

**FINAL AWARD DENYING COMPENSATION**  
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 08-120622

Employee: Harold Hembree  
Employer: Jerry Bennett Masonry (Settled)  
Insurer: Midwest Builders Casualty Mutual Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

**Introduction**

The parties asked the administrative law judge to resolve the issue of Second Injury Fund liability.

The administrative law judge rendered the following findings and conclusions: (1) employee sustained an incident of occupational disease that arose out of and in the course of his employment; (2) employee suffered a permanent partial disability of 14% of the left wrist as a result of the work injury of October 2008; (3) employee is permanently and totally disabled as a result of the October 2008 injury in combination with employee's preexisting conditions of ill-being; and (4) the Second Injury Fund is liable for permanent total disability benefits.

The Second Injury Fund filed a timely Application for Review with the Commission alleging the administrative law judge erred in ruling employee is permanently and totally disabled owing to his preexisting conditions combined with the October 2008 work injury.

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

**Findings of Fact**

After completing the tenth grade, employee dropped out of high school and entered the workforce. Employee became a bricklayer, an occupation he performed for more than 40 years. Employee did not obtain a GED and does not possess any special vocational training. Employee is not computer literate. Employee was 60 years old at the time of the hearing before the administrative law judge.

*Preexisting conditions of ill-being*

In June 2003 employee suffered a low back injury when employee stepped through a piece of scaffolding and fell about 5 feet to the ground. Employee underwent conservative treatment. Dr. P. Brent Koprivica examined employee in 2004 and rated his permanent partial disability from the injury at 20% of the body as a whole. Employee suffered residual discogenic pain with radiation into the lower extremity and loss of functional motion of the

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lumbar spine. Employee settled a workers' compensation claim arising from the injury for 10% permanent partial disability of the body as a whole.

On March 3, 2006, employee fell approximately 18 feet and suffered multiple injuries when a piece of scaffolding gave way. Employee suffered rib fractures and chest wall injuries, a comminuted intra-articular distal radius and ulnar fracture of the right wrist which contributed to the development of severe right carpal tunnel syndrome, a labral tear in the right shoulder with severe tendinopathy and acromioclavicular arthrosis, and right hip bruising and swelling. Employee was hospitalized immediately following the accident, and underwent surgeries on the right shoulder and right hand. Employee's multiple injuries left him with the following complaints and limitations: intermittent episodes of shortness of breath associated with the right-sided chest wall injury, severe residual stiffness and inability to use the right hand for grasping, a loss of right wrist and forearm motion, ongoing severe strength and motion deficits in the right shoulder, persistent numbness and chronic greater trochanteric bursitis affecting the right hip, and pain and swelling in the right leg.

Treating doctors determined employee was at maximum medical improvement from the effects of the March 2006 injuries as of April 4, 2007. Employee settled a workers' compensation claim arising from the March 2006 injuries for permanent partial disability of 50% of the body as a whole.

Employee returned to work in a light duty capacity in January 2007. Employee was not able to return to work as a bricklayer, but employer permitted employee to return to work as the designated "clean-up man." In this position, employee exclusively performed tuck pointing duties, which involved cleaning brick walls and preparing them for painting, as well as scrubbing bricks and sweeping floors. This was not a position typically available with employer, as each bricklayer would normally perform their own tuck pointing and clean-up tasks. Rather, employer created this position because there was no other work employee could perform.

#### Primary injury

Employee's work as a tuck pointer involved repetitive cleaning and scrubbing of bricks. As a result of the functional impairments of his right upper extremity resulting from the March 2006 injuries, employee was forced to rely heavily on his non-dominant left hand in performing these duties. On or about October 3, 2008, employee suffered an occupational disease injury as a result of this work, resulting in the development of a ganglion cyst in his left hand. Employee had to stop working in October 2008, and has not performed any work since. Employee received conservative treatment but declined surgery to remove the cyst in light of his preexisting right hand difficulties; employee did not want to be rendered incapable of using either upper extremity during the anticipated recovery period.

Employee continues to suffer pain and numbness in his left hand. Employee settled his claim for the primary injury with employer for 14% permanent partial disability of the left wrist. We find the settlement to be persuasive evidence of the nature and extent of disability resulting from the October 2008 left hand injury. We find that the primary

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injury resulted in a 14% permanent partial disability of the left upper extremity at the level of the wrist.

Expert opinion regarding permanent total disability

Dr. Koprivica examined employee in 2007 in regard to the March 2006 injuries and opined that employee sustained a 50% permanent partial disability of the body as a whole. Dr. Koprivica noted that his permanent partial disability rating was contingent on whether employee would be successful in sustaining employment.

Dr. Koprivica issued an addendum report in January 2009, in which he noted the following restrictions with respect to the March 2006 injury: no repetitive pinching or grasping with the right hand, no repetitive right wrist flexion or dorsiflexion, no repetitive ulnar or radial deviation of the right wrist, avoidance of repetitive or sustained activities above the right shoulder girdle, and avoidance of climbing, squatting, crawling, or kneeling. Dr. Koprivica deferred to a vocational expert as to the issue of permanent total disability, but opined that if a vocational expert found employee to be permanently and totally disabled owing to the restrictions referable to the March 2006 injury, then Dr. Koprivica believed employee was permanently and totally disabled owing to the March 2006 injury in isolation.

Michael Lala, a certified vocational counselor, evaluated employee and issued a report in May 2008. Mr. Lala opined that employee was permanently and totally disabled at that time. Mr. Lala explained that all of employee's medical restrictions translate vocationally to an extremely limited occupational base. In reaching his opinion that employee was permanently and totally disabled, Mr. Lala found it particularly significant that employee had lost the ability to perform work with his dominant right hand, wrist, and forearm. Mr. Lala acknowledged employee's accommodated position as a tuck pointer for employer, but opined that based on employee's age, education, past work experience, functional profile, vocational restrictions, and limited specific skills, employee could not realistically compete in the open labor market as of May 2008.

In his own testimony, employee expressed his belief that the clean-up man position was not accommodated work. We do not find employee's testimony persuasive on this point. We note that this characterization of the position conflicts with the opinions from both Dr. Koprivica and Mr. Lala that the clean-up work amounted to light or accommodated duty. We find more persuasive the expert opinion from Mr. Lala that the tuck pointing work amounted to light or accommodated duty. While employee should be lauded for his efforts in returning to the workforce, his inability to sustain that employment lends credence to the opinion from Mr. Lala that he would not be able to be employed on a sustained or routine basis. We deem persuasive and adopt Mr. Lala's opinion that employee was unable to compete in the open labor market as of May 2008.

We note that Dr. Koprivica issued another addendum report in June 2010 concerning the October 2008 occupational disease. At that time, Dr. Koprivica opined that employee was permanently and totally disabled owing to a combination of all of his disabling conditions, including the 2008 left hand injury. Dr. Koprivica expressly relied on Mr. Lala's May 2008 report finding permanent total disability, and cited the fact employee developed additional disability subsequent to the March 2006 injury. At his

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deposition, Dr. Koprivica testified that he believes employee is permanently and totally disabled owing to a combination of the October 2008 injury and preexisting conditions.

We find Dr. Koprivica's revised opinion regarding the cause of employee's permanent total disability lacking in persuasive force. Dr. Koprivica appears not to have recognized that Mr. Lala (a vocational expert, to whom Dr. Koprivica originally opined he would defer) found employee to be permanently and totally disabled as of May 2008, before the October 2008 left hand injury.

We note also that Mr. Lala performed a subsequent record review and issued an addendum report in April 2011. At that time, Mr. Lala opined that he still believed employee was unemployable in the open labor market given his vocational limitations. Mr. Lala did not specifically reference the October 2008 left hand injury in rendering this opinion, but did indicate that employee's permanent total disability was due to all of his disabilities resulting from his multiple injuries. Employee suggests that this necessarily includes the October 2008 injury; the Second Injury Fund disagrees. At his deposition, Mr. Lala appeared to endorse the former view when he testified that he issued the addendum report to make clear that the October 2008 injury was included in his permanent total disability analysis.

To the extent that Mr. Lala's permanent total disability opinion expressed in the April 2011 report and at his deposition includes the October 2008 left hand injury, we find that opinion lacking in persuasive force, as it conflicts with Mr. Lala's earlier opinion (which we have adopted) that employee was permanently and totally disabled as of May 2008.

### **Conclusions of Law**

#### *Second Injury Fund liability*

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in cases where an employee "who has a preexisting permanent partial disability ... receives a subsequent compensable injury." The Second Injury Fund is liable for permanent total disability benefits only where the evidence demonstrates that: (1) the employee suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

*Molder v. Mo. State Treasurer*, 342 S.W.3d 406, 411 (Mo. App. 2011)(citation omitted).

We have found persuasive and adopted Mr. Lala's expert vocational opinion that employee was permanently and totally disabled as of May 2008 as a result of his medical restrictions, lack of transferable skills, and extremely limited occupational base. We are not persuaded that employee's work as a designated tuck pointer amounted to work

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obtained through competition in the open labor market. Rather, it was a job that employer created for employee in order to accommodate his numerous physical restrictions following the March 2006 work injury, which effectively ended employee's 40-year career as a bricklayer. Notwithstanding employee's brief return to work as a tuck pointer, we are persuaded that no reasonable employer would be expected to hire employee given his physical condition as of May 2008.

It follows (and we so conclude) that employee was permanently and totally disabled as of May 2008. As a result, employee has failed to demonstrate that, at the time of the last injury, he suffered from a "preexisting permanent *partial* disability" as required under the statute. § 287.220.1 (emphasis added). Where employee was permanently and totally disabled prior to the primary injury, there is no basis for invoking Second Injury Fund liability.

We conclude, therefore, that the Second Injury Fund is not liable for permanent total disability benefits.

**Conclusion**

We reverse the award and decision of the administrative law judge. The Second Injury Fund is not liable for permanent total disability benefits.

The award and decision of Administrative Law Judge L. Timothy Wilson, issued June 28, 2012, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 3<sup>rd</sup> day of October 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

\_\_\_\_\_  
John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Harold Hembree

Injury No. 08-120622

Dependents: N/A

Employer: Jerry Bennett Masonry (Settled)

Insurer: Midwest Builders Casualty Mutual Company (Settled)

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

Hearing Date: May 23, 2012

Checked by: LTW

### 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: October 3, 2008
5. State location where accident occurred or occupational disease was contracted: Greene 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 occurred or occupational disease contracted: While engaged in employment with the Employer as a tuck pointer, during the period of January 2007 to October 2008, Employee performed repetitively throughout the full work day tuck pointing work. As a consequence of this work incident Employee sustained an occupational injury to his left hand, which involved a ganglion cyst.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left Wrist
14. Nature and extent of any permanent disability: 14% to Left Wrist
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A
17. Value necessary medical aid not furnished by employer/insurer? N/A

- 18. Employee's average weekly wages: Not Identified
- 19. Weekly compensation rate: \$772.53 (TTD / PTD) / \$404.66 (PPD)
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable: N/A (Employee and Employer / Insurer entered into a Stipulation for Compromise Settlement.)

22. Second Injury Fund liability: Yes

Weeks of permanent partial disability from Second Injury Fund: N/A

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund: Yes

Employee is entitled to permanent total disability benefits (\$772.53 per week) for his lifetime. There is a weekly differential (\$367.87) between permanent partial disability compensation paid by Employer / Insurer and permanent total disability compensation to be paid by Second Injury Fund. Accordingly, in light of Employee being deemed to have reached maximum medical improvement on June 23, 2010, and in light of Employer / Insurer being responsible for payment of 24.5 weeks of permanent partial disability compensation, the payment of permanent total disability compensation by the Second Injury Fund is effective as of June 23, 2010, and shall take into consideration 24.5 weeks of permanent partial disability compensation payable by Employer / Insurer.

**TOTAL: \$772.53 PER WEEK (LESS 24.5 WEEKS OF PPD PAID BY EMPLOYER & INSURER) FOR EMPLOYEE'S LIFETIME, EFFECTIVE AS OF JUNE 23, 2010.**

23. Future requirements awarded: Yes (See Award)

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Darren J. Morrison, Esq.

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Harold Hembree

Injury No. 08-120622

Dependents: N/A

Employer: Jerry Bennett Masonry (Settled)

Insurer: Midwest Builders Casualty Mutual Company (Settled)

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

The above-referenced workers' compensation claim, which involved the joining of two workers' compensation cases, was heard before the undersigned Administrative Law Judge on May 23, 2012.<sup>1</sup> The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about June 8, 2012.

The employee appeared personally and through his attorney Darren Morrison, Esq. The employer and insurer were not part of the evidentiary hearing, having previously entered into a Stipulation for Compromise Settlement with the employee, resulting in approval by an administrative law judge on or about June 23, 2010. The Second Injury Fund appeared through its attorneys, Stephen Freeland and Barbara Bean, Assistant Attorneys General.

In Injury No. 08-120622 the parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about October 3, 2008, Jerry Bennett Masonry was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Midwest Builders Casualty Mutual Company.
- (2) On the alleged injury date of October 3, 2008, Harold Hembree was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about October 3, 2008, the employee sustained an incident of occupational disease, which arose out of and in the course of his employment with the employer.
- (4) The above-referenced employment and incident of occupational disease occurred in Greene County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.

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<sup>1</sup> The workers' compensation cases that were joined for hearing include Injury Nos. 08-120622 and 06-029777.

- (5) The employee notified the employer of his injury as required by Section 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) At the time of the incident of occupational disease of October 3, 2008, the employee's average weekly wage was sufficient to allow a compensation rate of \$772.53 for temporary total disability compensation / permanent total disability compensation, and a compensation rate of \$404.66 for permanent partial disability compensation.
- (8) Temporary disability compensation was not provided to the employee.
- (9) The employer and insurer did not provide medical treatment to the employee.
- (10) The employee and employer / insurer entered into a Stipulation for Compromise Settlement for \$10,000 based upon approximate permanent partial disability of 14 percent referable to the left wrist. This Stipulation for Compromise Settlement was approved on June 23, 2010, which resolved the underlying claim filed against the employer / insurer.

The issue to be resolved by hearing in Injury No. 08-120622 is as follows:

- (1) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

In Injury No. 06-029777 the parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about March 3, 2006, Jerry Bennett Masonry was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Midwest Builders Casualty Mutual Company.
- (2) On the alleged injury date of March 3, 2006, Harold Hembree was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about March 3, 2006, the employee sustained an accident, which arose out of and in the course of his employment with the employer.

- (4) The above-referenced employment and accident occurred in Greene County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) At the time of the accident of March 3, 2006, the employee's average weekly wage was sufficient to allow a compensation rate of \$638.57 for temporary total disability compensation / permanent total disability compensation, and a compensation rate of \$365.08 for permanent partial disability compensation.
- (8) Temporary disability compensation was provided to the employee in the amount of \$28,825.05, representing 45 1/7 weeks in disability benefits.
- (9) The employer and insurer provided medical treatment to the employee, having paid \$87,296.45 in medical expenses.
- (10) The employee and employer / insurer entered into a Stipulation for Compromise Settlement for \$75,000 based upon approximate permanent partial disability of 50 percent to the body as a whole referable to the low back. This Stipulation for Compromise Settlement was approved on February 5, 2009, which resolved the underlying claim filed against the employer / insurer.

The issue to be resolved by hearing in Injury No. 06-029777 is as follows:

- (1) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

**EVIDENCE PRESENTED**

The employee testified at the hearing in support of his claim. Also, the employee offered for admission the following exhibits:

- Exhibit A.....Stipulation for Compromise Settlement in Injury No. 08-120622
- Exhibit B.....Stipulation for Compromise Settlement in Injury No. 06-029777
- Exhibit C.....Deposition of P. Brent Koprivica, M.D. (Inclusive of Attached Deposition Exhibits)
- Exhibit D.....Deposition of Michael Lala, CRC
- Exhibit E.....Medical Records
- Tab 1.....Ozark Magnetic Imaging

Tab 2 .....	St. John’s Physical Therapy
Tab 3 .....	Dr. Nicholas P. Carper
Tab 4 .....	St. John’s Health Center
Tab 5 .....	Dr. Scott Clarke, Spine Center
Tab 6 .....	Orthopaedic Specialists
Tab 7 .....	Dr. Jonathan Clark
Tab 8 .....	Dr. Victoria Kubik

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses at the hearing of this case. However, the Second Injury Fund offered for admission the following exhibit:

Exhibit I ..... Deposition of Harold Hembree

The exhibit was received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers’ Compensation in each file (Injury Number), which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in each Legal File, which include:

Injury No. 08-120622

- Notice of Hearing
- Request for Hearing-Final Award
- Stipulation for Compromise Settlement B/T Employee & Employer / Insurer
- Answer of Second Injury Fund to Claim for Compensation
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

Injury No. 06-029777

- Notice of Hearing
- Request for Hearing-Final Award
- Stipulation for Compromise Settlement B/T Employee & Employer / Insurer
- Answer of Second Injury Fund to Claim for Compensation
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

**DISCUSSION**

The employee, Harold Hembree, is 61 years of age, having been born on August 9, 1951. Mr. Hembree resides in Springfield, Missouri.

### *Education*

Mr. Hembree did not graduate from high school. According to Mr. Hembree, as a student his grades were not good; he dropped out of high school after completing the ninth grade. He did not obtain a GED, and does not presently possess a valid Driver's License. Also, he does not have any special vocational training, trade school, apprenticeships or certifications. He is not computer literate.

### *Work History*

Subsequent to dropping out of high school Mr. Hembree entered the work force, beginning employment as a Hod Carrier. In describing this vocation Mr. Hembree noted that a Hod Carrier mixes mortar and carries brick for the bricklayer, and he was working in this position to become a bricklayer. He later became a union bricklayer, and worked in this occupation for 40 plus years. (The vocational records of Mr. Lala note that during this period, for 21 years, Mr. Hembree owned his own company known as Hembree Masonry.)

In or around 2002 Mr. Hembree obtained employment with the employer, Jerry Bennett Masonry, working as a bricklayer. He continued in this employment until suffering a work injury on March 3, 2006. This injury necessitated a period of temporary total disability; eventually Mr. Hembree received a release to return to work and he returned to his employment with the employer, Jerry Bennett Masonry. Upon returning to this employment, however, Mr. Hembree was required to work as a tuck pointer.

According to Mr. Hembree bricklayers may perform tuck pointing work in the course of performing brick laying duties. However, in working as a tuck pointer for Jerry Bennett Masonry he was required to engage exclusively in tuck pointing work. He described the tuck pointing work to involve repetitive cleaning and scrubbing of bricks in order to prepare the bricks for painting, as well as washing and cleaning bricks. Mr. Hembree continued in this employment until suffering the occupational injury of October 3, 2008, which involved the development of a ganglion cyst in the left hand.

### *Prior Medical Conditions*

Prior to sustaining the work injury of October 3, 2008, Mr. Hembree suffered several injuries and/or medical conditions, which caused him to present with certain permanent disability. These prior medical conditions include:

- Low Back: In 1999 Mr. Hembree sustained a work injury, which involved 1,800 pounds of scaffolding being dropped from a forklift, striking him. The incident caused Mr. Hembree to sustain an injury to his low back and necessitated receipt of medical care. This medical care involved conservative treatment and included a diagnostic study in the nature of an MRI, which revealed moderate degenerative disk changes of the lumbar spine at the level of L4-L5 with a moderate diffuse bulge. This incident did not require surgery.

Following his recovery from the 1999 work injury Mr. Hembree returned to work full duty without restrictions. Dr. Koprivica notes that he “returned to all of his bricklaying activities without ongoing chronic symptoms or restrictions of any sort.”

In June 2003 Mr. Hembree sustained additional injury to his low back. This incident occurred when Mr. Hembree stepped onto certain scaffolding, and as he did so an unsecured board gave way causing him to fall approximately five feet to the ground, resulting in blocks and cords falling on top of him. This incident necessitated receipt of conservative medical treatment, which a MRI that revealed mild progression of the left lateral recess stenosis of the lumbar spine at the level of L4-L5, in comparison to the prior MRI performed in 1999.

Notably, during the period he was receiving treatment for this injury Mr. Hembree experienced an episode of back spasm and suffered a fall while camping. This fall caused Mr. Hembree to sustain a fracture to his second posterolateral rib, which necessitated additional medical treatment.

The 2003 work injury did not require Mr. Hembree to undergo any surgery. However, the incident resulted in Mr. Hembree suffering certain residual permanent disability. According to Dr. Koprivica, who examined Mr. Hembree in 2004, noted that this aggravating injury caused Mr. Hembree to develop “diskogenic pain with noted chronic mechanical back” and to suffer “significant ongoing losses of functional motion of his lumbar spine, which impact his capabilities on a daily basis.”

At the hearing Mr. Hembree indicated that the June 2003 work injury caused him to suffer residual low back pain, which included pain radiating into his buttock and lower extremity. Mr. Hembree further noted that it was difficult to deal with the pain; but he worked through the pain – “It’s a hard job but you work through the pain.” According to Mr. Hembree he settled the workers compensation claim with the employer and insurer based on approximate permanent partial disability of 10 percent to the body as a whole.

On or about March 3, 2006, Mr. Hembree sustained a work-related incident, which caused him to suffer multiple traumatic injuries, including an injury to his low back. This incident occurred when Mr. Hembree returned from break and climbed up on the scaffolding; he could not see that the board had been moved. As he was climbing the scaffolding a board gave way and Mr. Hembree fell approximately 16 feet to the ground.

- Left Thumb: In or around November 2001 Mr. Hembree sustained an injury to his left thumb, which involved a crush type injury with several hundred pounds smashing the left thumb. X-rays of the thumb were negative for fracture. He received conservative care and was released from treatment for the injury on January 2, 2002.
- Right Upper Extremity (Hand, Wrist, Forearm, Shoulder) / Right Hip / Right Rib Fractures (pneumothorax on the right): As a consequence of suffering the March 3, 2006, work injury and falling 16 feet, Mr. Hembree suffered multiple traumatic injuries, which necessitated immediate receipt of medical care, including

hospitalization at St. John's Medical Center in Springfield, Missouri. The injuries included the following:

- The injury to the chest wall involved rib fractures. He had a pneumothorax on the right. Mr. Hembree experienced complaints of chest wall pain, and notes experiencing intermittent episodes of shortness of breath associated with the right-sided chest injury.
- The traumatic injury to the right wrist involved a comminuted intra-articular distal radius and ulnar fractures at the right wrist. Treatment for this condition included a closed reduction with placement of an external fixator on the right. This injury caused Mr. Hembree to suffer severe hand tightness and stiffness with loss of supination following the distal radius fracture. In December 2006, while performing surgery involving the right shoulder, Dr. Wyrsh performed a right hand and wrist manipulation to address stiffness in the hand.

In addition, he developed severe carpal tunnel syndrome from the fracture, which required a surgical release. Additionally, he experienced ulnar-sided right wrist pain with ulnar positive variance, and was noted by Dr. Wyrsh to be presenting possibly with "early reflex sympathetic dystrophy."

On or about April 4, 2007, Dr. Wyrsh determined that Mr. Hembree had reached maximum medical improvement relative to treatment of his right hand, wrist and forearm. Yet, Dr. Wyrsh noted that Mr. Hembree was a potential candidate for fusion.

The injury to the right hand / wrist causes Mr. Hembree to present with severe residual stiffness and inability to use his right hand to make a functional fist or to utilize for grasping purposes. Also, he has suffered severe loss of wrist motion, as well as loss of forearm motion associated with the March 3, 2006, work injury.

- The traumatic injury to the right upper extremity included injury to the right shoulder. An MRI scan of the right shoulder revealed a SLAP tear, with severe tendinopathy of the supraspinatus and acromioclavicular arthrosis. In December 2006 Mr. Hembree underwent surgical repair that involved clavicle resection, biceps tenodesis, labral debridement and subacromial decompression. Dr. Wyrsh determined that Mr. Hembree had reached maximum medical improvement relative to his right shoulder on April 4, 2007, as well.

The injury to the right shoulder causes Mr. Hembree to present with ongoing severe strength deficits, as well as motion deficits in the right shoulder.

- The traumatic injury to the right hip involved complaints of bruising and swelling. Mr. Hembree experienced persistent numbness in the area of his right hip. The injury to the right hip causes Mr. Hembree to present with a greater trochanteric bursitis on a chronic basis.

The effects of the 2006 work injury caused Mr. Hembree to suffer from severe ongoing stiffness in his right fingers and wrist; it rendered him unable to make a closed fist with his right hand. Further, this work injury caused him to experience chronic right shoulder pain, as well as ongoing loss of strength and loss of range of motion in the right shoulder. Additionally, as a consequence of the work injury severely bruising his right hip and leg, Mr. Hembree suffered pain and swelling in his right hip and leg. Lastly, the work injury caused him to experience right chest wall pain and to suffer intermittent episodes of shortness of breath.

In light of this work injury, Mr. Hembree filed a workers' compensation claim, which resulted in he and the employer and insurer entering into a Stipulation for Compromise Settlement that resolved the underlying claim against the employer for this injury. This settlement agreement was based upon approximate disability of 50 percent to the body as a whole, and received approval from an administrative law judge on or about February 5, 2009.<sup>2</sup>

#### *Incident of Occupational Disease (Repetitive Trauma)*

Subsequent to suffering the work injury of March 3, 2006, Mr. Hembree underwent receipt of significant medical treatment, and while under the care of a treating physician was rendered temporarily and totally disabled for approximately 45 weeks. Thereafter, Mr. Hembree returned to his employment with Jerry Bennett Masonry. Notably, in returning to his employment with Jerry Bennett Masonry, on or about January 13, 2007, Mr. Hembree did not return to work as a bricklayer. Rather, he returned to work as a tuck pointer.<sup>3</sup>

It is noted in the medical report of Dr. Koprivica that he viewed this employment by Mr. Hembree as a tuck pointer to involve work occurring on an accommodated basis. Mr. Hembree, however, rejected the notion of this work being accommodated. According to Mr. Hembree bricklayers may perform tuck pointing work in the course of performing brick laying duties. However, in working as a tuck pointer for Jerry Bennett Masonry he was required to engage exclusively in tuck pointing work. He described the tuck pointing work to involve repetitive cleaning and scrubbing of bricks in order to prepare the bricks for painting, as well as washing and cleaning bricks.

Although the work he performed as a tuck pointer did not involve the type of heavy lifting that was required as a bricklayer, Mr. Hembree notes that the tuck pointing work was physically very demanding on use of his upper extremities, particularly his left hand, which he relied heavily upon in his work. And this work involved full time employment. He thus did not consider it to be an accommodated work. Nor did he believe the employer viewed or treated the employment as accommodated work. Notably, Mr. Hembree continued in this employment beyond the period of being declared at maximum medical improvement relative to the 2006 work injury, until suffering the occupational injury of October 3, 2008, which involved the development of a ganglion cyst in the left hand, which is his non-dominant hand.

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<sup>2</sup> In identifying an assessment of permanent disability in the settlement agreement the parties referenced 50 percent "BAW – low back." This reference would appear to be an error or an incomplete recitation, as the injury involved multiple parts of the body and did not relate solely to the low back.

<sup>3</sup> Mr. Hembree returned to work prior to being determined to be at maximum medical improvement, and worked in a light duty capacity. Later, on April 4, 2007, Dr. Wyrsh determined that Mr. Hembree had reached maximum medical improvement relative to the 2006 work injury. Subsequent to this determination Mr. Hembree continued to engage in employment with Jerry Bennett Masonry as a tuck pointer.

The effects of his March 3, 2006, injury forced him to rely heavily on his left hand to smooth and scrub the bricks and stone while performing tuck pointing work. The repetitive nature of the tuck pointing work caused Mr. Hembree to develop a ganglion cyst in his left hand, and thus sustain an incident of occupational disease in the nature of repetitive trauma. Further, this 2008 work injury prevented Mr. Hembree from using his left hand to complete his job duties, which resulted in him having to terminate his employment with Jerry Bennett Masonry. And Mr. Hembree has not engaged in any other employment since leaving his employment with Jerry Bennett Masonry on or about October 3, 2008.

### *Medical Treatment*

Mr. Hembree sought and obtained certain medical care for treatment of the ganglion cyst. In this regard, he was told that surgery could remove the cyst, but that it would temporarily take his left hand out of commission. Mr. Hembree thus declined the surgery, fearing that he would lose the use of both hands, as he already viewed himself as essentially one-handed because of the prior injuries to his right extremity. As a consequence, Mr. Hembree continues to present with a ganglion cyst in his left hand and continues to experience pain and numbness in his left hand, although he has experienced a decreased in the size of the cyst.

### *Independent Medical Examinations*

P. Brent Koprivica, M.D., a physician practicing in the specialty of occupational medicine, testified by deposition on behalf of Mr. Hembree. Dr. Koprivica performed an independent medical examination of Mr. Hembree in June 2004 in regard to the 2003 work injury, and again in 2007 in regard to the 2006 work injury. At the time of these two examinations, Dr. Koprivica took a history from Mr. Hembree, reviewed various medical records, and performed a physical examination of him. Further, in regard to the 2008 work injury Dr. Koprivica reviewed various additional medical records and reports.

In light of his initial examination and evaluation of Mr. Hembree, Dr. Koprivica opined that the 2003 work injury caused Mr. Hembree to sustain an injury in the nature of “a permanent aggravating injury to pre-existent degenerative disk disease of the lumbar spine at the level of L4-L5.” Further, Dr. Koprivica notes that this injury caused Mr. Hembree to sustain left-sided rib fractures and other abrasions. According to Dr. Koprivica, this injury causes Mr. Hembree to develop diskogenic pain and to present with chronic mechanical back pain, as well as ongoing loss of functional motion in his lumbar spine. In rendering an assessment of permanent disability referable to the 2003 work injury, Dr. Koprivica opined that Mr. Hembree sustained a permanent partial disability of 20 percent to the body as a whole. (Dr. Koprivica apportions 15 percent permanent partial disability referable to the low back, and five percent referable to the chest wall and the documented left second rib fracture.

In light of his second examination and evaluation of Mr. Hembree, Dr. Koprivica opined that the 2006 work injury caused Mr. Hembree to sustain multiple traumatic injuries to his low back, right wrist / hand, right forearm, right shoulder, right hip and chest wall (rib fracture and pneumothorax). In rendering an assessment of permanent disability referable to the 2006 work injury, Dr. Koprivica opined that Mr. Hembree sustained a permanent partial disability of 25 percent referable to the right shoulder (232-week level); he sustained a permanent partial

disability of 50 percent referable to the right forearm (200-week level); he sustained a permanent partial disability of 5 percent to the body as a whole referable to the chest wall pain; he sustained a permanent partial disability of 5 percent referable to the right hip (207-week level). And globally, considering the effects of the multiple conditions involved in the 2006 work injury, Dr. Koprivica opines that the 2006 work injury caused Mr. Hembree to sustain a permanent partial disability of 50 percent to the body as a whole. Dr. Koprivica opines that this injury presents a hindrance or obstacle to employment, and causes Mr. Hembree to be governed by restrictions and limitations.

Also, in evaluating the 2006 work injury in context of potential Second Injury Fund liability Dr. Koprivica did not find any additional permanent disability attributable to the Second Injury Fund. In later review, he further noted that Mr. Hembree settled the 2003 claim for 10 percent to the body as a whole, which is insufficient to meet the statutory threshold, and which is consistent with his opinion that the 2006 work injury did not result in Second Injury Fund liability.

Finally, in considering the 2008 work injury Dr. Koprivica noted that the 2006 work injury, considered in isolation, did not render Mr. Hembree permanently and totally disabled; and subsequent to returning to work Mr. Hembree sustained additional permanent disability referable to the left upper extremity. In this regard, in noting that this subsequent work injury causes Mr. Hembree to be governed by additional limitations and restrictions, including restrictions different from the 2006 work injury, Dr. Koprivica opines that Mr. Hembree is “permanently and totally vocationally disabled.” Dr. Koprivica thus states,

With this information, it is my opinion at this point that Mr. Hembree is permanently totally disabled.

With the benefit of the Compromise Settlement amounts, it would be my opinion that that permanent total disability arises based on the impact of combining all of the disabling conditions. I do not believe Mr. Hembree is permanently and totally disabled based on the last work injury claim of October 3, 2008, considered in isolation, in and of itself.

Notably, in his deposition testimony Dr. Koprivica acknowledges that he would defer to the vocational expert regarding any vocational impact caused by the restrictions he assigned to Mr. Hembree, as such restrictions relate to the 2003 and 2006 work injuries. And Dr. Koprivica was of the understanding that the restrictions considered by Mr. Lala related to both the 2003 and 2006 work injuries.

### *Vocational Opinions*

Michael K. Lala, M.D., a certified vocational counselor, testified by deposition on behalf of Mr. Hembree. Mr. Lala performed a vocational evaluation of Mr. Hembree on February 2, 2008. At the time of this evaluation, Mr. Lala took a history from Mr. Hembree, reviewed various medical records, and performed certain vocational testing. These vocational tests include: *Wide Range Achievement Test (WRAT-3)*, *Kaufman Brief Intelligence Test*, and *The Bennett Mechanical Comprehension Test*. These tests revealed that Mr. Hembree was reading at the second grade level, and performing arithmetic at the sixth grade level. The other tests

revealed similar low results. In light of these low scores, Mr. Lala opined that Mr. Hembree would not benefit by participating in a vocational rehabilitation or other advanced training program; and “the only way that Mr. Hembree could learn new job skills would be by hands-on-training on a job site.”

Further, in explaining the significance of the vocational testing performed on Mr. Hembree, Mr. Lala testified that while Mr. Hembree does not suffer from a learning disability, he demonstrated “low intellectual function.” In this regard, Mr. Lala propounded the following testimony:

Q. What do the scores on the WRAT-3 tell you about his transferability?

A. Well, essentially that he can't read and understand or communicate by writing at a level that's considered functionally literate. He's equivalent to a second grader. Typically we think about literacy as being about the fifth grade level or the level at which an average newspaper is written and that's the fifth grade level, so he's below that in reading and spelling. For his age he just did not learn or did not retain what he learned after he left school.

Also, Mr. Lala noted that subsequent to performing the vocational testing Mr. Hembree sustained the October 2008 work injury, which resulted in him performing an additional evaluation based on his review of additional records, including the depositions of Dr. Koprivica and Mr. Hembree, and the settlement agreements for the 2006 and 2008 work injuries. In light of his vocational evaluation of Mr. Hembree, including his subsequent review of additional records, Mr. Lala opined that Mr. Hembree is unemployable in the open and competitive labor market. Mr. Lala further states,

Given all the information, it is my professional opinion, that for the purposes of Missouri Workers' Compensation, Harold Hembree is permanently and totally vocationally disabled. It is clearly due to the combination of all of his disabilities and the resulting vocational limitations which arise from his multiple injuries that he is precluded from performing any jobs available in Missouri.

Mr. Lala specifically notes that this opinion includes consideration of the 2008 work injury, which hindered Mr. Hembree's ability to perform physical work with his left hand.

## **FINDINGS AND CONCLUSIONS**

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

### **I.**

#### **Occupational Disease & Injury**

The evidence presented in this case is supportive of a finding that as a consequence of working as a tuck pointer for Jerry Bennett Masonry, Mr. Hembree sustained an incident of occupational disease (repetitive trauma) that arose out of and in the course of his employment with the employer, Jerry Bennett Masonry. The evidence is further supportive of a finding that as a consequence of this work injury, which involved repetitive trauma to the left upper extremity, Mr. Hembree sustained an injury in the nature of a ganglion cyst in the left hand. Notably, the parties acknowledge and stipulate that Mr. Hembree sustained a compensable work injury on October 3, 2008, in the nature of an occupational disease involving the left upper extremity.

Accordingly, I find and conclude that the employee, Harold Hembree, sustained an injury in the nature of a ganglion cyst to his left hand on October 3, 2008. I further find and conclude that injury was caused by an incident of occupational disease (repetitive trauma) that arose out of and in the course of his employment with Jerry Bennett Masonry.

## II.

### Nature & Extent of Permanent Disability

The employee and employer and insurer entered into a Stipulation for Compromise Settlement, agreeing to resolve the underlying claim for payment of a lump sum of \$10,000 based upon, among other consideration, approximate disability of 14 percent of the wrist (175-week level). This settlement agreement, of course, is not binding on the Second Injury Fund.

After consideration and review of the evidence, I find and conclude that the work injury of October 3, 2008, caused the employee, Harold Hembree, to be governed by certain restrictions and limitations, which constitute a hindrance or obstacle to employment. I further find and conclude that this work injury caused Mr. Hembree to sustain a permanent partial disability of 14 percent referable to the left wrist. In addition, while this work injury presents a hindrance or obstacle to employment or reemployment, I find and conclude that the work injury of October 3, 2008, considered alone and in isolation, does not render Mr. Hembree permanently and totally disabled.

## III.

### Liability of Second Injury Fund

In order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as a result of the last compensable injury, and that disability has combined with a prior permanent partial disability to result in total disability. Section 287.220.1, RSMo. (2000); *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990); *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo. App. 1985).

This standard was most simply set forth when the Missouri Court of Appeals held:

Where a pre-existing permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability after the employer has paid the compensation due the employee for the

disability resulting from the work-related injury. *Reiner v. Treasurer of State of Missouri*, 837 S.W.2d 363, 366 (Mo. App. 1992)

In determining the extent of disability attributable to the employer and Second Injury Fund, the extent of the compensable injury must be determined first. *Roller v. Treasurer of the State of Missouri*, 935 S.W.2d 739, 742-43 (Mo. App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* It is therefore necessary that the employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury Fund liability.

In the present case, after consideration and review of the evidence, I find and conclude that the work injury (occupational disease) of October 3, 2008, causes Mr. Hembree to suffer residual pain and discomfort, and to be governed by limitations and restrictions. I further find and conclude that while this work injury presents a hindrance and obstacle to employment or potential employment, this injury considered alone does not render the employee permanently and totally disabled. The restrictions resulting from the October 3, 2008, work injury relate primarily to the use of Mr. Hembree's left Upper extremity.

Notably, Michael Lala, CRC, credibly testified that Mr. Hembree was permanently and totally disabled, but as a result of a combination of the October 3, 2008 occupational disease and the pre-existing medical conditions. Further, Dr. Koprivica deferred to the opinion of Mr. Lala in the vocational assessment and determination of whether Mr. Hembree is permanently and totally disabled. In rendering this decision, I find Mr. Lala credible, reliable and worthy of belief.

Further, prior to October 3, 2008, Mr. Hembree suffered from significant pre-existing disabilities referable to the low back, right upper extremity (hand, wrist, forearm, and shoulder), right hip and chest wall. These pre-existing conditions physically impacted Mr. Hembree's ability to perform certain activities, and to be governed by limitations and restrictions. These pre-existing medical conditions caused Mr. Hembree to suffer certain permanent partial disabilities, which meet the statutory threshold set forth in Section 287.230 RSMo.

In considering the nature and extent of these pre-existing permanent disabilities, I find and conclude that at the time of the work injury of October 3, 2008, Mr. Hembree presented with a permanent partial disability of 70 percent to the body as a whole. This disability relates to Mr. Hembree's low back condition, chest wall condition, right shoulder condition, right hand/wrist condition, right forearm condition, and right hip condition. I further find and conclude that these pre-existing disabilities presented a hindrance and obstacle to employment or potential employment.

The occupational disease, in combination with the pre-existing medical conditions, causes Mr. Hembree to be governed by significantly greater permanent restrictions and limitations. I find credible Mr. Hembree's testimony that prior to the work injury of October 3, 2008, he suffered significant restrictions and limitations and was severely limited in the use of his right upper extremity. However, he was able to work and engage in full employment as a tuck pointer because of his ability to utilize his left upper extremity, which allowed him to compensate for the limitations involving his right upper extremity. Unfortunately, subsequent to suffering the work injury involving his left upper extremity he was no longer able to perform the

physical work required of him, and thus could not continue in his employment with Jerry Bennett Masonry. Further, he lacks the capacity to work in a nonphysical sedentary work environment. Moreover, both Dr. Koprivica and Mr. Lala testified that Mr. Hembree is unable to compete in the open labor market due to a combination of the primary work incident and pre-existing conditions.

Accordingly, after consideration and review of the evidence, I find and conclude that as a consequence of the occupational disease of October 3, 2008, in combination with the pre-existing industrial disabilities referable to the lumbar spine, right upper extremity (hand, wrist, forearm, and shoulder), right hip and chest wall, Mr. Hembree is permanently and totally disabled. Therefore, the Second Injury Fund is ordered to pay to the employee, Harold Hembree, the sum of \$772.53 per week for the employee's lifetime. The payment of permanent total disability compensation by the Second Injury Fund is effective as of June 23, 2010. (This date is the date of the Stipulation for Compromise Settlement, wherein Mr. Hembree resolved the underlying claim and was identified as having sustained 14 percent permanent partial disability referable to the left wrist. Although Mr. Hembree may have reached maximum medical improvement prior to this date, there is no medical opinion or other evidence identifying a specific maximum medical improvement date.) Further, the payment of permanent total disability compensation shall take into consideration 24.5 weeks of permanent partial disability, which is attributable to the employer and insurer.

The award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Made by: /s/ L. Timothy Wilson

L. Timothy Wilson  
*Administrative Law Judge*  
*Division of Workers' Compensation*