
- Did employer receive proper notice? Yes
- Did accident or occupational disease arise out of and in the course of the employment? Yes
- Was claim for compensation filed within time required by law? Yes
- Was employer insured by above insurer? Yes
- Describe work employee was doing and how accident happened or occupational disease contracted: Employee did repetitive twisting, turning, pulling and keyboarding for employer over the course of several years which caused bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome.
- Did accident or occupational disease cause death? No
- Parts of body injured by accident or occupational disease: Bilateral Upper Extremities
- Nature and extent of any permanent disability: \$51,324.11 (See Findings)

- Compensation paid to date for temporary total disability: \$0.00
- Value necessary medical aid paid to date by employer-insurer: \$10,028.63
- Value necessary medical aid not furnished by employer-insurer: \$3,304.30 (See Findings)
- Employee's average weekly wage: \$1,269.23
- Weekly compensation rate:

\$649.32 for temporary total disability and permanent total disability
 \$340.12 for permanent partial disability

- Method wages computation: By Agreement
- Amount of compensation payable:

Previously Incurred Medical Aid:	\$ 3,304.30
Temporary Total Disability:	\$ 66,601.68
Permanent Partial Disability:	<u>\$ 51,324.11</u>
Total:	\$121,230.09 (See Findings)

- Second Injury Fund liability:

Permanent total disability benefits from Second Injury Fund (See findings in Issue 5).

- Future requirements awarded: None

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: Attorney Ronald Little and Shelia Blaylock

FINDINGS OF FACT AND RULINGS OF LAW

On December 28, 2007, the employee, James Hall, appeared in person and by his attorney, Ronald Little and Shelia Blaylock, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, John Dietrick. The Second Injury Fund was represented at the hearing by Assistant Attorney Eileen Krispin. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about March 26, 2003, Ameren UE was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured.
2. On or about March 26, 2003, the employee was an employee of Ameren UE and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. The employer had notice of employee's accident.
4. The employee's claim was filed within the time allowed by law.
5. The employee's average weekly wage was \$1,269.23, his rate for temporary total disability and permanent total disability is \$649.32, and his rate for permanent partial disability is \$340.12.
6. The employer has furnished \$10,028.63 medical aid to employee.
7. The employer has paid no temporary total disability benefits.

ISSUES:

- Occupational Disease;
- Medical Causation;
- Previously Incurred Medical Aid;
- Nature and Extent of Disability; and
- Liability of the Fund.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- Medical Records and Medical Bills of Dr. Henry Ollinger;
- Medical Records and Medical Bills of Neurological & Electrodiagnostic Institute;
- Medical Records and Medical Bills of Auburn Surgery Center;
- Medical Records and Medical Bills of Cape Neurological Surgeons;
- Medical Records and Medical Bills of Missouri Baptist Medical Center;
- Medical Records of St. Francis Medical Center;
- Medical Records of Cape Neurological Associates;
- Medical Records of Immediate Healthcare;
- Medical Records and Medical Bills of Dr. John Askew;

- Medical Records of Dr. John Askew;
- Medical Records of Southeast Missouri Hospital;
- Medical Records of Regional Primary Care Group;
- Medical Records of Dr. Gilberto Lozano;
- Deposition of Dr. Bruce Schlafly and Exhibits;
- Deposition of Dr. Raymond Cohen and Exhibits;
- Deposition of James England and Exhibits;
- Correspondence Requesting / Denying Medical Treatment;
- Medical Bill Spreadsheet;
- Temporary Total Disability Spreadsheet;
- Permanent Total Disability Spreadsheet;
- Archive Records from Division of Workers' Compensation; and
- Attorney Contract.

Employer-Insurer's Exhibits

- Deposition of Dr. Henry Ollinger and Exhibits.

FINDINGS OF FACT:

Based on the testimony of James Hall ("employee") and the medical records and reports admitted, I find as follows:

At the time of the hearing, the employee was 62 years old and was not married at the time of his injuries. He married his present wife on May 8, 2004. In addition to obtaining his high school diploma, the employee graduated from Union University with a Bachelor of Science Degree in Business Administration. His other specialized training included graduate work at Southeast Missouri University and electrical training in the US Army. Following his honorable discharge from the Army, the employee went to work in Operations at the New Madrid Power Plant. While employed at the New Madrid Power Plant, the employee injured his low back in a work related explosion. As a result of the injury, the employee underwent a left L5 partial hemilaminectomy with removal of an extruded disc on November 9, 1976 at Baptist Memorial Hospital. Following his injury, the employee began working at Sikeston Public Schools as a Youth Program Employment Coordinator. After two years, the employee went to work in Operations for the Sikeston Power Plant. In December of 1980, Ameren UE hired the employee to work in Operations at the Calloway Power Plant. After 7 years, the employee transferred to the Rush Island Plant in Jefferson County, Missouri.

Due to additional back problems and leg pain, the employee underwent a second surgery to his low back by Dr. Yong Kim on November 1, 1991. Dr. Kim performed a microlumbar discectomy at L5-S1 on the left due to the recurrent herniated disc (Employee Exhibit F). On May 28, 1992, Dr. Kim rated the employee's 1976 surgery at 30% permanent partial disability and his 1991 surgery as an additional 15% permanent partial disability due to additional scarring around the nerve root (Employee Exhibit G). Following the second surgery, the employee continued to have occasional pain and numbness due to his back injury and receive sporadic treatment for it. On January 19, 1998, Dr. Reno R. Cova noted that the MRI of the employee's back indicated that he had scar tissue in his lumbar region. As a result of the employee's medical problems, Dr. Cova requested that the employer place the employee on light duty for 12 months with restrictions of lifting less than 25 pounds and no excessive pulling or repetitive bending. Due to the employee's performance, Dr. Cova issued a letter to the employer on April 28, 1999 and requested that the employee be left on a job that does not entail lifting (Employee Exhibit H). At the hearing, the employee testified that the employer left him on light duty for approximately 5 years. As part of his light duty, the employee would tag valves by using a wrench to twist and pull the wire and metal tags. According to the employee, the light duty helped his low back, arms and legs because he was no longer constantly opening and closing valves with both hands like he had in the

past in Operations. On August 25, 1999, Dr. John H. Askew started monitoring and treating the employee for diabetes (Employee Exhibit I). In June of 2000, the employee was diagnosed with diabetes mellitus, hyperlipidemia due to obesity and hypertension. As part of the treatment, the employee was given medications and told to monitor his diet and exercise (Employee Exhibit J).

In order to reduce the strain on his low back and arms, the employee took another light duty job as the Corrective Action Coordinator to investigate accidents and create solutions to keep them from happening again. As part of his job duties, the employee would keyboard on his computer for approximately 6 hours a day. On March 29, 2002, the employee was taken to Southeast Missouri Hospital due to substernal chest pain. He underwent a cardiac catheterization and was given a stent to treat his arteriosclerotic coronary artery disease and acute inferior wall infarction (Employee Exhibit K). On April 9, 2002, Dr. Askew noted that the employee was having problems functioning and with mood swings and prescribed him Prozac (Employee Exhibit J). At the time of the hearing, the employee testified that he had problems with anxiety prior to his heart problems and that his medication was later switched from Prozac to Zanax and Cymbalta.

Although the employee had wrist and arm complaints since approximately 1993, their condition got progressively worse as the time passed. On March 26, 2003, the employee quit his employment with the employer. In April of 2003, the employee reported his hand and arm complaints to the employer and requested treatment. In August 2003, the nerve conduction studies indicated mild right and even milder left carpal tunnel in the employee's wrists (Employee Exhibit B). Following the nerve conduction study, Dr. Ollinger diagnosed the employee with bilateral carpal tunnel syndrome and early bilateral cubital tunnel syndrome. After a failed attempt to treat the employee's elbows and hands conservatively, Dr. Ollinger performed a right carpal tunnel release on December 5, 2003 and a left carpal tunnel release on December 19, 2003 (Employee Exhibit E). On January 21, 2004, Dr. Ollinger noted that the employee does have mild left cubital tunnel syndrome despite negative nerve conduction studies and released the employee to regular work without restrictions (Employee Exhibit A).

On March 24, 2004, the employee returned to Dr. Ollinger noting that his carpal tunnel complaints were resolved, but he was having some numbness and tingling in the ulnar nerve distribution in both hands and tender ulnar nerves of both elbows on a daily basis. Following a repeated nerve conduction study that was negative, Dr. Ollinger opined that the employee does have bilateral cubital tunnel syndrome but that his work was not a proximate cause or substantial factor in causing the condition. Instead, Dr. Ollinger attributed the bilateral cubital tunnel syndrome to the employee's diabetes and rated the employee at 5% permanent partial disability at the level of each wrist for the bilateral carpal tunnel syndrome (Employee Exhibit A). The employee's attorney requested treatment for the employee's bilateral cubital tunnel syndrome with Dr. Ollinger on September 20, 2004. On October 1, 2004, the employer denied further treatment based on it being unrelated to work (Employee Exhibit Q). Due to continued complaints regarding his elbow, the employee saw Dr. Kee Park on February 23, 2005. On March 8, 2005, Dr. Park performed a left cubital tunnel release on the employee (Employee Exhibit C & D). On March 17, 2005, Dr. Park released the employee. Since he was not happy with the result, the employee decided not to have the operation on the right elbow. A summary of the medical expenses for his left elbow surgery has been offered as Employee Exhibit R.

Following his last surgery, the employee has continued to get treatment and taking medication to treat his medical conditions. In January 2006, the medication that the employee was taking included Diovan, Vytorin, Zytac, Fluoxetine, Altace, baby aspirin, Xanax for anxiety, Darvocet for back pain, Naprosyn for back pain, vitamins and Ambien at bedtime for sleep (Employee Exhibit L). On February 21, 2006, Dr. Raymond F. Cohen examined the employee and opined that the right carpal tunnel syndrome, the left carpal tunnel syndrome and the left cubital tunnel syndrome were a direct result of his work and that work was a substantial factor in his disability. Further, Dr. Cohen opined that the treatment up to this point was medically necessary and was reasonable. After rating the employee's left wrist at 35% permanent partial disability and his left elbow at 30% permanent partial disability, Dr. Cohen rated his right wrist at 35% permanent partial disability due to the work injury. Due to the significant involvement of both upper extremities, Dr. Cohen applied a loading factor of 15%. Regarding the pre-existing injuries, Dr. Cohen opined that the employee had a 20% permanent partial disability of the whole person due to his coronary artery disease, a 45% permanent partial disability of the lumbar spine and no permanent partial disability due to the diabetes. Finally, Dr. Cohen noted that the combination of the employee's medical conditions was greater than the sum of each individual condition and that the employee was permanently and totally disabled (Employee Exhibit O).

On May 26, 2006, James England, a vocational rehabilitation expert, evaluated the employee and opined that after considering all of the factors, the employee is not able to sustain even sedentary to light work activity and is likely to remain totally disabled from a vocational standpoint (Employee Exhibit P). Following Mr. England's evaluation, Dr. Ollinger reviewed the employee's medical records on September 20, 2006 and opined that the bilateral cubital tunnel syndrome was still not related to the work with the employer but were due to the employee's diabetes. Despite his contention that it was not work related, Dr. Ollinger rated the employee's left elbow at 10% permanent partial disability and his right elbow at 20% permanent partial disability (Employee Exhibit A).

On December 11, 2006, the employee was evaluated by Dr. Bruce Schlafly who opined that the employee's work duties with the employer are the substantial and prevailing factor in the cause of his bilateral carpal tunnel syndrome and bilateral cubital syndrome and in the need for treatment. Dr. Schlafly recommended that the employee receive a right ulnar nerve transposition at the right elbow and noted that the employee may be permanently disabled. After rating the employee's wrists at 25% permanent partial disability each, Dr. Schlafly rated his right elbow at 35% permanent partial disability and his left elbow at 25% permanent partial disability due to the work injury. Finally, Dr. Schlafly recommended that a loading factor be applied to the employee's permanent partial disability (Employee Exhibit N). As of April 2007, the employee's medication included Diovan, Vytarin, Zytec, Plavix, Altace, Xanax for anxiety, Darvocet for back pain, Toprol, Naprosyn for back pain, Ambien at bedtime for sleep, Lunestra and Cymbalta (Employee Exhibit L).

At the time of the hearing, the employee was still having problems with pain in his wrists and his elbows, pain in his back, lifting more than 20 pounds, gripping things, bending down, typing, fishing, cooking, hunting, chores, driving, sleeping, walking and sitting. As a result of his surgeries, the employee has a one inch scar on his right wrist, a two inch scar on his left wrist, and a five to six inch scar on his left elbow. Additionally, the employee has offered a summary of temporary total disability owed and permanent total disability owed as Employee Exhibit S and T, respectively.

APPLICABLE LAW:

- Section 287.063.2 RSMo. in effect at the time of the occupational disease provided that "the employer who is liable to pay compensation for an occupational disease shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time of such last exposure."
- Section 287.063.1 RSMo. in effect at the time of the occupational disease stated that "an employee is conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 7 of section 287.067, RSMo."
- The burden is on the employee to prove all material elements of his claim. *Melvies v Morris*, 422 S.W.2d, 335(Mo.App.1968). The employee has the burden of proving that not only he sustained an accident that arose out of and in the course of his employment, but also that there is a medical causal relationship between his accident and the injuries and the medical treatment for which he is seeking compensation. *Griggs v A.B. Chance Company*, 503 S.W.2d 697(Mo.App.1973).
- Under the version of Section 287.020.2 RSMo. that was in effect at the time of the employee's accident, the term accident is defined to include only those injuries that are "clearly work related". Under this section an injury is "clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor".

- It is sufficient that causation be supported only by reasonable probability. See *Davis v. Brezner*, 380 S.W.2d 523 (Mo. App. 1964) and *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 658 (Mo. App. 1995).
- Under Section 287.140 RSMo., the employer is given the right to select the authorized treating physician. Subsection 1 also provides that the employee has the right to select his own physician at his own expense. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. *Emert v Ford Motor Company*, 863 S.W. 2d 629 (Mo.App. 1993); *Shores v General Motors Corporation*, 842 S.W. 2d 929 (Mo.App.1992) and *Hendricks v Motor Freight*, 520 S.W. 2d 702, 710 (Mo.App.1978).
- Under Section 287.140.1 “the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury”.
- Under Section 287.140 RSMo., the employer is given the right to select the authorized treating physician. Subsection 1 also provides that the employee has the right to select his own physician at his own expense. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. *Emert v Ford Motor Company*, 863 S.W. 2d 629 (Mo.App. 1993); *Shores v General Motors Corporation*, 842 S.W. 2d 929 (Mo.App.1992) and *Hendricks v Motor Freight*, 520 S.W. 2d 702, 710 (Mo.App.1978).
- Temporary total disability benefits are intended to cover the healing period and are not warranted beyond the point in which the employee is capable of returning to work. Temporary total disability benefits are not intended to compensate the employee after her condition has reached the point where further progress is not expected. *Brookman v Henry Transportation*, 924 S.W. 2d 286 (Mo.App.1996). See also *Williams v Pillsbury Company*, 694 S.W. 2d 488, 489 (Mo.App.1985). The pivotal question in determining whether an employee is totally disabled is whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in her present physical condition. *Brookman Id.* at 290.
- Section 287.020.7 RSMo. provides as follows:

The term “total disability” as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

- The phrase “the 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. *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. *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”. *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that persons physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).
- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a

major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

- Under Section 287.220.1 RSMo., the Second Injury Fund has no liability and the employer is responsible for full, permanent total disability benefits if the last injury "considered alone and of itself" results in permanent total disability. *Roller v Treasurer of the State of Missouri*, 935 S.W.2d 739 (Mo.App.1996) and *Maas v Treasurer of the State of Missouri*, 964 S.W.2d 541 (Mo.App.1998).

RULINGS OF LAW:

Issue 1. Occupational Disease & Issue 2. Medical Causation

The employer has disputed that the employee's bilateral cubital tunnel syndrome was related to the employee's work for the employer. In support of this contention, the employer offered the opinion of Dr. Henry Ollinger. Dr. Ollinger opined that the employee's bilateral carpal tunnel syndrome was caused by his work for the employer, but he thought that the employee's bilateral cubital tunnel syndrome was a result of the employee's diabetes. The employee presented evidence by Dr. Schlafly and Dr. Cohen in support of his contention that his bilateral cubital tunnel syndrome and bilateral carpal tunnel syndrome were related to his work for the employer. While Dr. Cohen opined that the employee's bilateral carpal tunnel syndrome and the left cubital tunnel syndrome were a direct result of the his work and that work was a substantial factor in his disability, Dr. Schlafly noted that the employee's work duties with the employer are the substantial and prevailing factor in the cause of his bilateral carpal tunnel syndrome and bilateral cubital syndrome and in the need for treatment.

At the time of the hearing, the employee testified that his work with the employer caused increased symptoms and problems in his arms and wrists. Due to other medical problems and the increased symptoms in his arms and wrist, the employee had to request light duty from the employer in order to continue working. Despite being placed on light duty, the employee continued to perform hand intensive work like twisting tags, pulling tags and keyboarding. Even Dr. Ollinger admits that the employee's work is hand intensive but he instead opined that the employee's diabetes caused the employee's bilateral cubital tunnel syndrome. All of the doctors have basically admitted that the employer has exposed the employee to the hazards of the occupational diseases of bilateral cubital tunnel syndrome and bilateral carpal tunnel syndrome. Both Dr. Schlafly and Dr. Cohen have even opined that due to this exposure that the employee has suffered bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. Further, they noted that the occupational disease was not due to the employee's controlled pre-diabetes. On the other hand, Dr. Ollinger failed to reasonably explain how the exposure from the employer caused the employee's bilateral carpal tunnel syndrome but did not cause his bilateral cubital tunnel syndrome. Although diabetes can be a factor in causing the bilateral cubital tunnel syndrome, the employee had continual exposure to the hazards of the occupational disease due to his employment with the employer. Both Dr. Schlafly's and Dr. Cohen's opinions account for the continual exposure that the employee encountered with the employer. Consequently, I find the opinions of Dr. Schlafly and Dr. Cohen are credible and more credible than the opinion of Dr. Ollinger.

The employee's testimony, the medical records, and the reports and depositions of Dr. Cohen and Dr. Schlafly are all credible and support a conclusion that the employee's repetitive work for the employer was a substantial factor in causing him to develop bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. I find that the opinion of Dr. Ollinger is not credible regarding the causation of the bilateral cubital tunnel syndrome.

In conclusion based on the evidence submitted at the hearing, I find that the employee sustained a compensable occupational disease and injury that arose out of and in the course of his employment. I further find the employee's work with the employer was a substantial factor in causing his bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome, and was clearly work related. The evidence supports a finding that the employee's bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome followed as a natural incident of his work and can be fairly traced to his employment as a proximate cause. I further find that the employee's injuries to his bilateral upper extremities and the need for medical treatment are medically causally related to the occupational disease.

Issue 3. Previously Incurred Medical Aid

Although the employee could have requested the entire amount of the bills, the employee has only requested an award of medical bills totaling \$3,304.30 for treatment for left cubital tunnel syndrome. The employer has disputed these bills on the basis of medical causation. The bills submitted by the employee include charges from Auburn Surgery Center and Cape Neurological Surgeons. Based on my above rulings regarding occupational disease and causation, the evidence also supports a finding that the charges were reasonable and the treatment was causally related to the employee's occupational disease. The employer is therefore directed to pay to the employee the sum of \$3,304.30 for the Auburn Surgery Center and Cape Neurological Surgeons bills related to the treatment of the employee's left cubital tunnel syndrome.

Issue 4. Nature and Extent of Disability

Temporary Total Disability:

The employee has requested an award of temporary total disability covering the day following his last day of work with the employer to the date he was released by Dr. Park following his left cubital tunnel release. The employer-insurer paid no temporary total disability benefits and denied coverage for the employee's bilateral cubital tunnel syndrome. Hind sight clearly indicates the employee has been totally disabled since March 26, 2003, and did not reach maximum medical improvement or the end of his healing period until he was released by Dr. Park. The employer-insurer chose not to authorize additional treatment in this case and in essence prolonged the healing period.

Based on the employee's testimony and the medical records, I find that the employee was temporarily totally disabled from March 27, 2003 through March 17, 2005 for a total for 102 4/7 weeks. The employer-insurer is therefore directed to pay to the employee the sum of \$649.32 per week for 102 4/7 weeks, for a total award of temporary total disability equal to \$66,601.68.

Permanent Partial Disability:

The testimony of the employee and the medical records confirm that the employee has suffered a significant disability as a result of his March 26, 2003 occupational disease of bilateral cubital tunnel syndrome and bilateral carpal tunnel syndrome. Based on this evidence, I find that the employee has a 30% permanent partial disability of his left upper extremity at the 210 week level. This disability is attributed to the employee's left carpal tunnel syndrome and left elbow cubital tunnel syndrome. The employer-insurer is therefore directed to pay to the employee the sum of \$340.12 per week for 63 weeks for a total award of permanent partial disability to his left upper extremity of \$21,427.56.

I further find that the employee has sustained a 30% permanent partial disability of his right upper extremity at the 210 week level. This disability is attributed to the employee's right carpal tunnel syndrome and right elbow cubital tunnel syndrome. The employer-insurer is therefore directed to pay to the employee the sum of \$340.12 per week for 63 weeks for a total award of permanent partial disability to his right upper extremity of \$21,427.56.

In addition to the permanent partial disability attributable to his left and right upper extremities, I find that

these two injuries combine synergistically to create an additional permanent partial disability for multiplicity equal to 15% of the total. The employer-insurer is therefore directed to pay to the employee the sum of \$340.12 per week for 18.9 weeks (63 weeks + 63 weeks = 126 weeks x 15% = \$18.9 weeks) for a total award for multiplicity of \$6,428.27. The combined award for permanent partial disability to the right and left upper extremities and multiplicity is therefore equal to \$49,283.39.

In addition to his permanent partial disability, the employee also has scars on both wrists and his left elbow from the surgical procedures. Based on these scars, I find that the employee is entitled to 6 weeks for disfigurement. The employer-insurer is therefore directed to pay to the employee the sum of \$340.12 per week for 6 weeks for a total of \$2,040.72 for disfigurement.

The total amount awarded against the employer-insurer for permanent partial disability and disfigurement is equal to \$51,324.11.

Issue 5. Liability of the Fund

On the question of whether the employee is permanently and totally disabled, it is significant to note that neither the employer-insurer nor the Second Injury Fund presented any reasonable evidence to suggest that the employee is capable of competing in the open labor market. Neither the employer-insurer's attorney nor the Assistant Attorney General representing the Second Injury Fund made this argument in their post-hearing briefs, and by implication seemed to have conceded that the employee is permanently and totally disabled. The employer's attorney has acknowledged that the employer-insurer is liable for some percentage of permanent partial disability for the employee's occupational disease, but argues that the employee's inability to compete in the open labor market is clearly the result of a combination of injuries. Conversely, the Second Injury Fund asserts that the employee's medical conditions have worsened post-injury which resulted in the permanent total disability.

The evidence in this case unequivocally supports a finding that the employee is permanently and totally disabled as a result of the combination of his pre-existing low back injuries, coronary artery/heart condition, his bilateral cubital tunnel syndrome, bilateral carpal tunnel syndrome and resulting treatment for the work related occupational disease. The employee had two prior low back surgeries, an insertion of a stent, and treatment on his back which had a significant impact on his ability to function both at home and in the work place. Prior to March 26, 2003, the employee even asked the employer to be placed on light duty so he could faithfully perform his job duties. A thorough review of the medical records indicates that the employee's low back condition never improved to the point where he was able to go for an extended period of time without seeking medical attention. There are numerous examples where the employee sought treatment for low back pain and numbness on the lower extremities prior to March 26, 2003. In addition to seeking treatment for his heart and anxiety, the employee also had several MRIs, x-rays, exams and different courses of testing for his pre-existing medical conditions prior to March 26, 2003.

Notwithstanding these significant disabilities, the employee continued to work for over 20 years at a physically demanding job. These preexisting disabilities did have an impact on his ability to perform his job and even forced him to request light duty. The evidence also supports a finding that the employee's primary injury of the occupational disease caused a significant disability to the employee's bilateral upper extremities. In accordance with my above findings, the employee suffered a 30% permanent partial disability of his right and left upper extremities as a whole as a result of his March 26, 2003 occupational disease.

Based on the evidence, I further find as of March 26, 2003, the employee had a preexisting disability to his lumbar spine equal to 37.5% of the body as a whole and a 17.5% preexisting disability to his body as a whole as a result of his coronary artery/heart condition. I further find that these preexisting disabilities were a hindrance or obstacle to the employee's employment or reemployment. The evidence also supports a finding that the employee's preexisting disabilities and his last occupational disease of March 26, 2003 combined synergistically and caused the employee to be permanently and totally disabled.

Based on these facts and the medical records, I find that the employee reached his maximum level of medical

improvement and the end of the healing period on March 17, 2005. The employer-insurer's permanent partial disability payments would therefore have commenced on March 18, 2005, and will continue for 126 weeks through August 17, 2007. Since the employee's permanent partial disability rate (\$340.12) is less than the agreed rate of compensation for permanent total disability (\$649.32), the Second Injury Fund is liable under Section 287.220.1 for the difference between the amount paid by the employer-insurer for permanent partial disability and the amount due for permanent total disability. The difference between the permanent total disability rate and the permanent partial disability rate is \$309.20 per week. The Second Injury Fund is therefore directed to pay to the employee the sum of \$309.20 per week for 126 weeks covering March 18, 2005 through August 17, 2007, for a total of \$38,959.20. Since all of this additional compensation has accrued prior to the date of the hearing, the full amount of this payment shall be due and payable as of the date this award becomes final.

In addition to the difference between the permanent total disability rate and the permanent partial disability rate, the Second Injury Fund is also liable for the full amount of the permanent total disability benefits commencing August 18, 2007. The Second Injury Fund is therefore directed to pay to the employee the sum of \$649.32 per week commencing on August 18, 2007, and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of the employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which the employee is restored to his regular work or its equivalent as provided in Section 287.200.2.

ATTORNEY'S FEE:

Ronald Little and Shelia Blaylock, 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.

Date: _____

Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Jeff Buker
Director
Division of Workers' Compensation

