

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

Injury No.: 03-051406

Employee: John Jones
Employer: Bennett Packaging of Kansas (Settled)
Insurer: Mid-Century Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: February 28, 2003

Place and County of Accident: Lee's Summit, Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 12, 2006. The award and decision of Administrative Law Judge Emily S. Fowler, issued June 12, 2006, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 17th day of January 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: John Jones

Injury No. 03-051406

Dependents: N/A

Employer: Bennett Packaging of Kansas

Insurer: Mid Century Insurance Company

Additional Party: Missouri State Treasurer, Custodian of Second Injury Fund

Hearing Date: April 17, 2006

Checked by: ESF/lh

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: February 28, 2003.
5. State location where accident occurred or occupational disease was contracted: Lee's Summit, Jackson 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 in the course and scope of employment, employee was required to pound on a truck door in order to get it open causing carpal tunnel injury to his right upper extremity. Further employee suffered from coronary artery disease and diabetes mellitus.
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: Right upper extremity and body as a whole.
14. Nature and extent of any permanent disability: 20 percent at the 175-week level of the right upper extremity previously paid by employer. Permanent Total Disability owed to employee by Second Injury Fund.
15. Compensation paid to-date for temporary disability: \$2,379.39.
16. Value necessary medical aid paid to date by employer/insurer? \$650.
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$823.44.
19. Weekly compensation rate: \$548.99/\$340.12.
20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable by employer: 20percent at the 175 week level previously paid by employer
22. Second Injury Fund liability: Permanent Total Disability beginning June 3, 2003. the Second injury fund to pay the difference between \$340.12 and \$548.99 or \$208.87 for the first 35 weeks equating to \$7,310.45 and then the sum of \$548.99 per week thereafter.

23. Future requirements awarded: N/A

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: Mr. Geoffrey Clark.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John Jones

Injury No: 03-051406

Dependents: N/A

Employer: Bennett Packaging of Kansas City

Insurer: Mid Century Insurance Company

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

Hearing Date: April 17, 2006.

Checked by: ESF/lh

On April 17th, 2006, the employee and the Second Injury Fund appeared for final hearing. The employee and the employer had previously settled the underlying claim by stipulation on August 26th, 2004. The employee John Jones appears in person and with counsel Geoffrey Clark. The Second Injury Fund was represented by Maurine Shine.

STIPULATIONS

The parties stipulated:

- 1) that on or about February 28th, 2003, Bennett Packaging of Kansas City was an employer operating subject to the Missouri workers' compensation law and whose liability was fully insured by Mid Century Insurance Company and that John Jones was its employee;
- 2) that John Jones was working subject to the law in Lee's Summit, Jackson County, Missouri;
- 3) that John Jones sustained an accident or occupational disease arising out of the course and scope of his employment;
- 4) that employee notified the employer of injury as required by law;
- 5) that the employee's claim was filed within the time allowed by law;
- 6) that employee's average weekly wage was \$823.44 resulting in a compensation rate of \$548.99 for temporary total and \$340.12 for permanent partial disability compensation;
- 7) that employee was paid temporary total disability compensation of \$2,379.39 and the medical care cost was \$650;

- 8) that the employer and the employee agreed through stipulated settlement to a 20 percent disability to the right upper extremity at the 175-week level resulting in a payment of \$11,904.20

ISSUES

The parties requested the Division to determine:

- 1) whether the Second Injury Fund is liable to employee for any disability compensation either as permanent total disability or permanent partial disability as a result of employee's injury from February 28th, 2003, in combination with his prior medical condition.

FINDINGS AND RULINGS

The employee testified on his own behalf and further presented the live testimony of his wife, Terry L. Jones, and Dr. Allen Parmet, and further presented the following exhibits, all of which were admitted into evidence without objection:

- Exhibit A - Stipulation for Compromise Settlement in case 03-051406 as to employer.
- Exhibit B - CV of Dr. Allen J. Parmet.
- Exhibit C - report of Dr. Allen J. Parmet dated 6/13/04
- Exhibit D - report of Dr. Allen J. Parmet dated January 29th, 2005.
- Exhibit E medical records of John Jones

The Second Injury Fund presented no live testimony but offered the following exhibits, which were admitted into evidence without objection:

- No. 1 - Deposition of Mr. John Jones taken on December 13, 2005

Mr. John Jones (hereinafter referred to as employee) testified that he was 59 years old at the time of hearing, and he had been married for approximately 24 years. He stated that his wife accompanied him to all of his medical appointments to help him "keep in line because my memory is not too good." Employee graduated from the 8th grade and subsequently obtained a GED in Chicago. After graduating from the 8th grade at the age of 16 years old, he began full-time work. He has had no other education since that time. He noted that since his coronary bypass surgery in September of 2002, he has had a loss of memory and is not very good at remembering things. He has been driving trucks all of his life, starting when he was approximately 14 years old and eventually graduated into driving tractor-trailer rigs all over the United States. He would supervise the loading and unloading of his rigs and occasionally help. The last job he had, started in 2001, local driving with Bennett Packaging of Kansas City. He left Bennett in 2003 after carpal tunnel surgery to his right upper extremity. He noted that the carpal tunnel injury was due to having to bang on the doors of the trucks to open them occasionally, causing the injury to his right upper extremity. Prior to this injury, which was February 28th of 2003, employee stated that he had suffered a heart attack in September of 2002. He had chest pain prior to that time starting back in 1998 and it gradually became worse and worse. On September 5th, 2002, he underwent a triple bypass for which he was off work for approximately two months until late October of 2002. He noted that since 1998 and over the following years he had become more fatigued and he had trouble with his legs with walking, as well as pushing in the clutch. Employee was also diagnosed with diabetes mellitus in 2002 after an increase in need to urinate, as well as an increase in fatigue. He also was suffering from blood in his urine. Prior to his heart attack in September of 2002, employee stated that his problems included his legs were becoming numb and weak interfering with his work. He would have to stop, rub his legs, and walk around. He also noticed problems with his eyes; he wasn't seeing as well. He was having chest pains. With regard to his diabetes, he noticed that he was getting sleepy, and often slept through lunch. He would have to stop frequently to go to the bathroom; and, further, since the surgery, the triple bypass surgery, he has had a loss of memory, which made it difficult for him to remember the routes and where he was supposed to go. He also noted that he was having problems with his arms being able to use the steering wheel. He would have to hit his arms on the steering wheel to wake them up as they would become numb and go to sleep. He stated he continued to work because he had to put food on the table. After his

carpal tunnel surgery, he was denied his DOT approval and was not able to return to work as a truck driver.

He noted that with regard to his activities of daily living, he would go to sleep somewhere around eight p.m. in the evening and wake up at 10 a.m. in the morning. He would get up and try to maybe work on the lawn, do a little raking, or maybe work on something mechanical but then would have to go back to bed. He stated that recently he tried to dig a trench in order to put some camera wires underground and it completely wore him out and he actually became very ill after only 30 minutes. He continues to have difficulty staying awake while driving. He lets his wife do all the driving. If he sits in a chair for very long, he will simply fall asleep. He doesn't feel there is any job he can do because of a combination of his problems of which he suffers, including sleepiness, fatigue, frequent urination. He continues to have numbness in his hands and shortness of breath.

On cross-examination, he did admit that he has a bad memory and that maybe his answers were not as accurate as he would have liked for them to be. He admitted that others generally unloaded the trucks, although from time to time he was required to help. He was a two- to three-pack-a-day smoker for quite sometime and was urged to stop smoking as far back as 1987. He admitted that when he initially had problems with the diabetes and it was recommended that he take a glucose test, he did not do so and continued to drive his truck after April 2001 when it was requested that he take a glucose test by his doctor. He admitted that after his heart surgery he did go back to work and did everything he could to perform a satisfactory job. He stated he was never disciplined for not performing his job duties. He admitted that he is on social security disability after June 3rd, 2003, and that he did good work for his employers and would get good evaluations, never missed work and that he performed 100 percent of all the requirements of the job with Bennett Packaging until his carpal tunnel surgery in 2003. He admitted his problems have gotten worse since February 5th, 2003.

On redirect he stated that the problems he had with his jobs would be that he would be running late on his runs, he had difficulty adhering to schedules even prior to February of 2003 due to all of his physical problems. The problems with his arms made it difficult for him to steer and navigate the truck. He had difficulty seeing in the caves when he had to drive down in them. He missed work due to his heart attack surgery, as he was off work for approximately two months.

On recross, he stated that he had been disciplined for being late a few times but it was noted that in his deposition, page 41, he stated that he did good work, he had good evaluations and that if asked employers would speak highly of him. Further, it was noted that he had a felony conviction which was not specifically determined and it was from a time period possibly in his teens.

Terry Jones, employee's wife, testified that they had been married for almost 23 years and that she does go to all of his medical appointments with him because she wants to know everything that is going on and wants to get results as quickly as possible. When they first met, she stated he was in good health and had noticed changes in his health beginning in 2001. She has noted that slowly but surely he had physical ailments of tiredness, weakness, and difficulty seeing. These problems became much worse after his heart attack, and then the carpal tunnel was added to that. In 2000 to 2001 he suffered from sleepiness. She noticed him sitting in a chair and just "dropping out". He would fall asleep quite a bit after the heart attack and would get weak. There were times when he would go to work and he would come home and he looked like he was just about to die. Prior to February 28th, 2003, when he worked around the house he would get real tired and sleep a lot. Prior to 2001 to 2003, he would come home on weekends from over-the-road truck driving and be able to do a number of chores around the house. Prior to his carpal tunnel surgery in 2003 that while he was driving and when she accompanied him she would have to rub his hands and he would actually beat his hands against the steering wheel in order to wake them up. He has continued to worsen since the carpal tunnel surgery, and that after the carpal tunnel surgery he was not approved by the DOT for his CDL license.

She testified that currently he is not able to do very much. He tries to mow and weed eat and tried to dig a trench that was only about three inches deep and really felt bad after that. On a typical day he gets up at between nine or ten and sometimes later and goes to bed at 8:30 in the evening. She stated he always seems run-down. Sometimes she is afraid he won't make it during the day while she is gone. There is an agency that comes in and helps clean and feed him meals during the day while she is at work. On cross-examination she admitted that since February of 2003 his condition has gotten worse and she noted that he was having sleeping problems and sleeping a lot since his heart attack.

Dr. Allen Parmet testified on behalf of employee, and in his testimony he reviewed his findings in his report of February 13, 2004, as well as January 29th, 2005. In that report it is noted that Dr. Parmet reviewed the employee's medical records and determined that employee suffered from right carpal tunnel syndrome status post surgical release, and felt that if employee's history was correct, that it would be occupationally related due to the recurrent banging of his hand and wrist on truck doors while employed with Bennett Trucking. He also noted that employee suffered from coronary artery disease status post coronary artery bypass graft September 2, 2002. This was not work related. He noted that as of September 2002, Mr. Jones was no longer physically qualified to hold a commercial driver medical certificate and further that employee suffered from diabetes mellitus Type II with an onset as early as 2001, and that he felt that as of May of 2002 he would have considered him disqualified as of that date and subsequent to it to return to driving a commercial vehicle. Dr. Parmet determined that employee suffered 15 percent permanent partial disability at the 175-week level of the right upper extremity. Dr. Parmet also felt that employee had a pre-existing disability of 10 percent of the body as a whole attributable to his diabetes mellitus Type II and further that due to employee's coronary artery disease that he suffered a permanent partial disability of 40 percent of the body as a whole. However, he felt that neither the diabetes nor the coronary disease were caused or exacerbated by his occupation but the disability they imposed interacted with the occupational injury to increase the overall effect on his ability to work in a synergistic manner resulting in an increased weighting factor of 10 to 15 percent. In Dr. Parmet's report of January 29, 2005, he felt that since February of 2003 employee's diabetes complications and coronary condition have progressed to the point that he is no longer able to sustain work at a sedentary level of labor on a sustained basis for a 40-hour week and he considered him at the time of his evaluation to be permanently and totally disabled from gainful employment due to the combined effects of these three conditions.

In reviewing the medical records admitted into evidence, it is noted that back on April 3, 1998, Dr. Kenneth Koontz performed a stress myocardial image demonstrating an ejection fraction of 54 percent and stressed-induced ischemia in the septum. On April 13th 1998, Dr. Craig Lundgren evaluated employee with a history of exertional chest pain and believed that the chest pain was from angina and that employee had a significant smoking history with 80-pack years and hypertension. He recommended proceeding to coronary angiography which was performed on April 14th demonstrating ejection fraction of 70 percent, a normal left main coronary artery, and plaquing that was present in the right coronary artery of 20 to 30 percent narrowing. On October 13th of 2000 Dr. John Fox performed a stress Cardiolite report with no ischemic changes noted, 80 percent of target heart rate was achieved. On November 3rd, 2000, Rhonda Dierksen, ARNP, saw him for a refill of Verapamil. He was complaining of light-headedness and dizziness after eating. It is also felt that he had bronchitis. On April 27th, 2001, Ms. Dierksen saw employee for Dr. Allen and it is noted he was complaining of hematuria, which was a recurrent problem. He was also complaining of fatigue and groin pain. He was now sleeping through lunch. He had urinary frequency and hypertension. Urinalysis demonstrated blood and he was diagnosed with fatigue, sleep apnea and prostatitis. He was smoking two to three packs of cigarettes a day at the time. He was begun on Tequin, which was an antibiotic. Also it was noted that a hemoglobin and glucose test were ordered but employee did not return to have the testing done. On October 26th, 2001, Dr. Fox admitted employee to Mercy Hospital in Fort Scott, Kansas for chest pain. He was noted to have pre-existing coronary disease and he was observed with telemetry and discharged home the following day. On October 31st, 2001, Dr. Downing performed a myocardial imaging study demonstrating an ejection fraction of 52 percent and mild hypokinesis of the inferior wall. On November 30th, 2001, Dr. Allen saw employee following hospitalization for chest pain. However, at that time he was not felt to have ischemia or myocardial infarction. May 20th, 2002, it was noted his triglycerides were elevated, glucose elevated to 144 and hemoglobin at 8.7 percent. His medications were adjusted. On July 26th, 2002, Dr. Allen saw him for follow-up for his diabetes. He had lost 14 pounds and was doing well. On August 19th 2002, Dr. Palmer provided a Department of Transportation commercial driver's medical certificate valid until May 20th, 2003. On his medical history employee reported taking Lotensin and Verapamil for high blood pressure. He specifically denied a history of heart disease, heart attack or other cardiovascular conditions and specifically denied diabetes or elevated blood sugars. The initial DOT driver's medical examination May 19th, 2002, was rejected due to a urine of four plus sugar with a specific gravity of 1.030. It was repeated on August 19th and reported to be negative. And it was noted on that date that he was on Glucotrol and controlled his sugars. Additional information documenting control of the diabetes was not appended. On September 5th, 2002, Dr. Allen evaluated employee for chest pain. He had chest pain off and on the day before and took seven Nitroglycerin and was unable to exert himself. He had presented to Fort Scott Mercy emergency department with a history of heart disease. The EKG at the time was not acute, and cardiac isoenzymes were negative. He was felt to have angina

and was transferred to St. John's Hospital in Joplin for cardiac defects.

On September 7th, 2002, Dr. Stephen Meyer admitted employee to St. John's Regional Medical Center in Joplin. He had a substernal chest pain diagnosed as unstable angina and he subsequently underwent coronary artery bypass grafting with three vessels grafted using the left internal thoracic artery to the left anterior descending and saphenous vein grafts to the diagonal and right coronary arteries on September 7th. He progressed well and was discharged home on September 13th for follow-up. On September 9th, Bennett Packaging Employee Absence Report indicated that employee was on medical leave of absence because of bypass surgery. On October 18th, 2002, Dr. Meyer issued a return to work status noting that employee was under care for coronary artery bypass surgery from September 7th through October 22nd, and he could return to work October 23rd, 2002. December 27th of 2002, Dr. Fox saw employee in consultation from Dr. Jay Allen after the bypass surgery and recommended cardiac rehab and Employee reported he could only do this on Fridays. December 30th, 2002, Dr. Fox evaluated Employee for entry into cardiac rehabilitation. Resting EKG changes were present with a possible right bundle branch block. Bruce protocol of 9 minutes was performed with a heart rate of 100 percent of predicted. No ischemia noted. 10.1 METS generated without arrhythmias. Limiting symptoms was leg fatigue. Recommended him to enter the cardiac rehab program. On December 30th, Gail Woods RN, reported initiating a cardiac rehab at the request of Dr. Allen. The sessions were conducted in December, January, February, March, and April 2002. A final report on April 25th indicated he was building up to 30 minutes of exercise three times a day, was building endurance and returning to weight lifting. He was able to treadmill for 20 minutes at a time achieving the maximum METS of 4.40.

On February 21, 2003, Dr. Douglas Hughes reviewed X-rays of employee's right hand demonstrating no acute changes. On March 11th, 2003, Dr. Allen saw him for right hand pain and paresthesias. He was felt to have right carpal tunnel syndrome and placed in a cock-up splint and given Bextra. On April 28th, 2003, Dr. Michael Ryan saw employee because of severe right hand pain, burning and discomfort of two months' duration who noted nerve conduction studies were abnormal as were EMG compatible with severe carpal tunnel syndrome without evidence of superimposed polyneuropathy. On April 28th, 2003, Dr. Lanny Harris evaluated employee for chest pain and employee had a cardiac catheterization and was not found to have recurrent coronary artery disease with all bypass grafts being patent, felt to have a severe carpal tunnel syndrome on the right, diabetes mellitus and hypertension and he was discharged home on April 30th. On April 28th, 2003, Christopher McKnight also saw him at Olathe Medical Center. He had two to three weeks of increasing chest pain not associated with exercise, had Nitroglycerin response, his diabetes was running between 60 to 150. Cardiac enzymes were normal, metabolic profile unremarkable, felt to have unstable angina, recommended to proceed with invasive cardiac testing. On further studies, chest pain was of undefined etiology, was demonstrated to have carpal tunnel syndrome that was severe and recommended follow-up with his primary care physician of Dr. Allen. On May 19th, 2003, Dr. Richard Brown issued a letter to the Department of Transportation stating that Mr. Jones' cardiac catheterization demonstrated normal left ventricular function and wall motion with diffuse three-vessel coronary disease and patent bypass grafts, felt that he was at low risk for cardiac event and able to resume normal activities, including work. On May 29th, 2003, Dr. Harris saw employee with history of several months of burning pain in the palms of his hands with all fingers going numb. He had a positive Tinel and Phalen's test with weak grip strength. Recommended surgical release which was done on June 3rd of 2003. On November 21, 2003, Dr. Daniel Zimmerman performed an independent medical examination obtaining X-rays of the right hand and demonstrating osteoarthritic changes of the first carpal metacarpal joint with other joints not demonstrating osteoarthritic changes. He noted that employee had coronary artery disease, mediated symptomatology since the late 1960's or early 1970's, and a coronary angiogram in 1998 demonstrated mild coronary disease. He felt that he had carpal tunnel syndrome related to his duties of employment and pre-existing coronary artery disease.

Mary Titterington, a vocational expert, testified that Employee was unemployable in the open labor market. Ms. Titterington opined that based on Dr. Parmet's restriction, Employee could not return to work as a commercial trucker, the job he performed for most for most of his life. She determined that he had no transferable skills, he would have trouble reporting to work on a daily basis, would have trouble staying on task, and would not be able to meet production goals. Based on Employee's functioning level and disabilities he is unemployable.

The employer and employee settled the claim against the employer on the basis of a 20% permanent partial disability at the 175-week level.

ISSUES

The first issue to be determined is whether Employee is permanently and totally disabled. RSMo §287.020.6 defines total disability as “an inability to return to any employment and not merely an inability to return to the employment in which the employee was engaged at the time of the accident.” The term “any employment” means “any reasonable or normal employment or occupation.” *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 404 (Mo.App. W.D. 1996) overruled on other grounds in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). It is not necessary that Mr. Jones be completely inactive in order to meet the definition of permanent total disability. Mr. Jones must be unable to compete in the open labor market. *Higgins v. The Quaker Oats Co.*, 183 S.W.3d 264, 272 (Mo.App. W.D. 2005)

The test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether an employer in the usual course of business would be reasonably expected to employ the employee in his present physical condition. *Custer v. Hartford Ins. Co.*, 174 S.W.3d 602, 616 (Mo.App. W.D. 2005). Courts have looked at factors such as the claimant’s physical and mental condition, age, education, training, job experience, and skills in making a determination of permanent total disability. See, *Gordon v. Tri-State Motor Transit Co.* 908 S.W.2d 849 (1995), 853 -854 (Mo.App. S.D. 1995), overruled on other grounds *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Dr. Parmet testified that as of September 2002 Employee was unqualified to hold a commercial driver’s license. Nonetheless, Employee was able to maintain the driver’s license and returned to work as a truck driver for Bennett Packaging after heart surgery. He was able to work as a truck driver from approximately October 2002 until his carpal tunnel injury on February 2003 and surgery in June 2003. After surgery, Mr. Jones attempted to return to work. He was not permitted to return by the DOT doctor because he could not pass the physical. He could not pass the physical because of his heart condition, his diabetes, and his carpal tunnel. He attempted to find other employment and was unsuccessful because of his medical conditions.

Dr. Parmet opined and testified that Employee is permanently and totally disabled because of his heart condition, his diabetes, and his carpal tunnel syndrome. Mary Titterington, a vocational expert with more than 20 years of experience testified that, based on Mr. Jones’ restrictions and taking into account his age, education, mental ability, and skills, he is unable to perform any work in the open labor market. Employee testified that he has attempted to find and cannot obtain any work. His wife testified that he is only able to work briefly and, after doing so, gets sick. The Social Security Administration has found Employee to be totally disabled. He is provided a home care attendant to clean and cook for him because he is unable to do these basic tasks himself. This Court finds that Employee is permanently and totally disabled.

The next issue to be determined is whether Employee’s permanent and total disability is a result of a combination of his primary carpal tunnel injury and his preexisting injuries. Dr. Parmet testified that his disability was not the result of Employee’s carpal tunnel alone. He testified that employee had preexisting coronary artery disease and diabetes. Dr. Parmet’s opinion was that Mr. Jones’ carpal tunnel resulted in a permanent partial disability of 15% at the 175-week level. He further opined that at the time of this injury, Mr. Jones had a preexisting disability of 10% of the body of the whole attributable to his diabetes. Dr. Parmet additionally believed that Mr. Jones’ coronary disease at the time of the injury constituted at 40% permanent partial disability to the body as a whole. Dr. Parmet’s report indicates that these three conditions increased the “overall effect on his ability to work in a synergistic manner. As a result, the total disability should be increased by a weighting factor of 10 to 15%.”

Immediately after being released back to work after carpal tunnel surgery, Mr. Jones attempted to return to work. He was not allowed to return because of his medical conditions. There is no dispute that this was for a combination of his medical conditions and not just his carpal tunnel condition. There is no evidence to dispute that he was unable to return to work because of the combination of his carpal tunnel, his coronary artery disease, and his diabetes.

The final issue to be determined is whether the Second Injury fund is liable to Employee for his permanent total disability benefits. In order to establish Second Injury Fund liability for permanent and total disability benefits, employee must prove that he has a permanent disability resulting in a compensable work-related injury and he has

a permanent disability predating the compensable work-related injury which is “of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed” RSMo §287.220.1. Additionally, Mr. Jones must prove the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time of the last injury resulted in permanent total disability. *Boring v. Treasurer*, 947 S.W.2d 483, 489 (Mo.App. E.D.,1997), overruled on other grounds *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

It is clear to this Court that Employee had a compensable work related injury. Mr. Jones testified that in February 2003, he was attempting to close doors on a tractor trailer when he felt a pop in his right wrist. He was subsequently diagnosed with carpal tunnel syndrome. The employer admitted liability and paid for employee’s carpal tunnel release surgery. He was released to return to work after recovering from his June 2003 carpal tunnel release surgery. Dr. Parmet rated this carpal tunnel injury at 15% permanent partial disability to the right upper extremity. The employer and claimant settled this claim for 20% to the right upper extremity. This settlement was approved by the division.

Employee had conditions which predated his carpal tunnel condition which were of such a seriousness to serve as an obstacle or hindrance to employment. Dr. Parmet, in his review of Employee’s medical history, notes that Employee had a long history of chest pain, that he was taking nitroglycerine as of September of 2002, and that in September of 2002 he had a heart attack and triple bypass surgery. Dr. Parmet stated that as of September 2002, Employee was no longer qualified to hold a commercial driver’s license.

Mary Titterington, Dr. Parmet, and Employee testified that this heart condition was an obstacle and hindrance to Employee’s employment before he developed carpal tunnel syndrome. Both Ms. Titterington and Dr. Parmet testified that without a commercial driver’s license, he could not drive. Dr. Parmet testified that with Employee’s heart condition could cause sleepiness. Employee testified that he began feeling uncontrollably tired in 2000 and this prevented him from performing his job in a satisfactory manner. It made him late to jobs and he was reprimanded for this. Additionally, the heart condition caused Employee a heart attack which prevented him from working for several months.

Dr. Parmet’s report notes that Employee was diagnosed with diabetes in 2002. Dr. Parmet testified that it often takes several years for a person to be diagnosed after the person becomes diabetic. Dr. Parmet testified that one of the first symptoms of diabetes is losing feeling in the extremities. Employee testified that he began to lose feeling in his extremities in 2000 and that this caused a hindrance in his employment in that he was not able to shift or drive as well and had to take breaks, thus making him late on his routes. Mrs. Jones testified that she remembers Employee banging his hands on the steering wheel trying to get the feeling in them. Dr. Parmet also testified that diabetes often causes frequent urination. Employee testified that starting in about 2000 and continuing throughout his employment at Bennett Packaging, he would have to urinate extremely frequently, causing him to be late on routes and his work performance to slip.

Dr. Parmet gave a permanent partial disability rating attributable to the diabetes, as of the date of his carpal tunnel occupational injury, of 10% of the body as a whole. Dr. Parmet further gave a permanent partial disability rating attributable to Employee’s heart condition, as of the date of the carpal tunnel occupational injury, of 40% of the body as a whole. Dr. Parmet opined that the coronary artery disease, the diabetes, and the carpal tunnel syndrome worked together in a synergistic manner to increase the disability by a weighting factor of 10 to 15%.

Every witness testified that Mr. Johns is no longer able to work. His inability to work began when he attempted to return from his carpal tunnel surgery. When Employee attempted to return to work a doctor refused to allow him to drive commercially. Dr. Parmet, in his report, concurs that Employee was not medically qualified to drive a commercial vehicle. He attempted to find work, but no one would hire him with his heart condition, his diabetes, and the residual effect of his carpal tunnel syndrome. Accordingly, he applied for and was granted social security disability. He has not been employed since leaving work to have his carpal tunnel surgery.

Mary Titterington testified that when Employee could not obtain medical clearance to drive commercially he was unable to be a commercial truck driver. She testified that this was the job Employee had for most of his life. She further testified that because of his education, training, and cognitive abilities, he did not have any transferable skills. Accordingly, he was unable to compete in the open labor market.

The Second Injury Fund appears to argue that it is not liable in this matter because Employee coronary artery disease and diabetes progressed after he could not work at Bennett Packaging. While there are indications that his condition may have worsened in the intervening years, the evidence is uncontroverted that he has been unable to work and compete in the labor market since his carpel tunnel surgery. There is no evidence of any malingering or anything else to show that he did anything but his utmost to obtain employment and was simply unable because of his prior medical conditions immediately after his carpel tunnel surgery.

Employee has met the test for establishing Second Injury Fund liability. He has proven that his coronary artery disease and diabetes were obstacles or hindrances to employment. Employee is permanently and totally disabled as a result of the combined effects of the February 28, 2003, carpel tunnel injury and his preexisting disabilities.

It appears that Mr. Jones became symptomatic for carpel tunnel syndrome on February 28, 2003, and had surgery on June 3, 2003. The testimony was that he stopped working before the surgery on June 3, 2003, and did not return thereafter. The employer paid temporary total disability for 4.33 weeks beginning on June 3, 2003 and ending on July 3, 2003. Employer also paid permanent partial disability of 20% at the 175 week level for 35 weeks. The Second Injury Fund became liable for \$208.87 per week beginning July 3, 2003 and continuing for the next 35 weeks, for a total of \$7,310.45. (\$208.97 is the difference between \$340.12 for permanent partial disability and \$548.99 for permanent total disability.). Once the 35-week time period expired, the Second Injury Fund became liable for \$548.99 a week in permanent total disability benefits from February 3, 2004 to present and continuing throughout Employee's lifetime or as long as Employee remains so disabled.

Finally an attorney fee of 25 percent of all benefits awarded herein shall be paid to Geoffrey Clark attorney for Employee.

Date: _____

Made by: _____

Emily S. Fowler
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation