MISSOURI SUPREME COURT

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.	)	

SUBSTITUTE REPLY BRIEF OF
APPELLANT SECOND INJURY FUND

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)
ATTORNEYS FOR THE
SECOND INJURY FUND

Table of Contents

Table of Authorities

CASES

STATUTORY AUTHORITY

ARGUMENT

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.

Respondent contends that the Second Injury Fund's assertion that it was held liable for an additional 10% permanent partial disability is "technically and substantially incorrect". He confuses the issue.

In a permanent partial disability case the Fund is never liable for the disability that arises from either the primary or preexisting injuries. Rather, the Fund is liable if the preexisting disability, combines with the compensable primary disability, to result in a greater disability than the sum of the two disabilities. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo. App E.D. 1995). In other words a "synergistic enhancement in which the combined totality is greater than the sum of the independent parts." *Id.* at 178. The Fund is only liable for the enhancement, the degree of disability that exceeds the sum of the two disabilities. *Id.* at 178*; Nance v. Treasurer of Missouri*, 85 S.W.3d 767, 772 (Mo. App. W.D. 2002).

In this case the Fund was held liable for the combination of the preexisting eye injury and the primary body as a whole neck injury. The preexisting eye was found to 110%

of the eye (154 weeks) and that was then combined with the primary 35% of the body as a whole (140 weeks) to create a disability of 294 weeks. The LIRC then found that these injuries did combine synergistically to create more disability than their simple sum - and that this synergy could best be expressed with a "load factor" of 30%. Therefore, the amount of disability that the Fund was found liable for is 88.2 weeks, or 294 weeks multiplied by a load factor of 30%.

Respondent suggests that the LIRC did not include a 10% enhancement, but if the LIRC had found that the eye disability was only 100% (140 weeks), and used the same 30% load factor, then the Fund's liability would only have been 84 weeks (140 + 140 = 280; 280 x .30 = 84). As explained in Appellant's brief the Fund should never be liable for disability in one eye as the eye is neither a body as a whole injury nor a injury to a major extremity as required by §287.220. But if the LIRC were right in holding the Fund liable, it miscalculated the extent of the liability by using the 10% enhancement.

CONCLUSION

Therefore, while it is true that the Fund cannot be held liable for permanent partial disability from the preexisting 110% eye disability itself, the LIRC decision to hold the Fund liable for the combination of a 110% eye versus a 100% eye is obviously an increase in disability of 10% permanent partial disability.

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 19th day of August, 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 601 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.

_____

_____