

BEFORE THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

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MISSOURI COURT OF APPEALS
WESTERN DISTRICT

TREASURER OF THE STATE OF)
MISSOURI CUSTODIAN OF THE)
SECOND INJURY FUND,)
)
Appellant,)
)
-vs-)
)
JAMES WITTE,)
)
Respondent.)

Case No. WD74644

BRIEF OF RESPONDENT, JAMES WITTE

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 The Commission did not err in holding that Respondent is entitled to recover from the Second Injury Fund because he proved by competent and substantial evidence that both his primary injuries and his multiple pre-existing medical conditions easily exceeded the threshold requirements for Second Injury Fund liability and that the primary injuries combined with the pre-existing medical conditions to result in a greater disability than the simple sum of those disabilities.	
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STATEMENT OF FACTS

The case at bar was brought by Respondent against the Second Injury Fund only, his claim against the employer having been settled against the employer/insurer on the basis of a permanent partial disability of 20% of the body and 30% of the right hip. (TR 5) In addition to stipulating to that settlement (though without stipulating that this represents the extent of permanent partial disability from the April 18, 2007 accident in the pending claim against the Second Injury Fund), the parties herein stipulated that on or about April 18, 2007, the Respondent was in the employment of Show-Me Livestock Cooperative; that the rate of compensation is \$186.67 per week; that all of the facts relevant to the Respondent's relationship with the employer/insurer are resolved in the Respondent's favor in his claim against the Second Injury Fund here; and thus, that the only issue to be resolved by this proceeding is the liability of the Second Injury Fund for permanent partial disability benefits. (TR 4-5)

The Respondent offered into evidence, without objection, the following exhibits:

- Exhibit 1 Report of Injury
- Exhibit 2 Stipulation for Compromise Settlement of Primary Claim
- Exhibit 3 Rating Report of Robert Poetz, D.O.
- Exhibit 4 Deposition of Robert Poetz, D.O.

Medical Records on Primary Claim

- Exhibit 5 Medical Records of Dr. Brenda Woods
- Exhibit 6 Medical Records of Progressive Spine Care & Rehab
- Exhibit 7 Medical Records of Capital Region Medical Center
- Exhibit 8 Medical Records of Mid-Missouri Hand & Orthopedic Surgery
- Exhibit 9 Medical report of Dr. Brian Edwards
- Exhibit 10 Treatment records from BJC Missouri Certified Home Care

Medical Records on Pre-Existing Claim

- Exhibit 11 St. John's Hospital/Hermann covering the following pre-existing medical conditions:
- Facial rash/hives - 12-28-97
- Deviated Septum – 8/30-96
- Rectal Bleed; Hemorrhoids; Diverticulitis (inflammation of diverticulitis in intestinal track) - 1-17-92
- Large extra testicular mass on the right testicle - 2-13-90
- Spastic Colon - 8-30-89
- Left exphoria tropia/multiple surgeries (addressing tendency of visual axis to diverge outward related to optical nerve condition) - 6-4-78
- Diabetes - 8-13-06
- Depression & Anxiety - 8-13-06
- Elevated cholesterol - 8-13-06
- Recurrent tineapedis - 8-13-06

Pneumonia - 8-13-06

Borderline cardiomegaly/hypertrophy of the heart - 8-13-06.

The testimony in this case came from two sources. Dr. Robert Poetz, a board certified osteopathic physician and surgeon testified by way of deposition. (TR 48; TR 76-with attachments) Dr. Poetz has been licensed to practice medicine in the State of Missouri for 47 years. (TR 52) He is a clinical professor of Family Medicine at several different medical schools including St. Louis University Medical School, The University of Missouri Medical School, and several others. (TR 52) Dr. Poetz belongs to the American Osteopathic Association and is a "fellow" in the American College of Osteopathic Physicians and Surgeons, and belongs to several other medical organizations. (TR 53) He has some special experience in regard to performing rating examinations for the Department of Vocational Rehabilitation for the State of Missouri, and has been engaged in performing workers' compensation evaluations in the State of Missouri for many years. (TR 63-64) Dr. Poetz's deposition incorporates two medical rating reports (TR 77; TR 85), which were exhibits to said deposition. Through both his testimony responsive to questions of the attorneys, and his detailed reports, Dr. Poetz provided cogent and substantial evidence regarding the multiple disabling health problems plaguing the 43 year old Respondent. The other source of testimony was the Respondent himself (TR 6-38).

The testimony of Respondent Witte and his rating physician, Dr. Poetz, described Mr. Witte's multiple disabilities from professional and lay perspectives respectively, and their

testimony was generally consistent. As to the primary injuries, which were the subject of the Stipulation for Compromise Settlement with the employer, Mr. Witte testified that he had sustained a broken right leg and hip for which he was taken to Capital Region Hospital where he underwent a surgical installation of a titanium pin and rod in his right leg and hip, that remains in his body to date. (TR 12) Dr. Poetz confirmed that Mr. Witte's primary injuries consisted of "a hip fracture and a fracture of the femoral neck of the severity described in the medical records". (TR 61) Dr. Poetz also testified that this is the kind of condition that would, as a general rule, predispose the patient to the onset of traumatic arthritis. (TR 61)

The Respondent is a man with limited formal education. Mr. Witte left school long before he would have graduated from high school. (TR 6-8) His primary employment has been as a laborer. Moreover, Mr. Witte's work history is devoid of any particular work skills, save for some limited training that he received in the field of security, where Mr. Witte worked as a security guard. (TR 7) The Respondent was security guard for some 10 years and worked for several years in the Missouri Department of Corrections at a penal institution in Jefferson City. (TR 7, 9-10)

The clamant testified that he is 7 feet tall (TR 6), and that his unusual height has put additional stress on his back and hips. (TR 84) Dr. Poetz testified that "very very few" in the general population are seven feet tall and that persons of such height are prone to various problems with joint disease from their stature. (TR 57) He further testified that such persons are prone to cardiovascular disease. (TR 58) Dr. Poetz also stated that because a workplace is

designed for persons of average height, a person of Mr. Witte's height has to deal with multiple impairments in the workplace. (TR 58) Mr. Witte testified that at the young age of 6, a childhood accident on a bicycle first caused problems with differential leg length, which had a direct effect on his back and hips. (TR 14-15) In the accident described by Respondent Witte, he testified that he "was riding a bicycle on a wet garden hose and it slipped and my right leg got caught up in the spokes. I got multiple injuries to my right leg. It was broke in 5 places". (TR 14) The Respondent described how this injury curtailed his participation in athletic sports such as basketball, football, any running sports, including baseball. (TR 15)

Apart from the lower leg fractures constituting part of the Respondent's pre-existing disabilities, there was evidence of his poorly controlled condition of diabetes. The Respondent testified that he takes insulin daily. (TR 16) There was also evidence of a pre-existing left eye injury described in the medical records and in Dr. Poetz's testimony and report as a "large angle exotropia (shortening of the muscle)", for which Mr. Witte underwent multiple surgeries. (TR 78) Although the Respondent's visual acuity has been restored with corrective lenses, function of the eye according to Dr. Poetz's unchallenged testimony on disability, has been compromised. (TR 17) Additionally, the Respondent has from childhood contended with conditions of depression and anxiety, which began according to the Respondent's perception, when as a young boy he was teased due to his height. (TR 18) He experiences anxiety attacks and flashbacks from his time working in the prison and from other events in his life, which impair his ability to deal with people. (TR 36) This was referenced

by the Respondent when he explained why in his current part-time work for Dollar General, he could not see himself operating a cash register. (TR 25) The Respondent said that if people got into line when he was operating a cash register, it would make him very nervous. (TR 25) The medical records and the testimony of Mr. Witte and Dr. Poetz also referenced a problem with the Respondent's spastic colon, a condition related to his nerves. (TR 19) Mr. Witte develops diarrhea whenever stressed and this condition can at times become urgent. (TR 19) This condition, with which the Respondent has contended since the age of 7 years, makes it unpredictable when he needs to use the restroom, and there are times when he needs to use the restroom repeatedly within a fairly short duration. (TR 19-20) Mr. Witte said this has posed a problem with his jobs. (TR 20)

The Respondent also introduced evidence of a pre-existing low back condition, which Dr. Poetz found to constitute a 10% permanent partial disability to the body as a whole. (TR 84)

According to the Respondent's testimony, in his current job as a "stocker" for a Dollar General Store, Mr. Witte gets on an average no more than 12 hours per week of work. (TR 22) Mr. Witte was asked whether he thought he could work full time given his multiple health problems, and the Respondent testified that he did not think that he could do so. (TR 25) He explained that when he stands for any length of time, he develops pain in his back and his hip, and sometimes he experiences spasms. He also testified that he has considerable difficulty trying to stoop, bend, or crawl. (TR 22-25) The Respondent's rating doctor opined that to a

reasonable degree of medical certainty, the accident of April 18, 2007, was the substantial and prevailing factor in causing Respondent to sustain a 30% permanent partial disability to the lower right extremity as measured at the right hip. Dr. Poetz further found to a reasonable degree of medical certainty that the Respondent had sustained a 20% permanent partial disability to the body as a whole measured at the lumbar spine. (TR 17)

Dr. Poetz additionally opined that the Respondent, James Witte, had some disability pre-existing the work accident that occurred in April of 2007, and in that regard the doctor testified that the Respondent had:

- A 15% permanent partial disability to the body as a whole referable to his diabetes;
- A 20% permanent partial disability to the visual system measured at the left eye;
- A 15% permanent partial disability to the right lower extremity measured at the right leg;
- A 15% permanent partial disability to the body as a whole referable to the GI System; and
- A 20% permanent partial disability to the body as a whole for anxiety and depression. (TR 66)

Additionally, as set forth in his supplemental report, Dr. Poetz opined that Mr. Witte had a 10% permanent partial disability to the body as a whole referable to the lumbar spine. (TR 20) All of these opinions were expressed by the doctor to “a reasonable degree of medical certainty”. (TR 67)

Finally, the Respondent's rating doctor, Robert Poetz, opined to a reasonable degree of medical certainty that the above specified pre-existing conditions combine with the primary disabilities to cause a greater degree of disability than the simple sum of said conditions and disabilities. (TR 67-68).

The Labor and Industrial Relations Commission found in accordance with the testimony of Respondent's expert, Dr. Robert Poetz, that Respondent's primary injuries herein amounted to 20% of the body as a whole referable to the lumbar spine and 30% of the right hip. (Appellant's Appendix A2). While not accepting the full percentages of pre-existing disability ascribed to the Respondent by the only expert to testify in this cause, Dr. Poetz, the Commission did clearly find that Respondent Witte's pre-existing disability was substantial, holding that he was entitled to recover from the Second Injury Fund, as his pre-existing disability consisted of 10% body as a whole (BAW) for diabetes; 10% BAW for his gastrointestinal condition; 10% BAW for psychiatric problems; 10% of the right leg at the 207 week level; and 5% BAW referable to his lumbar spine. (Appellant's Appendix A6).

POINTS RELIED ON

THE COMMISSION DID NOT ERR IN HOLDING THAT RESPONDENT IS ENTITLED TO RECOVER FROM THE SECOND INJURY FUND BECAUSE HE PROVED BY COMPETENT AND SUBSTANTIAL EVIDENCE THAT BOTH HIS PRIMARY INJURIES AND HIS MULTIPLE PRE-EXISTING MEDICAL CONDITIONS EASILY EXCEEDED THE THRESHOLD REQUIREMENTS FOR SECOND INJURY FUND LIABILITY AND THAT THE PRIMARY INJURIES COMBINED WITH THE PRE-EXISTING MEDICAL CONDITIONS TO RESULT IN A GREATER DISABILITY THAN THE SIMPLE SUM OF THOSE DISABILITIES.

Lewis v. Kansas University Medical Center, 356 S.W.3d, 796 (Mo. Ct. App. 2011)

Shipp v. Treasurer of the State of Missouri, 99 S.W.3d 44 (Mo. Ct. App. 2003)

§287.800 R.S. Mo.

§287.220.1 R.S. Mo.

ARGUMENT

Standard of Review

This Court's review of the matter at bar is governed by §287.495.1, R.S. Mo. 2000, which provides in relevant part that:

“Upon appeal no additional evidence shall be heard and, in the absence of fraud, the Findings of Fact made by the Commission within its powers shall be conclusive and binding. the Court, on appeal, shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the Award upon any of the following grounds and no other:

- (1) That the Commission acted without or in excess of its powers;
- (2) That the Award was procured by fraud;
- (3) That the facts found by the Commission do not support the Award;
- (4) That there was not sufficient competent evidence in the record to warrant the making of the Award.”

Lewis v. Kansas University Medical Center, 356 S.W.3d 796 (Mo. Ct. App. 2011).

As this Court stated in *Lewis*, the Court reviews the Commission's Award to determine whether it is “supported by competent and substantial evidence upon the whole record”. *Mo. Const. Art. V, Sec. 18*, and an Award is supported by competent and substantial

evidence unless it is against the overwhelming weight of the evidence. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

THE ISSUE OF “STACKING” OF DISABILITIES REVISTED

The core argument of the Second Injury Fund on the appeal before the Court constitutes but another run at an old argument that was soundly rejected by the Eastern District Appellate Court nine years ago. In *Shipp v. Treasurer of the State of Missouri*, 99 S.W.3d 44 (Mo. Ct. App. 2003), the Second Injury Fund argued that the Commission erred in finding claimant’s pre-existing injuries could be “stacked” to sustain a compensable threshold level of disability. The Appellate Court found no error in the Commission’s finding in that case noting that the injuries to the claimant’s arm at the wrist and at the elbow were also injuries to the same major extremity as her pre-existing injury to her arm at the shoulder. Explaining its reasoning, the Court said that “we believe that just as where there are injuries to multiple parts of the body it may be appropriate to ‘rate’ on the body as a whole where there are injuries to different parts of an arm, it may often be appropriate to consider the disability of the entire arm”. *Ibid p.6*. In *Shipp*, the Second Injury Fund urged the Court to find err in the Commission’s determination that claimant’s pre-existing injuries could be “stacked” on top of each other to sustain a compensable threshold level of disability, which if prohibited, would have prevented Claimant Shipp from meeting the required 15% permanent partial disability of a major extremity. As support for its contention, the Fund suggested in *Shipp*

that “stacking” of pre-existing claims had been found impermissible in *Motton v. Outsource Intern*, 77 S.W.3d 669 (Mo. Ct. App. 2002), an interpretation that the *Shipp* Court flatly rejected. As the Court said:

“*Motton* does not stand for the argument that §287.220 does not permit ‘stacking’ of pre-existing claims. In *Motton*, the Commission did not ‘stack’ the ‘pre-existing’ injuries of the claimant; rather, the Commission wrongly found §287.220.1 to be ambiguous and converted the percentage of ppd to a major extremity below the minimum threshold into weeks of compensation in order to satisfy the threshold limits.”

Thus, *Motton* turned on the question of whether the term “major extremity” was ambiguous so as to allow a tribunal to disregard the parameters prescribed by that term so as to focus exclusively on “weeks” of compensation. Finding no ambiguity in the term “major extremity” the Eastern District Appellate Court was unwilling to ignore the statutory threshold of 15% permanent partial disability required of a major extremity for Second Injury Fund liability. As it pertains to the instant case, *Motton*, which was decided before *Shipp*, does nothing to mitigate the bright illumination cast by *Shipp* on the same issue that the Second Injury Fund seeks to here re-litigate.

The avowed purpose of the creation of the Second Injury Fund was and continues to be, to encourage the employment of the physically disabled in industry. *Stewart v. Johnson*, 398 S.W.2d 850 (Mo. 1966). The Fund carries out this purpose by encouraging the employment of disabled persons without creating any greater exposure under the Workers’ Compensation Law, Chapter 287, R.S. Mo. than the employment of persons without pre-existing disabilities. James B. Slusher: *The Second Injury Fund* (1961) 26 Mo. L. Review

328. Before 1993, any pre-existing disability that was a hindrance to employment or re-employment could open the door to possible Second Injury Fund liability. It was in 1993 that the Second Injury Fund Statute was amended to limit permanent partial disability awards against the Second Injury Fund to those cases where both the pre-existing disabilities and the disabilities from the work injury are more than de minimis. The specifics of the law setting forth those criteria for a compensable Second Injury Fund Claim are contained in §287.220.1, which reads in pertinent part:

“If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtain re-employment if the employee becomes unemployed, and the pre-existing 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 of 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 pre-existing disability.”

It is submitted that the foregoing excerpt from the statute contains the protections intended by the legislature to shield the Second Injury Fund from liability for claimants with only de minimis pre-existing disabilities. Then, as to those claims surviving the protective

screen above set forth, the statute provides the mechanics by which compensation may be determined. That is plainly set forth in the statute as follows:

“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. . .” (emphasis added).

When the workers’ compensation chapter in the law was revised in 2005, the legislature made clear its intention that the laws be “strictly construed”. *Section 287.800.1* concisely states:

“Administrative law judges, associate administrative law judges, legal advisors, the Labor and Industrial Relations Commission, the Division of Workers’ Compensation, and any reviewing court shall Construe the provisions of this chapter strictly.”

Indeed, this Court has stated with equal bluntness that “courts must use principles of strict construction in applying all provisions of the Workers’ Compensation Act.” *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. Ct. App. 2010); rehearing and/or transfer denied).

Applying such strict construction to §287.220.1 R.S. Mo, wherein there is no prohibition expressed against stacking, and in light of the historical legislative purpose of the Second Injury Fund, it is clear that the Eastern District of the Appellate Court in *Shipp v. Treasurer of the State of Missouri*, *Ibid*, and the Commission in the instant case were correct

in declaring that it was not merely permissible, but intended that stacking of permanent partial disabilities should be undertaken where each such disability was deemed "a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed".

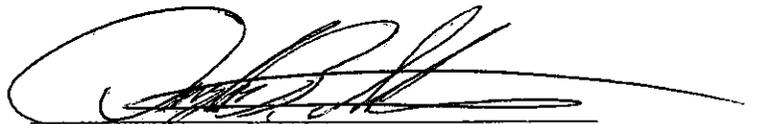
In the case at bar the evidence bespeaks a host of pre-existing disabilities any one of which may be deemed sufficient to reach the statutory threshold equaling fifty weeks of compensation of the body as a whole or fifteen percent permanent partial disability to a major extremity, per §287.220.1. Not surprisingly, then, Dr. Poetz, the one medical expert to testify in this cause, did testify that the claimant had a 15% permanent partial disability to the body as a whole referable to his diabetes; a 20% permanent partial disability to the visual system measured at the left eye; a 15% permanent partial disability to the right lower extremity measured at the right leg; a 15% permanent partial disability to the body as a whole referable to the G I System; and a 20% permanent partial disability to the body as a whole for anxiety and depression. That the Commission did not accept all of these conclusions, and in fact totally eliminated the disability ascribed to the visual impairment, is proof that the statutory workings implemented by the Commission are far from a boon to the Respondent. Claimants must still meet the thresholds previously described herein, but they should not be subject to additional barriers to compensation not contained in the statute, but merely contrived by the Second Injury Fund.

CONCLUSION

In the trial of this cause, Respondent submitted 11 exhibits including a broad compendium of medical records, 2 medical reports, and the deposition of a well qualified rating doctor. This evidence was buttressed by testimony from the Respondent himself, who, despite the fact that his formal education extended only into the 8th grade, testified credibly, directly and forcefully regarding both his pre-existing disabilities and primary disabilities, as well as their combination effect. The Second Injury Fund, on the other hand, offered no exhibits and no witnesses, and here seeks to deny compensation to the Respondent solely by an expanded and distorted reading of §287.220.1. Respondent respectfully urges this Court to prevent such a distortion of statutory intent, and asks the Court, consistent with §287.800 R.S. Mo. to uphold the award granted him by the Missouri Labor and Industrial Relations Commission, and for such other order as the Court may deem just and proper.

Respectfully submitted,

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Certificate of Service and Compliance with Rule 84.06(b) and (c)

The undersigned certifies that on April 28, 2012, true and correct copies of the foregoing brief and one CD-ROM containing the brief were sent postage prepaid via the United Postage Service to:

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The undersigned further certifies that the brief complies with the page limitations contained in Rule 84.06(b) and that the brief contains 4,264 words.

The undersigned further certifies that the labeled CD-ROM simultaneously filed With the hard copies of the brief, has been scanned for viruses and is virus free.


Douglas B. Salsbury