IN THE
MISSOURI SUPREME COURT

No. SC85386

THOMAS L. PIERSON

Employee/Respondent,

vs.

THE BOEING COMPANY

Employer (settled),

and

THE MISOURI STATE TREASURER
AS CUSTODIAN OF THE SECOND INJURY FUND

Additional Party/Appellant.

SUBSTITUTE BRIEF OF RESPONDENT

CURTIS, OETTING, HEINZ,
GARRETT & O'KEEFE, P.C.
J. Patrick Chassaing, #27246
Paul E. Martin, #34428
130 S. Bemiston, Suite 200
St. Louis, Missouri 63105
(314) 725-8788
(314) 725-8789 fax
Attorneys for Respondent
Thomas L. Pierson

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STATEMENT OF FACTS[1]

The Boeing Company employed Thomas Pierson ("employee" or "respondent") as an aircraft mechanic. In the course of his employment employee ruptured a cervical disc. The injury required surgery, specifically a discectomy with an allograft fusion and plating at the C5-C7 level. Employee still suffers from cervical stiffness, and weakness and numbness in his left arm. He has difficulty working at or above shoulder level, and any awkward positioning produces neck pain. Employee settled his primary injury claim against Boeing for 140 weeks of disability representing a disability of 35% of the 400 weeks allowable under Section 287.190.3 RSMo (2000). A5-6.[2]

At the time of the neck injury at Boeing, employee suffered from a preexisting injury. Diagnosed with strabismic amblyopia since early childhood, he has a 100% loss of vision in his left eye. The Administrative Law Judge ("ALJ") found that employee's preexisting eye injury amounted to 140 weeks of permanent partial disability, plus an additional 10% (14 weeks) due to total loss of use, thus finding a total preexisting disability of 154 weeks attributable to that loss of vision. The ALJ found that the disabilities from the neck injury and the preexisting vision

[1] In that the Fund challenges only the Commission's legal interpretations, respondent relies on the findings of fact of Administrative Law Judge Cornelius T. Lane, set forth at pp. A5-A6 of the Appendix in Appellant's Substitute Brief.

[2] This refers to the Appendix in the Substitute Brief of Appellant.

loss combined in a synergistic effect that was significantly greater than the disability resulting from each disability when considered separately. Applying a loading factor of 30% to 294 weeks of the combined disabilities, the ALJ determined Second Injury Fund ("Fund") liable for 88.2 weeks of permanent partial disability at $303.01 per week, or $26,725.48. A6.

The Labor and Industrial Relations Commission ("Commission") affirmed the award of the ALJ. A2. The Fund appeals from the Final Award Allowing Compensation.

RESPONSES TO
POINTS RELIED ON

I. THE COMMISSION DID NOT ERR IN AWARDING RESPONDENT FUND COMPENSATION BY CATEGORIZING HIS EYE INJURY AS A "BODY AS A WHOLE INJURY" UNDER THE SECOND INJURY FUND STATUTE BECAUSE:

A. THE PLAIN MEANING OF THE 1993 AMENDMENT TO THE FUND STATUTE, APPLIED IN THE CONTEXT OF THE ENTIRE WORKERS' COMPENSATION ACT, IS THAT A DISABILITY OTHER THAN A MAJOR EXTREMITY MUST BE CATEGORIZED AS A BODY AS A WHOLE INJURY.

B. THE FUND'S ARGUMENT LEADS TO THE ABSURD RESULT OF EXCLUDING PREEXISTING HEARING AND VISION DISABILITIES FROM CONSIDERATION AND THEREFORE MAY NOT BE ADOPTED; AND

C. IN THE ALTERNATIVE, THE STATUTE'S PLAIN LANGUAGE SHOULD BE CONSTRUED NOT TO IMPOSE THRESHOLDS ON PREEXISTING HEARING AND VISION DISABILITIES.

II. THE COMMISSION DID NOT ERR IN CALCULATING THE LIABILITY OF THE SECOND INJURY FUND BY INCLUDING THE LOSS OF USE PREMIUM UNDER SECTION 287.190 RSMo.

BECAUSE THAT SECTION ACTS AS A MEASURE OF ALL PREEXISTING DISABILITIES FOR SECOND INJURY FUND LIABILITY, AND IT IS NOT LIMITED TO THE DETERMINATION OF ONLY THE LIABILITY OF EMPLOYERS.

ARGUMENT

Standard of Review

On appeal the Fund does not challenge the factual findings of the Commission, the weight of the evidence or the integrity of the award. This Court's review is accordingly limited to whether the Commission exceeded its jurisdiction by misinterpreting or misapplying the law. *Section 287.495.1, RSMo. 2000*. The Court reviews the Commission's legal determinations for correctness, without deference to the Commission's judgment. *Twiele v. National Super Markets, Inc.*, *948 S.W.2d 142, 145 (Mo. App. E.D. 1997).*

I. THE COMMISSION DID NOT ERR IN AWARDING RESPONDENT FUND COMPENSATION BY CATEGORIZING HIS EYE INJURY AS A "BODY AS A WHOLE INJURY" UNDER THE SECOND INJURY FUND STATUTE BECAUSE:

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DISABILITIES FROM CONSIDERATION AND THEREFORE MAY NOT BE ADOPTED; AND

C. IN THE ALTERNATIVE, THE STATUTE'S PLAIN LANGUAGE SHOULD BE CONSTRUED NOT TO IMPOSE THRESHOLDS ON PREEXISTING HEARING AND VISION DISABILITIES.

The Fund contends that employee's preexisting blindness of the left eye is subject to, but does not meet a requirement in Section 287.220.1, RSMo 2000[3] controlling liability of the Fund. The Fund's position is based upon an overly narrow and strained construction of that section of the Workers' Compensation Act ("the Act") that leads to absurd results. The plain meaning of the words and phrases contained in clauses added by the legislature in 1993 is that a preexisting disability that is not restricted to a major extremity should be categorized as a disability of the body as a whole for valuation purposes. Alternatively, the amendment should be construed such that no threshold applies to preexisting hearing or vision losses.

[3] All further statutory references are to RSMo 2000 unless otherwise indicated.

A. THE PLAIN MEANING OF THE 1993 AMENDMENT TO THE FUND STATUTE, APPLIED IN THE CONTEXT OF THE ENTIRE WORKERS' COMPENSATION ACT, IS THAT A DISABILITY OTHER THAN A MAJOR EXTREMITY MUST BE CATEGORIZED AS A BODY AS A WHOLE INJURY.

Ostensibly in response to much publicized abuses of the Fund, the legislature in 1993 amended Section 287.220 RSMo to provide, among other things, varying thresholds for certain preexisting disabilities and for a worker's current or "second" injury disability as pre-requisites to recovery from the Fund. Prior to the amendments, the statute read, 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 permanent partial disability whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability caused by the combined disabilities is grater 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…

? *287.220, RSMo, 1986.*

The 1993 amendment replaced the second clause of the third sentence of the statute such that the pertinent portion of the section, with the amendments italicized, now reads:

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 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. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, *the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and* the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself…

The Fund seizes on two phrases, "body as a whole injury" and "major extremity," and argues that employee's preexisting blindness in the left eye is neither, and thus not a preexisting disability upon which Fund liability can be based.

The amending language first enunciates a standard against which to determine whether a preexisting disability qualifies for Fund compensation. The worker must show a:

> preexisting permanent partial disability…of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed,….

Second, the amendment requires that both the preexisting disability and the subsequent, i.e., "second," compensable injury meet varying minimum levels, or thresholds, to quality for compensation from the Fund, for two categories of injuries: "body as a whole injury" and "major extremity injury only." Neither term is defined in the amendatory language, nor elsewhere in the Workers' Compensation Act. The Fund concedes the terms are undefined and argues their definition must be derived from that section of the Act that defines "permanent partial disability," Section 287.190. The Fund contends that respondent's preexisting blindness in his left eye is neither a "major extremity injury only" nor a 'body as a whole injury." However, the Fund's analysis of Section 287.190 is flawed.

Section 287.190 is comprised of three subsections, of which only the first three are pertinent to this appeal.[4] Subsection 1 requires compensation for "loss by severance, total loss of use, or proportionate loss of use of one or more of the members" in a schedule. The schedule contains twenty-nine "losses" and provides maximum disability allowances for each. Losses (1) through (16) describe the arm at levels from the shoulder (232 weeks) to above the wrist (200 weeks) and the hand at the wrist (175 weeks) and each finger through each joint. Losses (17) through

[4] Subsection 4 provides for additional compensation for disfiguring injuries, subsection 5 provides the method of computing the weekly rate of compensation, and subsection 6 defines permanent partial disability as that which is "permanent in nature and partial in degree" and presumes its continuity.

(26) describe the leg from the hip joint (207 weeks) to the foot in metatarsus (110 weeks) and each toe through each joint. Three additional losses are described:

		Weeks
(27)	Complete deafness of both ears	180
(28)	Complete deafness of one ear, the other being normal	49
(29)	Complete loss of the sight of one eye	140

Though the statute refers to all the scheduled losses as "members," this does not equate to "individual body parts" as argued by the Fund.

The essence of subsection 1 is calculating compensation allowable for *losses* that can occur in two ways, i.e., physical severance and functional loss of use. Logically, severance is tantamount to loss of use. Disability resulting from severance or functional loss can be total, or something less than total, the latter requiring a determination of proportionality. The loss of function concept is exemplified by hearing and vision losses: it is not the physical presence or absence of the body part (ear lobe and canal, or the eyeball) that determines compensation, it is the loss of the function of those parts, i.e., the senses of hearing or seeing. In respondent's case, his left eyeball is intact but it is not functioning; his blindness could have been attributable to cogenital brain dysfunction or to a mechanical injury to the eyeball, yet the resulting disability still would be compensable according to the degree of lost function.

Having erroneously equated the schedule of losses to "body parts," the Fund next points to subsection 3 and argues, illogically, that it applies only to "body as a whole" injuries, i.e., disabilities not identified in the schedule of losses. Subsection 3 in its entirety, however, states:

> For permanent injuries other than those specified in the schedule of losses, the compensation shall be paid for such periods as are proportionate to the relation which the other injury bears to the injuries above specified, but no period shall exceed four hundred weeks, at the rates fixed in subsection 1. The other injuries shall include permanent injuries causing a loss of earning power. For the permanent partial loss of the use of an arm, hand, thumb, finger, leg, foot, toe or phalange, compensation shall be paid for the proportionate loss of the use of the arm, hand, thumb, finger, leg, foot, toe or phalange, as provided in the schedule of losses.

Subsection 3 does not employ the term "body as a whole." The essence of this subsection is to provide a higher disability allowance of four hundred weeks for losses "*other than* those specified in the schedule of losses" (emphasis added) and, thus, higher proportional payments. It provides that the term "other injuries" includes "permanent injuries causing a loss of earning power" but it does not exclude injuries that do not impact earning power. The last sentence reinforces the concept of proportionality for the various levels of the extremities, down to the phalanges

and, in this respect, it excludes any reference to hearing and vision losses, whether unilateral or bilateral.

Without any support in the record, the Fund asserts "[t]hese…injuries" [presumably those referred to in subsection 3] are those commonly known in "Workers' Compensation practice…as the Body as a Whole injuries." Appellants Substitute Brief, p. 13.

Also, the Fund cites several Missouri cases for the proposition that Section 287.190.3 means "body as a whole." However, the cases relied on by the Fund are inapposite. *Carenza v. Vulcan-Cincinatti, Inc.*, 368 S.W.2d 507, at 514 (Mo.App. E.D. 1963) (award based on "body as a whole" for multiple injuries to wrist, elbow, back and shoulder) described subsection 3 as a "catchall" provision with a higher, four hundred week maximum standard; it did not entail, or exclude, loss of hearing or vision as a "body as a whole" injury. *Gordon v. Chevrolet-Shell Division of General Motors Corp.*, 269 S.W.2d 163, at 170 (Mo.App. E.D. 1954) (award of "80 weeks" for injuries to back, left leg and ankle) pronounced that a "body as a whole" disability can result from a back injury not involving fractures; it did not entail or exclude hearing or vision losses. *Haggard v. Synder Construction Co.*, 479 S.W.2d 142, at 144 (Mo.App. W.D. 1972) (injury to *shoulder* distinguished from injury to *arm at shoulder* to support award proportional to "loss of use of normal function of the body as a whole.") did not turn on a definition of "body as a whole," and did not entail or exclude hearing or vision losses. *Farmer-Cummings v. Future Foam, Inc.*, 44 S.W.3d 830, at 835 (Mo.App. W.D. 2001) (Industrial Commission

award based on pulmonologist's opinion that workers' industrially induced asthma caused disability of 70-80 percent of the "body as a whole") did not entail loss of hearing or vision, nor exclude such losses from the term.

"Body as a whole" is, indeed, a "term of art" and, perhaps, is unique to worker's compensation practice. But it is not a particularly artful term. It was employed in respondent's settlement stipulation to refer to the disability resulting from his neck injury. However, that usage does not amount to an admission that subsection 3 means only "body as a whole." Further, respondent's settlement stipulation did not define "body as a whole" to exclude vision loss; nor do *Carenza*, *Gordon*, *Haggard* or *Farmer-Cummings*, supra, all of which were decided before the legislature amended the Fund statute to include thresholds. The fallacy of the Fund's argument is that it equates "body as a whole" to mean only such disabilities as fall under the ambit of subsection 3. It is more logical to argue the contrary: by establishing minimum thresholds of fifteen percent for a "major extremity injury only" and fifty weeks compensation "if a body as a whole injury," the legislature intended that if a disability is not based on a loss involving a major extremity, it must fall into a catchall category to be known as the 'body as a whole," and this is so without any reference whatever to Section 287.190.3.

Determination of the plain and ordinary meanings of these terms is presumed to lead to the meaning intended by the legislature. *Frazier v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 869 S.W.2d 152, at 156 (Mo.App. E.D. 1993). Absent a statutory definition, words and phrases contained in a statute are to

be given their plain and ordinary meaning; and the meaning of a word is to be derived from a dictionary. *Budding v. SSM Healthcare System*, 19 S.W.3d 678, at 680 (Mo.banc 2000); *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388 (Mo.banc 2002). This "plain meaning" doctrine must be applied in the context of the purpose of the whole statute. *Matter of Maxey's Estate*, 585 S.W.2d 326, at 328 (Mo.App. E.D. 1979).

In this case, resort to definitions in recognized dictionaries provides limited assistance in defining the terms. First, respondent has not found definitions of the entire phrases. Analysis of definitions of the individual words is inconclusive. *Webster's Collegiate Dictionary, 10th Ed.* defines "body" as "1a: the main part of a plant or animal *esp:* as distinguished from limbs and head" and "2a: the organized physical substance of an animal or plant…" *Schmidt's Attorneys' Dictionary of Medicine (Rel. 17 – 4/84)*, defines "body" as "1. The largest and most prominent part of a structure or organ;… 5. The whole frame or physical structure of man, animal, or plant, especially the former." *Webster's* defines "extremity" as "…a limb of the body; *esp:* a hand or foot;" "major" as 'one that is superior in rank, importance, size, or performance;" and "whole" as an adjective meaning "entire" and as a noun meaning "a coherent system or organization of parts fitting or working together as one."

Doctrines of statutory construction are subservient to the plain meaning rule and are to be resorted to only when the meaning is ambiguous or would lead to an absurd result. *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15 (Mo.banc 1995); *Spradlin v. City of Fulton*, 982 S.W.2d 255, at 258 (Mo.banc 1988). Remedial

statutes are to be liberally construed to give effect to the beneficial purpose of the statute. *Abrams v. Ohio Pacific Exp.*, 819 S.W.2d 338, at 341 (Mo.banc 1991). The Workers' Compensation Act is such a remedial statute, and the requirement of liberal construction is embodied within it, *Section 287.800, RSMo*, and such has been recognized by this Court. *West v. Poston Const. Co.*, 804 S.W.2d 734, at 745-746 (Mo.banc 1991).

Because the terms "major extremity injury only" and "body as a whole injury" arise in the context of the legislature's introduction of disability thresholds to Fund compensation, they are terms that relate to the same subject and must be construed *in pari materia*, *Todd v. Goostree*, 493 S.W.2d 411, at 417 (Mo.App. W.D. 1973), *appeal after remand* 528 S.W.2d 470 (Mo.App. W.D. 1975). When the two terms "major extremity injury only" and "body as a whole injury" are read together and in conjunction with the entire Second Injury Fund statute, Section 287.220, the legislature's intent is obvious: for threshold purposes all individual disabilities fall into one category or the other. A disability that relates to one of the major levels of the extremities (i.e., ranging from the arm at the shoulder to the hand, or ranging from the leg at the hip to the leg in metatarsus) must equal or exceed fifteen percent of the maximum weeks allowed for those levels in Section 287.190.1, i.e., schedules (1), (2), (3), (4), (5), (17), (18), (19), (20) and (21). If a disability relates to one of the levels of the extremities, it needs to be at least as severe as a fifteen percent

disability.[5] The word "only" is not without significance. Any disability that is not assessable solely at a level of an extremity, from an anatomical standpoint, must reside in "the body as a whole" category. In that category a threshold of fifty weeks must be met for the disability to qualify.[6]

B. THE FUND'S ARGUMENT LEADS TO THE ABSURD RESULT OF EXCLUDING PREEXISTING HEARING AND VISION DISABILITIES FROM CONSIDERATION AND THEREFORE MAY NOT BE ADOPTED

The purpose of the Second Injury Fund is to assure employers they would not be exposed to enhanced liability for compensable injuries suffered by workers with preexisting disabilities. In such cases the employer is liable only for the disability resulting from the latest, or "second" work-related compensable injury.

The Fund is liable for the enhancement, that is, for the degree of overall disability separately. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo. App. E.D. 1995). The Fund's purpose, thus, is to encourage the

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[5] Logically, any individual digit or phalange was deemed by the legislature too insignificant to qualify.

[6] Comparatively, the body as a whole disability threshold of fifty weeks is more difficult to satisfy than the fifteen percent threshold of a major extremity for either the arm at the shoulder (232 x .15 = 34.8 weeks) or the foot in metatarsus (110 x .15 = 16.5 weeks).

employment of individuals who are already disabled. See *Boring v. Treasurer of Missouri*, 947 S.W.2d 483, 488 (Mo. App. E.D. 1997). This purpose admits of no discrimination among the *kinds* of preexisting disabilities that employees may bring to their jobs.

This notion of universal coverage, regardless of the type of the injury, was recognized in the *Boring* case, where the Eastern District observed that Section 287.220 "provides for Fund liability for *all* preexisting injuries regardless of their causes." *Boring*, *947 S.W.2d at 487-488* (emphasis the Court's). And the statute itself states that "*[a]ll* cases of permanent disability *where there has been previous disability* shall be compensated as herein provided." *Section 287.220.1, RSMo.* (emphasis added). To accomplish this end the Second Injury Fund statute must be liberally construed in favor of the claimant and the public welfare; substantial rights are to be enforced at the sacrifice of procedural rights. *Section 287.800, RSMo.; Elking v. Deaconess Hospital, 996 S.W.2d 718, 719 (Mo. App. E.D. 1999).* And this Court must "broadly and liberally interpret the law with a view to the public interest and with an understanding that the law is intended to extend its benefits to the largest possible class." *Palazzolo v. Joe's Delivery Service, Inc., Slip op. ED81152 (Feb. 11, 2003)*[7]*, citing West v. Poston Const. Co., 804 S.W.2d 734, 745-746 (Mo. banc 1991).*

[7] *Palazzolo* is pending in this Court, No. SC85353, on the Fund's Application for Transfer, which awaits disposition.

Indeed, the Fund has been available to compensate employees for any number of predicate disabilities, including heart disease,[8] panic attacks,[9] mental retardation,[10] chronic obstructive pulmonary disease (induced and/or exacerbated by the employee's own smoking habits),[11] and many, many other injuries of every kind and stripe. To suggest that the legislature intended to exclude from this universe of predicate injuries those relating to hearing and vision contradicts the very purpose of the Fund statute. No possible goal of the Act could be served by refusing Fund compensation to employees with hearing or vision disabilities. Why should the legislature want to encourage the hiring of employees suffering qualifying partial disabilities of the arm or leg, or of the respiratory, circulatory, digestive, skeletal or muscular systems, or of the brain or the nervous system, but not encourage the hiring of employees with preexisting sight or hearing problems? The answer is straightforward. However, the construction proposed by the Fund would serve a contrary purpose.

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[8] See *Kowalski v. M-G Metals and Sales, Inc.*, *631 S.W.2d 919 (Mo. App. S.D. 1982).*

[9] See *Carroll v. Loy-Lange Box Co.*, *829 S.W.2d 86 (Mo. App. E.D. 1992).*

[10] See *Laturno v. Carnahan*, *640 S.W.2d 470 (Mo. App. E.D. 1982).*

[11] See *Boring v. Treasurer of Missouri*, *947 S.W.2d 483 (Mo. App. E.D. 1997).*

The purpose of the Second Injury Fund leaves no room for discriminating between disabilities by compensating for one disability rather than another, yet the Fund proposes a categorical interpretation of the law that would lead to such an absurd result. The Fund argues that "body as a whole injury" is derived from subsection 1's classification of "scheduled losses" and subsection 3's allowance for "permanent injuries other than" the scheduled losses. According to the Fund, if a preexisting disability falls under the schedule, necessarily it can not be a "non-scheduled" disability, and if it is not a non-scheduled injury it must not be a "body as a whole injury" under the Fund statute. This rationale leads to absurd results. For example, the loss of the thumb at the proximal joint is a scheduled injury assessed at 60 weeks disability, but can it be categorized as a "major extremity injury only?" The loss of a foot is scheduled at three levels of disability: the ankle, the foot in tarsus, and the foot in metatarsus, depending on the location of the injury. What about the loss of a hand (175 weeks disability)? What about the loss of multiple fingers or toes? Are these "major extremity injury only" disabilities?

These questions seem to have been answered by the Eastern District's recent decision in *Palazzolo v. Joe's Delivery Service, Inc.*, *Slip op. ED81152 (Feb. 11, 2003)*. In *Palazzolo* the Commission found Fund liability for a work-related injury consisting of 110 weeks disability to the metatarsus of the foot, but the Fund appealed, claiming that the injury was not to a "major extremity." In that appeal the Fund referenced the various disability levels found for the foot in Section 287.290.1 and argued that the legislature intended, by establishing these gradations, to separate

this particular injury from "major extremity" status. The Eastern District rejected the claim:

> In requiring that the subsequent partial injury equal a minimum of 15% permanent disability, the legislature did not choose to limit that threshold or define a major extremity by "levels" in the schedule of losses.

Quoting from *Motton v. Outsource International, 77 S.W.3d 669, at 675 (Mo. App. E.D. 2002),* the Eastern District noted further that the "legislature intended to make a simple 15% disability to a major extremity the threshold rather than attempt a more complex formula based on weeks of disability to various body parts at various levels." *Palazzolo, Slip op. ED81152, p. 3-4 (Feb. 11, 2003).*

If the Fund may not rely on the disability levels found in the schedule of Section 287.290.1 to define "major extremity," it conversely follows that the Fund may not rely on the same schedules to deductively define "body as a whole," especially when applied to vision or hearing disabilities. Such disabilities clearly can not be considered as involving a "major extremity." The incongruity of denying compensation because they are "scheduled" disabilities is plain. The Fund asserts respondent's "scheduled" preexisting injury, worth 154 weeks of compensation, would receive nothing, while a worker with a 15% "non-scheduled" preexisting disability amounting to 50 weeks of compensation would be compensated. The absurdity is patent.

The Fund is mixing apples with oranges in an effort to make lemonade. The impact of Section 287.190 is that it establishes the maximum allowances for work-related injuries under the Act. The Fund statute, on the other hand, sprang from a separate legislative policy intended to encourage the employment of persons with disabilities by shielding any given employer from the immediate impact of the risks of recurring injury to such workers. It did so by creation of a fund from which to provide appropriate additional compensation for *all* cases of qualifying permanent preexisting disability. *Section 287.220.1, RSMo.* While practitioners may look to Section 287.190 for guidance in assessing the amount of Fund liability, the Fund must not be permitted to use the latter statute to restrict the fact of liability under the Fund statute, especially when the result is compensation of some disabilities to the exclusion of others, regardless of the level of disability involved.

If the legislature truly intended such a bizarre result, it could have plainly said so. The Court should reject the Fund's proposed construction:

> Acting on the presumption that the legislature never intends to enact an absurd law . . . and on the principle that the reason of the law should prevail over the letter of the law, courts on numerous occasions, confronted with ambiguous or contradictory language, have adopted a construction which modifies the literal meaning of the words, or in extreme cases have stricken out words or clauses regarded as improvidently inserted, in order to make all sections of a law harmonize with the plain intent or apparent purpose of the legislature.

City of Joplin v. Joplin Water Works Company, 386 S.W.2d 369, 373-74 (Mo. 1965).

In that the Fund's proposed construction of the statute leads to an absurd result, this Court must adopt a reasonable statutory interpretation that comports with the purpose of the law. The Commission's award should be affirmed.

C. IN THE ALTERNATIVE, THE STATUTE'S PLAIN LANGUAGE SHOULD BE CONSTRUED NOT TO IMPOSE THRESHOLDS ON PREEXISTING HEARING AND VISION DISABILITIES.

An alternative approach is to construe the amendatory language more narrowly than even the Fund! The legislature left intact the broad language of the first sentence of Section 287.220 ["In all cases of permanent disability where there has been *previous disability*…]. (emphasis added) The legislature did not limit the types or categories of previous disabilities. Accordingly, by employing phrases such as "major extremity injury only" and "body as a whole injury" in narrowing the remedial benefits of the statute through the device of thresholds, it can be argued that the legislature intended that hearing and vision losses not be subjected to the thresholds. This Court need not reach this argument in the present case because respondent's left eye blindness, valued at either 140 or 154 weeks, significantly exceeds the threshold values for both the highest level of an extremity (34.8 weeks) and that required for a body as a whole injury (50 weeks).

II. THE COMMISSION DID NOT ERR IN CALCULATING THE LIABILITY OF THE SECOND INJURY FUND BY INCLUDING THE

LOSS OF USE PREMIUM UNDER SECTION 287.190.2 RSMo. BECAUSE THAT SECTION ACTS AS A MEASURE OF A CLAIMANT'S DISABILITY FOR SECOND INJURY FUND LIABILITY, AND IT IS NOT LIMITED TO DETERMINING ONLY THE LIABILITY OF EMPLOYERS.

The Fund's contention that the Labor and Industrial Relations Commission held the Fund liable "for an *additional 10%* permanent partial disability due to complete loss of sight in one eye pursuant to Section 287.190.2 [RSMo]" (emphasis added) is technically and substantively incorrect. First, the award imposed liability upon the Fund only for "a loading factor of 30%" of the second injury disability ("35% of the body as a whole or 140 weeks of disability") plus the preexisting total loss of vision in his left eye (140 weeks) "with an additional 10% due to total loss…See ?287.190 (1) & (2)," or "154 weeks of permanent partial disability…" Appellant's Appendix, p. A-6. Second, as indicated above, the commission looked to both subsection 1 and subsection 2 in determining separately the amount of the preexisting permanent partial disability, and to subsection 3 in determining the second injury permanent partial disability.

Interestingly, the Fund has no objection to the commission resorting to subsection 3 to assess disability arising from the neck injury, or the left eye blindness based on schedule (29) in subsection 1. Neither of those subsections specifically states they are, or are not, to be used to assess disabilities in calculating

Fund compensation. Yet those subsections are routinely used to that end, see, e.g., *Laturno*, supra, 829 S.W.2d at 88.

As argued in Point I, supra, the Workers' Compensation Act must be read as a whole. Prior to 1992, Section 287.430 – which established limitations on filing claims for compensation - made no mention of Fund claims, nor did Section 287.220 provide any such limitation on Fund claims. Nevertheless, the provisions of Section 287.430 were held applicable to claims against the Fund. See, *Grant v. Neal*, 381 S.W.2d 838 (Mo. 1964).

Respondent concedes that Section 287.190.2 makes no reference to the Second Injury Fund and that the immediately preceding subsection affirmatively mentions the employer's obligation to pay compensation. From these facts the Fund argues that subsection 2 may not be used to determine Fund liability. If this analysis were correct, it would follow that nothing in Section 287.190, which references only the employer's liability to pay compensation, can be used to determine Fund liability under Section 287.220. Obviously, such is not the case. Section 287.190 does not impose any substantive restriction on Fund liability. It only provides the allowances or standards by which that liability is to be calculated.

By enacting Section 287.190.2 the legislature declared Missouri's policy that a total loss of use of a member identified in the schedules is to be valued by increasing the scheduled loss by ten percent. This subsection is indelibly tied to the immediately preceding schedule of losses found in Section 287.190.1 and, applied together, the two sections operate to establish the value of respondent's blind left

eye. Use of this statutory guideline for determining Second Injury Fund compensation is not only appropriate; it is required. There is no other calculation method provided in Section 287.220.1.

The Fund is attempting to rely on a technical and strained statutory interpretation to thwart the purpose of the law, i.e., workers' *compensation*. Section 287.190.2 applies to the valuation of Second Injury Fund claims, and in that context does not violate any purpose or policy of the Workers' Compensation Act. The Commission acted properly by including the ten percent enhancement factor in determining respondent’s compensation.

CONCLUSION

Respondent's preexisting vision loss is a qualifying "body as a whole" injury under Section 287.220.1, RSMo., and Section 287.190.2, RSMo applies to enhance the value of that disability as a scheduled loss and, consequently, the amount of compensation to be paid by the Second Injury Fund. Accordingly, the award of the Commission must be affirmed.

Respectfully submitted,

CURTIS, OETTING, HEINZ,
GARRETT & O'KEEFE, P.C.

J. Patrick Chassaing, #27246
Paul E. Martin, #34428
130 South Bemiston, Suite 200
St. Louis, Missouri 63105
(314) 725-8788
(314) 725-8789 Fax
Attorneys for Respondent
Thomas L. Pierson

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies as counsel of record for respondent that the word count for this brief is 6,618 per Microsoft Word 97 and that the diskette provided to the Court and to the Appellant have been scanned for viruses and is free of same.

CURTIS, OETTING, HEINZ,
GARRETT & O'KEEFE, P.C.

J. Patrick Chassaing, #27246
Paul E. Martin, #34428
130 S. Bemiston, Suite 200
St. Louis, Missouri 63105
(314) 725-8788
(314) 725-8789 fax
Attorneys for Respondent
Thomas L. Pierson

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was delivered through First Class U.S. Mail this _____day of _____ 2003, to:

Ms. Jennifer Sommers, AAG
Attorney General's Office
720 Olive Street, Suite 2000
St. Louis, Missouri 63101
Attorney for the Second Injury Fund

_____