MISSOURI SUPREME COURT

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|---|---|---|
| THOMAS L. PIERSON | ) | |
| | ) | |
| Employee/Respondent, | ) | |
| vs. | ) | |
| | ) | |
| THE BOEING COMPANY | ) | |
| | ) | |
| Employer (settled), | ) | SC85386 |
| | ) | |
| and | ) | |
| | ) | |
| THE MISSOURI STATE TREASURER AS CUSTODIAN OF THE SECOND INJURY FUND, | ) | |
| | ) | |
| Additional Party/Appellant. | ) | |

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## Table of Authorities

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## Jurisdictional Statement

This is an appeal from a final award of the Labor and Industrial Relations Commission awarding an employee compensation from the Second Injury Fund for permanent partial disability. This appeal does not involve any matter within the exclusive jurisdiction of the Missouri Supreme Court. See MO. CONST., ART. V, SEC. III (1875, as amended 1982). Therefore this appeal, arising from an alleged injury or occupational disease that occurred in St. Louis County, Missouri, is within the jurisdiction of the Missouri Court of Appeals, Eastern District. § 287.495 and § 477.050, Rev. Stat. Mo. (2000). This case was transferred by the Eastern District Court of Appeals to the Supreme Court pursuant to Supreme Court Rule 83.02 because of the general interest and importance of the issues.

## STATEMENT OF FACTS

Thomas Pierson is a forty one year old married man who is currently working full time at Boeing as a aircraft assembler and mechanic. (Tr. at 6-7, 36). On December 22, 1999, the date of his primary work injury, he was working full time with frequent mandatory overtime. (Tr. at 38). In his job he frequently stands, bends and contorts when working, especially when riveting the fuel tanks. (Tr. at 11, 14). He is capable of reading blueprints and other schematics and riveting items that were as small as 1/16th of an inch in diameter. (Tr. at 41, 43). As a fabricator and aircraft assembler he works with very fine tolerances that require great attention to detail and to minute measurements. (Tr. at 42).

On or about December 22, 1999, Employee injured his neck and right shoulder at work. (Tr. at 15). He received treatment that eventually culminated in a neck fusion performed by Dr. David Kennedy. (Tr. at 101). Employee settled his case against the employer for 35% permanent partial disability for the body as a whole, referable to the neck. (Tr. at 129).

Prior to the neck injury, Employee was diagnosed with strabismic amblyopia in his left eye. (Tr. 137). The vision in Employee's right eye can be corrected to 20/20 with glasses. (Tr. at 37). He has no other pre-existing conditions. According to Employee, he cannot see much more than light and movement with his left eye. (Tr. at 10). This condition was known when Boeing (then McDonnell Douglas) originally hired Employee. (Tr. at 8-9).

In 2001, more than a year after Employee's accident at Boeing, Dr. Whitten evaluated Employee's eye condition. He documented the strabismic amblyopia in Employee's left eye. (Tr. at 134-137).

The Administrative Law Judge found that Employee suffered from 110% permanent partial disability of one eye due to Employee's pre-existing eye condition. The Administrative Law Judge awarded an additional 10% of the eye, or fourteen weeks, citing to § 287.190.2, which provides a ten percent "loss of use premium" when there is complete loss of use of a body part, such as an amputation or blindness.

The Second Injury Fund filed a timely Application for Review on the grounds that the Second Injury Fund is not liable for permanent partial disability to the eye, in that the eye is neither a body as a whole injury or a major extremity injury as required by § 287.220.1, nor is the Second Injury Fund liable for the "loss of use premium" under § 287.190.2 because that provision was inapplicable to the Second Injury Fund by virtue of the plain language of § 287.190.2 and § 287.220.1 Mo. Rev. Stat. (1994). The Labor and Industrial Relations Commission affirmed per curiam and without separate opinion. The Court of Appeals affirmed the payment for the preexisting blindness, but reversed on the issue of the 10% loss of use premium. The Court of Appeals then transferred the case to this Court.

## Points Relied On

**I. The Labor and Industrial Relations Commission erred in finding that the Second Injury Fund is liable for the combination of Employee's primary injury and his preexisting eye injury because the Employee does not have a compensable preexisting permanent partial disability under § 287.220.1 Mo. Rev. Stat. (1994) in that an eye is neither a body as a whole injury nor an injury to a major extremity and thus not compensable from the Second Injury Fund.**

*Leutzinger v. Treasurer*, 895 S.W.2d 591 (Mo.App. E.D. 1995)

*Betz v. Columbia Telephone, Co.* 24 S.W.2d 224, 227 (Mo. 1930)

*Carenza v. Vulcan-Cincinnati, Inc.*, 368 S.W.2d 507 (Mo. 1963)

RSMo § 287.220

RSMo § 287.190

8 CSR 50-5.020

**II. The Labor and Industrial Relations Commission erred in finding that Employee was entitled to a "loss of use premium" because § 287.190.2 is not applicable to the Second Injury Fund in that the plain language of § 287.190.2 and § 287.220.1 do not extend the "loss of use premium" to the Second Injury Fund.**

*Brown v. Morris*, 290 S.W.2d 160 (Mo.banc 1956)

*Premium Standard Farms, Inc. v. Lincoln Tp. of Putnam County*, 946 S.W.2d 234 (Mo. banc 1997)

*Bridges v. Van Enters*, 992 S.W.2d 322 (Mo.App. S.D. 1999)

*Rogers v. Pacesetter Corp.*, 972 S.W.2d 540 (Mo. App. 1998)

**RSMo § 287.190.2**

RSMo § 287.220.1

## Standard of Review

The court reviews decisions of the Labor and Industrial Relations Commission interpret or apply the law for correctness without deference to the Commission's judgment. *West v. Posten Const*. Co., 804 S.W.2d 743, 744 (Mo.banc 1991); *Soos v. Mallinckrodt Chemical Co*., 19 S.W.3d 683, 685 (Mo.App.E.D. 2000). In workers' compensation cases, the court broadly and liberally interprets 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. *West*, 804 S.W.2d at 746 (quoting *Wolfgeher v. Wagner Cartage Serv., Inc.*, 646 S.W.2d 781, 783 (Mo. banc 1983)). Although a liberal construction of the workers' compensation statute in favor of claimants is required, "this principle may not be extended so far as to destroy what we believe to be a 'clearly indicated' intent of the legislature." *Staples v. A.P. Green Fire Brick Co*., 307 S.W.2d 457, 463 (Mo.banc 1957). See also *Simpson v. Dale E. Saunchegrow Const*., 965 S.W.2d 899, 905 (Mo.App. 1998). Accordingly, the Court does not ignore the statute's language to award compensation where the statute does not so provide.

## ARGUMENT

**I. The Labor and Industrial Relations Commission erred in finding that the Second Injury Fund is liable for the combination of Employee's primary injury and his preexisting eye injury because the Employee does not have a compensable preexisting permanent partial disability under § 287.220.1 Mo. Rev. Stat. (1994) in that an eye is neither a body as a whole injury nor an injury to a major extremity and thus not compensable from the Second Injury Fund.**

To recover against the Second Injury Fund based upon a permanent partial disability basis, the Claimant must show the existence of a permanent partial disability pre-existing the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. § 287.220.1, R.S.Mo 1994; *Leutzinger v. Treasurer*, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995). Further, in permanent partial disability cases arising after August 27, 1993, the Fund is not liable unless the pre-existing permanent partial disability and the subsequent compensable injury must each equal a minimum of fifty weeks of disability for an injury to "a body as a whole" or fifteen percent of a major extremity. § 287.220.1, R.S.MO 1994; *Leutzinger*, supra.

Claimant's pre-existing left eye blindness fails to meet the statutory requirements found in § 287.220.1 Mo. Rev. Stat. (2000). An injury to the eye is neither an injury to a major extremity (such as an arm or leg) nor is it an injury to the body as a whole. Therefore it cannot be the basis of a compensable Second Injury Fund claim.

No where in the Workers' Compensation statute is the term "body as a whole" defined - and actually the only place it is even found in the statute is in the Second Injury Fund section. So to determine if total blindness in one eye is a compensable injury against the Second Injury Fund the Court must first determine what is a "body as a whole" injury.

To make that determination requires, first, a look at the section of the statute that defines permanent partial disability, § 287.190 Mo. Rev. Stat. (2000).

Section 287.190.1 deals with "scheduled losses." It gives numerical values, in weeks, to twenty nine individual body parts. This schedule of losses provides numerical values for all parts on the arms and legs, including the fingers and toes, as well as hearing loss in one or two ears, and the loss of sight in one eye. The loss of sight in one eye is given the numerical value of 140 weeks. The legislature also promulgated a visual chart of these disabilities. (Appendix A)

If a person has a compensable work injury that causes disability to one of these enumerated body parts, they are paid compensation based on a percentage of that specified numerical value.

However, if a person has a compensable work injury that causes disability to a body part not specifically enumerated in the schedule of losses, then their disability is determined based on § 287.190.3. This section allows for disability "for permanent injuries other than those specified in the schedule of losses". § 287.190.3 That disability is based on a percentage of 400 weeks. This paragraph is intended to cover and include any and

every kind of permanent injury other than those on the enumerated list. *Betz v. Columbia Telephone, Co.* 24 S.W.2d 224, 227 (Mo. 1930).

These are the injuries that in the Workers' Compensation practice are commonly known and referred to as the Body as a Whole injuries. "Body as a whole" is a term of art, used repeatedly in the day to day practice of Workers' Compensation law as well as in Workers' Compensation case law. And while there is no definition of "body as a whole" anywhere in the Workers' Compensation statue, the term is actually well defined by case law. In *Carenza v. Vulcan-Cincinnati, Inc.*, 368 S.W.2d 507 (Mo. 1963), the Court stated "...extent of injury from the 'catchall' provision now in paragraph 3 of Section 287.190, i.e. body as a whole..." *Id at 514. See also e.g*., *Gordan v. Chevrolet-Shell Division of General Motors*, 269 S.W. 2d 163, 170 (Mo. 1954) (20 percent body as a whole for a low back injury); *Haggard v. Synder Construction Co*., 479 S.W. 2d 142, 144 (Mo. 1972) (An injury to the neck, which is a non scheduled injury is properly expressed in terms of the body as a whole); *Farmer-Cummings v. Future Foam, Inc.*, 44 S.W.3d 830, 835 (Mo.App. 2001) (80 percent body as a whole as a result of asthma); Even the settlement stipulation for the primary neck injury in *this* case was expressed in terms of "Body as a Whole", or "BAW." (Tr. at 129).

A body part cannot be both a scheduled injury and an injury "other than those specified in the schedule of losses" - it must be one or the other. And total loss of sight in one eye is classified as a scheduled injury worth 140 weeks. 287.190.1(29). Since "body as a whole" injuries are defined by case law and common practice as injuries "other than those

specified in the schedule of losses," loss of sight in one eye cannot be a disability to the "body as a whole".

Another place to look for guidance as to whether or not loss of vision in one eye is a "body as a whole" injury is 8 CSR 50-5.020. That rule sets forth the rules to evaluate visual disability for Workers' Compensation purposes. Section (8) states, "For the complete loss of sight in one (1) eye, the Missouri Workers' Compensation Law allows one hundred forty (140) weeks; when there is a permanent partial loss in both eyes, the disability evaluation is on the basis of four hundred (400) weeks (disability to the body as a whole)." This rule again acknowledges that loss of vision in **one** eye is not a disability to the body as a whole.

Section 287.220.1 is unambiguous in the types of disabilities that will trigger Second Injury Fund liability, either major extremity injuries or injuries to the body as a whole. Blindness in one eye as it is not a major extremity injury, nor is it an injury to the body as a whole. Accordingly, Claimant fails to meet the Second Injury Fund threshold and his claim of disability benefits should be denied.

**II. The Labor and Industrial Relations Commission erred in finding that Employee was entitled to a "loss of use premium" because § 287.190.2 is not applicable to the Second Injury Fund in that the plain language of § 287.190.2 and § 287.220.1 do not extend the "loss of use premium" to the Second Injury Fund.**

**Even if this Court found that § 287.220.1 does allow recover from the Second Injury Fund for an eye injury, § 287.190.2, which provides for 110% permanent**

**partial disability in cases of complete loss of use, would not apply to the Second Injury Fund.**

**The Labor and Industrial Relations Commission held that the Second Injury Fund was liable for an additional 10% permanent partial disability due to complete loss of sight in one eye pursuant to § 287.190.2 Mo. Rev. Stat. (2000). But § 287.190.1** speaks only of the employer, not the Second Injury Fund:

> For permanent partial disability, . . . the employer shall pay to the employee compensation computed at the weekly rate of compensation in effect under subparagraph 5 of this section on the date of the injury for which compensation is being made, which compensation shall be allowed for loss by severance, total loss of use, or proportionate loss of use of one or more of the members mentioned in the schedule of losses.

This statute is unambiguous, accordingly its plain language indicates that the 10% loss of use premium applies to the employer. Nothing in § 287.190.2 suggests it can be applied to the Second Injury Fund.

Workers' compensation law is construed according to the general rules of statutory construction. *Frazier v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 869 S.W.2d 152, 156 (Mo.App. 1993). A court cannot create an ambiguity in a statute, where none exists, in order to depart from a statute's plain and ordinary meaning. *Premium Standard Farms, Inc. v. Lincoln Tp. of Putnam County*, 946 S.W.2d 234, 239 (Mo. banc 1997). The primary goal of statutory construction is to ascertain the intent of the

legislature by considering the plain and ordinary meaning of the terms used. *Frazier*, 869 S.W.2d at 156. In determining legislative intent, an undefined word used in a statute is given its plain and ordinary meaning. *Hoffman v. Van Pak Corp*., 16 S.W.3d 684 (Mo.App. 2000). Under traditional rules of construction, the word's dictionary definition supplies its plain and ordinary meaning. *Id*.

And Section 287.190.1 specifically provides only that "the employer", not the Fund, shall pay a premium for loss of use. By contrast, § 287.220.1, the provision that governs Second Injury Fund liability, makes no provision for payment regarding loss of use.

If there were some ambiguity, permitting the Court to invoke cannons of construction, the Court would begin with the rule that the express mention of one thing implies the exclusion of another. *Brown v. Morris*, 290 S.W.2d 160, 166 (Mo.banc 1956); *Bridges v. Van Enters*, 992 S.W.2d 322, 325 (Mo.App. S.D. 1999). The specific inclusion of the employer under § 287.190, therefore, necessarily connotes the exclusion of the Second Injury Fund. Thus, § 287.190 did not give the Labor and Industrial Relations Commission authority to award benefits from the Second Injury Fund under § 287.190.1-2.

Furthermore, the Labor and Industrial Relations Commission's award of 110% of the left eye violates the avowed and express statutory purpose of § 287.220.1. The acknowledged purpose of the Second Injury Fund was to encourage employment of disabled workers by reducing the liability of their employers. *Meilves v. Morris*, 422 S.W.2d 335, 338 (Mo. 1968). *Wuebbeling, v. Treasurer of the State of Missouri*, 898 S.W.2d 615,

617 (Mo. App. 1995). In effect, the Second Injury Fund removes the incentive to discriminate against disabled workers by offering assurance to employers that if the prior disability combines with a later, on-the-job injury so as to produce permanent and total disability that would not have resulted in the absence of the prior disability or condition, the employer's liability will be no greater than it would have been if the employee had been a perfectly healthy, non-disabled worker. *Id*. at 618.

In contrast, the general purpose of the Workers' Compensation Act is to place the losses sustained by employees as a result of their employment on industry. *Rogers v. Pacesetter Corp.*, 972 S.W.2d 540, 542 (Mo. App. 1998). The Act obligates the employer to provide the injured employee indemnity for loss of earning power and disability to work. § 287.190 Mo. Rev. Stat. (2000). Additionally, the employer is also required to provide medical care to the injured employee for the treatment of his injury or occupational disease. *Farmer-Cummings v. Future Foam, Inc.*, 44 S.W.3d 830, 833 (Mo.App. 2001).

Thus, the Second Injury Fund and employer compensate the employee for different aspects of Employee's disability. Section 287.190.1-2 recognizes this distinction in that it requires the employer, but not the Second Injury Fund, to compensate the employee for complete loss of use. Concomitantly, § 287.220.1 does not require the employer to compensate an employee for the combination of the work injury and pre-existing disabilities. Under the Commission's reasoning, the Second Injury Fund operates as a catch all pre-existing employer. This reasoning violates the statutory language and legislative

intent behind the Second Injury Fund. Accordingly, the very concept of compensation for complete loss of use demonstrates that it is limited solely to employers.

## CONCLUSION

**This Court should find that total blindness in one eye does not reach Second Injury Fund threshold pursuant to §§ 287.190 and 287.220.1 and as there are no other pre-existing injuries, this Court should deny Claimant's claim for permanent partial disability. In the alternative, should this Court find that Claimant is entitled to permanent partial disability benefits to the left eye, it should be limited to no more than 100% of the eye as § 287.190.2 is inapplicable to the Second Injury Fund.**

Respectfully submitted,

**JEREMIAH W. (JAY) NIXON**
**Attorney General of Missouri**

**M. Jennifer Sommers #43347**
**Assistant Attorney General**

**720 Olive Street, Suite 2000**
**St. Louis, Missouri 63101**
**(314) 340-7827 (Telephone)**
**(314) 340-7850 (Facsimile)**

**ATTORNEY FOR THE**
**SECOND INJURY FUND**

**Certification of Service and of Compliance with Rule 84.06(b) and (c)**

**The undersigned hereby certifies that on this 21st day of July, 2003, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:**

**Mr. J. Patrick Chassaing**
**Attorney at Law**
**130 S. Bemiston, Suite 2000**
**Clayton, MO 63105**

**The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 3,476 words.**

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

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