NO. SC85630

–

IN THE SUPREME COURT OF MISSOURI
EN BANC

–

LANA ELROD

APPELLANT/RESPONDENT,

vs.

TREASURER OF MISSOURI AS CUSTODIAN OF THE SECOND INJURY FUND,

RESPONDENT/APPELLANT.

–

Appeal from the Missouri Court of Appeals, Western District

–

SUBSTITUTE BRIEF OF RESPONDENT/APPELLANT TREASURER OF MISSOURI AS CUSTODIAN OF THE SECOND INJURY FUND

–

JEREMIAH W. (JAY) NIXON
Attorney General

KIMBERLEY R. FOURNIER
Assistant Attorney General
Missouri Bar Number 43687
Penntower Office Center
3100 Broadway, Suite 609
Kansas City, Missouri 64111
(816) 889-5000
(816) 889-5006 FAX
ATTORNEYS FOR

APPELLANT/RESPONDENT
SECOND INJURY FUND

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This appeal is from an opinion issued by the Missouri Court of Appeals, Western District reversing the Labor and Industrial Relations Commission's award of workers' compensation benefits. This court ordered transfer of this case on November 25, 2003, and thus has jurisdiction under Article V Section 10 of the Missouri Constitution. (As amended 1982).

STATEMENT OF FACTS

Employee, Lana Elrod, filed this workers' compensation claim based on a left knee

injury occurring on April 8, 1995, and alleged pre-existing conditions of diabetes, obesity, and right ankle (L.F. 21-24). Employee alleged that she was permanently and totally disabled (L.F. 5-8). After settling the claim with the Employer, 36th Street Food and Drink, the case came to final hearing against the Second Injury Fund on May 10, 2001, the Honorable Nelson Allen presiding.

The 1995 work injury

On April 8, 1995, Employee was working for employer as a cook (Tr. 4). In addition to cooking, Employee's job duties included assisting with the unloading of trucks, stocking the line and loading trucks (Tr. 6). She was required to lift cases of gallon jugs, large sacks of vegetables and potatoes and to unload and stack flour bags (Tr. 6).

Employee has been a cook and restaurant manager for most of her working adult life (Tr. 7). She trained under three chefs while learning to cook (Tr. 61). Her job duties as a restaurant manager have included cooking, supervision of the different areas of the kitchen, ordering of food, inventory record keeping, scheduling, and hiring and firing employees (Tr. 62-63). Employee admitted that a managerial position includes some sedentary work (Tr. 62).

On April 8, 1995, Employee was at work when she slipped and fell on the floor, on water from a leaking ice machine, and injured her left knee (Tr. 4). On that date, Employee weighed somewhere between 260 and 280 pounds (Tr. 7). She was taken to the hospital

where her knee was x-rayed and wrapped, and she was then discharged (Tr. 4-5).[1] Employee had physical therapy for the knee (Tr. 5). Employee began treating with Dr. Gondring for the knee injury (Tr. 11, 199-200). Dr. Gondring ordered an MRI and ultimately determined that there was a meniscal tear that required arthroscopic surgery (Tr. 11). Employee received a second opinion from Dr. Bohn who concurred that surgery was indicated (Tr. 12). Employee underwent surgery on November 6, 1995 and continued with postoperative physical therapy (Tr. 13-14). Employee did not return to work after the surgery because she still had some problems with the knee (Tr.14-15). Employee was prescribed a knee brace for the injury to her knee (Tr. 15). She was also to wear a brace on her ankle from her prior injury, however, she admitted that she did not always wear them at the same time because they locked together (Tr. 15, 52). Dr. Gondring noted that employee was not completely compliant with wearing the ankle brace he prescribed for her (Tr. 369).

[1] **The employee introduced only 12 pages of medical records into evidence. Additional medical evidence is the deposition testimony of Doctors Gondring and Hoffman. Therefore, most of the facts set forth in this brief regarding medical treatment were taken directly from the employee's testimony.**

In May,1996, Employee fell and re-injured her knee (Tr. 16). An additional MRI revealed an extension of the previous meniscal tear (Tr. 17). She underwent a second operation on the knee in November of 1997 (Tr. 20). Following the second surgery, Employee attended physical therapy, and Dr. Bohn finally released her to return to work on April 23, 1998 (Tr. 25, Tr. 69). Employee did not return to employment with employer (Tr. 25-26). Dr. Gondring saw Employee again in February, 1999 when he performed an independent medical examination for purposes of rating Employee's injuries (Tr. 202). Dr. Gondring rated employee's disability at 20% of the left lower extremity referable to the left knee (Tr. 204-205).

Second Wage Loss

Employee alleges that at the time of the injury to her knee, she was working a secondary job with Specialized Support Services where her job duties were to work with

behavior disordered teenagers and to teach them living skills (Tr. 21).[2] Employee testified that this was a sedentary job (Tr. 21). Between November, 1995 and the second knee surgery in November of 1997, Employee continued to maintain full time employment at Specialized Support Services and another similar full time job at Unity Homes where her employment was also at a sedentary level (Tr. 21-22).

Employee indicated that at Specialized Support Services her rate of pay was $6.50 per hour (Tr. 22). She testified that she was working 40 hours per week for Specialized Support Services just prior to the injury in April, 1995, and returned to work full time for Specialized Support Services in November, 1995 (Tr. 43-44, 54). She continued working full time for Specialized Support Services, and subsequently Unity Homes, until her second surgery on her knee in November of 1997 (Tr. 44-45).

Prior to the 1995 work injury

[2] **Employee admitted nothing into evidence to substantiate the secondary employment with Specialized Support Services, nor did she introduce any evidence of her rate of pay or hourly schedule for the thirteen weeks prior to the date of injury with that employer.**

After high school, Employee attended Highland Community College for one year, she went to cosmetology school for approximately 14 months, and attended classes at Missouri Western College for two years (Tr. 59-61). Her grades were generally good (Tr. 61). Employee is a musician, and has been a member of a band for several years, even playing on a few occasions after the 1995 injury (Tr. 69-70).

Prior to April of 1995, employee was treated for problems with her ankle and for diabetes (Tr. 8). Employee's ankle had been crushed in a car accident in approximately 1983, and she was diagnosed with diabetes about 15 years prior to the date of injury (Tr. 8-9). Employee treated with Dr. Gondring for her ankle in July 1992 (Tr. 198). In 1999, Dr. Gondring rated Employee's disability at 50% at the right lower extremity referable to the ankle (Tr. 204 - 205). Between 1983 and the injury to her knee in 1995, Employee held approximately 4 jobs (Tr. 67). She left each job for more money and managerial positions and not because of any health-related issues (Tr. 67).

Prior to the 1995 knee injury, Employee was able to work full time and occasionally some overtime, despite the injury to her ankle and her diabetic condition (Tr. 68). Employee was not on a daily dose of any pain medications prior to 1995 (Tr. 57). She testified that Dr. Berkowitz had treated her for diabetes since 1988, prescribed insulin for the diabetes, and recommended diets (Tr. 27). Employee admitted that she did not do much exercising to help control her weight (Tr. 27).

Subsequent to the 1995 work injury

Dr. Leanna Hoffman began treating Employee for diabetes in January, 1999 (Tr.

157). Dr. Hoffman diagnosed Employee with neuropathies and morbid obesity and has prescribed at least 24 pain pills per day including a number of narcotic medications (Tr. 29-30). Employee currently takes approximately 60 pills per day (Tr. 58). The pain medication was prescribed after 1999 to treat the pain resulting from the neuropathies that resulted from the progressed and poorly controlled diabetes (Tr. 58, 159, 163, 179). Dr. Hoffman did not give an opinion regarding the permanency of Employee's disability due to diabetes, nor did she give an opinion of the Employee's condition in 1995 (Tr. 177). Dr. Hoffman had no independent knowledge of Employee's condition before January of 1999 (Tr. 180-181).

Sometime in 1999, Employee was diagnosed with back disease (Tr. 30, Tr. 58). The neuropathies in her hands brought on carpal tunnel syndrome, and now Employee has trouble gripping and has had carpal tunnel surgery on both of her hands (Tr. 45). The surgeries on her hands were after the 1995 knee injury, even as recently as 2001 (Tr. 45-46). Dr. Hoffman testified that the development of Employee's carpal tunnel syndrome was a complication of poorly controlled diabetes, that Employee was not compliant and failed to control her diabetes (Tr. 66-67, 173).

Doctor Valera diagnosed Employee as clinically depressed in 2000 (Tr. 48). Prior to April of 1995, Employee never sought any kind of psychological treatment (Tr. 56).

In 2000, Employee was diagnosed with a heart condition known as small vessel disease which was also linked to her diabetes (Tr. 59).

Employee smoked approximately a pack and a half of cigarettes per day from 1988,

when she was diagnosed with diabetes, until two months prior to the final hearing (Tr. 51). She admitted that doctors told her smoking could worsen diabetes (Tr. 51). Employee was aware that obesity could worsen diabetes, however, she weighed about 30 pounds more at the time of final hearing than in 1988 when she was initially diagnosed with diabetes (Tr. 54-55, 64). Dr. Hoffman testified that Employee weighed approximately 270 pounds at the office visit in 1999 and that weight control was crucial for treatment of diabetes (Tr. 160). Dr. Hoffman opined that weight loss and cessation of smoking would have helped employee to have less pain (Tr. 182).

Prior to the onset of diabetic neuropathies, Employee testified that she could have performed the sedentary duties of a restaurant managerial position (Tr. 64).

When Employee applied for Social Security Disability, she saw a vocational expert who determined she was unemployable solely due to the lack of ability to use her hands (Tr. 70-71).

Statute of Limitations

Employee's original claim for compensation against the employer was filed on May 30, 1995, however, the first amended claim filed against the Second Injury Fund was dated November 3, 1998 (L.F. 2-3, L.F. 5-8, Tr. 50-51).

The Award

On July 6, 2001, Administrative Law Judge Allen awarded Employee benefits against the Second Injury Fund for both permanent partial disability assigning a 105% load factor, and for additional employer wage loss (L.F. 29-36). Administrative Law Judge Allen thus

rejected the Second Injury Fund's statute of limitations defense under Section 287.340 RSMo (L.F. 35-36). The Second Injury Fund appealed the final order to the Labor and Industrial Relations Commission (L.F. 55-57). The Commission affirmed the decision of Administrative Law Judge Allen on July 16, 2002 also rejecting the statue of limitations defense (L.F.58-72). Cross appeals were filed before the Missouri Court of Appeals, Western District by both the Appellant/Respondent, and by the Respondent/Appellant. The Court of Appeals, Western District reversed the finding of the Labor and Industrial Relations Commission, specifically holding that the Appellant/Respondent's claim was barred by the statute of limitations. This holding was in direct contravention to a statute of limitations ruling made by the Missouri Court of Appeals, Eastern District in *Kincade v. Treasurer of the State of Missouri*, 92 S.W. 3d 310 (Mo.App. E.D. 2002). Both parties filed appeals with the Missouri Supreme Court. Transfer was granted on November 25, 2003.

Response to Appellant/Respondent's Reply Brief before the Missouri Court of Appeals Western District

Appellant/Respondent stated on three separate occasions in her Reply Brief to the Court of Appeals that the Respondent/Appellant, Second Injury Fund had either misstated, or overlooked some evidence.

First on Page 1 of the reply brief, Appellant/Respondent indicated that there were 12 pages of medical records introduced into evidence. That assertion is correct. Those medical records were exhibits to deposition testimony and were the only medical records admitted

into evidence. But, those 12 pages did not, as Appellant/Respondent asserts on page 7 of her Reply Brief, indicate that Appellant/Respondent had insulin dependent diabetes or morbid obesity prior to her 1995 work accident.

Lastly, on page 9 of Appellant/Respondent's Reply brief, she indicated that information was provided to the Second Injury Fund regarding Appellant/Respondent's with regard to her pay records to substantiate her second wage loss claim. That assertion is irrelevant as none of those pay records were ever admitted into evidence.

POINTS RELIED ON

Point I

The Labor and Industrial Relations Commission erred in awarding benefits from the Second Injury Fund because Employee's Second Injury Fund claim was time barred by the statute of limitations in that she filed her claim against the Second Injury Fund more than two years after the date of injury and more than one year after the claim against the employer had been filed.

Abrams v. Ohio Pacific Express, 829 S.W. 2d 338 (Mo. banc 1991)

Jones v. Director of Revenue, 832 S.W.2d 516 (Mo. banc 1992)

Martensen v. Schutte Lumber Co., 162 S.W. 2d 312 (Mo.App. W.D. 1942).

Wolff Shoe Co. v. Director of Revenue, 762 S.W. 2d 29 (Mo. banc 1988)

Section 287.430 RSMo 2000

Point II

The Labor and Industrial Relations Commission erred in awarding Employee permanent partial disability benefits against the Second Injury Fund because the award is against the weight of the evidence in that there is no proper evidence to support that Employee's preexisting disability and work related injury combined to cause a greater overall disability than the sum of the disabilities considered independently. (Asserted in the alternative to Point I.)

Cartwright Wells Fargo Armored Service, 921 S.W. 2d 165 (Mo.App. W.D. 1996)

Gilley v. Raskas Dairy, 903 S.W. 2d 656 (Mo.App. E.D. 1995)

Messex v. Sachselectric Co., 989 S.W. 2d 206, 215 (Mo.App. E.D. 1999).

Searcy v. McDonnell Douglass Aircraft Co., 894 S.W. 2d 173 (Mo.App. E.D. 1995)

Point IV

The Labor and Industrial Relations Commission did not err in finding that Employee was not entitled to permanent total disability benefits from the second injury fund because if Employee is permanently disabled, then Employee's left knee injury plus subsequent deterioration of Employee's diabetes are the cause, not a combination of her preexisting conditions and the left knee injury. (Responds to Employee's demand for an award of permanent total disability.)

Garcia v. St. Louis County, 916 S.W.2d 263 (Mo.App. S.D. 1995)

Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789 (Mo.App. S.D. 1992)

Meilves v. Morris, 422 S.W.2d 225 (Mo. 1968)

Section 287.221(1) RSMo 2000

ARGUMENT

Standard of Review

This Court's review is governed by Section 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. Section 287.495.1 RSMo. (2000).

As Point I, is a legal dispute, it is guided by the court's holding in *Merriman v. Ben Gutman Truck Service, Inc.*, 392 S.W. 2d 292, 296-7 (Mo. 1965). This court is not bound by the Commission's decisions, and has *de novo* review.

As to Point's II and IV which involve factual disputes, this Court's review is limited to a single determination of whether, considering the whole record, there is sufficient competent and substantial evidence to support the Award. *Larry Hampton v. Big Boy Steel*

Erection, et al., SC85456, slip.op. (Mo. Banc., December 9, 2003).

Point I

The Labor and Industrial Relations Commission erred in awarding benefits from the Second Injury Fund because Employee's Second Injury Fund claim was time barred by the statute of limitations in that she filed her claim against the Second Injury Fund more than two years after the date of injury and more than one year after the claim against the employer had been filed.

Employee injured her left knee on April 8, 1995 (Tr. 4). Employee filed her initial claim for compensation against the employer on May 30, 1995 (L.F. 2-3, Tr. 50-51). On November 3,1998, employee filed an amended claim, adding the Second Injury Fund as a party (L.F. 5-8, Tr. 50-51). Employee filed her Second Injury Fund claim more than 3 years after she was injured and more than three years after she filed her original claim against the employer (L.F. 5-8, Tr. 50-51).

Employee's Second Injury Fund claim is barred pursuant to Section 287.430 RSMo, which sets out a one and two-year limitations period, depending on the circumstances states,

> A claim against the second injury fund **shall** be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, whichever is later. (Emphasis added).

The deadline for filing under the statute is not discretionary. This Court's

interpretation of the statute should be derived from the plain and ordinary language of the law. *Jones v. Director of Revenue*, 832 S.W.2d 516, 517 (Mo. banc 1992); *Abrams v. Ohio Pac. Express*, 819 S.W.2d 338, 340 (Mo. banc 1991). "There is no room for construction where words are plain and admit to but one meaning." *Id*. When determining whether the terms of the statute is clear and unambiguous, one court determines whether the terms of the statute are "plain and clear to one of ordinary intelligence." *Wolff Shoe Co. v. Director of Revenue*, 762 S.W. 2d 29, 31 (Mo. banc 1988). (L.F. 61-63).

The language of Section 287.430 RSMo, is clear and unambiguous. The statute allows an employee the later of two years after the date of injury or one year from the date a claim is filed against the employer to file against the Second Injury Fund. Employee argues that her amended claim was timely as to the employer, and , therefore as to the Fund, because Section 287.430 RSMo. (2000) states that a claim against an employer is to be "filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death." However, the legislature excluded any "last payment" language in establishing the statute of limitations for the Second Injury Fund. That exclusion leads to the conclusion that the legislature did not intend that the last payment language to apply when filing a claim against the Second Injury Fund (L.F. 61-63). Thus, it is irrelevant whether Employee was still receiving treatment for her 1995 work injury in 1998.

Further, Employee misplaces reliance in *Kincade v. Treasurer of the State of Missouri*, 92 S.W. 3d 310 (Mo.App. E.D. 2002). The Western District holding in *Elrod*

does contradict the Eastern District's holding in *Kincade*. In *Kincade* the Eastern District held that a claim against the Fund must be filed within a year of *any timely* claim against the employer. *Id*. at 312. In *Elrod*, the Western District held that "claim clearly refers to the primary claim filed by the claimant and not to any subsequent amended claims." Appendix .

Even relying on *Kincade,* Employee's situation is clearly distinguishable from *Kincade* because that employee dismissed the original claim and filed a new claim against the employer in a timely manner, also naming the Fund as a party. Employee never dismissed her original claim to re-file a new one.

Employee filed a number of amended claims after May of 1995 (L.F.5-8, 11-14, 16-20, 21-24). There is nothing in Section 287.430 RSMo that suggests the period for filing a claim against the Second Injury Fund may be extended by simply filing amended claims against the employer for the work related injury.

Even though Employee was still treating when she filed the original claim against the employer, the statute required that her Second Injury Fund claim be filed within one year after she opted to file that original claim or two years after the work injury. The amended claim herein cannot relate back to the filing of the original claim in order to satisfy the statute of limitations because the amended claim adds the Second Injury Fund as an additional party. The statute of limitations will not apply to an amendment of a claim if it perfects or amplifies the claim set out in the original pleading. *See Ford v. American Brake Shoe Company*, 252 S.W.2d 649, 652 (Mo.App. 1952). But Missouri law is clear that a claim does not relate back to the original filing of the claim if the amendment "sets up

an entirely new and distinct claim or cause of action from that embraced in the original petition or complaint." *Id*. at 652.

The amended claim that adds the Second Injury Fund as an additional party, is an entirely new and distinct claim. This issue was decided in *Martensen v. Schutte Lumber Co*., 162 S.W. 2d 312 (Mo.App. W.D. 1942). In that case the court held that a workers' compensation claim filed timely against the president of a corporation was not subject to amendment by bringing in the corporation which employed the claimant as an additional party after running of the limitation period. *Id*. at 316. That a lawsuit against one party is pending does not in any way dispense with the necessity of the timely filing of a claim against another party to the same action. *Id.*

Therefore, the Missouri Court of Appeals, Western District appropriately held that the Labor and Industrial Relations Commission erred in awarding employee any benefits for permanent total disability or permanent partial disability against the Second Injury Fund because claimant failed to timely file her claim for compensation against the Fund.

Point II

The Labor and Industrial Relations Commission erred in awarding Employee permanent partial disability benefits against the Second Injury Fund because its award is against the weight of the evidence in that there is no proper evidence to support that Employee's preexisting disability and work related injury combined to cause a greater overall disability than the sum of the disabilities considered independently. (Asserted in the alternative to Point I).

Even assuming *arguendo* the Court finds that employee's claim was timely filed against the Second Injury Fund, employee still failed to meet her burden of proof that an award for permanent partial disability against the Second Injury Fund was appropriate because she lacked substantial evidence, particularly with respect to the 105% load factor applied by the administrative law judge.

The administrative law judge found as follows:

> Her prior disabilities of 50% of the right ankle is 77.9 weeks, her 12.5% disability of body as a whole is 50 weeks and the April 8, 1995 injury to her left knee is 20% or 32 weeks. The sum of these injuries is 159.5 weeks; however the combination of her left knee, right ankle, morbid obesity and diabetes combine in such a manner that her permanent partial disability is vastly increased. I find the

combination results in a permanent partial disability of 81.875% body as a whole or 327.5 weeks. This is 168 weeks greater than their separate sums (L.F. 34).

A load factor of 168 weeks is essentially equal to a 105% load. This load factor is excessive because it is not supported by the evidence.

To establish a claim for permanent partial disability, the Employee must prove that her present compensable injury combines with the pre-existing permanent partial disability to cause a greater overall disability than the sum of the disabilities considered independently. *Cartwright v. Wells Fargo Armored Serv.*, 921 S.W.2d 165, 167 (Mo. App. W.D. 1996); *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 177-78 (Mo. App. E.D. 995); *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. E.D. 1990); *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576-77 (Mo. App. E.D. 1995). The employee must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995); *Griggs v. A.B. Chance Company*, 503 S.W.2d 679, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Id.*

Employee's sole evidence of preexisting disability was proof of an injury in 1983 to her right ankle. She had a 50% disability rating at the 155 week level from Dr. Gondring for that 1983 right ankle injury. Dr Gondring also rated her 1995 work injury to the left knee at 20% to the 160 week level, but issued no finding that her present work related right knee

injury combines with the pre-existing permanent partial disability to cause a greater overall disability than the sum of the disabilities considered independently (Tr. 204 - 205). Additionally, Dr. Gondring did not rate Employee's diabetes or morbid obesity, nor did he testify that the Employee was permanently and totally disabled. Dr. Gondring's testimony provides no probative value with which to assess whether Employee is permanently and totally disabled.

In *Gilley v. Raskas Dairy*, 903 S.W.2d 656 (Mo. App. E.D. 1995), the court affirmed the Commission's denial of Second Injury Fund benefits when the medical testimony presented by the claimant was found not probative. The court agreed with the Commission that without credible medical testimony, insufficient evidence existed to support an award of compensation from the Second Injury Fund. *Id*.

Here, Employee did not produce any medical evidence, credible or otherwise, to support her testimony that she had preexisting disabilities of diabetes and morbid obesity. Employee did not allege that morbid obesity and diabetes were preexisting disabilities in any of her claims for compensation (L.F. 2-3, 5-8, 11-14, 16-20, 21-24). She did not introduce into evidence a rating of either of these disabilities as of April 8, 1995, nor did she introduce medical records supporting the claim that she had diabetes since 1988. The only evidence regarding Employee's diabetes was employee's testimony and Dr. Hoffman's testimony regarding treatment since 1999. (Tr. 58, 157). Dr. Hoffman testified that she began treating Employee in 1999 but admitted that she did not have any knowledge of Employee's condition as it existed before January of 1999 (Tr. 180-181). Evidence of

treatment of Employee's diabetes in 1999 is not enough to trigger Fund liability. "Fund liability is only triggered by a finding of the presence of an actual and measurable disability at the time the work injury is sustained." *Messex v. Sachselectric Co*., 989 S.W. 2d 206, 215 (Mo.App. E.D. 1999).(Emphasis added.)

By Employee's testimony and Dr. Hoffman's testimony, Employee's current pain and inability to work are primarily due to the post-injury deterioration, specifically the development of diabetic neuropathies (Tr. 29, 30, 45, 48, 56, 57, 66, and 67). Employee testified that prior to her 1995 injury, and immediately thereafter, she was not experiencing these problems, and knew that her obesity and refusal to cease smoking could worsen her diabetic condition (Tr. 58, 64). She also testified that she might have been able to perform some restaurant managerial duties immediately following her 1995 knee recovery had it not been for the neuropathies in her hands (Tr. 64).

Additionally, Employee was not diagnosed with other symptoms of poorly controlled diabetes until after 1995 injury. These symptoms included heart disease (Tr. 59) and psychological problems (Tr. 56).

Employee failed to prove that diabetes and morbid obesity constituted a preexisting disability. She also failed to prove that her alleged preexisting disabilities of morbid obesity and diabetes, or her preexisting right ankle disability combined with her primary knee injury to make the sum of her disability greater. Thus, Employee failed to meet the *Cartwright* standard and the award of permanent partial disability against the Second Injury Fund is against the weight of the evidence.

Additionally, the application of the excessive load factor in the amount of 105% against the Second Injury Fund is against the weight of the evidence as well, in that the evidence demonstrates that claimant's problems stem from her refusal to control her diabetes, as well as from the subsequent deterioration of claimant's diabetic condition, neither of which are the responsibility of the Second Injury Fund.

Point IV

The Labor and Industrial Relations Commission did not err in finding that Employee was not entitled to permanent total disability benefits from the second injury fund because if

Employee is permanently disabled, then Employee's left knee injury plus subsequent deterioration of Employee's diabetes are the cause, not a combination of her preexisting conditions and the left knee injury. **(Responds to Employee's demand for an award of permanent total disability.)**

In response to Employee's brief, a workers' compensation claimant has the burden to prove all material elements of her claim. *Meilves v. Morris*, 422 S.W.2d 225, 339 (Mo. 1968); *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 793 (Mo. App. S.D. 1992). If the credible evidence is lacking as to one essential element, the employee's case fails. *Id*., 422 S.W.2d at 399. In order to establish Second Injury Fund liability for permanent total disability compensation, the employee must prove (1) a work-related injury resulted in permanent partial disability, (2) preexisting permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should she become unemployed and, (3) the permanent partial disability resulting from the work-related injury and preexisting permanent partial disability together resulted in permanent total disability. RSMo. Section 287.220.1 (1994), *see Lawrence*, 834 S.W.2d at 793.

As stated in the Fund's position set out above, and as correctly found by the Labor and Industrial Relations Commission, the Employee failed to meet her burden of proving these elements. Therefore, Employee's claim for permanent total disability properly failed.

The Second Injury Fund is not liable to provide compensation for increased disabilities caused by post-accident worsening of preexisting disabilities when that

worsening was not caused or aggravated by the primary injury. *Lawrence,* 834 S.W.2d at 793. In *Lawrence* the court, citing *Garcia v. St. Louis County,* 916 S.W.2d 263, 266 (Mo. App. S.D. 1995), stated:

> In computing permanent and total disability in the situation where claimant suffers from a previous disability, the ALJ or the Commission first determines the degree of disability as a result of the last injury. The ALJ or the Commission then determines "the degree or percentage of employee's disability that is attributable to all injuries or conditions at the time the last injury was sustained..." Section 287.221.1 RSMo. (1994). Thus, the Second Injury Fund is not liable for any progression of claimant's preexisting disabilities not caused by claimant's last injury.

Employee indicated that she was able to adequately perform her work duties prior to the 1995 injury despite the preexisting disability to her ankle (Tr. 68). It was not until after the 1995 injury that Employee was unable to work, due in large part to the deterioration and neuropathies caused by her diabetes (Tr. 45-46, 66-67, 70-71, 173).

Additionally, Employee did not provide any proof in the form of a medical opinion that, due to the combination of her preexisting injuries and her 1995 left knee injury, she was totally disabled. If she is permanently and totally disabled, it is as a result of the 1995 knee injury and worsening diabetic condition post 1995 knee injury and not a combination of the 1995 knee injury and the preexisting ankle. Employee lacked evidence for the Court

to make a finding of permanent and total disability against the Fund in this respect as well and compensation to Employee from the Second Injury Fund for a permanent and total disability was properly denied.

CONCLUSION

The Court should affirm the opinion of the Missouri Court of Appeals, Western District and issue an Award denying Employee any benefits from the Second Injury Fund.

Respectfully Submitted,
JEREMIAH W. JAY NIXON
Attorney General of Missouri

_____

Kimberley R. Fournier #43687

Assistant Attorney General
3100 Broadway; Suite 609
Kansas City Missouri 64111
(816) 889-5000

Certificate of Compliance and Service

I hereby certify :

1. That the attached brief (a) includes the information required by rule 55.03 and (b) complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 5546 words, excluding the cover, the signature block and this certification, as determined by WordPerfect 6.1 software; and

2. That the floppy disk 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 floppy disc containing a copy of this brief, were mailed, postage prepaid, on this ___ day of January 2004, to Joseph K. Houts 1601 Ashland Ave., St. Joseph, Missouri 64506.

_____
Kimberley R. Fournier

NO. SC85630

–

IN THE SUPREME COURT OF MISSOURI
EN BANC

–

LANA ELROD

APPELLANT/RESPONDENT,

vs.

TREASURER OF MISSOURI AS CUSTODIAN OF THE SECOND INJURY FUND,

RESPONDENT/APPELLANT.

Appeal from the Missouri Court of Appeals, Western District

APPENDIX TO SUBSTITUTE BRIEF OF RESPONDENT/APPELLANT TREASURER OF MISSOURI AS CUSTODIAN OF THE SECOND INJURY FUND

JEREMIAH W. (JAY) NIXON
Attorney General

KIMBERLEY R. FOURNIER
Assistant Attorney General
Missouri Bar Number 43687
Penntower Office Center
3100 Broadway, Suite 609
Kansas City, Missouri 64111
(816) 889-5000
(816) 889-5006 FAX
ATTORNEYS FOR
APPELLANT/RESPONDENT
SECOND INJURY FUND

TABLE OF CONTENTS TO APPENDIX