

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

Injury No.: 08-020145

Employee: Lonnie Jones
Employer: Laclede County
Insurer: Missouri Association of Counties
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 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 9, 2010. The award and decision of Administrative Law Judge L. Timothy Wilson, issued March 9, 2010, 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 15th day of July 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Lonnie Jones

Injury No. 08-020145

Dependents: N/A

Employer: Laclede County

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

Insurer: Missouri Association of Counties

Hearing Date: January 22, 2010

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: March 7, 2008
5. State location where accident occurred or occupational disease was contracted: Laclede 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:
Employee was in a dump truck and was going to unload a load of gravel. The hydraulic cylinder blew out. This caused the bed of the dump truck, which was raised, to crash to the frame, which produced a violent force, injuring the claimant.
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: Low back
14. Nature and extent of any permanent disability: Total disability
14. Compensation paid to-date for temporary disability: \$4,037.67
16. Value necessary medical aid paid to date by employer/insurer? \$30,272.58

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$510.00
- 19. Weekly compensation rate: \$340.53 TTD/PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Future medical is awarded (See Award.)

Permanent total disability benefits from Employer beginning October 13, 2008, at the rate of \$340.53 per week.

- 22. Second Injury Fund liability: No

TOTAL:

- 23. Future requirements awarded: Future medical and permanent total disability benefits

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: Paul Reichert, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Lonnie Jones

Injury No. 08-020145

Dependents: N/A

Employer: Laclede County

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

Insurer: Missouri Association of Counties

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on January 22, 2010. The record was left open for the submission of additional evidence, and 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 February 21, 2010.

The employee appeared personally and through his attorney, Paul Reichert, Esq. The employer and insurer appeared through their attorneys, Dave Weidner, Esq., and Jared Vessell, Esq. The Second Injury Fund appeared through its attorney, Heather Rowe, Assistant Attorney General.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about March 7, 2008, Laclede County (a governmental entity in Missouri) was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Missouri Association of Counties.
- (2) On the alleged injury date of March 7, 2008, Lonnie Jones was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about March 7, 2008, the employee sustained an accident which arose out of and in the course and scope of his employment with the employer.
- (4) The above-referenced employment and accident occurred in Laclede County, Missouri. Additionally, the contract of employment was made in Missouri. The parties agree to venue lying in Greene County, Missouri. Jurisdiction is proper. Similarly, 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 claimed accident, the employee's average weekly wage was \$510.00, which is sufficient to allow a compensation rate of \$340.53 for both temporary total disability compensation and permanent disability compensation.
- (8) Temporary disability benefits have been provided to the employee in the amount of \$4,037.67, representing 11 6/7 weeks in disability benefits.
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$30,272.58 in medical expenses.

The sole issues to be resolved by hearing include:

- (1) Whether the accident of March 7, 2008, caused the injuries and disabilities for which benefits are now being claimed?
- (2) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee of the effects of the injuries?
- (3) Whether the employee sustained any permanent disability as a consequence of the accident of March 7, 2008; and, if so, what is the nature and extent of the disability?
- (4) 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 presented at the hearing of this case the testimony of four additional witnesses – Timmy Jennings, Lowell Morgan, Gerald Lindsey¹, and Phillip Eldred, M.S., C.R.C. In addition, the employee offered for admission the following exhibits:

Exhibit A..... Deposition of Shane Bennoch, M.D. (including attached exhibits)
Exhibit B..... Vocational Evaluation Report from Phillip Eldred, M.S., C.R.C.
Exhibit C..... Supplemental Report from Phillip Eldred, M.S., C.R.C.
Exhibit D..... CV of Phillip Eldred, M.S., C.R.C.

The exhibits were received and admitted into evidence.

¹ The testimony of Gerald Lindsey is stricken and not admitted into evidence.

The employer and insurer objected to the testimony of Gerald Lindsey, asserting that Mr. Lindsey is a client of the employer and insurer, insofar as Mr. Lindsey was the direct supervisor of the employee at the time of the accident, although he is no longer an employee of Laclede County. The employer and insurer, by counsel, further assert that the employee’s attorney contacted and met personally with Gerald Lindsey, and during this meeting discussed Mr. Lindsey’s testimony, without first contacting and proceeding through legal counsel for the employer and insurer, and without affording legal counsel for the employer and insurer an opportunity to be present for the meeting between Mr. Lindsey and the employee’s attorney. (It is not disputed that the employee’s attorney contacted and met personally with Gerald Lindsey, and during this meeting discussed Mr. Lindsey’s testimony, without first contacting and proceeding through legal counsel for the employer and insurer, and without affording legal counsel for the employer and insurer an opportunity to be present.)

In light of the objections of the employer and insurer, the undersigned reserved ruling on the admission of Mr. Lindsey’s testimony and afforded the employee an opportunity to present said testimony as an offer of proof, and similarly afforded the employer and insurer, and the Second Injury Fund, opportunity to cross-examine Mr. Lindsey under the offer of proof. The parties have been afforded an opportunity to brief this issue. Having now considered the arguments of counsel, the objections of the employer and insurer are sustained. In light of the employer being a governmental entity and Mr. Lindsey no longer being an employee of the employer, it is understandable that the employee’s attorney did not necessarily view Mr. Lindsey as a client of the employer and insurer; I do not believe the contact was made with improper intent. Yet, I am persuaded that Mr. Lindsey should be recognized as an employee of the employer for purpose of this litigation, and the employer’s attorney was entitled to be present during any such meeting between Mr. Lindsey and Mr. Jones’ attorney. Therefore, the testimony of Gerald Lindsey is stricken and not admitted into evidence

The employer and insurer presented two witnesses at the hearing of this case – Danny Rhoades and James England, M.Ed., C.R.C. In addition, the employer and insurer offered for admission the following exhibits:

- Exhibit 1..... Medical Records from St. John’s Lebanon Family Practice
- Exhibit 2.....Medical Records from St. John’s Hospital - Lebanon
- Exhibit 3.....Deposition of Lonnie Jones
- Exhibit 4.....Deposition of Thomas Corsolini, M.D.
- Exhibit 5..... Medical Report from Thomas Corsolini, M.D.
- Exhibit 6..... Vocational Evaluation Report from James England, M.Ed., C.R.C.
- Exhibit 7..... Employer’s Personnel File of Lonnie Jones
- Exhibit 8.....Medical Records from St. John’s Regional Health Center
- Exhibit 9..... Medical Report from John C. Tabb, D.O.
- Exhibit 10.....Medical Records and Report from Todd J. Harbach, M.D.
- Exhibit 11.....Medical Records from St. John’s – Lebanon Physical Therapy
- Exhibit 12..... CV of James England, M.Ed., C.R.C.

The Second Injury Fund did not present any witnesses or offer any additional exhibits at the hearing of this case.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took official or judicial notice of the documents contained in the Legal File, which include:

- Notice of Hearing
- Request for Hearing-Final Award
- Minute Entry – Approval of Request for Hearing & Change of Venue to Springfield
- Notice of Commencement / Termination of Compensation
- Report of Injury
- Claim for Compensation
- Answer of Employer/Insurer to Claim for Compensation
- Answer of Second Injury Fund to Claim for Compensation

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, Lonnie Jones, is 61 years of age, having been born on November 28, 1948. Mr. Jones is a resident of Eldridge, Missouri. Mr. Jones is a Vietnam Veteran, who served two years in the United States Army, and subsequently received an honorable discharge.

Mr. Jones enjoys limited education, as he attended but did not graduate from high school. Nor has he obtained a GED or other vocational training or certification. Mr. Jones, however, possesses a CDL and Missouri driver's license.

Mr. Jones' vocational history is varied and relates primarily to labor-oriented work, including occupations described as Operating Engineer, Power-Shovel Operator, and Material Handler. Additionally, Mr. Jones has owned a construction business, working as a subcontractor.

In or around 1977 Mr. Jones obtained employment with Laclede County, working as a heavy equipment operator. He worked in this employment until in or around 1984. Thereafter, he operated his own business, "Jones Backhoe Service", which involved custom backhoe work, digging footings, helping put in sewer systems or water lines, etc., for residential construction projects. Additionally, in this business he put in footings for pole barns. He worked in this occupation as a self-employed person until in or around 1994.

In April 1994 Mr. Jones returned to work for Laclede County, working in the Road and Bridge Department. In this employment he worked primarily as a heavy-equipment operator, working with road graders, dozers, etc. Additionally, at times, he drove dump trucks, hauling sand, gravel, rock, etc. In the winter he would plow snow. And at other times he performed other work as asked of him, including driving his personal vehicle (4-wheel-drive truck) to evaluate road conditions and to drive to Springfield to pick up parts. Mr. Jones continued in this employment until being terminated by Laclede County on or about August 19, 2008.

Notably, while working for Laclede County, Mr. Jones worked as a self-employed contractor performing insulation work. He performed this work as a subcontractor and worked evenings and weekends. He ceased being able to engage in this work following his accident of March 7, 2008. And he has not engaged in any employment subsequent to being terminated by Laclede County.

Accident of March 7, 2008

On or about March 7, 2008, Lonnie Jones sustained an injury arising out of and in the course of his employment with Laclede County. At the time of the injury, the Laclede County road crew was spreading rock to cover metal culverts and certain rural roads in the county. As a member of the road crew, Mr. Jones ordinarily served as a backhoe operator. On this day he was the passenger in a dump truck which was being driven by Lester Baker. In addition to the dump truck, the road crew utilized a road grader which was being operated by Roger Mason.

Initially, Mr. Baker and Mr. Jones obtained a load of rock to cover metal culverts, which they had placed across the road; however, another worker had asked for a load of gravel to place on the road. The dump truck had approximately 19 ton of two-inch rock on it. Ordinarily, the road crew would spread the rock while going uphill. However, the road was muddy, which required the crew to spread the rock while going downhill. And, in light of the crew having to spread the rock while going downhill, the crew placed the bed of the dump truck nearly all the way up in order to distribute the rock. As the dump truck took off, the hydraulic cylinder blew out, causing the truck bed to fall freely to the frame. The crashing down of the bed produced a violent force, causing Mr. Jones to hit his head on the ceiling of the cab and then his buttock into his seat; he experienced immediate and severe pain in his low back. According to Roger Mason, who witnessed the incident, the crashing down of the bed caused the front tires of the dump truck to come off the ground four or five feet.

Subsequent to suffering this incident, Mr. Jones attempted to step out of the truck, but had pain and was unable to stand. He crawled to the edge of the road; he rested lying down for approximately 30 minutes. Thereafter, Mr. Jones and Mr. Baker got back in the truck and drove to the highway. Mr. Jones called Jerry Lindsay (foreman) and asked him to come and get him. While waiting for Mr. Lindsay, Mr. Jones laid on the grass of a person's yard. Mr. Lindsay arrived and took Mr. Jones to the emergency room of St. John's Hospital-Lebanon for evaluation and treatment.

Mr. Jones presented to the emergency room of St. John's Hospital - Lebanon with complaints of sharp back pain, exacerbated with movement and "relieved by nothing." The attending physician ordered x-rays of the lumbar spine. In light of his examination and findings, the attending physician diagnosed Mr. Jones with acute myofascial strain of the lumbar spine and a urinary tract infection. Mr. Jones was discharged from the hospital with medication (muscle relaxants and pain) and instructions to follow up with his primary care provider. (Apparently, the attending physician in the emergency room did not review the x-rays, or reviewed the x-rays to not reflect any fractures. However, the diagnostic imaging report, which was dictated on March 8 and transcribed on March 10) indicates that the x-rays evidenced a "low grade compression fracture of the cephalad endplate of L2 with about 10 percent collapse of the vertebral body." (Additionally, the x-rays revealed spondylosis and calcifications superimposing the lower pole of the left kidney.)

On March 13, 2008, Mr. Jones presented to John C. Tabb, D.O., for an examination and evaluation. At the time of this examination, Mr. Jones presented with complaints of moderate pain in his low back, more on the right than the left, since sustaining the accident on March 7, 2008. In light of his examination and findings, Dr. Tabb diagnosed Mr. Jones with a strained low back, and prescribed Flexeril and Tramadol, and placed work restrictions on Mr. Jones, including no climbing, no bending over, and no lifting more than 5 pounds. Dr. Tabb provided follow-up care. In the course of providing follow-up treatment, and in light of Mr. Jones continuing to present with low back pain, Dr. Tabb requested the x-ray reports from the emergency room visit of March 7, 2008. Upon reviewing the x-ray reports in April 2008, Dr. Tabb amended his diagnosis to include: 1) low back pain secondary to vertebral fracture; and 2) strained abdominal muscles. Dr. Tabb continued to provide follow-up treatment. Mr. Jones, however, did not improve, resulting in Dr. Tabb referring Mr. Jones to a spine surgeon for evaluation.

Mr. Jones presented to Todd J. Harbach, M.D., who is an orthopedic surgeon, for an examination and evaluation on May 8, 2008. At the time of this examination, Dr. Harbach took a history from Mr. Jones, reviewed certain medical records, and performed a physical examination of him. In light of his examination, Dr. Harbach propounded the following diagnosis:

ASSESSMENT:

1. Acute compression fracture approximately 2 months ago, March 7, 2008 accident on the job while driving a dump truck.
2. Back pain.
3. Possible osteopenia / osteoporosis.

In addition, Dr. Harbach ordered additional diagnostic studies, including an MRI scan of the lumbar spine. And Dr. Harbach took Mr. Jones off work, noting that he did not wish to “worsen the amount of anterior compression he has although that may not be possible at this point.”

In follow-up treatment, Dr. Harbach noted that the MRI scan revealed an acute fracture of the lumbar spine at the level of L2, which had not completely united. Additionally, Dr. Harbach noted, “The STIR images still lights up with a lot of increased signal. He also has a very collapsed degenerative level at L5-S1 that is chronic in nature and some degenerative discs throughout his back.” Dr. Harbach continued to take Mr. Jones off work and discussed treatment options with him. (James Sauer, M.D, who is the physician responsible for and reviewing the MRI, identified the L2 fracture as a “recent burst fracture of the L2 vertebral body.”)

On or about May 19, 2008, Dr. Harbach performed a Kyphoplastic procedure, referable to the defect at the L2 compression fracture. Postoperatively, Mr. Jones experienced improvement, but continued to experience a lot of pain in his low back with pain into his right buttock. Noting that Mr. Jones is unable to sit, stand, lie down, or do anything for a prolonged period without hurting, Dr. Harbach determined that Mr. Jones should continue to remain off work, and be referred to a pain clinic for facet blocks, SI joint injections, and possible epidurals.

Subsequently, Mr. Jones received post-operative care, including physical therapy provided by St. John's – Lebanon Physical Therapy Clinic. In June 2008 Dr. Harbach noted, among other things, that the post-operative MRI "revealed advanced lumbar spondylosis with essentially bone-on-bone wearing out of the lumbosacral disk" Additionally, Dr. Harbach noted that "the recent injury [March 7, 2008 injury] not only fractured the L2, but also set off all of his other degenerative processes and made them much worse." And Dr. Harbach noted that Mr. Jones was still unable to do very much, and was not able to return to his employment as a heavy-equipment operator. At the time of this examination, Dr. Harbach diagnosed Mr. Jones' medical condition to include: 1) healing L2 Kyphoplasty for acute vertebral body fracture; 2) advanced lumbar spondylosis with multilevel lumbar degenerative disk disease; 3) facet syndrome; and 4) possible sacroiliac joint pain.

On or about July 8, 2008, Dr. Harbach released Mr. Jones from his care, and referred him to Thomas Corsolini, M.D., who is a physician practicing in the areas of physical medicine and occupational medicine and is affiliated with Dr. Harbach's office. In releasing Mr. Jones from his care, Dr. Harbach propounded the following comments:

He has a pretty worn out back with pretty significant spondylosis. He was not having that many problems with it until this injury. I really do not recommend a big fusion for him because I doubt that it would increase his chance of returning to the same level of activity or work. Rather, I would send him to the Pain Clinic and perhaps to Physiatry. ... The patient may have to realize that he may not be able to return to this job; that certainly remains a possibility. I am going to keep him off work until he gets an appointment with either Dr. Corsolini or Dr. Pak, and I would like to transfer his care to them and they can work on work hardening and getting him back to work and handle his light duty forms and then also his final rating.

Dr. Corsolini assumed responsibility for Mr. Jones post-operative care, seeing Mr. Jones on three separate occasions. Dr. Corsolini allowed Mr. Jones to attempt a return to work in August 2008; Mr. Jones worked two days as an equipment operator, but the back pain increased to the point of not allowing Mr. Jones to perform all of his work duties.

In August 2008 the employer terminated Mr. Jones from its employment. Mr. Jones continued to treat with Dr. Corsolini, eventually determining that on October 13, 2008, Mr. Jones had reached maximum medical improvement, and released him from his care. Notably, in releasing Mr. Jones from his care, Dr. Corsolini addressed the nature of the injury and extent of disability, propounding the following comments:

He has healed from the compression fracture, and that particular level probably is not causing him any significant discomfort. He most likely is having ongoing discomfort attributable to the degenerative changes at the L5-S1 level. My opinion is that while the degenerative changes are preexisting, they probably were aggravated on a long-term basis with the incident of March 7, 2008. My opinion is that he will not be able to tolerate sustained operation of heavy equipment due to the difficulties posed by the sitting position combined with vibration and irregular movement. I would recommend that he have a long-term limitation of 30 pounds

maximum lifting and carrying on an occasional basis, and general avoidance of heavy equipment operation. I would estimate that he has sustained a permanent partial impairment of 3% of the whole person due to the compression fracture at the L2 level, and 3% of the whole person due to prolonged aggravation of preexisting degenerative changes at the L5-S1 level.

(In his deposition testimony, Dr. Corsolini indicated that a “compression fracture is a crushing or compressing of the bone.”)

On or about February 12, 2009, Mr. Jones presented to Shane L. Bennoch, M.D., for an independent medical examination and evaluation. At the time of this examination, Dr. Bennoch took a history from Mr. Jones, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Jones, Dr. Bennoch opined that, as a consequence of the March 7, 2008 accident, Mr. Jones sustained two injuries – 1) an L2 burst fracture; and 2) an aggravation of preexisting degenerative changes of the lumbar spine at the levels of L5-S1. Dr. Bennoch further opined that this accident necessitated receipt of medical care, including the Kyphoplasty procedure, and is the cause of Mr. Jones continuing to experience persistent back pain with radicular pain on the right.

Dr. Bennoch opined that the March 7, 2008, injury caused Mr. Jones to be temporarily and totally disabled from the time of the accident until he was dismissed from work in early October 2008. Dr. Bennoch felt that, at the time of his examination, Mr. Jones had reached maximum medical improvement, and was governed by restrictions and limitations. In this regard, Dr. Bennoch prescribed restrictions and limitations, which include:

1. Mr. Jones is limited to lifting less than 10 pounds.
2. Mr. Jones is not to engage in frequent lifting. (Dr. Bennoch defines “frequently” to mean “occurring one-third to two-thirds of an 8-hour workday (cumulative, not continuous).”)
3. Mr. Jones is limited in standing and/or walking to less than 2 hours in an 8-hour workday.
4. Mr. Jones must periodically alternate sitting and standing to relieve pain or discomfort.
5. Mr. Jones is limited in pushing and/or pulling in lower extremities; he cannot push or pull greater than 20 pounds and it cannot be repetitive.
6. Mr. Jones is never to climb ramps, poles, ladders, ropes or scaffolds; and he is never to balance on narrow, slippery, or moving surfaces. He may occasionally climb stairs; he may occasionally kneel -- bending legs to rest on knees; he may occasionally crouch – bending downward, forward with legs and spin; he may occasionally crawl – moving on hands and knees; and he may occasionally stoop – bending at waist. (Dr. Bennoch defines

“occasionally” to mean “occurring from very little up to one-third of an 8-hour workday (cumulative, not continuous).”

These restrictions are based on the March 7, 2008 accident, considered alone.

In rendering an assessment of permanent disability, Dr. Bennoch opined that the March 7, 2008, accident caused Mr. Jones to sustain a permanent partial impairment of 35 percent to the body as a whole, referable to the low back; Dr. Bennoch opines that this impairment is a hindrance to employment or reemployment. Additionally, Dr. Bennoch opined that, prior to March 7, 2008, Mr. Jones presented with preexisting impairments, which were a hindrance to employment or reemployment. In identifying the preexisting impairments, Dr. Bennoch opined that, prior to March 7, 2008, Mr. Jones presented with a permanent partial impairment of 10 percent to the body as a whole, referable to the endocrine system due to non-insulin dependent diabetes mellitus; and he presented with a permanent partial impairment of 5 percent to the body as a whole, referable to cardiovascular system due to hypertensive cardiovascular disease requiring treatment.

In addition, Dr. Bennoch opined that the combination of impairments creates a substantially greater impairment than the total of each separate injury/illness, and a loading factor should be added. Further, Dr. Bennoch is of the opinion that Mr. Jones is permanently and totally disabled.

Dr. Bennoch testified by deposition in behalf of the employee. In discussing the nature of the injury caused by the March 7, 2008 accident, Dr. Bennoch acknowledged that, prior to March 7, 2008, Mr. Jones presented with preexisting arthritic changes in the vertebra; the x-rays evidenced “lipping, he had some bridging.” In further describing this medical condition, Dr. Bennoch identified this condition to involve L4-L5 disc disease, with neuroforaminal stenosis and impingement of the L5 nerve. Yet, according to Dr. Bennoch, the vertebra looked good. Dr. Bennoch noted that this preexisting condition involved degenerative changes in the lumbar spine, but the condition was not disabling.

However, Dr. Bennoch notes that the violent nature of the March 7, 2008, accident to Mr. Jones’ body caused him to sustain an injury superimposed on this preexisting condition, rendering the injury symptomatic, and necessitated receipt of medical care. Dr. Bennoch testified that the mechanism of the March 7, 2008, accident is the prevailing factor in causing Mr. Jones to suffer an L5 nerve injury, rendering him symptomatic and to require receipt of medical care.

In addressing the limitations and restrictions governing Mr. Jones, Dr. Bennoch acknowledged that the restrictions and limitations he imposed on Mr. Jones relate to the March 7, 2008 accident, considered alone. Additionally, Dr. Bennoch acknowledged that Mr. Jones’ history of having to lie down and rest morning and afternoon to manage conservatively his pain is an appropriate method to manage his pain. Dr. Bennoch notes that “lying down” is sometimes “the only way he gets relief. In other words, just taking all the weight off is sometimes necessary.”

Further, Dr. Bennoch testified that, as a consequence of the March 7, 2008 accident, which Dr. Bennoch considers to be the prevailing factor, Mr. Jones will require receipt of

additional or future medical care. In this regard, Dr. Bennoch notes that Mr. Jones needs prescription medication to manage his pain and inflammation; and the condition may continue to worsen, necessitating additional surgical care.

In addition, in speaking to Mr. Jones' preexisting conditions, Dr. Bennoch testified that Mr. Jones presented with diabetes and hypertension – medical conditions that may interfere and can be disabling. According to Dr. Bennoch, while these conditions were disabling, Mr. Jones was continuing to work and worked around these medical problems.

Also, in addressing Mr. Jones' preexisting medical condition, on cross-examination, Dr. Bennoch acknowledged that in 1997 Mr. Jones obtained treatment for complaints to the low back pain. However, in addressing this medical event, Dr. Bennoch noted that the condition actually involved the "left CVA" (costovertebral angle) where the kidney sits, and dysuria. Dr. Bennoch identified this condition to involve a kidney or urinary infection, which was treated with Septra, and resolved with treatment for the infection.

Similarly, Dr. Bennoch acknowledged that in March 1999 Mr. Jones obtained medical treatment for complaints of low back pain, with pain in the hip, and during this period obtained chiropractic care. However, Dr. Bennoch noted that the examination performed on March 3, 1999, revealed that the straight leg testing was negative, and the pain appeared to resolve with conservative care, without Mr. Jones requiring additional follow-up treatment. And then in December 2000 Mr. Jones obtained treatment for back and groin pain while pheasant hunting; but he was diagnosed with hypertension, and did not receive treatment for a back injury.

Notably, in addressing the medical treatment received by Mr. Jones in 1997 to 2000, Dr. Bennoch identified this treatment to involve two to three visits to a physician. And, while Mr. Jones may have presented with low back pain with radicular complaints, the pain likely related to transient musculoligamentous pain, involving flareups irritating the nerves down in the low back, which resolved with anti-inflammatories and other conservative treatment, including rest. Dr. Bennoch further noted that, subsequent to resolution of this pain, Mr. Jones did not seek or obtain treatment for his low back until suffering the March 7, 2008 accident – approximately 8 years later. Dr. Bennoch thus concludes that, while Mr. Jones suffered from degenerative disc disease, this earlier low back pain did not involve a disc or nerve impingement. In explaining this testimony, Dr. Bennoch propounds the following comments:

Obviously, if it had been a disc and a nerve impingement, he would have had persistent complaints and he wouldn't have been able to do the job he was doing because he – you know, he just couldn't do it with a disc and nerve impingement.

* * *

I think if you look at an MRI report that was done in May of '08, it does mention that does have diffuse spondylosis present, but it also says, "The spinal canal and the neuroforamina are widely patent." And ... that's an important note in this guy's interpretation of the MRI. So, in other words, he – he's had some degenerative changes, but all the areas that might cause problems looks okay. The

spinal cord – the spinal canal opening is all nice and big, and the openings where the nerves go out – the neuroforamina – are also widely patent or widely opened.

Further, in addressing the question of causation, Dr. Bennoch testified on cross-examination that it is more likely than not that the neuroforaminal stenosis was caused by the acute trauma associated with the burst fracture. The March 7, 2008, accident is not merely a triggering or precipitating event, but the prevailing factor in causing Mr. Jones to suffer the L2 fracture and neuroforaminal stenosis. And, in this context, Dr. Bennoch opined that, at the time of the March 7, 2008 accident, Mr. Jones did not have any permanent impairment referable to the preexisting degenerative disc disease, insofar as it was completely asymptomatic. According to Dr. Bennoch, “[w]hat occurred was he went from asymptomatic to having an L4-5 disc with L5 nerve impingement, and that was from the accident. And that – again, more likely than not, and in my opinion, a lot more than more likely than not – was secondary to the accident.”

Phillip Eldred, M.S., C.R.C., testified in behalf of the employee. Mr. Eldred performed a vocational examination and evaluation of Mr. Jones on March 19, 2009. At the time of this evaluation, Mr. Eldred took a vocational and medical history of Mr. Jones, reviewed the various medical records, and performed certain vocational tests. In light of his examination and evaluation of Mr. Jones, Mr. Eldred opined that Mr. Jones is unemployable in the open and competitive labor market. Mr. Eldred further opined that Mr. Jones is unemployable in the open and competitive labor market as a consequence of the March 7, 2008 accident, considered alone, referable to the burst fracture and the limitations resulting from this work injury.

Notably, in rendering this opinion, Mr. Eldred testified that the most important factor in considering the question of Mr. Jones’ employability relates to the functional limitations and restrictions placed on him by the physicians. Additionally, Mr. Eldred notes that the lack of a GED or high-school degree is a detriment to Mr. Jones’ employability; and Mr. Jones is not a candidate to return to school and obtain retraining.

Further, in considering the restrictions imposed by the physicians, Mr. Eldred noted that only Dr. Bennoch provides sufficient specificity to allow him to assess vocationally the restrictions and limitations governing Mr. Jones. Although Dr. Corsolini and Dr. Tabb identified certain restrictions and limitations, the restrictions and limitations imposed by Dr. Corsolini and Dr. Tabb are incomplete. These physicians identify restrictions that relate to Mr. Jones’ past employment as a heavy-equipment operator, and do not address the limitations and restrictions governing Mr. Jones relative to other activities.

Dr. Corsolini testified in behalf of the employer and insurer. In discussing the nature of the March 7, 2008, injury and Mr. Jones’ continuing pain, Dr. Corsolini opined that the continuing source of Mr. Jones’ pain involves the L5-S1 level. In explaining his opinion, Dr. Corsolini noted that, following the kyphoplasty procedure, Mr. Jones’ pain around the waist resolved, but he continued to experience leg pain, typically, pain attributed to the L2 level does not radiate to the leg, but goes around the torso, generally at the waist level. Dr. Corsolini thus testified that he believed that the Kyphoplasty procedure was successful for treatment of the L2 fracture, but Mr. Jones was continuing to experience pain caused by the L5-S1 level.

In discussing the nature and extent of the March 7, 2008 injury, Dr. Corsolini indicated that, while he did not state it in his report, he is of the opinion that Mr. Jones' permanent impairment was 6 percent of the whole person; 50 percent is attributed to the March 7, 2008, injury and 50 percent is preexisting, attributable to previous degenerative changes. Notwithstanding, Dr. Corsolini acknowledged that the March 7, 2008, accident caused more than an L2 fracture; the L2 fracture "could have made something about his condition at L5-S1 change... functionally, something changed for him at that point."

On cross-examination Dr. Corsolini acknowledged that he did not believe Mr. Jones was magnifying his symptoms or that he was not being truthful with him. Mr. Jones voiced a genuine desire to return to his former occupation; and he gave a good try in returning to that occupation. Also, on cross-examination Dr. Corsolini acknowledged that he did not note Mr. Jones having any prior back problems, and would have noted prior back problems if it was in his review of medical records or had been reported to him by Mr. Jones.

James M. England, Jr., M.Ed., C.R.C., testified in behalf of the employer and insurer. Mr. England performed a vocational examination and evaluation of Mr. Jones on August 20, 2009. At the time of this evaluation, Mr. England took a vocational and medical history of Mr. Jones, reviewed the various medical records, and vocational report of Mr. Eldred. Mr. England did not perform any vocational tests, in light of the testing performed by Mr. Eldred. In light of his examination and evaluation of Mr. Jones, Mr. England opined that, if he assumed the restrictions imposed by Dr. Corsolini or Dr. Harbach, Mr. Jones is employable in the open and competitive labor market, and could perform "entry-level service employment such as cashiering, retail sales, security work, working as a courier delivering small products or packages, doing light assembly or packing work, etc." And Mr. England notes that, if Mr. Jones obtained "some additional short-term skill development, he could perform an even wider range of activity."

Yet, Mr. England acknowledges and opines that, if he assumed the restrictions imposed by Dr. Bennoch, Mr. Jones is unemployable in the open and competitive labor market. Additionally, Mr. England acknowledged that Mr. Jones applied for and obtained rather quickly social security disability benefits; but it is "not surprising considering the fact that he would be approved under the Social Security grid system considering his age and lack of transferable skills alone, regardless of the facts that he could do entry-level alternative employment."

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, Section 287.800, RSMo.

I. Nature of Injury

On or about March 7, 2008, Lonnie Jones sustained an injury by accident arising out of and in the course of his employment with Laclede County. At the time of this incident, the Laclede County road crew was spreading rock to cover metal culverts and certain rural roads in the county. As a member of the road crew, the employee worked as a backhoe operator or road grader. On this day he was the passenger in a dump truck, which was being driven by Lester Baker. In addition to the dump truck, the road crew utilized a road grader, which was being operated by Roger Mason.

Initially, Mr. Baker and Mr. Jones obtained a load of rock to cover metal culverts, which they had placed across the road; however, another worker had asked for a load of gravel to place on the road. The dump truck had approximately 19 ton of two-inch rock on it. Ordinarily, the road crew would spread the rock while going uphill. However, the road was muddy, which required the crew to spread the rock while going downhill. And, in light of the crew having to spread the rock while going downhill, the crew placed the bed of the dump truck nearly all the way up in order to distribute the rock. As the dump truck took off, the hydraulic cylinder blew out, causing the truck bed to fall freely and forcefully to the frame. Notably, the crashing down of the bed caused the front tires of the dump truck to come off the ground four or five feet. The crashing down of the bed produced a violent force, causing Mr. Jones to hit his head on the ceiling of the cab and then his buttock into his seat; he experienced immediate and severe pain in his low back. The injury necessitated receipt of medical care, including a surgical procedure involving kyphoplasty.

The parties do not dispute that Mr. Jones sustained an injury by accident on March 7, 2008. The parties, however, offer competing medical opinions, which differ in the nature and severity of the injury caused by the March 7, 2008, accident. The employee relies principally upon the medical opinions of Shane Bennoch, M.D.; the employer and insurer rely principally upon the medical opinions of Dr. Corsolini.

After consideration and review of the evidence, I resolve the differences in medical opinion in favor of Dr. Bennoch, who I find credible, reliable, and worthy of belief. In rendering this decision, and having had an opportunity to view personally Mr. Jones, I find Mr. Jones to be credible and accept as true his testimony, including complaints of pain and symptomology. In particular, I accept as true and find that, prior to March 7, 2008, and for approximately eight years preceding the incident, Mr. Jones did not suffer from low back pain or present with any radicular complaints; but, subsequent to the accident, Mr. Jones experienced immediate and severe low back pain with radicular complaints to his leg. And, since suffering this accident, Mr. Jones has experienced a progression of low back pain with radicular complaints, which affect his ability to work and engage in daily activities.

I further find and conclude that, prior to March 7, 2008, Mr. Jones presented with degenerative disc disease of the lumbar spine, but was asymptomatic. At most, prior to March 7, 2008, Mr. Jones experienced transient musculoligamentous pain, which did not prevent him from working or engaging in his daily activities, and resolved with anti-inflammatory medication and/or rest. The occasional prior low back pain experienced by Mr. Jones did not involve a disc or nerve impingement.

Notably, both Dr. Bennoch and Dr. Harbach have addressed the nature and severity of the injury caused by the March 7, 2008, accident. Dr. Bennoch opined that the March 7, 2008, accident is the prevailing factor in causing Mr. Jones to sustain two injuries -- 1) an L2 burst fracture; and 2) an aggravation of preexisting degenerative changes of the lumbar spine at the levels of L5-S1. He offers medical testimony explaining the nature and mechanism of this injury. And Dr. Harbach, in his office note of June 2008, states that the post-operative MRI "revealed advanced lumbar spondylosis with essentially bone-on-bone wearing out of the lumbosacral disk." Additionally, Dr. Harbach states that the March 7, 2008, accident "not only fractured the L2, but also set off all of his other degenerative processes and made them much worse." Dr. Harbach further notes that, as a result of this injury, Mr. Jones presents with a medical condition that includes: 1) healing L2 Kyphoplasty for acute vertebral body fracture; 2) advanced lumbar spondylosis with multilevel lumbar degenerative disk disease; 3) facet syndrome; and 4) possible sacroiliac joint pain.

Accordingly, after consideration and review of the evidence, I find and conclude that, the March 7, 2008, accident is the prevailing factor in causing Mr. Jones to sustain two injuries -- 1) a burst fracture of the L2 vertebral body; and 2) an aggravation of preexisting degenerative changes of the lumbar spine at the levels of L5-S1. The latter injury includes development of advanced lumbar spondylosis with multilevel lumbar degenerative disk disease; facet syndrome; and possible sacroiliac joint pain. Although Mr. Jones presented with preexisting degenerative disk disease of the lumbar spine, this preexisting medical condition was not symptomatic, and did not involve a disc injury or cause nerve impingement. However, the mechanism of the March 7, 2008, accident, which involved a violent force to Mr. Jones' body, caused Mr. Jones to aggravate severely the degenerative condition of the lumbar spine, causing Mr. Jones to develop and suffer significant progression of degenerative changes to the lumbar spine at the levels of L4-L5, L5-S1.

II. Medical Care

The evidence is supportive of a finding that the accident of March 7, 2008, necessitates receipt of future medical care. Dr. Bennoch testified that, as a consequence of the March 7, 2008, accident, which Dr. Bennoch considers to be the prevailing factor, Mr. Jones will require receipt of additional or future medical care. In this regard Dr. Bennoch notes that Mr. Jones needs prescription medication to manage his pain and inflammation; and the condition may continue to worsen, necessitating additional surgical care. I find Dr. Bennoch credible and persuasive on this issue.

Admittedly, Dr. Harbach released Mr. Jones from his surgical care, and not recommending a fusion. Yet, he released him from his care while recognizing that Mr. Jones presented with continuing and significant symptomology, which required additional medical care, including recommendations for referral to a pain clinic. Additionally, Dr. Harbach ruled out a fusion, not because of lack of symptoms, but because he did not believe it would increase his chance of returning to the same level of activity or work.

After consideration and review of the evidence, I find and conclude that, as a consequence of the March 7, 2008, accident, Mr. Jones sustained an injury to his low back; and,

while he is at maximum medical improvement relative to this injury, he is continuing to present with symptoms that necessitate future medical care. The March 7, 2008, accident is the prevailing factor in causing Mr. Jones to suffer from a medical condition, which necessitates receipt of future medical care in order to cure and relieve him from the effects of the injury. Therefore, the employer and insurer are ordered to provide to the employee such future medical care as may be prescribed and directed by Dr. Bennoch, and which is reasonable, necessary, and causally related to the March 7, 2008 accident.

III.

Nature & Extent of Permanent Disability & Liability of Second Injury Fund

The accident of March 7, 2008, and the injuries caused by this accident, causes Mr. Jones to be governed by permanent restrictions and limitations. Having considered the various restrictions imposed by the several physicians, I find and conclude that, as a consequence of the March 7, 2008 accident, considered alone, Mr. Jones is governed by the permanent restrictions imposed on him by Dr. Bennoch. These restrictions, which relate solely to the March 7, 2008, accident, considered alone, are as follows:

1. Mr. Jones is limited to lifting less than 10 pounds.
2. Mr. Jones is not to engage in frequent lifting. (Dr. Bennoch defines "frequently" to mean "occurring one-third to two-thirds of an 8-hour workday (cumulative, not continuous)."
3. Mr. Jones is limited in standing and/or walking to less than 2 hours in an 8-hour workday.
4. Mr. Jones must periodically alternate sitting and standing to relieve pain or discomfort.
5. Mr. Jones is limited in pushing and/or pulling in lower extremities; he cannot push or pull greater than 20 pounds and it cannot be repetitive.
6. Mr. Jones is never to climb ramps, poles, ladders, ropes or scaffolds; and he is never to balance on narrow, slippery, or moving surfaces. He may occasionally climb stairs; he may occasionally kneel -- bending legs to rest on knees; he may occasionally crouch -- bending downward, forward with legs and spine; he may occasionally crawl -- moving on hands and knees; and he may occasionally stoop -- bending at waist. (Dr. Bennoch defines "occasionally" to mean "occurring from very little up to one-third of an 8-hour workday (cumulative, not continuous)."

In addition, Mr. Jones testified that, at times during the day he must lie down in order to relieve his pain, attributable to the March 7, 2008 injury. I find Mr. Jones credible. Dr. Bennoch considers this a reasonable restriction governing Mr. Jones' condition. I find and conclude that the restrictions and limitations governing Mr. Jones include having to lie down periodically during the day.

Dr. Bennoch is of the opinion that Mr. Jones is permanently and totally disabled as a consequence of the March 7, 2008 accident, considered alone. Further, the vocational opinions of both Mr. Eldred and Mr. England recognize that, if the restrictions and limitations imposed by Dr. Bennoch are assumed to govern Mr. Jones' employment opportunity, he is unemployable in the open and competitive labor market.

In light of the foregoing, and after consideration and review of the evidence, I find and conclude that, as a consequence of the March 7, 2008 accident, considered alone, the employee, Lonnie Jones, suffered a significant injury to his low back, which renders him unemployable in the open and competitive labor market. The employee is permanently and totally disabled as a consequence of the March 7, 2008, accident, considered alone.

Therefore, in light of the foregoing, the employer and insurer are ordered to pay to the employee, Lonnie Jones, the sum of \$340.53 per week for the employee's lifetime. The payment of permanent total disability compensation by the employer and insurer is effective as of October 13, 2008, when he reached maximum medical improvement.

In addition, in light of the aforementioned ruling, the Claim for Compensation, as filed against the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is denied.

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. The award is subject to modifications as provided by law.

Made by: /s/ L. Timothy Wilson
 L. Timothy Wilson
 Administrative Law Judge
 Division of Workers' Compensation
 (signed March 4, 2010)

This award is dated and attested to this 9th day of March, 2010.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation