In the Missouri Court of Appeals
Eastern District

DIVISION ONE

WILLIAM DYSON,	)	No. ED97865
	)	
Employee/Respondent,	)	Appeal from the Labor and
	)	Industrial Relations Commission
v.	)	
	)	
TREASURER OF THE STATE OF MISSOURI, CUSTODIAN OF THE SECOND INJURY FUND,	)	
	)	
Defendant/Appellant.	)	Filed: September 18, 2012

Introduction

The Treasurer of the State of Missouri, Custodian of the Second Injury Fund (Fund) appeals from the decision of the Labor and Industrial Commission (Commission) awarding William Dyson (Employee) workers' compensation benefits from the Fund. We would reverse that portion of the Commission's decision that found the Fund liable for permanent partial disability (PPD) enhancement on Employee's preexisting PPD that does not individually meet the statutory threshold; however, because of the general interest and importance of the issues, we transfer to the Missouri Supreme Court pursuant to Rule 83.02.

Factual and Procedural Background

On January 7, 2008, Employee was working as a driver and warehouseman for D & D Distributors a.k.a. Grey Eagle Distributors (Employer), loading and unloading

approximately 180 half barrels and 2,500 to 3,500 cases of beer each day, when he injured his neck while lifting a half barrel. Employee entered into a stipulation of compromise settlement with Employer regarding this neck injury for 15% PPD of the neck (spine). On June 23, 2008, Employee injured his right shoulder moving a half barrel (primary injury). After conservative treatment, Employee underwent an arthroscopy and debridement on August 21, 2008, for rotator cuff tendonitis and impingement. Employee was released to full duty with no restrictions on October 10, 2008. In 2009, Employee settled his workers' compensation claim for this injury with Employer for 25% PPD of the right shoulder. In 2001, prior to working for Employer, Employee had also injured his right ankle when he tripped over some railroad tracks. He was treated with steroid injections and physical therapy, and continues to have pain in his ankle when standing for long periods of time, when squatting, and with barometric pressure changes. Employee testified that the doctor prescribed orthotics but they did not help. He stated that he wears boots year-round because he needs support at the ankle.

On April 8, 2009, Employee was evaluated by Dr. David Volarich (Dr. Volarich), who assessed 65% PPD for the primary right shoulder injury; 15% PPD to the body as a whole for the neck injury; and 20% PPD for the right ankle injury, diagnosing Employee with a preexisting ankle strain and tendonitis. On May 14, 2009, Dr. Volarich issued an addendum to his April 8, 2009 medical report, giving his opinions as to Employee's preexisting disabilities, opining that "the following permanent industrial disabilities exist and are a hindrance to his employment or re-employment…15% [PPD] of the body as a whole rated at the … spine … [and] 20% [PPD] of the right lower extremity rated at the ankle …. [t]he combination of these disabilities creates a substantially greater disability

than the simple sum or total of each separate injury/illness, and a loading factor should be added."

On March 28, 2011, the Administrative Law Judge (ALJ) held a hearing to determine whether Employee was entitled to workers' compensation benefits from the Fund. The ALJ found the primary right shoulder injury amounted to 25% PPD and the preexisting neck injury amounted to 15% body as a whole PPD, both meeting the minimum threshold as set forth in Section 287.220(1)[1] and then combining with a 10% load factor to yield a total of 11.8 weeks of PPD, which at Employee's compensation rate entitled him to $4,590.67 in PPD benefits from the Fund. The ALJ found that Employee's preexisting right ankle injury was not sufficient to meet the minimum statutory threshold to trigger Fund liability.

Employee filed an application for review with the Commission, which issued a final award allowing compensation but modifying the award and decision of the ALJ. The Commission affirmed the ALJ's finding that Employee suffered a preexisting PPD of 15% of the body as a whole referable to the cervical spine as a result of his neck injury and made an additional finding of fact that Employee suffered a 7.5% PPD of the right ankle. The Commission included the 7.5% ankle PPD in its Fund calculations, concluding that Employee had met the 50-week threshold by converting and adding all of Employee's preexisting disabilities into weeks of compensation, to-wit: 60 weeks for the neck and 11.63 for the right ankle for the sum of 71.63 weeks. The Commission then added 58 weeks of PPD for the primary shoulder injury (converted from 25% PPD) and multiplied by a load factor of 10% to reach a grand total of 12.96 weeks of PPD or $5,041.96, for which the Fund was liable. This appeal follows.

[1] All statutory references are to RSMo 2006, unless otherwise indicated.

Points on Appeal

In its first point, the Fund contends the Commission erred in including the 7.5% PPD to Employee's right ankle (11.63 weeks) in calculating the liability of the Fund because to be considered in determining the liability of the Fund, Section 287.220.1 requires a disability to a major extremity to be at least 15%.

In its second point, the Fund maintains the Commission erred in awarding benefits to Employee for the 7.5% PPD to Employee's right ankle because there is no evidence that this was a hindrance or obstacle to Employee's employment or re-employment in that it made no finding whatsoever regarding the effect the disability had upon Employee's employability as required by Section 287.220.1.

Standard of Review

In reviewing a decision by the Commission, we review the findings of the Commission and not those of the ALJ. Roberts v. City of St. Louis, 254 S.W.3d 280, 283 (Mo.App. E.D. 2008). An appellate court shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the award only if: (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; or (4) there was not sufficient competent evidence in the record to warrant making the award. Section 287.495. "[I]n the absence of fraud, the findings of fact made by the [C]ommission within its powers shall be conclusive and binding." Id.

We examine the whole record to determine whether there is sufficient competent and substantial evidence to support the award, or whether the award is contrary to the overwhelming weight of the evidence. Hampton v. Big Boy Steel Erection, 121 S.W.3d

220, 222-23 (Mo.banc 2003). "We defer to the Commission's assessment of witness credibility and the weight given to the testimony." Pursley v. Christian Hosp. Ne./Nw., 355 S.W.3d 508, 514 (Mo.App. E.D. 2011).

This Court reviews decisions of the Commission, which are clearly interpretations or applications of law, for correctness without deference to the Commission's judgment. Shipp v. Treasurer of State, 99 S.W.3d 44, 50 (Mo.App. E.D. 2003). The Commission's finding of ultimate facts through the application of rules of law, rather than by natural reasoning based on facts alone, are conclusions of law. Id. The Commission's award becomes a question of law, where the evidentiary facts are not disputed. Id.

Discussion

Point I

In the instant case, the Commission criticized the ALJ's failure to include Employee's preexisting right ankle condition in determining the extent of Fund liability, rejecting the ALJ's reasoning that if one of a worker's preexisting disabling conditions, considered in isolation, fails to meet one of the thresholds in Section 287.220.1, then that condition is ignored for all purposes when considering the liability of the Fund. The Commission specifically stated, "We are of the opinion that the [ALJ] applied an improper analysis both as to the thresholds for triggering [Fund] liability and also in calculating the extent of [Fund] liability."

In this case, the relevant statute is Section 287.220.1 and it provides, in pertinent part:

> 1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability

> whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

Section 287.220.1 sets out the prerequisites for both establishing and calculating Fund liability, first setting out the requirements an employee's PPD must meet in order to implicate Fund liability, and second describing the calculations necessary in determining the compensation liability of the Fund and the employer.

Each Preexisting PPD Must be a "Hindrance or Obstacle"

Section 287.220.1 sets out a series of standards that each preexisting PPD must satisfy before the establishment of Fund liability. The first standard prescribes that each preexisting PPD to be "of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment." Section 287.220.1; Pursley, 355 S.W.3d at

515. Employee fulfilled this standard through testimony and medical records, as we will set out in our discussion of Point II.

If the preexisting PPD is found to be an obstacle or hindrance to the employee's ability to work, then the analysis proceeds to the numerical thresholds.

Each Preexisting PPD Must Satisfy the Numerical Thresholds

The relevant portion of Section 287.220.1 that sets forth the numerical thresholds for preexisting PPDs requires that:

> [T]he permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation….

The Commission set out two alternative avenues through the statutory thresholds: one for a single major extremity injury, and the other as a catchall for all other types and combinations of preexisting disabilities. The 15% PPD standard, the Commission held, is only applicable when a claimant is asserting a preexisting injury to a single major extremity. In all other instances (*i.e.*, an injury to multiple major extremities, or any number of body as a whole injuries), the Commission determined that a claimant must show the injury exceeds the body as a whole threshold of 50 weeks of compensation. The Commission found that when an employee has more than one preexisting PPD, the employee is allowed to combine them to exceed the 50-week requirement for purposes of simplicity, because the simplicity inherent in the 15% PPD threshold for a major extremity cannot be achieved. The Commission determined that a method was needed to combine the various disabilities to determine the employee's *overall* preexisting disability as of the moment of the primary injury. That method, according to the

Commission, was the weeks of compensation measure applicable to body as a whole injuries. The Commission reasoned that the word "only" in Section 287.220.1's phrase "if a major extremity *only*" means that the 15% PPD requirement applies just when the employee has a single preexisting PPD of a major extremity. This reasoning is in error. See Salviccio v. Second Injury Fund, No. ED97862, slip op. at 8-10 (Mo.App. E.D filed Sept. 11, 2012).

Our interpretation of Section 287.220.1 is that it requires each preexisting PPD that has been deemed a hindrance or obstacle to be measured against the statutory threshold corresponding to its respective classification. Id. at 10. If the preexisting PPD is a body as a whole injury, then it must be the equivalent of at least 50 weeks of compensation. Alternatively, if the preexisting PPD is an injury to a major extremity, then it must be assigned at least a 15% PPD rating in order to implicate Fund liability.

Stacking Preexisting Unrelated Body as a Whole Injuries and Stacking Body as a Whole Injuries with Major Extremity Injuries is Disallowed by Section 287.220.1

The Commission also determined that combining or stacking different preexisting injuries is permissible to meet the statute's respective thresholds. In particular, the Commission concluded that when the preexisting injuries amount to more than a single major extremity injury, Section 287.220.1 permits stacking body as a whole injuries with each other, and/or combining them with major extremity injuries. We disagree. See Salviccio, slip op. at 10-12.

There are limited instances when stacking injuries is allowable under the statute. In the case of a claimant that has multiple injuries to a single major extremity at various levels, this Court has held that "it may be appropriate, depending on the facts and circumstances, to rate the percentage of disability to the entire major extremity." Shipp,

99 S.W.3d at 53 (acceptable to combine preexisting PPD of the right wrist and right shoulder into resulting 15% PPD of the right arm). The propriety of allowing stacking in those limited circumstances is rooted in the language of Section 287.220.1. Though various injuries to a single major extremity may be categorized at the different compensation levels set forth in Section 287.190.1, such categorization does not alter the fact that those injuries still constitute the same major extremity. See id.

Missouri's Workers' Compensation laws are subject to strict construction, see Section 287.800.1, and strict construction means that a "statute can be given no broader application than is warranted by its plain and unambiguous terms." Robinson v. Hooker, 323 S.W.3d 418, 423 (Mo.App. W.D. 2010). The statute makes no allowance for combining body as a whole injuries together or combining a body as a whole injury with a major extremity injury. See Salviccio, slip op. at 11. Had the legislature intended to allow for that type of stacking and its resultant circumvention of the thresholds, it would have done so. Id. It did not, and we will not give the statute a broader application than is warranted by its plain and unambiguous terms. Id., see also Sell v. Ozarks Med. Ctr., 333 S.W.3d 498, 506-07 (Mo.App. S.D. 2011). Accordingly, we find that the type of stacking advanced by the Commission is precluded by the language of Section 287.220.1.

Employee's Preexisting Ankle Injury Did Not Satisfy Major Extremity Threshold

Applying Section 287.220.1, we find that Employee's 7.5% PPD to his ankle does not meet the minimum 15% PPD threshold for major extremities, and thus does not trigger Fund liability. Only Employee's preexisting injury to his neck (spine) at 15%

body as a whole PPD was sufficient to incur Fund liability. This percentage translated into weeks is 60 weeks,[2] meeting the 50-week threshold for body as a whole injuries.

Only Preexisting Injuries that Satisfy the Thresholds May Be Included in Calculating Fund Liability

Because Employee's preexisting ankle injury did not meet the initial threshold for injuries to major extremities set forth in Section 287.220.1 to trigger Fund liability, it is not included in the final calculation of Fund liability to which Employee is entitled. This is so despite contrary interpretations which have been asserted that the language of the fourth sentence of Section 287.220.1 requires the inclusion of all preexisting injuries when calculating Fund liability, to-wit:

> After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, **the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined** by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

(Emphasis added.) We find this sentence is not to be interpreted so as to allow injuries that otherwise would not satisfy the thresholds to be included in calculating Fund liability, so long as at least one of the preexisting PPDs meets the thresholds. We reject that interpretation and hold that only those preexisting injuries and conditions that have

[2] Calculating the number of weeks of compensation requires the Commission to determine the degree of PPD expressed as a percentage figure. Motton v. Outsource Int'l, 77 S.W.3d 669, 674 (Mo.App. E.D. 2002). That percentage is then multiplied by 400 weeks (400 weeks being the maximum number of weeks of compensation set out in Section 287.190.3). The resulting sum is the amount of PPD expressed in weeks of compensation for a body as a whole injury. If the sum is greater than or equal to 50 weeks, then that particular PPD may be utilized in calculating Fund liability.

satisfied the previously outlined thresholds may be considered in the calculation of Fund liability. Salviccio, slip op. at 14.

In this case, only Employee's neck injury satisfied the threshold and only those 60 weeks of compensation attributable to the neck injury may be carried forward into the calculations. The first step in calculating the liability of the Fund requires the 60 weeks attributable to Employee's preexisting PPD be added to the 58 weeks of compensation attributable to Employee's primary shoulder injury, converted from the 25% PPD which the Commission projected. The sum is 118 weeks. Next, we look to whether Employee's preexisting condition combined with the effects of his primary injury to result in a greater disability than their simple sum. The Commission believed the testimony of Dr. Volarich and concluded that Employee's primary shoulder injury combined synergistically with his preexisting neck PPD to result in a combined disability greater than their simple sum and assigned a 10% load factor. When the 118 total weeks is multiplied by the 10% load factor, the result is 11.8 weeks of PPD enhancement due from the Fund, not 12.96 weeks, as awarded by the Commission.

Based on the foregoing, Point I is granted.

Point II

Although our resolution of Point I would be dispositive of this appeal and render Point II moot, we address it since we are transferring this case to the Supreme Court.

The Fund's contention that there was no evidence that Employee's ankle injury was a hindrance or obstacle to his employment is controverted by expert witness Dr. Volarich's medical report, which opined that Employee's neck and right ankle conditions

preexisting the June 23, 2008 injury amounted to a hindrance to his employment or reemployment, to-wit:

> Pertaining to his medical conditions preexisting 6/23/08, it is my opinion that the following permanent industrial disabilities exist and are a hindrance to his employment or re-employment:
>
> 1. There is a 15% [PPD] of the body as a whole rated at the thoracolumbar spine due to the strain/sprain injury that required conservative care. The rating accounts for his ongoing back pain syndrome particularly with fixed positions.
> 2. There is a 20% [PPD] of the right lower extremity rated at the ankle due to the strain injury and tendonitis that required injections. The rating accounts for ongoing pain, particularly with prolonged weightbearing and deep squatting activities.
>
> The combination of his disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness, and a loading factor should be added.

Employee also testified that when he uses his right shoulder to get into the work truck, it hurts his right ankle. He stated that he has to wear boots, even in the summer, to support his ankle and still has discomfort at the end of the day. The Commission found these two witnesses, expert and lay, credible. We defer to the Commission's assessment of witness credibility and the weight given to the testimony. Pursley, 355 S.W.3d at 514. The testimony of the claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of the disability, especially when taken in connection with, or where supported by, some medical evidence. Id. at 515. Here, Employee's testimony as to the pain and disability related to his ankle was supported by Dr. Volarich's professional medical assessment. We find the foregoing to be sufficient competent and substantial evidence in the record that Employee's ankle injury is a hindrance or obstacle to his employment. Hampton, 121 S.W.3d at 222-23. Accordingly, Point II is denied.

Conclusion

For the foregoing reasons, we would reverse that portion of the Commission's decision finding the Fund liable for PPD enhancement due to Employee's preexisting ankle injury and would remand to the Commission to enter an award finding the Fund liable for 11.8 weeks of PPD enhancement. However, because of the general interest and importance of the issues, we transfer to the Missouri Supreme Court pursuant to Rule 83.02.

Sherri B. Sullivan, J.

Clifford H. Ahrens, P.J., and
Glenn A. Norton, J., concur.