

Summary of SC92834, *Treasurer of the State of Missouri-Custodian of the Second Injury Fund v. James Witte*

consolidated with

SC92842, *Joseph Salviccio v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund*

consolidated with

SC92850, *William Dyson v. Treasurer of the State of Missouri as Custodian of Second Injury Fund*

consolidated with

SC92867, *Eric Buhlinger v. Treasurer of Missouri as Custodian of Second Injury Fund*

On review from the labor and industrial relations commission

Argued and submitted December 11, 2012; opinion issued November 12, 2013

Attorneys: In SC92834, the treasurer was represented by Rochelle L. Reeves of the attorney general's office in Jefferson City, (573) 751-3321; and Witte was represented by Douglas B. Salsbury of The Miller/Salsbury Law Firm in Eureka, (636) 938-9877. In SC92842, the treasurer was represented by Cara L. Harris and Kristin M. Frazier of the attorney general's offices in Springfield and St. Louis, respectively, (573) 751-3321; and Salviccio was represented by Elizabeth J. Ituarte of Kriegel & Ituarte PC in St. Louis, (314) 352-0505. In SC92850, the treasurer was represented by Rochelle L. Reeves and Daniel A. Cunningham of the attorney general's offices in Jefferson City and St. Louis, respectively, (573) 751-3321; and Dyson was represented by James S. Haupt, an attorney in St. Louis, (314) 621-5667. In SC92867, the treasurer was represented by Cara L. Harris of the attorney general's office in Springfield, (573) 751-3321; and Buhlinger was represented by Dean L. Christianson of Schuchat, Cook & Werner in St. Louis, (314) 621-2626.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: The state treasurer, as custodian of the second injury fund, appeals four workers' compensation decisions of the labor and industrial relations commission converting preexisting partial disabilities into weeks of compensation, combining those weeks to determine whether the statutory threshold was met, and awarding compensation against the fund. In a 6-0 decision written by Judge Patricia Breckenridge, the Supreme Court holds that section 287.220.1 sets forth specific thresholds for triggering the fund's liability when a claimant has serious preexisting permanent partial disability, and under the clear and unambiguous language of this section, multiple preexisting permanent partial disabilities cannot be combined to meet those thresholds. The statute requires a single preexisting permanent partial disability to meet the thresholds to trigger the fund's liability, but there is no threshold requirement for the "last" injury giving rise to the most recent claim for benefits. To the extent that prior appellate decisions misstate the requirements for triggering fund liability or require disabilities from the last injury to meet the thresholds, they are overruled. Once the fund's liability is triggered, all preexisting injuries must be considered in calculating the amount of compensation for which the fund is liable.

The Court affirms the commission's decisions in SC92842, SC92850 and SC92867. Because the claimants had an individual preexisting permanent partial disability that met the statutory

thresholds to trigger the fund's liability, the commission did not err in finding they were entitled to compensation and in awarding them an amount based on the combined disability of all their injuries – preexisting and last. The Court, however, reverses the commission's decision in SC92834. Because the claimant did not have any one preexisting permanent partial disability that met the thresholds, the commission erred in awarding him any compensation from the fund.

Facts: The state treasurer, as custodian of the second injury fund, appeals four decisions of the labor and industrial relations commission related to workers' compensation benefits. Because all require interpretation of section 287.220.1, RSMo Supp. 2012, the cases are consolidated for opinion. In each, the worker settled his claims against his employer and proceeded to hearing only against the fund. The facts of each are undisputed.

In SC92834, James Witte slipped and fell in April 2007 while working for Show-Me Livestock Co-op Inc., breaking his right leg and hip. An administrative law judge (ALJ) concluded that, although he had multiple preexisting disabilities, none was significant enough to constitute a hindrance or obstacle to employment or to reach the thresholds set out in section 287.220.1. Witte sought review from the commission, which found that he suffered preexisting permanent partial disabilities of 10 percent of the body as a whole, referable to diabetes; 10 percent of the body as a whole, referable to gastrointestinal issues; 10 percent of the body as a whole, referable to psychiatric problems; 5 percent of the body as a whole, referable to his lumbar spine; and 10 percent of his right leg. The commission converted all of Witte's preexisting disabilities into weeks of compensation, combined them – determining that his overall preexisting permanent partial disability amounted to 160.7 weeks of compensation, well above the 50-week minimum threshold – and awarded him nearly \$8,500 in compensation from the fund.

In SC92842, Joseph Salviccio injured his left knee in November 2008 while working for Western Supplies Company. An ALJ determined that the fund was not liable for compensation because none of his preexisting permanent partial disabilities rose to the level necessary to satisfy the thresholds of section 287.220.1. Salviccio sought review from the commission, which found he suffered preexisting permanent partial disabilities of 50 percent of the left little finger; 12.5 percent of the body as a whole, referable to diabetes; 4 percent of the body as a whole, referable to a 1999 hernia; and 3.5 percent of the body as a whole, referable to a 2005 hernia. The commission converted all of Witte's preexisting disabilities into weeks of compensation, combined them – determining that his overall preexisting permanent partial disability amounted to 91 weeks of compensation, well above the 50-week threshold – and awarded him about \$5,000 in compensation from the fund.

In SC92850, William Dyson injured his right shoulder in June 2008 while working for D & D Distributors. An ALJ determined that a preexisting permanent partial disability due to a prior neck injury was sufficient to meet the thresholds set forth in section 220.287.1, but one due to a prior ankle injury was not. Dyson sought review from the commission, which determined that both the neck and ankle injuries should have been included in determining the fund's liability. The commission converted all his disabilities to the equivalent number of weeks, determined that he met the threshold and awarded him about \$5,000 in compensation from the fund.

In SC92867, Eric Buhlinger suffered a concussion and sustained injuries to his neck, back and left elbow in an August 2008 skid loader incident while he was working for Bryan Company. An ALJ concluded that, collectively, his permanent partial disabilities from the 2008 injury and his

preexisting permanent partial disability met the thresholds of section 287.220.1 and awarded him nearly \$6,800 in compensation from the fund. The fund sought review from the commission, which accepted the ALJ's decision and award.

AFFIRMED IN PART AND REVERSED IN PART.

Court en banc holds: (1) The second injury fund's liability for compensating workers with preexisting disabilities is governed by section 287.220, and its liability for permanent partial disability benefits is determined by subsection 1 of that section. What triggers the fund's liability is determined by the third sentence of this subsection, which has several requirements. First, the claimant must have a preexisting permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment. Second, the percentage of disability attributable to the preexisting disability must equal at least 50 weeks of compensation for an injury to the body as a whole or at least 15 percent for an injury to a major extremity. Third, the combination of the preexisting disability and the disability from the "last" injury giving rise to the most recent claim for benefits must equal at least 50 weeks of compensation for an injury to the body as a whole or at least 15 percent for an injury to a major extremity. Fourth, the combined disability must be substantially greater than the disability that would have resulted from the last injury alone. To the extent that certain prior decisions of the court of appeals misstate the requirements for triggering the fund's liability, they are overruled.

(2) Considering its clear and unambiguous language, section 287.220.1 does not permit combining – or "stacking" – multiple preexisting permanent partial disabilities to meet the thresholds for the fund's liability. In defining these thresholds, the third sentence of the statute repeatedly refers to the singular "disability" rather than the plural "disabilities" and likewise uses the singular "injury" rather than the plural "injuries." In contrast, the fifth sentence – discussing compensation for permanent total disability – uses the language "previous disability or disabilities," specifically providing for consideration of multiple disabilities. The legislature's use of different terminology for permanent partial disability and permanent total disabilities is presumed intentional and for a particular purpose. In the third sentence, then, it is presumed the legislature intended to require there to be a single preexisting partial disability that itself meets the thresholds to trigger fund liability. While the term "disability" could refer to multiple injuries, section 287.220.1 sets the thresholds based on a single injury.

As such, the commission's method of combining several lesser injuries to meet the thresholds is a misapplication of section 287.220.1. This error is apparent from the commission's difficulty in attempting to combine a major-extremity injury with a body-as-a-whole injury, in which it converted all preexisting disabilities to a common unit of measurement – weeks – a method of calculation not supported by the statute. The statute does not permit the conversion of a major-extremity disability into weeks of compensation because it clearly requires that such a disability be measured by the percentage of permanent partial disability. Further, the statutory thresholds exclude *de minimus* injuries from triggering liability.

(3) Section 287.220.1 does not require permanent partial disabilities from the last injury, however, to meet a numerical threshold to trigger liability. The statute's plain and ordinary language imposes the 50-week or 15-percent permanent partial disability thresholds only on the combined disability, not a disability resulting from the last injury. When the numerical language is removed, it is more apparent that the threshold language refers to the degree or percentage of

disability caused only by the combined preexisting disabilities. To the extent that certain prior decisions of the court of appeals state that disabilities from the last injury must meet the thresholds, they are overruled.

(4) Once the fund's liability has been triggered by meeting the requirements in the third sentence of section 287.220.1, the fourth sentence provides the mechanics for determining the amount of compensation for which the fund is liable. The fund is liable only for the degree of the combined disability that exceeds the numerical sum of the preexisting disabilities and the disability from the last injury. The plain and ordinary meaning of the statute's language expressly requires the ALJ to consider "all" preexisting injuries or conditions – without the threshold limitation – in calculating the amount of compensation for which the fund is liable.

(5) As to the four decisions below, the Court holds:

(a) In SC92834, the commission erred in awarding Witte compensation. The fund is liable only when there is a preexisting permanent partial disability that meets either the 50-week threshold for an injury to the body as a whole or the 15-percent threshold for an injury to a major extremity. Because none of Witte's preexisting injuries, considered alone, meets the thresholds, he is not eligible for compensation from the fund.

(b) In SC92842, the commission erred in combining all of Salviccio's injuries to meet the thresholds, but it did not err in finding the fund liable. His 12.5-percent disability to his body as a whole as a result of his diabetes – multiplied by 400 weeks as provided by section 287.190.3, RSMo – meets the 50-week threshold to trigger the fund's liability. The commission also did not err in using all of Salviccio's injuries to calculate the amount of his award.

(c) In SC92850, the commission erred in combining both of Dyson's preexisting permanent partial disabilities to meet the thresholds, but it did not err in finding the fund liable. Evidence supports the commission's finding that his prior ankle injury amounted to a hindrance or obstacle to employment. While the ankle injury was insufficient to meet the thresholds, his 15-percent permanent partial disability to his body as a whole, referable to his prior neck injury – multiplied as provided by section 287.190.3 – meets the 50-week threshold to trigger the fund's liability. The commission also did not err in using both of Dyson's preexisting disabilities to calculate the amount of his award.

(d) In SC92867, the commission did not err in combining the permanent partial disabilities from Buhlinger's last injury in meeting the thresholds because these injuries did not need to meet the thresholds. His preexisting permanent partial disability of 17.5 percent of his left ankle met the 15-percent threshold for injuries to a major extremity to trigger the fund's liability. The commission properly considered all of Buhlinger's injuries to calculate the amount of his award.