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## **JURISDICTIONAL STATEMENT**

This appeal arises from a final award issued by the Labor and Industrial Relations Commission in a workers' compensation case. As the issues herein do not fall within the exclusive appellate jurisdiction of the Supreme Court, as designated in Article V, Section III, Constitution of Missouri, 1945 (as amended 1982), this case was within the general appellate jurisdiction of the Court of Appeals. The Supreme Court accepted transfer on May 26, 2009.

## STATEMENT OF FACTS

### *Primary Injury*

On September 13, 2000, the driver of another vehicle hit Joseph Banks (Banks) van while in the course and scope of his employment (Tr. 26). As a result of this accident, Banks injured his neck and both shoulders (Tr. 26). He underwent surgery on his neck and right shoulder (Tr. 27). Banks testified that he could not really do his job anymore due to the physical problems from the accident (Tr. 27). Banks settled his workers' compensation claim against the Employer/Insurer on January 29, 2007 for 23.9% of the body as a whole referable to the cervical spine, 25% of the right shoulder, and 15% of the left shoulder (Tr. 982).

Banks filed a claim against the other driver's insurance company with the aid of attorney John Anderson (Tr. 33). He settled that third party case for the policy limits of \$100,000.00 (Tr. 33). After deducting attorney's fees and costs, \$54,903.48 remains in Mr. Anderson's escrow or trust account (Tr. 34).

### *Procedural History*

The Administrative Law Judge issued an award finding the Second Injury Fund liable for permanent total disability benefits, but did not award a subrogation interest in the third party net recovery, which would give the Fund a credit towards future payments (A-16). Within the award, the judge opined that while the Fund may have a theoretical subrogation interest in the third party recovery, she could not determine the actual interest because the employer's subrogation interest has not been determined (A-15). The Labor

and Industrial Relations Commission affirmed the decision of the Administrative Law Judge and incorporated the findings in its Final Award on July 9, 2008 (A-1).

## POINTS RELIED ON

**I. The Commission erred in ordering the Second Injury Fund to begin payments to Banks without determining the subrogation interest of the Second Injury Fund, because under the holding in Cole v. Morris, the Fund has a right of subrogation in money held by Banks' attorney in that the money paid to the attorney by a third party was for the work injury that Banks suffered which is the injury upon which permanent total disability payments were ordered to be paid by the Fund and thus duplicate the payment for that same injury.**

Cole v. Morris, 409 S.W.2d 668 (Mo. 1966)

Flannery v. Breckenridge Material Company, 224 S.W.3d 138 (Mo. App. E.D. 2007)

Manley v. Mulligan Construction Co., 107 S.W.3d 285 (Mo. App. E.D. 2003)

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**II. The Commission erred in ordering the Second Injury Fund to begin payments to claimant Banks without determining the subrogation interest of the Second Injury Fund, because the Commission was able to make that determination as set forth in Cole v. Morris, in that the Commission had jurisdiction to determine subrogation to the degree the result would be a credit against a Commission award, the Commission was not required to first determine the subrogation rights of the**

**employer, and the Commission had a sufficient record to determine the subrogation rights of the Fund, *i.e.*, the amount recovered, attorney's fees and expenses.**

Cole v. Morris, 409 S.W.2d 668 (Mo. 1966)

Flannery v. Breckenridge Material Company, 224 S.W.3d 138 (Mo. App. E.D. 2007)

Manley v. Mulligan Construction Co., 107 S.W.3d 285 (Mo. App. E.D. 2003)

## STANDARD OF REVIEW

This Court's standard of review is governed by § 287.495 RSMo. (2000). The Labor and Industrial Relations Commission's decision will be affirmed unless it acted in excess of its powers, the award was procured by fraud, the facts did not support the award or there was not sufficient evidence in the record to warrant the making of the award. § 287.495.1 RSMo. (2000). While this Court defers to the Commission on issues of fact, questions of law are reviewed *de novo*. Endicott v. Display Technologies, Inc., 77 S.W. 3d 612, 615 (Mo. banc 2002). The question of law at issue in this case is reviewed *de novo*.

## ARGUMENT

**I. The Commission erred in ordering the Second Injury Fund to begin payments to Banks without determining the subrogation interest of the Second Injury Fund, because under the holding in Cole v. Morris, the Fund has a right of subrogation in money held by Banks' attorney in that the money paid to the attorney by a third party was for the work injury that Banks suffered which is the injury upon which permanent total disability payments were ordered to be paid by the Fund and thus duplicate the payment for that same injury.**

*Second Injury Fund has a common law right of subrogation enumerated in case law*

More than 42 years ago, this Court held that “the weight of authority and better reasoned opinions lead toward a conclusion that the Fund is entitled to subrogation.” Cole v. Morris, 409 S.W.2d 668, 669 (Mo. 1966). The Court recognized that the workers' compensation law, Chapter 287, RSMo., does not specifically provide the Fund with a right of subrogation, but also held that the absence of such a provision did not mean that the Fund lacked such a right. Id. at 669-70. The Court then reviewed the statutory scheme and the applicable common law.

The Court began by analyzing the basis of subrogation, noting “it rests on the principle that substantial justice should be attained regardless of form, that is, its basis is the doing of complete, essential, and perfect justice between all the parties without regard to form.” Id. at 670 (quoting 83 C.J.S. Subrogation pp. 579-80, §2a). The Court noted the general rule that “any person who, pursuant to a legal obligation to do so, has paid for an injury resulting from the wrong of another may be subrogated to the rights of the

injured person against the wrongdoer.” Id. The Court found that this right was based in common law: “The right of subrogation existed in such persons under the common law before the enactment of what is now chapter 287...and exists today without enactment of statutory authority.” Id. at 671.

In holding that the Fund was entitled to common-law subrogation, the Court found that its obligation to pay arose in the same way as the employer’s; thus, there was no logical reason to deny the Fund the right of subrogation. Id. at 670-71. The Court noted the unfairness of denying the Fund subrogation:

[I]f the Fund is deprived of the right of subrogation, it would result in the unjust enrichment of the employee, who could retain both compensation and damages, thereby violating a basic tenet of the common law that there may not be a double satisfaction for the same wrong.

Id.

Since Cole, there have been various challenges to the application of the Second Injury Fund’s right of subrogation. Of recent note are two cases, Manley v. Mulligan Constr.Co., 107 S.W.3d. 285 (Mo. App. E.D. 2003), and Flannery v. Breckenridge Materal Co., where the Commission awarded the Employer and the Second Injury Fund subrogation credit. 224 S.W.3d 138 (Mo. App. E.D. 2007). In Manley, the employee argued that the Commission erred in concluding that the Fund has a right to subrogation for permanent total disability benefits. 107 S.W.3d at 285. The Missouri Court of Appeals, Eastern District, concluded that in following Cole v. Morris, the Commission did not act without or in excess of its powers in concluding that the Fund has a right to

subrogation for PTD [permanent total disability] benefits. Id. In Flannery, the Commission awarded the Employer and the Second Injury Fund subrogation reimbursement. 224 S.W.3d 138 (Mo. App. E.D. 2007). Employee Flannery alleged, *inter alia*, that the commission erred in awarding subrogation to the Fund. As it had in Manley, the Missouri Court of Appeals, Eastern District, affirmed the Commission's award. 224 S.W.3d 138. This Court denied transfer in both.

Since 1966, then, the law has been well-established that the Fund has a right to subrogation, *i.e.*, the right to a credit against payments for a disability based on amounts the claimant received for that disability from a third party. The Commission, in declining to determine the extent to which the Fund was entitled to such a credit as to Banks, did not question that right.

*Legislative Acquiescence to the ruling in Cole*

Missouri courts have long recognized that “where a court of last resort construes a statute, and that statute is afterwards reenacted, or continued in force, without any change in its terms, it is presumed that the legislature adopted the construction given to it by the court.” Med. Shoppe Int'l v. Dir. of Revenue, 156 S.W.3d 333, 334 n.2 (Mo. banc 2005) (quoting Jacoby v. Mo. Valley Drainage Dist. of Holt County, 163 S.W.2d 930, 939 (Mo. banc 1942)). The presumption that the legislature adopted the Court's construction is particularly strong when that construction has been in place “for a long period of time, so that there has been abundant opportunity for the lawmaking power to give further expression to its will.” Id. (quoting Howard Elec. Co-op. v. Riney, 490 S.W.2d 1, 9 (Mo. 1973)).

The legislature has had ample time since 1966 to amend the law if it disagreed with the judicial holding in Cole. Indeed, the legislature has amended § 287.150 three times and § 287.220 seven times since 1966. Yet the legislature has never enacted a provision that would deny a subrogation right to the Second Injury Fund. After such a long passage of time, the decision in Cole has become so well accepted that it has been “woven into the fabric of the statute.” Med. Shoppe, 156 S.W.3d at 333-34.

**II. The Commission erred in ordering the Second Injury Fund to begin payments to claimant Banks without determining the subrogation interest of the Second Injury Fund, because the Commission was able to make that determination as set forth in Cole v. Morris, in that the Commission had jurisdiction to determine subrogation to the degree the result would be a credit against a Commission award, the Commission was not required to first determine the subrogation rights of the employer, and the Commission had a sufficient record to determine the subrogation rights of the Fund, *i.e.*, the amount recovered, attorney’s fees and expenses.**

*The Commission has jurisdiction to determine the Fund’s subrogation right.*

In Cole, the employee settled his workers’ compensation case against his employer before settling the third party claim. He then pursued his claim against the Second Injury Fund. The Commission concluded that the Fund was liable for permanent total disability benefits, but denied allowing the Fund credit against the award based on the third party recovery. 409 S.W.2d at 669. This Court reversed and remanded the case to the circuit court with directions to return the cause to the Commission for entry of its order in

accordance with the opinion. Id. at 672. The Court determined the Second Injury Fund's subrogation interest—and, again, remanded to the Commission to implement that determination—without determining the interest of the employer. Id. at 671.

At this stage, this case is like Cole. Here, too, the employee settled his claim against the employer prior to pursuing his claim against the Second Injury Fund. Here, too, employee recovered from a third party for his on-the-job injury. Although there is no evidence in the record as to the date of the third party settlement (*i.e.*, whether, as in Cole, he settled with the employer before recovering from the third party), there is evidence that Banks settled his third party action prior to his workers' compensation hearing against the Fund. And here, as in Cole, the Commission refused to determine the extent of the Fund's subrogation interest – *i.e.*, to do what this Court instructed the Commission to do on remand.

By remanding for a decision by the Commission, this Court implicitly found in Cole that the Commission has jurisdiction, as part of its authority over awards against the Fund, to determine the Fund's subrogation right. Here, the Commission acknowledges Banks' argument that despite Cole, the Division of Workers' Compensation has no jurisdiction to determine SIF subrogation rights (A-14). The Commission's decision suggests that, while the Fund has a theoretical subrogation interest in Banks' third party recovery, the remedy is an equity suit in circuit court filed by the Employer, as opposed to a determination by the Commission (A-15, n. 4).

However, this Court—in Cole—provided direction on this issue. There, the Court specifically directed the circuit court to return the cause to the Commission for entry of

its order in accordance with the opinion. Cole v. Morris, 409 S.W.2d 668, 672 (Mo. 1966). If the Fund's remedy for its right of subrogation did indeed lay exclusively within an equity suit in circuit court, then the court in Cole would not have directed the cause returned to the Commission, bypassing the circuit court in the process.

Perhaps what the Court recognized in Cole is that the Commission has the jurisdiction to credit (or, treat as an advance against future installments of compensation) an award of workers' compensation benefits. The Commission has on at least two previous occasions determined the Fund's subrogation interest and both times, the Missouri Supreme Court has denied transfer on those cases. See Employee: James Flannery Employer: Breckenridge, 2006 WL 2092488 (Mo.Lab.Ind.Rel.Com.), Flannery v. Breckenridge Material Co., 224 S.W.3d 138 (Mo.App.E.D. 2007), Employee: Earl Manley Employer: Mulligan Construction Company, 2002 WL 1824986 (Mo.Lab.Ind.Rel.Com.), Manley v. Mulligan Constr. Co., 107 S.W.3d 285 (Mo.App.E.D. 2003).

To require the Fund to file an equity suit in circuit court to assert its right of subrogation is impractical, especially when the Commission exercises its statutory power to decide the Employer's subrogation interest. The result is two tribunals—the Commission and circuit court—making decisions about the same issue: the same right of subrogation vested in the Employer and the Fund. Further complicating this impracticality is that neither court is bound by the other when making decisions regarding the right of subrogation. The Commission is the only tribunal that can decide the right of subrogation of both parties.

*The Commission did not have to decide the employer's rights first.*

Here, the Commission did not entirely ignore nor reject Cole, as Banks asked. Rather, it held that while the Fund may have a theoretical subrogation interest in the third party recovery, it could not determine the actual interest because the employer's subrogation interest had not been determined. There is no legal mandate anywhere to determine the employer's subrogation interest first, nor is it necessary to make a finding of unjust enrichment to the employee. As the court in Cole does not distinguish between the right given by statute and the right given by common law, one cannot assume that one right is superior to the other. There is no language in Cole that indicates that the employer's subrogation interest must be determined first, or before that of the Second Injury Fund. There is no language stating that the statutory right of subrogation supercedes or takes priority over the common law right. The decision in Cole does not state that the Fund's right of subrogation is subordinate to that of the employer. Thus, there is no basis to demand that the employer's subrogation interest be decided first.

*The Commission had before it sufficient facts on which to determine the extent to which subrogation would affect the award against the Fund.*

Regardless of whether the Commission had to determine subrogation rights in a particular order, the Commission had before it sufficient facts on which to proceed. Prior to the hearing against the Second Injury Fund, Banks settled his third party claim for the policy limits of \$100,000.00 (Tr. 33). After deducting attorney's fees and costs, \$54,903.48 remains in Banks' attorney's trust account (Tr. 34). In addition, Banks settled his case with the employer approximately one year prior to the ALJ's award against the

Second Injury Fund (Tr. 982). The Commission had before it—on the Stipulation for Compromise Settlement—evidence of all the monies paid by the employer to settle its liability (Tr. 982). In fact, the Commission has often used the amounts commonly found on settlement documents to determine the subrogation interests of the employer and of the Fund. The Commission has looked at the amounts paid in medical expenses—past and future, temporary total disability, and permanent partial disability. See Employee: James Flannery Employer: Breckenridge, 2006 WL 2092488 (Mo.Lab.Ind.Rel.Com.); Employee: Earl Manley Employer: Mulligan Construction Company, 2002 WL 1824986 (Mo.Lab.Ind.Rel.Com.); Employee: John G. Rodden Employer: Six Flags Theme Parks, Inc., 1998 WL 831830 (Mo.Lab.Ind.Rel.Com.). Here, as in those cases, the Commission had all the necessary monetary values before it to determine the employer’s interest—if it is, indeed, necessary to determine the employer’s interest before the Fund’s.

The Fund cannot be penalized because Banks chose to settle his case with the employer before pursuing his claim against the Fund. The Fund is entitled to a credit against the permanent total disability benefits, as established by common law and recognized by the Supreme Court in Cole v. Morris. The Court held that the employee should reimburse the Fund for all compensation paid him by the Fund; the balance of the third party recovery shall be retained by employee and be treated as an advance payment by the Fund on account of any future installments of compensation. Cole v. Morris, 409 S.W.2d 668, 671 (Mo. 1966).

Here, the Fund has not paid Banks any compensation; therefore, he does not have to reimburse the Fund. However, the balance of the third party recovery should be

treated as an advance payment by the Fund on account of the future installments of PTD benefits ordered by Commission.

## CONCLUSION

The Second Injury Fund respectfully requests this Court reverse the Award of the Commission, find that the Fund has a subrogation right enforceable by the Commission, remand this matter to the Commission for a determination of the appropriate amount of subrogation credit due on the award and apply it as an advance against the Fund's future payments.

Respectfully Submitted,  
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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Local Rule 360 of this Court and contains 3833 words, excluding the cover, this certification and the appendix, as determined by Microsoft Office Word 2003 software; and
2. That the CD-ROM filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a CD-ROM containing a copy of this brief, were mailed, postage prepaid, this 20th day of July, 2009, to:

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