

# IN THE SUPREME COURT OF MISSOURI

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Supreme Court No.: SC 84933

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**LAURA LANDMAN**  
**Employee/Respondent-Cross Appellant,**

v.

**ICE CREAM SPECIALTIES, INC.,**  
**Employer/Appellant-Cross Respondent,**  
**and**  
**OLD REPUBLIC INSURANCE COMPANY,**  
**Insurer/Appellant-Cross Respondent**

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**APPELLANTS-CROSS RESPONDENTS**  
**ICE CREAM SPECIALTIES, INC. AND**  
**OLD REPUBLIC INSURANCE COMPANY'S**  
**SUBSTITUTE REPLY BRIEF IN RESPONSE**  
**TO BRIEF FILED BY THE SECOND INJURY FUND**

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## ARGUMENT

### Introduction

In their Substitute Reply Brief in response to the Brief filed by the Second Injury Fund, Appellants Ice Cream Specialties, Inc. and Old Republic Insurance Company (hereinafter “employer” or “ICS”) will limit their arguments to the most salient points contained in the Substitute Respondent’s Brief filed on behalf of the Second Injury Fund (hereinafter “Fund”). Such limitation, however, should not be understood as an abandonment of any argument previously asserted by the employer.

#### I.

**REPLY TO THE FUND’S ARGUMENTS<sup>1</sup> THAT THE COMMISSION’S FINDING THAT ICS WAS LIABLE FOR PERMANENT TOTAL DISABILITY AS A RESULT OF THE LAST INJURY AND OCCUPATIONAL DISEASE OF VENOUS STASIS ALONE WAS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD, WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND WAS SUPPORTED BY RELEVANT CASE LAW AND SECTION 287.220 AND THAT CLAIMANT’S PRE-EXISTING VENOUS STASIS CONDITION DID NOT ACT AS A HINDRANCE OR OBSTACLE TO EMPLOYMENT AND DID NOT RISE TO THE LEVEL OF A KNOWN COMPENSABLE CONDITION UNTIL THE FEBRUARY 1999 ACCIDENT.**

### Introduction

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<sup>1</sup> In Point I of its Substitute Reply Brief, ICS will respond to Points I and II of the Argument set forth in the Fund’s Substitute Respondent’s Brief.

In its Substitute Respondent's Brief, the Fund argues that it has no liability to claimant, since the "competent and substantial evidence in the record establishes that the primary February 27, 1999 accident and occupational disease of venous stasis acquired through 17 plus years at ICS alone caused claimant to be permanently and totally disabled." (Fund Brief, 27). The Fund contends that claimant's venous stasis condition was the "last injury" for purposes of Fund liability and that this condition did not rise to the level of a known compensable condition until February 27, 1999. (Fund Brief, 34, 35, 37, 38, 39, 40). Claimant's venous stasis condition was not compensable prior to this time, the Fund posits, because claimant was not working under any permanent restrictions and was able to perform her full and regular duties as a machine operator. (Fund Brief, 27, 28-29, 31, 32, 33, 34, 39, 40).

The Fund fails to apply the appropriate legal standard governing when an injury or occupational disease becomes disabling for workers' compensation purposes. It misconstrues the testimony of James England and fails to acknowledge Mr. England's findings regarding the effect of claimant's shoulder disability on her inability to return to employment. Compounding this error, the Fund ignores the undisputed testimony of Dr. Poetz, showing that claimant's venous stasis condition pre-existed the 1999 work accident and resulted in a permanent partial disability to each of claimant's lower extremities prior to that accident, thus precluding it from being the "last injury" for purposes of Fund liability under Section 287.220.

**Claimant's Venous Stasis Condition Was Disabling Prior To February 1999**

That claimant was able to work full time as a machine operator, and did not miss work or work under permanent restrictions prior to February 1999, did not preclude her venous stasis condition from becoming "disabling" and thus, compensable for workers' compensation purposes prior to that time. Within the workers' compensation context, a "disability" is an inability to do something, a physical or

mental illness, or an injury or condition that incapacitates in any way. *See, Loven v. Greene County*, 63 S.W.3d 278, 284-285 (Mo.App.S.D.2001). Under the Workers' Compensation Act, it is not necessary for an employee to miss work or work under restrictions before that employee is considered to be "disabled" from an occupational disease. *See, Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755, 760-761 (Mo.App.W.D.1997); *Johnson v. Denton Construction Co.*, 911 S.W.2d 286, 287 (Mo. banc 1995). To the contrary, an employee becomes "compensably injured" or "disabled" from an occupational disease when she is unable to perform certain job related activities, when the disease affects the employee's earning ability, or when it requires the employee to seek medical treatment. *Coloney*, 952 S.W.2d at 760; *Johnson*, 911 S.W.2d at 287; *Williams v. Long Warehouse*, 426 S.W.2d 725, 732 (Mo.App.E.D.1968).

Viewing the evidence in light of the appropriate legal standard, it becomes readily apparent that claimant was "compensably injured" and "disabled" by her venous stasis condition prior to the February 1999 accident. There is no dispute that claimant sought medical treatment for her venous stasis condition several years prior to that work incident. (Tr. 28-29).<sup>2</sup> *Williams*, 426 S.W.2d at 732. Claimant testified that prior to February 1999, she worked slower than she otherwise would have due to lesions and leg swelling, that she had difficulty getting around at work, that climbing stairs at work caused her pain, and that she climbed the stairs at work more slowly due to her leg condition. (Tr. 64, 65-66, 70, 84). Thus,

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<sup>2</sup>Matters referred to herein that are contained in the Transcript of Hearing shall be designated as (Tr. \_\_\_\_). Matters referred to herein that are contained in the Legal File shall be designated as (L.F. \_\_\_\_).

claimant's venous stasis condition affected her ability to work. *Coloney*, 952 S.W.2d 760; *Loven*, 63 S.W.3d at 285.

The testimony of Dr. Poetz shows that claimant's venous stasis condition impaired her earning ability prior to the 1999 work accident. It was Dr. Poetz' opinion that, as of July 1, 1997, claimant's pre-existing venous stasis condition resulted in a 20% permanent partial disability to each of her lower extremities. (Tr.198, 201-202, 203). *Coloney*, 952 S.W.2d at 760; *Johnson*, 911 S.W.2d at 287. Dr. Poetz' undisputed testimony demonstrates that claimant's venous stasis condition was a "measurable disability" prior to her work accident in February of 1999. *Loven*, 63 S.W.3d at 292. As such, that condition constituted a "hindrance or obstacle" to claimant's employment within the meaning of Section 287.220.1. RSMo. §287.220.1; *Loven*, 63 S.W.3d at 285.

In its Brief, the Fund chooses to ignore Dr. Poetz' undisputed testimony demonstrating that claimant's venous stasis condition was a compensable disability prior to the 1999 accident and rendered claimant permanently and partially disabled before that accident occurred. Neither the Fund nor the Industrial Commission is free to arbitrarily ignore this competent, substantial and undisputed evidence. *Garibay v. Treasurer of Missouri*, 930 S.W.2d 57, 61 (Mo.App.E.D.1996); *Toole v. Bechtel*, 291 S.W.2d 874, 880 (Mo. 1956).

**Claimant's Permanent Total Disability Arose From**

**A Combination Of Her Injuries And Disabilities**

The Fund's analysis likewise ignores competent, substantial and overwhelming evidence demonstrating that claimant's permanent total disability resulted from the *combination* of her injuries and

disabilities and not the 1999 work accident alone. It is undisputed that, prior to the 1999 accident, claimant had a pre-existing venous stasis condition that resulted in a 20% permanent partial disability to each lower extremity. (Tr. 198, 201, 202, 203, 335, 405, 414, 441). Additionally, claimant suffered from pre-existing morbid obesity, a condition that constituted a hindrance or obstacle to claimant's employment or re-employment in the open labor market. (Tr. 103, 104-105, 117-118, 127, 179, 181-182, 183, 265-266, 267). Claimant had a pre-existing 15% permanent partial disability to the body as a whole due to her weight condition. (Tr. 203-204). RSMo. §287.220.1; *Garibay*, 930 S.W.2d at 60; *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo.App.W.D.1997). As a result of the 1997 work accident, claimant sustained a 40% permanent partial disability to her left upper extremity at the shoulder level. (Tr. 203). This shoulder injury was a hindrance or obstacle to claimant's employment or re-employment. (Tr. 107, 110, 196-197).

Dr. Poetz and James England both concluded that it was claimant's pre-existing disability from her venous stasis and obesity conditions, when combined with the disability from her 1997 shoulder injury and her 1999 work accident, that rendered claimant permanently and totally disabled. However, the Fund entirely ignores the testimony of Dr. Poetz and misconstrues the substance of James England's testimony.

It was Dr. Poetz' testimony that claimant sustained an additional 10% permanent partial disability to her left lower extremity as a result of the February 27, 1999 accident. (Tr. 202, 209). He assigned this additional disability because claimant's work injury aggravated her pre-existing venous stasis condition. (Tr. 203).

Dr. Poetz testified that claimant was permanently and totally disabled and unable to compete in the open labor market. (Tr. 207). In Dr. Poetz' opinion, claimant was permanently and totally disabled as a

result of the combination of her left shoulder injury, her obesity and the venous stasis condition in her lower extremities. (Tr. 207-208). This testimony is competent and substantial evidence demonstrating that claimant's permanent total disability did not result from the 1999 work accident alone. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App.E.D.1999). But the Fund chooses to ignore Dr. Poetz' testimony.

Likewise, the Fund ignores the substance of James England's testimony regarding the causation of claimant's permanent total disability. In Mr. England's opinion, claimant was permanently and totally disabled and unable to compete on the open labor market. (Tr. 111-112). Mr. England testified that it was a combination of claimant's leg problems, shoulder problems, and obesity that rendered her permanently and totally disabled. (Tr. 111). The combination of claimant's shoulder impairments and leg impairments kept her from performing even sedentary employment. (Tr. 109-110).

As Mr. England explained, to perform a full range of sedentary activity, an individual needed to be able to sit at least six hours a day and use both hands on a repetitive basis. (Tr. 108-109). These requirements were negated in claimant's case, since she did not have normal use of her left upper extremity and since she could not sit in a regular chair with her legs down. (Tr. 109). In asserting that Mr. England's testimony established "that he did not identify any jobs claimant could perform due to the primary February 1999 injury alone, without regard to her prior injuries or conditions," (Fund Brief, 33), the Fund selectively ignores Mr. England's testimony that it was claimant's leg impairment, when combined with her shoulder impairment, that prevented her from performing even sedentary activity. In reaching this conclusion, Mr. England necessarily considered claimant's pre-existing shoulder disability resulting from the 1997 work accident. (Tr. 108-109, 110-112).

Looking to James England's testimony as a whole,<sup>3</sup> it is clear that Mr. England was of the opinion that claimant's permanent total disability arose from a combination of her injuries and impairments and not from her leg condition alone. Even assuming, *arguendo*, that Mr. England testified that a "predominant factor"<sup>4</sup> in claimant's inability to compete on the open labor market was her leg condition, such a statement does not vitiate Mr. England's testimony that claimant's permanent total disability arose from a combination of her injuries and impairments. *Reese*, 5 S.W.3d at 526.

The competent, substantial and overwhelming evidence in the record, evidence that the Fund chooses to ignore in its Substitute Respondent's Brief, demonstrates that claimant's permanent total disability arose from the combined effect of her injuries and disabilities and not solely from the 1999 work injury alone. *Kizior v. TWA*, 5 S.W.3d 195, 201 (Mo.App.W.D.1999). For this reason, the Commission erred as a matter of law in refusing to assess permanent total disability against the Fund. *Id.*; RSMo. §287.220.1.

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<sup>3</sup> The ultimate importance of expert medical testimony concerning causation in a workers' compensation case is to be determined from the testimony as a whole. *McGrath v. Satellite Sprinkler Systems*, 877 S.W.2d 704, 708 (Mo.App.E.D.1994).

<sup>4</sup> See Fund Brief, 31.

**Claimant's Venous Stasis Condition Is Not The**  
**Last Injury For Purposes Of Section 287.220**

There is no dispute that claimant is permanently and totally disabled. What is in dispute is which party, ICS or the Fund, is liable for claimant's permanent total disability. The Fund contends that "claimant is permanently and totally disabled because of the primary leg injury alone," (Fund Brief, 24); that the "primary February 27, 1999 accident and occupational disease of venous stasis . . . caused claimant to be permanently and totally disabled," (Fund Brief, 27); that "the primary February 27, 1999 traumatic injury alone caused claimant to be permanently and totally disabled," (Fund Brief, 34); that "considering claimant's primary leg condition alone due to the February 27, 1999 injury, she is precluded from even sedentary employment," (Fund Brief, 35); and that "claimant is permanently and totally disabled as a result of the last injury and venous stasis condition alone." (Fund Brief, 40). It asserts that there is no need to engage in an analysis regarding claimant's pre-existing disabilities, in that the employee was totally disabled as a result of the "last injury" and occupational disease alone. (Fund Brief, 35, 37-38, 39, 40). This analysis begs the question. Namely, what was claimant's "last injury" for the purposes of Section 287.220 and Fund liability?

When an employee is found to be permanently and totally disabled, Section 287.220.1 fixes and limits an employer's liability to that part of the employee's disability resulting from the last injury, had there been no pre-existing disability. RSMo. §287.220.1; *Kizior*, 5 S.W.3d at 200; *Conley v. Treasurer of Missouri*, 999 S.W.2d 269, 275 (Mo.App.E.D.1999). This statutory section contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability. *Id.* First, the employer's liability is considered in isolation. The employer at the time of the last

injury shall only be liable for the percentage of disability which would have resulted from the last injury had there been no pre-existing disability. *Kizior*, 5 S.W.3d at 200; *Conley*, 999 S.W.2d at 274. Second, the Commission must determine the percentage of the employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained. *Id.*; RSMo. §287.220.1. Third, the percentage of disability that existed prior to the last injury, combined with the disability resulting from the last injury, considered alone, is to be deducted from the combined disabilities. *Id.* Fourth, the compensation for the balance then becomes the responsibility of the Fund. *Id.*

In deciding whether the Fund has any liability to an employee, the first determination is the degree of disability from the last injury. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App.E.D.2000); *Vaught v. Vaught's, Inc./Southern Missouri Construction*, 938 S.W.2d 931, 939 (Mo.App.S.D.1997). An employee's pre-existing disabilities are irrelevant until the employer's liability from the last injury is determined. *Kizior*, 5 S.W.3d at 201. If a claimant's last injury, in and of itself, renders her permanently and totally disabled, then the Fund has no liability and the employer is responsible for the entire amount. *Hughey*, 34 S.W.2d at 847; *Vaught*, 938 S.W.2d at 939.

The Fund contends that the division of the "primary injury" into an accident and occupational disease "is a false distinction." (Fund Brief, 36). This contention ignores the findings of the Industrial Commission that on February 27, 1999, claimant was stepping over a bar at work and slipped in some oil, with her left leg hitting the bar. As the Commission found, claimant instantly got a deep purple bruise on her left leg and experienced severe pain. Further, the Commission found that an accident did occur on February 27, 1999, but that the major symptoms following that accident, including open lesions on

claimant's shin, were predominately a symptom of the occupational disease of venous stasis, as opposed to the accident. (L.F. 97-124).

When the 1999 work accident occurred, claimant sustained an "injury" within the meaning of Section 287.020.2. *Albert v. Krey Packing*, 195 S.W.2d 890, 893 (Mo.App.E.D.1946). Claimant sustained a soft tissue injury to her left leg that resulted in a deep purple bruise and pain in that lower extremity. (Tr. 33-34). Dr. Poetz opined that claimant sustained an additional 10% permanent partial disability to her left lower extremity as a result of the accident. (Tr. 202-203).

Given claimant's own testimony, Dr. Poetz' findings, and those of the Commission, it is clear that claimant did, indeed, sustain an "accident" resulting in an "injury" within the meaning of the Workers' Compensation Act when she fell on February 27, 1999. RSMo. §287.020; *Albert*, 195 S.W.2d at 893. Thus, the distinction between the February 1999 work accident and claimant's occupational disease of venous stasis is a material, viable distinction. The Fund's argument to the contrary must be rejected.

In addition, the Court must reject the Fund's assertion that claimant's venous stasis condition was the "last injury" for purposes of Section 287.220.1. Section 287.220.1 provides that after the liability of the employer for the "last injury" considered alone has been determined, the degree of disability attributable to all injuries or conditions existing at the time the last injury was sustained is then to be determined. RSMo. §287.220.1. Drawing from this statutory language, the Fund asserts that the degree of pre-existing disability in claimant's legs, if any, with regard to her venous stasis condition must be determined as of February 27, 1999. (Fund Brief, 38-39). If the Court engages in the inquiry suggested by the Fund, it will find that, as early as July of 1997, claimant had a pre-existing permanent, compensable disability to each lower extremity as a result of her venous stasis condition.

The undisputed evidence demonstrates that claimant's venous stasis condition pre-existed the February 1999 work accident. After the 1997 work accident, claimant was examined at BarnesCare. There, the physician found bilateral non-pitting edema in both lower extremities secondary to venous insufficiency and stasis that pre-existed claimant's 1997 work accident. (Tr. 441). Dr. Poetz found that claimant had a pre-existing condition of venous stasis in both her right and left legs prior to the 1997 accident. (Tr. 198, 201, 203). In Dr. Poetz' opinion, this condition resulted in a pre-existing permanent partial disability of 20% to each of claimant's lower extremities. (Tr. 198, 201, 202, 203). The permanent partial disability rating assigned by Dr. Poetz for this pre-existing disability is undisputed.

Similarly, Dr. Altesher testified that claimant's venous stasis condition pre-existed her 1997 and 1999 work events. While Dr. Altesher did not know the exact time when claimant's venous stasis process began, it was before claimant injured her leg at work on February 27, 1999. (Tr. 335). As Dr. Altesher conceded, the medical records show that claimant was having leg lesions as far back as 1995. (Tr. 346).

Claimant testified that prior to the July 26, 1997 work accident, she experienced problems with her legs. In 1995, claimant developed an open sore on her left leg. Dr. Mammen, her family physician, treated this sore with ointment and it went away in a month or two. (Tr. 28-29). When claimant developed another left leg sore, Dr. Mammen referred her to Dr. Lee, who prescribed ointments, water pills and soaks, which cured the lesion. (Tr. 29). In August of 1997, claimant developed an open sore on her left leg, which went away three to four months later, after claimant took antibiotics and water pills. (Tr. 30, 31-32). In May of 1998, claimant's left leg lesion reopened. (Tr. 32). She received treatment from Dr. Lee and Dr. Mammen. This was the first time claimant received a prescription to keep her leg elevated

whenever possible. (Tr. 32).

In that the competent, substantial and undisputed evidence demonstrates that claimant's venous stasis condition pre-existed her 1999 work accident and resulted in a measurable, permanent, compensable disability before that work event, that condition could not, as a matter of law, constitute the "last injury" within the meaning of Section 287.220.1. RSMo. §287.220.1; *Johnson*, 911 S.W.2d at 287; *Coloney*, 952 S.W.2d at 760. Rather, claimant's "last injury" was her work accident occurring on February 27, 1999. This "last injury" resulted in an additional 10% permanent partial disability to claimant's left leg. (Tr. 202-203). Any liability of ICS on the 1999 Claim is limited to this amount of permanent partial disability. Liability for claimant's permanent total disability will then fall on the Fund, since claimant's occupational disease of venous stasis constituted a permanent previous disability within the meaning of Section 287.220.1 and claimant's permanent total disability arose from the combination of her injuries and impairments. *Garibay*, 930 S.W.2d at 61; *Messex v. Sachs Electric*, 989 S.W.2d 206, 214 (Mo.App.E.D.1999); *Vaught*, 938 S.W.2d at 942.

Employer respectfully requests that the Court reverse the Award of permanent total disability made by the Commission on the 1999 Claim and remand the Claim to the Commission so it can make a proper assessment of the permanent partial disability arising to the employee from the 1999 work accident. Once the Commission has made this assessment, it can then determine the benefits owed to claimant by ICS on the 1999 Claim. After the Commission determines this amount, the Commission can deduct it from the compensation due claimant for permanent total disability and hold the Fund liable for the difference. *Vaught*, 938 S.W.2d at 942.



## CONCLUSION

For the foregoing reasons, and those set forth in their Substitute Appellants' Brief previously filed with this Court, employer ICS and insurer Old Republic Insurance Company respectfully request that the Court reverse the Award of the Industrial Commission finding the employer liable for permanent total disability on the 1999 Claim. The work accident occurring on February 27, 1999 and the injury resulting therefrom constituted the "last injury" for purposes of Fund liability under Section 287.220.1. Claimant's occupational disease of venous stasis did not constitute the "last injury" for Fund purposes, in that it pre-existed the 1999 accident and resulted in a measurable, permanent, and compensable disability as of 1997.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

A copy of the foregoing was mailed this 7th day of February, 2003 to: Mr. Michael Gerritzen, Attorney at Law, One Firststar Plaza, 505 North 7th Street, Suite 2505, St. Louis, MO 63101-1600 and Ms. Plia Lippman Cohen, Attorney at Law, Office of the Attorney General, Laclede Gas Building, 20th Floor, 720 Olive Street, St. Louis, MO 63101.

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Mary Anne Lindsey

**CERTIFICATE OF COMPLIANCE**

This Brief complies with Special Rule 1 and contains 3,720 words. To the best of my knowledge and belief the enclosed disc has been scanned and is virus-free.

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Mary Anne Lindsey