

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

Injury No.: 06-097907

Employee: Ted Jackson
Employer: Noranda (Settled)
Insurer: Noranda Aluminum, Inc. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the ALJ dated November 29, 2011, as supplemented herein.

Preliminaries

The ALJ awarded employee permanent total disability (PTD) benefits against the Second Injury Fund. The Second Injury Fund appealed to the Commission, alleging that the ALJ erred in finding it liable for employee's PTD benefits. The Second Injury Fund concedes that employee is permanently and totally disabled, but alleges that employee's PTD is solely the result of the last injury.

Discussion

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are adopted and incorporated by the Commission herein.

In evaluating cases involving preexisting disabilities, the employer's liability must first be considered in isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In *Kizior*, the Court set out a step-by-step test for determining Second Injury Fund liability:

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) the employer's liability is considered in isolation – 'the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability'; (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing

¹ Statutory references are to the Revised Statutes of Missouri 2005 unless otherwise indicated.

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at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund.

Kizior, 5 S.W.3d at 200.

The Second Injury Fund argues that the ALJ skipped the first step in the aforementioned analysis before concluding that employee's PTD is a result of his primary injury synergistically combining with his preexisting disabilities. In support of its argument that employee is permanently and totally disabled solely as a result of the last injury, the Second Injury Fund points to vocational expert, Susan Shea's, testimony; specifically, Ms. Shea's response to the last question of her deposition. Ms. Shea was asked about employee's ability to work, considering only the effects of the last injury. Ms. Shea responded that she did not believe employee could do any work.

We do not find that Ms. Shea's response to the last question of her deposition overrides and supersedes the overwhelming weight of the evidence that employee is merely permanently and partially disabled as a result of the last injury.

Dr. Cohen clearly and unequivocally opined that employee is not permanently and totally disabled as a result of the last injury alone. Dr. Doll prescribed lifting and physical restrictions, but did not opine permanent total disability from the last injury alone. Similarly, Dr. Coyle, the treating surgeon, did not declare employee permanently totally disabled from the last injury alone, but rather imposed light duty restrictions from the same.

In addition to the aforementioned, employee himself testified that if the primary neck and back injuries were the only problems he had, he felt he would still be able to work in some capacity, such as driving a crane or forklift.

Based upon the aforementioned, we do not find that employee is permanently and totally disabled as a result of the last injury alone. We find, as did the ALJ, that as a result of the primary injury employee sustained 17.5% permanent partial disability of the body as a whole referable to the lumbar spine, and 12.5% permanent partial disability of the body as a whole referable to the cervical spine. We further find, in accordance with Dr. Cohen's uncontradicted medical opinion, that these primary injuries combined synergistically with employee's preexisting disabilities to render him permanently and totally disabled.

Award

We affirm the award of the ALJ as supplemented herein.

The award and decision of Administrative Law Judge Maureen Tilley, issued November 29, 2011, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

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

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

Given at Jefferson City, State of Missouri, this 6th day of June 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Ted Jackson Injury No.: 06-097907
Employer: Noranda
Additional Party: Second Injury Fund
Insurer: Noranda Aluminum Inc c/o Sedgwick Claims Management Services
Hearing Date: 9-07-11

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? 01-19-06.
5. State location where alleged accident occurred or occupational disease contracted: New Madrid County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee was pulling a thermal coupler when he injured his neck and low back.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Neck and low back.
14. Nature and extent of any permanent disability: 12.5 % Neck; 17.5% Low back.
15. Compensation paid-to date for temporary total disability: \$16,689.83.
16. Value necessary medical aid paid to date by employer-insurer? \$24,992.39.
17. Value necessary medical aid not furnished by employer-insurer? N/A
18. Employer's average weekly wage: \$1,696.74.
19. Amount of compensation payable? See Award.
20. Weekly compensation rate: \$696.97 PTD; \$365.08 PPD.
21. Method wages computed: By agreement.
22. Second Injury Fund liability: Permanent total disability.
23. Future Requirements Awarded: N/A

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's attorney Stephen L. Taylor.

FINDINGS OF FACT AND RULINGS OF LAW

On 09-07-11, the Employee appeared along with his attorney, Stephen L. Taylor, for a Hearing for a Final Award. The Second Injury Fund appeared by its attorney, Gregg Johnson. The primary case had previously settled, therefore the employer-insurer was not present. 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. That on 01-19-06 the Employer, Noranda, was operating under and subject to the provisions of the Missouri Workers' Compensation Act.
2. That on 01-19-06, Ted Jackson was an employee of Noranda and was working under and subject to the Missouri Workers' Compensation Act.
3. That on 01-19-06, Ted Jackson sustained an accident or occupational disease during the course of employment at Noranda.
4. That the employer had notice of the employee's work injury that occurred on 01-19-06.
5. That the employee's claim was filed within the time allowed by law.
6. That the average weekly wage for the injuries that occurred 01-19-06 was \$1,696.74 and the rate of compensation for purposes of permanent partial and permanent total disability is \$696.97 PTD and \$365.08 PPD.
7. That the injuries sustained by the employee were medically causally related to his employment at Noranda.

ISSUES

The following issues were identified.

1. Employee's claim of Permanent Total Disability against the Second Injury Fund.
2. If not PTD, then Employee's claim of Permanent Partial Disability against the Second Injury Fund.
3. Dependency per *Schoemel*.

EXHIBITS

Several exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical Records Packet – Primary & Prior, with subsections as follows:
 1. Missouri Delta Medical Center.
 2. Dr. Colleen Hunter-Pearson.
 3. ReStart.
 4. Ferguson Medical Group.

5. Orthopaedic Associates.
 6. St. Francis Medical Center Pain Clinic.
 7. Cape Neurosurgical Associates, Dr. Yingling.
 8. Midwest Spine Surgeons, Dr. Coyle.
 9. Orthopedic & Sports Medicine, Inc., Dr. Doll.
 10. Sikeston Imaging Center.
 11. Southeast Missouri Hospital Pain Clinic.
 12. Professional Imaging.
 13. Dr. Allen Spitler.
 14. Southeast Missouri Hospital.
 15. Dr. William Shell.
- B. Deposition of Dr. Raymond Cohen, with attachments.
- C. Deposition of Vocational Expert Susan Shea, with attachments.
- D. Social Security Award.
- E. Paystubs.
- F. Judicial Notice of Division of Worker's Compensation file primary claim and the two prior claims.

Second Injury Fund Exhibits

1. Joint Exhibit - Deposition of Susan Shea.

FINDINGS OF FACT

Employee, Ted Jackson, testified that he was a resident of Matthews, New Madrid County, Missouri and was born on April 29, 1947. He testified that he has been married to Kathy Jackson since April 6, 1984. The employee testified that he has no dependent children. The employee stated that his wife Kathy is dependent upon him for support and has been dependent since April 6, 1984.

Employee testified that he lived in New Madrid County as a child and graduated from New Madrid County High School in 1965. He testified that he worked after high school for Boyer Construction Company as a laborer for one year. He then went to work for Fruin & Collins as an iron worker in St. Louis from 1965 to 1966. Employee testified he was drafted into the United States Army in 1966. He testified that he served for three years in the United States Army and was trained as a mechanic then discharged honorably in 1969.

Employee testified that after his discharge from the Army he returned to work at Boyer Construction Company as a carpenter until 1974.

Employee testified that he then went to work for a timber company cutting trees from 1974 to 1978.

Employee testified that he then began his career with Noranda Aluminum on July 17, 1978. Employee testified that he worked there until he left in 2008. Employee testified that during his

time working at Noranda Aluminum he began as a utility worker, which required general cleaning up. He indicated he worked in that position a few years and then he became a cell operator for a year. Employee testified that he then began working in tapping which required getting metal out of the pots and was heavy labor.

Employee testified that he suffered no injuries either at work or away from work until an injury at work occurred in 1984 when he smashed his finger.

Employee indicated that he also injured his back in 1987 while working in the tapping area and that he was off work for 3 months with a lumbar strain. Employee testified that he received a 7% permanent partial disability settlement as a result of this low back injury.

Employee indicated that he went back to work as a cell operator because it was lighter work and there was less strain on his back. He worked there for approximately two years. He then took a job at Noranda as a material handler because it was an easier job and it was lighter work.

Employee testified that in 1989 he sustained a work related injury to his left lower extremity when he broke his heel. Employee indicated that he received treatment through workers' compensation and had a pin put in his foot. He also indicated that he settled this workers' compensation claim for 30% permanent partial disability to the left lower extremity at the ankle level. Employee indicated that he was off work for some period of time but returned to work as a material handler as it was lighter work that he could do. Employee also testified that he had restrictions with his capability of walking, climbing and standing because of the heel injury.

Employee indicated that thereafter he became a crane operator at Noranda because it was lighter work and did not require him to stand as long his feet or strain his back as much as his previous job.

Employee testified that he suffered a heart attack while at work in June of 1992 and had an angioplasty which required him to be off work for one month period. After returning to work about one month later he had to have a heart bypass and was off work another 3-4 months.

Employee testified that he went back to work as a crane operator because that was lighter work and that it was inside an air conditioned area which made it easier for him to complete his job. Employee testified that after the heart attack and heart surgery strenuous exertion caused him great difficulty and the heat gave him problems with breathing.

Employee testified that he had continued problems climbing a ladder and his back was hurting because he was bent over doing the job as a crane operator so he went back to doing work as a cell operator in 1996. Employee indicated that he had suffered no other injuries at work in the meantime.

Employee went to work as a wheel operator in 1997 because it was an easier job and he made more money. He indicated that he continued that job up until 1999 when he became a furnace operator. Employee testified that job was easier on his back and required less exertion and he

could go into an air conditioned area after short periods of work time which helped him with his breathing problems. Employee testified that he worked as a furnace operator up until January 19, 2006 when the primary injury occurred to his neck and low back.

Employee testified that on January 19, 2006 he was trying to pull a thermal coupler. He stated that metal accumulated on it and it got stuck. He stated that when he was pulling on the thermal coupler, he fell back. In this process, he injured his neck and low back. Employee indicated that he was treated at the plant and taken to the emergency room. He was then treated by the company doctor in Sikeston, Missouri. He was thereafter referred for further medical care and eventually came under the treatment of Dr. David Yingling, who performed neck fusion for a herniated disc at the C3-4 level on August 10, 2007. Dr. Yingling also saw Employee for his low back injury but did not recommend surgery for the low back. Employee also treated with Dr. Patrick Knight who prescribed physical therapy and epidural steroid injections. He was thereafter treated by Dr. James Coyle who found an L5-S1 central disc protrusion and referred Employee to physiatry for conservative treatment by Dr. James Doll. Dr. Doll diagnosed low back and right lower extremity pain and paresthesias with an L5-S1 annular tear. Dr. Doll prescribed physical therapy and medication for pain, for which employee indicates he is still treating with his primary care physician and the Veterans' Administration.

Employee indicated that he was off work drawing temporary total disability before his neck surgery in 2007 for approximately five months.

Employee indicated that he returned to work and was placed on light duty which was a job he indicated was "created", where he sat in a conference room, read a book and watched T.V. until he was eventually released with restrictions. Employee testified that he tried to return to work as a furnace operator in June of 2007 and was only able to do the job one week. Employee testified that the plant nurse told him to take "non-occupational medical leave" which he did for 34 weeks and then he left the Employer in 2008.

Employee indicated that he did look for work after leaving Noranda but was unable to find any he could perform.

Employee testified about having the smashed finger in 1984. He testified about a lumbar strain in 1987 and Employee testified that he was able to work after he broke his left heel in 1989. Employee also testified about the surgery to the left heel.

When asked about problems after the heel injury, Employee testified that he had trouble standing as long; walking as far; that he was no longer able to do sports and that he had problems climbing a ladder which he thereafter took one rung at a time. He also indicated he had problems with weight bearing.

Employee testified that he changed jobs after the heel injury to a job that allowed more sitting. Employee also testified that he required a prosthesis, and an ankle brace, which he wore for many years after the injury.

Employee also testified about problems outside of work and that he stopped engaging in sports. The employee also stated that he changed the way that he hunted because he could not walk as far. He also indicated that he was okay with fishing after the heel injury but he changed his method of yard work from a push mower to a riding lawnmower.

Employee testified that his left foot remains about the same today as it did after the injury and recovery from that injury. He also testified that he takes over-the-counter medication for his foot pain on a daily basis. Employee testified that the pain on a 0 to 10 scale is about a 6 to 7 daily. Employee testified that he had no foot injuries since the injury of 1989 to his left foot.

Employee testified in 1992 he suffered a heart attack while at work and was sent to Southeast Hospital in Cape Girardeau, Missouri and he was treated by Dr. Alan Spitler. He indicated that he first had an angiogram and then an angioplasty and was in the hospital for several days and off work for about a month. He went back for a checkup and had to have bypass surgery and was off for 3-4 months after that. When questioned about his work ability after the heart attack, Employee testified that it did affect him and that it caused him to slow down everything that he did. He indicated that he felt weak after the surgery and he did less walking and less lifting. He indicated that presently he was still on medications for his heart after the heart attack and surgeries in 1992. Employee testified he remains on medication to this date. Employee also testified that it was more difficult for him to do his job and that he changed to a lighter job after the heart attack. He indicated he became a crane operator because it was lighter work and air conditioned. He did indicate that he had problems climbing the ladder to the crane because of his left heel and heart-related limitations.

Employee testified that after the heart attack doing things away from work caused him more problems because of exertion causing him difficulty with breathing and that he was able to walk less than he could prior to the heart attack. He indicated that he still had chest pains and that heat and exertion causes those. Employee indicated he continued with these problems even until the day of the hearing. Employee also testified that he had another angiogram in 2004 and that he has not had any changes in his condition from his heart since that time.

Employee testified that he had an onset of diabetes in 2004 and that he has been treated with medication since then. Employee testified that the diabetes caused him weakness and dizziness at times. Employee testified that he did miss work at times from the effects of the diabetes and is continuing to treat with medication for that condition to this date. Employee testified that it affected his ability to do his job because he missed work as a result of his condition and that he often got hypoglycemic at work and would have to stop working and find something to eat. Employee testified that this diabetic condition remained the same until his accident on January 19, 2006 and since.

Employee then testified about the accident on January 19, 2006 and that after his treatment for his neck and low back he still continued to have symptoms. Employee testified he still has neck pain on a daily basis and he takes over-the-counter medication for the pain. Employee testified that the pain in the neck was about a 6 to 7 on a daily basis. Employee also testified he still has

low back pain and that he takes over-the-counter medication for back pain as well. Employee testified that his pain remains at a 7 on a daily basis for the low back pain.

Employee testified that he had no neck injuries since January 19, 2006 and that he has had no low back injuries since January 19, 2006.

Employee testified that if the neck and low back were the only problems he had, he felt he might still be able to do some of his past jobs at Noranda. Employee indicated he thought he might still be able to drive a crane or drive a forklift.

When asked what he could not do now that he could do before the injury, Employee testified that he could not stand as long; could not sit as long; that he would need to lie down for long periods of time, that he could no longer take care of his animals, do yard work, or do housework other than light housework. He indicated that he could cook breakfast and did do activities of daily living and take care of his own needs.

Employee testified that he usually wakes about 7:00 a.m. He stated that he does not sleep well at night. He stated that he sleeps approximately two hours at a time. Employee testified that when he gets up, he usually bathes and cooks his breakfast and watched T.V. and read until about noon. He testified in the afternoons he stayed at home and usually napped in the recliner and watched T.V. or read a book until his wife came home about 5:00 p.m. He indicated that his wife would prepare dinner and then he would go to bed about 9:30 p.m. or 10:00 p.m. and try to sleep.

Employee testified that along with over-the-counter medication he also took his regular heart medication and diabetes medication and sometimes uses a heating pad to help with the pain.

The employee was asked if he was still seeing a doctor and he indicated that he was seeing Dr. Walton in Sikeston and doctors at the Veterans' Administration.

When asked if his conditions remain about the same since his release from the last injuries, Employee testified that they did. Employee also testified that he had been receiving Social Security Disability benefits dating from 2007. Employee was asked if he had worked all of his life and wanted to continue to work to which he answered in the affirmative. When asked if there was any kind of work that Employee was able to do he answered that he did not know of any.

Numerous medical records were admitted into evidence.

Medical records from Missouri Delta Medical Center were marked as Section 1 of Exhibit A. Those reflect that Employee was treated for his injury on January 19, 2006 at Missouri Delta Medical Center.

Section 2 of Exhibit A is the medical records of the company doctor, Dr. Colleen Hunter-Pearson who treated Employee for complaints of lower back and upper back after injury at work at Noranda on January 19, 2006.

Section 3 of Exhibit A is records of treatment at Restart in Sikeston, Missouri for the injury at work on January 19, 2006.

Section 4 of Exhibit A is records of treatment by Dr. William Shell for low back pain with onset at work in 2006.

Section 5 of Exhibit A is records of Dr. Knight of Orthopaedic Associates at Cape Girardeau, Missouri who treated Employee for complaints of back pain from the injury at Noranda on January 19, 2006. Dr. Knight treated Employee for low back pain and found positive straight leg raise on the left with continued back pain and radiculopathy. Dr. Knight referred Employee to a neurosurgeon.

Section 6 of Exhibit A is records of treatment at St. Francis Medical Center Pain Clinic with lumbar epidural steroid injections recommended by Dr. Knight.

Section 7 of Exhibit A is records of Dr. David Yingling at Cape Neurosurgical Associates upon referral by Dr. Knight for back injury at work on January 19, 2006. Dr. Yingling treated Employee for low back pain and also for neck pain. Dr. Yingling treated Employee conservatively for low back pain but after a MRI scan of the neck found a disc rupture at the C3-4 level for which he performed surgery on employee August 10, 2007.

Section 8 of Exhibit A is the medical records of Dr. James Coyle who treated Employee for his continuing back pain as a result of the injury at Noranda on January 19, 2006. Dr. Coyle found a L5-S1 central disc protrusion with an annular tear and referred Employee to physiatrist Dr. James Doll for conservative treatment. After treatment done by Dr. Doll, Employee returned to Dr. Coyle in 2008 because of his continuing complaints. Dr. Coyle had Employee return to light duty and without seeing any need for surgery left his work status the same upon release.

Section 9 of Exhibit A is the records of Dr. James Doll of Orthopedic and Sports Medicine, Inc. Dr. Doll is a physiatrist who performed lumbar epidural steroid injections to treat Employee for his low back complaints. He also initiated medication including ibuprofen, Soma and Amitriptyline for pain. Dr. Doll performed a series of three injections and then referred Employee to physical therapy and a conditioning program and to continue his medications as needed. Dr. Doll released Employee with ongoing symptoms essentially unchanged including low back pain with paresthesias down both legs. Also Dr. Wayne indicated that no surgery was recommended and Employee was released with lifting restrictions and avoidance of repetitive bending, twisting and squatting activities and recommended he continue on medication and do home exercises.

Several imaging studies were also included in Exhibit A which revealed a herniated disc at C3-4 and bulging disc in the lumbar spine.

As a part of Exhibit A there were records from Dr. Alan Spitler at Southeast Hospital and Dr. William Shell documenting the cardiac treatment and procedures performed on Employee during 2002 and 2004.

Employee's Exhibit B was the deposition of Dr. Raymond Cohen who performed an Independent Medical Evaluation of Employee with report dated June 10, 2008 and a supplemental report on October 4, 2010. Dr. Cohen opined that the injuries Employee sustained at work on January 19, 2006 resulted in permanent partial disability to Employee at the level of the cervical spine and, further, that the injury of January 19, 2006 resulted in permanent partial disability to Employee at the lumbar spine. Dr. Cohen also opined that Employee did have pre-existing disability at the lumbar spine on the injury date of January 19, 2006. Dr. Cohen opined that the injury at work on January 19, 2006 was the prevailing factor in Employee becoming symptomatic and that he needed to be on appropriate medications for his ongoing neck and low back pain. He also opined that he needed to be followed by a physician for the neck and low back pain. Dr. Cohen opined that Mr. Jackson was presently totally disabled from his prior occupation and any similar kind of work. Dr. Cohen prepared a supplemental report on October 4, 2010. Dr. Cohen reviewed and reported in detail the prior injury Employee suffered to his left foot. He also reviewed and reported on the heart attack in 1992 and the diabetes and subsequent treatment which Employee had prior to the January 19, 2006 injury.

Dr. Cohen opined that Employee had a pre-existing 35% permanent partial disability of the left foot at the ankle and a 25% whole person disability from the diabetes and coronary artery disease prior to the January 19, 2006 injury. Dr. Cohen opined that Employee had restrictions based upon the left ankle injury. He also opined that he had restrictions from the cardiac condition to avoid extreme temperatures and over exertion.

Dr. Cohen opined that Employee's prior conditions combined with the injury of January 19, 2006 to create a greater overall disability and because of the synergistic effect of the disabilities that Employee was permanently and totally disabled and not capable of gainful employment in the open labor market. He also opined that his pre-existing conditions and disabilities are an obstacle to his employment or re-employment.

Employee's Exhibit C was the deposition of Susan Shea, Vocational Expert, which was taken on April 11, 2011. Ms. Shea testified that she performed an evaluation of Employee on July 15, 2009.

Ms. Shea evaluated Employee prior to Dr. Cohen's Independent Medical Evaluation of October 2010. As a result, Ms. Shea did not have the detailed information or ratings of Dr. Cohen concerning Employee's pre-existing disabilities to Employee's left foot and coronary artery and diabetes diseases. However, Ms. Shea concluded that Employee is unemployable in the regular work force of the national economy. She noted that Employee is at an age at which it is doubtful that a new employer would invest time and money in training him for work and it would be more difficult for such a worker to adjust to new types of work. She noted he had limitations on sitting and standing which would preclude training for new work and in addition those limitations on sitting and standing would preclude any work without modification. She also noted that he was

in need of medication for diabetes, coronary artery disease and pain for the rest of his life or for an undetermined time. With consideration of these things it was highly doubtful that any employer who is aware of Employee's medical history and limitations would consider him for hire.

The Division of Workers' Compensation records reflect that Employee settled his primary injury for 17.5% of the lumbar spine and 12.5% of the neck. The Division's records also reflect that Employee settled his 1987 low back strain for 7% of the low back and body as a whole. The Division of Workers' Compensation records also reflect that Employee settled his 1989 left foot at the ankle injury for 30% permanent partial disability of the ankle.

APPLICABLE LAW

- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.20.1 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 completing 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.
- 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 for 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.E.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 person's physical condition, reasonable, 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).*

RULINGS OF LAW

Issue 1. Permanent Total Disability.

Given these statutory provisions and cases, the first question that must be addressed is whether Employee is permanently and totally disabled. If Employee is permanently and totally disabled, then it must next be determined whether the accident of January 19, 2006 alone caused his permanent total disability. If so, Employer/Insurer is liable to Employee for his permanent total disability benefits and the Second Injury Fund has no liability to Employee. If not, the Second Injury Fund is only liable for permanent total disability benefits if the permanent total disability was caused by a combination of his pre-existing injuries and conditions and the employee's injury of January 19, 2006. Under Section 287.220.1, the pre-existing injuries must also have constituted a hindrance or obstacle to Employee's employment or re-employment.

Is Employee permanently and totally disabled?

Based on all of the evidence presented, I find Employee was a credible and persuasive witness on the issue of permanent total disability. Employee offered detailed testimony concerning the impact his injuries have had on his daily ability to function. Employee's testimony in this regard is very credible and supports a conclusion that Employee will not be able to compete in the open labor market. With his physical limitations and level of pain, it is extremely unlikely any employer would reasonably be expected to hire Employee in his present physical condition.

On August 23, 2006, Dr. James Doll, placed Employee at maximum medical improvement. Dr. Doll stated that employee requires permanent restrictions of no lifting greater than 35 pounds and avoidance of repetitive bending, twisting, and squatting activities. He has also prescribed continued physical therapy and current medications with reliance on over-the-counter medications on an as needed basis. While Dr. Doll did not specifically opine regarding Employee's ability to compete in the open labor market, he does impose significant restrictions upon Employee that would obviously limit his employability.

Dr. Coyle last saw Employee in October 2006. At that time, Dr. Coyle believed Employee was limited to only light duty. In 2008, Dr. Coyle wrote a letter after reviewing some records of Employee's interim care. In the letter, Dr. Coyle declined to further comment on Employee's work status as he had not seen him in almost two years. Further, Dr. Coyle was only looking at the effects of the 1/19/06 work injury and made no comment on any restrictions or limitations stemming from his prior injuries and conditions.

Dr. Cohen gave the opinion that Employee was permanently and totally disabled from the combination of the primary injuries to his neck and low back and the prior injuries to his left heel and his heart and diabetes conditions. Dr. Cohen believed the primary and prior injuries/conditions combined synergistically to create an overall disability greater than their simple sums and as a result Employee was permanently and totally disabled incapable of employment in the open labor market.

Vocational professional Susan Shea also provided her opinion that Employee was permanently and totally disabled and incapable of employment in the open labor market. She noted his physical limitations, his level of pain, his relatively advanced age, his ongoing need for medications and pain management and felt that because of all these factors he was not employable.

Based on a review of all the evidence, I find that the opinions of Dr. Cohen and Ms. Shea are credible and persuasive regarding whether Employee is able to compete in the open labor market. I find that no employer in the usual course of business would reasonably be expected to hire Employee in his present condition and reasonably expect Employee to perform the work for which he is hired. I therefore find that Employee is unable to compete in the open labor market and is therefore permanently and totally disabled.

Is the permanent total disability caused by a combination of the pre-existing injuries and conditions and the injury of 1/19/06?

Based on all of the evidence presented, I find that the last injury alone did not cause Employee to become permanently and totally disabled. Dr. Cohen found that the last injury alone rendered Employee permanently and totally disabled *from his prior occupation or any similar type of work*. He did not conclude that the primary injury disabled Employee from *all* types of employment. Rather, it is not until Dr. Cohen further considered the combination of primary and prior conditions together that he then declared Employee disabled from all employment in the open labor market.

Susan Shea, the vocational rehabilitation expert, considered all of the conditions of Employee, including his primary injuries and his pre-existing injuries and conditions and determined that Employee was permanently totally disabled and incapable of employment in the open labor market.

I find that the record establishes that Employee's prior injuries and conditions created a hindrance or obstacle to his employment or re-employment. Employee credibly testified as to his limitations resulting from the prior left foot injury, which resulted in the surgical implanting of metal hardware in the foot. Employee testified that since that injury and surgery he walked with a limp in the left leg, and suffered from swelling in the left ankle with prolonged exertion. He testified that he modified his work activities and was always mindful at work to land on the right foot if at all possible. He had to transition from material handler to crane operator, a lighter duty job which required less standing and walking. He had a shoe repairman place a special orthotic device in his work boot to provide support to his left heel. He took ibuprofen regularly to relieve

the pain and swelling in his heel. The fact that his prior claim on the left foot resulted in a settlement based on 30% PPD further supports the notion of significant pre-existing disability.

Regarding the condition of diabetes, Employee testified to multiple occasions at work where he suffered hypoglycemic episodes characterized by the sudden onset of shakiness and weakness. He would have to stop working and find something to eat. He had to try to eat about every two hours.

Regarding his heart condition, Employee testified about his angioplasty and subsequent bypass procedures. He noted that he was forced to miss between 4-5 months of work time as a result of the two surgical procedures on his heart. He stated Dr. Spitler told him "not to overdo it". He testified that the heart condition limited his exertional abilities and affected his stamina.

I find that Employee's testimony regarding the limitations of these prior injuries and conditions is credible, and consistent with the medical evidence of record. I find the opinions of Dr. Cohen and Ms. Shea credible and persuasive on this issue, and that Employee's current condition of permanent total disability is the result of the synergistic combination of his primary injury and his pre-existing injuries and conditions.

Employee settled his primary claim against Employer/Insurer for 17.5% of the low back and 12.5% of the neck, which computes to total of 120 weeks. Dr. Cohen found Employee at maximum medical improvement as of the date of his 6/10/08 report. I therefore find that Employee was at MMI on 6/10/08. Thus, Employer/Insurer's liability for permanent partial disability begins on 6/11/08 and ends on 9/28/10, a period of 120 weeks. Since the compensation rate for permanent partial disability is less than the amount payable for permanent total disability, the Second Injury Fund is liable for the difference between what Employee is receiving for permanent partial disability from Employer/Insurer and what he is entitled to receive for permanent total disability. The difference between the PTD rate of \$696.97 and the PPD rate of \$365.08 is \$331.89 per week.

The Second Injury Fund is therefore ordered to pay Employee the sum of \$39,826.80, representing the difference in PTD versus PPD for the 120 week period of 6/11/08 to 9/28/10. Commencing on 9/29/10, the Second Injury Fund is ordered to pay full weekly PTD benefits at the rate of \$696.97 per week. These PTD payments shall continue for the remainder of Employee's lifetime or until suspended if Employee is restored to his regular work or its equivalent as provided in §287.200 RSMo.

Issue 2. Dependency .

Employee has requested a finding of dependency based on *Schoemel* and subsequent cases. In this case, Employee testified that he was currently married to and living with his wife Kathy. Employee and his wife Kathy were married on April 6, 1984. They have no children. Employee's wife Kathy is financially dependent on Employee for support and has been so since they married.

In *Schoemel*, 217 S.W.3d 902, the Court stated that §287.240.4 applied to the entire Workers' Compensation Act and meant that a "dependent" was a relative who was actually dependent upon the employee for support at the time of injury. Although the *Schoemel* decision was subsequently abrogated by §287.230.2, the *Bennett* decision recognized that recovery under *Schoemel* was limited to claims for permanent total disability benefits that were pending between January 9, 2007 and June 26, 2008.

The Division's records show that the claim was pending within the time recognized by the *Schoemel* decision and subsequent cases. Therefore, pursuant to §287.240.4, I find that Employee's spouse, Kathy Jackson, is a total dependent of Employee.

ATTORNEY'S FEE

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

INTEREST

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

Employee: Ted Jackson

Injury Number 06-097907

Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation