

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

Injury No.: 04-142098

Employee: Donald Payne  
Employer: J. B. Hunt Transport, Inc. (Settled)  
Insurer: Self-Insured (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

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

**Preliminaries**

The parties stipulated the sole issue for determination by the administrative law judge was the liability of the Second Injury Fund for permanent disability with employee alleging permanent total disability.

The administrative law judge summarized the evidence and concluded the Second Injury Fund is liable for permanent total disability benefits.

The Second Injury Fund submitted a timely Application for Review with the Commission.

For the reasons set forth below, we reverse the award of the administrative law judge.

**Findings of Fact**

Preexisting conditions

Prior to December 24, 2004, the date on which employee sustained the primary injury, employee suffered preexisting cardiovascular disability referable to a 1997 heart attack which necessitated a surgery and placement of two stents.

Employee also suffered preexisting diabetes. Although the condition was not diagnosed until after the work injury, the condition caused swelling and pain in employee's legs for several years prior to the accident of December 24, 2004.

Employee also suffered from sleep apnea prior to December 24, 2004.

Primary injury

On December 24, 2004, employee suffered injury while working for employer when he fell on ice while walking through a truck stop parking lot. Employee suffered injuries to both shoulders as a result of the accident. Treating doctors diagnosed bilateral rotator cuff tendonitis. We must determine the nature and extent of this primary injury.

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Employee presents Dr. Bennoch, who rated the primary injury at 40% “permanent partial impairment” of each shoulder. Dr. Bennoch testified impairment is not the same as disability and that employee’s true disability may be “much less” than the impairment ratings he issued. Surprisingly, the parties did not ask Dr. Bennoch to express his opinions in terms of permanent partial disability. We find Dr. Bennoch’s impairment ratings to be of little help to us in analyzing this claim.

Dr. Bennoch’s restrictions are also somewhat confusing. We note that, in his report of May 18, 2006, Dr. Bennoch initially assigned postural limitations secondary to employee’s preexisting weight and cardiovascular conditions. Then, in his report dated May 14, 2010, Dr. Bennoch identified the same restrictions, but this time suggested they were referable to the primary injury. Finally, at his deposition, Dr. Bennoch testified that all the limitations he identified in his first report are for the primary shoulder injuries. We take it that Dr. Bennoch retracts his initial restrictions referable to preexisting conditions and ultimately believes that all of the restrictions he identified are referable to the primary injury.

Accordingly, we find that Dr. Bennoch assigned the following restrictions in reference to the primary injury: no lifting or carrying more than 10 lbs, no push/pull, no repetitive lifting, no work at or above shoulder level, no climbing, no balancing, no reaching with both arms, and no work that involves vibration, hazardous machinery, or heights.

Dr. Bennoch offered the opinion in his report dated May 14, 2010, that employee is permanently and totally disabled owing to the effects of the December 2004 work injury considered alone, if employee does not have surgery. Then, at his deposition, Dr. Bennoch opined that employee is permanently and totally disabled owing to a “collection” of his medical problems. Later, on cross-examination, Dr. Bennoch agreed that, as of his examination of employee on May 12, 2010, “[t]he shoulders—bilateral shoulders alone would have been enough, in that present state, without any further treatment, to be permanently and totally disabled.” *Transcript*, page 394. Dr. Bennoch went on to agree that, to his knowledge, employee had not received any further treatment.

Employee testified he did not elect to undergo the surgery Dr. Bennoch referenced because he decided, based on discussions with his treating doctor, that it wouldn’t help. Employee also credibly testified (and we so find) that his shoulders are worse now than before. Accordingly, we find that employee has not received any treatment that would change the impact of Dr. Bennoch’s May 12, 2012, opinion that employee is permanently and totally disabled owing to the primary injury if it is considered alone.

Employee also presents Philip Eldred, who opined employee is permanently and totally disabled. Mr. Eldred explained that employee, a truck driver for almost his entire working life, has no transferable skills. Mr. Eldred backed up this assertion with an in-depth explanation of his methodology. We credit Mr. Eldred on this point and find that employee has no transferable skills.

Mr. Eldred opined that employee is permanently and totally disabled because he has worked in manual labor all his life, has a GED but no formal training beyond that, and

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because of the physical restrictions imposed by the doctors. We note that Mr. Eldred did not appear to be aware that Dr. Bennoch ultimately opined that all of the restrictions he identified were referable to the primary injury alone. For example, Mr. Eldred incorrectly believed Dr. Bennoch's lifting and similar restrictions were attributable to employee's cardiovascular problems as well as the primary injury. As noted above, Dr. Bennoch did not so testify.

Mr. Eldred was asked whether he believed the work injury alone rendered employee permanently and totally disabled or whether it was a combination of employee's preexisting conditions and the effects of the primary injury. Mr. Eldred provided the conclusory response that it was a combination. Especially in light of Mr. Eldred's failure to appreciate the nature of the restrictions assigned by Dr. Bennoch, we find Mr. Eldred's opinion lacking credibility on the question whether employee is permanently and totally disabled as a result of the effects of the work injury considered alone.

The Second Injury Fund presents Mary Titterington, who opined employee is not permanently and totally disabled. Ms. Titterington believes employee has some skills that would be transferable to light or sedentary work. We have credited Mr. Eldred's testimony that employee does not have any transferrable skills. We find Ms. Titterington's contrary opinion lacking credibility, and in turn we are not persuaded by her testimony that employee is not permanently and totally disabled.

After careful consideration, we find Dr. Bennoch's opinion as stated in his May 14, 2012, report, and as conceded on cross-examination at his deposition, to be the most credible on the question whether employee is permanently and totally disabled owing to the effects of the work injury considered alone.

## **Conclusions of Law**

### **Second Injury Fund liability**

For the Second Injury Fund to be liable for permanent total disability benefits, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation.

We have found most credible Dr. Bennoch's opinion, conceded on cross-examination, that employee is permanently and totally disabled owing to the work injury considered alone. Employee certainly suffered some preexisting disability, most notably with respect to his cardiovascular condition, but we are precluded from even considering employee's preexisting conditions until we have determined the nature and extent of the primary injury, because "pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). We conclude employee is permanently and totally disabled as a result of the primary injury considered alone and in isolation.

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Employee has failed to meet his burden of proving Second Injury Fund liability for permanent total disability benefits.

**Conclusion**

Based on the foregoing, the Commission concludes employee is permanently and totally disabled as a result of the primary injury considered alone and in isolation. Accordingly, employee's claim against the Second Injury Fund is denied.

The award and decision of Administrative Law Judge Karen Wells Fisher, issued March 21, 2012, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of December 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T  
Chairman

\_\_\_\_\_  
James Avery, Member

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

Attest:

\_\_\_\_\_  
Secretary



16. Value necessary medical aid paid to-date by employer/insurer? N/A.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: \$480.00.
19. Weekly compensation rate: \$360.00.
20. Method wages computation: Stipulation.
21. Compensation payable: N/A. The Claim for Compensation against the employer was settled, and approved by the Division on December 10, 2009.  
  
Unpaid medical expenses: N/A. The Claim for Compensation against the employer was settled, and approved by the Division on December 10, 2009.
22. Second Injury Fund Liability: Permanent Total Disability. The Second Injury Fund is ordered to pay permanent total disability benefits from November 26, 2010, for the remainder of the Employee's lifetime at a compensation rate of \$360.00.
23. Future requirements awarded: N/A
24. Attorneys' fees and expenses: An attorneys' fee of twenty five percent (25%) of the amount of all benefits recovered is granted to Patrick J. Platter of the Law Firm of Neale & Newman, LLP pursuant to *Section 287.260*.

## **I. Introduction**

This claim was the subject of a hearing held on Thursday, November 10, 2011, at the Joplin office of the Division of Workers' Compensation. The purpose of the hearing was to issue a Final Award pursuant to *Section 287.460*.<sup>1 2</sup> The Claimant, Donald Payne, appeared with his legal counsel, Patrick J. Platter. The Treasurer of the State of Missouri as Custodian of the Second Injury Fund appeared by its legal counsel, Assistant Attorney General, Todd Smith. The employer, J.B. Hunt Transport, Inc., had previously entered into a settlement dated December 10, 2009.

The parties entered into the following stipulations:

1. On or about December 24, 2004, J.B. Hunt Transport, Inc. was employer operating subject to the Missouri Workers' Compensation Law.

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<sup>1</sup> Inferences to statutes shall be to the Revised Statutes of Missouri (RSMo 2000) unless otherwise specified.

<sup>2</sup> Payne suffered this accident on December 24, 2004, before 2005 amendments to the Missouri Workers' Compensation Law became effective. As a result, substantive provisions of the Missouri Workers' Compensation Law in effect before August 28, 2005 control this claim.

2. On December 24, 2004, Donald Payne was an employee of employer.
3. That the Claimant, Donald Payne, was working subject to the Missouri Workers' Compensation Law.
4. That on December 24, 2004, claimant sustained an accident which resulted in an injury.
5. That the accident arose out of and in the course of employment.
6. That venue is proper.
7. That the accident caused the injuries and disabilities for which benefits are now being claimed.
8. That the c notified the employer of his injury as required by §287.420
9. That the Claim was filed within the applicable statute of limitations.
10. That the average weekly wage was \$480.00, resulting in a workers' compensation rate of \$360.00 per week.
11. That the Claimant reached maximum medical improvement on December 10, 2009.
12. That benefits from the Second Injury Fund should be payable from the date of November 26, 2010.

The only disputed issue was the extent of liability of the Second Injury Fund for permanent disability with the claimant alleging permanent total disability..

The following Exhibits were admitted in to evidence on behalf of the Claimant, Donald Payne:

- A. Medical Records – Arkansas Occupational Health
- B. Medical Records – Tallgrass Immediate Care
- C. Medical Records – Cox Health Center Aurora (Dr. Herman Damek)
- D. Medical Records – Cox Monett Hospital
- E. Medical Records – Ferrell-Duncan Clinic

- F. Report of Phillip Eldred, MS, CRC dated February 15, 2011
- G. Curriculum Vitae of Phillip Eldred, MS CRC
- H. Report of Dr. Shane Bennoch dated May 18, 2006
- I. Report of Dr. Shane Bennoch dated May 14, 2010
- J. Addendum letter of Dr. Shane Bennoch dated May 25, 2010
- K. Addendum letter of Dr. Shane Bennoch dated July 6, 2010
- L. Deposition of Dr. Shane Bennoch dated March 4, 2011
- M. Stipulation for Compromise Settlement entered into between the claimant and employer on December 10, 2009

The following Exhibits admitted into evidence on behalf of the Second Injury Fund:

1. Deposition of Mary Titterington
2. Deposition of Donald Payne

Vocational rehabilitation consultant, Phillip Eldred, and Donald Payne testified at the hearing. It is expressly found that both witnesses were credible.

This claim centers upon an accident that Payne suffered on December 24, 2004. Payne was working as an over-the-road truck driver. He had suffered from diagnosed medical conditions of cardiovascular disease and diabetes before the accident. He injured both shoulders, diagnosed as torn rotator cuffs, as a result of the accident. Payne claims permanent total disability benefits from the Second Injury Fund. The Fund denies liability.

## **II. Findings of Fact**

### **A. Personal Background of Donald Payne**

Donald Payne is 59 years old and lives in Aurora with his wife. He has children and grandchildren living in the Aurora area. He attended high school through the 11<sup>th</sup> grade and then quite high school to work. He enlisted in the United States Army and served for a period of two (2) years. Payne served in field artillery. He earned a GED high school equivalency certification in 1974 while serving in the Army. He received an honorable discharge.

The following is a chronology of Mr. Payne's employment with the most recent job

mentioned first: truck driver – Dan Cline Trucking Company, Mt. Vernon, Missouri, June 2005 until August 2005; truck driver – J.B. Hunt Company, Lowell, Arkansas, October 2004 through March 2005; truck driver – Sharkey Transport, Topeka, Kansas, 2002 through 2004; delivery manager – Lowe’s Home Center, Topeka, Kansas, 2000 – 2002; and van foreman – Allied Van Lines, Topeka, Kansas, 23 years.

Payne maintained a commercial driver’s license (CDL) so that he could be employed as an over-the-road long haul truck driver.

Payne described a long history of attempting to find work despite physical restrictions specified later. He is registered at the Missouri Career Center, but has been unable to find employment despite a long effort. The limitations that Payne reports are similar to those found by Dr. Bennoch. He stated that he cannot stand or walk for more than one hour; he cannot sit for more than thirty (30) minutes; and he must change positions constantly. He stated that he has physical problems associated with lifting, carrying, climbing, balancing, stooping, kneeling, crouching, crawling, reaching, handling and fingering.

### **B. Employment at J. B. Hunt Transport**

Payne worked at J.B. Hunt as an over-the-road truck driver. His exclusive duties were driving. He did not haul cargo into and out of the trailers. He asked haulers or lumpers to perform these functions for him. He worked at J.B. Hunt from October 2004 until March 2005. The parties stipulated to an average weekly wage of \$480.00 with a compensation rate of \$360.00. He received instructions from a central dispatch center. No particular dispatcher was his direct supervisor. Payne’s territory was the continental United States. His only duties while working at J.B. Hunt consisted of operating the tractor trailer unit and hooking and unhooking the trailer.

### **C. Accident**

Payne was running a route for J.B. Hunt on December 24, 2004. He was stopped at a TA truck stop east of Memphis, Tennessee. He had been driving through a significant snow and ice storm. The parking lot of the truck stop was covered with ice. He stepped over a curb and both feet went out from underneath him. He landed on his upper back, primarily his shoulders and neck.

His wife, who had been traveling with him, helped him get up from the parking lot. He returned to the truck and finished his haul because his employment with J.B. Hunt had been short and he could not afford to take off work.

He had constant pain to his upper back and shoulders as time progressed. The pain was primarily at the front of his shoulders. He compared the muscles in his upper arms as if they were separated. He, as before, restricted his employment to driving, and hooking and unhooking

trailers. He eventually requested J.B. Hunt to refer him for medical treatment.

#### **D. Medical Treatment**

J.B. Hunt originally referred Payne to Tall Grass Immediate Care in Topeka, Kansas since Payne resided in the Topeka area. He complained of bilateral shoulder pain, a decreased range of motion and pain across his chest. Payne, during the hearing, pointed to his sternum and his chest immediately above that when describing the discomfort he felt both then and since then. Physicians diagnosed him to suffer from bilateral rotator cuff tendonitis.

Payne moved to Aurora and retained Dr. Herman Damek in Aurora as his primary care physician. He saw Dr. Damek for this condition. He first reported to Damek that his right shoulder had improved but that the left shoulder was still bothering him and that he could not lift his left arm without pain. Dr. Damek noted left shoulder abduction at 90 degrees and flexion of 30 degrees, which was decreased compared to the right. Payne reported that he had pain and weakness with resistance flexion and abduction with the left shoulder. There was pain to palpitation on the interior aspect of the right shoulder. Dr. Damek referred Payne for physical therapy. Payne reported to physical therapy. He stated that the therapy increased his range of motion, though not his strength. In addition, the therapy did not lessen the discomfort he felt in his chest.

Dr. Damek eventually referred Payne to orthopedic surgeon, Dr. Justin Ogden. Dr. Ogden noted the following during his initial examination on March 4, 2010. Active range of motion of the left shoulder, demonstrated 180 degrees forward flexion, 160 degrees abduction and 60 degrees of external rotation. Payne could internally rotate his shoulders to the L1 level of his lumbar spine. Hawkins test was positive. The drop arm sign was negative. The Jorgensen's test was negative. The deltoid and rotator cuff strength were 5/5 with mild pain. Sensation was intact. Examination of the right shoulder showed active range of motion of 180 degrees forward flexion, 160 degrees abduction and 60 degrees of external rotation. He could also internally rotate this arm to L1 of his lumbar spine. Hawkins test was positive. The drop arm sign was negative. The Jorgensen's test was negative.

Dr. Ogden diagnosed chronic bilateral shoulder pain and pain with rotator cuff testing though without detectable weakness. Dr. Ogden noted that Payne had not improved with six (6) weeks of physical therapy. He recommended MRI scans of the shoulders.

MRI scans were taken of both shoulders on March 11, 2010. The left MRI scan indicated high grade tearing of the distal supraspinatus with a complete pinhole identified. There was fluid extending into the subacromial and subdeltoid bursa. There were severe degenerative changes at the AC joint. The right shoulder, despite a significant motion artifact, indicated a 1.8 centimeter complete supraspinatus tendon tear. There was also a partial tear of the infraspinatus tendon. There was also fluid within the subacromial and subdeltoid bursa.

Dr. Ogden concluded that his final diagnosis was bilateral rotator cuff tears, the right shoulder worse than the left. Dr. Ogden, according to Payne, did not enthusiastically endorse surgeries. Dr. Ogden, instead, recommended bilateral shoulder injections. Dr. Ogden noted that the pain was not typical for rotator cuff tears.

### **E. Previous Obstacles or Hindrances to Employment**

Payne suffered a myocardial infarction in December 1997. His cardiovascular surgeon implanted two stent replacements. Payne missed work from December 1997 through the late spring of 1998. He learned to pace himself in his later work in order to avoid chest pain.

Payne, several years before the Memphis accident, started to suffer from swelling in his feet and legs, as well as pain in his feet, due to diabetes. This made it more difficult for him to walk and it likewise became uncomfortable for him to operate tractor trailer units.

Payne, before the Memphis accident, suffered from snoring and inability to sleep. Physicians, after the Memphis accident, eventually diagnosed him to suffer from sleep apnea. It was difficult, at times, for him to keep driving and his wife rode with him as a precaution.

### **F. Dr. Shane Bennoch**

Dr. Shane Bennoch examined Payne at the referral of Payne's counsel. He examined Payne twice. The dates of the examinations were May 18, 2006, and May 14, 2010. Dr. Bennoch, after the first examination, diagnosed Payne to suffer from bilateral rotator cuff injuries with bilateral weakness on abduction. He recommended that Payne undergo MRI scans. He believed that the shoulders would justify a permanent partial impairment, though he preferred to defer upon ratings until the MRI scans were taken and medical treatment was completed.

Dr. Bennoch still rated Payne's preexisting disabilities. These included thirty percent (30%) to the body as a whole for the myocardial infarction with resulting stent replacements; five percent (5%) to the body as a whole for high blood pressure which required medication to stay controlled; and ten percent (10%) to the body as a whole for diabetes and the medication necessary to control it.

Dr. Bennoch recommended that Payne follow these restrictions, which concerned his shoulder injuries: occasional lifting – twenty (20) pounds; frequent lifting – less than ten (10) pounds; limit pushing and pulling with both arms; and limit pulling to thirty (30) pounds.

Dr. Bennoch recommended that Payne follow the following restrictions due to his cardiovascular disease and weight: occasional climbing on ramps, poles, ladders, ropes and scaffolds; occasional climbing of stairs; occasional balancing on narrow slippery or moving surfaces; occasional kneeling when bending legs to rest on knees; occasional crouching; occasional crawling; and occasional stooping.

Dr. Bennoch examined Payne again on May 12, 2010. His diagnosis remained the same. He issued permanent disability ratings of forty percent (40%) to both shoulders.

Dr. Bennoch revised his restrictions as follows: occasional lifting less than ten (10) pounds; no frequent lifting or carrying; and no pushing or pulling.

Dr. Bennoch listed the following postural limitations due to the cardio vascular disease: no climbing of stairs, ramps, poles, ladders, ropes or scaffolds; frequent climbing of stairs; no balancing on narrow, slippery or moving surfaces; frequent kneeling; frequent crouching; frequent crawling; and frequent stooping.

Reaching in all directions, including overhead, would be limited in both arms. Exposure to vibrations and hazards would be limited due to his arms.

Dr. Bennoch rated the preexisting disabilities as before, though issued an additional rating of permanent disability of ten percent (10%) to the body as a whole due to severe obstructive sleep apnea.

#### **G. Testimony of Vocational Consultant**

Phillip Eldred is a vocational rehabilitation counselor. He interviewed and evaluated Donald Payne on February 15, 2011 at the referral of Payne's counsel. Eldred is a certified rehabilitation counselor. He practices at Rehabilitation Consulting Service in Springfield. He has conducted a private practice there since October 1990. He was a senior counselor for the Missouri Division of Vocational Rehabilitation from 1981 to 2006. He holds a Bachelor of Science in secondary education and a Master of Science in guidance and counseling from Missouri State University. He earned certification as a rehabilitation counselor in October 1991.

Eldred's summary and comments upon these sources of evidence are fully reflected in Exhibit F. He also testified to these matters. A summary of the results for Payne's scores on vocational testing is nonetheless worthwhile. Mr. Payne's scores on the Wide Range Achievement Test-4 indicate that he is functioning at the ninth (9<sup>th</sup>) grade level in word reading; at the fifth (5<sup>th</sup>) grade level in spelling; and at the tenth (10<sup>th</sup>) grade level in math computation. In word reading, he is functioning at the eighteenth (18<sup>th</sup>) percentile. This means that he scored less than eighty two (82%) of those persons in his age group. In spelling, he is functioning at the tenth (10<sup>th</sup>) percentile. This means that he scored less than ninety percent (90%) of those persons in his age group. He scored at the fiftieth (50<sup>th</sup>) percentile in math computation. This means that he scored at the fifty percent (50%) level of those persons in his age group.

Payne took the PTI oral directions test. This is a wide range test of general mental ability designed to be simple, valid and practical in use for testing both adolescents and adults. It assesses the ability of an individual to follow directions presented orally. It is particularly useful for individuals with limited education since the skills required range from basic literacy to

somewhat above junior high school level. Payne correctly answered thirty two (32) items. This is the equivalent to the 55<sup>th</sup> to 65<sup>th</sup> percentiles compared to vocational rehabilitation clients. This tends to show a high average ability to concentrate and listen to oral directions.

Payne also took the Purdue Pegboard test. This is test of dexterity used in the selection of employees for industrial jobs such as assembly, packing and operation of certain machines and other manual jobs. The test measures two types of activity. The first concerns the gross movement of hands, fingers and arms. The second test concerns what may be called assembly or fingertip dexterity. Research has identified three factors that distinguish industrially injured workers who are able to return from non-workers. Those who return to work were younger than those remaining unemployed. The second difference was scores on the Purdue Pegboard dexterity test. Those who were successful returning to work had higher scores on all subtests. The final difference was the diagnosis and physical restriction. Those requiring sedentary work would normally have few vocational alternatives. Payne's scores were similar to those who were not successful in returning to work because he is 59 years of age, had low scores on the Purdue Pegboard test and had significant physical restrictions recommended by Dr. Bennoch which amounted to less than the sedentary level.

Eldred also identified the Dictionary of Occupational Titles. The Dictionary of Occupational Titles is a comprehensive assembly of job descriptions of 12,761 jobs recognized by the United States Department of Labor. Each job description includes specific criteria as to the amount of training necessary for the job, the physical demands of the job, the essential functions of the job and so forth. Vocational rehabilitation consultants rely upon the DOT as a primary reference for job descriptions in the open labor market. It is preferable, for example, to a subsequent publication known as O\*NET, also published by the Department of Labor. The DOT is preferable to O\*NET because it is much more specific for each particular job description. O\*NET, by contrast, only identifies groups of jobs as opposed to individual jobs themselves.

Eldred is able to search all 12,761 job descriptions within the DOT on behalf of a client like Payne to determine whether Payne's physical ability to work, relevant work history and potential transferable work skills meet any of these jobs. He uses a computer software program known as OASYS. This software program permits him to search the entire DOT without manually doing so. Eldred applied background factors concerning Payne such as his relevant work history, physical restrictions and other matters into OASYS in order to determine whether Payne has placement potential and was, indeed, employable in the open labor market.

Eldred relied on various sources of information regularly relied upon by vocational rehabilitation consultants. Those sources of information included Payne's medical history; an identification of preexisting obstacles to employment; an identification of his present problems; Payne's report of functional limitations; an analysis of job descriptors contained within the U.S. Dictionary of Occupational Titles; this included a search through the computer software known as OASYS to find potential employment suitable for Payne; special considerations for persons with

pain who may only be potentially eligible for unskilled type jobs; physical restrictions; Payne's education; licenses, certifications and military service; vocational testing results based upon the Wide Range Achievement Test-4, the PTI Oral Directions Test and the Purdue Pegboard Test; his work history; and identification of the presence, or absence, of transferrable skills.

Eldred arrived at the following conclusions. Payne was restricted in the following physical demands: standing, walking, sitting, lifting, carrying, pushing, pulling, climbing, balancing, stooping (bending), kneeling, crouching, crawling, reaching, handling and fingering.

Payne should be restricted in the following work environments: working in proximity to vibrations; working in proximity to moving mechanical parts; working in high exposed places and working with explosives.

Eldred noted that Dr. Bennoch gave restrictions at the light work level on May 18, 2006 and imposed even more significant restrictions (less than sedentary work level) on May 12, 2010. A four step process could then be used to determine Payne's potential for future employability: (1) Payne could not return to his previous work and had no transferrable job skills. He had no training potential and could not perform unskilled work; (2) if one could assume that Payne could only perform at the sedentary work level, he had lost access to 89% of the job market. Assuming that he could perform sedentary work, he still could not perform his past work since that had all been at medium, heavy and very heavy work levels. Likewise, assuming, again, that he could perform sedentary work, he would have no transferable skills; (3) his work or trade profile was not comparable to any sedentary jobs that would allow him to be retrained if he could perform sedentary work and if he had physical and academic ability to be retrained; and (4) unskilled jobs are not considered as having transferable work skills. They require a short demonstration of up to thirty (30) days of training to be able to perform. These jobs are normally at the bottom of the pay scale. Payne's work or trade profile would not compare to any sedentary occupations if he were not able to perform sedentary work.

Eldred concluded that Payne could not be placed in the open labor market and likewise could not compete for labor in the open labor market. Eldred believed that this inability to compete for work in the open labor market was based upon a combination of Payne's disabilities, including his shoulder disabilities, myocardial infarction, and swelling in his lower extremities from diabetes. He believed that the myocardial infarction and diabetes were hindrances or obstacles to employment before the accident near Memphis.

Eldred disagreed with the vocational consultant retained by the Second Injury Fund to review Payne's case file, Mary Titterington. It is expressly found that Eldred's analysis is more persuasive upon Payne's employability, and cause of his employability, than Titterington. First, Titterington did not meet with Payne to discuss his employment options as Eldred did. Second, Titterington did not rely upon precise physical restrictions or precise job descriptions when analyzing Payne's case. She presumed what the physical demands of particular positions would be and further presumed what Payne's restrictions were, but did not conduct a precise analysis.

Lastly, she was incorrect when reviewing restrictions from Dr. Bennoch. She believed that Dr. Bennoch did not restrict Payne from reaching, handling and fingering when Dr. Bennoch, in fact, did.

### **III. Rulings of Law**

#### **1. Nature and Extent of Liability of the Second Injury Fund**

It is expressly ruled that Donald Payne is permanently and totally disabled and, further, that his permanent total disability results from a combination of disabilities that existed before December 24, 2004, and the disability to his shoulders that resulted from that accident. His permanent total disabilities and this disability exceed the sum of the separate disabilities that respectively existed before and after December 24, 2004.

The test to determine the liability of the Second Injury Fund for permanent disability has been stated as follows: (1) the liability of the employer is considered in isolation by determining the degree of the claimant's disability due to the last injury; (2) the degree of the claimant's disability attributable to all injuries is determined; (3) the degree of the preexisting injury is deducted from the total disability following the last injury; and (4) the balance of liability is assigned to the Second Injury Fund. *Kizior v. Transworld Airlines*, 5 S.W.3d 195 (Mo.App. W.D. 1999); *APAC Kansas, Inc. v. Smith*, 227 S.W.3d 1 (Mo.App. W.D. 2007). The Fund appears to primarily argue that Payne is not permanently and totally disabled. The Fund, at least with the report and testimony of Titterington, does not argue that Payne is totally disabled due to the December 2004 accident alone or that he had a progression of personal medical conditions after his compensable injury that left him totally disabled irrespective of his accident. In any event, Payne's medical profile indicates physical conditions that posed as a hindrance or obstacle to employment necessary as an element for benefits against the Second Injury Fund. See, *Carlson v. Plant Farm*, 952 S.W.2d 369 (Mo.App. W.D. 1997); *Garibay v. Treasurer*, 930 S.W.2d (Mo.App. E.D. 1996). These include his cardiovascular disease, diabetes and sleep apnea.

The Fund's argument goes to the second element of the test expressed in *Kizior* and *APAC Kansas*. Eldred, based upon the uncontroverted restrictions set forth by Dr. Bennoch, credibly testified in his four part analysis that Payne's disability was permanent and total. First, Payne could not return to his previous work based upon the restrictions set forth by Dr. Bennoch. In addition, Payne had no transferrable job skills and Titterington, indeed, specified none. Eldred testified, and Titterington did not dispute, that Payne had no training potential. These experts disagreed upon whether Payne could perform unskilled work. This is unlikely for Payne given his discomfort with standing due to swelling in his feet and legs; his inability to use a computer keyboard; his need to pace himself physically; and his work restrictions. Many of his complications existed before December 24, 2004. These include a need to pace himself, a need to stay off his feet and not use his feet and legs and refrain from too much exertion with his upper extremities.

Second, Eldred accurately noted that Payne, even if he were to perform at a sedentary work level, had lost access to 89% of the job market. Payne was, therefore, not eligible to perform his past work since that work was at medium, heavy and very heavy work levels and, even if Payne were to perform sedentary work, he had no identifiable transferable work skills.

Third, Payne's work profile was not comparable to any sedentary jobs that would allow him to be retrained if he could perform sedentary work. It is unrealistic to expect a future employer to hire Payne for sedentary labor given his long employment as a truck driver, foreman/mover and full bodied manager at Lowe's.

Last, unskilled jobs are not considered as having transferrable work skills. Payne's work or trade profile would not compare to any sedentary occupations if he were to attempt sedentary work.

The undersigned therefore concludes that the Treasurer of the State of Missouri is liable for the payment of permanent total disability benefits at the rate of \$360.00 per week since November 26, 2010. This is based upon the records reflecting that medical treatment, the report and testimony of Phillip Eldred, the testimony of the Claimant Donald Payne and the testimony of Dr. Shane Bennoch.

Date: March 21, 2012

Made by: /s/ Karen Wells Fisher  
Honorable Karen Wells Fisher  
*Administrative Law Judge*  
*Division of Workers' Compensation*